The Human Rights Act 1998 in Constitutional Context: The Common Law, The Rule of Law, and Human Rights

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This dissertation is submitted for the degree of Doctor of Philosophy

July, 2018.

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Thomas Fairclough

July, 2018.

Abstract

The Human Rights Act 1998 in Constitutional Context: The Common Law, The Rule of Law, and Human Rights

The Human Rights Act 1998 (HRA) is seen as a landmark piece of constitutional legislation that brought about many legal and political changes in the United Kingdom's human rights architecture. Yet the HRA is vulnerable to repeal; successive governments have promised to repeal or otherwise alter the HRA.

In this climate, the Supreme Court has instructed counsel to argue common law rights first, with the HRA there to supplement and fill the gap on the occasions where the common law does not go as far as the HRA. The logical conclusion of this is that the Supreme Court, or at least some Justices, think that the common law adequately protects rights to a level near, if not the same as, the HRA does; the results of arguing the common law will often be the same as those resulting from reliance on the HRA.

The academic commentary regarding these judicial statements has been far from enthusiastic. The consensus is that common law rights do not go as far as the HRA in terms of their width, that the enforcement mechanisms lack rigour compared to s 3 HRA and the proportionality principle, and that they are vulnerable to legislative override. Therefore, a loss of the HRA would be a loss for the legal protection of rights.

This thesis disputes the conclusion stated in the foregoing paragraph. It argues that one has to view the vectors against which one can measure the potency of common law rights through the lens of the rule of law. This principle, the controlling factor in the constitution, promises protection against arbitrary behaviour by state actors because it embodies the value of equality of concern. Once this is appreciated, an entirely new dimension of common law rights becomes apparent; the reach of rights, their rigour of protection, and their constitutional resilience are revealed to be much stronger than orthodoxy suggests.

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Chapter 1

Introduction

I. Statement of Thesis

This thesis seeks to determine the extent to which human rights are protected at common law and therefore the extent to which the Human Rights Act 1998 (HRA) is necessary from a rights protection perspective. The orthodox view, summarised in this Chapter and developed in more detail in the following Chapters, suggests the following: on the three vectors I use, the reach of rights, their rigour of protection, and their constitutional resilience, the common law does not protect rights to the same extent as the HRA. I reject that conclusion throughout this thesis.

The defining characteristic of this thesis is its reliance on the rule of law. It rejects an empirical rules based account of law, relied on by orthodox writers, and instead places reliance on an interpretivist approach. This thesis looks at the vectors through a common lens: the rule of law as the guarantor of freedom from arbitrary action. This uniting principle, the controlling factor of the constitution, shapes law's doctrinal architecture. This thesis acts to unite seemingly disparate areas through the rule of law and examines the power of common law rights through that lens.

Once this is appreciated, this thesis argues that the reach of common law rights, their rigour of protection, and their constitutional resilience are all far stronger than orthodoxy would suggest because of their normative foundations in the rule of law. The vectors this thesis examines, rather than being hermetically sealed away from one another, are united in the fact that they are influenced and shaped by the rule of law. The differing doctrines in each vector are affected by the unified theoretical account I use. The rule of law, the central thread running through the constitution, means that common law rights are just as strong as their statutory counterparts.

II. Context of Thesis

In 1997 New Labour's manifesto promised to "incorporate the European Convention on Human Rights into UK law to bring those rights home and allow people to access them in their national courts".[1] Within five months of their general election victory the Labour government

[1] Labour Party, "New Labour: Because Britain Deserves Better" (1997). Available here: http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml (accessed 3 June 2018).

published a white paper, *Rights Brought Home*, that promised to incorporate the European Convention on Human Rights (ECHR) so that individuals could have their rights upheld without going to the European Court of Human Rights (ECtHR). The white paper paved the way for the HRA, which received Royal Assent on 9 November 1998 and came into force on 2 October 2000.

When passed the HRA was controversial and the Conservative Party promised, in their 2015 manifesto, to repeal it and "reduce the role for the European Court of Human Rights".[2] This would "break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court as the ultimate arbiter of human rights matters in the UK".[3] Despite the difficulties with viewing the ECtHR the final arbiter of human rights in the domestic system[4] the government seems convinced that the HRA needs replacing to fulfil what they see as the proper role of human rights. Whilst we do not as yet have a timeframe it is worth noting that the then Minister for Courts and Justice recently said that the government is "committed to reforming our domestic human rights framework, and we will return to our proposals once we know the arrangements for our exit from the European Union".[5]

Whilst we have not had any formal proposals as to what the HRA's replacement will look like[6] this thesis will assume that the level of rights protection will be lower than it is under the current statutory framework. If this is so, then it is worth examining other sources of rights protection. Here, a renewed focus on the common law is helpful. The common law was largely forgotten about with the coming into force of the HRA. As Lord Neuberger, extra-judicially, put it "the attitude of many lawyers and judges in the UK to the Convention was not unlike that of a child to a new toy. As we became fascinated with the new toy, the old toy, the common law, was left in the cupboard"[7]; in this way, a kind of "common law inertia"[8] set in vis-à-vis utilising the common

[2] Conservative Party, "Strong Leadership, A Clear Economic Plan, A Brighter, More Secure Future" (2015), 58. Available here: https://www.bond.org.uk/data/files/Blog/ConservativeManifesto2015.pdf (accessed 3 June 2018).
[3] ibid 60.
[4] Whilst s 2 HRA states that courts are required to "take into account" ECtHR judgments this does not mean that they are binding on national courts. See *R (Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9, [2018] 1 All ER 374, [32] (Lord Toulson).
[5] HC Deb 24 January 2017, vol 620, col 153.
[6] There have been indications, see Conservative Party, "Protecting Human Rights in the UK: The Conservative's Proposals for Changing Britain's Human Rights Laws" (2015). Available here: http://readinglists.ucl.ac.uk/link?url=https%3A%2F%2Fwww.conservatives.com%2F~%2Fmedia%2Ffiles%2Fdownloadable%2520Files%2Fhuman_rights.pdf&sig=2be7374cfdab3cf60f13b48425424346512ae6cc411ab894740a7678f8bb2734 (accessed 3 June 2018); and The European Union Committee, "The UK, the EU, and a British Bill of Rights" (HL 2015-26, 139), see the evidence of the then Secretary of State for Justice, Michael Gove MP.
[7] Lord Neuberger, "The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience" (8 August 2014), [29].

law to protect human rights. This gained judicial support in *Watkins v Secretary of State for the Home Department*[9] where Lord Rodger suggested that now that the HRA incorporates the ECHR the common law does not need to go to lengths to protect rights; indeed, Lord Rodger goes as far as to say that where something falls within an ECHR right then "a claimant can be expected to invoke his remedy under the Human Rights Act rather than seek to fashion a new common law right".[10] Brian Dickson observes that this saw "the coffin lid of constitutional rights…well and truly screwed down".[11] The reasoning for this casting aside is based on epistemological ease; the common law does not provide clear, definitional, listed rights. Unlike the HRA[12] the common law, whilst saying it protects rights, often does "not explain what that means"[13] and was never explained with systematic rigour by the House of Lords or the Supreme Court.[14]

There is "no complete list of rights which the common law ranks as constitutional…by contrast…[the HRA and ECHR] provide a codified statement of what those rights are…There is no comparable definitive statement of common law rights".[15] However, this tendency towards "inertia" has been dissipating just when the HRA is threatened. Judicial support for a revisiting of common law rights has been endorsed at the highest level[16]; indeed, Lord Mance has made clear that:

> There has too often been a tendency to see the law in areas touched on by the Convention *solely in terms* of the Convention rights…the Convention rights represent a *threshold protection*…In some areas, *the common law may go further than the Convention*, and in some contexts it may also be inspired by the Convention rights and jurisprudence…But the natural starting point in any dispute is to start with domestic law.[17]

Further, Lord Toulson argued that the ability of the common law "has not ceased on the enactment of the [HRA]"[18] and Lord Reed noted that the common law's "application should

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[8] Roger Masterman and Se-shauna Wheatle, "A common law resurgence in rights protection?" [2015] EHRLR 57, 58.
[9] [2006] UKHL 17, [2006] 2 AC 395.
[10] ibid [64] (Lord Rodger).
[11] Brian Dickson, *Human Rights and the United Kingdom Supreme Court* (OUP 2013) 28.
[12] I leave aside here the issue of the scope of ECHR rights. These are far from certain.
[13] *R v Lord Chancellor Ex p Witham* [1998] QB 575, [1997] 2 All ER 779, 585 (Laws J).
[14] Dickson (n 11) 26.
[15] Roger Masterman and Se-shauna Wheatle (n 8) 59.
[16] See generally *S v L* [2012]] UKSC 30, 2012 SLT 961, [15]-[17] (Lord Reed) (it is worth noting that I agree with the approach Lord Reed takes here but disagree that s 3 HRA somehow permits extra powers the courts do not otherwise have: see Chapter 6); *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115; *Kennedy v The Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808; and *A v BBC* [2014] UKSC 25, [2014] 2 WLR 1243.
[17] Emphasis added. *Kennedy* (n 16) [46] (Lord Mance).
[18] ibid [177] (Lord Toulson).

normally meet the requirements of the Convention".[19] These cases "emphasise the common law as guarantor of human rights".[20]

This has led to a view that the common law has the ability to protect human rights to an extent roughly equal to that of the HRA. If this is so then to what extent is a codified Bill of Rights necessary for the efficacy of rights protection? There are various vectors by which one can measure the potential of common law rights against their HRA counterparts. Mark Elliott has noted that these include *which* rights are protected; the *rigour* of their protection; and their *constitutional resilience* in the face of legislative hostility.[21] This thesis does not seek to expand upon these vectors and relies on them as a useful approximation of the potential of rights. It is against these vectors that this thesis measures said potential.

III. Orthodoxy Explained

I explain, throughout the thesis, the various orthodox views that inform consideration of each of the above vectors vis-à-vis common law rights. What follows is an overview of the orthodox view; it is not comprehensive and is expanded upon in each Chapter. In describing orthodoxy I am not agreeing with it; as stated above, the orthodox view of each vector is rejected in this thesis because once we take account of the rule of law, the controlling factor of the constitution, then we see the power of rights at common law as far stronger than orthodoxy suggests. Orthodoxy ignores the rule of law; as such, the conclusions orthodoxy suggests are wrong.

In Chapter 4, which considers the reach of common law rights, I say that the orthodox view is that the common law does not protect the same breadth of rights as the HRA does.[22] For example, Richard Clayton says, "problems remain about how we identify common law rights and how common law rights will impact in practice, as a result of their *traditional limited status* in

[19] *A v BBC* (n 16) [57] (Lord Reed).
[20] *The Commissioner of Police of the Metropolis v DSD and NBV* [2015] EWCA Civ 646, [2016] 3 All ER 986, [27] (Laws LJ).
[21] Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 CLP 1.
[22] See Lady Hale, "UK Constitutionalism on the March" (2014) 19(4) JR 201; Roger Masterman and Se-shauna Wheatle, "a common law resurgence in rights protection?" [2015] EHRLR 57; Richard Clayton QC, "The empire strikes back: common law rights and the Human Rights Act" [2015] PL 3; Scott Stephenson, "The Supreme Court's renewed interest in autochthonous constitutionalism" [2015] PL 393; Adam Straw, "Future Proofing: Running Human Rights Arguments under the Common Law [2015] JR 193; Conor Gearty, "On Fantasy Island: British Politics, English Judges, and the European Convention on Human Rights" [2015] EHRLR 1; Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 CLP 1; Eirik Bjorge, "Common Law Rights: Balancing Domestic and International Exigencies" (2016) 75(2) CLR 220; and Sophie Boyron, "The Judiciary's Self-Determination, the Common Law, and Constitutional Change" (2016) 22(1) EPL 149.

English law".[23] Conor Gearty describes common law rights as a "fantasy".[24] Judicially, Lady Hale has denied the common law is concerned with the right to vote; her Ladyship stated "It would be wonderful if the common law *had* recognised a right of universal suffrage. But…*it has never done so*".[25] Finally, Elliott says it is not the case that "the common law did, or does, contain a catalogue of rights that equates to the body of rights found in the Convention".[26]

I then move to consider the rigour of protection in Chapters 5 and 6 of the thesis; the former looks at challenging executive action directly whilst the latter examines how we ought to understand statutes that seem to authorise a breach of rights. Whilst clearly related each area is so large that two chapters are necessary. With regards to judicial review of executive action, Chapter 5 examines the doctrine of irrelevant considerations and substantive review at common law. In relation to the former, the orthodox view is that what counts as irrelevant considerations comes from the purpose of the statute; there is nothing inherently rights-orientated about the doctrine.[27]

Regarding the latter, the orthodox view is that the courts are concerned "not with the decision but the decision making process"[28]; hence in *Wednesbury* the famous statement that the courts will only intervene on substantive grounds if the decision maker "came to a conclusion that is so unreasonable that no reasonable authority could ever have come to it".[29] Or, similarly, the courts will find an action void if it is "a decision [that] is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[30] The orthodox view is that this "demonstrates the judges' historical reluctance to interfere, save at the margins, with the merits of decisions made by public bodies".[31] Thus, at common law, the orthodox view holds that the courts will only intervene in extreme cases. This can be contrasted with the principle of proportionality, which operates on HRA rights. In *R (Daly) v Home Secretary*[32] Lord Steyn said that "the intensity of review is

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[23] Emphasis added. ibid 4.
[24] Conor Gearty, "On Fantasy Island: British politics, English judges and the European Convention on Human Rights" UK Const L Blog (13 November 2014) https://ukconstitutionallaw.org/2014/11/13/conor-gearty-on-fantasy-island-british-politics-english-judges-and-the-european-convention-on-human-rights/ (accessed 3 June 2018).
[25] Emphasis added. *Moohan and Another v The Lord Advocate* [2014] UKSC 67, [2015] 2 All ER 361, [56] (Lady Hale).
[26] Elliott (n 21) 5.
[27] Indeed, "the question in regard to the considerations taken into account in reaching a decision is normally whether that consideration is relevant to the statutory purpose": Woolf et al (eds), *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2015) [5-128].
[28] *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 (HL), 1173 (Lord Brightman).
[29] *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA), 230 (Lord Greene MR).
[30] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL), 410-11 (Lord Diplock).
[31] Sir John Laws, "Wednesbury" in Forsyth C and Hare I (eds), *The Golden Metawand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press 1998) 186.
[32] [2001] UKHL 26, [2001] 2 AC 532.

somewhat greater under the proportionality approach"[33] and Rebecca Williams has argued that proportionality can "be used more intensively than even the most 'intense' setting of *Wednesbury*".[34] From this perspective, *Wednesbury* has been said to set a standard of review "so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued".[35] The orthodox view is that it does not go as far as the HRA in terms of rigour of protection vis-à-vis substantive review of executive action.

In Chapter 6 the thesis examines how the courts approach statutes that, on their face, seem to authorise action that is contrary to common law rights. Lord Steyn put it in *R v Secretary of State for the Home Department, ex p Pierson*[36] as follows: "Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law and the courts may approach legislation on this initial assumption".[37] We call this assumption the principle of legality. The courts approach legislation and try to understand it as if it is compatible with common law principles. However, this is said to be limited since the courts insist they are just giving effect to Parliamentary intention; they will not give an interpretation that is contrary to Parliament's intention. If the courts are convinced that Parliament intended to legislate against common law rights then the presumption will give way. When will the courts be convinced that Parliament did not in fact intend for rights to apply? The most obvious example is where Parliament has used express language[38] or where it is a necessary implication from the statutory framework.[39] In *R (Gillan) v Metropolitan Police Commissioner*,[40] for example, Lord Bingham said "The principle of legality has no application in this context, since even if these sections are accepted as infringing a fundamental human right…they do not do so by general words but by provisions of a detailed, specific and unambiguous character".[41] Lord Carswell sums up the orthodox view when he says:

> [T]he courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence… as not having

[33] ibid [27] (Lord Steyn).
[34] Rebecca Williams, "Structuring substantive review" [2017] PL 99, 101.
[35] *Daly* (n 32) [138].
[36] [1998] AC 539 (HL)
[37] ibid 587 (Lord Steyn).
[38] *R v Lord Chancellor, ex p Witham* [1998] QB 575, [1998] 2 WLR 849, 586 (Laws J).
[39] *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1AC 604, [31] (Lord Steyn).
[40] [2006] UKHL 12, [2006] 2 AC 307.
[41] ibid [15] (Lord Bignham).

> been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication.[42]

This stands in contrast to section 3 HRA, which seeks to find "the meaning [of the provision] that best accords with Convention rights".[43] An Act being interpreted under s 3, as opposed to the principle of legality, is therefore not restricted to finding Parliament's *actual* intention on the orthodox view. Section 3 is said to be merely limited by the statutory language; therefore, it is said to go further than the principle of legality.

The final substantive Chapter, Chapter 7, looks at the constitutional resilience of common law rights; to what extent do rights endure in the constitution? The orthodox view here is potentially the most deeply rooted view in the constitution. The argument is that Parliament is sovereign; A V Dicey described Parliament's sovereignty as the "dominant characteristic" of the British constitution[44] meaning that "In England we are accustomed to the existence of a supreme legislative body, i.e. a body which can make or unmake every law….this is, from a legal point of view, the true conception of a sovereign".[45] This logically means "no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament".[46] This Victorian idea endures. As A W Bradley put it:

> The sovereignty of Parliament … means that there are no legally enforceable limits to the legislative authority of the Westminster Parliament. The courts interpret and apply Acts of Parliament, but, *in the absence of any written constitution* for the United Kingdom to impose limits upon Parliament's powers, they may not review the validity of legislation.[47]

This means that, if an Act cannot be interpreted to be rights compliant (on which see Chapter 6), then the courts must give effect to it; the Act trumps the right at common law. This logically follows because "there is no judicial body in the country by which the validity of an Act of Parliament can be questioned",[48] which means, as Lord Morris put it:

> When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct

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[42] *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, [8] (Lord Carwell).
[43] Lord Lester, Lord Pannick, and Javan Herberg, *Human Rights Law and Practice* (3rd edn, LexisNexis 2009) 43.
[44] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) 3.
[45] ibid 27.
[46] ibid 3.
[47] Emphasis added. A W Bradley, "The Sovereignty of Parliament- in Perpetuity?" in Oliver D and Jowell J (eds), *The Changing Constitution* (2nd edn, Clarendon Press 1989) 25.
[48] *Ex parte Cannon Selwyn* (1872) 36 JP 54.

> interpretation of the enactment: there must be none as to whether it should be on the statute book at all.[49]

The orthodox view is that the constitutional resilience of rights at common law is relatively low. By clearly legislating to the contrary (discussed in Chapter 6) Parliament displaces rights at common law.

Orthodoxy holds that the HRA is more potent than its common law counterpart on every vector: the reach of rights is wider; the rigour of protection stronger; the constitutional resilience higher. If this is correct then the loss of the HRA would be a loss to the legal protection of rights; yet it is precisely this premise that this thesis wholly rejects.

IV. Orthodoxy Challenged: The Centrality of the Rule of Law

The orthodox view of common law rights provides some scope for common law rights to act in the absence of the HRA but sees them as more limited than the HRA. Chapter 2 provides the methodology that informs my critique of the orthodox positions described above. I suggest that the orthodox conclusions are arrived at by a lack of appreciation for the rule of law; in Chapter 2 I reject positivistic accounts of law and suggest following a Dworkinian approach, which recognises the centrality of the rule of law.[50] Following others, I suggest that "the rule of law…is the ultimate controlling factor on which our constitution is based"[51] and, more broadly, "it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law".[52] The conclusion I take from this, and apply to my examination of prevailing orthodoxy, is that knowing how law ought to operate is, in part, a normative exercise; the doctrinal architecture is based on normative, principle-orientated, foundations. I suggest we understand law by reference to these normative considerations; disputes about what the law is are, I argue, disputes about normative understandings.[53]

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[49] *Pickin v British Railways Board* [1974] AC 765 (HL), 789 (Lord Morris).

[50] See Ronald Dworkin, *Law's Empire* (Hart 1986) for an overview and Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28(4) OJLS 709 for a study of how this would work in the United Kingdom.

[51] *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, 304 (Lord Hope).

[52] ibid.

[53] I utilise the disagreement in *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 2 WLR 813 to demonstrate this. See further Thomas Fairclough, "*Evans v Attorney General* [2015]: The Underlying Normativity of Constitutional Disagreement" in Juss S and Sunkin M (eds), *Landmark Cases in Public Law* (Hart 2017).

Even after arguing the rule of law is pertinent to common law rights and their strength a question arises: what values does the rule of law encapsulate? At its core, the rule of law "promises protection…against the arbitrary exercise of power"[54] because it is "a bulwark against any assertion of arbitrary power".[55] This means that the law "must itself be non-arbitrary, in the sense that it is justified in terms of a *public or common good*- one that we can fairly suppose favours a similar freedom for all".[56] The rule of law is against arbitrary distinctions between persons; instead, objective legitimate justification for action is needed.[57] It is through the reasoned application of principle and justification for differing treatment that we establish common law rights. To put it simply, this thesis utilises the rule of law as the controlling factor in the constitution; it is concerned with non-arbitrariness, which in turn displays or reflects the value of equality. Equality is, fundamentally, the antithesis of arbitrariness; it reflects consistency in principle at its deepest level, which is what the law is concerned with.[58] The principle of equality is fundamental to the identification of rights and their protection in the common law constitution. It grounds the rights found at common law. This is *not* the same as saying that there is a crude prohibition on different treatment; it is only to say that such treatment must be open to justification in line with constitutional principles, with equality being central.[59]

The above, developed principally in Chapters 2 and 4, leads us to a new dimension of common law rights: we view the vectors against which we measure the potency of common law rights through the lens of the rule of law. Once this is appreciated we see that the orthodox views seem less steady in their foundation. In Chapter 4, where I examine the reach of common law rights, I argue that those rights are not limited to those that have been recognised by the courts in the past; instead, they find their basis in the rule of law itself, which exists outside of judicial enunciation. The role of the courts is diagnostic: they are there to enunciate the rights; a failure to do so is just that: a failure. Rather than focusing on what has been decided in the past the debate should turn to look at the values the rule of law encapsulates and what rights they justify. If the rule of law, which underlies such well established common law rights as freedom of speech, a fair hearing, and freedom from retrospective punishment, can underlie a previously unrecognised right there is no reason to suggest that the courts should not recognise such a right in appropriate litigation. Once this is appreciated we see a wide range of hitherto unrecognised rights exist at

[54] Gerald J Postema, "Fidelity in Law's Commonwealth" in Austin L and Klimchuk D (eds) *Private Law and the Rule of Law* (OUP 2014) 17.
[55] T R S Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 93.
[56] ibid 93.
[57] Ronald Dworkin, "Is there a right to pornography?" (1981) OJLS 177.
[58] T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 123
[59] ibid 122.

common law; the common law sceptics, clinging to orthodoxy based on an assumed positivistic framework, sideline the rule of law and fail to recognise this.

In Chapter 5 I argue that the rule of law also helps frame discourse vis-à-vis review of executive action. I suggest, first, that the doctrine of irrelevant considerations acts as a rough comparator to the proportionality requirement of a legitimate aim. I argue that the moral right to be treated with equal concern, as discussed in Chapter 4, grounds a right to be treated with equal concern for dignity; this is similar to saying citizens must be treated with objective reason. When it comes to rights issues this means objective considerations, not ones based on personal preferences or gains. When it comes to detrimental or differing treatment of an individual or identifiable group of individuals external preferences cannot count; they are irrelevant to making the decision. Whilst orthodoxy suggests statutory purpose comes from Parliament, I suggest this does not mean that acting for reasons that do not respect rights is not always tantamount to acting for irrelevant considerations. On an orthodox view what constitutes an irrelevant consideration comes from Parliament's intention but I argue Parliament's powers are themselves limited by the rule of law, which acts as the controlling factor in the British constitution and is inherent in legal power(s). When examining the purpose for which powers have been granted to the executive said purpose cannot be seen as refuting the rule of law. Instead, purpose must be read in line with the rule of law so that the former does not threaten the latter. T R S Allan puts this idea best when he says that:

> Every case involving the application and interpretation of a statute calls for an accommodation of legislative purpose and legal principle…Just as it would be an affront to representative democracy for a court to disregard a statute's general purposes or ignore its specific provisions, so it would infringe the rule of law if a court invoked either purpose or text to justify the infliction of unnecessary damage to the rights of individuals.[60]

Since the rule of law demands the non-arbitrary treatment of citizens, taking account of reasons that are morally irrelevant amounts to not treating the individual as a moral equal because to do so would be to treat the citizen arbitrarily (i.e. without a good reason), which the rule of law promises protection against.

Chapter 5 then moves onto substantive review; I argue that even if a decision maker takes account of relevant considerations and excludes irrelevant considerations he cannot exercise his discretion however he likes. Just because a decision maker has passed the relevant considerations

[60] Allan (n 55) 174.

threshold does not mean judicial scrutiny is excluded. Someone might be a terrorist and this legitimates differing treatment to the general population but does this justify, for example, torture? Or killing his family? The answer is it does not at common law. Yet why not? Whilst morally relevant differentiating facts may justify different treatment, in the sense that differing treatment is permissible in line with the rule of law and therefore not automatically arbitrary, they do not justify *all* differing treatment one can imagine. Yet how do we assess what differentiating treatment is legal? As said above, the orthodox view is that, at common law, we take a light touch approach. Yet Chapter 5 disputes that conclusion and thereby disputes that *Wednesbury* and proportionality are so different.

First, I say that proportionality is itself a variable standard of review. In different contexts it has required a "fair balance"[61] between competing interests; has been understood as requiring the action taken to be the least restrictive method[62]; or whether the chosen measure was merely reasonably necessary in the given case.[63] Strikingly, the ECtHR has held, in cases involving national level economic policy decisions, that a decision will only fall foul of the ECHR if it is "manifestly without reasonable foundation".[64]

I argue that if neither tool is rigid then we must question why the debate over *Wednesbury* and proportionality occupies so many pages; surely the debate should be about how and why the methods are variable? In Chapter 5 I suggest that the degree to which the tools become more or less exacting depends on context because the rule of law will grant a wider or narrower degree of latitude depending on what is at stake. For fundamental rights the rule of law means a decision maker cannot do any more than is necessary to achieve their legitimate aim as to do so would be arbitrary, which is the antithesis of the rule of law; I argue that *Wednesbury* reflects this in theory and there is evidence of it in recent cases.[65] From this perspective, Chapter 5 argues that there is little difference, in substance, between *Wednebsury* review and the approach of proportionality under the HRA. Thus, if the HRA were removed the rigour of review of executive action for rights violations would remain strong at common law.

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[61] *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, [39] (Lord Bingham).
[62] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [30]-[33], [44] (Lord Bingham).
[63] See Maurice Kay LJ's comments in *R (Clays Lane Housing Co-Operative Ltd.) v The Housing Corporation* [2004] EWCA Civ 1658, [2005] 1 WLR 2229, [25]: "I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest *and* as being reasonably necessary" (emphasis original).
[64] *Stec v United Kingdom* (2006) 43 EHRR 47, [52].
[65] See *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591.

The foregoing leads us to a fresh aspect of the rigour of protection of common law rights: what should the response be if a statute seems to permit a breach of rights? The orthodox view is that the courts will interpret statutes in line with common law rights unless Parliament's intention is clearly to the contrary. In Chapter 6 I examine what we mean by Parliamentary intention and the scope of Parliament's powers. I suggest two things: (i) there are clear epistemological issues with Parliamentary intention; and (ii) the orthodox view suggests Parliamentary intention and the rule of law can clash, which I dispute in both Chapters 6 and 7. As to (i) I, again, utilise *Evans*, as I do in Chapter 2, to show that even if we accept Parliament can legislate clearly to overturn common law rights we do not find it easy to place when it has shown the intention to do so. Nothing in the Parliamentary intention theory really helps us to *be certain* of Parliament's intention. It is difficult to know what *counts* as Parliamentary intention. As such, I draw upon Allan in Chapter 6 to suggest that Parliament's intention is what we impute to the legislature; we ought to do so in a way that respects the rule of law insofar as possible.

I then move to (ii), where I supplement the foregoing analysis by saying that we have to examine the relationship between the rule of law and Parliamentary intention. Using cases such as *Jackson*[66] I suggest that the former is logically prior to the latter; it is logically impossible to understand what Parliament's intention is without accommodation of the rule of law. Parliament cannot displace something that is logically prior to its powers. I argue in Chapter 6 that the rule of law is the cornerstone of the constitution; it is prior to legal powers and therefore Parliamentary legislation must be understood in line with the rule of law. As such, we should be slow to see Parliament's intention as cutting across the rule of law; the principle of legality is not limited in the way the orthodox view suggests. It is therefore suggested in Chapter 6 that the rigour of protection vis-à-vis interpretation is such that there is little substantive difference between s 3 HRA and the common law principle of legality.

This leads us to the final substantive chapter. In Chapter 6 I suggest that whilst the boundaries of the principle of legality are wide there will be times when a statute or part thereof will be "condemned as irredeemably incompatible" with common law rights; this comes about "if the whole *raison d'être* of a provision violates" common law "no interpretation can save it".[67] Chapter 7 looks at what ought to happen when this occurs. The orthodox view is that Parliament can make or unmake any law. This is true as a general statement of the constitution of the United Kingdom; Parliament is indeed, *generally*, capable of passing legislation that can, *generally speaking*,

[66] *Jackson* (n 51).
[67] T R S Allan, "Parliament's Will and the Justice of the Common Law" (2006) (59) CLP 28, 41.

displace common law doctrine. For example, the New Zealand legislature removed, wholesale, personal injury at common law from the New Zealand legal landscape.[68] The most striking conclusion orthodoxy draws from this *general* rule "is the widespread agreement … Parliament may suspend or abrogate even so-called 'constitutional' or 'fundamental' rights".[69]

I argue against this view. I suggest the constitutional resilience of common law rights, founded on the rule of law, is much greater than the orthodox view would suggest. Drawing together disparate strands of the previous Chapters, Chapter 7 argues the following: the rule of law is logically prior to Parliament's powers. The legislature therefore has no power to cut across the rule of law, which grounds common law rights, since Parliament's powers *are themselves* derived from law. Law must be in accordance with the rule of law[70] and therefore statutory wording must be understood in line with the rule of law. The suggestion in Chapter 7 is that, if statutory text cannot be intelligibly understood in line with the rule of law, it must be discounted as law.

If statutes cannot be intelligibly understood as not cutting across common law rights then they must be seen as what they are: only *purported* statutes. From this perspective, I engage with the debate around so-called "strike down" of statutes[71] and suggest that this is appropriate in such circumstances. The appeal to democracy usually invoked as a defence to strike down is, in fact, premised on a conception of democracy that is flawed; democracy, on its best reading, involves limitations to the will of the populace. In this way, the refusal to recognise purported Acts as having legal force if they cut across the rule of law is, I argue in Chapter 7, itself a boon to democracy and democratic accountability. We can see common law rights, founded on the rule of law, as central to the British constitution; their resilience, I argue, in the face of legislative hostility is high.

Once the foregoing is appreciated this thesis concludes that far from being weaker than the HRA the common law protects a wide variety of rights; the rigour of protection is little different to the HRA; and the constitutional resilience of common law rights is higher than that of their statutory counterparts given that the latter could be removed by the legislature. This thesis, it ought to be stressed, does not suggest that the HRA *ought to be* repealed; it only suggests that, properly

[68] Accident Compensation Act 1972
[69] Lakin, (n 50) 713.
[70] See Chapter 2 for the theoretical framework of this proposition.
[71] Though I find that wording somewhat pejorative since, on my account, the courts would not be "striking down' an Act; they would be recognising a purported Act as not an Act at all. It simply never existed; it is void. From that perspective, there is nothing to "strike down". It is recognition of voidness.

understood, the common law gives protection to rights similar to that of the HRA and, from this legal perspective,[72] a repeal of the HRA need not be as detrimental as suggested.

The contribution of this thesis consists not in a new theory or revolutionary historical find but in a drawing together of seemingly disparate issues. This thesis looks at one question, how the common law protects rights and how that compares to the HRA, through seemingly separate areas: it examines jurisprudence, the reach of rights, process and substantive review, statutory interpretation, Parliamentary sovereignty, and so on. Through examination of these seemingly separate areas through the lens of the rule of law we see a much more complete picture of common law rights than we see through one subject alone.

I conclude by saying it is in the common law that we truly find the rights citizens enjoy; the common law, at least in cases involving rights, founded on the rule of law, is not as malleable to political expediency as Acts of Parliament are. It does not give way as the HRA would to an expressly repealing statute. As I suggest in the conclusion of this thesis, ignorance of the common law is where the real danger to rights lies. Ignorance of the common law risks ignorance of our domestic rights, protected by the domestic constitution, which are not reliant on statute or international obligations. The rule of law, I suggest, works to provide and protect rights as a matter of course in the domestic constitution of the United Kingdom.

[72] This, of course, sidelines the *political* benefits the HRA has brought to the protection of rights, most notably by creating a more "rights cultured" Parliament.

Chapter 2

In Search of Legal Human Rights: A Principled Approach

I. Introduction

This thesis seeks to determine the extent to which human rights are protected outside the statutory framework, the Human Rights Act 1998 (HRA), by examining common law rights. By doing this, we can place the HRA in its proper constitutional context. However, we face a prior problem: *how* do we know which, or to what extent, rights are protected? It is this question that this Chapter seeks to answer. It is axiomatic to suggest that we need a methodology to ascertain which rights exist. Many lawyers suggest that we look at cases to know what the law is. In this way, law is a historical exercise predicated on what has been done before being constitutive of what the law is. This is what Ronald Dworkin terms the "plain-fact view of law".[1]

The aim of this chapter is not to provide a novel methodology but to apply Dworkinian arguments to the British constitution at large and, more specifically, to the identification of common law rights. This will take us into more abstract examination of selected decisions for a better theoretical understanding. After Dworkin, I argue the traditional positivist models that justify an empirical view of law lack a sound theoretical basis. To explore this, I examine the work of Joseph Raz and H L A Hart. Whilst there are various models of positivism the focus is on these two writers because their work is, in the case of Raz, the most sophisticated conceptual justification for positivism or, in the case of Hart, the jurisprudential framework that has been appropriated, at least implicitly, by the most lawyers. After analysing Raz's view on its own terms, I will discount it as the best candidate for determining the extent of rights in the constitution. I will then explore Hart's work and analyse it by reference to a Supreme Court decision. After demonstrating that Hart's approach cannot account for the disagreement in the judgment examined I will turn to Dworkin's work, which provides the most viable methodology for how we determine what the law is. This, I will suggest, provides a working approach for determining the rights that exist and their operation in the constitution.

[1] Ronald Dworkin, *Law's Empire* (Hart 1986) 7.

II. Plain Fact Views of Law

II.A. Explaining Plain-Fact Views

The "plain-fact" view of law is a term used to describe a school of legal thought characterised as legal positivism.[2] Whilst positivism is a broad church, John Gardner has argued that there is "only one proposition [that is the] distinctive proposition of 'legal positivism'"[3] namely, that "in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits".[4]

Legal positivists agree that whether human rights exist in the legal system will depend on whether a relevant body has *in fact said* they do. You would need legislation or a judicial decision to *make it the law*, for example, that you have a right to vote. This seems an orthodox understanding of the state of common law rights. In the climate surrounding the HRA's promised repeal several articles have warned that the common law will not go as far as the HRA in terms of rights protection. For example, Richard Clayton tells us "problems remain about how we identify common law rights",[5] before going on to *list* the rights the common law protects according to *De Smith's*.[6] Likewise, Conor Gearty describes the common law protecting rights as a "fantasy", stating common law has a partisanship for property and contract rights over others and has acted "as a base for the serial abuses of liberty".[7] Further, Lady Hale, extra-judicially, has stated that there are difficulties with the identification of common law rights, arguing, "no two lists…would be the same".[8] All of these pieces share a common characteristic: they empirically catalogue the rights explicitly protected by the common law and say that this is what the common law currently protects. They use this process to compare the common law and HRA rights and draw conclusions as to the extent of each.[9]

So, then, we have several lawyers offering a positivist account of common law rights. On this approach, one would only need to catalogue the case law to see which rights are protected, and

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[2] ibid.
[3] John Gardner, *Law as a Leap of Faith* (OUP 2012) 19.
[4] ibid. This ignores the hard/soft positivism divide (which Gardner acknowledges: ibid 22), which, on the latter, allows a non-source based test to be part of the legal validity criteria.
[5] Richard Clayton, "The empire strikes back: common law rights and the Human Rights Act" [2015] PL 3, 4.
[6] Woolf et al (eds), *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2015).
[7] Conor Gearty, "On Fantasy Island: British politics, English judges and the European Convention on Human Rights" UK Const L Blog (13 November 2014) https://ukconstitutionallaw.org/2014/11/13/conor-gearty-on-fantasy-island-british-politics-english-judges-and-the-european-convention-on-human-rights/ (accessed 2 June 2018).
[8] Lady Hale, "UK Constitutionalism on the March" [2014] 19(4) JR 201, 201.
[9] See T A Fairclough, "Black Spiders and Public Lawyers: Constitutionalism Revisited?" [2016] 21(1) JR 44.

then compare any list from that process with the list of rights protected under the HRA (and case law around the HRA). However, on what basis is this the case? More specifically, what makes it *correct* that the proper approach is one of historical cataloguing? I turn now to the two theorists mentioned above, Raz and Hart, to see if an empirical approach to rights determination is located in an adequate theoretical framework.

II.B. Raz

Joseph Raz is a scholar whose work provides a strong argument for determining grounds of law (i.e. which facts make a proposition of law true). Raz is the leading living positivist and his theory relies on purported conceptual necessity rather than empirical studies.[10] Raz argues that what the law is, and in turn the grounds of law, can never be a matter of moral debate; its identification always depends "exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument".[11] For him law is "posited", that is, "made…by the activities of human beings".[12] Raz does not see this as a complete theory of law but rather "as a constraint on what kind of theory of law is an acceptable theory…it is a thesis about some general properties of any acceptable test for the existence and identity of legal systems".[13] Why, then, is it the case that law can only be identified by its sources? And what are the possible ramifications for the place of human rights in the British constitution?

Raz argues in "every legal system…law either claims that it possesses legitimate authority or is held to possess it, or both".[14] Ignoring the problems around this personification of law[15] what does it mean to say that law claims authority? Authority, Raz argues, "occupies a mediating role between the precepts of morality and their application by people in their behaviour"[16]; authoritative dictates, which law gives, replace reason(s) for action. If you accept the authority of, say, Parliament, then you will accept its balance of reasons for a given course of action and will rely only on that; the authoritative dictate removes any need for one to engage in normative reasoning by its very nature.[17] As Dworkin puts it:

[10] This distinguishes Raz from Hart.
[11] Joseph Raz, *The Authority of Law* (OUP 1979) 39-40.
[12] ibid 38.
[13] ibid 39.
[14] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994) 199.
[15] See Ronald Dworkin, "Thirty Years On" (2002) 155 HLR 1655, 1666.
[16] Raz (n 14) 210.
[17] ibid 196-8.

> Before any law is adopted regulating the matter…people may have a variety of reasons for and against parading a lion in Piccadilly. When an authority enacts a law forbidding the practice, the authority has ruled that the reasons anyone has against the practice are stronger…than the reasons anyone has for it. Accepting the ruling as authoritative means not reassessing these various reasons … but simply taking the directive as *the* reason.[18]

Law would not, on this argument, be authoritative if people still had to weigh and balance moral considerations when deciding whether to do something; if that were the case, the law would not have replaced those reasons and so would have failed its conceptual purpose. Therefore, if the law is to fulfil its purpose then it must be identifiable only by its sources and not due to moral recourse, which would defeat its "very point and purpose".[19] I do not propose to engage with the conceptual nature of authority here.[20] Instead, I wish to examine whether Raz's thesis can explain our understanding of legal human rights. I will examine two traditional "sources" of legal human rights by reference to Raz's theory: (1) statutory Bills of Rights; and (2) common law rights.

II.B1. Statutory Bills of Rights

For Raz, what the law *is* at any given time cannot rely on controversial moral propositions. How, then, do legally recognised rights figure in Raz's framework? It may be that a Bill of Rights is enough. A Bill of Rights, passed by Parliament, is certainly posited. We are told, for example, by the HRA that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right"[21] and that by "Convention right" we mean "(a) Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Article 1 of the Thirteenth Protocol".[22] We are even given guidance on how to interpret Acts; s 3 says "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". Therefore, we can see that the HRA is posited in a sense. However, is it correct that the HRA requires nothing other than source-based decision-making? It is clear that what rights are at play in a novel or hard case necessarily requires

[18] Emphasis added. Dworkin (n 15) 1671.
[19] Joseph Raz, "Authority, Law, and Morality" (1985) The Monist 68(3) 295, 298.
[20] For jurisprudential arguments on Raz see: Michael Moore, "Authority, Law, and Razian Reasons" (1986) 62 Southern California Law Review 827 (arguing that Raz's concept of authority is wrong); Philip Soper, "Legal Theory and the Claim to Authority" (1989) 18 Phil & Pub Aff 209, 224-36 (supposing Raz's concept of authority is right in general it is a wrong account of *legal authority*); and Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Law* (OUP 2001) 127-33 (Raz's account, if accepted, gives an epistemological limitation but does not give a metaphysical one on what law *actually is*).
[21] Section 6(1) HRA.
[22] ibid s 1.

moral discourse.[23] Likewise, notwithstanding assessment of the reach of rights, how do we assess whether there has been a breach of a right? The proportionality test is the most common assessment of qualified rights yet this necessarily involves questions of weight, which are not source-based questions in any meaningful sense.[24] Dworkin argues that this criticism of Raz's work "is underscored…when we notice how much [Raz's theory] contradicts common sense"[25] since so many decisions involve questions of weight and principle.[26]

Raz has attempted to square this circle. Let us restate the problem: law, purportedly, conceptually rejects morality forming *part of the law* yet judges often morally reason due to statutes' wording. Raz responds by denying there is a conflict to solve. Instead, he focuses on something called the "directed powers of courts".[27] He claims that constitutional statutes[28] enable "the courts to change the law by following guidelines set by the law itself".[29] For Raz, Bills of Rights do not require conformity with relevant moral norms as a condition of legal validity; what they instead do is give a power to *change the law*. Therefore, Bills of Rights:

> [Do] not help establish the content of existing law, they specify conditions which trigger the exercise, by judges, of their Hohfeldian power to rid the law of a morally unworthy legal norm…the existence of a law still depends on its sources…even though moral norms can and do figure prominently in legal decisions or otherwise to change it.[30]

In this sense, such statutes only give rise to "instances of apparent incorporation" of moral principles into law but not actual incorporation if we define incorporation as "legislating or otherwise making a standard into a law of the relevant legal system by a rule that refers to it and gives it some legal effect".[31] Raz argues that this is common; various statutes and doctrines give effect to, for example, foreign law without making it part of the law itself[32]; such references lead to "the application of…standards [that are] legally required, and rights and duties according to

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[23] For example, Article 6 requires a "fair" trial- but what is fair? This is non-source based yet very much alive in, for example, *R v A* [2001] UKHL 25, [2002] 1 AC 45.
[24] See the dispute between Lords Sumption and Kerr vis-à-vis weight to be attached to the Home Secretary's reasoning in an assessment of proportionality in *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] 2 All ER 453.
[25] Dworkin (n 15) 1675.
[26] ibid.
[27] Raz (n 14) 228.
[28] Do note that any statute that directs the courts to interpret in a non-source based fashion falls within the purview of the "directed powers of courts".
[29] Raz (n 14) 228.
[30] W J Waluchow, "Legality, Morality, and the Guiding Function of Law" in Kramer, Grant, Colburn, and Hatzistavrou (eds), *The Legacy of H L A Hart: Legal, Political, and Moral Philosophy* (OUP 2008) 88.
[31] Joseph Raz, "Incorporation by Law" (2004) 10 Legal Theory 1, 10.
[32] ibid.

law include thereafter rights and duties determined by those standards".[33] Raz explicitly states that the HRA is similar to this; he argues that if s 3 had said primary legislation must be read in a way that makes it compatible with Kant's philosophy we "would not have been in the least tempted to think that…it…[has] become part of the law of the land, though beyond doubt they would have been given by that imagined Act some legal effect".[34]

Whilst this seems an elegant solution to the above problem, on a closer inspection this approach is (a) internally inconsistent; and (b) against a common understanding of the law. As to (a), it has to be remembered that, for Raz, (1) law is there to replace reasons with a reason; it stops one having to balance non-source based considerations and, instead, to just follow the source-based authoritative edict. (2) Raz denies principles form part of the law; he suggests such standards are just there to direct the powers of the courts. The problem, though, is that (1) and (2) do not support one another. Raz argues that judges are having their powers directed by statutes such as the HRA. So, if legislation seems like it would violate European Convention on Human Rights (ECHR) rights it should be read in such a way as to make it compatible, which requires moral reasoning. However, it is difficult to see how these directed powers actually help us when advising a client; more specifically, it is difficult to see how the authoritative nature of law is preserved. If the law is supposed to be based on social facts (e.g. we have legislation that says X) but I, as counsel, know that X will have to be read in accordance with, for example, Article 8 ECHR then, surely, the authoritative nature of law that Raz relies on disappears?[35] Certainly, "If I am a citizen who looks to the law for practical guidance—i.e. who wants to know what I should do, and which actions I will be expected to have performed should I ever find myself before a court of law—then the bottom line for me is the identity of the legal norms under which I will be judged in that context"[36] yet, under the Razian approach, the law *as it is* will be changed by these directive statutes.

Further, this seems to go against the common view of such statutes.[37] As Dworkin says:

> [Raz's] thesis stands ordinary opinion on its head: most lawyers and laymen think not that school segregation laws were perfectly valid until the Supreme Court decided they should not be enforced, but rather that the court struck these laws down because it rightly found them constitutionally invalid. When the Court does strike down a statute on constitutional grounds, moreover, it almost always treats

[33] ibid.
[34] ibid 11.
[35] This is similar to Waluchow's argument (n 30) 94.
[36] ibid 94.
[37] I am not arguing that common sense judgments are constitutively correct; however they do have diagnostic value.

> that statute as if it were already invalid. It denies that the statute had any legal force even before the Court acted.[38]

Whilst appreciating that this is in reference to strike down the same runs true under the HRA framework. First, when a public authority acts purportedly pursuant to statute and the courts decide that the action violates a HRA protected right (and therefore find the authority's action *ultra vires* under s 6 HRA) our ordinary view is that the action of the authority was *always* illegal; we do not think that they acted perfectly within competence until the court, as directed by the HRA, decided that they were not.

On a broader view, when the courts adopt an interpretation that deviates from the literal wording of a statute, due to s 3, they are not "changing" the law. Everything, to be understood, must be interpreted. Acts mean nothing before they are read and a literal interpretation is just that: an interpretation. It does not enjoy priority over other interpretations in itself.[39] The courts are simply asked to apply a statute, and their task is to interpret an Act in its context, including other statutes. Just because a statute's meaning is different than it would have been had s 3 never appeared on the statute book does not mean that s 3 involves a "change" in the law. All it does is give priority to one form of interpretation over another; law does not exist in any meaningful way pre-interpretation (since even literal readings are interpretative)[40] and so an argument that s 3 "changes" a great many statutes' meaning is incompatible with common sense. Our understanding of the law may change with differing interpretations, but that does not mean that the law itself has changed when we initially decide to use (or, to use Raz's language, are "directed" towards) one interpretation over another.

One response to this would be to examine the way in which the HRA affected statutes enacted before the HRA came into force. A case study involving housing (under Article 8 ECHR) and discrimination (Article 14 ECHR) may be of use. For background, the Rent Act 1977 provided that certain people residing with a tenant at the time of his or her death were entitled to remain in the property. If the survivor was a spouse of the deceased then he or she became the "statutory" tenant and enjoyed certain benefits. For the purposes of the Act a person "who was living with the original tenant as his or her wife or husband" at the time of death was treated as a spouse.

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[38] Dworkin (n 15) 1675.
[39] T R S Allan, "Law, Democracy, and Constitutionalism" (2016) 75(1) CLJ 1, 11.
[40] This is not to argue that law only exists when judges apply it; it is to argue that it is false to say that when a statute exists provisions like s 3 change said statute's meaning when judges use them.

Further, if the survivor was a member of the deceased's family residing with him or her then that person was entitled to an "assured" tenancy, which did not give the same level of protection.

Fitzpatrick v Sterling Housing Association Ltd[41] was decided just before the HRA came into force. Fitzpatrick lived with his same-sex partner for eighteen years. The partner was the tenant and died. Fitzpatrick wished to be treated as the surviving spouse. The House of Lords said he could not be treated as a spouse as the reference to "his or her wife or husband" could not apply to a same-sex partner; the words were gender specific. Enter the HRA and we see that "the case law…developed quite radically"[42] with *Ghaidan v Godin-Mendoza*.[43] The House of Lords was once again asked to consider whether a same-sex partner of a deceased tenant could be treated as a spouse. The argument was that the HRA had changed things; s 3 HRA obliged the court to interpret "spouse" so as to be compatible with Article 14 ECHR. The majority of the House of Lords agreed, with Lord Nicholls having "no reason to doubt" that s 3 HRA requires that the Rent Act 1977 should:

> Be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading…in this way would have the result that cohabitating heterosexual couples and cohabitating homosexual couples would be treated alike for the purposes of succession.[44]

Therefore, we can see that in interpreting statutes, ECHR rights have led to a different conclusion when invoked compared to before their domestic effect (although this leaves out the possibility that *Fitzpatrick* was wrongly decided, on which see Chapter 6). Raz may point to case studies like this to argue that this shows how the HRA incorporates directed powers to change the law. However, I argue this gets us nowhere. Whilst true that the Rent Act 1977's meaning was recognised as different after the HRA, this is easily explained by the usual working of statutes; later statutes, even with general language, often change the meaning of previous statutes without repealing them. There is nothing novel, nor does it advance Raz's cause, to point this out. Whilst the HRA no doubt did change the case law in relation to the Rent Act 1977 it does not show that the principles it enshrines *always change the law*; it just shows that it changes our understanding of Acts that precede its coming into force, which is very much what is expected from Acts of Parliament. In relation to Acts that come after the HRA, the HRA does not *change* the law when s 3 is invoked; it just gives us the interpretative route to know what the law is properly understood.

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[41] [2001] 1 AC 27 (HL).
[42] Dawn Oliver, "England and Wales: The Human Rights Act and the Private Sphere" in Oliver D and Fedtke J (eds) *Human Rights and The Private Sphere: A Comparative Study* (Routledge-Cavendish 2007) 76.
[43] [2004] 2 AC 557 (HL).
[44] ibid 572 (Lord Nicholls).

So, then, Raz argues law must be posited; it is a matter of sources, not controversial morality. I have suggested that whilst Acts are "posited" they necessitate deep moral discourse to ascertain their meaning. More specifically, the HRA requires moral debate in order to discover both the scope of rights and the proportionality of any action that interferes with rights. Raz argues that this does not present a problem for his work; he has suggested that the judiciary are directed to take into account moral principles but that these principles do not form part of the law. This reasoning is flawed. It betrays what common sense tells us, that interpretation sections do not change the law but instead help us understand its actual meaning and this "directed powers" approach is inconsistent with the authoritative nature of law that Raz relies on for a source-based view of what law is. For these reasons, Raz cannot easily accommodate Bills of Rights; his theory is too narrow to accommodate the kinds of arguments we usually see in legal rights disputes.

II.B2. Common Law Rights

The other main source of rights is from case law. In common law systems rights are often recognised outside of statute. Raz may argue that his service conception of law and directed powers argument can explain this, and help us to identify rights at common law. In short, there are various cases that enunciate rights[45] and there is a general rule at common law that "in the absence of express language or necessary implication…the courts…presume that even the most general words were intended to be subject to the basic rights of the individual".[46] Raz could suggest that this fits his model perfectly; the courts, in the form of judicial decisions, posit rights and there is a general overarching rule of interpretation of (a) common law; and (b) statutes that will give effect to these rights.

Again, however, we run into the problem of the requirement to reason morally. To know how far rights reach,[47] how they rank against one another,[48] and the intensity of adjudication[49] is inherently a principle-based exercise. This is something that Raz's theory does not allow. However, Raz argues that common law doctrines of interpretation are directed powers (similar to

[45] See Chapter 4.
[46] *R v Home Secretary, Ex p Simms* [1999] 2 AC 115, 131 (Lord Hoffmann).
[47] See *Moohan v The Lord Advocate* [2014] UKSC 67, [2015] 2 All ER 361 where there is dispute about whether there is a right to enfranchisement at common law.
[48] *R (HS2 Action Alliance Limited) v The Secretary of State for Transport* [2014] UKSC 3, [2014] 2 All ER 109, [207] (Lords Neuberger and Mance) where it is recognised that there are various constitutional principles that can be ranked against one another in terms of normative weight.
[49] In *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 it was held that intensity of review will depend on the normative importance of principles and their weight.

those in statute considered above) from senior courts to lower courts (depending on the rules of precedent in a system).[50] He then suggests that such rules of interpretation "prescribe the ends which alone must be served by the exercise of the powers and enjoining the courts to use their powers to those ends. The ends are embodied…general doctrines" e.g. the principle of legality.[51] He sees such doctrines as instructing courts to achieve certain desirable ends and the law changes when those ends are met. Therefore, whilst moral reasoning takes place in courts it is not to determine what the law *is* but rather *how to change the law to meet the instructed ends*. However, there are (at least) three issues with this.

First, to preserve the veneer of his sources thesis, Raz argues that whilst you can have "directed power" rules of interpretation they must be "a matter of fact and not a moral issue",[52] that is, some near uniform practice must settle the interpretation that we use and it must be identifiable only on social (i.e. source-based) grounds.[53] If there is no such settled rule of interpretation then "the question is unsettled".[54] But, as we shall see, the principle of legality's exact meaning, its strength and relation with statutory language is not something that the judiciary do agree on.[55] Indeed, there are many common law principles employed in statutory interpretation but we have not been given a definitive ranking of them.[56] Does this mean when one Supreme Court Justice takes a controversial interpretation of a statute and rejects others he is "exercising a power that no legal authority has given [him]"?[57] This seems counterintuitive but it is hard to see what else Raz can argue; his theory is simply too neat to accommodate actual judicial practice, which any sound jurisprudential methodology should aim to explain.

Second, suppose Raz says that even though the principle of legality is not settled (i.e. is not authorised by law) but that, with time, acceptance comes about due to the Supreme Court's precedent making power and eventually the rule of interpretation becomes settled (or legally authorised). You would have a situation where an unauthorised approach became authorised through its own use. Yet what are the legal limits on this authority? Can the Supreme Court claim for itself wide interpretive powers and take advantage of precedent to make this a settled legal rule? Could the Supreme Court decide, for example, that it has strike down powers? On Raz's

[50] He uses the general maxim, "a contract that tends to corruption in public life is illegal" to illustrate his point: Raz (n 14) 228.
[51] ibid 233.
[52] ibid 217.
[53] Dworkin (n 15) 1676.
[54] Raz (n 14) 217.
[55] See II.C. below.
[56] *HS2* (n 48) [207] (Lords Neuberger and Mance).
[57] Dworkin (n 15) 1676.

approach there cannot be moral limits to what the Supreme Court could do since this would be adding an extraneous moral value to what has to be a source based exercise.[58]

The third problem reflects what was outlined vis-à-vis statutory rights.[59] Raz is arguing that interpretive provisions that include non-sourced based conditions necessarily change the legal position when resorted to. Let us take *Simms*[60] as an example. It would be the case, for Raz, that the Home Secretary was able make whatever rules he wished in accordance with the plain language of s 47(1) Prison Act 1952. The law was then changed when the House of Lords decided that the principle of legality meant that the statute had to be understood in line with fundamental rights (in this case, freedom of expression). However, this again goes against our common sense view of such interpretation; generally, we do not think that the Home Secretary in *Simms* acted lawfully until the Law Lords changed the law and quashed his regulations retrospectively, we think that he always acted unlawfully and, because of law, the House of Lords found against him. This seems to move against our intuitive view, which is that the courts strike down executive action because it was always void; *ultra vires* action is not legal action. However, since moral reasoning takes place when the courts do this we have to decide which we think is the case: moral principles form part of the law, in which case Raz's methodology is unhelpful, or they do not, in which case the courts artificially change the law retrospectively in most every case where they rely on principles. In the absence of compelling reasons for the latter the former must be correct, and therefore Raz's approach is not useful in determining the extent to which rights exist in the constitution outside of the HRA.

II.C. Hart

Having considered Raz (and found him lacking) we turn to Hart's work. His account arguably provides the most effective methodology for ascertaining the grounds of law in any legal system, a testament to which is the appropriation of his theoretical work by "doctrinal" lawyers. Part of the attractiveness of Hart's theory lies in its simplicity: he states that the tests of legal validity in

[58] ibid.

[59] As such I only examine it briefly, see above for fuller argument.

[60] *Simms* (n 46). See also *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41, [2005] 2 AC 680 where the House of Lords was asked, if they were minded to overturn a previous decision, whether they would do so with prospective effect only. The House of Lords declined to do so on the basis that the House of Lords would, if it overturned the previous case, be recognising the law as it was, and dismissing what "the law…was generally thought to be…[the newly recognised law] operates retrospectively as well as prospectively" [6]-[7] (Lord Nicholls). Courts are there "to decide the legal consequences of past events. A court decision which takes the form of a "pure" prospective overruling does not decide the dispute between the parties according to what the court declares is the present state of the law" [28] (Lord Nicholls). See also the discussion on discretion and remedies in *Ahmed (No 2)* [2010] UKSC 2, [2010] 4 All ER 745.

any given advanced state are derived from a rule within the legal system telling us what the grounds are. In every complex system, for Hart, the apex rule is the "rule of recognition", which provides the "criteria by which the validity of other rules of a system [are] assessed".[61] For Hart this rule is "*ultimate*" because if a "question is raised whether some suggested rule is *legally valid*,[62] we must, in order to answer the question, use a criterion of validity provided by some other rule [here the rule of recognition]".[63]

Pausing here, one may query how we know what the rule of recognition actually is. Hart states "the rule of recognition exists only as a complex, but normally *concordant*, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria.".[64] Hart is never entirely clear on who counts as an "official", but it is certain that, for him, "official" has a wide meaning: it involves the courts,[65] police officers,[66] ministers, county councils and so on.[67]

It is important to stress that, for Hart, the rule of recognition (and its content) are empirically verifiable whilst inherently flexible. There is no difficulty, for Hart, in the notion of an empirically verified rule that contingently prescribes unlimited legislative power[68]; it is only that such power would be present because of empirically verified views and not on a normative basis.[69] For example, for Hart whether Parliament has the power to legislate contrary to fundamental rights depends on whether most relevant persons accept, as a matter of empirical fact, that Parliamentary legislation is capable of displacing human rights; it is emphatically not to do with normative discourse.[70]

What, then, does the rule of recognition say in the British constitution? Though Hart never undertakes an empirical survey of "officials'" attitudes he tells us that:

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[61] H L A Hart, *The Concept of Law* (OUP 1997) 105.
[62] I stress *legally* valid because there are rules outside of law: we have rules of morality, games, and so on. The function of the rule of recognition is to delineate between those rules and legal ones.
[63] Hart (n 61) 107.
[64] Emphasis added. ibid 110.
[65] ibid 101.
[66] ibid 114.
[67] ibid 26.
[68] ibid 106.
[69] ibid 112, 240. See further, Andrei Marmor, "Legal Positivism: Still Descriptive and Morally Neutral" (2006) 26(4) OJLS 683.
[70] See Hart (n 61) 72, where Hart talks about the American Constitution limiting the powers of Congress. In addition, see below, where I discuss the possibility of the Rule of Recognition incorporating morality. Further, see Hart (n 61) 149 where he states whilst "necessity of logic…dictates that there should be a [sovereign] Parliament; it is only one arrangement among others, equally conceivable, which has come to be accepted with us as the criterion of legal validity".

> "'Whatever the Queen in Parliament enacts is law' is an adequate expression of the rule…and is accepted as an ultimate criterion for the identification of law….That Parliament is sovereign in this sense may now be regarded as established, and constitutes part of the ultimate rule of recognition used…in identifying valid rules of law".[71]

On Hart's account, then, we have rights (if we do) because Parliament has enacted them. With added complexity we may say that rights exist at common law but Parliament could remove them with sufficient legislation. As such, a Bill of Rights or actual judicial decisions would be necessary to legally protect rights.[72] This definition has strong resonance with what could be described as an orthodox view of the British constitution.[73] Further, an empirical study has recently confirmed the core view of Parliamentary sovereignty vis-à-vis the rule of recognition. After interviewing some 30 officials[74] the authors of said study stated that they "found only a little evidence…that UK officials are currently tempted by any substantive restrictions on parliamentary supremacy. Whatever the views of certain judges, and whatever the hopes of certain theorists, we found only the beginnings of uncertainty and hesitation".[75] For present purposes, let us suppose that this is the case, and most officials assume that Parliament is sovereign.[76] Does this explain legal practice and mean that our grounds of law are reliant on the edicts of Parliament? Consequently, does it mean that human rights are legally protected for only as long as, and only to the extent that, Parliament allows?

II.C.1. Testing Hart's Rule of Recognition: *R (Evans) v Attorney General*

[71] ibid 148-9. Hart could suggest that he is not offering a theory of Parliamentary sovereignty nor of British constitutionalism; he could argue that his suggestion that the rule of recognition accords with Parliamentary sovereignty is merely illustrative as opposed to correct. Regardless, his work has been appropriated by positivists to validate their own positions. For example, Jeffrey Goldsworthy tells us "most senior legal officials…have for a very long time recognized as legally valid whatever statutes Parliament has enacted, and have often said they are bound to do so" therefore Parliamentary sovereignty is a "central component" of the rule of recognition in the United Kingdom: Jeffrey Goldsworthy, *The Sovereignty of Parliament* (OUP 1999) 238.

[72] Hart (n 61) 101.

[73] For example, Lord Campbell held "All that a Court of Justice can do is to look at the Parliament Roll; if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire" *Edinburgh & Dalkeith Railway Co v Wauchope* [1842] UKHL J12, (1842) 1 Bell 278. More recently, after enunciating various "constitutional" provisions, Lord Neuberger said, extra-judicially (and not in a way that reflects his judicial decisions), "they can all be revoked or altered *by a simple majority in parliament*" and "what Parliament decides is the law, once it is embodied in an Act of Parliament… which is brought into law by the Queen signing and approving it…Parliament has ultimate power with no restraining influence": Lord Neuberger, "The UK Constitutional Settlement and the Supreme Court" (2015) 5 The UK Supreme Court Annual Review 13, 16-18.

[74] Drawn from the civil service, the police, the military, and local government but not including judges, who were left out on the basis that their opinions are discernable from judgments.

[75] David R Howarth and Shona Wilson Stark, "The Reality of the British Constitution: H L A Hart and What 'Officials' Really Think" (2014) 53 University of Cambridge Legal Studies Research Paper Series, 31.

[76] Even forgetting the defects in Hart's theory (to be discussed below) I agree with Allan that, once you examine the detail, there is no agreement on the intricacies of Parliamentary sovereignty as a general rule and so it is difficult to summon Hart's work as a defence of Parliamentary sovereignty: T R S Allan, *The Sovereignty of Law* (OUP 2013) 156.

It is Hart's rule of recognition that I take as my target in this section. To test Hart's theory I will analyse it by reference to *R (Evans) v Attorney General*.[77] The reasons for the selection of this case are threefold: first, *Evans* directly examines the legal basis of executive action under a statute (and therefore the grounds of law); second, it is a striking case in terms of the range of judicial opinion; third it is a case that has attracted a rich body of academic attention, thereby bringing out a good many views from the academic community that supplement any single analysis.[78] Whilst *Evans* is not substantively about human rights adjudication at common law it provides a fascinating methodological insight; it is this perspective of the case that we are interested in, which we can appropriate and use for common law rights questions later in the thesis. As stated previously, my aim in this part of the thesis is to demonstrate an accessible methodology for public lawyers to make use of. We are interested, in this part, on what makes a proposition of law true or false. To that extent, any case (whether in public or private law) that involves disagreement of the nature to be examined provides us with answers regardless of which specific narrow area of law we direct those answers towards.

The case revolved around the fact that The Prince of Wales has sent letters to government ministers giving his views on political issues. Evans, a journalist, used the Freedom of Information Act 2000 (FoIA) in an attempt to gain access to the so called "black spider memos".[79] Evans' efforts resulted in a ten-year legal battle that reached its climax in the judgment of the Supreme Court that this thesis examines. After the government declined to release the letters Evans complained to the Information Commissioner, who found for the government. Evans persisted. After taking his case to the Upper Tribunal the Commissioner's views were overturned and the letters ordered for release.[80]

Usually after judicial determination litigation (excepting an appeal) comes to a close. However, the government invoked the power in s 53 FoIA, which provides that a decision stating that information must be given will not have effect if a certificate is given to the Commissioner stating that there are reasonable grounds for denying that non-disclosure would be unlawful. This is a veto power, whereby the government sought to neutralise the Upper Tribunal's order. The case in the Supreme Court was a judicial review of the purported veto of the Attorney

[77] [2015] UKSC 21, [2015] 2 WLR 813.
[78] Any conclusions about Hart's rule-based account drawn from *Evans* are not to be seen to be correct only because of *Evans*; there is a long line of cases that can be used to analyse Hart's views. For example, Stuart Lakin's treatment of *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262: Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28(4) OJLS 709.
[79] Named after Prince Charles's handwriting.
[80] *Evans v Information Commissioner* [2012] UKUT 313 (AAC).

General. As such, the question for the court was: did the Attorney General have the legal power to veto the Upper Tribunal's order for disclosure on the facts of the case?

How one goes about answering this question will depend on one's grounds of law. It is apt here to remember that, for Hart, the grounds of law are embodied in a rule of recognition, which is discovered through an empirical survey of what most officials think. On such an approach, it is argued, whether something is law or not depends on whether Parliament has in fact said it is (and no more or less).[81] Does this explain the approach of the Justices in *Evans* to the grounds of law and do they act as if the grounds of law depend on an empirical survey?

Before examining the judgments it is important to note that the Justices agreed that the statutory text read as follows, and therefore there could be no *empirical disagreement* between the Justices:

> A decision notice or enforcement notice to which this section applies shall cease to have effect if…the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on *reasonable grounds* formed the opinion that…*there was no failure* [to comply with statutory duties].[82]

The Attorney General argued that, in *Evans*, it could not be said that his views were unreasonable as they reflected the views of the Commissioner and the Upper Tribunal had acknowledged that there were "cogent arguments for non-disclosure".[83] However, despite there being arguments that cut both ways, on the question of whether the Attorney General was legally entitled to set aside a judicial order with which he disagreed, the majority of the Supreme Court answered in the negative.

Lord Neuberger, with whom Lords Kerr and Reed agreed, spoke for the majority within the majority and held a:

> [s]tatutory provision which entitles a member of the executive…to overrule a decision of the judiciary merely because he does not agree with it…would cut across two constitutional principles which are also fundamental components of the rule of law. First… a decision of a court is binding as between the parties and cannot be ignored or set aside by anyone... Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are…reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney

[81] I have left out the common law here because it adds nothing to the picture that is building yet complicates it, suffice to say that Hart thought that common law is law but Parliament has the power to overturn it through legislation *because* most officials accept that this is the case: Hart (n 61) 101.
[82] Emphasis added. Section 53(2) FoIA.
[83] *Evans* (n 75) [49] (Lord Neuberger).

> General's argument in this case, flouts the first principle and stands the second principle on its head.[84]

As such, Lord Neuberger argued that s 53 could not be "invoked effectively to overrule that judgment merely because a member of the executive… takes a different view". Thus, for Lord Neuberger, whilst he was careful to couch his approach in terms of Parliamentary intention and statutory interpretation,[85] the two principles he identified shaped the law (and as such the Attorney General's power)[86] such that, in the end, Lord Neuberger held that s 53 could only be used if there was a material change in circumstance since the tribunal's decision or said decision was demonstrably flawed.[87]

Lord Mance, with whom Lady Hale agreed, also held that the Attorney General's certificate was illegal. Instead of using constitutional principles directly to understand the law, Lord Mance focused on the standard of review that would apply when assessing the Attorney General's action. Any test must be "context-specific" for Lord Mance, "in the sense that it must depend upon the particular legislation…and upon the basis on which the Attorney General was departing from the decision".[88] Further, it was clear that the Attorney General had to show he had reasonable grounds for refusing disclosure, which was higher than mere rationality (i.e. *Wednesbury*).[89] In considering what is reasonable one must consider the factual investigation by the Tribunal and the extent to which the Attorney General can replicate that; effectively, if a Tribunal is better equipped to make a decision then a relevant person would need solidly reasoned grounds for issuing a certificate.[90] Lord Mance was clearly alive to the separation of powers issues in the case; however he makes clear that "section 53 must have been intended by Parliament to have, and can and should be read as having, a wider potential effect than that which Lord Neuberger has attributed to it".[91] For Lord Mance whilst the words of the statute have a (large) part to play, context is key, and his understanding of that context will shape the words. This differentiates him from Lord Neuberger because it "reflects the differing extents to which Lords Neuberger and Mance were prepared to permit fundamental constitutional principles to

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[84] ibid [51]-[52] (Lord Neuberger).
[85] ibid [58] (Lord Neuberger), where he states that if Parliament had made its intentions "crystal clear" then s 53 would have given the power to the Attorney General.
[86] This is most readily acknowledged in [68]-[69] (Lord Neuberger).
[87] *Evans* (n 75) [71] (Lord Neuberger). This was something Lord Neuberger accepted would result in a "narrow range of potential application" of s 53: *Evans* (n 75) [86].
[88] ibid [128] (Lord Mance).
[89] ibid [129] (Lord Mance).
[90] ibid [130] (Lord Mance).
[91] ibid [124] (Lord Mance).

operate".[92] Whilst using similar ingredients the amount of each was different; a different formula for testing propositions of law was used by Lords Neuberger and Mance respectively.

Lord Hughes dissented, stating that the section "can mean nothing other than that the accountable person…is given the statutory power to override the decision".[93] To arrive at such a radically different conclusion, Lord Hughes, like the others, said that he was applying Parliamentary intention; this being found in the "*plain words of the statute*…If Parliament had wished to limit the power to issue a certificate to these two situations [i.e. the two situations that, for Lord Neuberger, represented the only factual scenarios in which the power would be legally exerciseable] that is undoubtedly what the subsection would have said".[94] It appears that for Lord Hughes in *Evans* the literal meaning of the statute (and that alone) is what constitutes the law.

Lord Wilson also dissented. He stated that the answer Lord Neuberger provided "did not…interpret section 53…It re-wrote it. It invoked precious constitutional principles but among the most precious is that of parliamentary sovereignty, emblematic of our democracy".[95] Lord Wilson found it "helpful to notice the circumstances in which section 53" came into being;[96] Parliament had decided that there needed to be a power to override the evaluation of public interests of the Commissioner, tribunals, or courts when it decided to give a right to information (as opposed to a discretion).[97] His Lordship also stated that since the veto power could only be used in narrow circumstances Parliament had clearly recognised the difficulties of executive override.[98] For Lord Wilson, then, it is fair to summarise that what Parliament had done and intended was all that mattered and this was discovered by a historical analysis of the provision in question. Whilst this may lead to an undesirable result in the circumstances of the case,[99] the judiciary are there to follow the words of the statute understood in the context of enactment, which constitute the law, and which had therefore expressly conferred a power of override in the circumstances.[100]

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[92] Mark Elliott, "A tangled constitutional web: the black-spider memos and the British constitution's relational architecture" [2015] PL 539, 546.
[93] *Evans* (n 77) [153] (Lord Hughes).
[94] Emphasis added. ibid [155] (Lord Hughes).
[95] ibid [168] (Lord Wilson).
[96] ibid [170] (Lord Wilson).
[97] ibid.
[98] ibid [172] (Lord Wilson).
[99] "Without in any way agreeing with the Attorney General that the public interest in maintaining the exemption did outweigh the public interest in disclosure…there were reasonable grounds for him to hold that opinion [within the context of the Act]": ibid [183] (Lord Wilson).
[100] ibid [179] (Lord Wilson).

There are four distinct methods of determining the validity of propositions of law at play in *Evans*: for Lord Neuberger, what is law is what the statute says combined with constitutional principles (which weighed heavily). This is a strong constitutionalist approach. Conversely, Lord Mance seems to suggest the law is whatever the statute says it is, understood in its wider constitutional context (a weaker constitutionalist approach). Lord Hughes argues that the law is whatever the "plain words of the statute" mean, thereby seemingly advocating a literalist interpretation; and, for Lord Wilson, the law is whatever the statute says, understood by the historical Parliamentary context in which it was passed, supporting an intent-based originalist method.

The First Implication

What sense can be made out of these different approaches and what are the implications for Hart's rule-based theory? The first implication is simple: Hart's theory depends on agreement and therefore does not sensibly allow for disagreement about the grounds of law, and yet that is what we see playing out in the *Evans* case. It is hard to establish what the rule of recognition is if there is such deep-seated disagreement about the grounds of law. Such disagreement does not tell us that there is uncertainty about the rule of recognition; since the rule depends on agreement disagreement tells us there is no settled rule.[101]

The Second Implication

The second implication is that it is difficult to see how *principles* figure in Hart's *rule* based theory. How can Hartian writers reconcile the fact that some Justices rely on principles (e.g. the separation of powers, democracy, and the rule of law) in their arguments? The disagreements are about to what extent principles figure in legal reasoning. It is easy to see the difference between principles and rules; Dworkin suggests that:

> Rules are applicable in an all-or-nothing fashion. If the facts a rules stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision…but

[101] There could be a settled rule that is more abstract than I have argued before that everyone does agree on (indeed, this seems to be Hart's approach with inclusive legal positivism). However, as I discuss in the following section, that seems untenable. Further, whilst *Evans* is, of course, just one case it is a striking recent example in a long line of cases; e.g. *Jackson* has similar disagreement. Likewise, see chapter 1 of T R S Allan, *The Sovereignty of Law* (OUP 2013), where Allan talks about disagreements in a variety of famous judicial review decisions. See also Lakin (n 78).

> this is not the way principles operate…[A principle] states a reason that argues in one direction, but does not necessitate a particular decision.[102]

If this is accepted then the "rule" that Hart says exists cannot, given a rule's character, easily leave room for the principles that are clearly at play in the judgments. There are two defences that can be employed to blunt the force of this implication: the approach of inclusive positivism and the characterisation of principles as "extra-legal".

Inclusive (or Soft) Positivism

One reconciliatory response is to say the principles Lords Neuberger and Mance rely upon form part of the rule of recognition itself.[103] Thus, the rule of recognition could read something like "whatever the Queen enacts in parliament is law insofar as it respects the rule of law in so far as there is ambiguity of intention". In this way the rule-based nature is preserved because principles are subsumed into the rule.[104]

This, however, runs into two problems, which I shall characterise as (i) the disagreement problem; and (ii) the argument problem. The disagreement problem revolves around the fact that disagreement about principles' meaning would still be prevalent; judges disagree about the meaning of important principles in the constitutional context. As pointed out above, though Lords Neuberger and Mance both invoke the same principles they seem to disagree about the weight to be attached to them.[105] As such, it is difficult to see how any principles and their meaning can be agreed upon and codified into a unitary rule, which would be necessary to preserve Hart.[106]

One way to solve this was put forward by Jules Coleman. He distinguishes between two types of disagreement: the first involves disagreement over the content of the rule ("content disputes") whilst the second involves disagreements over application of agreed rules ("application disputes").[107] Coleman argues that judges agree on the rule of recognition, so there is no content

[102] Ronald Dworkin, *Taking Rights Seriously* (HUP 1977) 24-5.
[103] This is the approach Hart took in endorsing inclusive positivism: Hart (n 61) 250-4.
[104] This is Elliott's view: Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001).
[105] Disagreement about the rule of law is a core constitutional debate: Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.
[106] Dworkin (n 102) 39-45.
[107] Jules Coleman, "Negative and Positive Positivism" (1982) 11(1) JLS 139, 156. I have taken the labels provided in Scott Shapiro, "The 'Hart-Dworkin' Debate: A Short Guide for the Perplexed" (2007) 77 Public Law and Legal Theory Working Paper Series 25.

dispute (e.g. "the law is whatever Parliament says insofar as it respects the rule of law") but disagreement arises over the implementation of that rule; "the divergence in behaviour….as exemplified in their identifying different standards as legal ones does not establish their failure to accept the rule of recognition…they disagree about which propositions satisfy [the rule of recognition's] conditions".[108] So Lords Neuberger and Mance *converge* on the rule of recognition's content but *diverge* on its application.

This distinction seems powerful, and seems to help explain the implications outlined above. However, it is important to note what Coleman is saying: his argument is that principles play a part (if they do) *only* because the rule of recognition says that they do. It is also important to remember that Hart's work is predicated on *agreement* and not *disagreement*. The distinction Coleman makes is unhelpful because it is saying that people settle a controversial proposition of law (on which there is evidently disagreement) by reference to an agreed "convention that decides the issue".[109] Likewise, it is unclear how far this abstraction goes. If everyone agrees that the rule of recognition is that cases must be decided "fairly", does it make sense to characterise any decisions after (inevitable) disagreement as following from a "convention"?[110] Finally, Coleman's argument "eviscerates the idea of a convention itself"[111] because a convention is discovered through people's behaviour acting in a defined pattern and behaviour is right if it conforms with this pattern but this is not really how principles work. Imagine if the rule of recognition said judges should decide "properly": this is otiose for legal reasoning because "a judge would think he should decide in a proper way whatever other judges do or think. What is the alternative? Deciding improperly?"[112] Therefore, Coleman's defence does not help. Again, this is problematic for the Hartian approach because it necessarily depends on *agreement* and whilst there might be agreement that a principle forms part of the rule there would be little agreement about what that principle means,[113] rendering the rule an empty shell.

The argument problem was alluded to briefly in the section above. It suggests that a rule based on agreement does not adequately capture the nature of the argument or principles invoked. It does not reflect actual judicial practice. Lord Neuberger in the case did not seem concerned with

[108] ibid 156. This was accepted by Hart: "Judges may be agreed on the relevance of such tests as something settled by established judicial practice even though they disagree as to what the tests require in particular cases." Hart (n 61) 258-9.
[109] Dworkin (n 15) 1658.
[110] ibid 1660.
[111] ibid 1661.
[112] ibid.
[113] Dworkin (n 102) 45: "[Principles] are controversial, their weight is all important, they are numberless, and they shift and change so fast that the start of our list would be obsolete before we reached the middle".

whether other "officials" care about the principles; he seemingly invoked the principles because he saw them as part of the law in a way that does not depend upon the empirically verified views of officials (indeed, he had read Lord Wilson's judgment and therefore knew there was *not* any agreement).[114] It is false to say that the principles in anyway derived from an agreed upon "rule". Dworkin makes this point most succinctly when he states that principles differ from Hartian rules because their:

> Origin…lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Their continued power depends upon this sense of appropriateness being sustained…True, we would mention any prior cases in which that principle was cited….Yet we could not devise any formula for testing how much and what kind of institutional support is necessary.[115]

Extra-Legal Principles

A more radical strategy has been proposed to save the Hartian rule from redundancy. The argument goes that principles *do not* form part of the law[116] and, by invoking them, one has gone beyond the limits of the law; these principles are extra-legal and therefore, any judge invoking them is not acting in accordance with the law.[117] Lord Wilson suggested this when he stated that Lord Neuberger and the Court of Appeal "did not…interpret section 53 of FOIA. [They] re-wrote it".[118] Scott Shapiro explains that theoretical disagreements could be best explained as arguments about *repair* and/or *modification* of the statute in question,[119] so we can instead see the various Justices' arguments not about what the law *is* but about what the law *should be*, the latter involving recourse to principles whilst the former does not. The judiciary do this to conceal the legislative nature of their actions; "courts preserve their legitimacy when they act as though there really is law 'out there' to discover rather than admitting that the law is sometimes indeterminate and that they are filling in the gaps".[120]

This view seems to fit well with the orthodox view outlined above: Parliament legislates, the courts interpret and act on that legislation, and Parliament then has the power to come back and

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[114] ibid 53.
[115] ibid 40.
[116] This argument is similar to Raz's considered above.
[117] That is not to say that what they are doing is good or bad, it is simply to state a fact.
[118] *Evans* (n 77) [168] (Lord Wilson). Lord Wilson, however, also (though perhaps not as obviously) invokes principles. How to read Lord Wilson's speech will be discussed in the next section of this Chapter.
[119] Shapiro (n 107) 33. Though Shapiro does not endorse this view himself.
[120] ibid.

make its intention clearer, which, in theory, the courts would acquiesce to.[121] Whilst this sounds familiar it is still unsatisfying as an account of judicial practice. If this were the case, and judges routinely act outside of the law, then would the public not have discovered it by now? If the judges all agree on what the law is but argue about if/how to change it then "why has this view not become part of our popular political culture?".[122] Further, to reiterate the point made above, judges certainly do act as if they consider pertinent principles to have *legal* weight, and you need more than a mere unsubstantiated statement to displace the presumption that this is correct. Lord Neuberger, for example, clearly takes the view that the principles he invokes are pertinent to answering the *legal* question in the case.[123] If he is incorrect then we have a situation where the President of the Supreme Court is either entirely wrong about the grounds of law (worrying) or is lying about what he is actually doing by purporting to follow the law whilst really (knowingly) invoking his own political principles to change it (more worrying). In the absence of serious argument to the contrary the Occam's razor would suggest principles are part of the law, though, of course, this tells us nothing about *which* principles or their *weight*.

The Third Implication

Thus far, then, we can say that Hart's theory is, at least, defective. The third implication of the judicial disagreement in *Evans* is not so much focused on the principles employed but rather the disagreement vis-à-vis those principles itself. We must recall Hart's theory. For him, the grounds of legal validity are contained in a single rule. This rule is the essence of the legal system; it separates norms into the legal and non-legal.[124] To talk of different criteria for legal validity than those in the rule of recognition is to be *incorrect* about the grounds of law. You are talking of a *different concept*.

Here lies the problem. For ease, let us apply a label to each of the Justices in *Evans*' criteria: Lord Neuberger could be "A", Lord Mance "B", Lord Wilson "C", and Lord Hughes "D". Each of these approaches is different because each uses different criteria. Whilst they may have similarities (C and D's use of related criteria, for example, is why the differences are not always noticed) they are distinct and would give rise to differing results depending on the factual

[121] *Simms* (n 46) 131 (Lord Hoffmann).
[122] Dworkin (n 1) 37
[123] Which is different to saying that he feels that they are relevant to change the *law*; he clearly sees the separation of powers as *internal* to law such that any proposition of law will be tested by reference to them.
[124] Hart (n 61) 105.

matrices in a give case. Not only this but, on the Hartian approach, only *one*[125] could adequately reflect the rule of recognition. So if C is correct, then A, B, and D are wrong. If there is a fifth way that adequately encapsulates the rule of recognition ("E") then E is correct and A, B, C, and D are wrong.

So far then we could say that on a Hartian approach (at least) three of the Justices in *Evans* were incorrect. This is troubling but, in theory, acceptable; it may well just be that we think one Justice is right and the others wrong. The problem, however, goes deeper. If the four Justices are following different criteria in their identification of what "law" is, that is, using different criteria to decide on whether a postulated legal proposition is true or false, then "each must mean something different from the other when he says that the law is".[126] It is clear what Lord Neuberger means is something different ("A") to Lord Mance ("B"), who means something different again to Lord Wilson ("C"), who is talking past Lord Hughes ("D") when discussing the validity of the legal proposition brought before the Supreme Court for judicial determination.

So then what is the point of the disagreement in the case?[127] If they use different criteria then they are "talking past one another"[128] in the same way as if they were all arguing over how many banks there are in the country when each means something different by the word "banks".[129] Let us imagine that Lord Neuberger means riverbanks, Lord Mance financial institutions, Lord Wilson people with the surname Banks, and Lord Hughes the cushions on a billiards table. The ensuing (inevitable) disagreement would be pointless; it would not be genuine debate since they are not all talking about the same *concept*. Likewise, any agreement (such as between Lords Neuberger and Mance or Lords Wilson and Hughes) is also futile; it would be sheer luck that there was convergence, in the same way as if there just happened to be 15,000 river banks and financial institutions in the country.

Indeed, this difficulty vis-à-vis disagreement goes deeper than even the judiciary. Such theoretical disagreement is prevalent in the academic community too. As noted above, *Evans* has prompted a substantial amount of academic literature. I wish to, briefly, look at two pieces, each by prominent public law academics yet startlingly different in view point. The first is by T R S

[125] Indeed, at most one since in theory none could be correct.
[126] Dworkin, (n 1) 43.
[127] In *Evans* the judges explicitly refer and debate to and with each others' speeches.
[128] Dworkin, (n 1) 44.
[129] To use Dworkin's example: ibid.

Allan.[130] He starts by telling us that the Justices in *Evans* were examining principles and understood them differently from one another.[131] After going through each of the Justices' approaches he comes to the conclusion that Lord Neuberger's approach is right since it "is the most candid and convincing…Provided that some possible future application (as regards Tribunal decisions) could be envisaged there was no violence to the statutory language…it is also *true* that the idea of parliamentary sovereignty *must* be explained in the context of our commitment to the rule of law".[132] In a later piece Allan's staunch approach is watered down but comes to similar conclusions. He states that the dissenters' view would "sanction the *unconstitutional* overriding of a judicial decision by a member of the executive" and that Lord Hughes' literalist approach should be treated with caution since Acts cannot be seen as self-contained codes.[133]. Allan seems to hold that statutory interpretation *must* take place with a nexus to a substantive version of the rule of law. Anything else, for Allan, is wrong.[134]

The second piece is by Richard Ekins and Christopher Forsyth.[135] They start by stating that Parliament's decision (in enacting s 53 FOIA) was ignored by "the misinterpretation of legislation, in which courts impose on a statute an artificial reading that departs from Parliament's intention".[136] That is to say that the majority in *Evans*, for Ekins and Forsyth, acted *wrongfully*. Indeed, they state that "whatever one thinks of [FOIA's] merits, it should have been- but was not- faithfully applied by the Supreme Court".[137] Further, when discussing Lord Neuberger's two factual matrices that would legitimate s 53's use they say "there is not a hint in the statutory language or in the context in which that language was chosen to suggest the qualification that the judgment imposes".[138] So, for Ekins and Forsyth, statutory language and context (Lords Hughes and Wilsons' views respectively) are heavily involved in the criterion of legal validity; indeed,

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130 T R S Allan, "The Rule of Law, Parliamentary Sovereignty, and a Ministerial Veto Over Judicial Decisions" (2015) 74(3) CLJ 385.
131 ibid.
132 Emphasis added. ibid 388.
133 Emphasis added. T R S Allan, "Law, Democracy, and Constitutionalism" (2016) 75(1) CLJ 38, 44-5.
134 Whilst Allan argues he is fully engaging in the interpretivist methodology to be discussed below there is an ambiguity in Allan's work that suggests that he does in fact think that a substantive version of the rule of law *must* be correct, thereby denouncing all other versions of the grounds of law as *wrong* in a similar sense to how I have portrayed a Hartian view of *Evans* (that is, *in fact* wrong as opposed to *normatively* wrong). Suffice to say that Allan's self-characterisation of his work as "interpretivist" does not mean that he engages with the interpretivist methodology to its full extent. I agree with Stuart Lakin's analysis of Allan (n 17): Stuart Lakin, "Defending and Contesting the Sovereignty of Law: The Public Lawyer as Interpretivist" (2015) 78(3) MLR 549.
135 Richard Ekins and Christopher Forsyth, "Judging the Public Interest: The rule of law vs. the rule of courts" (2015) Judicial Power Project.
136 ibid 4-5.
137 ibid 5.
138 ibid 12.

"Parliament simply did not enact the provision that Lord Neuberger contemplates".[139] This is relevant, for Ekins and Forsyth, since "the [judgment of Lord Neuberger] does not attend properly to the reasoning and choice of the enacting Parliament, which in our *constitution has authority to make the law it chooses to make*".[140] This analysis reaches its zenith when they state:

> Lord Neuberger is not much moved by the evident disconnect between the meaning he imposes on the statute and any meaning that there is reason to think Parliament intended…Yet the fundamental aim of statutory interpretation is to find and give effect to the intention of Parliament in enacting the statute, reading the statutory language in the context of enactment to determine how Parliament chose to change the law.[141]

This is because "the *controlling question*… is what rule did *Parliament choose to promulgate*".[142] The grounds of law for Ekins and Forsyth can be taken to be "whatever Parliament chose to promulgate" or something similar.[143]

What do we make of these two pieces? It must be the case, if Hart is right, that either (or neither) Allan or Ekins and Forsyth must be correct. They cannot both be in any meaningful away. Since they, if we follow Hart, would be talking past one another any academic discourse between the authors would be useless. They do not follow the same criteria for what counts as "law" and, as such, discussion is rendered meaningless similar to the Justices deciding the case.

Once this conclusion takes hold deep despair sets in about legal practice. It must be incorrect to say that when the judiciary disagree about the answer to a case they are having a nonsensical disagreement. Further, it seems startling to say that Allan and Forsyth have not been having any meaningful discussion over the decades. Yet such a conclusion follows logically from Hart's rule of recognition theory. Since we cannot have both, which must abandon our jurisprudential landscape, Hart's theory or sensible discussion? It is logical to suggest that the former must be abandoned in favour of the latter; indeed even Scott Shapiro (a positivist) states that, "positivists have had little to say about this…more powerful objection".[144]

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[139] ibid.
[140] Emphasis added. ibid 14.
[141] ibid.
[142]Emphasis added. ibid.
[143] I leave aside here the difficulties in endorsing *both* Lord Hughes and Lord Mances' differing approaches; as pointed out above, their grounds of law would lead to divergent conclusions in differing factual matrices.
[144] Shapiro (n 105) 38.

If Hart and Raz cannot provide an adequate jurisprudential basis for an empirical approach to the determination of propositions of law one must ask why do we hold onto such an account? Further, if the reader (like myself) is troubled by such fundamental theoretical disagreement about the grounds of law how can we characterise the disagreement so as to rescue the judiciary and academic community at large from talking past one another and thus rendering their debates otiose? Further, depending on our recasting of theoretical disagreement, what are the consequences for our grounds of law and the place of human rights in the constitution?

III. Recasting Disagreement: Interpretive Practices

It seems that if we are to maintain allegiance to the arguments made by the writers considered above we lose a sound jurisprudential explanation of the grounds of law. More specifically, if we dogmatically pledge ourselves to the Hartian view of law (which many writers do, either explicitly or implicitly) then legal practice and discourse are rendered otiose. It is examining the disagreement that seems to permeate legal practice that will lead to a working methodology for determining the grounds of law in the United Kingdom. With this methodology firmly in place we will be able to move onto consideration of the extent to which a codified Bill of Rights is necessary in the British constitution. Again, *Evans* lends itself to fruitful analysis.

III.A. An Imaginary Example

Law, I argue, is an interpretive practice[145] and seeing it this way resolves the difficulties I outlined above. To illustrate what I mean by an interpretive practice it will be helpful to imagine a social practice on a smaller scale. Let us imagine the rules of vegetarianism and follow the stages in their development. The first stage is that the vegetarians of our imaginative community follow shared rules. They will say that vegetarianism prohibits consumption of animal meat and the purchase of products which animals have died to produce (leather goods, for example). This works for a time but, eventually, the vegetarians of our imagined society will start to question the purpose of vegetarianism, which exists quite independently and logically prior to their rule(s). This is the second stage. Imagine, upon reflection, some vegetarians argue that, because the point of vegetarianism is the protection of sentient beings, it is equally wrong to buy any animal produce at all. Other vegetarians may say although vegetarianism is about the protection of animals, as long as the food is free-range and organic then buying animal produce conforms with

[145] Here I am arguing after and in favour of Dworkin's methodology. His views are expounded throughout multiple volumes; the most succinct are Chapters 2 and 3 of Dworkin (n 1).

vegetarianism. A third group may argue that if vegetarianism is about the protection of sentient beings then being a vegetarian logically entails political activism. All groups insist they are following what vegetarianism requires yet are using different factual criteria to one another in their determination. This changing of the social practice is the third (and final) stage of interpretivism.

It is clear then that, after reflection, the three different groups are using different sets of criteria in identifying the meaning of the word "vegetarian", similar to our banks example. Is it right to characterise these groups as talking past one another in the same way as that example? I would argue not, despite coming to differing criteria all camps have engaged in interpretive practice, which renders their disagreement real. The uniting link between vegetarianism and the point of the practice (respect for animals) acts "as a kind of plateau on which further thought and argument are built".[146] Whilst people may argue over differing *conceptions* of vegetarianism they are united in the abstract *concept* of it. This renders their disagreement real, in the sense that they are arguing for the best understanding or conception of vegetarianism. In this way, normative discourse enters into the meaning of a practice; a social practice's meaning is sensitive to its point's best understanding, which is inherently normative. What this tells us is that disagreement makes perfect sense, but only in the context of an interpretive methodology. Since, as I have argued above, we have disagreement in legal practice that has not been explained by another other theory we have a strong reason to support the interpretivist methodology.

III.B. Interpreting the British Constitution

So then, social practices are understood in light of their best interpretation. This involves seeking the purpose of the practice upon which we can mostly agree. You then understand the social practice in light of this purpose and the values it has. The shape of the practice is moulded not by agreement but normative understanding of the point. Any disagreement is seen as revolving around the value underlying the point of the practice. This makes disagreement real in a sense that Hart's theory cannot provide.

It is important here to note that the *practice* is understood by reference to the best normative reading of its point. There is a distinction between interpretation and invention. An interpreter must achieve a considered balance between the salient features of a given legal system and the

[146] ibid 71.

normative elements that best justify these features; in Stuart Lakin's words "moral theory partly determines the content of the practice, and the standing features of the practice constrain the available range of moral theories".[147] In this way, an interpreter of the British constitution will need to examine features such as the relevance of legislation and Parliament, whereas an inventor of a constitution will "have no genuine regard for the standing features of British constitutional practice".[148] Essentially, the work of interpretivism is to help explain the constitution as it actually is which necessarily, in an interpretivist framework, requires normative evaluation; however, whilst values play their part in determining constitutional doctrines one should not use one's own view of the ideal constitution and say it is constitutive of the *actual* constitution without a level of "fit" between the standing features and the values underlying legal practice.[149]

So, the first thing that we must do is identify the point of legal practice. Why do we have law? The answer to this would have to be sufficiently abstract so as to be largely agreeable (thereby putting everyone on the same "plateau") but concrete enough to have meaning. Dworkin suggests that law's purpose is "to guide and constrain the power of government…law insists that force not be used or withheld…except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified".[150]

Some take issue with this. John Gardner argues that this reduces law's unifying purpose to a matter of coercion.[151] He says that it is both implausible and far from uncontroversial.[152] He suggests that a legal system would exist in a society of angels and:

> Since the *ex hypothesi* perfect population of such a society will be guided by the *ex hypothesi* perfect laws and policies of their *ex hypothesi* perfect government, coercion by that government will not be needed…Nor, therefore, will law be called upon to regulate government coercion.[153]

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147 Lakin (n 131) 566.
148 ibid.
149 Dworkin (n 100) 342: "no principle can count as a justification of institutional history unless it provides a certain threshold adequacy of fit" however "amongst those principles that meet [this threshold] the morally soundest must be preferred". ". Where exactly this threshold is is contentious and not examined, by reason of constraints, in this thesis. *Cf.* T R S Allan, "Interpretation, Injustice, and Integrity" (2016) 36(1) OJLS 58, 68-74.
150 Dworkin (n 1) 93. It is important to note that whilst Dworkin utilises this point he does not think that this *has* to be the point. He could, he acknowledges, be wrong.
151 John Gardner, "Law's Aims in *Law's Empire*" in Hershovitz S (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 208.
152 ibid.
153 ibid.

This, however, is mistaken. There is nothing in Dworkin's work to suggest that the point of a practice is the same wherever a similar system of practice exists. It is not *necessarily* right that international law has the same purpose as domestic law; nor American the same as Iranian; nor is it right to suggest that the law of the real world would *necessarily* have the same point as law in a society of angels.[154] Therefore, comparing two different systems and saying they do not share the same "point" does not help us very much. Dworkin makes clear that his "suggestions about the justification of coercion are claims about the right strategy in communities of the kind lawyers are normally called upon to interpret".[155]

There is a deeper point that may have some weight. Even in normal legal systems the licensing of government coercion follows a failure. Hart argues that the resort to coercion is a "secondary provision…for a breakdown in case the primary intended peremptory reasons are not accepted as such".[156] As such, Gardner says, coercion "is a purpose of law only on those occasions when law has failed to achieve its more unifying (albeit less distinctive) purpose of providing normative guidance".[157]

The issue with this is that it seems to reduce law's purpose down to mere guidance. As Gardner points out this is not distinctive. Many social systems provide guidance. For example, morality provides guidance. It may not be illegal (save in certain circumstances) to lie yet I have moral guidance not to do so. Similarly, social expectations provide guidance. Whilst it is not illegal to refuse to properly queue in England it is frowned upon. There is an overlap between morality and societal expectations; if I breach the former then (according to some) I have done something objectively wrong regardless of what anyone else thinks and, possibly, I will be punished for it. With the latter any blame will be more grounded in nature; it is society's principles that I am offending.

Law's purpose is different to both of these systems. It too offers guidance. It purports to tell you what to do. The difference between law and morality and social expectations is that the former inherently involves the state. The state is inherently involved when, for example, I make a contract. Even if I do not breach that contract (which would be when state coercion actually

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[154] Ronald Dworkin, "Response" in Hershovitz S (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 310.
[155] ibid.
[156] H L A Hart, "Commands and Authoritative Legal Reasons" in *Essays on Bentham* (OUP 1982) 254.
[157] Gardner (n 151) 209.

comes into play) by the very act of making the contract I have engaged with the state. The state is present as is the potential for its coercive force.

This is similar (though different) to Nicos Stavropoulos' argument in favour of law's purpose of licensing state coercion. Stavropoulos suggests that we are committed to the ideal of principled consistency, which means the element of coercion is always at work when we look at our legal system. Simply "the fact that coercion…is always on the cards makes it the case that institutional practice affects [legal] obligations in a special way. Not all obligations so affected need be enforced in actual practice. But because some are, the constitution of all is affected".[158]

Dworkin's analysis can thus be saved: lawyers would agree, after reflection, that the distinctive purpose of law is to regulate when the state becomes present with the potential for coercion. Since coercion is sometimes present in legal obligations equality of treatment suggests we must understand all legal obligation by reference to that coercion. Law may be similar to other social systems in that it provides guidance but is inherently different because the state is inherently involved. Law, most succinctly, is about making sure the state's (coercive) power is only present in our lives when this is licensed "in accordance with standards established…before that exercise".[159]

To summarise, law is to be understood by reference to its point. The point of law is to regulate coercion and make sure that legal rights and responsibilities flow from standards established prior to their realisation. The effect this has on our thinking will depend largely on what value(s) we see as underlying the practice. Interpreting legal practice, again, requires one to understand the practice in light of its point and one's understanding of the point will be conditioned by the values served by the point. In this way, understanding legal practice (and thereby our grounds of law) is an inherently normative exercise. Understanding legal practice is about one's understanding of the value(s) of having state action legitimated by prior authorisation. These values are used to understand the standing features of the constitution. This is broadly the same as suggesting that legal practice can only be understood by reference to the rule of law and the values underlying it,[160] which gains explicit judicial support in *Jackson*, where Lord Hope said, "the rule of law…is the ultimate controlling factor on which our constitution is based"[161] and, more

[158] Nicos Stavropoulos, "The Relevance of Coercion: Some Preliminaries" (2009) 22(3) Ratio Juris 339, 353.
[159] Ronald Dworkin, *Justice in Robes* (HUP 2008) 169.
[160] For an overview of the debate see Craig (n 103). Dworkin took the purpose of law as being the rule of law.
[161] *Jackson* (n 76) 304 (Lord Hope).

broadly, "it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law".[162] This, of course, tells us nothing about which values underpin legal practice or what their repercussions are.

What does this mean for identifying human rights in our legal system? This depends on the values we identify. To illustrate the potential of this methodology, let us consider two fictional judges, each with a very different understanding to the other.[163] First, imagine a judge who believes that having official power used only in pre-authorised circumstances is useful because this promotes certainty, predictability, and generally facilitates people being able to organise their own lives knowing when the state will and will not intervene.[164] Whether a proposition of a legal human right is valid for her will depend on how these values are served. One could argue, before this judge, that human rights are legal human rights only if some statute (such as the HRA) classifies them as such. With added complexity, the judge might say that human rights exist at common law *only if* courts have empirically accepted that this is the case in a clear analytical framework. This judge is unlikely to be persuaded by arguments that human rights exist in the legal framework because of any moral force or sense of justice they hold alone and, as such, she could strike down an Act of Parliament just because it contravenes these extraneous values. Likewise, she may find great difficulty in the idea of anything more than light-touch review, since a more searching standard than traditional *Wednesbury* would violate the principles she identifies as underlying law.[165] Finally, she may side with Raz and say that, when the courts recognise a previously undeclared right, they are *making new law* since the novel right was not previously found in social sources.

On this interpretive methodology a positivistic plain fact view of law could prevail as the type of test for determining the validity of propositions of law. However, crucially, they do not do so necessarily because of some empirical consensus or due to the conceptual nature of authority (both of which I rejected above). Instead, a positivist approach would be the best interpretation (if it is) because of the normative force of such a theory in explaining the standing features of our

[162] ibid.

[163] Of course these two judges do not exhaust the range of interpretations available; they are only to illustrate the point for current purposes. For such examples see Dworkin (n 1) chapters 3-6. I draw on Lakin's examples: Lakin (n 76) 732.

[164] Raz thinks his theory promotes these values: Raz (n 11) 210.

[165] This is a plausible interpretivist reading of Philip Sales's argument that the traditional *ultra vires* doctrine makes it improper for courts to engage in proportionality review (which he sees as a more stringent form of review than *Wednesbury*) unless such an approach has been sanction by Parliament (e.g. by the HRA): Philip Sales, "Rationality, Proportionality, and the Development of the Law" (2013) 129 LQR 223.

constitution. Positivism is not, as Allan argues, "simply confused and misguided"[166] nor necessarily "dogmatic"[167] but is instead a viable interpretation of the British constitution built on normative foundations, which will be considered in Chapter 5 in relation to common law rights.[168]

A second judge may think differently. She may believe that the reason we insist on coercive power being authorised before use is because this represents due process and a lack of arbitrariness. It captures the idea that everyone is an equal in society. These values underpin the purpose of the legal system and so the standing features of that system are explained by these values. For her, whether legal human rights exist may not just depend on whether Parliament or the Supreme Court have declared such rights. She may think that she must interpret the past decisions that authorise force in line with these principles. As such, she may argue that you cannot legally be detained without some objective and rational justification, even if an Act of Parliament purports to give an unfettered power on executive authorities to do so.[169] This does not amount to judicial legislation since, she would argue, she is giving effect to the *law properly understood*. For her, no codified Act would be needed. Further, she might argue that there *could* be situations in which a court would be justified in striking down a (purported) Act of Parliament.[170] For example, if Parliament passed a statute saying that from now on all law and state power is to be vested in an unnamed individual of the Prime Minister's choosing and there should be no judicial review of the decisions made, then this judge may well say that Parliament has acted in a way that conflicts directly with the point of law properly understood and therefore its action cannot be law.[171]

Does this analysis help explain the disagreement in *Evans*? I would argue that it does. Remember, we have four Justices, each utilising a different approach. Most starkly, we can see how Lords Neuberger, Hughes and Wilson hold different views but how these views map onto different values that underpin the purpose of law as controlling state coercion. Lord Neuberger's views seem to translate roughly into those of our second fictional judge; he takes the statute and interprets it to its (for him) best or true meaning through the lens of due process and non-

166 Allan (n 99) 340.
167 ibid 50.
168 This argument re positivism and Allan's purported use of interpretivist methodology builds on the critique Lakin has made of Allan: see Lakin (n 99).
169 *Simms* (n 46).
170 *Moohan* (n 47) [35]: Lord Hodge envisages striking down an Act if Parliament sought to curtail the franchise: "the common law, informed by principles of democracy and the rule of law…would…declare such legislation unlawful".
171 *Jackson* (n 76) 302 (Lord Steyn).

arbitrariness, both values served by his interpretation. Lord Hughes is most clearly the Razian[172] in the Supreme Court; he thinks that one should just read the words "literally", which would arguably make what the law is (and is not) clear and more understandable to the layman since he would not have to understand the law in context of various rights and principles that take a degree of learning to understand. Further, Lord Wilson relies heavily on an orthodox majoritarian form of democracy in his reasoning. We can recast his judgment as a suggestion that the reason Parliament has ultimate authority to decide legal norms and standards is because they represent the supreme democratic body and they are best placed, therefore, to represent the will of the people in establishing standards which authorise state coercion.[173]

IV. Conclusion

The aim of recasting the debate between the Justices in this way is to show that the disagreement is about the *value* found in the (broadly tacitly accepted) *purpose* of law. It is not to say that the judiciary consciously act in such an analytical way, it is merely to suggest that this way of thinking about law helps to make the disagreement real. It re-orientates judicial and academic disagreement from nonsense to sense. They agree on the concept of law (that law's purpose is to regulate state coercion) but disagree about conceptions of law (different concrete iterations of what the concept *means* when one looks at the values underlying the concept). Like our vegetarian example, this acts "as a kind of plateau on which further thought and argument are built".[174]

It is from this plateau that this thesis proceeds. The aim of this part has not been to decide on an interpretation that best fits the British constitution but rather to show that an interpretivist approach (a) is the soundest methodology; and (b) has the potential to solve seemingly doctrinal public law issues, specifically the extent to which a Bill of Rights is necessary for the efficacy of rights protection in the British constitution. Throughout the rest of the thesis I will argue for, demonstrate, and use an approach that is far more like our second fictional judge than our first.

Before getting to the substance of the question this thesis tries to answer Chapter 3 looks at what we mean by "Bills of Rights". In theory, these could include socioeconomic rights, which it would be hard to argue that the constitutional order already protects. This thesis tries to compare and contrast the constitution without a Bill of Rights and one that does have such a statute; as

[172] Raz (n 11).
[173] Whilst there are problems with Parliamentary democracy it is more democratic an institution than the judiciary.
[174] Dworkin (n 1) 71.

such, we need to know what I mean by "Bill of Rights". Whilst the HRA is the Bill of Rights in the United Kingdom at the moment it is, of course, vulnerable to repeal; I will compare and contrast it with the New Zealand Bill of Rights Act (NZBORA) to give an overview of how Bills of Rights work, which we can then compare the common law to. Chapter 3 looks at the reach of Bills of Rights, their rigour of protection, and their constitutional resilience in a Westminster system.

I then move, in Chapter 4, to use the methodology given in this Chapter to look at the reach of common law rights; I argue there that, when one properly appreciates the rule of law, one can see the reach of common law rights as far broader than orthodoxy suggests. Chapters 5 and 6 examine the rigour of protection of common law rights; I argue in those Chapters that, again, the common law is far more powerful than the orthodox, sceptical view would suggest. Finally, in Chapter 7 I look at the resilience of common law rights; I argue there that, since they find their foundation in the rule of law, they cannot be displaced by the legislature and are, therefore, incredibly constitutionally resilient.

Chapter 3

Bills of Rights in the United Kingdom: Architecture and Practice

I. Introduction

This thesis aims to answer a relatively simple question: to what extent does the United Kingdom need a codified Bill of Rights for the purposes of rights protection? In this respect, at its most basic, this thesis acts as a comparator between the United Kingdom's system of rights protection under the Human Rights Act 1998 (HRA) and the constitutional system without the HRA under the common law itself. To answer the question this thesis addresses we need to know how the HRA works so that we can compare the common law to it. To that extent, this Chapter is relatively descriptive,[1] at least when compared to other Chapters; this descriptive stance ought to facilitate an understanding how the judges apply the HRA in practice (and therefore an understanding of its practical strength). Whilst this may not lead to a full appreciation of how the HRA *can* work in terms of its full potential the aim of this thesis is not to directly examine such an application. It is merely to examine how the common law could fill the void left by an abandonment of the HRA. In this sense, I say nothing about the potential of the HRA nor whether the judiciary have applied its full protective strength; I focus instead on how the judiciary say they have been applying the HRA in practice.

The HRA's future is currently in doubt.[2] Therefore, comparing the common law to the HRA may, in the near future, render this work out-dated by virtue of a new "British Bill of Rights" (BBoR). That is, to know the strength of the common law we have to compare it to a codified Bill of Rights. The current such bill is the HRA but the HRA may be replaced, meaning the comparator against which we measure the common law may disappear from the constitutional landscape. So far, we have only had vague rumours about what the BBoR will actually look like and, more importantly, how it will differ in substance from the HRA. Thus, a problem occurs. This work could compare the common law to the HRA, which could lower the future viability of

[1] Insofar as anything can be purely descriptive; I share Ronald Dworkin's apprehension that all description is necessarily partly interpretative.

[2] Conservative Party, "Protecting Human Rights in the UK: The Conservative's Proposals for Changing Britain's Human Rights Laws" (2015). Available here: http://readinglists.ucl.ac.uk/link?url=https%3A%2F%2Fwww.conservatives.com%2F~%2Fmedia%2Ffiles%2Fdownloadable%2520Files%2Fhuman_rights.pdf&sig=2be7374cfdab3cf60f13b48425424346512ae6cc411ab894740a7678f8bb2734 (accessed 3 June 2018); and The European Union Committee, "The UK, the EU, and a British Bill of Rights" (HL 2015-26, 139), see particularly the evidence of the then Secretary of State for Justice, Michael Gove MP.

this research, or the thesis could compare the common law to the rumours about the future BBoR, which would involve building a thesis on shifting constitutional sands. To ensure that this work continues to compare the common law to a Bill of Rights this thesis will utilise the HRA as the comparator but will also examine the statutory scheme for rights protection in New Zealand and suggest how that might differ from the HRA framework. The New Zealand Bill of Rights Act (NZBORA) is very similar to the HRA in its architecture.[3] However, a major difference between the two schemes is that the HRA is an incorproation of European Convention on Human Rights (ECHR) rights, with a powerful link between the national level and the supranational.[4]

The NZBORA lacks such a supranational guidance system. Since many of the issues taken with the HRA seem to emanate from a political distaste for purported supranational interference[5] it seems fair to suppose that the BBoR, if it ever comes, will differ from the HRA in one key aspect: it will change the relationship between the domestic and supranational orders for the purpose of domestic law.[6] As such, examining the NZBORA's workings, which are similar to the HRA but without the direct supranational link, may help us to determine how a future codified Bill of Rights in the United Kingdom might operate. Therefore, the second substantive part of this Chapter will trace out the NZBORA framework and then compare the relevant parts to the HRA. This will ensure that the comparator against which we measure the potency of the common law remains valid even in the face of a repeal of the HRA.

II. Human Rights Act 1998: Structure and Operation

The aim of this part is to explain the operation of the HRA. In doing so it will be useful to adopt Mark Elliott's three vectors against which we can compare the HRA and common law and examine how the HRA works within each of them. Elliott's three vectors are: (i) reach of rights; (ii) rigour of protection; and (iii) constitutional resilience of rights.[7] Before going to track these doctrinal areas, however, it will prove useful to provide context to the HRA's enactment.

[3] The substantive differences between the two schemes will be addressed below.
[4] Section 2 HRA is the clearest example of this (see below).
[5] Conor Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (OUP 2016).
[6] Do note that the relationship between the two jurisdictions is a spectrum; there are a range of possible relationships.
[7] Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 CLP 1.

II.A. History, Purpose, and Implementation of the HRA

Following the Second World War there was a general feeling in Europe that there was a need to protect against the 1930s style of authoritarianism that had put Europe (and indeed much of the world) on the brink of collapse.[8] The ECHR was designed to be part of the solution against fascism. British lawyers were, perhaps surprisingly to some modern day politicians, a key influence in the ECHR's drafting[9] and the United Kingdom was the first country to officially ratify the ECHR in 1951. Whilst the government of the day was concerned that the ECHR might impinge upon the state it was not until the Wilson government of 1965 that the individual was able to go to the European Court on Human Rights (ECtHR) and petition it on the grounds that his or her rights had been infringed by the domestic legal order.[10]

As a result of this newfound ability to petition the ECtHR litigants would occasionally find themselves, after exhausting the domestic legal process, going to the ECtHR in order to seek redress for their perceived violations of rights. This was a state of affairs brought about, in part, by the dualist analysis of constitutional law in the United Kingdom. In short, when the United Kingdom is party to a treaty at the supranational level the rights or obligations found in that treaty has no effect at the domestic level until Parliament incorporates them into an Act; that is not to say, however, that there are no legal rights or obligations created by the ratification of a treaty, it is merely that these exist only at the *international* as opposed to *domestic* level.[11] Dissatisfaction with this method of rights protection grew throughout the 1990s (mainly due to time and cost implications) and led, in part, to Tony Blair's New Labour running on a platform of constitutional reform. Blair's Labour Party won the 1997 general election by a landslide.[12] This new government had promised to "incorporate the European Convention on Human Rights into

[8] Colm O'Cinneide, "Human rights and the UK constitution" in Jowell J, Oliver D, and O'Cinneide C (eds), *The Changing Constitution* (8th Edn, OUP, 2015).
[9] G Marsten, "The United Kingdom's Part in the Preparation of the ECHR, 1950" (1993) 42(4) ICLQ 796.
[10] See A W B Simpson, *Human Rights at the End of Empire* (OUP 2001) and Anthony Lester, "UK Acceptance of the Strasbourg Jurisdiction: What Went on in Whitehall in 1965?" [1998] PL 237. In November 1998 the 11th Protocol was accepted and ratified by the United Kingdom, meaning that the Convention now requires all parties accept the individual right of petition to the Court.
[11] *R v Secretary of State for Home Department, Ex p. Brind* [1991] 1 AC 696 (HL) makes this point in relation to the ECHR's status in British law pre-HRA. More broadly, the justification for this dual analysis is because international treaties are made by the Crown under the Royal Prerogative (though the government are the actual actors, merely using the power in the name of the Crown). Since it is the antithesis of the rule of law that the Crown/Executive could change the law of the United Kingdom without Parliamentary approval, the courts recognise that an international treaty has no effect at the domestic level without Parliamentary implementation/authorisation. See *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 1 All ER 158, [32]-[33] (Lord Thomas LCJ, Sir Terence Etherton MR, and Sales LJ).
[12] Labour took 418/659 seats in the House of Commons on 43.2% of the vote with a 71% turnout.

UK law to bring these rights home and allow people to access them in their national courts"[13] and started doing so immediately after taking office Within five months of general election victory the government published a white paper, *Rights Brought Home*, that promised to incorporate the ECHR so that individuals could have their rights upheld without the time and cost of going to the ECtHR. The white paper paved the way for the HRA, which received Royal Assent on 9 November 1998 and came into force on 2 October 2000. At the time of writing the courts have had 16 years to define and implement the structure of the HRA. I come now to describing how it has worked in practice.

II.B. From Who to Whom? Rights Protected Under the HRA

The HRA was passed to give "further effect to" ECHR rights at the domestic level.[14] For the purposes of the HRA these rights include Article 2-12 and 14 of the ECHR, Articles 1-3 of the First Protocol, and Article 1 of the Thirteenth protocol.[15] This includes the right to life (Article 2); to be free from torture, inhuman, or degrading treatment or punishment (Article 3); freedom from slavery or forced labour (Article 4); a right to liberty and security of the person (Article 5); a right to a fair trial (Article 6); freedom from retrospective punishment (Article 7); respect for private and family life (Article 8); freedom of thought, conscience, and religion (Article 9); freedom of expression (Article 10); freedom of assembly (Article 11); freedom to marry and found a family (Article 12); and a right not to be discriminated against in the exercise of the ECHR rights (Article 14). In addition, Articles 1-3 of the First Protocol include a right to protection of private property (Article 1); a right to education (Article 2); and a commitment by the Member States to hold free elections (Article 3). Finally, Article 1of the Thirteenth Protocol abolishes the death penalty.[16]

Whilst these rights are abstract in wording the ECtHR has generally taken an expansive view of how they ought to be given effect. Whilst a descriptive account of the reach of each right is impossible within the parameters of the present discussion a general overview of the principles and policies governing the area covered by the ECHR rights (and therefore the reach of the HRA) will be useful. The general approach of the ECtHR has been to treat the ECHR as a living

[13] Labour Party, "New Labour: Because Britain Deserves Better" (1997). Available here: http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml (accessed 3 June 2018).
[14] The long title of the HRA states that it is: "An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights"
[15] Section 1(1)(a)-(c) HRA.
[16] The full wording of each of these rights can be found in Schedule 1 HRA.

instrument, with the meaning and reach of the rights not fixed at the time the ECHR was made but instead re-defined and understood in line with the contemporary moral understanding(s) of their points or purpose.[17]

Originally, the ECtHR focused on a consensus based approach to interpretation. This involved looking at the "present day standards" that are somehow common or shared between the Member States.[18] This consensus then shaped the reach of the rights by enforcing the majority view of Member States against a Member State that was out of step with said view of others. A good example of this is *Tyrer v United Kingdom*,[19] which revolved around whether the Article 3 prohibition against unusual and degrading treatment extended to protecting minors from corporal punishment. By the late 1970s judicial corporal punishment was not allowed in the majority of Member States. Despite protestations from the Attorney General for the Isle of Man that such punishment did not constitute degrading treatment the ECtHR still found a breach of Article 3 had occurred, stating that "the Court must also recall that the Convention is a living instrument which…must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be informed by the developments and commonly accepted standards…of the Member States".[20]

Such an expansive approach to reading the rights in the ECHR continued for some years. The ECtHR often relied on consensus on rights to delineate the sphere of ECHR rights. This approach has, however, been slowly superseded by a *value* orientated approach. Over time, a loosening of the consensus approach occurred[21]and eventually gave way to one that looked at "elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their *common values*".[22] An

[17] For example, the ECtHR changed its position on adoption of children by homosexual couples; it used to say that this did not fall within Articles 8 or 14 ECHR but this understanding of the rights was re-evaluated and changed in *EB v France* (2008) 47 EHRR 21, [70]-[73] and [91]-[93].
[18] What this actually meant is not clear. Howard Yourow says it is "vexing" to attempt to uncover the precise analytical framework of the consensus doctrine: Howard Charles Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" (1987) 3 Conn J Int'l L 111, 158. More recently it has been pointed out that what we mean by "consensus" of Member States is not clear; do we mean consensus of the people of the state? Consensus of legal practice? Consensus of experts? This is never articulated by the ECtHR: see Kanstantsin Dzehtsiarou, 'Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights' (2011) P L 534, 548.
[19] (1978) Series A no 26.
[20] ibid [31].
[21] George Letsas, "The ECHR as a Living Instrument: Its Meaning and Its Legitimacy" in Føllesdal A, Peters B, and Ulfstein G (eds), *Constituting Europe: The European Court of Human Rights in a National, European, and Global Context* (CUP 2013) 115-7.
[22] Emphasis added. *Demir and Baykara v Turkey* [2008] ECHR 1345, [85].

example of how this works can be found in *Rantsev v Cyprus and Russia*,[23] which looked at whether or not human trafficking falls within the prohibition on slavery for the purposes of Article 4 ECHR. The ECtHR noted that

> sight should not be lost of the Convention's special features of the fact that it is a living instrument which must be interpreted in the light of present-day conditions…There can be no doubt that [trafficking] threatens human dignity and fundamental freedoms…and cannot be considered with…the values expounded in the Convention.[24]

In *Hirst v United Kingdom* the ECtHR all but abandoned consensus as the determinative factor, stating that "even if no common European approach to the problem can be discerned, this cannot in itself be determinative of the issue".[25] To understand how interpretation of ECHR rights occurs the following passage from George Letsas, after considering the many cases (some of which are mentioned above), is useful. He says the:

> Court treats the ECHR as a living instrument by looking for *common values* and *emerging* consensus in international law. In doing so, it often raises the human rights standard *above* what most contracting states currently offer. It reasons mainly by focusing on the substance of the case.[26]

So we know that the supranational court treats the rights found in the ECHR as expansive; the expanded view of these rights is linked to the best understanding of the values underpinning the rights. Consensus can be evidence of these values but not constitutive thereof. The task of delimiting the scope of rights does not centre around what the framers of the ECHR would have thought the extent of the rights would be; nor do we look at what Member States signing the ECHR would have thought the scope of the rights would have been and say that this is constitutive of the scope of those rights; nor does the task focus on how the rights would have been understand by the general populations at the time the ECHR was agreed. Instead, the ECtHR takes a value first approach to rights interpretation, seeking to ensure that the rights are understood by the values that underlie them.

What does this mean for the scope of domestic statutory rights as protected by the HRA? Section 2 HRA states that domestic courts, when deciding if a purported interference with a right

[23] Appl No 25965/04.
[24] ibid [282].
[25] Appl No 74025/01.
[26] Letsas (n 21) 122.

falls within the scope of any given right protected by the HRA, are required to "take into account" ECtHR judgments. Whilst what this actually means (or should mean) is still subject to academic debate[27] the position seems to be that domestic courts should "usually follow a clear and constant line of decisions by the ECtHR".[28] However, in relatively few situations the domestic courts will decline to follow the ECtHR guidance vis-à-vis the extent of the rights covered in the ECHR. The first exception is based on the premise that sometimes ECtHR guidance is not clear and/or consistent and as such the domestic courts have no satisfactory jurisprudence to follow.[29] On a related note, there may be times when the ECtHR simply has not had to decide a case and as such there is no guidance for the domestic court to follow. In such a case the courts will have to decide the matter for themselves.[30] Finally, and most controversially, there have been some occasions where the domestic courts have declined to follow ECtHR readings of rights because they think the supranational court has not properly understood some part or feature of the domestic legal system.[31] Generally, then, the reach of the rights in the ECHR goes beyond an intention or originalism based understanding. Instead, their scope is reached by understandings of the roles that the rights play and the principles underlying them. Barring the situations identified above, the domestic courts will follow the ECtHR in giving an expansive scope to the protected rights. Thus, rights protection when the HRA is used is relatively generous.

Now that a general understanding of the reach of rights is appreciated in the HRA framework we must inquire into *where* those rights reach. That is, more precisely, who owes rights based obligations to whom? Section 6(1) HRA says that public authorities (including the courts and tribunals themselves) are required to act compliantly with the ECHR rights enshrined in the HRA. In this respect, whilst having some indirect horizontal effect,[32] the HRA framework only

[27]Roger Masterman, "Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?" [2004] PL 725; Jane Wright, "Interpreting section 2 of the Human Rights Act 1998: towards indigenous jurisprudence of human rights" [2009] PL 495; Francesca Klug and Helen Wildbore, "Follow or lead? The Human Rights Act and the European Court of Human Rights" (2010) EHRLR 621; Lord Irvine of Lairg, "A British interpretation of Convention rights" [2012] PL 237; and Philip Sales, "Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine" [2012] PL 253.

[28] *Pinnock v Manchester City Council [*2011] UKSC 6, [2011] 2 AC 104, [48] (Lord Neuberger).

[29] See *N v SSHD* [2005] UKHL 31, [2005] 2 AC 296 concerning deportation and Article 3 ECHR.

[30] See *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, [27]-[38] (Lord Hoffmann).

[31] *R v Horncastle* [2009] UKSC 14, [2010] 2 All ER 359 on the law of evidence is a classic example of this.

[32] The extent to which the HRA would affect private relationships was debated from the beginning, with Richard Buxton, 'The Human Rights Act and private law" (2000) 116(1) LQR 48 and Sir William Wade, "Horizons of Horizontality" (2000) 116(2) LQR 217 taking opposing views. A study of the extent to which the HRA has had horizontal effect is found in Dawn Oliver, "England and Wales: The Human Rights Act and the Private Sphere" in Oliver D and Fedtke J (eds) *Human Rights and The Private Sphere: A Comparative Study* (Routledge-Cavendish 2007). In short, indirect horizontal effect occurs under the HRA framework where (1) a private body is carrying out functions of a public nature; (2) the s 3 HRA interpretation imperative affects legislation that is primarily concerned with

directly purports to protect individuals against state actions. Whilst what a "public" authority is has been difficult to define[33] the courts have been consistent in saying that the HRA protects private persons from public power. As such, the HRA provides for a vertical framework of rights protection whereby the state and its actors[34] are under an obligation not to breach the rights of private persons.

II.C. Rigour of Protection

Whilst the previous section identified the rights one has protected from the state or its actors under the HRA framework these rights mean nothing in the abstract. Their strength really relies on the rigour of their protection; that is, this section describes how the HRA bites on protected rights to limit the impact of state action and public power on individual liberty. There are two distinct, though related, legal[35] routes found in the HRA framework to give effect to the rights it protects: (i) the duty on the courts to interpret legislation in line with rights; and (ii) the duty on public bodies to act with respect for rights. I consider each of these in turn.

II.C1. The Interpretation Obligation

I term the first route to rights protection the "interpretation obligation". Section 3 HRA is the statutory framework's "principal remedial measure" in the face of possible state interference with protected rights.[36] In short, s 3 provides that primary and secondary legislation, passed both before and after the HRA's coming into effect, is to be read in line with the Convention rights as far as it is possible to do so. This obligation on the courts creates a presumption that statutes will be interpreted in such a way as to avoid a breach of the rights of the individual.[37] Given the emphasis on s 3 in the literature it will be worth exploring the strength of the interpretation provision. Certainly, in any comparison between the common law and the HRA, such as that in the following Chapters, the approach to statutory interpretation vis-à-vis rights will be a key point of contention, on which see Chapter 6.

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regulating private persons; and (3) the ECtHR has provided for a positive obligation on the state to protect people's rights from other persons.

[33] See the differing views in *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95. For critique see Dawn Oliver, "Human Rights and the Private Sphere" (2008) UCL Human Rights Review 8.

[34] For full details of bodies that have been found to be performing functions of a public nature see Lord Woolf *et al* (eds), *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2013) 158-61.

[35] This ignores the non-legal, political impact the HRA has had, particularly in relation to legislation formation and scrutiny. For an excellent study in this aspect of the HRA see Hunt M, Hooper H J, and Yowell P (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015).

[36] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [39] (Lord Steyn).

[37] Lord Steyn, "Interpretation and Devolution: A few Reflections on the Changing Scene" [1998] EHRLR 153, 155.

At the passing of the HRA (but before its operation beginning in 2000) Lord Lester of Herne Hill stated that s 3 only requires an interpretation in line with human rights to be possible (as opposed to reasonable or reasonably possible). What this means is that "where necessary the courts will…prefer a possible but strained interpretation to an interpretation that more closely reflects the statute".[38] The aim of s 3 was to ensure that courts would imply words into statutes to remedy a perceived default, to enable courts to "give a restrictive interpretation to …legislation on delegated powers that threaten Convention rights so as to ensure that rights are not unnecessarily restricted".[39] Despite these initial views of how s 3 would actually work it was not agreed upon from the outset. Geoffrey Marshall called the provision "deeply mysterious"[40] and Alison Young described the provision as giving the judiciary a "*carte blanche* to dictate when it is impossible to interpret statutes in a manner compatible with Convention rights. The express words of section 3(1) are so vague that they do not provide clear criteria of the limits of possibility".[41] How then does s 3 work in practice?

The starting point is to try and find an interpretation of the legislation in question that best accords with Convention rights. Extra-judicially Lord Steyn has said "the search will be for a possible meaning that would prevent the need for a declaration of incompatibility [on which see below]. The question will be: (1) what meanings are the words capable of bearing? (2) And, initially can the words be made to give a sense consistent with Convention rights?"[42] The s 3 requirement is just that: a requirement and not one that depends on ambiguity of language, if the language can bear a Convention compliant meaning then a lack of ambiguity in the wording will not stop such an interpretation from being given by the courts.[43] Whilst there is an obligation to attempt to interpret away an inappropriate interference with rights this merely gives an obligation or an obliged outcome to the judiciary; it does not help the courts to know *how* or by what *technique* they ought to try to interpret the difficulty away.[44] It seems, however, that this can be done by reading down or reading in language to the statute.[45]

[38] Lord Lester, "The art of the possible: interpreting statutes under the Human Rights Act" [1998] EHRLR 665, 669.
[39] ibid 670.
[40] Geoffrey Marshall, "Interpreting Interpretation in the Human Rights Bill" [1998] PL 167, 167.
[41] Alison L Young, "Judicial Sovereignty and the Human Rights Act 1998" (2002) CLJ 53, 65.
[42] Lord Steyn (n 37) 155.
[43] *Ghaidan* (n 36) [29] (Lord Nicholls).
[44] See *HM Advocate v DS* [2007] UKPC D1 (Lord Hope).
[45] See *Connelly v DPP* [2007] EWHC 237 (Admin), [2007] All ER (D) 198 (Feb), [18] (Dyson LJ).

There are, however, two main identifiable limits to the use of s 3 in the courts' jurisprudence: (i) where a purported interpretation is somehow contrary or runs against the fundamental aim(s) of the legislation; and (ii) where the impact of a proposed interpretation would give rise to polycentric considerations not within the courts' usual area of expertise. The first limitation was enunciated in *Re S (Care Order: Implementation of Care Plan)*: "[A] meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment."[46] This was reaffirmed in *Doherty (FC) and others v Birmingham City Council* where Lord Hope held "section 3(1) provides the court with a powerful tool to enable it to interpret legislation and give effect to it. But it does not enable the court to change the substance of a provision from one where it says one thing into one that says the opposite."[47]

The second limitation on s 3's potency relates to institutional capacity. This was summarized by Lord Rodger, who held that s 3 cannot be used if its use would involve "difficult questions…even if the proposed interpretation does not run counter to any underlying principle of the legislation, it would involve reading into the statute powers or duties with far-reaching practical repercussions [of the kind the courts is not equipped to deal with]".[48] So, in *Bellinger v Bellinger*[49] the courts refused to read a requirement that the parties to a marriage must be "respectively male and female" in a HRA compliant way because to do so would have far reaching consequences, which Parliament is best left to decide.[50] An example of how this might work would be to look at the topical example of prisoners' voting. Currently, entitlement to vote is in parliamentary elections in the United Kingdom is governed by the Representation of the People Act 1983. Section 3 of this Act states a "convicted person during the time that he is detained in a penal institution in pursuance of his sentence… is legally incapable of voting at any parliamentary or local government election". This was found to be contrary to Article 3 of the First Protocol ECHR, which states that Member States must give free elections under constitutions that will ensure the free expression of the will of the people. In its (in)famous judgment of *Hirst v UK (No 2)*[51] the ECtHR found that this blanket ban breached the ECHR protection. Yet what could a domestic court do under the established HRA framework? Parliament is clearly resistant to changing the law to make it ECHR compatible and it seems

[46] [2002] UKHL 10, [2002] 2 AC 291, [37] (Lord Nicholls).
[47] [2008] UKHL 57, [2008] 3 WLR 636, [49] (Lord Hope).
[48] *Ghaidan* (n 36) [115] (Lord Rodger).
[49] [2003] UKHL 21, [2003] 2 AC 467.
[50] ibid [38]-[49] (Lord Nicholls).
[51] (2005) 42 EHRR 849.

impossible for a court to interpret around the disenfranchisement of prisoners without engaging in some way with difficult, policy centered issues, which the courts have expressed time and again they are not willing to do. Without agreeing with this, on which see Chapter 6, the orthodox view is that interpretation around the blanket prohibition would necessarily require consideration of when prisoners can and cannot vote, which has implications that the court may not be able to deal with.

II.C2. The Duty to Respect Rights

Section 6 of the HRA states that it is unlawful for a public authority to act in a way that is incompatible with a Convention right.[52] As discussed above, a public authority for the purposes of the HRA includes courts and tribunals and any person carrying out functions of a public nature. Thus there is a duty to restrict rights placed on public bodies *stricto sensu* (e.g. government departments, local authorities, the police, etc.), which will always fall within the ambit of s 6 and those bodies that are susceptible to HRA challenges if (a) some of their functions are of a public nature; and (b) it is when acting within such a function that the purported interference with rights occurred.

Before going into the workings of s 6 it may be useful to note its relationship with s 3, which we examined above. It would seem that s 3 would be all one would need. Unless an exercise of public power was not grounded in statute (e.g. Royal Prerogative powers) then it would make sense, on an orthodox view, to only ever use s 3. If the legislation could be read in line with the HRA then a public body that acted against Convention rights purportedly pursuant to that statutory power then it would be acting *ultra vires* since the legislation, properly understood in line with Convention rights via s 3, would not have permitted the body from acting in that way. Contrariwise, if the legislation could not be read in line with Convention rights then a public authority would be acting *intra vires* when it interfered with Convention rights since primary legislation permitted the interference.[53] Therefore, if a body is acting pursuant to primary legislation then, on an orthodox view, s 6 seems otiose. All one would need is s 3, with s 6 just as a safety net for cases where s 3 cannot be used because the power used by the public body is not a legislative one. Regardless of this seemingly obvious tension the courts have not formally

[52] It should be noted that, whilst not defined, incompatible means the same as "inconsistent": *AG's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, [7] (Lord Bingham).
[53] Please note that I am sceptical of this account of *ultra vires* as the foundation of judicial review. However, as noted above the point of this Chapter is to report the mechanisms by which the judiciary seem to indicate the HRA works in practice.

reconciled the relationship between ss 3 and 6. Sometimes they use s 3 and sometimes they use s 6; they never really explain why. As we shall see, the New Zealand courts have tried to formulate doctrine that explains the relationship between their equivalent provisions. On the basis that our courts have not we will have to ignore the apparent tension above and evaluate s 6's operation on its own terms.

As noted above s 6 makes it illegal for a public authority to interfere with Convention rights. How, then, do we assess the incompatibility of a public body's actions? The means of assessing whether an action illegally interferes with Convention rights depends on which category the right falls into. The rights under the ECHR can be categorised in one of three ways: absolute, limited, and qualified.[54]

Absolute rights are those with which the state cannot interfere. More specifically, public bodies are not able to justify interference with absolute rights in a way that keeps their actions legal (unless they do so pursuant to an Act of Parliament, in which case a s 4 declaration will arise). These rights include the right to life (Article 2); the right to be free from torture, inhuman and degrading treatment or punishment (Article 3); the prohibition on slavery (Article 4); and the right to not be punished without legal authority (Article 7).

Limited rights differ in that there *are* situations when an interference with the right can be legally justified. The circumstances in which such justification exists are specifically listed in each of the limited rights. First, the Article 5 right to liberty and security of the person can only be interfered with if (a) the person has been convicted by a competent court; (b) the person has been lawfully detained for non-compliance with a lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before a competent legal authority; (d) if the state is detaining a minor by lawful order for the purposes of educational supervision or lawful detention to bring him before a competent legal authority; (e) the purpose of detention is to prevent the spreading of infectious diseases or persons of unsound mind, alcoholics or drug addicts; and (f) the lawful arrest or detention of someone to prevent them illegally entering the country or to depart said person.

[54] I take my terminology from *De Smith's* (n 34) [13-060].

Article 6 provides the right to a fair trial and judgment is to be pronounced publicly unless the interests of morals, public order, or national security in a democratic society or where the interests of children or the protection of the private life of the parties would justify (to the extent strictly necessary) excluding the public from the case. Likewise, if publicity would prejudice the interests of justice then Article 6 allows the hearing to be held in private.

Article 12 provides that men and women of marriageable age have the right to marry and start a family. Article 12 leaves it the "national laws" to determine what the marriageable age is of the parties. Finally, the right to education under Article 2 of the First Protocol says that no one shall be denied the right to education and, in exercising any assumed functions vis-à-vis education, the state shall respect the rights of parents to ensure such education as in conformity with their own religious and philosophical convictions.

Finally, the Convention provides for qualified rights, which include the right to respect for private and family life (Article 8); the right to freedom of thought, conscience, and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); and the right to the enjoyment of possessions (Article 1 of the First Protocol). Interference with a qualified right can only be justified if the interference is in accordance with law and is "necessary in a democratic society",[55] the latter part of which encapsulates the proportionality approach of the ECHR; that is to say, the qualified rights can be interfered with if the interference is in accordance with law and proportionate. Let us take each in turn.

Claimants win very few cases by arguing that the state action was not prescribed by law.[56] However, if the state cannot show that its interference was prescribed by law then the action is not compliant with Convention rights and thus, usually, illegal by virtue of s 6 HRA. As Lord Hughes puts it the prescribed by law test is "a prior test [to proportionality] which is designed to ensure that interference with Convention rights can" in the sense of having the potential to be, "proportionate".[57] That is, if the public body cannot show that its actions were prescribed by law then its defence under the HRA must automatically fail. To be in accordance with law it is not enough that a public body can point to a statute that gives it its purported power. Instead, the

[55] Note that "necessary" does not mean indispensible; it merely implies a "pressing social need": see *Sunday Times v UK* (1979) 2 EHRR 245, [59], [62], [65].
[56] Though this could well be because, if the state cannot point to a law to authorize its action then the Claimant will usually win without the HRA element.
[57] *Beghal v DPP* [2015] UKSC 49, [2015] 3 WLR 344, [33] (Lord Hughes). Likewise see T A Fairclough, "Terrorism, Journalism, Declarations and Dichotomies: A Closer Look at *Miranda* (2016) JR 123, [7].

ECtHR jurisprudence insists that the law is of a *sufficient quality* to allow interferences with rights to occur. This incorporates two parts: first, the power must be relatively clearly defined, accessible, and published. That is, it must be predictable.[58] Second, Lord Hughes states that the "prescribed by law" requirement entails that the rule must be subject to "sufficient safeguards to avoid the risk that power will be arbitrarily exercised and thus that unjustified interference with a fundamental right will occur".[59]

Once the public body shows that the action was prescribed by law the ECHR requires the courts to move to proportionality. As the ECtHR has put it, we test proportionality by:

> [looking] at the interference complained of in the light of the case as a whole and [determining] whether the reasons adduced by the national authorities to justify it are relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued.[60]

Whilst the legality requirement has been applied in domestic courts the judiciary have been wary to follow statements of principle vis-à-vis the proportionality test from the ECtHR cases because Strasbourg approaches proportionality "in a relatively broad-brush way",[61] which is in contrast with the "more analytical approach to legal reasoning characteristic of the common law"[62], which leads to a "more clearly structured approach". Likewise, as a supranational court the ECtHR's approach is "indissolubly linked to the margin of appreciation",[63] which is not something the national courts give to the public bodies and so proportionality "cannot simply mirror that of the Strasbourg court".[64] Instead, proportionality at the national level is found in common law case law. The exact formulation of proportionality under national law has been subject to some change and so a brief history will prove useful.

Lord Clyde put it that the test of proportionality includes whether: "(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective".[65] As Lord Reed notes in

[58] *Malone v United Kingdom* [1984] ECHR 10, [68]-[70].
[59] *Beghal* (n 57) [30] (Lord Hughes).
[60] *Jersild v Denmark* (1994) App No 15890/89, [31].
[61] *Bank Mellat v HM Treasury (no 2)* [2013] UKSC 39, [2014] AC 700, [70] (Lord Reed).
[62] ibid [72] (Lord Reed).
[63] ibid [71] (Lord Reed)
[64] ibid (Lord Reed).
[65] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands, and Housing* [1999] 1 AC 69 (HL), 80 (Lord Clyde).

Bank Mellat, these criteria have an "affinity" with those formulated by the ECtHR as long as we understand (iii) "as permitting the primary decision-maker an area within which its judgment will be respected".[66] Whilst this formulation was influential and applied by the House of Lords and the Supreme Court it was eventually noted in *Huang v Secretary of State for the Home Department*[67] that the formulation in *De Freitas* was founded in the judgment of Chief Justice Dickson in *R v Oakes*,[68] which included not only the above criteria but also a further criterion, namely that the courts should balance the measure's effects in terms of interference with the right against the importance of the objective the measure seeks to achieve. If the former outweighs the latter then the public body will have failed the proportionality test. Lord Wilson speaking for the majority in *R (Aguilar Quila) v Secretary of State for the Home Department*[69] noted that this criterion forms part of the proportionality test under the HRA at the domestic level. Thus, Lord Reed has noted that proportionality comprises a four stage test:

> (1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter….In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.[70]

I will refer throughout the rest of this section to these criteria and keep them numbered as they are above. This formulation seems to be the one that currently holds sway in the United Kingdom. The Supreme Court has affirmed it since *Bank Mellat*.[71] Proportionality under the HRA is traditionally seen as a very strong and, more specifically for the purposes of this thesis, far stronger than the common law approach to substantive review (on which see Chapter 5) and, therefore, the orthodox view seems to be that the HRA provides a stronger standard of protection than the common law. As such, it will be worth examining the test in some detail.

The first criterion in *Bank Mellat* is usually equated with the requirement to follow a "legitimate

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[66] *Bank Mellat* (n 61) [72] (Lord Reed).
[67] [2007] UKHL 11, [2007] 2 AC 169, [19].
[68] [1986] 1 SCR 103, 138-9.
[69] [2011] UKSC 45, [2012] 1 AC 621, [45] (Lord Wilson).
[70] *Bank Mellat* (n 61) [74] (Lord Reed). Though in the minority in the case Lord Reed's formulation was agreed by Lord Sumption, with whom six Justices agreed with. As Sumption puts it at [20]: "Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the *application* of the test, but there is nothing in his *formulation of the concept of proportionality* (see his comments [68]-[76]) which I would disagree with" (emphasis added).
[71] See *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, [80] (Lord Neuberger).

aim" to meet a "pressing social need" found in the ECHR.[72] However, this stage is "almost invariably satisfied" at the domestic level[73] because the courts will usually be willing to accept that an aim is legitimate since the ECHR only provides for them in broad terms; thus, it is "rare for challenges to succeed on the basis that a limitation was not in pursuit of a legitimate aim".[74] According to Tom Hickman the first criterion merely helps to frame the debate for the second and third stages.[75] The second stage requires that a measure be rationally connected to the objective identified at the first stage; this is a relatively low threshold since all it requires is that the measure chosen furthers the objective the public body wishes to achieve to a certain extent.[76]

The third criterion, namely whether a less intrusive measure could have been adopted without unacceptably compromising the advancement of the objective, and the fourth criterion are often judged together (perhaps due to the fourth criterion only recently being recognised as its own strand of the test) and so I deal with them together here. It is worth noting that proportionality is to be judged by the courts; as Lord Bingham stated in *R (Begum) v Governors of Denbigh High School*[77] "proportionality must be judged objectively, by the court".[78] This was affirmed in *Belfast City Council v Miss Behavin' Ltd*[79] where Lord Mance held that "The court's role is to assess for itself the proportionality of the decision-maker's decision" [80] and Lord Neuberger stated that proportionality "is a matter for the court to decide".[81] However this is *not* the same as saying that the courts have taken on a role for themselves of substituting their judgment on the merits of the case with that of the primary decision maker. In *R (Lord Carlile of Berriew QC) v Secretary of State for the Home* Department[82] Lord Sumption stated "no review, however intense, can entitle the court to substitute its own decision for that of the constitutional decision-maker".[83]

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[72] Sir Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh QC, and Stephanie Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell 2008) 202.
[73] Tom Hickman, *Public Law After the Human Rights Act* (Hart 2010) 179.
[74] *De Smith's* (n 34) [13-083]. Though do see *Ghaidan* (n 36) [18] (Lord Nicholls)
[75] ibid. This was written pre-*Bank Mellat* and so does not recognize the fourth stage as a standalone criterion.
[76] In *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [31]-[36], [44] we see the House of Lords saying that measures were not rationally connected to the legitimate aim of tackling the security threat of Al Qaeda because there were immigration measures that (a) applies to persons who were not connected to Al Qaeda; (b) permitted those recognized as terrorist suspects to leave the country; and (c) did not apply to British nationals despite the obvious fact that these may provide an equal terrorist risk as foreign born nationals in the United Kingdom. Since (b) and (c) further helped answer the question provides in the third criterion of proportionality (i.e. the measures went further than necessary) Lord Bingham notes that the criteria are inter-related: [30].
[77] [2006] UKHL 15, [2007] 1 AC 100.
[78] ibid [30] (Lord Bingham).
[79] [2007] 1 WLR 1420 (HL).
[80] ibid [44] (Lord Mance).
[81] ibid [88] (Lord Neuberger).
[82] [2014] UKSC 60, [2015] AC 945.
[83] ibid [20].

Therefore, whilst the court makes the final determination of whether an action complies with the proportionality test the intensity of review that the courts utilise is somewhat more lax than the wording in *Bank Mellat* suggests. Indeed, in that case Lord Reed noted[84] that the Canadian jurisprudence makes clear that the limitation must be "one that it was reasonable for the legislature to impose" and, moreover, "that the courts were 'not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line"'.[85] This is not to be confused with saying that the third criterion requires the decision maker to only fall within a broad range of reasonable responses. Instead, it is to make proportionality workable and make limitations on rights possible (which the ECtHR accepts can be justified). To make this point, drawing on the American jurisprudence, Lord Reed notes "a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation".[86]

Despite the area of discretion for the decision maker being open we do not know quite *how open* this area is; more specifically, we do not know how much weight the courts will accord to the view(s) of the decision maker, which will in turn effect how much discretion the decision maker is given. As Lord Reed puts it, "the intensity [of review] that is to say, the degree of weight or respect given to the assessment of the primary decision-maker depends on the context".[87] It is here that the doctrine of deference becomes relevant;[88] put simply, the greater the level of deference in assessing proportionality then the greater degree of latitude/discretion that is afforded to the decision maker.[89]

Deference in assessing proportionality is a doctrine that has generated much academic debate, which I do not intend to go into here.[90] Needless to say, however, that any doctrinal examination of deference's operation will, to an extent, be marred by the theoretical difficulties underlying it.

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[84] *Bank Mellat* (n 61) [75].
[85] ibid [75] (Lord Reed) quoting from *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-2 (Dickson CJ).
[86] ibid [75] (Lord Reed) quoting from *Illinois Elections Bd v Social Workers Party* (1979) 440 UK 173, 188-9 (Blackmun J).
[87] ibid [69]-[70].
[88] Do note that deference in domestic law is *not* the same as the margin of appreciation doctrine developed by the ECtHR: see Sir John Laws, "The Limitation of Human Rights" [1998] PL 254, 258 and David Pannick, "Principles of Interpretation of Community Rights under the Human Rights Act and the Discretionary Area of Judgment" [1998] PL 545, 548-9. This was judicially confirmed in *R v DPP, Ex p Kebilene* [2000] 2 AC 326 (HL).
[89] Though Lord Mance recently stated that "Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of 'manifest unreasonableness"', see *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016.
[90] See Paul Daly, *A Theory of Deference in Administrative Law* (CUP 2012) for a solid review of many of the debates. I do not intend to review these debates here; as stated previously, the aim of this Chapter is merely to give an overview of how the judiciary say the HRA works.

However, we have some authoritative guidance on the twin pillars of deference in *R (Lord Carlile) v Home Secretary*.[91] Here, Lord Sumption articulated two rationales for deference,[92] "the first is the constitutional principle of the separation of powers. The second is no more than a pragmatic view about the evidential value of certain judgments of the executive, whose force will vary according to the subject matter".[93] The first rationale for deference articulated in the case law is predicated on constitutional principles such as the separation of powers; Lord Sumption, in *Carlile*, tells us that the HRA did not abrogate the distribution of powers between the different arms of the state and so "even in the context of Convention rights there remain areas which although not immune from scrutiny require a qualified respect for the constitutional functions of decision-makers who are democratically accountable".[94] Such an approach is reminiscent of the role of the courts in non-rights judicial review[95] and examples of such decisions usually involve policy choices,[96] polycentric decision-making,[97] or decisions taken by the legislature itself.[98] In these cases, the weight accorded to the decision maker will be high though this does not mean "that the traditional reticence of the courts about examining the basis of executive decisions" continues in Convention rights cases".[99]

The second underlying rationale of deference enunciated in the Supreme Court involves institutional competence. As Lord Sumption put it:

> It does not follow from the court's constitutional competence to adjudicate on an alleged infringement of human rights that it must be regarded as factually competent to disagree with the decision-maker in every case or that it should decline to recognise its own institutional limitations…. the executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her.[100]

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[91] [2014] UKSC 60, [2014] 3 WLR 1404.
[92] Though note that Lord Sumption dislikes the term "deference" for what the courts are doing: "At least part of the difficulty arises from the word, with its overtones of cringing abstention in the face of superior status" ibid [22] (Lord Sumption).
[93] ibid [22] (Lord Sumption).
[94] ibid [28] (Lord Sumption).
[95] See, for example: *R (Hooper) v SSWP* [2003] EWCA Civ 813, [2003] 1 WLR 2623 where, at [63]-[64], Lord Justice Laws stated that "a very considerable margin of discretion must be accorded….[where] questions of economic and social policy [are] involved". More specifically, Lord Bingham noted in *R (Gentle) v Prime Minister* [2008] UKHL 20, [2008] 1 AC 1356 at [8] there is "restraint traditionally shown by the courts in ruling on what has been called high policy- peace and war, the making of treaties, the conduct of foreign affairs".
[96] Eg *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport, and the Regions* [2003] 2 AC 295 (HL), [75]-[76].
[97] *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 (HL), [70].
[98] See *Nicklinson* (n 71) [75] (Lord Neuberger).
[99] *Lord Carlile* (n 91) [32] (Lord Sumption).
[100] ibid [32] (Lord Sumption).

Such situations where the courts may lack institutional competence to decide the question (at least relative to the decision maker) and therefore afford a higher degree of deference include those issues traditionally outside of the court's areas of expertise. This may include cases such as *Carlile* itself, which included high level security and foreign policy concerns, decisions about the distribution of finite or scarce resources,[101] questions involving macro or micro economic policy, which the judiciary is traditionally cautious to rule on[102]or, more generally, cases that involve making factual predictions about various possible actions and possible consequences to those actions such as to lead to reasonable differences in opinion.[103] In short, the more technical, political, or difficult it is to judge (possibly due to variables or uncertain predictions about future actions) an issue the less likely the courts will be to overturn or disrupt the decision-maker's assessment of that issue. The intensity of review lowers according to the competencies of the respective players. Whilst some take issue with the role deference plays it is clear that proportionality provides a high intensity of review and, as mentioned above, it is traditionally seen as a more intense approach than the common law provides (discussed in Chapters 5 and 6).

II.D. Constitutional Resilience of HRA Rights

The final way in which I seek to assess the strength of the common law against the HRA is by examining the constitutional resilience of both against the legislature. Here, I look solely at the HRA.[104] Within the current statutory framework we can examine resilience from two separate perspectives, both of which entail different legislative aims: (i) amendment or repeal of the HRA itself; and (ii) overriding a particular right in a particular case.

As to (i) the HRA provides no mechanism for entrenchment. The HRA can currently be expressly repealed by a simple majority vote in Parliament in the ordinary way.[105] This distinguishes the HRA from other Westminster Systems' methods of rights protection such as the Canadian Charter of Rights and Freedoms ("the Charter"), found in Part 1 of the Constitution Act 1982[106] and lowers the overall protection of rights the HRA affords.[107] This

[101] See *Rotherham v Business Secretary* [2015] UKSC 6, [2015] 3 All ER 1.
[102] See *R (Centro) v Transport Secretary* [2007] EWHC 2729 (Admin).
[103] See *A* (n 76) [29] (Lord Bingham).
[104] The common law is examined in the following Chapters.
[105] See Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2008) chapters 5 and 6 for a discussion on how you could entrench the HRA.
[106] The history of the Charter (and the broader Act) is well documented in Anne F Baefsky, *Canada's Constitution Act 1982 and Amendments: A documentary History* (McGraw-Hill Ryerson 1989). For a general overview of the Charter see Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (5th edn Irwin Law 2013). By virtue of s 38 of the Constitution Act 1982 to amend the Charter the legislative assemblies of at least two thirds of the provinces that contain, in the aggregate, at least 50% of the population of all the provinces have to authorize the amendment as well

ignores, of course, the *political realities* of the day. In light of a slender majority and the government being occupied by the United Kingdom's forthcoming exit from the European Union it is unlikely that the HRA will be repealed immediately. Having said this, the Prime Minister has publicly expressed her full intentions to repeal the HRA and exit the Council of Europe.

(ii) Is more complicated. What happens if an Act of Parliament does something that violates one's rights without expressly mentioning the HRA? There are two possibilities here: (a) the new Act would impliedly repeal part of the HRA that it violated; or (b) the Act would have to be interpreted in line with s 3 and, if that was not possible, a s 4 declaration would be given whilst maintaining the validity of the HRA (even in the face of the latter Act being incompatible with the former).[108] As to (a) the orthodox view[109] is that Parliament is sovereign. This means "Parliament has the legal right to make or unmake any law whatever".[110] A necessary part of this traditional view is that Parliament cannot pass a law that binds itself; simply, the Parliament of today cannot pass anything that restricts the Parliament of tomorrow.[111] Due to the central purported fact of the omnipotence of the *current* Parliament it does not need to expressly repeal a previous Act to take away its legal force. The general position is that Parliament can repeal an Act or parts of it by "enacting a provisions which is clearly inconsistent with the previous Act".[112] Further, if the inconsistency only operates between parts of the Acts then it is only to the extent of this inconsistency that the previous Act is repeal; this can be termed *pro tanto* implied repeal.[113] Therefore, an Act (let us call it the Speed Limit Act 1985) that provides for the speed limit to be 30 miles per hour on residential roads is repealed (at least to the extent of any inconsistency) if a later Act (let us call it the Road Safety Act 2004) provides for the speed limit to be 35 miles per hour on residential roads *even though* the Road Safety Act 2004 does not mention the Speed Limit Act 1985.

Is the HRA susceptible to repeal due to inconsistent later legislation in the same way our fictional road legislation would be? For example, if an Act was passed requiring foreign born terrorist

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as resolutions from the Senate and House of Commons. In thirty-four years not a single amendment has been made to the Charter.

[107] This is a premise of Young's book: Young (n 105).

[108] We considered this above in relation to our discussion on s 3's strength.

[109] Though one I will challenge in Chapter 7.

[110] Jeffrey Goldsworth, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999) 10.

[111] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 76-84.

[112] *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590, 595-596 (Scrutton LJ).

[113] *Goodwin v Philips* (1908) 7 CLR 1, 7 (Griffith CJ); this was affirmed as the UK position in *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151, [43] (Laws LJ).

suspects to be indefinitely detained without charge at the Home Secretary's command (a possible breach of Articles 5, 6, 8 and 14) would this amount to a *pro tanto* repeal of the HRA due to the inconsistency between this Act and the HRA? Such a problem was recognised by Lord Justice Laws in *Thoburn* (albeit he was specifically looking at *pro tanto* implied repeal of the European Communities Act 1972 at the time). Laws LJ suggested a way to resolve the apparent difficulties identified above. He held that the doctrine of implied repeal does not apply in relation to what he calls "constitutional statutes", which are Acts that "condition the legal relationship between citizen and state in some general, overarching manner"[114] or "which enlarges or diminishes the scope of what we now regard as fundamental constitutional rights".[115] The HRA satisfies both of these tests and has therefore been recognised as a constitutional statute.[116] Due to the importance of such constitutional statutes (and, more broadly, constitutional principles)[117] Laws held that inconsistent later statutes will only repeal them if the courts are certain that it is Parliament's "actual- not implied, constructive, or presumed- intention"[118] that the constitutional statute be so repealed. Thus, Laws held in *Thoburn* that you need "express words in the later statute"[119] or "words so specific that the inference of an actual determination to effect the result contended for was irresistible".[120] That is, constitutional statutes are immune from implied repeal.[121]

Therefore, if an Act appears to breach a Convention right protected by the HRA then this does not *pro tanto* impliedly repeal the HRA. Instead, the courts will follow the s 3 route to try to interpret the inconsistency away. As considered above, this is a strong interpretative power and it is only if a clash is unavoidable that s 3 will not be utilised and a s 4 declaration will be given instead, which, as outlined above, does not affect the validity of the Act that interferes with Convention rights. Nor, though, does the valid Act even now impliedly repeal the HRA. Whilst it permits interference with Convention rights such an Act does not impliedly repeal these rights; for that, specific words to such an effect would, in light of *Thoburn*, be needed.

In light of this, we can say that the HRA provides for a relatively high level of constitutional resilience in the face of primary legislation. Whilst the orthodox view is that primary legislation can defeat Convention rights it can only do so to the extent that it *expressly* says so or there is no

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[114] ibid [62] (Laws LJ).
[115] ibid.
[116] ibid. Approved of by Lords Neuberger and Mance in *R (Buckinghamshire County Council and others) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, [207].
[117] ibid.
[118] *Thoburn* [63] (Laws LJ).
[119] ibid.
[120] ibid.
[121] ibid. At least by ordinary statutes. There are questions about conflicts between two constitutional statutes.

other possible implication to draw. Even then, it must do so in relation to repealing the actual right itself; a mere inescapable inconsistency in an Act that would allow a body to interfere with a Convention right does not give rise to a wholesale repeal that Convention right. Instead, it just allows interference within the parameters of that Act. The right still survives until the legislature squarely faces up to repealing the Convention right, which provides for a relatively high degree of constitutional endurance at least when compared to the resilience of ordinary legislation.

II.E. Concluding on the HRA

As stated at the beginning of this Chapter there are three broad areas in which we can compare the HRA and common law. These are reach of rights; rigour of protection; and constitutional resilience. The general orthodox view has been that the HRA is stronger than the common law. More specifically, at least three (and possibly four) claims are made: (i) the HRA's normative reach is greater than that of the common law's; (ii) the s 3 interpretation obligation is more potent than that of the common law's approach to rights based interpretation; (iii) Convention rights provide a higher strength of protection than common law rights do; more specifically proportionality is a higher intensity of review than the common law's reasonableness approach and thus rights have a higher rigour of protection under the HRA than the common law; and, (iv) the HRA is harder to displace than mere common law doctrines as it is a constitutional statutes.[122] We have now sketched out the doctrinal workings of the HRA in relation to its reach, rigour of protection, and resilience ready for us to compare the HRA to the common law. In the following Chapters, I look at the reach (Chapter 4), rigour (Chapters 5 and 6), and constitutional resilience (Chapter 7) of common law rights and compare them to their analogues under the HRA. By looking through a rule of law lens, which I argued one must do in Chapter 2, I suggest that orthodoxy is incorrect to suggest that the common law does not protect rights to a similar degree as the HRA.

Before I get to that stage, however, as outlined at the beginning of this Chapter it will be useful to examine the NZBORA. As noted above it will be useful to see how Bills of Rights work in Westminster systems without direct supranational influence. This will provide us with knowledge of how the statutory scheme of rights may work post-HRA (if indeed it is repealed). In the following section I describe how the NZBORA has operated and contrast any differences it has with the HRA; the purpose for doing so is simple, with the possible repeal of the HRA on the

[122] This is not a claim that is as boldly made as (i)-(iii).

constitutional horizon it is worth knowing how Bills of Rights operate in another common law system.

III. New Zealand

We move now to the NZBORA. Again, the reason for doing so is that the HRA may be repealed in the near future and, at one extreme end of the reforming spectrum, we may leave the Council of Europe and thus the ECHR. It will be useful to know, then, how strong the Bill of Rights is in a country that has a Westminster system purportedly based on Parliamentary Sovereignty but is not subject to anything like the ECHR (therefore the Bill of Rights operates solely on the domestic level with little, if any, direct international influence and certainly no such influence that the New Zealand courts are mandated to take into account). This will help us to assess the strength of any possible future British Bill of Rights that the common law may be compared to.

The NZBORA received Royal Assent, once it was passed by the New Zealand Parliament, after a long[123] and hotly debated[124] process, in August 1990. Prior to this, New Zealand had no modern codified Bill of Rights. The government of the day issued a White Paper stating:

> A Bill of Rights for New Zealand is based on the idea that the…system of government is in need of improvement. We have no second House of Parliament. And we have a small Parliament. We are lacking in most of the safeguards which many countries take for granted. A Bill of Rights will provide greater protection for the fundamental rights and freedoms vital to the survival of New Zealand's democratic and multicultural society.[125]

Similarly to our above examination of the HRA we will examine the NZBORA in terms of (i) reach of rights; (ii) rigour of rights protection; and (iii) constitutional resilience.

III.A. The Scope of Rights in the NZBORA

III.A1. Which Rights?

The NZBORA as enacted provides that "the rights and freedoms contained in this Bill of Rights are affirmed", such rights including (in Part 2 NZBORA, under the heading "Civil and Political

[123] See Geoffrey Palmer, "A Bill of Rights for New Zealand?" in Keith K (ed) *Essays on Human Rights* (Sweet & Maxwell 1968) 107-8.
[124] *Cf* Jerome Elkind and Antony Shaw, *A Standard of Justice* (OUP 1986) to New Zealand Law Society, "Submissions on the White Paper: A Bill of Rights for New Zealand" (20 December 1985).
[125] *A Bill of Rights for New Zealand: A white paper* (1985) AJHR A6, 5.

Rights"): the right not to be deprived of life (s 8); the right not to be subjected to torture or cruel punishment (s 9); the right not to be subjected to medical or scientific experimentation (s 10); the right to refuse to undergo medical treatment (s11); electoral rights (s 12); freedom of thought, conscience, and religion (s 13); freedom of expression (s 14); a right to manifestation of religion and belief (s 15) freedom of peaceful assembly (s 16); freedom of association (s 17); freedom of movement (s 18); freedom from discrimination (s 19); a right to enjoy one's cultural heritage (s 20); a right to freedom from unreasonable search and seizure (s21); a right to liberty (s 22); various rights when arrested and charged (ss 23-24); minimum standards of criminal procedure (s 25); freedom from retroactive penalties and double jeopardy (s 26); and a right to justice (s 27).

As examined above in relation to the HRA I do not intend to go through each right protected and look at the extent to which it reaches. Instead, I solely wish to see if the general approach to the reach of rights under the NZBORA is similar to the HRA despite the lack of formal ECtHR influence. If it is then we have little reason to suspect, given the similarities between the two jurisdictions, that the British courts would act differently in the vast majority of cases without something akin to s 2 HRA.

Andrew Butler and Petra Butler argue, "the most fundamental principle of BORA interpretation is that it is to be interpreted purposefully".[126] There are numerous cases that emphasise this approach in the New Zealand jurisprudence[127] and its purpose is to allow "for the inclusion within its scope of conduct that truly comes within that purpose and the exclusion of activity that falls outside".[128] This calls for a wide interpretation; the New Zealand courts have cited with approval [129] Lord Wilberforce's comment that constitutional rights call for "a generous interpretation…suitable to give to individuals the full measure of the fundamental rights and freedoms".[130] Thus, the New Zealand courts often look to ensure that NZBORA rights are effective and focus on the principles underlying such rights.[131] In this way it seems that the approach to the reach of rights rights under the NZBORA is not overly different to the rights contained in the HRA despite the lack of a formal supranational link such as that in s 2 HRA. There is little reason to think that a BBoR would suddenly take a very narrow approach to rights

[126] Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis 2016) 99.
[127] Recent examples include *R v Mist* [2006] 3 NZLR 145, (2005) 8 HRNZ 10 (SC), [45] (Elias CJ and Keith J); and *Ministry of Health v Atkinson* [2012] 3 NZLR 356 (CA), 271 (Richardson J).
[128] *Ministry of Transport v Noort, Police v Curran* [1992] 3 NZLR 260 (CA), 279 (Richardson J).
[129]Eg *R v Goodwin* [1993] 2 NZLR 153 (CA), 168 (Cooke P).
[130] *Minister of Home Affairs v Fisher* [1980] AC 319 (PC), 328 (Lord Wilberforce).
[131] E.g. a wide interpretation of the right to not be discriminated against in *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA), [113].

interpretation in the absence of something akin to s 2; indeed, such expansive interpretation is common in common law systems, on which see Chapter 6.

III.A2. From Who to Whom?

Further, the NZBORA, similarly to the HRA, explicitly envisages a vertical only effect of human rights (that is, between the state and private individuals/bodies). S 3 NZBORA states:

> [T]his Bill of Rights applies only to acts done (a) by the legislative, executive, or judicial branches of the government of New Zealand; or (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

By saying that the rights affirmed in s 2 NZBORA "only" applies to acts done by the state or its actors the NZBORA envisages an exclusion of purely private agents from rights obligations. This approach was certainly envisaged in the White Paper, which argued, "Bills of Rights are thought of as documents which restrain the great powers of the state. They are not seen as extending to private actors".[132] Further, whilst s 3 (quoted above) states that the NZBORA applies to the "legislative" arm of the state s 4 makes clear:

> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights) (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.

In this way ss 3 and 4 NZBORA approximate equivalent provisions in the HRA (specifically s 6).

III.B. Rigour of Protection under NZBORA

Section 5 of the NZBORA states "subject to section 4 [see above] the rights and freedoms contained in this Bill of Rights may be subject only to such limits prescribed by law as can be demonstrably justified in a democratic society". The aim here is to affirm the "obvious" proposition that rights are not intended to be absolute.[133] It is impossible to see s 5 in isolation, rather, one must see it with s 6 NZBORA, which reads "whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning". This provision has retrospective effect

[132] ibid 69-71.
[133] *Noort* (n 128) 286 (Hardie Boys J)

meaning that legislation passed prior to the NZBORA still has to be read consistently with the rights contained in the NZBORA where possible.[134]

What, then, is the relationship between ss 4, 5, and 6? In *R v Hansen*[135] Tipping J said:

> Section 6 is concerned with meanings which are inconsistent with the rights and freedoms contained in the Bill of Rights. It is only when a meaning is inconsistent that the preference for a consistent meaning mandated by s 6 comes into play. Logically, therefore, the Court's initial task is to identify the meaning which the statutory provision bears without reference to the preference with which s 6 is concerned. The Court then tests that meaning for Bill of Rights consistency along the lines set out below.[136]

Specifically, Tipping J said the correct approach is as follows:

> Step 1. Ascertain parliament's intended meaning;
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom;
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s5;
> Step. 4 If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails;
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them, if so, that meaning must be adopted;
> Step. 6 If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted.[137]

To adequately understand this methodological approach and the strength of rights adjudication under the NZBORA two facets of the above test must be identified: (a) how do we assess a "justified" limit on rights (step 3); and (b) how far can one interpret, under s 6 NZBORA, in line with the rights enshrined in NZBORA (step 5)?

III.B1. Assessment of Justifications for Limitations on Rights

In *Hansen*[138] Tipping J held that the rule of law requires limitations on rights to be demonstrably justified[139] and therefore the burden falls on the state to prove that this is the case. Similar to the

134 *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 440-1 (Cooke P).
135 [2007] NZSC 7, [2007] 3 NZLR 1
136 ibid [88] (Tipping J).
137 ibid [92].
138 *Hansen* (n 135).
139 [101]-[102] (Tipping J).

UK courts[140] Tipping J drew on the *Oakes* jurisprudence of the Canadian Supreme Court. He then put forward the test for limitation of rights as follows:

(a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
(b) (i) is the limiting measure rationally connected with that purpose?
(ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient attainment of its purpose?
(iii) is the limiting in due proportion to the importance of the objective?[141]

In *Hansen* each Judge adopted methodology substantially similar to Tipping J's. However, Blanchard J and Anderson J drew on the *Oakes* test as put in *R v Chaulk*,[142] which differs from *Oakes* in that it does not require the right or freedom to be limited "as little as possible".[143] Instead, the New Zealand courts only require that the right or freedom is limited no more than is reasonably necessary.[144] The rationale for this, similar to that noted above for the operation of proportionality under the HRA, is that the courts must give Parliament some latitude, which the literal phrasing in *Oakes* would not allow for.[145]

Since 2007 the New Zealand courts have sought to refine this test. Most notably, similarly to how the HRA operates the High Court has confirmed that the rational connection and sufficiently important objective tests are threshold issues that are considered at an abstract level; once the state shows that there was an important objective and the measure was rationally connected to it then they pass these tests.[146] Similarly to the HRA these tests rarely provide much of a barrier for the state to pass.

The High Court has also confirmed "A decision will meet the minimal impairment standard if it falls within a range of reasonable alternatives. A decision is not disproportionate merely because the court 'can conceive of an alternative which might better tailor objective to infringement'".[147] Similar to judicial review under s 6 HRA then, as confirmed in *Bank Mellat*, there is latitude afforded to the decision maker under the NZBORA. The courts will not just look to see if there

[140] See Section II.C2 above.
[141] *Hansen* (n 138) [104] (Tipping J).
[142] [1990] 3 SCR 1303, 1335-6.
[143] Which *Oakes* does, see *Oakes* (n 68) 138-9 (Dickson CJ).
[144] See *Hansen* (n 138) at [79]-[80] (Blanchard J); [279] (Anderson J); and [42] (Elias CJ). Do note that McGrath J dissented on this point; at [271] he adopts a test that asks "whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness".
[145] *Oakes*' phrasing would "unreasonably circumscribe Parliament's discretion": ibid [126] (Tipping J).
[146] *Attorney-General v IDEA Services Ltd (in stat man)* [2012] NZCA 184, [2012] 3 NZLR 456, [222].
[147] ibid [222] quoting *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, [6].

could have been a less intrusive means but instead look at whether the decision fell within the range of acceptable responses. How, though, does this work? Similar to our discussion on the HRA this is where the intensity of review becomes relevant. In *Hansen* Tipping J noted that "there is a spectrum which extends from matters which involve major political, social, or economic decisions at one end to matters which have a substantial legal content at the other".[148] Accordingly, the more equipped the legislature is to deal with something the less intense the court's scrutiny will be.[149] This is linked, as it is in the HRA jurisprudence, to "a matter of deference", which recognizes" that governmental agencies must have some space to make legitimate choices" especially in "areas such as social and economic policy".[150]

Thus, it seems that proportionality under the NZBORA is substantially similar to that under the HRA. Even without direct supranational guidance (as the HRA has from the ECtHR) the New Zealand courts have adopted a principle of proportionality that, whilst calling for anxious scrutiny of decisions, will take a less intensive approach when matters that the courts feel they lack expertise in arise. It is worth noting that deference is not something that has been well articulated in New Zealand, indeed in 2009 Dame Sian Elias made the point, extra-judicially, that "the debate over the weight to be given to the assessment of the primary decision-maker has not yet produced a substantial body of case law in New Zealand".[151] However, it does seem as though the HRA and NZBORA are, at least roughly, in step when it comes to proportionality and intensity of review in human rights cases (not least because they share a common inspiration in the *Oakes* jurisprudence). Therefore, given the common genesis of the proportionality principle in both states there is no reason to suspect that proportionality would significantly weaken if the Parliament of the United Kingdom were to introduce something that replaced the HRA and severed the official link with the ECtHR.

III.B2. Section 6 Interpretation Obligation

Section 6 NZBORA has aroused much debate and is widely considered as a hugely important item in the judicial toolbox.[152] However, it has been given less bite than might perhaps have been

[148] Hansen (n 138) [116] (Tipping J).
[149] If an issue involves "the complex interaction of a range of social, economic, and fiscal policies as well as taxation measure" for example then a "greater latitude or leeway" will be given to a decision maker: *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729, [91].
[150] ibid [172] (Ellen France J).
[151] Sian Elias, "Righting Administrative Law" in Dyzenhaus D, Hunt M, and Huscroft G (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart 2009) 66
[152] *Noort* (n 128) 270 (Cooke J).

expected. In *Noort* Cooke J stated that s 6 will "come into play *only* when the enactment *can* be given a meaning consistent with the rights and freedoms. This *must* mean...*can reasonably be given such a meaning*. A strained interpretation would not be enough".[153] This places quite high restraints on s 6's potential, making it so only "reasonable" and "non-strained" interpretations are viable.[154] Tipping J, in *Moonen v Film and Literature Board of Review*,[155] gave a slightly different formulation saying that an interpretation need only be "tenable" for it to be possible under s 6.[156]

The rationale for this relatively restrictive approach was discussed in *Quilter v Attorney General*.[157] This Supreme Court decision examined whether the Marriage Act 1955 prohibited same-sex marriage. The court agreed that the Act only included heterosexual marriage but declined to proceed readily to s 6 since the majority decided that there was no discrimination (and therefore rights were not being infringed). Thomas J dissented on the discrimination point but also argued that s 6 was of no use to the claimant since what they asked for would "strain the meaning" of the Marriage Act 1955 and that the court could not give such a meaning since it was not "possible without usurping Parliament's legislative supremacy"; his refusal was based on the premise that s 6 does not allow "the Court to legislate".[158] Further, he noted that changing the usually understood definition of marriage was "a question weighted with policy considerations of the kind Parliament is both constitutionally and practically equipped to decide". As Kris Gledhill points out:

> This illustrates two separate lines of reasoning for limiting the width of the interpretive power: it did not include straining the meaning (an internal limitation on the language of the statutory obligation), and there was the question of the institutional capability of the judiciary to reconstruct language in light of its potential repercussions (an external contextual feature).[159]

There were suggestions following these decisions that the NZBORA provided a weaker degree of protection vis-à-vis interpretive obligations than the United Kingdom's HRA.[160] These

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153 ibid 272.

154 Whilst Cooke J's judgement is the one most often cited the other Justices gave similar formulations: Hardie Boys J said s 6 can only operate where an interpretation is "fairly open" on the wording of the statute (ibid 286); Richardson J held that s 6 NZBORA reflects a strong legislative intention to protect rights and freedoms but there must be "room" to interpret in the language itself (ibid 178).

155 [2000] 2 NZLR 9.

156 ibid [16] (Tipping J).

157 [1998] 1 NZLR 523.

158 ibid 542.

159 Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart 2015) 403.

160 The exact mechanics of the HRA were discussed above however in *Kebilene* Lord Cooke noted that the HRA "conveys a rather more powerful message" (*Kebilene* (n 88) 274 (HL)); Lord Steyn in *R v A (No 2)* [2001] 2 AC 45 (HL), at [44], suggested that the New Zealand model was a "weaker" one; and in *Ghaidan* (n 36) at [44]-[45] Lord Steyn again said that the "reasonable" based model of New Zealand had been rejected for a stronger one by the United Kingdom.

suggestions, in part, led to a revisiting of s 6 NZBORA by the New Zealand Supreme Court. In *Hansen*[161] Elias CJ said she was "unable to accept that there is any material difference between the New Zealand and the United Kingdom models"[162] and Anderson J said that he could not distil any differences between the "relative potency" of the NZBORA and HRA.[163] Further, McGrath J was happy to note that meanings other than the natural one could be adopted if they were "sympathetic to protected rights"[164] and Elias CJ even went as far as to say that strained interpretations could be permissible to protect rights.[165] Regardless of these views, the Supreme Court still saw textual reasonableness as a constraint on s 6's potential potency.[166] Blanchard J summarized for the court when he held that s 6 NZBORA "can only dictate the displacement of what appears to be the natural meaning of a provision in favour of another meaning that is *genuinely open in light of both its text and its purpose*".[167] As such, it seems as though the interpretation provision in NZBORA is not used to the same extent as its HRA counterpart. Nevertheless, we still find the courts willing to take an expansive interpretation of a statute.

III.C. Constitutional Resilience of NZBORA

The NZBORA, like the HRA, contains no provision for entrenchment. An expressly repealing statute can therefore displace it. Further, the doctrine of implied repeal, discussed in this Chapter vis-à-vis the HRA, is also recognised in New Zealand.[168] Likewise, the exception to the general principle is also recognised in relation to the NZBORA; namely, the NZBORA cannot be repealed by an ordinary statute except by express words. What *counts* as express wording is, of course, up for debate but, for present purposes, the NZBORA should be seen as more entrenched than an ordinary statute.[169]

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161 *Hansen* (n 135).
162 ibid [13].
163 ibid.
164 ibid [248]-[251].
165 ibid [13].
166 Gledhill (n 22) 420.
167 *Hansen* (n 138) [61]. Likewise, McGrath J held that the outcome had to be a "reasonably available meaning" (ibid [252]); Tipping J said that it must be tenable (ibid [149]); and Anderson J said that s 6 gave a power of construction not reconstruction (ibid [289]-[290]). Even Elias J, who said that a strained interpretation was possible, held that it must be tenable (ibid [5]).
168 *Patterson's Freehold Gold-dredging Co Ltd v Harvey* (1909) 28 NZLR 1008 (SC).
169 See *R v Pora* [2001] 2 NZLR 37 (CA). On which see Petra Butler, "Human Rights and Parliamentary Sovereignty in New Zealand" (2004) 35 VUWLR 341.

IV. Conclusion

This Chapter has not aimed to be novel. Nor has it aimed to give a complete in-depth guide to the HRA or NZBORA. Instead, the aim has been to sketch out how the law has worked in relation to both so that we can compare the common law, in the following Chapters, to codified Bills of Rights. I primarily looked at the HRA because this is the Bill of Rights in the United Kingdom, with a BBoR being merely on the constitutional horizon. I also looked at the NZBORA, which is a Bill of Rights in a system similar to the United Kingdom's but with no direct supranational stronghold in the same way as the ECHR as applied by the ECtHR. In short, I assessed that Bills of Rights usually focus on civil political rights; they take an expansive meaning; courts utilise some sort of proportionality test tempered with deference, specifically finding its genesis in *Oakes*; there is a reasonably strong interpretive obligation (though there is a debate about s 3 of the HRA's strength relative to its NZBORA counterpart's, with the latter sometimes seen as weaker); and, whilst not entrenched, these two Bills of Rights are more entrenched as constitutional statutes than ordinary statutes.

From the foregoing, we may proceed to compare and contrast the common law in the following Chapters. In Chapter 4 I examine the reach of common law rights; in Chapters 5 and 6 their protective rigour; and in Chapter 7 their constitutional resilience. Throughout, I refer back and, in parts, expand on this Chapter. Orthodoxy, which I sketch out in each Chapter, suggests that the common law is not as strong as its statuary counterparts on any of the vectors examined. The following Chapters dispute that premise by examining the traditional views through a rule of law lens, as suggested in Chapter 2.

Chapter 4

The Reach of Common Law Rights

I. Introduction

In this Chapter I examine the reach of common law rights. That is, I look at *which* rights come under the scope of the common law. Whilst the aim is not to catalogue all of the rights that exist at common law I will give an overview of them and show a methodology to identify them. This leaves aside, for the following Chapters, the protective rigour of those rights and their constitutional resilience in the face of seemingly hostile legislation, which are the two other vectors against which the overall strength of legal rights fall to be assessed. Therefore, whilst this Chapter looks at which rights we *have* at common law it does not say whose job it is to identify or enforce them; merely stating the existence of a right at law does not mean that that right is always enforced through the judiciary. There will be circumstances in which the legislature or executive are best placed to decide on rights issues. These issues will be discussed in the following Chapters.

I first examine the academic literature that has been produced over the past several years vis-à-vis the potential of the common law. Far from being enthused about the potential of the common law the response from the academic community has been incredibly (though not entirely) sceptical; the general argument has been that the common law does not protect people's rights in the same way as the Human Rights Act 1998 (HRA) because the rights it recognises are narrower than those under the HRA. As such, even if the protective rigour and constitutional resilience of common law rights are the same as or stronger than their counterparts the prior problem exists that the citizen does not have the same rights as those found under the HRA.

The sceptics' claim is an empirical one predicated on the common law being exclusively what the case law *says* it is; more specifically, the approach taken by those I call the common law sceptics is to report what rights cases *have* recognised and, if a right has not been expressly recognised, then that right does not *exist* at common law. This Chapter, drawing on Chapter 2, argues that this approach is flawed and so the current debate about how far the common law reaches is flawed. The consensus reached in the literature thus far is problematic by virtue of a problematic methodology. A focus only on the empirical case law ignores the principle-orientated approach that the common law should and does take. The principles underlying rights that have already

been explicitly recognised can equally account for other rights; there is no reason to suppose that these rights would not be recognised. Recognition of a right is generally a judicial function but the judiciary are doing just that: *recognising the right that already exists*. An absence of prior recognition does not mean that the right does not already exist at common law; existence and recognition are separate matters. I argue that the courts' function vis-à-vis common law rights is diagnostic not constitutive.[1]

Whilst this Chapter (and indeed this thesis) does not purport or attempt to catalogue all of the rights that the common law protects I will use some examples of previously unrecognised common law rights as rights that one can argue nonetheless exist at common law. This will reveal the potential of the common law in protecting rights as being far more wide ranging than has been previously supposed. The Chapter will end by looking at the operation of the common law in comparison with European Convention on Human Rights (ECHR) rights as enunciated by the European Court of Human Rights (ECtHR), which was described in Chapter 3. The suggestion in the present Chapter is that there is little to choose between the two approaches to legal human rights and so a repeal of the HRA would not fundamentally narrow the range of human rights available.

II. Academic Commentary and Empirically Recognised Rights

The renewed focus on common law rights has prompted a large amount of academic commentary.[2] Much commentary, far from embracing common law rights, has been sceptical of the common law's ability to adequately match the reach of the HRA. Specifically, writers suggest that the common law falls at the first hurdle since it does not protect the same rights as the HRA. On their view, the HRA occupies a wider terrain than the common law. It will be useful to examine what such writers say and *why* they say it in more detail. As I go on to disagree with their

[1] I borrow this terminology from George Letsas, "The Scope and Balancing of Rights: Diagnostic or Constitutive?" in Brems and Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in determining the scope of human rights* (CUP 2014).

[2] Including Lady Hale, "UK Constitutionalism on the March" (2014) 19(4) JR 201; Roger Masterman and Se-shauna Wheatle, "A common law resurgence in rights protection?" [2015] EHRLR 57; Richard Clayton QC, "The empire strikes back: common law rights and the Human Rights Act" [2015] PL 3; Scott Stephenson, "The Supreme Court's renewed interest in autochthonous constitutionalism" [2015] PL 393; Adam Straw, "Future Proofing: Running Human Rights Arguments under the Common Law" (2015) 20(4) JR 193; Conor Gearty, "On Fantasy Island: British Politics, English Judges, and the European Convention on Human Rights" [2015] EHRLR 1; Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68(1) CLP 1; Thomas Fairclough, "Black Spiders and Public Lawyers: Constitutionalism Revisited?" (2016) 21(1) JR 1; Eirik Bjorge, "Common Law Rights: Balancing Domestic and International Exigencies" (2016) 75(2) CLR 220; and Sophie Boyron, "The Judiciary's Self-Determination, the Common Law, and Constitutional Change" (2016) 22(1) EPL 149.

approach, that is the *way* they come to the conclusions they do, I also disagree with their substantive conclusions.

Richard Clayton says "a number of recent decisions…suggest that common law rights are…centre stage" and as such "some will, no doubt, argue that using domestic law rights can achieve much the same as the HRA".[3] As such, Clayton says it is "opportune to reflect on the scope for utilising fundamental common law rights".[4] However, almost immediately Clayton argues, "problems remain about how we identify common law rights and how common law rights will impact in practice, as a result of their *traditional limited status* in English law",[5] before going on to *list* the rights he says the common law protects.[6] Clayton seems to make two claims: (i) it is hard to identify common law rights; Clayton says that "the identification of common law rights is not straightforward"[7]; and (ii) even when we can see common law rights in cases they are "limited" and thus, for Clayton, the reach of common law rights is limited.[8] Even if one concedes (i), which I will not take issue with here, this Chapter takes great issue with (ii) and its conclusions, which will be discussed in the following sections.

Likewise, Conor Gearty describes common law rights as a "fantasy".[9] Gearty has suggested that in the past the common law has shown a "partisanship…for property and contract rights over gender and racial equality; an hostility to trade unions and the Labour party so severe that neither could have survived without legislation directly overturning judicial malevolence; the common law's service as a base for the serial abuses of liberty".[10] In a way similar to Clayton, Gearty seems to rely on what the common law explicitly and narrowly *did* as constitutive of what the common law *is*.

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[3] Richard Clayton, "The empire strikes back: common law rights and the Human Rights Act" [2015] PL 3, 3.
[4] ibid.
[5] Emphasis added. ibid 4.
[6] Clayton lists the rights from Woolf et al (eds), *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2015).
[7] Clayton (n 3) 7.
[8] ibid 4.
[9] Conor Gearty, "On Fantasy Island: British politics, English judges and the European Convention on Human Rights" UK Const L Blog (13 November 2014) https://ukconstitutionallaw.org/2014/11/13/conor-gearty-on-fantasy-island-british-politics-english-judges-and-the-european-convention-on-human-rights/ (accessed 2 June 2018). The suggestion might be that Conor Gearty's focus is not on the methodological side of common law rights but is instead expressing a *distrust* of common law judges and their will to uphold rights. Indeed, he focuses in large part of the judges themselves and not their judgments. Though this is a socio-legal question I would simply suggest that it would be the same judges who have acted under the HRA. The HRA allows enough latitude to the judiciary that, if they really did want to avoid protecting rights, they would do so.
[10] ibid.

Further, whilst Lady Hale has, extra-judicially, stated "the common law…is a rich source of fundamental rights and values"[11] her Ladyship went on to say that there are difficulties with the identification of common law rights, suggesting "no two lists…would be the same".[12] Indeed, Lady Hale went on to agree with Clayton: "identification of less well-established common law rights is more difficult".[13] Judicially, Lady Hale has denied the common law is concerned with the right to vote; her Ladyship stated "It would be wonderful if the common law *had* recognised a right of universal suffrage. But…*it has never done so*"[14] and so for Lady Hale it cannot or does not recognise such a right now. Lady Hale seems to make the same two points that Clayton does, that is that (i) common law rights are epistemologically hard to identify; and (ii) because the common law has not explicitly recognised the same breadth of rights as the HRA it does not do so.

Finally, after saying that in the years leading up to the HRA some common law rights achieved attention, Mark Elliott argued "inevitably, no authoritative catalogue of such rights exists, although it is hard to dispute the proposition that such rights as could be inferred from the case law appeared to occupy a terrain substantially narrower than that occupied by the Convention rights".[15] Indeed, Elliott says it is not the case that "the common law did, or does, contain a catalogue of rights that equates to the body of rights found in the Convention".[16]

To reiterate, all of these pieces share a common characteristic: they empirically catalogue the rights explicitly protected by the common law and see that as constitutive of what the common law protects; Elliott explicitly claims, "the normative reach of common law rights is an ultimately *empirical* question".[17] Since this is apparently lower than what the HRA explicitly protects it is, apparently, the case that the common law does not reach as far as the HRA. If this approach is correct[18] then, it would seem, it is hard to disagree with these writers and dispute the proposition that the common law does not occupy the same terrain as the HRA vis-à-vis *which* rights are protected. It will be useful here to provide an overview of the rights that have been explicitly recognised in domestic common law judgments.

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[11] Lady Hale, "UK Constitutionalism on the March" (2014) 19(4) JR 201, 201.
[12] ibid 201.
[13] ibid 205.
[14] Emphasis added. *Moohan and Another v The Lord Advocate* [2014] UKSC 67, [2015] All ER 361, [56] (Lady Hale).
[15] Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) CLP 1, 4.
[16] ibid 5.
[17] Emphasis added. ibid 11.
[18] As stated above, the argument developed in this Chapter is that this approach is not correct.

II.A. Empirically Recognised Common Law Rights

What follows is not designed to be an exhaustive list of recognised rights but is designed to give a flavour of their breadth; it is obvious that the common law has recognised many of the rights found in the HRA. Perhaps the most settled example is access to the courts. In *Raymond v Honey*,[19] when examining whether a broad statutory provision gave the Secretary of State for the Home Department the ability to refuse a prisoner access to the courts, Lord Wilberforce stated that there was nothing in the Act that conferred powers to stop "unimpeded access to the courts". His Lordship understood the statute in that way because access to the court is "so basic a right".[20] Likewise in *A v B (Investigatory Powers Tribunal: Jurisdiction)*[21] Collins J noted "The courts of this country have always recognised that the right of a citizen to access a court is a right of the highest constitutional importance".[22] A related right to that of access to a court is a right to a fair hearing; as Lord Steyn puts it in *R (McCann) v Manchester Crown Court*[23] "under domestic English law [citizens] undoubtedly have a constitutional right to a fair hearing.".[24] Likewise, in *Osborn v The Parole Board*[25] Lord Reed noted that the procedural requirements of Article 5(4) ECHR go no further than that of the common law.[26]

Further, the right to life was recognised at common law before the HRA came into force. In *R v Secretary of State for the Home Department, ex p Bugdaycay*[27] Lord Bridge held that "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny".[28] Related is the right to be free from torture: Lord Bingham makes clear that "from its very earliest days the common law of England set its face firmly against the use of torture"[29] due to it being "totally repugnant to the

[19] [1983] 1 AC 1 (HL).
[20] ibid 12-13 (Lord Wilberforce).
[21] [2008] EWHC 1512 (Admin), [2008] 4 All ER 511.
[22] ibid [12] (Collins J).
[23] [2002] UKHL 39, [2003] 1 AC 787.
[24] ibid [29] (Lord Steyn).
[25] *Osborn v Parole Board* [2013] UKSC 61, [2014] 1 All ER 369.
[26] ibid [112]-[113] (Lord Reed). The broader discussion of the Article 5 case law takes place at [101]-[113].
[27] [1987] AC 514 (HL).
[28] ibid 531 (Lord Bridge). I leave aside the question of what "anxious scrutiny" is for the purposes of this Chapter as that falls within the purview of the rigour of the protection of rights, on which see Chapter 5.
[29] *A and others v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221, [11] (Lord Bingham). Though illegal at common law torture did take place in England in the 16th and early 17th centuries; however, this did not take place with the authority of the common law but rather by virtue of the Royal Prerogative in cases (generally) dealing with offences against the state. This pre-dates the English civil war. Now, of course, the prerogative, if incompatible with the common law, must give way.

fundamental principles of English law"[30] and "repugnant to reason, justice, and humanity".[31] Hence the common law will not admit evidence procured by torture because of "constitutional principle".[32]

The right to liberty has also been recognised since at least the 19th century.[33] More recently, Roskill LJ held that when a court "has to consider a matter involving the liberty of the individual, it must look at the matter carefully and strictly, and it must ensure that the curtailment of liberty sought is entirely justified by the statute relied upon by those who seek that curtailment".[34] In *R (Juncal) v Secretary of State for the Home Department and others*[35] Wyn Williams J made clear "the citizens of this country do enjoy a fundamental or constitutional right not to be detained arbitrarily at common law".[36]

Further, freedom of expression has been recognised. In *Attorney General v Observer Ltd and Others*[37] Lord Goff stated he wished:

> [T]o observe that I can see no inconsistency between English law on this subject and article 10 of the European Convention on Human Rights. This is scarcely surprising, since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world.[38]

Likewise, in *R v Secretary of State for the Home Department, ex p Simms*[39] Lord Steyn held that "The starting point is the right of freedom of expression. In a democracy it is the primary right".[40]

Yet it seems arguable that the common law has not recognised[41] the same breadth of rights as the HRA does. Certainly, as Lady Hale pointed out, it has not regularly recognised a right to universal enfranchisement[42] nor can it be said that the case law has enunciated a right to respect for family

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[30] David Jardine, *A Reading on the Use of Torture in the Criminal Law of England* (Baldwin and Cradock 1837) 6.
[31] ibid 12.
[32] *A and others* (n 29) [13] (Lord Bingham).
[33] See *Bowditch v Balchin* (1850) 5 Exch 378, 381: "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute", meaning they will not read powers into the statute.
[34] *R v Thames Metropolitan Stipendiary Magistrate, ex p Brindle* [1975] 1 WLR 1400 (CA), 1410 (Lord Roskill).
[35] [2007] EWHC 3024 (Admin), [2007] All ER (D) 289 (Dec).
[36] ibid [47] (Wyn Williams J).
[37] [1990] 1 AC 109 (HL).
[38] ibid 283 (Lord Goff).
[39] [2000] 2 AC 115 (HL).
[40] ibid 125 (Lord Steyn).
[41] I use the word recognised in its strictly empirical sense: i.e. what the past cases *actually say* the common law protects.
[42] *Moohan* (n 14) [56] (Lady Hale). *Cf Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395: "Although embodied in a statute, in a system of universal suffrage today the right to vote would fall within

and private life in the common law.[43] If all that matters is what the past case law *says* then one can certainly see that the common law does not go as far as the HRA vis-à-vis the reach of rights; as such, if the HRA were repealed the common law would not, on this approach, replicate the rights lost from the statute book. However, this is precisely what is disputed in this Chapter.

III. A Principled Approach to Rights Identification

The contention of this Chapter is that the conclusion in the preceding paragraph rests on an approach that is flawed. My argument is that the empirical approach is flawed as it fails to take account of the role that legal principle plays in legal reasoning. As T R S Allan says "the common law constitution is chiefly characterized by its dependence on legal principle".[44] In short, the argument in this section will be that the common law sceptics have failed to take into account the role that the rule of law plays in shaping the common law. Whilst judicial recognition of the common law is inherently limited by what is litigated and to what level I argue that that is not the same as saying that *decided* cases are exhaustively *constitutive* of the common law. A better view is that the principles underlying the common law, specifically the rule of law, exist due to their normative status.[45] These principles condition the reach of rights; whilst we may have finite *iterations* of rights in the case law that does not mean the reach of the common law is *limited* to such decisions.

III. A. The Rule of Law as the Controlling Factor

The starting point in this argument against the common law sceptics is that they sideline the role the rule of law plays and the normative condition of the common law.[46] Here, I recall and use the interpretivist methodology endorsed in Chapter 2. At the general level Lord Hope tells us "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based."[47] This tells us that the powers of the state are conditioned by the rule of law; what rights we have at common law are, in part, determined by the rule of law (as opposed to merely and

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everyone's notion of a "constitutional right". And, doubtless, the principle of legality would apply in construing any statutory provision which was said to have abrogated that right" [61] (Lord Rodger).

[43] Thus there has not been a direct analogue to Article 8 ECHR recognised under common law jurisprudence.

[44] T R S Allan, "The Moral Unity of Public Law" (2017) 67 UTLJ 1, 2.

[45] See Ronald Dworkin, "The Model of Rules" (1967) 33 U Chi L Rev 40 on this point and Chapter 2.

[46] A broader version of this claim is made in Thomas Fairclough, "*Evans v Attorney General*: The Underlying Normativity of Constitutional Disagreement" in Juss S and Sunkin M (eds), *Landmark Cases in Public Law* (Hart 2017) and in Chapter 2.

[47] *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56, [107] (Lord Hope). A thorough theoretical examination of this claim is in Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28(4) OJLS 709.

wholly dependent on judicial recognition). As Allan puts it:

> [W]hen we point to the rule of law as a basic principle of British government, we identify our constitutional foundations with the value of law itself…the rule of law is not merely an ideal or aspiration *external* to the law…it is a *value* internal to law itself, informing and guiding our efforts to ascertain…legal rights.[48]

The rule of law is at the core of law; any discussion of legal powers, rights, and responsibilities must take account of the rule of law. It is a discussion that must be more than a mere reporting exercise. To ignore this inherent point is to engage in a mistaken exercise and conclusions gained from that exercise are built on weak foundations.

The rule of law is controversial. There is a risk that the rule of law has become "all things to all people"[49] and it is certainly "an essentially contested concept"[50] with a wide range of views as to what it incorporates.[51] There is a problem as to how we identify what the rule of law requires. This Chapter cannot begin to deal with such an inquiry but an overview will be useful. Elliott has stated that even if we accept that law is conditioned by its theoretical underpinnings this "says nothing about the content" of such underpinnings.[52] Elliott states that this must "be determined empirically"; that is, the content of the rule of law must be empirically determined.[53] This approach is difficult to sustain. Legal principles find their origin in their normative value and so their identification must also be a normative exercise. Their use in legal practice depends on the "sense of appropriateness" in said use.[54] We might use decided cases that demonstrate our view of the rule of law in support of our view but those cases are not somehow *constitutive* of our view in and of themselves. As Allan says "judicial opinion and *dicta* are only contributions to the debate about constitutional theory that we must join".[55] We cannot, as Elliott implies, accept that the rule of law is the controlling factor in the constitution but see the rule of law only in its "empirical manifestation" because to do so would be to "surrender" the role of theory and the rule of law as an internal ideal.[56] It would ignore the normative foundations on which doctrine rests.

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[48] Emphasis original. T R S Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 88.
[49] See Paul Daly, "A Pluralist Account of Deference and Legitimate Expectations" in Groves M and Weeks G (eds), *Legitimate Expectations in the Common Law World* (Hart 2017)
[50] Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" (2002) 21 Law and Philosophy 137.
[51] For an overview of the debate see Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.
[52] Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001) 66.
[53] ibid.
[54] Dworkin (n 45) 41.
[55] Allan (n 48) 227.
[56] ibid

Whilst doctrine is important so too is recognition that the doctrinal architecture of public law (and law more broadly) rests on a set of normative foundations; from the normative comes the doctrinal.[57] The surprising thing is that this should not come as a surprise to anyone. Many of the cases quoted above relating to common law rights depend on the internal ideal of the rule of law for their justification. In *Simms* Lord Steyn says that not only is freedom of speech an important constitutional right but that it is so because "without it an effective rule of law is not possible".[58] In *A v B* Collins J makes clear that removing the right to a fair hearing is "*prima facie* contrary to the rule of law".[59] Laws J in *Witham* states that common law rights are "logically prior" to the democratic political process[60] and therefore somehow inherent in law. In *R v Secretary of State for the Home Department, Ex parte Pierson*[61] retrospective punishment (and the absence of a fair hearing) was held to violate a common law right. Counsel for the Secretary of State tried to claim that this case fell to be decided by reference to the doctrine of legitimate expectations but Lord Steyn held that the correct "analysis of this case is in terms of the rule of law".[62] Finally, Lord Reed in a recent judgment on access to justice[63] states, "access to justice is not an idea recently imported from the continent of Europe, but has long been embedded in our constitutional law. The case has…been argued…on the basis of the common law right of access to justice".[64] Indeed, not only is the right "embedded" in the domestic constitution but it seems to be because the "right of access to the courts is *inherent* in the rule of law".[65] Whilst Lord Reed goes on to discuss cases that support this view he is doing just that: using previously decided cases to support the view that the right comes from the rule of law itself.[66]

The rule of law conditions common law rights and the courts often follow this analysis. Therefore, difficulty sets in when academics try to present the extent of the common law as a solely empirical question determined entirely by what previous case law says in a narrow sense.[67] It is in part a normative question about the best conception of the rule of law, which underpins legal practice. Elliott is therefore wrong when he says a distinction "needs to be drawn between

[57] I make this argument in Fairclough (n 46) 299 and in Chapter 2.
[58] *Simms* (n 39) 125 (Lord Steyn).
[59] *A v B* (n 21) [12] (Collins J).
[60] *R v Lord Chancellor Ex p Witham* [1998] QB 575, 581 (Laws J).
[61] [1998] AC 539 (HL).
[62] ibid 591 (Lord Steyn).
[63] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 4 All ER 903. Note that Lords Neuberger, Mance, Kerr, Wilson, Hughes and Lady Hale all agreed with Lord Reed.
[64] ibid [64] (Lord Reed).
[65] Emphasis added. ibid [66] (Lord Reed).
[66] ibid [76] (Lord Reed).
[67] That is, says about the right in question in the particular case not what it says about the rule of law more generally.

values associated with the common law and rights protected by it"[68] and that a way to reconcile the opposing views of Allan and Gearty is to see that the former is concerned mainly with theoretical values whereas the latter focuses on "tangible protection". Elliott separates value and doctrine; his point seems to be that to know what the common law *actually* protects we just look at the case law in a narrow sense but, if we want to know what the common law *could* protect then we look at the values underlying the common law to justify *changing* the law. Elliott acknowledges the potential for *legal change* in line with values when he says there is "no *a priori* reason why the body of such rights should not develop in a way that over time yields a degree…convergence with the Convention".[69] For Elliott, to answer the question "is there a common law right to vote?" we just look at the case law and see if the courts *have in fact* recognised such a right. This does not preclude the Supreme Court answering the question "should there be a right to vote at common law?" such that they may, on Elliott's account, *change* the law to incorporate such a right but, for Elliott (and presumably the other common law sceptics), the Supreme Court would be doing just that: using values they say are associated with the common law (though external to it) to *change* the law. There is not, on their account, currently a common law right to enfranchisement and to say that there is would, on their approach, be wrong.

This is, again, too narrow a view of the common law and how we know what it is.[70] A report of "doctrine" cannot sideline principle; doctrine is nothing but the crystallization of principle that comes from a (normative) understanding of that principle.[71] Put another way, the values underpinning doctrine do just that: they underpin doctrine. Trying to separate value and doctrine proves difficult since the two are intertwined and interdependent; as I argued in Chapter 2 we understand law by reference to a dialogue between its features and values.[72] The nexus between value and practice is something that the common law sceptics sideline and treat, at best, as relevant to common law *change* but not identification of what the common law *is*. Thus, the picture of the common law they present is incomplete because it ignores the fact that *principles* are currently part of the law and constrain judicial discretion; any attempt to know what the law is should take account of these principles. A judge, when adjudicating on a seemingly novel point, does not just look at the empirical case law to see what the law is and then reach for values

[68] Elliott (n 15) 5.
[69] Elliott (n 15) 11.
[70] For a non-common law rights example see *In re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41, [2005] 2 AC 680, [6]-[7] (Lord Nicholls).
[71] See Stephen R Perry, "Judicial Obligation, Precedent, and the Common Law" (1987) 7 OJLS 215 and Allan (n 44).
[72] See also Fairclough (n 46) 302.

"associated" with the common law to change the law if she so desires. Instead, a judge facing a situation in which there is no clear established "rule" is obligated to take into account relevant principles when making her decision; to fail to account for principle in making a decision leads to criticism that the judge was *legally wrong* in the outcome they reached.[73] More specifically, a judge, tasked with deciding if there is a novel common law right would be wrong if she failed to take account of the rule of law when making her decision since it and the values it contains control legal decision making.[74] It would be an abdication of judicial responsibility to merely *report* past cases as exhaustive of the law. Allan puts this point best in the British constitutional setting when he says "the judicial enforcement of rights may make great intellectual demands on judges, who are required to exercise *judgment* in what may often be finely balanced disputes, but it does not involve *discretion*, in the sense in which other state officials may enjoy a legitimate freedom of choice between competing alternatives".[75] It would not be enough for a judge to say, as Lady Hale did in *Moohan*, that there is no common law right to voter enfranchisement because the common law has not recognised such a right; adjudication must account for values underlying the law. There is little discretion in making such decisions; judicial adjudication is bound by the relevant legal principles governing a case. In this way, Lord Hodge's approach (though not his conclusions) in *Moohan* better accords with the best framework:

> I have no difficulty in *recognising* the right to vote as a basic or constitutional right….It is also not in doubt that the judiciary have the constitutional function of adapting and developing the common law through the reasoned application of established common law *principles* in order to keep it abreast of current social conditions.[76]

Likewise, the Supreme Court's recent judgment on tribunal fees[77] gives implicit support to this view. Here, Lord Reed states "many examples can be found of judicial *recognition* of the constitutional right of unimpeded access to the courts".[78] Again, it seems as though Lord Reed is seeing the judicial role as recognition of a right in line with constitutional principle and he uses previous cases as "examples" of that recognition not as constitutive of the right itself.

Pausing here, it is worth noting why this distinction is important. It may be that common law

[73] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 35.
[74] See *Jackson* (n 47) [107] (Lord Hope) and Lakin (n 47).
[75] Allan (n 48) 279.
[76] Emphasis added. *Moohan* (n 14) [33] (Lord Hodge).
[77] *UNISON* (n 63). Note that this was a unanimous judgment in the Supreme Court.
[78] Emphasis added. ibid [76] (Lord Reed).

sceptics agree with my argument but, in response, could say that it does not matter.[79] We currently have the HRA. The common law's rights will only come into play on repeal of the HRA; even then, they would only matter if the proposed British Bill of Rights is significantly weaker than the HRA. Therefore, they might say, there is little utility in examining the correct approach for common law rights identification. This argument is, however, difficult to sustain for four reasons. First, the judiciary has directed advocates to argue common law rights *now* not in the event of HRA repeal.[80] Second, there is value in knowing what the common law is. Our understanding of common law rights provides us insight into the wider workings of the common law constitution. Third, the argument I am presenting, that when assessing the reach of the common law we must look to the rule of law not just narrow case law, is relevant to shifts in understanding outside of rights cases or even administrative law. The role of the rule of law can be applied equally to private law doctrine and problems.[81] Finally, the difference between myself and the sceptics is that I am assessing what the common law *currently protects* by reference to the rule of law; as argued above, the sceptics seem, at best, to see the rule of law and its associated values as being relevant only to *changing* the law. Therefore, my argument is that the instant the HRA is repealed (if it is) the common law is *already there* to protect one's rights[82]; it does not require a *change* in the law.[83] A response to this final point may be that the common law has not in the past protected rights; some would say that the common law finds its basis in "a heavily class-bound, patriarchal society in which most people had no right to vote, religious difference was not tolerated, and radical political debate was routinely limited by persecution and imprisonment".[84] Whilst true that some common law judges have in the past tolerated such injustices it is worth pointing out that the approach to the common law that I am advocating requires one to see the common law in light of morality; it is implicit here that morality has an objective meaning. That is, there is a right answer to moral questions. Due to this I broadly agree with Allan when he says that

> The common law inevitably reflects the society and polity within which it is imbedded; but its susceptibility to enlightened change, in conjunction with altered perceptions of justice in society at large, is a product of its intrinsic dependence on the moral judgment and vision of all who participate in legal analysis.[85]

[79] I am grateful to Alison Young for pointing out this argument to me at a workshop entitled "Human Rights Post-Brexit" sponsored by the British Academy.
[80] *Osborn* (n 25).
[81] Austin L M and Klimchuk D (eds), *Private Law and the Rule of Law* (OUP 2014).
[82] It is also there to protect one's rights whilst the HRA is in force.
[83] This, of course, ignores the socio-legal point about the need for litigation to have rights vindicated and regonised by the senior courts.
[84] Geoffrey Kennet, "Individual Rights, the High Court, and the Constitution" (1994) 19 MULR 581, 611.
[85] T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 249

That is, whilst the common law may have been used to justify unjustifiable results in the past its reflective nature means that it will not give the same results now. As our understanding of morality shifts so too does our understanding of the rule of law; since the rule of law is linked to which rights we have at common law our (newer) understanding of morality changes what rights we identify at common law.

A second argument against what I have said so far may be that I have presented the views of the common law sceptics too narrowly: it may well be that Elliott and Clayton, for example, would say of course the common law can change and they may even accept that change is, actually, not the endorsement of a "new" right but actually just the recognition of a pre-existing right (which I would agree with and have argued for above). They may say that we differ because, for them, there is little practical power in a right that has not been recognised by the courts even if it does exist. They may say that if a right has not been recognised at common law we could not advise clients that such a right exists and therefore the power of that right is, at best, limited.

In a sense, I agree with them. Without wishing to engage in the practicalities of being a practising lawyer it seems that when advising a client whether or not he would have a claim it is surely easier when there is a well established history of the judiciary recognising a relevant right. Thus, if, for example, via secondary legislation the executive is preventing enforcement of legal rights in the courts then the prospect of judicially reviewing that secondary legislation and winning is relatively clear. Advising a client (in normal circumstances) is essentially a question of giving the odds of success. A client wants to know if he is likely to win.

Nothing I have argued in this Chapter disputes that. Of course what the law is would be more certain and citizens would have better knowledge of it if every common law right that exists had been thoroughly examined and recognised by the Supreme Court. That would make the lawyer's task in advising her client far easier. Where the difference between myself and some of the works identified above falls is in the importance of seeing that a common law right is a right even if it has not yet been judicially recognised. First, what I said above about the importance of recognising a right is a right at common law even though we still have the HRA stands here too. Further, if it is realised by greater numbers of people that a right exists even if the courts have not explicitly said that it does then, in practical terms, that does make a difference. Making arguments on the basis of the rule of law, arguing for consistency and integrity in our legal system, is more likely to bring about judicial recognition of a right in litigation than when an

advocate does not argue such and argues solely on the empirical facts of previously decided cases before her. In this sense, whilst it is clearly of great benefit to a practising lawyer when there is a clear record of courts enforcing a right at common law that is not to say there is no practical benefit of seeing such a right exists even when it has not been explicitly held to exist in a court. Seeing the common law as infused by the rule of law, seeing common law rights as a doctrinal expression of the values underpinning the rule of law, helps shape arguments, which, in turn, I argue, helps shape judgments and makes it more likely that the courts will endorse a seemingly novel right.

III. B. Identifying Rights with the Rule of Law: Non-Arbitrariness and Equality

Even after arguing the rule of law is relevant to the identification of common law rights and that this is of significant value a question arises: what values does the rule of law encapsulate and how do these values map onto rights hitherto unrecognised as part of the common law? At its core, the rule of law "promises protection…against the arbitrary exercise of power"[86] because it is "a bulwark against any assertion of arbitrary power".[87] By arbitrary we do not mean, as Joseph Raz contends, only powers exercised "with indifference".[88] The rule of law reflects consistency in principle; it flourishes and constrains decision making when one sees that it is concerned with equality before the law.[89] This means that the law "must itself be non-arbitrary, in the sense that it is justified in terms of a *public or common good*- one that we can fairly suppose favours a similar freedom for all".[90] The rule of law, in this sense, is against arbitrary distinctions between persons or groups; instead, objective legitimate justification for action is needed.[91] This goes further than saying that law is concerned only with the uniform application of rules regardless of their content; the rule of law provides for substantive equality, that is to say equality in principle, not just mere consistency in application.

There is, again, plenty of judicial recognition of this principle, which gives support to the interpretation I endorse: Lord Donaldson MR held that "it is a cardinal principle…that all persons in a similar position should be treated similarly"[92] and Lord Bingham held "it is generally

[86] Gerald J Postema, "Fidelity in Law's Commonwealth" in Austin L M and Klimchuk D (eds) *Private Law and the Rule of Law* (OUP 2014) 17.
[87] Allan (n 48) 93.
[88] Joseph Raz, *The Authority of Law* (2nd edn, OUP 2009) 219.
[89] Ronald Dworkin, *Law's Empire* (Harvard University Press 1987) 227.
[90] Emphasis added. Allan (n 48) 93.
[91] See generally Ronald Dworkin, "Is there a right to pornography?" (1981) OJLS 177.
[92] *R v Hertfordshire CC, ex p Cheung* The Times, April 4, 1986 (Lord Donaldson MR).

desirable that decision makers…should act in a broadly consistent manner".[93] Indeed, the insistence on equal treatment before the law seems to have affected one of the most fundamental changes to administrative law of the last century: the erosion between jurisdictional and non-jurisdictional errors of law.[94] Whilst these cases may be said to deal with formal equality a more substantive principle has played a part in administrative law decisions. In the 19th century Lord Russell held byelaws could not provide for differing treatment between differing classes.[95] Likewise Lord Denning held courts "will not allow a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules or in the enforcement of them".[96] The broadest statement of principle comes from Lady Hale, who tells us that arbitrary treatment "Is the reverse of the rational behaviour we expect from government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions".[97] Likewise, this approach has been recognised in other common law jurisdictions. In Australia Deane and Toohey JJ held courts must treat individuals "fairly and impartially as equals before the law"; judges should therefore reject "discrimination on irrelevant or irrational grounds".[98] In short, the rule of law looks for differences to justify different treatment but not all differences are acceptable to legitimate different treatment for the rule of law. That is, not all reasons are good reasons so as to satisfy the rule of law. As Lady Hale says, distinctions must be *rational*.[99]

Once we appreciate the foregoing we can see a new dimension to how identification of common law rights can proceed. Rather than focusing on what has been decided in the past the debate should turn to look at the values the rule of law encapsulates and what rights they justify. If the rule of law, which underlies such common law rights as freedom of speech, a fair hearing, and freedom from retrospective punishment, can underlie a previously unrecognised right there is no reason why the courts should not recognise such a right in appropriate litigation.[100] It is through

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[93] *R (O'Brien) v Independent Assessor* [2007] UKHL 10, [2007] 2 AC 312, 328 (Lord Bingham).
[94] *R v Lord President of the Privy Council, Ex parte Page* [1992] UKHL 12, [1993] AC 682.
[95] *Kruse v Johnson* [1889] 2 QB 291 (CA).
[96] *Edwards v SOGAT* [1971] Ch 354 (CA).
[97] *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [132] (Lady Hale).
[98] *Leeth v The Commonwealth* (1992) 174 CLR 455, 487. These judges were in the minority but their point still stands. See Allan's discussion of this case in Allan (n 85) 247.
[99] See *Ghaidan* (n 97).
[100] Note that is not to say that the courts *will* do so, which involves legal sociological issues involving predicting judgments. Instead, the focus here is on what the law *actually is*, which I suggest is not entirely dependent on judicial enunciation. See Ronald Dworkin, *A Matter of Principle* (HUP 1985) 120 where he says that whilst legal problems may be epistemologically difficult they have "a right answer. It may be uncertain and controversial what that right answer is, of course, just as it is uncertain and controversial whether Richard III murdered the princes. It would not follow from that uncertainty that there is no right answer to the legal question, any more than it seems to follow from the uncertainty about Richard that there is no right answer to the question whether he murdered the princes". Simply, a

the reasoned application of principle that we establish common law rights. It is important to note here that other constitutional principles such as deference and the separation of powers mean that the judiciary may not *enforce* these rights in certain cases; there may be cases where they say that the executive or legislature are best placed to decide whether there is justification for differing treatment. That is not to say, however, that there is *no right*; it is only to say that the courts may decline to interfere with a particular decision for particular reasons. This aspect of common law rights adjudication will be discussed in the following Chapters.

This leads us to a key question: what counts as justifiable differences such as to justify different treatment between persons and what does this mean for rights at common law?[101] The answer to this question will help us to identify rights at common law. As stated throughout this section not all differentiation is *justified* differentiation for the purposes of the rule of law. As such, we need to know what does count as justified differentiation. To understand this and therefore what rights exist at common law we have to recall the following: the rule of law, the controlling factor in the constitution, is concerned with non-arbitrariness, which in turn reflects the value of equality. Equality is the antithesis of arbitrariness; it reflects consistency in principle, which is what the law is concerned with.[102] As we saw above there is plenty of judicial support for this view. The principle of equality is fundamental to the identification of rights in the common law constitution. It grounds the rights found at common law. This is *not* the same as saying there is a crude prohibition on different treatment; it is only to say such treatment must be open to justification in line with constitutional principles, with equality being central to that.[103]

The starting point is equality. Note that this is not the same as equal distribution but is instead about the right to treatment *as an equal*[104]*;* it is about respecting the equal dignity of each individual. As George Letsas puts it, it is about "the right to be treated with equal respect and concern by one's government, and the right to be treated as someone whose dignity matters and

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fact and knowledge of the fact are independent of one another; knowledge of a fact does not create the fact itself. A judge saying a right has not been violated does not mean that the right *has not* been violated. It merely means that that judge *thinks* it has not been. This is the distinction that George Letsas draws between constitutive and diagnostic questions. Courts usually act by using diagnostic tests to determine whether rights *have in fact* been violated; their saying they have (or have not) does not mean that they have (or have not) been violated: Letsas (n 1).

[101] Do note that this is different (though related) to the *assessment* question of how we and who should assess whether a particular difference is one that warrants differentiation in treatment. This broadly concerns institutional competence and deference as well as more broadly considering the relationship between the judiciary, executive, and legislative branches of the state. This is something that is examined in Chapters 5, 6, and 7.

[102] Allan (n 85) 123

[103] ibid 122.

[104] Dworkin (n 73) 273.

matters equally to those of others".[105] Equality provides a basis of how state power works: equality demands that state power should show equal concern for citizens in its use. Since the common law is predicated on the rule of law, which in turn encapsulates an idea of anti-arbitrariness, and the opposite of arbitrariness is the value of equality of concern then we ought to see the common law in this light. Once this idea takes hold it is easy to see that individuals have an abstract, yet concrete, right to be treated as equals. Law, which is fundamentally about equality of concern, provides for this. So we must be treated as equals whose dignity matters and the state cannot use law in a way that does not show such equal concern. This, as I have argued, is the foundation of common law rights.

What rights does this ground? As stated throughout this Chapter the aim is not to give a list of common law rights, which is not possible, but to show their potential once the common law approach is understood. As stated above the common law focuses on principle and decided cases are specific instances of principle applied to facts. As such, the focus here is on principle and its operation with an examination of how it might work for as yet unrecognised common law rights.

In short, non-arbitrariness in the form of equality of concern, which the rule of law demands, acts as a "trump" against certain types of reasons for state action. On this account the common law respects decisions one makes about one's own life and also does not allow interference with somebody's choices on the basis of one's own external preferences.[106] A legal system built on the rule of law, which itself reflects the idea of equality of concern, cannot utilise legal power just because a decision maker thinks something is inferior or lower than him or her or than society as a whole. You cannot ban or limit political action by communists because society thinks that they are morally bad, nor can you stop homosexuals adopting children because you prefer the nuclear family, nor again can you stop ethnic minorities or women or transgendered people from serving in the military because white male officers would not want them to serve and so on. All of these things rely on external preferences; that is preferences about how others are treated without any objective justification, which is the cornerstone of the rule of law. A system that respects the rule of law requires objective justification for differentiation in treatment in the restriction of liberties or opportunities. Action must be objectively justified in that it does not rely on the idea that someone or some course of conduct is not worthy of equal respect.[107] Instead, such

[105] George Letsas, "Dworkin on Human Rights" (2015) 6(2) Jurisprudence 327, 333.
[106] This is itself explained by the principles of intrinsic value and personal responsibility: see Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press 2006) 9-10.
[107] Dworkin (n 73) 238.

differentiation in treatment must rely on, for example, evidence that a particular person or group should be treated differently because the rights of others need to be protected and the only way to do this is to seemingly limit the liberties of the first person.[108] This is why it is permissible to restrict the right to liberty if someone has committed a crime: he or she is incarcerated, at least in part, so as to protect others. It is also why it is impermissible to incarcerate someone because you *suspect* (but cannot prove) they have committed a crime. It is also why that whilst the communist party must have a freedom to demonstrate or to free expression they cannot burn down property or riot in Whitehall; rights do not extend to infringing others' rights.[109] In short, the common law does not categorically *list* or *prescribe* a set schedule of rights but, instead, works on the basis of equality of concern or non-arbitrariness; it is concerned with the dignity of persons. It is not the case that the common law necessarily lists rights to vote or to freedom of assembly; rather, as Letsas puts it, citizens "have a right not to be deprived of a liberty on the basis that their conception of the good life is inferior. Specific rights therefore exist only when, and to the extent that, there are liberties of individuals that the majority is likely to attack motivated by hostile external preferences".[110]

One might respond to this that this sets the threshold of government action too low: if the state can show that it was acting with equal concern but there was an objective reason for action then would it not be acting in accordance with rights? What is to stop the state torturing a terrorist for information? By virtue of being a terrorist and the need for the safety of its citizens why can a state not torture him at common law? Dworkin's response is to say that some practices are so clearly wrong that they cannot be justified; even if purportedly showing equal concern for the equal dignity of the individual the practice simply cannot do so: "some acts of government are so obviously inconsistent with the principles of human dignity that they cannot be thought to be justified by any intelligible conception of those principles".[111] That is, when judging whether a government is acting in good faith we do not look at whether the government *thinks* that it is but we look, objectively, at whether they are *in fact* showing equal concern for the dignity of its citizens.

Let us use the example of tapping a person's telephone. Let us imagine that James is a known terrorist and the police know that he is telephoning Jemima to plan a terrorist attack; can it be

[108] ibid 202.
[109] ibid 201.
[110] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 114.
[111] Dworkin (n 106) 36.

said that tapping this telephone conversation be a breach of rights? On this account it is not: whilst it is seemingly a restriction on liberty there is no liberty to plan terrorist attacks and as such the police are not breaching or interfering with a right. Respect for dignity does not entail respect for plotting terrorist attacks in the same way as it does respect for plotting a peaceful demonstration. Next, let us imagine that the police know Jeremy is a serial killer and Teresa will be telephoning him at 20:00. There is no suggestion that Teresa is a serial killer or anything other than an upstanding citizen with no knowledge of Jeremy's crimes but the police want to tap the telephone because they hope Jeremy will reveal his location; is this justified? Unlike our first example the police will be interfering with Teresa's rights (but not Jeremy's) but, in this case, it is a justified intrusion into her liberty because, whilst her dignity is offended, it is a small intrusion for a large gain (that of catching a serial killer and preventing him committing any more crimes) and the aim was not to violate her rights it was incidental to the legitimate aim (stopping a serial killer).

In these sorts of cases the state recognises that it is intruding on someone's liberty and this is cause for an apology but also recognises that it is proportionate. In this case, whilst there is objective justification for action, Teresa has not done anything to warrant it; she is incidental or collateral and the reasons are external to her herself. Equal concern for dignity would recognise that she is entitled to make a telephone call but, in this situation, the intrusion into that liberty would be legitimate. Finally, imagine a situation where those purporting to act for Islamic reasons have committed a large number of terrorist attacks. Let us imagine the Home Secretary, using broad statutory discretion given to her, says that the police may now tap all telephones belonging to those they suspect are Muslims. This would be an affront to the rule of law as it would be over-broad and, as such, arbitrary; insufficient targeting in liberty restricting measures violates the dignity of those targeted.

As stated throughout the aim of this Chapter is not to catalogue the rights the principles underlying the common law justify. The aim is far more modest: all this Chapter seeks to do is demonstrate that the current debate has taken place on a flawed premise and demonstrate the richer role the common law plays in human rights adjudication using select examples of rights that, whilst unrecognised, do exist at common law. The principles underlying the common law justify far more rights than the common law has *in fact explicitly* recognised in past decisions and here I will discuss two of them.

First, the right to vote. In a Western liberal democracy participation in that democracy is essential. This shows equal concern for citizens; something that the rule of law is itself concerned with. Thus, the context of the United Kingdom is that, generally, citizens are able to vote in elections for those that govern them. Any deviation from this approach would be arbitrary to the extent that it could not be objectively justified. Unjustifiable differentiation in treatment between persons is the antithesis of the rule of law[112] and so law can, and more importantly *should* (in the sense of putting the judiciary under a legal obligation) recognise a general right to enfranchisement, which can only be limited for objectively legitimate reasons. A good example would be the voting age: having it at 18 is objectively justified on the premise that those under this age are deemed to not have enough experience to participate in the democratic process. Variation of the age, within a given boundary, is therefore justified; it does not offend the rule of law. However, removing the vote from, say, one gender, or giving it only to land owners, or to those of a particular ethnic origin would be a violation of the rule of law; it would not be objectively justified within the context of a liberal democracy.[113] As a result, since the rule of law underpins the common law, controls its content,[114] and places the judiciary under an *obligation* to decide a case a particular way we can say, with confidence, that the common law supports a right to enfranchisement and that a judge, tasked with deciding this point head on, would be legally obligated to decide as such. This is not the same as saying it will be easy; human rights cases, as pointed out above, often require difficult questions of judgment on competing arguments of principle. However, as stated throughout a lack of epistemological ease in the judicial role does not mean that that role does not exist or should not be carried out properly; it merely means that we need judges who are well equipped to decide the cases brought before them.

Another example is the right to end one's life with the help of another person. That is, is there a right to euthanasia? Clearly, the state is empowered (and indeed is under a duty) to protect its citizens. It is objectively justified to prevent people's lives from being ended prematurely by others as a safeguard for vulnerable people who might be persuaded to say they want to end their own lives so they will no longer be a burden or for the financial gain of their next of kin. It does not follow, though, "that an *absolute* rule is morally acceptable".[115] There will be genuine cases of people wishing to have help in ending their lives. If these situations exist, that is if these people are not vulnerable to manipulation and are of sound mind, then it is difficult to see what the

[112] See Postema (n 86).
[113] Of course, one could try to justify removing the franchise from, say, those that do not own property but such justifications would likely fail: see Chapter 5.
[114] See *Jackson* (n 47) and the common law rights cases quoted above.
[115] Allan (n 44) 23.

rationale is for preventing them from doing so or for criminalizing those who do help. The only reasons commonly put forward are those regarding the sanctity of life but this is an external moral consideration about how others ought to think or feel, which equal concern does not permit. Further, as I have stressed throughout this Chapter consistency of treatment is key and fundamental to the rule of law. As Allan suggests, evidence of an ill person's right to dignity and the following autonomy is clearly present in our own system. We allow a hospital patient to refuse medical treatment. As Lady Hale points out in *R (Nicklinson) v Ministry of Justice*[116] we have recognised that there are cases where those who are terminally ill but of sufficient mental capacity to give informed consent can decline assistance without which they will die.[117] As Allan says, if we recognise the freedom to end our own lives by refusing medical treatment or by suicide we should not differentiate between those cases and those who lack the "physical independence" to end their own lives.[118] Whilst of course recognising that a ban on assisted suicide is, in *general*, justified to protect those who cannot consent it is only justified to the extent of a legitimate difference; you cannot use a general ban to unjustly treat one group (here the physically incapacitated) as compared to another group (e.g. terminally ill but physically able). To not recognise that such differentiation does not turn on justified principle is a breach of the obligation to treat citizens with equal concern; as such, equal concern, which lies at the heart of the rule of law, recognises a right to end one's own life in limited circumstances.[119]

Recalling our discussion in Chapter 3 of the ECHR will also be useful here because we can see how ECHR rights operate in a similar way to domestic rights interpretation and application. There is therefore an analogy to be drawn. Throughout this Chapter I have argued that the common law sceptics are incorrect when they say that the common law does not touch the same rights as the HRA because it has not done so in the past. I have therefore rejected an empirical view of the common law and instead demonstrated that the common law is, instead, focused on *principle*; that is, the judicial function is to give judgment on difficult cases but in doing so they do not and should not just look to the past narrowly defined. Instead, they look to constitutional principle for their inspiration (specifically, the rule of law and all it entails).

We can recall how the ECtHR originally looked at empirical consensus in deciding the reach of

[116] [2014] UKSC 38, [2015] AC 657, [303] (Lady Hale).
[117] See *Re B (Consent to Treatment: Capacity)* [2002] EWHC 429 (Fam), [2002] 1 FLR 1090.
[118] Allan (n 44) 25.
[119] For a longer discussion on this issue see Allan (n 44) 23-6. See also Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthenasia* (Harper Collins 1993). Do note that says nothing of enforcement of that right; this will be discussed in the following two Chapters.

rights found under the ECHR. As pointed out in Chapter 3 the ECtHR looked to "present day standards" in interpreting the ECHR rights. This consensus shaped the reach of the rights. However, we also then went on to discuss how the ECtHR has now started to look for *values* underlying rights; that is, it now takes a far more *principled* approach to rights identification. As George Letsas says the:

> Court treats the ECHR as a living instrument by looking for *common values* and *emerging* consensus in international law. In doing so, it often raises the human rights standard *above* what most contracting states currently offer. It reasons mainly by focusing on the substance of the case.[120]

Where, then, is the difference between the common law and the ECHR's approach to rights identification? In recognition of rights, at least, we can see the two as being far closer than one would think. As pointed out above, almost by definition the common law does not give a catalogue of the rights it recognises. However, even whilst the ECHR and the HRA purport to do just that the meaning of those abstract rights only comes about after reflection on constitutional principle; this is exceptionally similar to the common law methodology. Both the ECHR and common law, both sets of rights, are best understood as concrete iterations of general constitutional principle and values, both recognise that substance is more important than form; it is therefore difficult to see too much substantive difference between them once this is understood.[121]

IV. Conclusion

This Chapter aimed to build on the methodology discussed in Chapter 2 and apply it directly to the identification of common law rights. That is, this Chapter looked at which rights we can say we have at common law. The aim was neither to be prescriptive nor to give a list; instead, the aim was far more modest in that I suggested that the majority of writers on common law rights took a flawed approach to the identification of rights. They use a narrow, empirical approach to try and

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[120] Emphasis added. See George Letsas, 'The ECHR as a Living Instrument: its Meaning and its Legitimacy' in Follesdal A *et al* (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 122.

[121] It is important to note that *this must be* understood for it to work; as I suggest throughout this Chapter (and indeed this thesis) what the common law rights are and what the judiciary says common law rights are are not wholly identical; there will be times when the judiciary fail to uphold or recognise a right that does exist at common law once one properly understands the systematic common law method described in this Chapter. One can recall Lady Hale's failure to engage in constitutional principle in *Moohan* to demonstrate this point. Whether or not the judiciary will uphold common law rights is a question of legal sociology and trust in the judiciary: it depends on the judges and their backgrounds and training (indeed, as said this may well be why Conor Gearty is sceptical of them). However, given their exposure to human rights due to the HRA we can hope that judicial awareness of principle and rights is now such that, absent the HRA, they would boldly protect the rights of the citizens against the state.

catalogue rights. This, I have argued, is unsuitable for how the common law works. Instead, a focus has to be had on the primary normative underpinning of the common law: that is, state action must be in accordance with law. This, I argued, reflects a commitment to anti-arbitrariness, which in turn recognises equality of concern for the dignity of citizens by the state. I then argued that whilst the common law cannot be catalogued or listed each right that the common law has recognised is a specific manifestation of principle; moreover, there is evidence that the judiciary recognise what they are doing because they rely on the rule of law to *justify* the recognition of a right at common law. By reflecting on the idea of equality of concern for the dignity of citizens we can see a vast array of common law rights; treating citizens with an equality of concern means you cannot stop them protesting just because we disagree with their views; we cannot stop people voting because they are somehow undesirable characters or most people think a certain type of person should not vote; and we cannot stop them or punish their family for ending their lives with assistance when they are of sound mind and wish to do so. Of course, there are situations where it is permissible to stop such actions but these must be objectively justified; that is, the state must show equal concern for the dignity of its citizens when it stops citizens from exercising a purported liberty. Thus, for example, you can stop citizens protesting if you know the protest is going to result in a large amount of violence; you can stop people voting if they are below a certain age; and you can stop them ending their own lives with assistance if there is a real risk they might have been influenced to do so (thus meaning it is not a real choice). The law, in its role as a protector against arbitrariness, should recognise all of these rights and more *even if* it has not already done so; what has been done in the past is not constitutive of the entire legal landscape now. Decided cases are only specific manifestations of the broader principle and it is on that principle that this Chapter has focussed.

Once we recognise this then, I argue, arguments about the common law and common law rights start to flourish; they take place on a richer landscape. Instead of focusing on past decisions narrowly conceived we can focus on the principles those decisions enunciate. This, I argued, produces the practical effect of focusing lawyers' and judges' minds on the substance of the dispute before them. Likewise, as I argued toward the end of this Chapter, it shows that the differences between the common law and HRA, which incorporates the ECHR, are in form only. In terms of legal reasoning both do the same: they focus on the principles underling law to justify which rights they recognise. There is little reason, therefore, to doubt that the common law, properly understood, can recognise the entire range of rights protected by the ECHR; in substance, there is little between them.

Chapter 5

Rigour of Protection I: Common Law Rights Review of Executive Action

I. Introduction

In the previous Chapter I examined which rights the citizen can claim against the state at common law. My argument was simple: what rights you have at common law cannot be found in any definitive "list" but that does not mean that they are not there. Rather than focusing on trying to empirically determine such a list focus should be given to the rule of law, which, I argued, underpins rights hitherto not explicitly recognised by the judiciary.

I also stated, however, the recognition that a right exists tells us nothing about its enforcement or how it works. Saying that I have a right does not tell us what happens in a situation where a state actor seemingly interferes with that right. For example, imagine that I am a campaigner who believes that abortion is tantamount to murder and I wish to publicly campaign on Oxford Street with graphic images to say as much. State agents try to stop me doing this either entirely or only let me protest down a narrow side street with far fewer people. I argue that these state agents have infringed my rights to free speech. The state agents argue that they wish to limit my exposure to people during my protest because (a) my views are abhorrent; (b) the way I wish to express my views, with graphic images, would distress many people and I do not have a right to emotionally hurt others; (c) it is impracticable to provide me with safe passage in Oxford Street; and (d) they are not infringing with the right because I have the ability to protest elsewhere. On the methodology described in the previous Chapter we see that there is at least a *prima facie*[1] right of free speech here but what does that mean in practice? Do the judiciary enforce the right? If so, then how? Does it matter what kind of state actor it was? If so, then what differences emerge and why? Should we give deference to state actors? If so, then when and how? Do the political or judicial branches of the state protect rights best? Or is it not so clear-cut and might who is best placed to protect rights change depending on the circumstances?

These are questions that need to be answered if we are to understand common law rights. However, due to the complexity of the questions and the answers I have broken them down in the following way: this Chapter looks at review of the executive's action. If an action has

[1] That is, it looks as if there might be a right in the circumstances but investigation of the facts is needed to see if there is.

purportedly interfered with common law rights then what should happen when reviewing that action? The next Chapter (Chapter 6) will look at what happens when a statute seemingly interferes or seemingly authorises an interference with a right and how the courts should approach such statutes. The Chapter following that (Chapter 7) will then deal with a most fundamental question of constitutional law: what happens when the legislature and the judiciary are at loggerheads over a rights issue? Inevitably, there is an overlap between the issues raised in each of these Chapters; questions of separation of powers, interpretation, and so on run through them all but I have separated them to make them manageable.

As to the current Chapter the focus will be on rights review at common law. This, in part, recalls the *Wednesbury*[2]/proportionality debate[3] but also looks at process review and the relationship between substantive and procedural review at common law. I argue the following: since common law rights in part act as reason blockers the courts should first examine the reasons for executive action; if such action is based wholly or mainly on external preferences then the courts ought to say that the executive has acted arbitrarily, inconsistently with the rule of law, and been influenced by improper purposes and/or irrelevant considerations and their act is void.[4] The first substantive part of this Chapter focuses on process review in the form of irrelevant considerations; it recognises that many reasons the state may give for treating someone differently to the majority are (morally, legally) irrelevant. They simply do not give a good reason and, as such, must be excluded from decision makers' minds. This is something often overlooked in HRA jurisprudence, where the focus is on *substance* but rarely *process* yet the right not to be treated arbitrarily is infringed where irrelevant considerations have been taken account of. This is not about balancing (which comes later) but about ensuring that the decision making process does not take account of things that do not count as justifiers for different treatment in line with the rule of law.

If, however, the executive was not so motivated then we can move to substantive review proper; even if not motivated by hostile preferences has the executive shown little regard for citizens' dignity? This is where the balancing of (legitimately) competing interests becomes relevant. Recall

[2] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).
[3] See Anthony Lester and Jeffrey Jowell, "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 368; Michael Taggart, "Proportionality, Deference, *Wednesbury*" [2008] NZLR 423; Paul Craig, "Proportionality, rationality, and review" [2010] NZLR 265; Tom Hickman, "The Substance and Structure of Proportionality" [2008] PL 694; Tom Hickman, "Problems for Proportionality" [2010] NZLR 303; Sir Philip Sales, "Rationality, proportionality, and the development of the law" [2013] LQR 223; Section 1 of Wilberg H and Elliott M (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015); and Rebecca Williams, "Structuring substantive review" [2017] PL 99.
[4] This recalls the first stage of proportionality- the requirement of a legitimate aim- on which see Chapter 3.

in Chapter 4 we discussed how even if motivated by non-external reasons the state can still act in a way that does not show such regard; there are circumstances in which the state acts arbitrarily even if it has objective reasons for action. The argument is that the courts, at common law, are essentially looking to see if the executive has acted arbitrarily, which it cannot do because such behaviour is the antithesis of the rule of law. Whilst this is a binary question (you either have acted arbitrarily or you have not) instrumental, though as will be discussed, not democratic, deference may play its part to allow the executive some latitude. In this sense, what matters is intensity of review and deference and I reject or at least side-line the distracting debate about whether *Wednesbury* should replace proportionality and instead focus on the real debate: how should state institutions relate to one another when certain issues (here, human rights) are in play?[5]

II. Process Review and Common Law Rights

It is axiomatic to say that when an executive body has purportedly interfered with human rights then a wide range of arguments may be available to the claimant. She may argue that not only has a right been curtailed but that the decision maker fettered their discretion; has unlawfully delegated his authority; has not given notice; has not given reasons; and so on. All of these are clearly important ways in which a claimant may expose the illegality of the state's actions towards her but are not directly examined here. The main focus of this section is irrelevant considerations. The aim is to examine how the common law correlates to the HRA. Irrelevant considerations reasonably correlate to the idea of a body needing to follow a "legitimate aim" in order to satisfy the proportionality test under the HRA.[6] Before moving to how this works in the common law rights arena it will be useful to provide an overview of the doctrine itself.

Lord Greene MR, in *Wednesbury*[7] gave, perhaps, the most famous formulation of the relevant/irrelevant considerations doctrine when he said that:

> It is true the discretion must be exercised reasonably. Now what does that mean? … a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to

[5] This is what Mark Elliott is arguing for when he says that "It is paradoxical that while the debate about substantive review is in fact a manifestation of deeper institutional and normative disputation, much of it consists of disagreements that are (at least superficially) doctrinal in nature": Mark Elliott, "From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification" in Wilberg H and Elliott M (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 62.
[6] See Chapter 3 and *Bank Mellat v HM Treasury* [2013] UKSC 38, [2014] AC 700, [74] (Lord Reed).
[7] *Wednesbury* (n 2).

> consider. *He must exclude from his consideration matters which are irrelevant to what he has to consider*. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."[8]

There are three types of consideration that decision makers often have regard to: those that must be taken into account; those that may be taken into account; and those that may not be taken into account.[9] The focus here shall be on the third of these: namely, considerations that may not be taken into account since I am arguing that the right not to be treated arbitrarily means that some things cannot be taken account of without violating that right; the aim here is to know what kind of things these are. As we saw above, Lord Greene MR held that the general position is that a decision maker will be acting unreasonably (and therefore his decision will be void) if he takes account of considerations "which are irrelevant to what he has to consider". However, to be more precise it is not the case that a decision maker must not even be aware of such matters; it is only that he cannot allow himself to be influenced by such a consideration.[10]

An excellent example of the irrelevant considerations doctrine is *R v Secretary of State for the Home Department, Ex p Venables*.[11] This was a case that arose out of the murder of a child by two young children, Robert Thompson and John Venables. At the time the Secretary of State for the Home Department had the power to amend the minimum length that the two should serve before being eligible for release. The Home Secretary informed Thompson and Venables that the tariff would be 15 years with a review not taking place before 12 years' incarceration. In coming to this opinion the Home Secretary had taken account of correspondence, petitions from the public, and newspaper articles that generally sought a harsh punishment for the two of them. They sought judicial review of the decision. The question in the case was whether the decision was reached in a way "which was procedurally unfair to [the applicants] and was thus an improper exercise of the discretion which is vested in [the Home Secretary]".[12] Lord Hope said that the Home Secretary "wrongly took into account in fixing his tariff of material derived from public petitions and through the media".[13] This material was "wrongly" taken into account because it was "irrelevant" and "should have been left entirely out of account".[14] Yet *why* was this material irrelevant?

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[8] Emphasis added. ibid 229 (Lord Greene MR).
[9] *R v Somerset County Council Ex p Fewings* [1995] 1 WLR 1037 (CA), 1049 (Simon Brown LJ).
[10] See *Hanks v Minister of Housing and Local Government* [1963] 1 QB 999 (HC), 1020 where Megaw J said that the normal position is the taking account of irrelevant considerations renders a decision void but there may be times when the consideration played an "insignificant" role.
[11] [1998] AC 407 (HL).
[12] ibid 537 (Lord Hope).
[13] ibid 536 (Lord Hope).
[14] ibid (Lord Hope).

Lord Steyn seems to give us two reasons, which helps inform us of what *makes* material irrelevant. First, the material the Home Secretary specifically took into account was "worthless and incapable of informing him in a meaningful way of the true state of informed public opinion…I mean the public opinion formed in the knowledge of all the material facts of the case. Plainly, the 'evidence'…did not measure up to this standard. It was therefore irrelevant".[15] Lord Steyn is making the point that even if something *could* be relevant, in that it has the *potential to be* relevant, it might not be if it is not diagnostically valuable.

The second reason that the material was irrelevant in this case is "more fundamental".[16] The Home Secretary in this case was carrying out a quasi-judicial role: "in fixing a tariff the Home Secretary is carrying out…a classic judicial function". It is obvious, Lord Steyn suggests, that a judge must ignore newspaper campaigns because "it would be an abdication of the rule of law for a judge to take into account such matters…He ought to concentrate on the *facts* of the case".[17] Indeed, "the power given to [the Home Secretary] requires, above all, a detached approach".[18]

It could be suggested that the reason public opinion could not be taken account of was because of the quasi-judicial function the Home Secretary was undertaking. However, I suggest that it goes deeper than this. The rule of law limits when and what kind of public opinion may be taken account of because the rule of law promises protection against arbitrary treatment. There will be some cases when public opinion can be sought.[19] However, that does not mean that all types of public opinion can be relevant; as was made clear by the House of Lords an unrepresentative sample of public opinion cannot be a relevant consideration.

As stressed in Chapter 4, the rule of law, which both is, and is recognised to be, the controlling factor of the constitution, precludes arbitrary behaviour by decision makers; arbitrariness is the antithesis of the rule of law. Differences in treatment, therefore, have to be justified and by justification we mean an objective moral justification; not all differences count. Only differences predicated on morally significant reasons can legitimate differing treatment between persons or groups of persons. The law, in this way, is concerned with equality of concern for citizens. It is here that irrelevant considerations become relevant to common law rights.

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[15] ibid 525-6 (Lord Steyn).
[16] ibid 526 (Lord Steyn).
[17] Emphasis added. ibid (Lord Steyn).
[18] ibid (Lord Steyn).
[19] Indeed the courts often require consultation in things such as, *inter alia*, planning applications.

We can view *Venables* through this lens. The difference between Venables and Thompson and a similarly situated murderer(s) who had been sentenced and had their tariff fixed by the Home Secretary is that there was a frenzy of media publicity and a public outcry around the pair that was unusual in terms of magnitude. Their crime must be treated the same as anyone who had committed a crime with similar facts. The media rage does not count as a legitimate differentiator. Crimes ought to receive a proportionate punishment. We expect, for reasons of public safety, rehabilitation, and deterrence, to punish those who offend. There is clearly no breach of a right if the state detains someone in a prison after they have been convicted of a serious crime. There is no issue with that being the case. The problem arises when you treat one offender differently from another on external grounds. The rule of law does not allow you to treat two similarly situated people differently for no good reason. An offender whose crime happens to catch the public's imagination does not deserve to be punished more harshly; he is not situated differently to an offender who has not caught such attention. The moral right to be treated with equal concern grounds a right to be treated with equal concern for your dignity; you must be treated with objective reason. When it comes to rights issues this means objective considerations, not ones based on personal preferences, politics, or gains. Clearly there will be times when personal preferences should count (should vacant land be used to build an opera house or a rock concert hall?) but when it comes to detrimental or differing treatment of an individual or identifiable group of individuals external preferences cannot count; they are irrelevant.

The orthodox view may well go against this. A "black letter" public lawyer may say that relevant considerations are not to do with the rule of law but statutory purpose. Therefore, we only need to look at the purpose of the statute to know what is relevant and irrelevant to making a decision under that statute. The rule of law does not come into it. Here, the orthodox lawyer seemingly has a point. Indeed, *De Smith's* says, "the question in regard to the considerations taken into account in reaching a decision is normally whether that consideration is relevant to the statutory purpose".[20]

I take no issue here with the idea that the relevancy or irrelevancy of considerations flow wholly or partly from the underlying statutory purpose. However, this in isolation does not take us very far in the present context as it invites the following question: how do we know what a statutory

[20] Woolf *et al*, De *Smith's Judicial Review* (2018 Sweet and Maxwell) [5-128].

purpose is or involves? If the relevancy or irrelevancy of considerations is premised on Parliamentary intention then we must enquire into a problem that will be addressed in more detail in Chapter 6, namely, how should courts interpret legislation?

There are many techniques used when interpreting legislation.[21] Suffice to say for the present Chapter that the common law, in line with the rule of law, holds a presumption that Parliament does not intend to legislate in a way that would cut across human rights.[22] As shall be explored in Chapter 6, legislative purpose cannot (at least ordinarily) be taken to mean anything that would disrespect the rule of law and constitutional principles.[23] Statutory purpose, on an orthodox view, comes from Parliament but, as is relied on throughout this thesis, Parliament's powers are themselves limited by the rule of law, which acts as the controlling factor in the British constitution and is therefore inherent or implied into legal power(s).[24] Therefore, when examining the statutory purpose for which powers have been granted to the executive said purpose cannot, in any way, be seen as refuting the rule of law. Instead, purpose must be read in line with the rule of law so that the former does not threaten the latter. T R S Allan puts this idea best when he says:

> Every case involving the application and interpretation for a statute calls for an accommodation of legislative purpose and legal principle…Just as it would be an affront to representative democracy for a court to disregard a statute's general purposes or ignore its specific provisions, so it would infringe the rule of law if a court invoked either purpose or text to justify the inflict of unnecessary damage to the rights of individuals.[25]

The rule of law demands the non-arbitrary treatment of citizens by state officials.[26] This is the same as saying that there is a moral right, enshrined in law, to claim that the state must treat you with equal concern for your dignity. It is about equality of the citizen before the law; this equality requires non-arbitrary behaviour by the state. Therefore, if we cannot see statutory intent as excluding or in any way cutting across the rule of law then we cannot see relevant and irrelevant considerations as capable of doing so; what is relevant and what is irrelevant is shaped by the rule of law. When decision makers are granted wide discretionary powers by statute they must act in

[21] Recall Chapter 2 for a discussion on this in the context of *Evans*.
[22] What this means shall be discussed more fully in Chapter 6. For now, see T R S Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 169 and *Regina v Home Secretary, Ex p Simms* [1999] 2 AC 115 (HL), 131 (Lord Hoffmann).
[23] See Allan (n 22) 169 and Chapter 5 as a whole.
[24] See Chapters 2 and 4 as well as *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 and Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28(4) OJLS 709.
[25] Allan (n 22) 174.
[26] I make the argument for this in Chapters 2 and 4 and do not intend to repeat them here.

accordance with the rule of law since they can only act within their powers and their powers are shaped by the rule of law.

Therefore, when a decision maker is acting under an Act he must act within the general purpose, which is itself understood by constitutional context. Let us use an example of how this combines common law rights, as discussed in Chapter 4, with tangible protection at law. Imagine an Act called the Adoption Act 2017 gives powers over adoption to a public agency. The Act states that officials working for this agency must certify whether a couple is suitable for adoption taking account of "the best interests of the children". The Act says nothing about what facts go towards this. A decision maker receives an application from a lesbian couple; both are in well-paying jobs; both have lots of experience with children; and their relationship is strong and stable. On paper they are a great couple to adopt. Yet the decision maker refuses to certify the couple as suitable for adoption because "whilst they are good candidates children's best interests are served by being brought up in the traditional family". Whilst stressing that he is not in any way personally hostile to same-sex couples he does believe children are best placed with a family that has an opposite sex couple.

Under the HRA framework, as discussed in Chapter 3, we would say that this is a disproportionate interference with the rights of the lesbian couple if one can say that there is a right to adoption under Article 8 read with Article 14.[27] Yet it seems to me that we do not need to go to substantive review proper in cases such as this. Instead, the idea of equality of concern for everyone's dignity, that is, the right to be treated as a moral equal and therefore not arbitrarily as the rule of law stipulates, provides redress for the lesbian couple at common law. Recall in Chapter 4 how I said that the rule of law encapsulates the idea that decision makers cannot treat you arbitrarily; when treating you differently from other citizens they must show that there was an objective, morally justified reason for doing so. So when depriving someone of an opportunity (here adoption) or a liberty (let us say the right to vote) some reasons will not be capable of justifying such deprivations. If an action is predicated on external preferences then these are not objectively justified and thus the right is violated.

[27] *Cf Fretté v France* ECtHR 26 February 2002, Application No 36515/97; and *EB v France*: ECtHR 22 January 2008, Application No. 43546/02. In the former the ECtHR said that refusing adoption based on sexual orientation did not violate Article 14 when read with Article 8 because there was no right to adopt found in Article 8. This was reversed in *EB*.

As I argued above this idea can be seen and incorporated into the idea that decision makers must exclude irrelevant considerations from their minds when making a decision. If they do not then they are not treating someone as a moral equal, and are thus acting against the rule of law, which is something they cannot do if they wish to remain within the bounds of their legal power since statutory powers must be read in line with the rule of law. In the example of the lesbian couple wishing to adopt the couple does not have to challenge the decision on the basis that that they have some sort of freestanding *human right* to adopt; it would be a stretch to argue such a right exists on its own.[28] Instead, they argue that the decision maker erred by depriving them of the *opportunity* to adopt (when they otherwise meet the criteria) based on an *irrelevant consideration*. The sexuality of the couple is not relevant to a decision of whether or not they can adopt without evidence that same-sex couples are generally worse parents than heterosexual couples.[29] As George Letsas explains, in such a situation the executive would have violated a "*reason-blocking* right of [the applicant], namely her right that the government does not deprive her of a liberty or an opportunity on the sole basis that the majority is prejudiced against her way of life…no real balancing is taking place here".[30] It would be different if there was substantial, objective evidence that a lack of male parenting is detrimental to a children's best interests. Likewise, whilst this is a general example there may be specific cases were the same does not hold true; for example, a teenager brought up in a very strict religious household may have a high personal animosity towards same-sex partners. In such a situation it might well be quite right to same the lesbian couple cannot adopt him as it would not be in his interests.

II.A. Assessment of Relevant Considerations: Standard and Intensity of Review

I stress that the decision in the example above ought to be *in theory* quashed for a simple reason: I had given a clear-cut example of a hypothetical decision. Unfortunately, decisions are rarely so clear cut either in terms of whether a consideration in a particular case *is in fact* irrelevant or in terms of *which considerations did the decision maker in fact* take account of. Only the first will be looked at as the second involves evidential procedures, which fall outside the scope of this thesis. It is often difficult to know whether a consideration was irrelevant or not. How we go about this is

[28] See George Letsas on this: George Letsas, "The Scope and Balancing of Rights: Diagnostic or Constitutive?" in Brems and Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in determining the scope of human rights* (CUP 2014) 60-3.
[29] Even then, to avoid an over wide general rule the state would have to show how the couple applying *are in fact* worse parents; a general rule that same-sex couples cannot apply is simply not good enough.
[30] Emphasis added. Letsas (n 28) 53.

obviously critical to *enforcement* of the right to be treated non-arbitrarily at common law.[31] To assess common law rights we need to know how they are protected not just what they are.[32] Whether a consideration was irrelevant raises questions to do with the *standard* and *intensity* of review undertaken by the courts of a decision maker's decision. These are terms I borrow from Mark Elliott and correlate to the following: how *heavy* is the burden on decision makers and has the burden *in fact* been discharged and how do we go about assessing this?[33] For example, if a decision must be shown to be necessary then this is the standard of review. However, this says nothing about whether, in that particular case, the standard has in fact been met, which "involves assessing the quality of the justification" offered by the decision maker,[34] which can involve adjudicate deference.

II. A1. Standard of Review

In the case of irrelevant considerations the standard of review is something that is "almost universally assumed to be correctness",[35] which means that the courts will intervene to correct any mistake that exists. If a consideration has been taken account of that the courts view as irrelevant then the courts will intervene; there is a *right answer* to whether a consideration is or is not relevant. The traditional view has been that this involves "no deference at all"[36] and this is backed up by the few cases where the courts have explicitly looked at this.[37] The starting point is that "under our constitution…it is the function of the courts and not of political bodies to resolve legal questions".[38] This is premised on the fact that the High Court is the "only part of the judicial branch which is sufficiently independent of the legislature and the executive to be able to impose any meaningful check or balance upon them".[39] Indeed, this independence seems to go towards the idea that questions of law are "the area in which the judicial branch can claim a

[31] Here I use right in the sense that a citizen does indeed have a legal right against decision makers not to be treated arbitrarily. This right, inherent in the rule of law, shapes different doctrines of administrative law. This says nothing explicitly about how rights fit into different models of judicial review. For reasons of space this is precluded from discussion in this thesis.
[32] What common law rights are was discussed in Chapter 4.
[33] See Elliott (n 5) 70.
[34] ibid 71.
[35] See Hanna Wilberg, "Deference on Relevance and Purpose?" in Wilberg H and Elliott M (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 266.
[36] ibid 265.
[37] Eg in *Padfield v Minister of Agriculture, Fisheries, and Food* [1968] AC 997 (HL), 1030 the House of Lords made clear that if a decision maker acts for a purpose other than a statutory purpose then the persons aggrieved by the decision must be entitled to the protection of the court. Likewise, in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 764 Lord Keith held that "it is for the courts…to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant…his decision cannot stand".
[38] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, 102 (Lord Bingham).
[39] Ivan Hare, "The Separation of Powers and Judicial Review for Error of Law" in Forsyth C and Hare I (eds), *The Golden Metwand and Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Hart 1998), 132.

special expertise".[40] So a decision maker will be given no inherent latitude in determining whether a consideration is or is not relevant; instead, the courts will determine whether a factor is *in fact* an irrelevant factor. If it is then the decision falls within illegality and is therefore void.

This approach fits within the framework that I articulated above. A consideration, on my account, is either relevant or it is not so there is a right answer: a consideration cannot be "kind of" irrelevant. It can be "maybe" irrelevant in the sense that we find it hard to know whether it is or is not irrelevant but that does not detract from its actual status either way; it may be hard to know whether a consideration is *in fact* irrelevant but epistemological difficulties do not affect a consideration's status as such. Issues revolving around a decision maker's legal powers and which considerations can legally be taken account of is just that: a legal question. As Cranston J makes clear in *R (UNISON) v Monitor*[41] "it would not be comfortable with the rule of law for [executive decision makers] to be given free rein…to interpret legislation in whatever manner they wished."[42] That is, the rule of law, which is essentially a commitment to non-arbitrary behaviour, must, as a corollary of that commitment, ensure that decision makers are faithful to law: there is no faithfulness to the law if decision makers are simply allowed to decide for themselves what the law requires of them. That is not to say there will not be circumstances in which a decision maker will earn deference and I discuss this below. It is only to say that the starting point is that it is not for decision makers to interpret the boundaries of their own powers.

As argued above, the rule of law means that decision makers cannot take into account irrelevant considerations; therefore, whether a particular consideration is in fact irrelevant is a question of law. It flows from the rule of law. It would render the rule of law an empty shell to say all of this but then to hold that decision makers can decide for themselves what the rule of law requires without justification. It would allow arbitrariness to contaminate the (legal) decision making process, which the rule of law stands against. Indeed, a commitment to consistency and judicial enforcement of the rule of law can be seen in many cases,[43] which as I have argued throughout demonstrates a commitment to and an understanding of the rule of law; as Rothstein J put it

[40] ibid.
[41] [2009] EWHC 3221 (Admin), [2010] PTSR 1827.
[42] ibid [60] (Cranston J).
[43] See e.g. *Anisminic Ltd v Foreign Compensation Commission and Another* [1969] 2 AC 147 (HL), 174. Likewise, in *Pearlman v Keepers of Harrow School* [1979] QB 56, 70, Lord Denning MR held that the correctness standard on points of law is important because "it is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in which court it is heard". Likewise, see the emerging consensus that policy must be read objectively by the courts and a decision maker, acting on an incorrect understanding of the policy (i.e. an understanding that the court does not think is the correct one) falls into illegality: *Secretary of State for Communities and Local Government v Hopkins Homes Ltd* [2016] EWCA Civ 168, [2017] 1 All ER 1011.

bluntly in the Canadian Supreme Court "divergent applications of legal rules undermine the integrity of the rule of law".[44]

II. A2. Intensity of Review

Whilst the standard of review is correctness this says nothing about *intensity of review*. Whilst the correctness standard applies, in that the consideration taken is either relevant or irrelevant and that is a question for the courts to decide, it is obvious that knowing whether or not something is relevant will not always be easy. As Paul Craig says "what are relevant considerations…will often not be self-evident"[45] and identification of relevant considerations is not a self-executing exercise.[46]

How then should the courts proceed? The first point to note here is that there is nothing wrong with saying that, where the circumstances justify it, a degree of adjudicative deference ought to be given to decision makers by the courts. As stressed above, there is a right answer to whether a consideration is relevant or not; the court's function is to find out whether someone's rights have been breached. In the example I gave of a lesbian couple seeking to adopt the court's role is to assess whether or not the couple's rights have been violated: more abstractly, has the executive treated them arbitrarily or not? The court's function is diagnostic: a consideration is either relevant or it is not and the court's job is to discover if said consideration is or is not relevant. There is nothing in this to suggest that this means the court must decide for itself without taking account of the executive's views on a case. It is not an abdication of judicial duty, within this framework, to give deference to a decision maker; indeed, given that the court is seeking the right answer to a case it is an abdication of duty to not listen to expert opinions. The duty on the court is to try and find the right answer; often, this will mean relying on expert decision maker's evidence. It is in this vein that this section continues.

The starting point is that intensity of review should be based on getting the right answer. This is key and underpins the discussion on deference. Deference plays its part but not deference as enunciated under the HRA. It will be useful to recall that, in Chapter 3, we looked at the twin pillars of deference: "the first is the constitutional principle of the separation of powers. The

[44] *Canada (Citizenship and Immigration) v Khosa* [2009] SCC 12, [2009] 1 SCR 339, 394 (Rothstein J). I should stress here that divergence is, of course, justified where the circumstances justify it.
[45] Paul Craig, *Administrative Law* (Sweet & Maxwell 2016) [19-003].
[46] ibid [19-018].

second is no more than a pragmatic view about the evidential value of certain judgments of the executive, whose force will vary according to the subject matter".[47] We can loosely term these types of deference as (i) democratic; and (ii) instrumental. The former is based on the status of the decision maker; it is, as Lord Sumption says, about "respect for the constitutional functions of decision makers who are democratically accountable".[48] The latter is about institutional competence, to reiterate what Lord Sumption said about this:

> It does not follow from the court's constitutional competence to adjudicate on an alleged infringement of human rights that it must be regarded as factually competent to disagree with the decision-maker in every case or that it should decline to recognise its own institutional limitations…. the executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her.[49]

I argue that democratic deference is of little use in relation to questions of law for the following reason: it is of no inherent epistemological value. It gets us no closer to the right answer; it does not assist in the diagnostic function of the court. I rely on instrumental deference in relation to questions of law. When we come to substantive review proper I will argue that, when adjudicating on exercises of discretion, both instrumental and democratic deference can have a role to play but the latter's role is much more minimal than the former's.

As stated above the role of the court in a human rights case is diagnostic: has a right been breached or not? The courts saying it has or has not does not *change the fact* of the breach. As elucidated in Chapter 4 this means, in part, that a decision maker cannot take account of irrelevant considerations when considering whether to subject someone to a detriment or deprive them of an opportunity; to do so breaches the rights of the individual in that the decision maker is not acting with equal regard to the citizen's dignity. Whether a consideration is or is not irrelevant is, as I have said, a binary construct: it is relevant or it is not. This is why we have a correctness standard in such cases. It follows that intensity of review has to be about whether or not the consideration was in fact irrelevant. Factors affecting the intensity have to be linked to this epistemological aim: is there something about the decision making process or the decision maker's qualifications that justifies more weight being given to their views? The starting point is

[47] *R (Lord Carlile) v Home Secretary* [2014] UKSC 60, [2014] 3 WLR 1404 [22] (Lord Sumption).
[48] ibid [28] (Lord Sumption).
[49] ibid [32] (Lord Sumption).

that it is for the judges to decide whether a consideration is irrelevant and, as pointed out above, they may give weight but it does not abdicate them of their role.[50]

Often lurking behind the label "democratic deference" lie epistemological qualifications. In *R v DPP, Ex p Kebilene*[51] Lord Hope said "the judiciary will defer, on democratic grounds, *to the considered opinion* of the elected body or person"[52] but then goes on to say that deference "will be easier…to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts *are especially well placed to assess* the need for protection".[53] Indeed, even in *Carlile* where Lord Sumption defends democratic deference he does so on the basis that there are particular areas where respect should be accorded to the democratically accountable body: examples include policy choices, broad questions of policy, or the allocation of resources.[54] If the deference comes from the pedigree of the decision maker then it is hard to see why deference attaches itself in certain cases or, in Lord Hope's words, in cases where they have a "considered opinion". It seems that democratic deference is often used as shorthand for a type of instrumental deference: whilst it seems to attach due to the pedigree of the decision maker it only does so in particular areas where the decision maker has particular areas of expertise or has a considered opinion.

This comes out in *R (Nicklinson and another) v Ministry of Justice*,[55] where Lord Mance held that "whether a statutory prohibition is proportionate is, in my view, a question in the answering of which it may well be appropriate to give very significant weight to the judgment and choices arrived at by the legislator".[56] However, whilst this seems to be based on the premise that democratic institutions get deference this is not so: Lord Mance bases his views on "questions of institutional competence", specifically on the basis that "these may well be issues with which a court is less well equipped and Parliament is better equipped to address [than the courts]…On some issues…the judiciary can claim greater expertise than it can on some others. The same applies to the legislature".[57]

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[50] Indeed, as noted in Chapter 3 deference does not include abdication of the judicial function under the HRA. See Jeffrey Jowel on this point, where he makes clear that whilst it is constitutionally legitimate to give latitiude where the circumstances justify it it is not on the basis that the courts lack constitutional authority to decide the case: Jeffrey Jowell, "Judicial Deference and Human Rights: A Question of Competence", in Craig P and Rawlings R (eds), *Law and Administration in Europe, Essays in Honour of Carol Harlow* (OUP 2003) 73-5, 80.
[51] [2000] 2 AC 326 (HL).
[52] Emphasis added. ibid 381 (Lord Hope).
[53] Emphasis added. ibid (Lord Hope).
[54] *Carlile* (n 47) [28] (Lord Sumption).
[55] [2014] UKSC 38, [2015] AC 657.
[56] ibid [164] (Lord Mance).
[57] ibid (Mance).

It is hard to see what epistemological utility democracy alone serves. It is true to say that a democratically accountable decision maker is often well informed, undertakes a holistic process, has specialist advisors, has particular expertise and so on. This may justify deference. But it is not the mere fact of the label "democratically accountable" that ought to give rise to deference on questions of law. To put it simply, just because a government minister is democratically accountable does not mean that his views on, for example, the relevancy of sexuality to adoption are worth any more weight. His thinking that sexuality is relevant to adoption does not *make it the case* and the courts would be mistaken to act as though it does. This can be contrasted with a case where the relevant decision maker does have particular expertise, has undertaken a thorough process, and is well informed: here, her views *do* carry more epistemological weight, which, when compared to the relevant judge's expertise, may justify an amount deference. Indeed, this gains support when we recall the above discussion of the standard of review: the court's correctness standard seemed premised on the idea of the High Court's special expertise in answering questions of law. Whilst the general position is correctness with a high intensity of review this is based on the idea that "appellate and reviewing courts have greater law-making expertise *relative to* trial judges and administrative decision makers".[58] Where the decision maker has greater expertise the intensity of review ought to be lower; whilst the standard is correctness (in that there is one right answer) the latitude that the courts should give decision makers may well vary based on expertise.

Indeed, it seems to be that instrumental deference may have a large part to play in questions of law. What is relevant or irrelevant can, as stressed above, be a complex question. Whether an irrelevant consideration has been taken account of, sufficient to violate equal concern for one's dignity, can be difficult to assess. As Paul Daly puts it, "It may well be the case…that the delegated decision-maker has greater familiarity with the purposes of the statute than a reviewing court"[59]. More specifically, as Wilson J put it in the Supreme Court of Canada "we must recognise…that [tribunals'] decisions are crafted by those with specialized knowledge of the subject-matter before them"[60] and courts "may not be as well-qualified as a given agency to provide interpretations of that agency's constitutive statute".[61] Likewise a court may not always

[58] Emphasis added. *Canada (Citizenship and Immigration)* (n 44) 394 (Rothstein J).
[59] Paul Daly, *A Theory of Deference in Administrative Law: Foundations, Application, and Scope* (CUP 2012) 244.
[60] *National Corn Growers Association v Canada (Import Tribunal)* [1990] 2 SCR 1324, 1335 (Wilson J).
[61] ibid 1336 (Wilson J).

be well placed to decide if a consideration has legitimate objective value and is therefore relevant. The key question when it comes to intensity of review on questions of law is relative expertise.

In short, the court's function is to get the right answer: is the consideration relevant or not? This requires difficult decisions of judgment. The court is entitled to defer to a decision maker's decision (or give strong weight to it) if the decision maker is *more likely*, by virtue of *expertise* and the *process undertaken*, to get the right answer. This means that a judge has a responsibility to assess evidence and, part of doing so, will include looking at the qualifications of the decision maker. Let us imagine a different, though topical, adoption case to the one used above. A couple that are well qualified for adoption are practising Muslims. They apply to adopt a child. There are no children up for adoption in the local borough that are of a similar background. There is, however, a four-year-old child who is from a practising Christian background. The couple says they would happily adopt this child and raise her. Another couple, assessed as not being quite as good as the former couple, also request to adopt this child. This couple are Christians. The decision maker, in his assessment, decides that, whilst, religion aside, the Islamic couple would score slightly higher than the Christian couple, he will allow the latter couple to adopt. The Islamic couple are told that they will no doubt make great adoptive parents and, should a child of Islamic or no particular religious origin come along, they will be first in line. They are also told that there is no bar on them adopting a child with a Christian background but, in the points-based exercise the decision maker undertakes, he considers religious background relevant to children's best interests.

Imagine the Islamic couple then challenge this. They say, in line with our example involving the lesbian couple, that this is an irrelevant consideration in that it has no objective basis and thus violates the rule of law because they are being treated differently to another similarly situated couple (i.e. a couple with the same financial stability, parenting skills, etc.) on the basis of an external consideration (in this case their religious beliefs).

In response the decision maker,[62] the hypothetical Minister for Adoption and Child Welfare, a government minister and elected Member of Parliament, says that the consideration is relevant. He has not treated the couple differently on the basis of morally arbitrarily external considerations. Instead, he has, in formulating his policy, listened to experts who say that children, in their formative years, need stability and therefore it is best to keep children in similar

[62] Of course in real life the decision will have been taken under the Minister's name by an official of requisite expertise due to the *Carltona* doctrine.

religious backgrounds to their own if possible during the adoption process. The experts who have told him this have all got degrees in childhood psychology and have published papers on the influence of adoption on children's development, including one person who specifically looked at the effect of religion on children's development. The Minister explains that this is not a bar on adopting children from different religious backgrounds but operates to give a priority to those of the same background because the experts have told him that this goes towards the best interests of children *not* because of any external religious hostility.

The court has to decide whether the religious background of the couple is a relevant or irrelevant consideration. As we stated above, a consideration is irrelevant if it is morally irrelevant in the sense of being an arbitrary consideration. External preferences are irrelevant. However, in this case the Minister is not arguing that Islamic couples should not be allowed to adopt but, instead, the best interests of the child in question will be affected by the social-religious backgrounds of their adoptive parents. A Minister who presents well informed expert evidence that such a consideration *is in fact* relevant because it *does in fact* affect children's well-being should be accorded a degree of instrumental deference: whether or not the Minister in the case *is in fact right* will depend on the quality of evidence he has adduced; if he can point to a large number of well-qualified experts on whom he has relied then he is *more likely* to be right about the relevancy of the consideration.

As stated throughout this part, a decision maker has to only take account of relevant considerations; he must exclude irrelevant ones from his mind. What counts as an irrelevant consideration is a question of law. The rule of law, as I argued in Chapter 4, means that decision makers must show equal regard for every citizen's dignity. This means only treating them on a proper, morally relevant basis. If you take account of irrelevant considerations (e.g. sexuality in adoption cases or media attention in sentencing decisions) then you are not treating someone in line with the rule of law and thus the decision goes outside the boundaries of law.

This is not to say that such cases are easy nor that a decision maker's views on whether something is relevant or not is not itself relevant. This statistical likelihood, that is *how likely* is it that the decision maker got the right decision, is something that the courts ought to take account of when setting their intensity of review. There will, of course, be times when the decision maker is more institutionally qualified to know if something is or is not a relevant consideration than a judge in the High Court. This is emphatically *not* an abdication of duty by the judge; quite the

reverse, the judge's sole duty is to try to fulfill her diagnostic function in respect to questions of law as best as she can. She would be failing to do so if she did not give weight to those who are more knowledgeable about a given set of facts than she is.

This leaves open an important question for the remainder of this Chapter: what happens if the decision maker does not take account of irrelevant considerations? For example, if there *is* evidence that children do better with heterosexual adoptive parents does this mean that *all* same-sex couples must *always* be banned from adopting? This clearly is not the case. This part of the Chapter has focused on *process*: which considerations have played a part? In the rest of this Chapter I will look at substantive review; i.e. when there is no defect in the decision making process but one argues that one's rights have still been violated. This requires an examination of the burgeoning area of proportionality at common law.

III. Substantive Review and Common Law Rights

In the previous section I developed the idea that common law rights find part of their effective judicial protection in the idea of irrelevant considerations; that is, the rule of law, which promises protection against arbitrary decision making, means that decision makers cannot take account of external, morally irrelevant considerations. To do so violates equal concern for dignity; as explained in Chapter 4, common law rights find their source in this idea.

However, none of this is to suggest that a decision maker, if taking account of relevant considerations and excluding from his mind irrelevant considerations, can exercise his discretion as he sees fit. Just because a decision-maker has passed the threshold does not mean judicial scrutiny is excluded. Someone might be a terrorist and this, of course, legitimates differing treatment to the general population (i.e. the fact that he is a terrorist is in itself a relevant consideration in the legitimation of some differing treatment) but does this justify, for example, torture? Or killing his family? The answer is it does not at common law. Yet why not? Whilst morally relevant differentiating facts may justify different treatment, in the sense that differing treatment is permissible in line with the rule of law and therefore not automatically arbitrary, they do not justify all the differing treatment that one can imagine.

In the previous section I said that actions could be quashed if based on irrelevant considerations, which give rise to what Letsas calls reason-blocking rights[63]; i.e. an interference with a right can be prohibited because the reason(s) for the interference is in itself a prohibited reason(s). Therefore, balancing or substantive review does not enter into the picture. In this section, I will look at how the courts can and should police the executive's actions when it acts for legitimate (i.e. non-irrelevant) reasons. The distinction, such as it is, is well understood. As T R S Allan puts it "Governmental action that simply *ignored* such rights would plainly violate the rule of law; but whether or not it takes proper or adequate account of them clearly depends on judgements of *weight*".[64] The previous section dealt with taking account of irrelevant considerations. As argued, you ignore the right to be treated non-arbitrarily, in line with the rule of law, if you take account of irrelevant considerations; this section deals with assessments of weight. In short, to what standard should the courts hold executive discretion when it is acting for legitimate purposes?

As said, this section looks at substantive review; unlike irrelevant considerations where I looked at the process undertaken, we are looking here at the balance struck by the decision maker when balancing competing interests and assess that balance. The traditional view in the domestic constitution has been that, if a decision maker has followed the correct process, he will only be subject to a low standard by the courts on the balance struck between competing interests in his decision. He will only be subject to light touch review characterised as *Wednesbury* unreasonableness. [65] This seems at stark contrast with the seemingly more intrusive proportionality test under the European Convention on Human Rights (ECHR) qualified rights and the absolute prohibition on interference with other ECHR rights described in Chapter 3 and indeed the traditional view has been that *Wednesbury* does not go as far as proportionality in the rigour of protection it offers. The rest of this Chapter traces the development of the *Wednesbury* principle and argues, in line with recent case law and a proper theoretical account founded on the rule of law, that there is no reason that *Wednesbury* cannot, where appropriate, provide for a very rigorous standard of substantive review and any divergence between *Wednesbury* and proportionality, at least in terms of the standard and intensity of review, is illusionary.

[63] Letsas (n 28) 53.
[64] Emphasis original. Allan (n 22) 244.
[65] This light touch review finds its classic formulation in *Wednesbury* (n 2), where Lord Greene MR says, at 229 it must be "something so absurd that no sensible person could ever dream that it lay within the powers of the authority". In *Short v Poole Corporation* [1926] Ch 66 (CA), 90-1 Warrington LJ gave the example of a red-haired teacher being dismissed because she had red hair.

III. A. (Ostensibly) Orthodox Substantive Review

The traditionally assumed view is that judicial review is concerned "not with the decision but the decision making process"[66]; this has given rise to the (mistaken) view that the courts are concerned with the process but not the substance of a decision.[67] However, this has never (certainly in modern judicial review) quite been the case: the courts have traditionally been ready to interfere on the ground that a decision "offends substantive principles",[68] which means the courts can interfere with the actual decision itself when it is deemed appropriate to do so. The courts, in judicial review, have traditionally been seen as taking what might be described as a "light touch" approach in their questioning of substantive decisions. For example, in *Wednesbury* substantive unreasonableness is taken to be appropriate when a decision maker "came to a conclusion that is so unreasonable that no reasonable authority could ever have come to it".[69] Likewise, in *GCHQ*,[70] Lord Diplock said that a court can intrude on a substantive decision if it is "a decision [that] is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[71]

For Sir John Laws, extra-judicially, this traditional view "demonstrates the judges' historical reluctance to interfere, save at the margins, with the merits of decisions made by public bodies"[72]; indeed, Sir William Wade says that the light touch approach has been understood as a compromise between judicial power and the doctrine that "the courts must not usurp the discretion of the public authorities which Parliament appointed to take the decisions".[73] However, as Sir John goes on to argue the orthodox, light touch approach is not representative of how substantive review has actually worked in the past. As he puts it, "there is an important

[66] *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 (HL), 1173 (Lord Brightman).
[67] Anthony Lester and Jeffrey Jowell, "Beyond Wednesbury: substantive principles of administrative law" [1987] PL 368, 369.
[68] ibid.
[69] *Wednesbury* (n 2) 230 (Lord Greene MR).
[70] *Council of Civil Services Union v Minister for the Civil Service* [1985] AC 374 (HL).
[71] ibid 410-11 (Lord Diplock).
[72] Sir John Laws, "Wednesbury" in Forsyth C and Hare I (eds), *The Golden Metawand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press 1998) 186.
[73] William Wade and Christopher Forsyth, *Administrative Law* (7th edn, OUP 1994) 339.

mis-match between the language of *Wednesbury* and its application in practice".[74] More recently, it has been clearly stated that whilst "*Wednesbury*, taken literally and monolithically, claims only to permit intervention where no reasonable decision maker could have come to the same decision…of course [it] has subsequently been applied with varying intensity or flexibility".[75]

It seems inescapable that what *Wednesbury* unreasonableness, shorthand in itself for substantive review at common law, means will depend on the subject matter before the courts. Whilst adhering to the language of *Wednesbury* and *GCHQ* the courts "have to a considerable extent…adopted variable standards of review".[76] At one end of the spectrum come human rights cases. In such cases, the courts will give a higher level of scrutiny than *Wednesbury's* ordinary language would suggest. A range of cases decided by the House of Lords in the 1980s-90s (before the HRA) demonstrate this. For example, in *R v Secretary of State for the Home Department, ex p Bugdaycay*[77] Lord Bridge held that "the most fundamental of all human rights is the individual's right to life and when an administrative decision…is said to…put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny".[78] Likewise, Lord Bridge said in *R v Secretary of State for the Home Department, ex p Brind*[79] that whilst we may not (at the time) have a codified Bill of Rights this does not mean that the common law is powerless to help applicants whose rights have been interfered with; as he put it, a lack of codified Bill of Rights does not mean that the court is "not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it".[80] Further, in *R v Ministry of Defence, ex p Smith*[81] Sir Thomas Bingham MR agreed with the proposition that "the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable".[82]

Likewise, at the other end of the spectrum we find cases involving large scale, national economic decisions. For example, in *R v Secretary of State for the Environment, ex p Nottinghamshire County Council*[83] the House of Lords was tasked with considering a cap on rates by local authorities. Lord

[74] Sir John Laws (n 72) 186.
[75] Williams (n 3) 101.
[76] Sir John Laws (n 72) 187.
[77] [1987] AC 514 (HL).
[78] ibid 531 (Lord Bridge).
[79] [1991] 1 AC 696 (HL).
[80] ibid 748-749 (Lord Bridge).
[81] [1996] QB 517 (CA).
[82] ibid 554-5 (Sir Thomas Bingham MR).
[83] [1986] AC 240 (HL).

Scarman said he "could not accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of 'unreasonableness' to quash guidance framed by the Secretary of State…the guidance being concerned with the limits of public expenditure by local authorities".[84] Indeed, *Wednesbury* unreasonableness requires in such large-scale economic cases a demonstration of "manifest absurdity" before a court will intervene.[85] There is, therefore, little doubt that "that in an area such as national economic policy the courts' perception of what will count as good judicial review grounds is different from the approach taken in….cases touching fundamental or constitutional rights".[86]

Recalling that proportionality itself is a variable standard of review[87] it might be questioned why there is a debate at all over *Wednesbury's* ability to protect rights to the same degree. After all, as stated in Chapter 3 "despite appearances to the contrary, proportionality…is not more monolithic than unreasonableness".[88] In different contexts proportionality has put the standard as requiring a "fair balance"[89] between competing interests for Article 8 purposes; has been understood as requiring the action took to be the least restrictive method by which a decision maker achieves a legitimate aim[90]; or whether the chosen measure was merely reasonably necessary in the given case.[91] Strikingly, the European Court on Human Rights (ECtHR) has held, in cases involving national level economic policy decisions that a decision will only fall foul of the ECHR if it is "manifestly without reasonable foundation",[92] which, as Elliott points out, makes proportionality "difficult to distinguish from a reasonableness test".[93]

Yet even though the courts use *Wednesbury* to apply "anxious scrutiny" to a decision maker's decision in rights orientated cases and despite the fact that proportionality is itself a variable standard of review there was still, and may still be, an idea that proportionality provided for a more stringent and intense form of review compared to *Wednesbury* in some cases. Indeed, in *R*

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[84] ibid 247 (Lord Scarman).
[85] *R v Secretary of State for the Environment, ex p Hammersmith London Borough Council and Others* [1991] 1 AC 521 (HL), 597 (Lord Bridge).
[86] Laws (n 72) 189.
[87] See Chapter 3.
[88] Michael Taggart, "Proportionality, Deference, *Wednesbury*" [2008] NZLR 423, 465.
[89] *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, [39] (Lord Bingham).
[90] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, [30]-[33], [44] (Lord Bingham).
[91] See, for example, Maurice Kay LJ in *R (Clays Lane Housing Co-Operative Ltd.) v The Housing Corporation* [2004] EWCA Civ 1658, [2005] 1 WLR 2229, [25]: "I conclude that the appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest *and* as being reasonably necessary" (emphasis original).
[92] *Stec v United Kingdom* (2006) 43 EHRR 47, [52].
[93] Elliott (n 5) 75.

(Daly) v Home Secretary[94] Lord Steyn said that "the intensity of review is somewhat greater under the proportionality approach"[95] and Rebecca Williams has argued that proportionality can "be used more intensively than even the most 'intense' setting of *Wednesbury*".[96]

This sentiment seems, in large part, to come from the *Smith* case mentioned above, which has often been used as an example of where the ECtHR's substantive review and the common law "need not always [yield the same result]".[97] This case revolved around whether the Ministry of Defence's "long-standing absolute prohibition on those known to be homosexual joining, or once discovered, remaining in the armed forces"[98] was legal. In *Smith*, though the Court of Appeal spoke of anxious scrutiny and Sir Thomas Bingham MR said the court "has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power",[99] they went on to say that "the threshold of irrationality is a high one" which "was not crossed in this case";[100] indeed, Lord Justice Thorpe said that the claimants fell "a long way short of success"[101] in the case.

Smith went to the ECtHR, claiming a breach of her ECHR rights.[102] Not only did the ECtHR find that there had been a breach of Article 8 but it also found that there had been a breach of Article 13, which is the right to an effective remedy. The was essentially because

> [T]he threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued.[103]

This, it is said,[104] demonstrates the fact that proportionality, whilst itself a variable standard, can go further that *Wednesbury* in terms of maximum rigour. It has been said "for many people there

[94] [2001] UKHL 26, [2001] 2 AC 532.
[95] ibid [27] (Lord Steyn).
[96] Williams (n 3) 101.
[97] *Daly* (n 94) [23] (Lord Bingham).
[98] *Smith* (n 80) 561 (Henry LJ).
[99] ibid 556 (Sir Thomas Bingham MR).
[100] ibid 558 (Sir Thomas Bingham MR).
[101] ibid 566 (Thorpe LJ).
[102] *Smith and Grady v UK* (1999) 29 EHRR 493.
[103] ibid [138].
[104] E.g. in *Daly* (n 94) at [23] and [27].

could have been no clearer example of the need for the incorporation of the ECHR than the case of *Smith*".[105] As Mark Elliott put it

> For all that 'rights' might have been acknowledged at common law, practical enforcement was limited on occasion, as decisions like *Brind* and *Smith* show. Although in both cases it was acknowledged that human rights were at stake, the courts' capacity to protect the relevant rights was limited by broad adherence to the traditional doctrinal machinery of domestic administrative law.[106]

III. B. Distinguishing Between Doctrinal Labels and Substantive Subject Matter

On the account above, it seems, that, on an orthodox view, *Wednesbury* is not as rigorous as proportionality can be in human rights cases. Thus, it is at least arguable, that there is a higher degree of protective rigour under the HRA than there is at common law. On that basis, one can easily see how the argument goes that, even if the common law touches the same rights as the HRA,[107] it does not give as effective protection and, since Elliott rightly argues "to possess a legal right arguably implies some form of enforceability"[108] the HRA is therefore better at effectively protecting rights than the common law.

It is important here to clarify the terms of the debate that this part of the thesis engages with. Often, the argument around proportionality and *Wednesbury* focuses on the structure or methodology each approach ostensibly uses and which, of those approaches, is more desirable. It seems to be for these reasons that a debate rages about which should be used in different contexts, as if there is somehow an important, bright line distinction.[109] One can, of course, understand how the debate has become fixated on methodological and structural distinctions between the two approaches: proportionality appears to have provide a relatively clear structure under the HRA whereas *Wednesbury* seems, at best, to be somewhat opaque in its operation.[110] However, that is not to say that they are two entirely different creatures dealing with entirely separate issues.

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[105] Sir Rabinder Singh, "Making Judgments on Human Rights Issues", University of Nottingham Human Rights Law Centre Annual Lecture 2016 https://www.judiciary.gov.uk/wp-content/uploads/2016/03/Singh_HumanRights8March2016.pdf (accessed 2 June 2018).
[106] Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 CLP 85, 89.
[107] I argued in Chapter 4 that the approach to which rights exist in both frameworks draws on similar values and principles, meaning that the range of rights reach a high degree of convergence.
[108] Elliott (n 106) 89.
[109] The questions around *Wednesbury's* future status have been addressed by the courts, who have asked whether it should be "buried" (*R (Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397 [35] (Dyson LJ) or "consigned to the dustbin of history" (*R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355 [303] (Lady Hale)).
[110] See Jowell and Lester (n 66). They make this point throughout their article.

It used to be the case that we thought of weight as irrelevant to *Wednesbury* review in its substantive sense. For example, in *Daly*, Lord Steyn said that one way in which rationality and proportionality are different is that the latter involves the courts examining the weight accorded to the competing interests, which is not done under *Wednesbury* review.[111] Likewise in *Tesco Stores Ltd v Secretary of State for the Environment*[112] Lord Keith said weight was a question for the decision maker not the courts under *Wednesbury* review.

However, it has recently been argued that in terms of substantive decision making the courts already "undertake precisely the same kind of reasoning as they do under proportionality"[113] and any differences between different types of substantive review come from the subject matter of the cases "rather than any inherent distinction between proportionality and rationality".[114] Paul Craig likely makes this argument best when he argues that we have an irrelevant considerations doctrine. If a decision is based on something irrelevant it will be struck down. If it is relevant then it may be taken account of but is still subject to reasonableness review. Therefore

> It follows that when the court is dealing with reasonableness review the factors taken into account by the primary decision-maker have been…adjudged relevant…It follows that reasonableness review is concerned with the weight accorded by the primary decision maker…it is the courts' judgment as to whether the relative weight given by the primary decision-maker to considerations that are relevant is reasonable or not. If it is not about this then reasonableness review would not exist. If weight really were out of bounds…then there would be not reasonableness review, since it would have no content once the court had adjudged the relevance and purpose issues.[115]

I agree with this point and, for purposes of space, do not intend to expand on it here save to say that this Chapter proceeds on the basis that *Wednesbury* and proportionality do not follow incommensurate paths; specifically, they both ask questions and assess judgments that relate to the weight given to factors.

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111 *Daly* (n 94) 547.
112 [1995] 1 WLR 759 (HL).
113 Williams (n 3) 99 and, albeit less stridently, Elliott (n 99) 102-3 . *Cf* the point made and cases cited by Lord Reed in *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 [114] (Lord Reed). However, others argue that there are still bright line, important distinctions between the two standards: see, for example, Jason Varuhas, who argues that "the law under the HRA and [common law review] are distinct fields" in Jason N E Varuhas, "Against Unification" in Wilberg H and Elliott M (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 93.
114 Williams (n 3) 100.
115 Paul Craig, "The Nature of Reasonableness Review" (2013) 66 CLP 131, 136

Whilst I do not disown or disavow the importance of doctrinal and structural questions I do not intend to focus on how like proportionality *Wednesbury* is, in terms of its structure, here. This is for two principal reasons: (i) this thesis is necessarily limited in space and so some important issues cannot be considered in the detail they would generally merit; and (ii) arguments over doctrinal methods and structure in substantive review, whilst important, often distract from the key underlying substantive issue in substantive review: that is, the proper standard and intensity of scrutiny that the courts should exercise over executive action in different contexts. Indeed, looking behind the supposed methodological debates one often sees what seems to be a normative one.[116]

As Elliott rightly puts it the debate is animated "by disagreement about underlying constitutional matters, including the rule of law, the separation of powers, and the nature, status, extent and legitimacy…of legislative, administrative, and judicial authority".[117] Elliott also correctly goes on to say that, whilst doctrinal tools play a "valuable role" such tools are subservient to "underlying concerns that ought to be in the driving seat".[118] It is those primary, sub-structure concerns that this part of the thesis will examine: whilst structure and doctrinal labels are important what is more important, in this context, is an examination of what scrutiny is legitimate for the courts to undertake when looking at the substance of administrative decisions. As Allan puts it "rationality and proportionality are only convenient labels for a form of review that must press as far, in each case, as is necessary to satisfy the court…that the action in question is truly justified".[119] What counts as justification and the standard this imposes is, of course, in large part of a normative question that, as pointed out above, relies on questions to do with the rule of law, separation of powers, and institutional competence.

III. C. *Wednesbury* and Proportionality: Convergence of Standard(s)?

Despite some dated judicial *dicta* to the contrary there is nothing in the nature of the common law to suggest that review at common law (under *Wednesbury* or a common law form of proportionality) cannot be as intense in its scrutiny as proportionality under the HRA can be and our focus, here at least, is on the standard of substantive review in protecting rights and not the structure that review takes. Both review under the HRA and at common law involve questions of

[116] Recall the cases briefly mentioned above as to why the courts traditionally said substantive review at common law was light touch.
[117] Elliott (n 5) 61.
[118] ibid 61-2.
[119] Allan (n 22) (OUP 2013) 245.

weight and it is questions about weight where focus lies. Yet the orthodox view seems to be that, in human rights cases, proportionality provides for a more rigorous standard. I argue that this view is incorrect and a proper understanding of the rule of law and the underlying norms of substantive review reveal a coherence between the two seemingly doctrinally separate tests. There is nothing, of course, in the structure of the test that stops *Wednesbury* from being so intense in appropriate situations and, as argued for above, the focus here is on the rigour of protection not the structure of any test.

The crucial point is that the standard of review becomes more stringent when it is necessary to do so because the range of legally acceptable responses is itself reactive to context. What, therefore, are the appropriate situations where a judge, looking at a domestic decision that calls for review outside of the HRA, may apply a standard of substantive review more traditionally associated with proportionality under the HRA? The standard of review, what Elliott calls the "operative burden of justification",[120] is to be derived from the "normative significance of the value" that is affected by the decision maker's decision.[121] Elliott uses the example of *R v Secretary of State for the Home Department, ex p Bugdaycay*[122] to illustrate this point; as Lord Bridge held in the case:

> [T]he court must…be entitled to subject an administrative decision to the more rigorous examination…according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision…is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.[123]

Elliott goes on to say, and for present purposes we may agree with him, that the "*general* principle [is] that the more important the norm threated by a decision, the greater should be on the onus on the decision maker to justify it".[124] The normative status of the principle will, I suggest, dictate the range of permissible responses open to a decision maker. Some permit wide ranging responses such that a low standard of review is justifiable where a legally adequate process has taken place. Others, however, only allow for a much narrower range of legally permissible responses.

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[120] Elliott (n 5) 76.
[121] ibid.
[122] *Bugdaycay* (n 76).
[123] ibid 531 (Lord Bridge).
[124] Emphasis added. Elliott (n 5) 76.

This, in turn, is linked to the rule of law and anti-arbitrariness; some very important norms can only be interfered with in very narrow ways; interfering with them in other circumstances is not justifiable by virtue of their importance and thus such interference is arbitrary. The converse is true for other norms, where a wide range of responses do not render the decision one that could properly be characterised as arbitrary. The relationship between the rule of law and discretion, I argue, is precisely why the range of reasonable responses (and thus the justificatory burden and, in a sense, the standard of review) fluctuates according to context.

In short, the relative normative status of the norm will dictate the range of permissible responses open to a decision maker, which in turn calibrates to the standard of review in a given case. To use a crude but illustrating example: the width of discretion wherein you can legitimately interfere with someone's bodily integrity is narrower than the range of discretion in deciding what to build in an empty part of the country (houses, an army training camp, a new prison, a new hospital, etc.). In both cases the decision maker must act within the boundaries of their discretion, that is, for our purposes, he must not act arbitrarily, but the width of such discretion is dictated by the factual matrix of the case and the norms that are involved. In both cases the decision maker cannot act arbitrarily but it is much easier to act arbitrarily when your decision affects someone's liberties and opportunities (which means the discretion is narrower) than when making a much broader decision not involving a particular person's dignity. The court's task is to assess whether someone has acted within the bounds of their discretion or not.

Why, then, is the range of responses legally open to a decision maker narrower in common law rights cases? As stressed in Chapter 4 the overarching basis of rights at common law is the rule of law; this in turn is reflective of the principle of non-arbitrariness, which is understood as a right to be treated as someone with equal dignity. Decisions that threaten the rule of law, I suggest, are of primary importance and ought to be subject to a very high standard of review because the rule of law is itself at the foundation of all legal powers; a decision cannot be taken in violation of it and be legal because that poses a contradiction in terms: something that is premised on the rule of law cannot itself go against the rule of law. Further, when characterising whether something is arbitrary I mean, as will be developed, not just that they had no good reason for the decision (on which see the previous section of this Chapter) but, also, that even if they have good reason to act the action taken goes further than that good reason permits.

What does this mean? As stressed in the part of this Chapter dealing with process review vis-à-vis irrelevant considerations a decision maker cannot take account of considerations that are not sufficient for the rule of law in justifying differing treatment of citizens. Thus, we said, all other things being equal a lesbian couple should not be refused an opportunity to adopt *just because* they are lesbians. This, I stressed above, is not a question of balancing; it is a binary question: is the consideration an objectively relevant one or not? If it is irrelevant then to bear it in mind when making a decision renders the decision one that does not show equal concern for the dignity of the individual affected, which is the antithesis of the rule of law.

However, my central point in this section is that even if there is an objective differentiator between one citizen and the next this does not justify all differing treatment between them. You would still be acting arbitrarily, I argue, if you go further than is necessary to achieve the legitimate aim or if you act in a way that is not calibrated to that aim.

I predicate my argument on the theory of rights presented in Chapter 4, which relied on Dworkin's idea of rights as trumps for its vision of common law rights. However, Dworkin, as far as I am aware, never expressly talks about how his theory interacts with the proportionality doctrine or the standard of review of governmental decisions outside of correctness review. Yet it is clear, I argue, that his view of the rule of law accounts for such ideas.[125] As stressed in Chapter 4, the idea of non-arbitrariness, which lies at the base of the rule of law, does not mean that the state may never interfere or limit one's liberties or opportunities.[126] It is that doing so requires an objective consideration. When such a consideration applies it is necessary to balance that consideration against the individual's right to be treated as an equal. For example, it is obviously accepted that one's liberty to speak freely can be limited; defamation laws being a case in point, which Dworkin says ensure the "rights of others not to have their reputation ruined by a careless statement".[127] But what if the state imprisons someone for life or cuts off his or her tongue for a minor case of defamation?

I argue that this, whilst passing the threshold objection explained in the previous section vis-à-vis irrelevant considerations, nevertheless violates the dignity of the citizen. To put it simply: if the objective could be achieved whilst infringing the right to a lesser extent a more severe

[125] This was very recently examined in a more purely jurisprudential piece: Jacob Weinrib, "When Trumps Clash: Dworkin and the Doctrine of Proportionality" (2017) 30(3) Ratio Juris 341.
[126] Ronald Dworkin, *Taking Rights Seriously* (HUP 1978) 191.
[127] ibid 193.

infringement cannot be justified.[128] Objective facts may legitimate differing treatment but it seems axiomatic to suggest that they cannot justify all differing treatment; to do so would nullify the entire idea of the rule of law, that is, the idea of non-arbitrariness of state power because, by definition, you would be behaving arbitrarily if going further than legitimated.

If one goes further than necessary in pursuance of the legitimate, relevant differentiator then one is acting arbitrarily. The difference in treatment is not justified relative to the characteristic or factor that justifies differing treatment. To refer to an example used above it is, I argue, obviously legitimate to take account of the fact that a couple might not be the best couple to look after children when considering certifying them for adoption but that does not justify, for example, sterilising the couple just because, to recall an above example, they (an Islamic couple) may not be as well placed as a Christian one to adopt a child brought up in a Christian household. You would be going too far and, as such, move from legitimate action to illegitimate arbitrariness.

It seems difficult to argue that *Wednesbury* and proportionality are different in terms of the standard of review in rights cases: the range of reasonable responses a decision maker can make constricts to reflect the decision's impact on interests; only a limited number of responses (i.e. those that go no further than necessary to achieve the objective) fall within the bounds of reasonable responses. This, in substance, is substantially similar to proportionality in its more rigorous form. This view of substantive review echoes Allan's account. He has argued, for example, that the common law, in line with the rule of law, means "it is not sufficient…for [legitimate] purposes to be *asserted* by way of justification unless there is a genuine connection between ends and means. When the incidental consequences of a measure are out of all proportion to its alleged objected, we may fairly conclude that the purported justification is specious".[129]

The arguments I make vis-à-vis rigour of review seem to find some recognition in recent Supreme Court decisions despite the fact that such decisions do not easily, if at all, cohere with one another. Without agreeing that there has not been such an opportunity it is hard to dispute Lord Carnwath's comment in *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs*[130]:

> It is hoped that an opportunity can be found in the near future for an authoritative review in this court of the judicial and academic learning on the

[128] Weinrib (n 125) 346.
[129] Allan (n 22) 247.
[130] [2016] UKSC 3, [2016] AC 1457.

> issue, including relevant comparative material from other common law jurisdictions. Such a review might aim for rather more structured guidance for the lower courts than such imprecise concepts as 'anxious scrutiny' and 'sliding scales'.[131]

Despite the lack of coherence and consistency in the Supreme Court's approach common trends, often fitting what I have argued for above, do seem to emerge. *Kennedy v The Charity Commission*[132] provides one such example. In short, Kennedy wished to have access to information held by the Charity Commission; they refused because said information was, they argued, not within the remit of the Freedom of Information Act 2000 by virtue of ss2(3) and 32(2) of said Act. Kennedy challenged this decision on the basis of Article 10 of the ECHR. The Supreme Court instead focused on the domestic legal landscape by looking at the "common law presumption in favour of openness".[133] Questions were therefore asked about the nature of review at common law. Lord Mance said, quite clearly, that "the common law no longer insists on the uniform application of the rigid test of irrationality…The nature of judicial review in every case depends on context"[134] and, further, agreeing with Paul Craig (as I have done previously in this Chapter) "both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny…depending on context".[135]

A further example exists in *Pham v Secretary of State for the Home Department*[136] which concerned a challenge to the Home Secretary's decision to remove Pham's naturalised British nationality in accordance with s 40(2) British Nationality Act 1981. Here, again, it seems that context is key. Lord Carnwath argued that it is not clear how proportionality under the HRA or EU would "differ in practice…from principles applicable under domestic law"[137] given that the Supreme Court has endorsed "a flexible approach to principles of judicial review, particularly where important rights are at stake".[138] Lord Mance goes further still and says that because removal of citizenship is such a radical step to take there must be a "*correspondingly* strict standard of judicial review…and the tool of proportionality is one which would…be both available and valuable for the purposes of such a review".[139] Two things are worth noting here: first, I emphasised the word "correspondingly" because it demonstrates, quite clearly, the fact that the standard of review

[131] ibid [55] (Lord Carnwath).
[132] [2014] UKSC 20, [2015] AC 455.
[133] ibid [47] (Lord Mance).
[134] ibid [51] (Lord Mance).
[135] ibid [54] (Lord Mance).
[136] [2015] UKSC 19, [2015] 1 WLR 1591.
[137] ibid [60] (Lord Carnwath).
[138] ibid [61] (Lord Carnwath).
[139] Emphasis added. ibid [98] (Lord Mance).

corresponds to the value of the norm at play. Second, this seems to add confusion to *Kennedy* by suggesting that proportionality is the standard that is stricter (thereby implicitly saying *Wednesbury* is not). As said above, it is clear that the Supreme Court is not entirely consistent on questions of *Wednesbury* and proportionality but, I would argue, what is clear is that the strength of the standard of review is dictated by norms and, moreover, issues involving rights will attract much more rigorous scrutiny under both the HRA and the common law (whether we term common law substantive review as *Wednesbury* or proportionality).

Indeed, the confusion over whether the Supreme Court sees any difference vis-à-vis the rigour of review (as opposed to structure) between the two approaches is made opaque again in *Youssef v Secretary of State for Foreign and Commonwealth Affairs*,[140] which again involved individual rights at common law. Specifically, Youssef was challenging the Secretary of State's decision to allow Youssef to be designated by the Sanctions Committee of the United Nations Security Council. Designation results in the freezing of the designated person's assets. Youssef argued that the High Court and Court of Appeal were wrong to engage in mere rationality review and something more searching was required. Yet the premise of Youssef's argument, that is "the very notion that one must choose between proportionality and irrationality may be misplaced"[141] given that, in cases involving national security there would be "a more loosely structured proportionality challenge",[142] which seems to mean one with a less rigorous standard of review.

Despite Supreme Court equivocation it seems generally accepted that both structures of review involve different standards depending on the context and these standards often coincide. Likewise, it is said explicitly by some Supreme Court Justices, academics, and in my argument, that the distinction between *Wednesbury* and proportionality is one to do with doctrinal structure; that is not to say it is unimportant but it is of secondary importance to the question I seek to address in this Chapter: to what extent does judicial review at common law protect one's rights compared to judicial review under the HRA?

On my account, the *standard* of review can be formulated as whether the decision maker acted arbitrarily, which correlates to the well established question of whether the decision maker went further than was necessary to achieve his legitimate aim. Whilst that question is more traditionally associated with proportionality it is also recognised as part of the *Wednesbury* formulation in cases

[140] [2016] UKSC 3, [2016] AC 1457.
[141] ibid [271] (Lord Kerr).
[142] ibid [282] (Lord Kerr).

involving common law rights.[143] This is not to say that the range of decisions that are open to a decision maker is *always* narrow; to echo Elliott it is only the case that the range will constrict or relax according to context *in both* proportionality and *Wednesbury*. In this sense there is little, substantively, to choose between the two approaches and it is incorrect to state that proportionality always provides for a more intensive form of review than *Wednesbury* does at common law.[144]

III. D. Common Law Substantive Review: Standard and Intensity

An overview of deference, it will be remembered, was given earlier in this Chapter in relation to irrelevant considerations and questions of law. Here, I briefly examine deference in substantive review. It will be recalled that a distinction was drawn between standard and intensity of review; the former being the standard the decision must reach and the intensity being the strength (or lack thereof) that the judiciary will examine whether or not that standard has been reached.

As will be apparent from the sections above the *standard* of review is, in a sense, both fixed and highly flexible. It is fixed because the ultimate question is whether the decision maker acted arbitrarily. However, the extent of the range of non-arbitrary decisions, that is, the number of permissible decisions open to the decision maker whilst still falling into the legitimate scope of his decision making power, itself widens or constricts according to the context of the situation. A decision maker, I have argued, has a wider range of options open to him in planning cases that involve no rights issues than he does in relation to, for a legitimate reason, altering the standard format of a fair trial, where only a small number of variations are permissible when absolutely necessary. This is how the range of permissible responses fluctuates depending on how the moral equality of the citizen is interfered with. The more the decision affects someone's dignity the higher the standard of justification that will be required; to put it another way, the further you take someone away from the way you treat the paradigm citizen vis-à-vis interests, detriments, or opportunities the more you need to show by way of justification. Hence why, in what we would normally see as rights cases, the rigour of protection is higher in the sense that the range of permissible responses is narrower, to the point of disappearing in extreme cases (for example, torture).

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[143] Williams (n 3).

[144] It can no doubt be inferred, from the foregoing, that I agree with Allan that "we should not confuse the propriety of the [*Wednesbury*] test with the bungled application of it" and, therefore, I agree that *Smith* was wrongly decided at the domestic level: see Allan (n 22) 247-9.

In this way, as stressed above, what the rule of law requires is itself context dependent. There is no deference in the standard of review because the range of permissible considerations itself fluctuates depending on the norm in question; the standard is dictated by the implications for the rule of law. If one follows due process it is not a breach of the rule of law to build a rugby stadium instead of a football stadium. It is a breach of the rule of law, however, to issue blanket prohibitions on voting for prisoners or to rule that no one can criticise the government. The reason is that, in the latter examples, you have gone further than the legitimately differentiating factor(s) justifies. In the former, you have not as there is a legitimate choice to make and you are not treating anyone as a moral unequal/arbitrarily[145] and, as such, there are no rule of law implications and so the decision is best left to elected decision makers.[146]

This leads us to intensity of review. Just because there might be, in a case involving someone's opportunities and liberties, a narrower range of responses open to the decision maker at common law this is not to say that the courts will bulldoze over a decision maker's views. It is only to say that a decision maker must convince a court that he acted non-arbitrarily; that is, he must show that the legitimate aim pursued could not have been achieved by a means that was less intrusive. I will not rehearse arguments made above but, needless to say, I do not think democratic deference plays much, if any, part in relation to the intensity of review[147]; a body's democratic credentials relative to the High Court's does not mean they are better equipped, epistemologically speaking, to know if how they acted was justified or not in the sense of whether or not the objective factor used to justified their interference was sufficient.

In assessing whether a decision maker has gone further than legally permitted it is important to bear in mind that the question is not always clear. A good example would be assisted suicide. Assuming, for now, that there may be legitimate reasons to treat assisted suicide differently from non-assisted suicide does this legitimate differentiator justify a blanket prohibition? This is clearly difficult to assess but it must be borne in mind that the key question is whether the aim justifies the difference in treatment. Some would argue, of course, that it is not legitimate because it treats people differently, not all people are at risk of being coerced into receiving life-ending treatment,

[145] Note you might be doing so if, for example, you choose a rugby stadium because you think football fans are more likely to be from working class backgrounds.
[146] This touches on, whilst doing its best to avoid, the legitimate purview of democratic decision making. Why are democratically elected decision makers, on my account, given a wider berth in planning or economic cases but not in human rights cases? This is something that is clearly relevant here albeit hidden below the surface. The scope of democratic decision making will be addressed in Chapter 7.
[147] As pointed out in the preceding footnote the principle of democracy will be explicitly considered in Chapter 7.

and, with the blanket prohibition, you are forcing people to endure a situation that they do not wish to endure. Further, they might argue, that with sufficient safeguards the risk posed to vulnerable people could be neutralised or substantially minimised.

The government would no doubt argue that it would be hard to neutralise the risk of a system of assisted suicide being abused because safeguards are never 100% effective. Likewise they may argue that assisted suicide would run the risk of normalising the premature ending of human life, which the decriminalisation of suicide did not do because it was not state sanctioned or induced. The High Court is tasked with deciding the point: does the legitimate aim (protection of human life) justify a blanket ban or does it go too far? I do not intend on answering that question here; I am only interested in how a court ought to go about deciding the question. In short, the government's argument does not carry any weight just because it is the government that has said it. We require more; something of true epistemological value. We need to know the basis of the claims that the government makes: why should we treat the claim that this is non-arbitrary as such? What reason(s) do we have to prefer the government's view? To reiterate what I argued above it is about the applied expertise of the view; deference, a lowering of the intensity of review, is something that is earned. The government's view earns a lowering of intensity by virtue of its thoroughness by, for example, taking lots of expert evidence into account. A decision maker, in short, earns deference when it can show good reasons for their view on a controversial matter to be preferred but it is, ultimately, for a court to be satisfied that the decision maker has, in all the facts, not gone further than the rule of law permits.[148]

IV. Conclusion on Review of Executive Action

Chapter 4 looked at which rights the citizen enjoys at common law. I stressed in that Chapter, and expanded in the present Chapter, the fact that the common law, ultimately, provides for one right: the right to be treated non-arbitrarily, which reflects or is underpinned by the notion of being treated as a moral equal. This, I suggested, is in line with the rule of law, which promises consistency in principle. I argued, in Chapter 4, that this gives rise to a number of rights. This Chapter, in contrast, did not look at *which* concrete rights a citizen enjoys at common law but,

[148] See Allan (n 22) 249 on this.

instead, developed a two-stage idea of how these rights are in fact protected at common law. As stated above, having a right is worth little without its enforcement.[149]

In this Chapter I argued two things. First, that when a decision maker makes a decision that somehow affect someone's liberties or opportunities he will be expected to show that he did not act for irrelevant reasons. If he did, I argued, then he has not treated the citizen as a moral equal; he has treated him arbitrarily. Considerations are, I stressed, to be determined in such cases in line with the rule of law: they must be morally relevant, objective considerations. If a decision maker acts on the basis of an irrelevant consideration then he has taken himself outside of the scope of his decision making power because decision makers cannot, as a matter of principle, logic, and fact, act outside of their powers whilst still acting legally. I also stressed, in this part of the Chapter, that the standard for such questions is correctness: it is for a court to determine if a decision maker acted for irrelevant reasons. If he did not then his decision was void. Likewise, I suggested that the intensity of review should only vary based on epistemological considerations; that is, adjudicative deference ought to only be given if there are good, compelling reasons to suggest that the decision maker is more likely to be correct about the relevancy of a consideration.

I then moved on to substantive review. Even if a decision maker acts for relevant considerations, that is, for objective, legitimate reasons, his decision can still be arbitrary if he goes further than those reasons allow. This, I said, explains why the standard of review at common law is flexible: the range of permissible responses open to a decision maker widens and constricts according to the issue at stake. I suggest that interference with common law rights requires a more exacting standard of review because fewer avenues are legitimately open to a decision maker when he wishes to treat someone differently to the norm. To put it more simply, it is easier to act arbitrarily, that is without due diligence to someone's moral equality, the more you are subjecting them to a detriment. Thus, you need far more justification for banning a group from marching at all than you do for saying they cannot march down Oxford Street but can go down Pall Mall. This, I suggested, is not a novel approach to the common law: it is simply explaining how common law substantive review (usually labelled *Wednesbury* or irrationality review) is best understood in line with the rule of law. There is nothing, I suggested, in the structure of *Wednesbury* or in its ontological nature that means it cannot be as effective at protecting rights as

[149] There is, of course, the intrinsic value of having one's right recognised even if it is not enforced. However, to the paradigm claimant who seeks redress by the courts he will, usually, want effective protection not just a recognition of a right.

proportionality under the HRA. Further, I suggested, drawing upon Elliott's recent work, that focus on the structure of review as opposed to the standard and intensity of review is misguided. We must focus on the actual burden it places on decision makers. As I pointed out proportionality is itself a flexible standard that becomes more exacting in human rights cases and less exacting in, *inter alia*, issues to do with national level economics, policy, and international relations. Further, both tests require a court to engage in questions of weight and judgment and it is a mistake to think otherwise.

Therefore, I argued, there is little to choose between the common law and the HRA in relation to substantive review vis-à-vis the standard and intensity of review.[150] Since I argued in Chapter 4 that the rights each protect are also substantially similar the picture I am building is that, in substance, the two approaches are far more approximate to one another than is generally assumed. In the following two Chapters I shall look at the strength of the principle of legality as compared to s 3 HRA and the constitutional resilience of common law rights. We will then be in a position to holistically conclude as to whether there is much to choose between the two methods of rights protection.

[150] There is of course the debate about the transparency of the tests but, as I stressed above, this is of secondary importance to the standard and intensity of review.

Chapter 6

Rigour of Protection II: The Rule of Law, Rights, and Statutory Interpretation

I. Introduction

This Chapter turns to the second principal method by which the courts can give effective protection to common law rights. The previous Chapter looked at both process and substantive review of an executive agent's decision and argued, when both are properly understood in line with the rule of law, that they give a degree of protection equivalent to that of proportionality under the Human Rights Act 1998 (HRA). We now turn to look directly at legislation and how the courts do and should treat statutes that appear, at least at first-glance, plausibly hostile to common law rights in that they seem, on a shallow view, to empower a decision maker to breach rights when exercising his delegated power. That is, in this Chapter my focus is upon statutory interpretation. This Chapter examines the rigour of protection at common law vis-à-vis statutory interpretation; this is the analogue of what I termed, in Chapter 3, the "interpretation obligation" found in section 3 HRA, which requires courts to interpret legislation in line with the rights the HRA protects as far as it is possible to do so. Therefore, this Chapter looks at the degree of convergence between common law rights-compliant interpretation and interpretation under s 3 HRA.

To this end, this Chapter will first explain the approach to statutory interpretation at common law, which provides for rights compliant interpretation where possible. I then move to the orthodox view, which is that s 3 HRA goes further than the common law does in terms of the strength of interpretation prowess. I then explain that it is the case that the common law is not somehow structurally more limited than s 3 HRA and, actually, there is no reason why the common law's approach to statutory interpretation, properly understood in line with the rule of law, cannot be as robust as that of the HRA's.

Further still, I suggest that whilst it is clearly the case, as a general principle, that statute can displace common law doctrine it is just that: a *general* principle. As I will argue, statute cannot displace the rule of law, which is where common law rights are located. The full ramifications of this latter point are explained in Chapter 7.

II. The Principle of Legality in Practice Compared to Section 3 Human Rights Act 1998

The approach to statutory interpretation and rights was relatively well established by the time the HRA came into force. The most famous enunciation of the principle is found in *R v Secretary of State for the Home Department, ex p Simms*.[1] The applicants in this case were convicted of murder. They communicated with journalists about their stories. The prison authorities stopped these visits unless the journalists agreed not to use information gained for professional purposes. The journalists refused to do so. The Secretary of State effectively put a blanket ban on visits for journalistic purposes to these prisoners. The question was whether the legislation enabling orders for the maintenance of good order in prisons permitted such a ban. In what is now a classic speech Lord Hoffmann stated

> The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words….In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom…apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[2]

Further, Lord Steyn put it in *R v Secretary of State for the Home Department, ex p Pierson*[3] as follows: "Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law and the courts may approach legislation on this initial assumption".[4] This principle of legality acts as a presumption, in that "the courts should be slow to *impute* to Parliament an intention to override established rights….there is nothing new in this; it is a well-established interpretive principle".[5] Indeed, the principle of legality's modern formulation bears a striking resemblance to older cases; for example Sir John Romilly MR held that the principle that "the general words of the Act are not to be so construed as to alter the previous policy of the law…cannot be disputed".[6] When Sir John Romilly MR talks of "the previous policy of the law" he means established legal principles.

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[1] [2000] 2 AC 115 (HL).
[2] ibid 131 (Lord Hoffmann).
[3] [1998] AC 539 (HL)
[4] ibid 587 (Lord Steyn).
[5] Emphasis added. *Bennion on Statutory Interpretation* (5th edn Butterworths 2008) 823.
[6] *Minet v Leman* (1855) 20 Beav 269, 52 ER 606, 610 (Sir John Romilly MR) (Court of Chancery).

From this perspective, the "presumption that Parliament intends the rule of law to be upheld is a cornerstone of Britain's unwritten constitution".[7]

Some examples of the principle of legality's operation in individual rights cases may be useful here to illustrate the depth and rigour of the principle's operation. In *A v Secretary of State for the Home Department (No 2)*[8] secondary legislation empowered the Special Immigration Appeals Commission (SIAC) to receive evidence that would not be admissible in a court of law[9] and the Secretary of State relied on evidence of a third party that had purportedly been obtained through torture. SIAC held that as long as the British government had not tortured individuals or been complicit it could hear such evidence. The question was whether the Rules did permit such evidence. The House of Lords answered in the negative, holding that

> It trivialises the issue before the House to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer. I accept the broad thrust of the appellants' argument on the common law. The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.[10]

Further, Lord Bingham made it clear that he was "a little dismayed at the suggestion" that the right not to be tortured could "be overridden by a statute and a procedural rule which make no mention of torture at all".[11]

A more recent example is found in *R (UNISON) v Lord Chancellor*.[12] As part of the government's austerity drive it was decided that courts and tribunals must become more cost effective and a greater contribution must be given by litigants to the financing of the system. By virtue of s 42 Tribunals, Courts, and Enforcement Act 2007 the Lord Chancellor could impose fees for tribunals, but only those listed or designated by the Lord Chancellor in an order. The Lord Chancellor designated the Employment and Employment Appeals Tribunals as such and set fees for them. The financial burden was mainly placed on claimants. In short, after the introduction of

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[7] T R S Allan, "Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective" (2006) 59 CLP 27, 44.
[8] [2005] UKHL 71, [2006] 2 AC 221.
[9] Rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003/1034.
[10] *A* (n 8) [51]-[52] (Lord Bingham).
[11] ibid [51] (Lord Bingham)
[12] [2017] UKSC 51, [2017] 3 WLR 409.

the fees (which ranged from several hundred pounds to over two thousand depending on the type of case) there were far fewer claims brought than in previous years. UNISON judicially reviewed the Lord Chancellor's decision to bring in fees. The Supreme Court unanimously found the Lord Chancellor's decision unlawful because it was not authorised by the Tribunals, Courts, and Enforcement Act 2007.

Lord Reed (with whom Lord Neuberger, Lord Mance, Lord Kerr, Lord Wilson and Lord Hughes agreed) held that, first, in deciding the extent of the power conferred on the Lord Chancellor "the court must consider not only the text of that provision, but also the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles".[13] One such principle is "The constitutional right of access to the courts", which "is inherent in the rule of law";[14] indeed, Lord Reed recognised this principle at work in a range of sources from the mid 17th century[15] to the 20th century.[16] The court's task was to see "whether the impediment or hindrance in question had been clearly authorised by primary legislation".[17] The court will be exacting; even if there is some interference authorised by the statute (in this case the setting of fees will always interfere, to an extent, with access to the courts) "it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfill the objective of the provision in question."[18]

After examination of the relevant authorities Lord Reed said "It follows… that the Fees Order will be *ultra vires* if there is a real risk that persons will effectively be prevented from having access to justice. That will be so because section 42 of the 2007 Act contains no words authorising the prevention of access to the relevant tribunals."[19] In short, "In order for the fees to be lawful, they have to be set at a level that everyone can afford, taking into account the availability of full or partial remission."[20] Since access to the Employment Tribunal was severely curtailed in practice and because the Lord Chancellor could not justify his actions or point to a primary statute that clearly permitted such an effect the Fees Order was held to be *ultra vires*.

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[13] ibid [65] (Lord Reed).
[14] ibid [66] (Lord Reed).
[15] Sir Edward Coke, *Institutes of the Laws of England* (first published 1642, 1809 edn) 55-6. Though it is worth noting that the principle could have found recognition even earlier: *Stradling v Morgan* (1560) 1 Pl 199.
[16] *Attorney General v Times Newspapers Ltd* [1974] AC 273 (HL), *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd* [1981] AC 909 (HL), and *Chester v Bateson* [1920] 1 KB 829 are examples of the principle at work in a range of circumstances.
[17] *UNISON* (n 12) [79] (Lord Reed).
[18] ibid [80] (Lord Reed).
[19] ibid [87] (Lord Reed).
[20] ibid [91] (Lord Reed).

The point, for our purposes, is that even whilst a statute said that the Lord Chancellor could set fees the courts *read that provision* as meaning the Lord Chancellor can *only* impose fees that do not unjustifiably infringe on access to the courts; other such fees would be *ultra vires* in that they went outside the scope of the Lord Chancellor's powers. In this way, the courts do not read statutes literally or take them at face value; instead, they are read in line with the rule of law and its necessarily implications. This means that general powers are by definition limited; they cannot be used to go against the rule of law.[21] For our purposes, this is the same as saying that statutes are read in line with the rights of the individual, which were explored much more fully in Chapter 4.

II.A. The Principle of Legality's (Ostensible) Limitations and s 3 HRA

The orthodox view is that, whilst the principle of legality is a strong tool in the judicial toolbox, it is limited in important ways. The first is that, by definition, the principle of legality requires some rights or values on which to bite; you can only interpret in line with rights or values if there are such rights or values. In short, the principle of legality has no application "if the necessary backcloth of a basic common law principle is absent".[22]

The second limitation is that the principle of legality is seen, as said above, as a *presumption*, which by definition means it can be displaced. Lord Hoffmann gives the orthodox qualification in *Simms* by stating "Parliamentary sovereignty means that Parliament can…legislate contrary to fundamental principles of human rights".[23] That is, if the courts are convinced that Parliament intended to legislate against common law rights then the presumption will give way; the presumption is ostensibly centered on what Parliament *intended*. When, then, will the courts be convinced that Parliament did intend rights to be displaced? The most obvious example would seem to be where Parliament has used express language[24] or where it is a necessary implication from the statutory framework that the right is to be overridden.[25] In *R (Gillan) v Metropolitan Police Commissioner*,[26] for example, the House of Lords said "The principle of legality has no application in this context, since even if these sections are accepted as infringing a fundamental human right,

[21] More is said on the relationship between the rule of law and the principle of legality later in this Chapter.
[22] *R v Secretary of State for the Home Department, ex p Stafford* [1999] 2 AC 38 (HL), 47G-49F (Lord Steyn).
[23] *Simms* (n 1) 131 (Lord Hoffmann).
[24] *R v Lord Chancellor, ex p Witham* [1998] QB 575, [1998] 2 WLR 849, 586 (Laws J).
[25] *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, [31] (Lord Steyn).
[26] [2006] UKHL 12, [2006] 2 AC 307.

itself a debatable proposition, they do not do so by general words but by provisions of a detailed, specific and unambiguous character".[27] Lord Carswell sums up the orthodox view when he says

> [T]he courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication.[28]

These perceived limitations on the principle flow from the fact that the principle is itself said to be concerned with Parliament's actual intent. The orthodox view is forcefully argued for extra-judicially by Sir Philip Sales when he says that the "principle of legality is directed at seeking to ascertain the true intention of Parliament, as the basis for the interpretation of legislation".[29] This is seen as somehow different to s 3 HRA, which instead seeks to find "the meaning [of the provision] that best accords with Convention rights".[30] An Act being interpreted by s 3, as opposed to the principle of legality, is therefore not restricted to finding Parliament's *actual* intention on the orthodox view.

The difference between the two comes out in the contrasting cases of *Fitzpatrick v Sterling Housing Association Ltd*[31] and *Ghaidan v Godin-Mendoza.*[32] Aileen Kavanagh has described the contrast between the two cases as "instructive as a way of examining the difference s.3(1) has made to traditional methods of statutory interpretation".[33] These cases effectively concerned the same issue: on the death of a protected tenant his or her spouse became a statutory tenant by succession. "Spouse" did not necessarily mean the couple were married; a person who was living with the original tenant "as his or her wife or husband" was treated as the spouse of the original tenant due to paragraph 2(2) of Schedule 1 to the Rent Act 1977. In the former case, decided before the HRA, the House of Lords said that this phrase did not include members of a same-sex couple.[34] Reading it in such a way would amount, it was said, to "an exercise of legislation, not interpretation" [35] The phrase was, apparently, "obviously intended to include persons not legally

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[27] ibid [15] (Lord Bingham).
[28] *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2002] UKHL 21, [2003] 1 AC 563, [8] (Lord Carwell).
[29] Sir Philip Sales, "A comparison of the principle of legality and section 3 of the Human Rights Act 1998" [2009] LQR 598, 607.
[30] Lord Lester, Lord Pannick, and Javan Herberg, *Human Rights Law and Practice* (3rd edn, LexisNexis 2009) 43.
[31] [2001] 1 AC 27 (HL).
[32] [2004] UKHL 30, [2004] 2 AC 557.
[33] Aileen Kavanagh, "Judicial Reasoning after *Ghaidan v* Mendoza" in Fenwick H, Phillipson G, and Masterman R (eds) *Judicial Reasoning under the UK Human Rights* Act (CUP 2008) 138.
[34] It is worth noting that the principle of legality is not expressly mentioned in the case.
[35] *Fitzpatrick* (n 31) 68 (Lord Hutton).

husband and wife who lived as such without being married. That *prima facie* means a man and a woman".[36]

The latter case involved the HRA and the question for the House of Lords was whether the interpretation given to paragraph 2(2) of Schedule 1 in *Fitzpatrick* could survive s 3 HRA. Godin-Mendoza's argument was, effectively, that (i) the *Fitzpatrick* interpretation infringed Arts 14 and 8 of the European Convention on Human Rights (ECHR) and, as such, (ii) paragraph 2(2) of Schedule 1 ought to be read in a Convention compliant way. The House of Lords found that Godin-Mendoza was correct about (i)[37] and as such turned to whether s 3 allowed a departure from the interpretation provided in *Fitzpatrick*. Whilst it was clear that "not all legislation would be capable of being made Convention-compliant by application of section 3"[38] it was "accepted that the application of section 3 does not depend upon the presence of ambiguity" in the statutory language.[39] It was said that the principle of legality "involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 [in contrast] may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.".[40] This is, however, tempered by the fact that s 3 does not allow "a meaning inconsistent with a fundamental feature of legislation".[41]

As including a same-sex couple in the definition of "living together as his or her wife or husband" would not go against the grain of the legislation it was decided that paragraph 2(2) of Schedule 1 could be read in a way as to not discriminate against same-sex couples; this therefore departed from the common law interpretation given in *Fitzpatrick*. The orthodox view, here, is that s 3 made the difference in the later case; moreover, it did so because it acts in a different, more rigorous, way. Section 3 requires a court to give a Convention-compliant meaning wherever it is possible to do so; this includes situations where it is obvious what Parliament intended.

The orthodox view can therefore be summarised in the following way: the principle of legality is said to be limited to discoverable Parliamentary intent; thus, when it is obvious that the legislature wants something (either by express words or by necessary implication) that something has to be respected by the courts. As we shall see in the following sections and Chapter 7, I take

[36] ibid 34 (Lord Slynn).
[37] *Ghaidan-Mendoza* (n 32) [8]-[24] (Lord Nicholls).
[38] ibid [27] (Lord Nicholls).
[39] ibid [29] (Lord Nicholls).
[40] ibid [31] (Lord Nicholls).
[41] ibid [33] (Lord Nicholls).

issue with this orthodoxy and suggest that the principle of legality is far less limited than the conventional view would suggest.

III. (Re)Defining the Principle of Legality: Parliamentary Intention and the Rule of Law

In the preceding section I showed that, on an orthodox view, the common law principle of legality is a very strong tool. It has been used to, *inter alia*, quash secondary legislation setting tribunal fees and ensure that prisoners can communicate with journalists; it does so not by attacking the decision itself *per se* (on which see Chapter 5) but by saying the decision maker, whose power comes from the enabling statute, was never authorised to do what he did by the statute, meaning that the action was *ultra vires* and void. However, the principle of legality is said to be limited by the fact that it relies on Parliamentary intention for both its legitimacy and operation; that is, the basis of the principle is that it is one of statutory interpretation seeking to find Parliament's intention. Therefore, when it is clear (either by express words or necessary implication) what Parliament wants to do the principle of legality, it is said, has to give way. The principle acts as an *a priori* assumption vis-à-vis Parliament's commitment to the rule of law; this is a presumption that can (and ostensibly does) give way when Parliament decides it to be so and the courts must recognise this decision.

This is seen as different from the interpretation provision found in s 3 of the HRA. Despite Lord Hoffmann's statement that "the principle of legality will be expressly enacted as a rule of construction in section 3",[42] thereby assuming that all that is happening is a statutory recognition of a preexisting constitutional state of affairs, s 3 has been argued, as seen above, to be free from the limitations of the principle of legality. Since s 3 legislatively authorises reading a statute in line with rights wherever it is possible to do so (thereby avoiding the purported limitations seen in the principle of legality) the claim is that s 3 is more rigorous in its protection of rights than the principle of legality.

I argue here that there are two difficulties with the presumed limits on the operation of the principle of legality (and therefore difficulties with assessing it as less powerful than s 3): first, there are clear epistemological difficulties with the purported limitations on the principle of legality; *Evans*[43] is a case in point, which will be shortly examined.[44] In short, we disagree about

[42] *Simms* (n 1) 132 (Lord Hoffmann).
[43] *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 2 WLR 813.

the boundaries of interpretation based on Parliamentary intent so, even if we accept there are boundaries, it is not clear where they will be or how we know if they are reached. Indeed, if we accept Parliamentary intention as a term it will be useful, after discussing the epistemological difficulties, to say what a better view of it is. Parliamentary intention, I argue, is nothing but shorthand for what meaning we impute onto Parliament as a legitimate legislator.

Second, the more fundamental objection is that the view seems premised on the idea that (a) Parliamentary intent can go against the rule of law so that there is some sort of clash between the law and the rule of law; and, relatedly, (b) that Parliament can override, if it wishes, aspects of the rule of law. Both of these, insofar as they are different, are difficult to sustain when subject to proper examination. The latter of these two issues will be developed in much more detail in the next Chapter, which explicitly examines the limits of Parliamentary sovereignty and the rule of law.

III.A. Epistemological Difficulties with Parliamentary Intention

As explained above, the orthodox view is that Parliament can displace common law rights with sufficiently clear language or by necessary implication. Therefore, the argument goes, this means that the principle of legality is less robust at protecting one's rights than its counterpart in s 3 HRA, which is not threatened by Parliament's actual intent but only by semantic possibilities. Thus, on the orthodox account, it may be accepted that citizens have a right to free speech but if Parliament makes itself sufficiently clear in, say, banning the Labour Party and making it a criminal offence to distribute Labour Party literature then the Labour Party is banned and it is a criminal offence to distribute its literature, regardless of the fact that to do so would be an horrific encroachment on one's democratic freedoms.

In this section I argue that, even if it is true[45] that Parliament can *in theory* legislate contrary to the rule of law, there exist sufficient epistemological problems to consider this purported limitation on the principle of legality's use itself highly limited. The argument here is quite simple: how do we *know* what Parliament *actually* intended? More specifically, how do we know, even on an orthodox view, to a sufficient extent that Parliament *actually* intended to displace the *a priori*

[44] I say shortly because *Evans* was, obviously, the focus of Chapter 2. I made broader points about the case in Thomas Fairclough, "*Evans v Attorney General*: The Underlying Normativity of Constitutional Disagreement" in Juss S and Sunkin M (eds), *Landmark Cases in Public Law* (Hart 2017).
[45] On which see the following section and Chapter 7.

assumption of consistency with constitutional principles (and specifically, for our purposes, human rights)?

The difficulty in assessing whether there is in fact such Parliamentary intention comes out quite clearly in the case of *Evans v Attorney General*.[46] Chapter 2 examined this case in some detail[47] but it is worth mentioning again here. In that case the Supreme Court was tasked with reading s 53(2) of the Freedom of Information Act 2000, which said that if it was "reasonable" to do so the responsible minister could issue a certificate to the effect that they will not be bound by a decision or enforcement notice that requires information to be released. Depending on how widely or narrowly one read s 53(2) the provision either gave a great deal of unique power to a minister or very little power at all. All four Supreme Court Justices that gave judgments agreed that Parliament was able to exclude constitutional principles with sufficient clarity[48] but they all disagreed as to what would *constitute* sufficient clarity. Lords Hughes and Wilson thought that s 52(2) FoIA "clearly" demonstrated sufficient intent whilst Lord Neuberger thought that the provision did not even approach sufficient clarity to displace the rule of law.

Unfortunately, no proposed solution to this problem really helps us find Parliamentary intention with any degree of confidence. We cannot just look at the literal wording of the statute[49] since that, by definition, would rob the principle of legality[50] of any utility, purpose, or function because the principle of legality acts as an *a priori* assumption. There is little serious academic work that thinks statutes ought to be read literally all of the time to get us towards Parliamentary intention and so I intend to not say anymore about the literal wording as a standalone feature.

Where, then, do we turn in our search for Parliamentary intention? Well we could, in theory, treat what the government intended when introducing a Bill to Parliament as constitutive of its meaning. We could look at the White Paper (if there is one), Parliamentary debates and speeches, comments by the introducing minister, the government's manifesto if it contained a section on this piece of proposed legislation, what proposed amendments the government rejected, and so on and so forth. This could help us to see the "Parliamentary context"[51] in which judges may be able to find the Parliamentary intention. Let us give an example. Imagine an Act says something

[46] *Evans* (n 43).
[47] Further, I dealt with it more generally in Fairclough (n 44).
[48] See Lord Neuberger at [56]-[58]; Lord Mance at [124]; Lord Hughes at [154]; and Lord Wilson at [173].
[49] As Lord Hughes in *Evans* would advocate: *Evans* (n 43).
[50] And indeed any other interpretive presumptions, e.g. the presumption that statutes should accord with international law.
[51] Lord Wilson in *Evans* (n 43).

along the lines of "the Secretary of State for Justice can, by written order, do anything in furtherance of good order in prisons". The Secretary of State orders that prisoners who cause a nuisance in prisons ought to be chained to the walls. A prisoner is chained to a wall and commences a judicial review, saying that this constitutes torture, which is prohibited by the common law.[52] The Secretary of State says that the words say he can do anything. A response from the claimant would be that "anything" has to be read as "anything that does not violate one's rights". So far so good. However, the Secretary of State may say that, for example, the government ran on a manifesto promising an "end to namby-pamby, soft prisons" and to "restore discipline in our prisons". Further, imagine the Secretary of State could point to proposed amendments that said the new power "must accord with human rights enshrined in the common law and international law" but the government whipped its Members of Parliament to vote against the amendment. Thus, the Secretary of State says, Parliament clearly did not intend for the power to be circumscribed to respect human rights; such a reading of the Act, the Secretary of State says, would render the power impotent and not respect Parliament's intention.

Does this Parliamentary context reveal Parliament's intention such that rights ought to be disregarded? Well it is certainly the case that since *Pepper v Hart*[53] the courts have been able to have recourse to Parliamentary materials to look at Parliamentary context but, as Lord Steyn notes extra-judicially, the "statements of a minister are no more than indications of what the government would like the law to be" and whilst such references may help to understand the context or purpose of an Act they cannot constitute Parliamentary intention because "to treat the indications of the government….as reflecting the will of Parliament" reduces the role of Parliament and is problematic for the separation of powers.[54] Essentially, just because the government wanted a Bill to mean something why should we say that is what the Act that came from that Bill in fact means when such a reading would be problematic for constitutional principles such as the freedom of the individual? Indeed, Lord Hoffmann seems to agree with this sentiment when he says regard to statements made in Parliament raises "conceptual and constitutional difficulties".[55]

So if we sideline the role of the government's wishes as being constitutive of or going significantly towards Parliamentary intention then what are we left with? We could look to

[52] See Chapter 4 and *A* (n 8) [11] (Lord Bingham)
[53] [1993] AC 593 (HL).
[54] Johan Steyn, "*Pepper v Hart*; a Re-examination" (2001) 21 OJLS 59, 65.
[55] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NT 390, [40] (Lord Hoffmann).

Parliament as a whole but that does not really help us either; Parliament is made up of some 793 peers in the House of Lords and 650 Members of Parliament in the House of Commons. How do we get a single intention, "Parliament's intention", from (up to) 1,443 individuals walking through a particular lobby in either Parliamentary chamber? We might look at the speeches of particular peers or Members of Parliament but it is reprehensible to privilege one or some individuals in either House over others; it would be inconsistent with our system of *Parliamentary* legislation:

> A statute passed in Parliament is an Act *of Parliament*, not an act of the majority party…There is no justification for privileging *the mental states of any faction* in the legislature as canonical with regard to the decision that has been made by the whole. The decision is made in the name…of the entire community….[Parliamentary] proceudres make us *one* in action, and their identification of something as the text of a statute makes us *one* as the authors of a deed.[56]

Further still, even putting to one side these constitutional issues there is still an epistemological issue with looking at individual members' speeches in either House of Parliament: even if we can identify a speaker how do we know what she meant? What *counts* as their intentions? Dworkin puts this problem broadly in the United States of America context when he says that:

> Whose mental states count in fixing the intention…Every member of the Congress enacted it, including those who voted against it? Are the thoughts of some- for example, those who spoke or spoke most often, in the debates- more important than the thoughts of others? What about the executive officials and assistances who prepared the initial drafts? What about the president who signed the bill and made it law? Should his intentions not count more than any single senator's?...Further…a statute owes its existence not only to the decision people made to enact it but also to the decision of other people later not to amend or repeal it.[57]

The Parliamentary intention approach, at least in a simplistic sense, does not help us with these questions; it says that legislative intent can cut across the rule of law when it is "clear" or "explicit" but how do we know that such an intention is present? It is all well and good for Michael Gordon, for example, to describe cases like *Anisminic*[58] as an "aberration", "where the courts have used interpretive techniques to bypass, rather than implement, the legislative

[56] Emphasis added. Jeremy Waldron, *Law and Disagreement* (OUP 1999) 144-5.
[57] Ronald Dworkin, *Law's Empire* (Hart 1986) 318-9.
[58] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

intentions of Parliament"; indeed, Gordon calls *Anisminic* a "famous"[59] example of such a case but nothing he says really helps us to *identify* or *be certain* of Parliament's *actual* intention.

It is difficult then to really know what *counts* as Parliamentary intention; as argued above, there are clearly severe epistemological issues with such an approach. Yet it is clear from our constitutional arrangements that Parliament has a very important role in law making via statute. What, then, should we understand this role to be and how does it relate to the idea of "Parliamentary intention"?

What do we make of the phrase "Parliamentary intention"? It is, for the reasons considered above, difficult to really get to Parliamentary intention, which can purportedly limit the principle of legality, with anything approaching the clarity we may get from a single speaker.[60] As Allan makes clear "if, then, we do talk of legislative intention…we must mean the intentions or purposes we *attribute* to Parliament, according to reasons that apply independently of its members' opinions or preferences.".[61] That is, we must inquire as to what Parliament as a single, corporate body meant. To keep the metaphor of Parliamentary intention live it makes sense to speak of the "relevant author for the purposes of any pertinent legislative intent" as an "*ideal or representative* legislator…The ideal legislator is the author of a text that conveys Parliament's instructions in a manner that fairly and accurately reports the outcome of deliberation and decision; but he takes for granted….the fundamental rights of citizens".[62] From this perspective, what counts as Parliamentary intention, and therefore on the orthodox view could limit the rule of law, and therefore common law rights, is itself a value judgment; it does not exist by virtue of individual peers or Members of Parliament or the government but instead what the body as a whole is understood as meaning. We are still looking at Parliamentary intention but, I suspect, in a very different way to what, for example, Gordon means. For example, it is *ontologically* different to the *actual* intent of the government insofar as that is in itself discernible. As Allan properly argues, if we are looking at Parliamentary intention from the perspective of an ideal legislator then, whilst the statute's general purpose(s) must be respected and accounted for[63] we also have to see human rights, at common law, as being part of the meaning of the legislation because they form part of the context that the Parliament is legislating in; even if we may think that the words

[59] Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics, and Democracy* (Hart 2015) 122.
[60] Though note that even getting to a single speaker's meaning by his or her words is in itself not always easy. What people *mean* and what they *say* are not always the same thing: Dworkin (n 57) Ch 3.
[61] T R S Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (OUP 2013) 192. Emphasis original.
[62] Emphasis original. ibid 194-5.
[63] ibid 174.

used point in one direction the true meaning of Parliament's intention should respect the rule of law and the principle of legality.[64] When we recognise rights as part of the domestic constitutional landscape[65] why should we impute an intention onto Parliament that ignores or sidelines those rights? If Parliamentary intention is a construct, a relatively useful metaphor for helping us to know what Parliament legislated, not the actual intention of an actual person then why should it be taken, ever, as requiring a breach of the rule of law? To the extent that Parliament has a discernable purpose the courts ought, of course, try to give effect to that general purpose but it should be extremely slow to determine that the purpose is one that cuts across the rule of law; if a rule of law compliant interpretation is available then that ought to be the reading supplied by the interpreting court.[66]

It is unclear how Parliamentary intention can therefore limit the operation of the rule of law in any substantive way. Judges and academics talk about it being able to do so when it is "clear". I have argued that it is difficult to know what Parliamentary intention is in a given case; it cannot be the words on their own, nor the government's views, nor the views of individual legislators. It has to be, I have argued after Allan, Parliament as a corporate body; as Waldron points out, it is Parliament speaking with one voice. This requires us to understand what the body of Parliament means. The rule of law, legal principle, forms part of the context in which Parliament itself legislates; if a judge thinks that a reading of a statute breaches the rule of law then the judge ought to reject that interpretation[67] as being constitutionally inappropriate. Whilst it may seem a linguistic stretch to reject an interpretation that closer fits the ordinary meaning of the wording of the text this privileges a literalist interpretation but why should that be so? If we are looking for what Parliament meant why should the text (in a narrow sense) be privileged over the context (which includes constitutional principle) when deciphering Parliamentary intention? As Allan puts it

> Treated as a general principle…the doctrine of parliamentary sovereignty is perfectly consistent with the rule of law because it does not threaten the integrity of basic constitutional values. Every case….calls for an accommodation of legislative purpose and legal principle…Just as it would be an affront to representative democracy for a court to disregard a statute's general purposes….so it would infringe the rule of law if a court invoked either purpose

[64] ibid 169.
[65] As I argued for in Chapter 4.
[66] What happens when the only interpretation available is one that cuts across the rule of law is discussed in Chapter 7.
[67] This is precisely what Lord Neuberger did in *Evans* (n 43).

> or text to justify the infliction of unnecessary damage to the rights of individuals.[68]

III.B. Parliamentary Intent, the Rule of Law, and Legal Meaning

The preceding points about Parliamentary intention and how we decipher it draws on or hints at a deeper point, which is examined centrally in this section. In short, the orthodox view is that, whilst we may take account of the rule of law in arriving at legislative intent, the former must give way to the latter when the latter is sufficiently clear. I argued previously that that clarity is often lacking and there is little reason, once one appreciates what we mean by Parliamentary intention, to impute onto Parliament an intention to violate the rule of law. Whilst I will discuss below and in Chapter 7 what happens when we cannot understand a statute in a way that respects the rule of law the view taken here is that this will be incredibly rare and, at the very least, much rarer than the orthodox view would have it.

I supplement that analysis here by explaining the relationship between the rule of law and Parliamentary intention. The former is logically prior to the latter; it is therefore logically impossible to really understand what Parliament's intention is without accommodation of the rule of law. Parliament cannot displace or somehow cut across something that is logically prior to its powers; because of this limitation on Parliament we cannot understand Parliament as exercising its legislative power in a way to cut across the rule of law. The rule of law is, as stressed throughout this thesis and explained in particular in Chapter 2, the cornerstone of the constitution; it is logically prior to legal powers and therefore all Parliamentary legislation, which purports to convey legal powers, duties, and/or obligations, must be understood in line or by reference to the rule of law.[69] The previous section argued this view makes epistemological sense; since we cannot easily know what Parliament intended we have to impute an intention onto it so it makes sense, I argued there, to impute one that respected constitutional principles such as the rule of law. This section argues that that view is theoretically coherent and sound.

As ever, it will be useful to examine the orthodox view of the rule of law's interaction with statutory text before moving on to why this view is, unfortunately, mistaken. The challenge to the rule of law and its interpretive prowess comes, most prominently, from Geoffrey Goldsworthy. He argues that there is a distinction between the "genuine interpretation" of a statute, which

[68] Allan (n 61) 174.
[69] I examine the full ramifications of this statement vis-à-vis Parliamentary sovereignty in Chapter 7.

respects the statutory text and "creative interpretation", which apparently "involves constructing the meaning of a text" by modifying it or altering the meaning of the statute.[70]

This idea of (presumably illegitimately) changing or modifying legislation by reference to external values is a pertinent one and one that seems to be assumed in many constitutional writers' work and occasionally comes in judicial decisions. For example, in *Evans* Lord Wilson said that Lord Neuberger's interpretation of s 53(2) FoIA "did not…interpret [the provision]…it re-wrote it".[71] Likewise, after accepting that the rule of law can play a part in adjudication and interpretation[72] Mark Elliott says that

> This is not…to suggest that the principle of parliamentary sovereignty is an infinitely elastic one, such that no amount of judicial violence to statutory provisions would imply any breach of the judicial obligation implicit in the principle. Unless the obligation to enforce legislation is to be emptied of any meaningful content, a point must come at which the statutory text is so clear as to preclude a given 'interpretation', even if competing constructions would accommodation rule of law or separation of powers considerations less fully. The obligation, after all, is to interpret the statutory provision, *not to treat it as an essentially blank canvas on which to project constitutional values that operate so radically upon the provision as to overwhelm it.*[73]

Elliott goes on to say that, given the foregoing, it is difficult to escape the view that Lord Neuberger's understanding of s 53(2) was at least close to the line between interpretation and invention. Likewise, Forsyth and Ekins accuse Lord Neuberger in *Evans* of not attending "properly to the reasoning and choice of the enacting Parliament" and not being sensitive to "the evident disconnect between the meaning he imposes on the statute and any meaning there is reason to think Parliament intended to convey. Yet the fundamental aim of statutory interpretation is to find and give effect to the intention of Parliament".[74]

Further still, Michal Hain seems to suggest that anything more than a narrow, limited use of the principle of legality would provide "a recipe for constitutional conflict where fundamental

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[70] Geoffrey Goldsworthy, "Implications in Language, Law, and the Constitution" in Lindell G (ed), *Future Directions in Australian Constitutional Law: Essays in honour of Professor Leslie Zines* (Federation Press 1994) 162.
[71] *Evans* (n 43) [168] (Lord Wilson).
[72] Which is unsurprising given his modified *ultra vires* theory doctrine: Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001).
[73] Mark Elliott, "A tangled constitutional web: the black-spider memos and the British constitution's relational architecture" [2015] PL 539, 549. Emphasis added.
[74] Richard Ekins and Christopher Forsyth, "Judging the Public Interest: The Rule of law vs. the Rule of Courts" (Policy Exchange 2015) 14 https://policyexchange.org.uk/wp-content/uploads/2016/09/judging-the-public-interest.pdf (accessed 2 June 2018)

constitutional values clash with explicit legislative wording".[75] Moreover, Hain then argues that *Evans* and *UNISON*[76] "highlight the difficulties inherent in *implying* constitutional values into a statute".[77] Adopting Elliott's canvas metaphor Hain takes issue with the judiciary "[projecting] extrinsic values onto the partially complete canvas painted by the words - that is, by means of statutory interpretation".[78]

I wish to make two points about these pieces and their united view that the rule of law cannot and (one assumes) should not interfere with "explicit" legislative intention: (a) as argued above, it is unclear when Parliament is explicit; and (b) even if we are fairly sure Parliament wanted to do something by its choice of words in the statute so what? Why does our being fairly sure, or even sure, matter? Why should that require a judge to disregard the constitutional implications of a particular interpretation of a statute?

As to (a) all that needs to be said is that Goldsworthy *et al* put the cart before the horse: by saying judges are implying constitutional principles into legislation they are implying that we *already know* what that legislation means; we may know what it *says* in the sense of which words are used in which order but that is not the same as *meaning*. We do not, just by reading a statute, know what it means. That is the point. As demonstrated above we do not easily know what Parliament did *in fact* intend. The above quotations are full of the same assumption: that we know what Parliament meant and we are somehow changing the meaning. As argued in the section above, we do not *know*; we might suspect but that is not the same thing. Even if we suspect or have a fairly good idea what individual Members of Parliament would have expected the words of a statute to mean is that assumption enough to displace constitutional principles? Hain talks about "explicit legislative wording" but it is not clear what that means. The wording is explicit in that one does not have to hunt for the words; you simply look at them on the statute book. They are not hidden away. All legislative wording is, in that sense, "explicit". Yet it is the *meaning* of the text that is not, in any way, obviously certain. To take the rule of law seriously we must focus on the language and its interaction with the rule of law; not just the language in isolation.[79] This, in most

[75]Michal Hain, "Guardians of the Constitution- the Constitutional Implications of a Substantive Rule of Law" UK Const Law Blog (12 September 2017) https://ukconstitutionallaw.org/2017/09/12/michal-hain-guardians-of-the-constitution-the-constitutional-implications-of-a-substantive-rule-of-law/ (accessed 11 January 2018).
[76] *UNISON* (n 12). Considered in Chapter 4.
[77] Hain (n 75). Emphasis added.
[78] Ibid.
[79] See further my critique of Sales LJ's approach to ouster clauses on this basis. He focused on semantics whereas I suggest the focus ought to be on constitutional substance: Thomas Fairclough, "*Privacy International*: Constitutional Substance over Semantics in Reading Ouster Clauses" UK Const Law Blog (4 December 2017)

cases, will be sufficient to give effect to the statutory purpose whilst respecting the rule of law though of course it leaves open the possibility that, in some cases, it will not be possible; I discuss such cases later in this Chapter and in Chapter 7.

This brings us to (b): why does it matter if legislative wording seems to cut across the rule of law? Examining the canvas analogy might prove useful. The point that the above writers seem to be making is that the judiciary, in using the principle of legality, are somehow changing the meaning of the statute by imposing "extrinsic" principles upon it. This, it seems, becomes, at some point on the spectrum, illegitimate for the judiciary to do.

Yet I argue that these writers have got the cart before the horse again. They talk as if legislation, as if law, exists away from the rule of law; as if we can know what a particular law is without reference to the rule of law. By the analogy used, we have law that is then changed or modified by an "extrinsic" value: the rule of law. But that is, to be frank, too simplistic and miguided a view of the rule of law and the wording of legislation. The rule of law, as stressed in previous Chapters, is logically prior to law and law-making powers. At the most general level Lord Hope told us in *Jackson* that "the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based".[80] Allan makes a similar point when he says "without resort to context and circumstance there is no independent meaning to 'change'".[81] All bodies of the state must act in accordance with the rule of law; if we think that Parliament's law-making powers are legal, in the sense that Parliament can be acting legally or not, then it follows that the rule of law is logically prior to Parliament.[82] This specific point is not one I wish to labour here[83] but this is the case: Bills have to pass certain legal procedures to be Acts of Parliament. Such Acts are legal Acts and legal powers are limited by the rule of law. The breadth of these legal limits is neither here nor there for now[84]; what is important to note for current purposes is that Parliament must act in accordance with law and law is itself understood by reference to the rule of law. As Allan points out, "the rule of law is not merely an ideal or aspiration *external* to the law…it is a *value* internal to law itself, informing and guiding our efforts to…ascertain legal rights".[85]

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https://ukconstitutionallaw.org/2017/12/04/thomas-fairclough-privacy-international-constitutional-substance-over-semantics-in-reading-ouster-clauses/ (accessed 11 November 2018).

[80] *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56, [107] (Lord Hope).

[81] Allan (n 61) 201.

[82] On this point see Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28(4) OJLS 709.

[83] It was examined in more depth in Chapter 2.

[84] On which see Chapter 7.

[85] Allan (n 61) 88.

The rule of law is not some external value that is projected onto and (illegitimately) changes the law provided for by Parliament; it is an internal value. The canvas analogy implies that external values are cancelling out what the legislation provided for, what the legislation meant, and is therefore, somehow, changing or disregarding the law. The suggestion is that the judiciary, in adopting a rule of law consistent interpretation, are somehow painting over what Parliament provided for. Yet this is wrong. Legislation *can only* be understood in line with the rule of law; law cannot, logically, run counter to the rule of law. What a statute means, what powers, rights, duties, and/or obligations it provides for can only be understood in line with the rule of law. The understanding of a statute logically entails a rule of law compliant meaning. When a judge is faced with two competing interpretations of a statute, one compliant with the rule of law and one that cuts across it, she is *obliged* to judge that the rule of law compliant meaning is the *correct meaning* of the statute; there is no other choice here. Rather than the rule of law being extrinsic legal powers therefore carry an implicit, intrinsic limitation that the powers cannot be used or understood in a way that is contrary to the rule of law.

From this perspective there is no real clash nor difficulty like that envisaged by Goldsworthy *et al* between the rule of law and legislation because the latter's meaning cannot be ascertained without reference to the former. This may at times give us a non-literal meaning to the statute, in that there may well be a disconnect between the wording and meaning of a statute (e.g. in *Anisminic* or *Evans*) but this is not in itself a problem and is, instead, to be expected. Context often gives a very different meaning to text than the text would on its own and you cannot divorce the two. As I argued elsewhere, when the judiciary are interpreting a statute they are seeking to discover what the law is; this necessarily takes account of the aim of the legislation and its words but also the rule of law because the former two do not exist on an island isolated from constitutional principle.[86] This is why it is difficult to agree with Elliott who seems to suggest that the further one moves away from a literal reading a statute the more justification is required[87]; as Allan makes clear such a concern implies "that a literal reading enjoys an automatic priority, questions of legitimacy arising only when a more nuanced, non-literal reading is substituted".[88] Further still, Allan makes clear that "a literal reading needs as much justification as a non-literal one".[89] It is therefore difficult to hold the orthodox view that the text of a statute can somehow displace the

[86] Thomas Fairclough, "What's New About the Rule of Law? A Reply to Michal Hain" UK Const Law Blog (18 September 2017): https://ukconstitutionallaw.org/2017/09/18/thomas-fairclough-whats-new-about-the-rule-of-law-a-reply-to-michal-hain/ (accessed 11 January 2018).
[87] Elliott (n 71).
[88] T R S Allan, "Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*" [2016] CLJ 38, 48.
[89] ibid 45.

rule of law; what we seek is the *meaning* of a statute and this is, by definition, sensitive to context, which, given its primary role, includes the rule of law, and to the purpose of the statute as expressed in the text.

One way to demonstrate this is through the judicial treatment of ouster clauses. As stated throughout, there has to be a dialogue between text (which may reveal the aim or policy of the legislature) and context, which includes the rule of law. We only understand the *meaning* of the text by reference to the context. It is not isolated. From this perspective, given the logical priority of the rule of law, the text of a statute cannot and should not be read in a way that vandalises or somehow cuts across the rule of law. When deciding on which interpretation or understanding of the meaning of text is the correct one, then, interpretations that would cut across the rule of law must be discarded. Therefore, the same or similar textual phrases in different factual circumstances may produce startlingly different results. The contrasting cases of *Anisminic* and *Privacy International*[90] prove useful here.[91]

In *Anisminic* the Foreign Compensation Commission, an administrative body set up to distribute funds, made a decision that was subject to a challenge. Before the challenge could be substantively examined, however, the Commission sought to rely on a statutory ouster of judicial review: section 4(4) of the Foreign Compensation Act 1950 provided that "the determination by the Commission of any application made to them under this Act shall not be called into question in any court of law". Elliott suggests that, "on the face of it, there seems to be very little, if any, room for judicial maneuver: if no 'determination'…could be 'called in question'….then it is difficult to see what scope might remain for judicial review".[92] This is likely correct if one takes a narrow, isolationist point of view; if the text and a shallow reading of it were all that mattered then, it would seem, that this is exactly what s 4(4) Foreign Compensation Act 1950 does provide for.

That was not the view of the House of Lords. Interpreting s 4(4) Lord Reid argued that if the Commission committed an error of law then, by definition, it would not be acting under the Act

[90] *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2017] All ER (D) 188 (Nov) on appeal from [2017] EWHC 114 (Admin), [2017[All ER (D) 25 (Feb).
[91] It is worth noting that *Privacy International* seems likely, at the time of writing this Chapter, to appeal to the Supreme Court. Nothing that I say in this Chapter particular turns on the actual final determination of the case. The point I make more turns on the method or mode of analysis vis-à-vis statutory interpretation.
[92] Mark Elliott, "Through the Looking-Glass? Ouster Clauses, Statutory Interpretation and the British Constitution" in Hunt C, Neudorf L, and Rankin M (eds), *Legislating Statutory Interpretation: Perspectives from the Common Law World* (Carswell 2018) 7.

that established it, and would therefore be "doing something which [it had] no right to do"[93]; that is, its decision would be a nullity and the ouster clause contained in s 4(4) did not protect nullities, it protected "determinations". Further, Lord Reid stated if s 4(4) was intended "to prevent any inquiry [in all circumstances] I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law".[94] This, in effect, meant that the section was read in a way that protected the rule of law; an interpretation of the statute that would oust the jurisdiction of the High Court to examine the legality of executive actions would have been an anathema to the rule of law.[95] It is worth noting here that whilst Lord Reid countenances something "more specific" as being able to oust the jurisdiction of the High Court he does not tell us what that would actually be; the best way to read this, I suggest, is in the way, extra-judicially, Lord Phillips suggested: Lord Reid was throwing down the gauntlet to Parliament, saying it cannot be taken to intend something that cuts across the rule of law, to avoid a constitutional crisis.[96] What would happen if the gauntlet was taken up is discussed in Chapter 7.

Privacy International involved a not dissimilar provision. The Investigatory Powers Tribunal (IPT) is a specialist tribunal set up by the Regulation of Investigatory Powers Act 2000 (RIPA) to supervise the conduct of the intelligence services. The IPT is made up of five Justices of the High court and other lawyers and has its own procedural rule. Privacy International made a complaint to the IPT that the security services had been involved in unlawful activity relating to computer hacking. In short, they said that they had not been acting pursuant to a lawful warrant because the warrant was overly broad. A preliminary issue in the case was whether warrants could be given in general, broad terms and still fall within RIPA. The IPT said that it could. Privacy International wanted to challenge that decision. There is no right of appeal in RIPA so Privacy International commenced judicial review proceedings against the IPT in the High Court.

However, s 67(8) RIPA states "Determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court". Despite the advocates on both sides arguing the case in terms of the rule of law Sales LJ, with whom Flaux and Floyd LJJ agreed, stated that this case

[93] *Anisminic* (n 58) 174 (Lord Reid).
[94] ibid 170.
[95] Indeed, Lord Neuberger says "The constitutional importance of the principle that a decision of the executive should be reviewable by the judiciary lay behind the majority judgments in [*Anisminic*]": *Evans* (n 43) [54] (Lord Neuberger).
[96] Political and Constitutional Reform Committee, *Constitutional role of the judiciary if there were a codified constitution* (2014-14 HC, 802) para 41.

turned "on a short point of statutory construction".[97] Sales LJ noted that s 67(8) RIPA was drafted differently to that at issue in *Anisminic*, which, as stated, referred to "determinations" being immune from challenge. RIPA, however, included not only "determinations" but also decisions "as to whether [the IPT has] jurisdiction". For Sales LJ this precluded the *Anisminic* interpretation of ouster clauses. He said that this view was "strongly supported by the statutory context in which section 67(8) appears"[98] and it was "clear that Parliament's intention in establishing the IPT…was to set up a tribunal capable of considering claims and complaints against the intelligence services under closed proceedings".[99] For him, giving effect to the ouster clause "promotes this purpose" and, conversely, reading around the section would "subvert" it.[100]

What do we make of these divergent decisions? More importantly, why are they different? I suggest one argument here comprised of two parts: (i) it is emphatically *not* about the statutory language; and (ii) it *is* about the effect each provision may have on the rule of law. As to (i) it will be apparent this Chapter takes issue with Sales LJ's approach. On one view he is correct: the language employed by RIPA is different to that of the Foreign Compensation Act 1950. However the question is surely why does it matter to such a significant extent to render the clauses, in effect, as meaning the opposite of one another in that one successfully ousts jurisdiction and the other does not. An interpretation of RIPA that does not oust jurisdiction may "strain" the natural meaning of the words in isolation but "it is not clear that it would be substantially more strained than that which was rendered in *Anisminic*".[101] Sales LJ talks about the clarity of Parliamentary intention but it is quite unclear how it was any more clear than in cases such as *Anisminic*, *Evans*, or *UNISON* or why it matters.

A better approach would be to focus on the rule of law implications in each case. Instead of focusing on the statutory language Sales LJ should have focused, as indeed James Eadie QC did on behalf of GCHQ,[102] on the rule of law because it may well be that the rule of law is threatened in one context but not the other[103] and it would be *this fact* as opposed to minor linguistic differences that justifies different readings or understandings of the two statutory provisions.

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[97] *Privacy International* (n 90) [24] (Sales LJ).
[98] ibid [48] (Sales LJ).
[99] ibid [42] (Sales LJ).
[100] ibid [43] (Sales LJ).
[101] Mark Elliott, "*Privacy International* in the Court of Appeal: *Anisminic* distinguished- again" PublicLawForEveryone (26 November 2017) https://publiclawforeveryone.com/2017/11/26/privacy-international-in-the-court-of-appeal-anisminic-distinguished-again/ (accessed 2 June 2018).
[102] *Privacy International* (n 90) [23].
[103] I take no view here on whether that is *in fact* the case; I only make the point here to demonstrate the wider point vis-à-vis the centrality of the rule of law to the *meaning* of legislation, which we, as lawyers, need to ascertain in any given case.

The central justification for the usual understanding of clauses that could be interpreted as ousting jurisdiction is that of access to the courts and judicial oversight of the executive in line with the rule of law; it is about making sure the citizen is not being treated arbitrarily by the state. It is an essential check on state power.[104]

One could simply argue that, in *Privacy International*, such a justification or reason for deciding on a narrow interpretation of s 67(8) is just not engaged. The factual matrix in *Privacy International* is, arguably, different in principle to *Anisminic* in that there are sufficient legal safeguards to protect the citizen from illegal or arbitrary treatment in the composition and rules of the IPT, which were lacking in relation to the Foreign Compensation Commission.[105] This seems to be what counsel for GCHQ was arguing for when he suggested that whether or not an ouster clause brings the rule of law into question will be dependent on context. James Eadie QC argued, as summed up by Sales LJ:

> On the one hand, if it is said that a provision should be construed as having the effect of excluding the possibility of judicial review in relation to an act of the executive, that would impact upon the usual principle of the rule of law in an especially intrusive way and the drafting required to achieve that effect would correspondingly need to be especially clear. On the other hand, if it is contended that a provision ousts the jurisdiction of the High Court in relation to judicial review but in the context of provision of a right of access to another court or tribunal, the rule of law would still be capable of being vindicated by an independent and impartial judicial body, even if not the High Court. The impact upon the rule of law would be far reduced and accordingly the courts should be more ready to find that the language of what appeared to be an ouster provision was indeed effective to achieve that result.[106]

This type of justification for a wide interpretation or understanding of s 67(8) is far more convincing than that advanced by Sales LJ, who effectively sidelines GCHQ's analysis for a far more textual one. The former's analysis focuses on a semantic difference that does little to justify a radically different conclusion; the latter bases the argument, at least in large part, on principle, which recognises the centrality of the rule of law and its place as the controlling factor in the constitution. From this perspective, there should be little doubt that the domestic constitution privileges the rule of law (when it is threatened) when looking for the *meaning* of statute.

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[104] These are the types of justification used by Lord Neuberger to support his interpretation of s 53(2) FoIA.
[105] Though *cf* David Feldman's analysis of *Anisminic* in David Feldman, "*Anisminic Ltd v Foreign Compensation Commission* [1968]: In Perspective", in Juss S and Sunkin M (eds), *Landmark Cases in Public Law* (Hart 2017).
[106] *Privacy International* (n 90) [23].

Where does this analysis take us? It will be recalled that the orthodox view is that the principle of legality, which gives effect to the rule of law in the interpretation of statutes, that is, in getting to statutes' *true meaning*, can be displaced with sufficient clarity of language[107] because the *aim* of statutory interpretation is to get to Parliament's intention. Yet this view has been challenged here. As I have argued, one cannot understand legislation's meaning without reference to the rule of law; the latter is logically prior to the former. To say that legislation *means* something that would cut across or diminish the rule of law is to fail to grasp what law is; any interpretation of a statute, that is any plausible account of what a statute means or of what the law is, must account for the rule of law. If it does not then it is not the correct interpretation of that statute. This may, of course, give rise to what may be seen as surprising results[108] in the sense that, once the rule of law is duly accounted for and appreciated, our understanding of a statute moves far from its narrow or more literal interpretation but, as stated, there is no reason to privilege a literal interpretation or act as if every step away from such an interpretation must itself be justified.

Yet where does this take us when examining s 3 HRA relative to the common law principle of legality? Which protects rights to a higher degree? In a sense that is an impossible question to answer: we cannot quantify interpretive rigour in any meaningful way. All we can do is describe how they work[109] and compare the two. From this perspective no doubt many would argue that it is clear that s 3 HRA goes further than the principle of legality; as described above, the orthodox view is that s 3 goes beyond *actual* Parliamentary intention whereas the principle of legality is, necessarily, proscribed by it. Further, no doubt they would, again, point to *Fitzpatrick* as an example of this. To an extent, of course, they would be correct to do so. *Fitzpatrick* did not account for rights in the same way as *Ghaidan*. There was clearly a failing; but the question becomes whether the failing is one of the principle of legality's or its application in the case itself? From the foregoing the answer this thesis provides ought to be obvious: the principle of legality was, and is, more than capable of giving the same answer in *Fitzpatrick* as *Ghaidan* provided by use of the HRA.

As argued in Chapter 4 the right to be free from arbitrary discrimination and/or treatment is at the core of the rule of law. A sufficient appreciation of this fact in the interpretive deliberation of *Fitzpatrick* would have rejected interpretations that discriminated against same-sex couples; in

[107] *Simms* (n 1) 131 (Lord Hoffmann).
[108] *Anisminic*, *Evans*, and *UNISON*, for example, have all been considered to be surprising.
[109] Not in the sense of an empirical investigation but how they *actually* work; this takes account of the fact that some cases may be wrongly decided.

short, it would have given an interpretation substantively similar to that in *Ghaidan*. The decision in *Fitzpatrick* wrongly endorsed an interpretation that denied same sex partners the same protections given to heterosexual partners. Indeed, in Fitzpatrick no issue was directly raised vis-à-vis discrimination[110]; whereas in *Ghaidan* it took center stage.[111] The failing by the House of Lords in *Fitzpatrick* is not a failing of the principle of legality, properly understood, but a failing of the court to use it properly. Had the court done so, had they recognised the importance of the rule of law and been courageous in producing an interpretation that may have unsettled the more conservative elements of society, they would have put a large amount of weight on the principle of non-arbitrariness inherent in the common law; there is, as Kavanagh shows, no reason why the Rent Act 1977 could *not* have been interpreted, at common law, so as to include same-sex couples.[112]

III.C. Limitations on the Principle of Legality?

It follows from what I have argued above that the orthodox view vis-à-vis the limitations of the principle of legality, relative to those of s 3 HRA, are, in fact, not as limited as expected. As Allan puts it, once we recognize the importance of constitutional principle and context "the old lynchpin of Parliamentary intent was never fully determinative".[113] Whilst the words of the statute are important in that they demonstrate or indicate the aim or purpose of the statute this must always be tempered with an understanding, appreciation, and accommodation of the rule of law within the statutory meaning.

When, though, will the principle of legality, a term that labels a complex dialogue between the purpose of a statute and the constitutional context it operates in to accommodate the former in the latter, not be able to provide an interpretation that is sufficient to respect the rule of law? The consequences, the constitutional escalation, of such a scenario without the HRA will be considered more fully in the next Chapter but it is worth examining in brief here. The first thing to note is that this should be incredibly rare: the ingenuity of the judiciary, when appreciating the proper role of the rule of law, can lead to interpretations that satisfy the rule of law. One can think of cases like *Anisminic*, which demonstrate this *par excellence*. Further, as argued above, cases

[110] *Fitzpatrick* (n 31) 45 (Lord Slynn).
[111] *Ghaidan* (n 32) [9] (Lord Nicholls).
[112] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act (Law in Context)* (CUP 2009) 110. Kavanagh quotes *R (Wilkinson) v Her Majesty's Commissioners of Inland Revenue* [2005] ULHL 30, [2006] 1 All ER 529, [18] (Lord Hoffmann) in support of this.
[113] Allan (n 7) 40.

where the principle of legality has not been used to its full rigour do not necessarily represent cases were the principle of legality *lacked the potential* to be so rigorous.[114]

Whilst the boundaries of the principle of legality are wide there will be times when a statute or part thereof will be "condemned as irredeemably incompatible" with common law rights; this situation comes about "if the whole *raison d'être* of a provision violates" common law then "no interpretation can save it".[115] Allan gives, as an example, the *Belmarsh* case.[116] In this case the House of Lords was asked to look at Part 4 of the Anti-terrorism, Crime, and Security Act 2001, which provided for the detention of non-nationals if the Home Secretary believed that their presence in the country was a risk to security. The House of Lords quickly recognised that s 23 specifically mentioned non-nationals and was, therefore, discriminatory in its effects given that it did not apply to United Kingdom nationals who presented the same threat. There was no real mention of an interpretation that was consistent with the HRA or common law in this case. This seems in part because of the direct reliance on the HRA and partly because the language of the Act was so specific that it was difficult to interpret or understand the language in a way that did not discriminate against non-UK citizens due to the imbalance the Act purportedly created. It gave new powers to the Home Secretary specifically in relation to non-nationals. Even if we interpreted the provision to take account of the discrimination by providing an implied restriction, e.g. you could not detain someone unless you would do the same to a British national (despite having no power to do so), the substantive result would still be an imbalance and a violation of the rule of law.

There may be cases, like *Belmarsh*, where there is no interpretation, in the sense of giving meaning to the words of the statute, that can rescue the statute so as to be compliant with the rule of law. These will, however, be incredibly rare.[117] Under the HRA framework mediation is found in the use of s 4 HRA, which provides for declarations of incompatibility. The government inevitably follows these and rectifies the error.[118] Under the common law principle of legality, when, which should be rare, interpretation fails, in the sense that the text cannot be understood in a way that

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[114] *Fitzpatrick* (n 31) is an example of such a failing.
[115] Allan (n 7) 41.
[116] *A* (n 8).
[117] Interpretative failures under the HRA are very rare: as of the end of July 2017 only 25 declarations of incompatibility have become final with a further three subject to appeal. As argued above, even cases where we might need ingenuity understand a statute in line with the rule of law are just difficult cases; the need for ingenuity in common law adjudication is nothing new.
[118] See Anthony Bradley, "The Sovereignty of Parliament: Form or Substance?" in Jowell J and Oliver D (eds), *The Changing Constitution* (7th edn 2011 OUP). The only one not followed is prisoners' voting and, at the time of writing, that is being looked at.

does not cut across the rule of law, to mediate between the rule of law and statutory purpose what happens? In the following Chapter I will give an account of the rule of law that goes to the central features of the British constitution and argue that, where the two cannot be reconciled, the rule of law has to triumph.

IV. Conclusion

This Chapter started by describing the orthodox view of the principle of legality. This view holds that, whilst the rule of law can be given effect to via statutory interpretation, such a presumption finds its basis and limitation in the (somewhat nebulous) concept of Parliamentary intention. That is, the principle of legality is apparently legitimated because of the presumption that Parliament intends to legislate in line with the rule of law and, therefore, it is logically limited in that Parliament can, with sufficient clarity, make clear it *does not* intend to legislate in line with the rule of law. This, the orthodox view holds, limits the principle of legality in a way that s 3 HRA is emphatically *not* limited. Section 3, it is said, is not limited by Parliament's intention; instead, it is only limited by linguistic creativity and ingenuity. You are not, with s 3, looking for Parliament's actual intention but instead the meaning that best accords with the ECHR. The orthodox view is, therefore, that s 3 provides a stronger interpretive methodology, and therefore a stronger protection to rights, than its common law counterpart.

I took exception to the orthodox view on two bases. First, I argued that the orthodox idea of Parliamentary intention is itself misguided because it is riddled with epistemological issues. Simply, we do not *know* what Parliament intended. The words on the statute book only provide a hint or an idea. As argued, it is no good to look at what the government wanted or what individual speakers said in Hansard. Both of these approaches would only provide us with an idea of what the individual or government wanted; they would not help with what *Parliament* intended. From this perspective, I argued that it is better to see Parliament as a body on which we have to impute intention given what we know about the context in which it legislates. Therefore, I suggested, there is little reason to ever really think that Parliament intends to legislate contrary to the rule of law; to think that it does, actually, diminishes the stature of Parliament. We should always assume that Parliament intends to comply with the rule of law; to do otherwise would be to be cynical about the legislature.

More pertinently, I then went on to discuss why this view, that the rule of law is paramount, is, in theoretical terms, the best view. There is a misapprehension, I argued, that plagues public law: the assumption, the orthodox view, is that Parliament *can in fact* legislate contrary to the rule of law. That somehow the rule of law's operation is a simple presumption that can be displaced. This, I argued, misunderstands the relationship between the rule of law and legislation. The former is logically prior to the latter; its place is central to the constitution. Once this is appreciated, we can see that the idea that the rule of law is being unjustifiably used to cut across Parliamentary intention is false; this view puts the cart before the horse in that it is better to see the rule of law as pre-existing legislation. When Parliament legislates the *only viable interpretation(s)* of that legislation is one that accords with the rule of law. Adopting an interpretation, giving effect to a meaning, that cuts across or somehow diminishes the rule of law is the antithesis of law. Legislation can *only* be understood in line with the rule of law. Therefore, no matter the clarity of the words used in the statute, the judiciary, I argued, have a duty to find the meaning of a statute and the meaning of a statute can only be one that accords with the rule of law. This is not to suggest that the purpose or aim of a statute are unimportant; as explained, in the constitution the legislature is, of course, important. It is only that the route to that legislative aim must be one that respects the rule of law; it could not, logically, be otherwise given the priority and logical necessity of the rule of law.[119]

Therefore, the orthodox view that Parliamentary intention can cut across the rule of law (and therefore the rule of law, and the rights it protects, is limited in the domestic constitution) is misguided. We cannot know what Parliament wanted; we have to impute an intention onto it. When doing so it would be constitutionally negligent to impute an intention that did not account for the rule of law. Further still, we have a strong reason for according the rule of law primacy in statutory interpretation: it is logically prior to Parliamentary intention. When legislating Parliament can only issue law in a framework or context that accounts for the rule of law. It cannot be otherwise. As such, the perceived or purported limitations of the principle of legality disappear; they fail to account for the rule of law's place in the constitution and misunderstand how we know what Parliament intended. Since a statute can *only* mean something that respects the rule of law it is false to say that the principle of legality can be limited in a way s 3 is not. When interpreting a statute, whether under s 3 HRA or the principle of legality, rights must be respected. Imposing a meaning onto a statute that does not respect rights ignores the place of the rule of law and shirks judicial duty.

[119] On which see Chapter 2, which situates the rule of law at the centre of the constitution.

This leaves open, for the following, final substantive, Chapter, what happens when text and context cannot be reconciled. Where the purpose of the statute cannot be given any effect that still respects the rule of law and the rights it implies what do we do? This goes to the core of the constitution and perennial questions it poses: what is the relationship between the legislature and judiciary, statute and rule of law, democracy and rights? It is these questions that the final Chapter will now answer.

Chapter 7

The Supremacy of Law: The Constitutional Resilience and Primacy of Common Law Rights

I. Introduction

To an extent this thesis has, so far, skirted or otherwise avoided a fundamental question of constitutional law: the nature of Parliamentary sovereignty in relation to human rights. Can, for example, Parliament legislate to criminalise peaceful communists? Or to indefinitely detain people without trial? To stop people of colour from voting? More broadly and, at the same time, more specifically, can Parliament legislate in violation of the rule of law? If not, then what are the judiciary to do when Parliament seems to have done so? In short, what is the *constitutional resilience* of common law rights and how does that compare to the Human Rights Act 1998 (HRA)? It is these questions that this Chapter seeks to answer.

It has made sense to leave these questions for the final substantive Chapter because, in providing the answers, this Chapter draws upon the arguments previously made about the centrality of the rule of law,[1] the identification and nature of common law rights,[2] judicial review of the exercise of administrative powers on human rights grounds,[3] and the relationship between statutory interpretation and the rule of law.[4] Further still, these questions and the answers this Chapter provides, whilst insightful and important, will, practically, appear in litigation very rarely since a conflict between the rule of law and statute will be, on my account, unusual because statutory interpretation will usually reconcile statutory purpose and the rule of law[5]; whilst these questions do go to the heart of the constitution in terms of fundamental rights the practical effects will be rare because the approaches to review of executive action and statutory interpretation will cover the vast majority of cases. Those approaches are the norm in a judicial review predicated on common law rights. Nevertheless, it is important to consider the constitutional status of common law rights; this Chapter aims to show that such rights have a fundamental place within the constitution.

[1] See Chapter 2.
[2] See Chapter 4.
[3] See Chapter 5.
[4] See Chapter 6.
[5] On which see Chapter 6.

This Chapter therefore follows the following structure: first, I describe the orthodox view, which is that Parliament is sovereign and, as such, has the power to make or unmake any law it wishes.[6] This, I suggest, is true as a general principle or statement of the constitution of the United Kingdom; Parliament is indeed *generally* capable of enacting legislation that can, *generally speaking*, displace common law doctrine. I argue that this is true as a general statement of law but just because a broad-brush statement or description of law may be true it does not mean that it is true in all or every situation that one can imagine. This Chapter goes on to argue that, whilst Parliament may make or unmake law it *cannot* do so contrary to its own powers; since Parliament's powers are derived from law the legislature cannot, logically, act contrary to law. Whilst there may conceivably be other limits to the general principle of Parliamentary sovereignty[7] I focus here on the rule of law. If the rule of law, as previously argued,[8] is central to the constitution and prior to law one cannot make something that can intelligibly be called "law" if that purported law cuts across or somehow acts contrary to the rule of law.

From this perspective, the doctrine of Parliamentary sovereignty, whilst useful shorthand for a general approach or description of Parliament's role in making law, is limited by virtue of the rule of law. One cannot invoke Parliamentary sovereignty in support of something that would cut across the rule of law. This is how, in the previous Chapter, I defended a robust interpretive technique. When interpretation fails,[9] however, there is a startling and obvious truth: the purported statute must be rejected as no having legal force. You cannot, I argue in this Chapter, have legal powers that cut across the rule of law. What flows from such a fact? This Chapter goes on to argue that two types of remedy could be in play: declarations of incompatibility and the formal judicial rejection of the legal validity of a purported statute or part thereof.[10]

I argue that once these unorthodox but not particularly novel points are recognised as forming part of the landscape of common law rights we can, I suggest, see a new dimension to the resilience of common law rights. Whilst the HRA can be repealed with an express statute[11]

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[6] Anthony Bradley, "The Sovereignty of Parliament: Form or Substance?" in Jowell J and Oliver D (eds), *The Changing Constitution* (7th edn 2011 OUP). *Cf* T R S Allan, *The Sovereignty of Law* (OUP 2013).

[7] European Union law and devolution being the classic examples.

[8] See Chapters 2 and 4.

[9] Which should be incredibly rare: see Chapter 6.

[10] Commonly known as "strike down" of the statute or part thereof. Likewise, it is trite to say that if a provision of a statute is constitutionally offensive then only that part of the statute is to be struck down or have a declaration made against it. Not the entire statute. Proportionality of response is, obviously, important and the courts are not empowered to refuse to recognise legislation for reasons other than said purported legislation is constitutionally offensive.

[11] See Chapter 3. In short, whilst it is a constitutional statute (and therefore immune from implied repeal) it can still, as an Act of Parliament, be removed by Parliament.

common law rights, which are derived from the rule of law,[12] cannot be *because* they are derived from and form part of the rule of law, which *itself cannot* be rejected or side-lined by Parliament no matter how express or clear the language used in a statute is.

II. Parliamentary Sovereignty: Orthodox Explained

The idea that Parliament is sovereign is one that has been tacitly assumed by most lawyers working in the British system.[13] The idea is most famously attributed to A V Dicey, who described Parliament's sovereignty as the "dominant characteristic" of the British constitution.[14] He explained that this meant that "In England we are accustomed to the existence of a supreme legislative body, i.e. a body which can make or unmake every law….this is, from a legal point of view, the true conception of a sovereign".[15] It logically followed, for Dicey, that "no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament".[16] This Victorian formulation of the powers of Parliament survived over a century later, when A W Bradley said, in the introduction to a chapter on Parliamentary sovereignty:

> The sovereignty of Parliament as a doctrine of constitutional law means that there are no legally enforceable limits to the legislative authority of the Westminster Parliament. The courts interpret and apply Acts of Parliament, but, *in the absence of any written constitution* for the United Kingdom to impose limits upon Parliament's powers, they may not review the validity of legislation.[17]

In this way, and for the purposes of this thesis, we can see that the "sovereignty of Parliament describes in formal terms the relationship which exists between the legislature and the courts"[18] in that, whilst the courts may interpret legislation[19] Parliament, ultimately, on the orthodox view, has the final say. This, striking yet seemingly straight-forward, view is supported by a range of judicial and academic writings. For example, in 1872 it was held that "there is no judicial body in the country by which the validity of an Act of Parliament can be questioned"[20] and the High Court of Justiciary in Edinburgh said, in 1906, that "For us an Act of Parliament duly passed by Lords and Commons and assented to by the King is supreme, and we are bound to give effect to

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[12] See Chapter 4.
[13] On this see Chapter 2 and David R Howarth and Shona Wilson Stark, "The Reality of the British Constitution: H L A Hart and What 'Officials' Really Think" (2014) 53 University of Cambridge Legal Studies Research Paper Series.
[14] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund 1982) 3.
[15] ibid 27.
[16] ibid 3.
[17] Emphasis added. A W Bradley, "The Sovereignty of Parliament- in Perpetuity?" in Oliver D and Jowell J (eds), *The Changing Constitution* (2nd edn, Clarendon Press 1989) 25.
[18] ibid 26.
[19] On which see Chapter 6.
[20] *Ex parte Canon Selwyn* (1872) 36 JP 54.

its terms".[21] Sir Robert Megarry V-C said, in a case that challenged the validity of the Canada Act 1982, "from first to last I have heard nothing in this case to make me doubt the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be *ultra vires*".[22] Likewise, Lord Morris held in the House of Lords that:

> When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the statute book at all.[23]

If whatever Parliament legislates is law and this cannot be questioned what, then, is the relationship, pertinent for the purposes of this thesis, between common law and statute law? The orthodox view is, again, quite simple: Parliament may change any rule of the common law except the rule that the courts recognise the supremacy of Acts of Parliament.[24] It logically follows, from the orthodox view, that whilst Parliament is sovereign other types of law can still exist (e.g. common law rules of negligence) but, once Parliament chooses to legislate, its view on a particular matter takes precedence over the common law's. An analogy can be drawn with European Union law and competence.[25] In EU law once the EU has adopted a regulation on a matter it is not open to the Member States to legislate for the same topic. Stephen Weatherill describes this as "exclusive competence"[26] because the EU, when it legislates, "occupies that field, thereby precluding Member State action".[27] Elliott says this is analogous to the relationship between the common law and Acts of Parliament. On an orthodox view, he is correct. As he says:

> [I]n the absence of a statutory framework, it is for the courts, by imposing common law requirements of rationality and fairness, to regulate the use of *de facto* governmental power. However, once *de facto* power is replaced with statutory power, regulated by a statutory framework, any limits which the courts subsequently impose….must relate to the scope of the power which Parliament granted.[28]

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[21] *Mortensen v Peters* (1906) 8 F (J) 93 (HCJust), 100.
[22] *Manuel v AG* [1989] Ch 77, 86 (Sir Robert Megarry V-C).
[23] *Pickin v British Railways Board* [1974] AC 765, 789 (HL) (Lord Morris).
[24] Bradley (n 17) 33. Bradley cites H R W Wade, "The Basis of Legal Sovereignty" (1955) CLJ 172, 186-9 in support of this. That piece looks at the nature of Parliamentary sovereignty if there are limited things (e.g. its own sovereignty) that Parliament can apparently not change.
[25] I take this analogy from Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001) 90. Elliott uses it in a slightly different way, concerning the logical nature of the *ultra vires* theory of judicial review.
[26] Stephen Weatherill, "Beyond Pre-emption? Shared Competence and Constitutional Change in the European Community" in O'Keeffe D and Twomey P M (eds.), *Legal Issues of the Maastricht Treat* (Chancery Law 1994) 16.
[27] ibid.
[28] Elliott (n 25) 90.

Whilst Elliott is talking about the grounds of judicial review that view would hold true generally, on an orthodox approach, in describing the relationship between statutory and common law. The common law, of course, contains many doctrines and principles that are not regulated by statute: a prime example of this would likely be the tort of negligence, which is almost entirely regulated by the common law. The common law tort of negligence does not require or base itself on statute; the common law, through judgments, regulates people's conduct in this way. That does not mean, however, that Parliament cannot regulate people's conduct differently. For example, in New Zealand,[29] the legislature, via the Accident Compensation Act 1972, removed negligence based damages for personal injury[30] and replaced them with a national benefits agency.[31] Likewise, in the United Kingdom various statutes have taken precedence over inconsistent previous common law doctrine.[32]

So far, so simple. On the orthodox view the common law can operate until Parliament says otherwise; it is the act of Parliamentary occupation of a section or area of the legal landscape that removes the common law. Thus, if Parliament wishes to, for example, change the common law rules on contract it is, generally speaking, able to do so. This does not seem too problematic; in general, we expect the legislature to be able to vary or remove common law doctrines. This reflects the democratic pedigree of Parliament, at least relative to the judiciary.

From this general view comes, for our purposes, as Stuart Lakin puts it, the most "striking manifestation of [Parliamentary sovereignty]…is the widespread agreement among judges and lawyers that a sovereign Parliament may suspect or abrogate even so-called 'constitutional' or 'fundamental' rights by sufficiently clear and unequivocal language".[33] As discussed in Chapter 6,

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[29] As pointed out in Chapter 3 New Zealand represents a country that is most similar to the United Kingdom in its domestic constitutional makeup.

[30] Section 5 of the Act said "subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment".

[31] For quite a detailed note on the introduction and operation of the then new framework see Geoffrey W R Palmer, "Accident Compensation in New Zealand: The First Two Years" (1977) 25(1) The American Journal of Comparative Law 1.

[32] See, for example, the War Damages Act 1965, which reversed the House of Lords in *Burmah Oil Co v Lord Advocate* [1965] AC 75 (HL); and the Compensation Act 2006, which reversed the decision of *Barker v Corus Steel* [2006] UKHL 20, [2006] 2 AC 572.

[33] Stuart Lakin, "Debunking the idea of Parliamentary Sovereignty" (2008) 28(4) OJLS 709, 713. Lakin cites *R v Secretary o State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL), 131 (Lord Hoffmann); Paul Craig "*Ultra vires* and the Foudnations of Judicial Review" [1998] CLJ 63, 86; and Jeffrey Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] PL 448, 458-9 in support of this statement.

the general view is that, if Parliament makes itself clear enough,[34] Parliament can displace or otherwise cut across human rights. That is why Lady Hale in *Jackson*[35] said that "[t]he courts will…decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear".[36] Likewise, Lord Reed, in *AXA*,[37] held that "Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words".[38] To much the same end, if Parliament makes itself "crystal clear" then it can, according to Lord Neuberger in *Evans*,[39] cut across the rule of law.

The orthodox view, therefore, is that Parliament can, if it makes itself clear enough, cut across the rule of law and limit the citizen's human rights at common law. As I argued in Chapter 6, we should be slow to see Parliament's intention as anything other than a wish to fulfil its aim in line with the rule of law. To do otherwise would be to impute[40] an intention to Parliament that supposes they wish to violate the rule of law. Yet there will be times when the aim of the legislature simply cannot be reconciled with the rule of law. This occurs when the statutory aim, as revealed by the text of a statute, simply cannot be understood in any way that does not cut across common law rights. It is in these (as I argued, rare) cases where the orthodox view holds that common law rights must give way to legislative intention. In this Chapter, I argue otherwise.[41]

After drawing on previous Chapters to suggest Parliament cannot cut across the rule of law I go on to look at what the implications are. If statutes cannot be intelligibly understood as not cutting across common law rights then they must be seen as what they are: only *purported* statutes. Once this is recognised the judiciary, I will argue, have a range of options open to them at common law: they can, for example, issue a declaration of incompatibility or refuse to recognise the statute as having legal force. The remainder of this Chapter discusses the appropriateness of each remedy and the main objections the foregoing analysis might face.

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[34] Recall that Chapter 6 questioned what this means and found the orthodox view lacking.
[35] *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262.
[36] ibid [159] (Lady Hale).
[37] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868.
[38] ibid [152] (Lord Reed). Lord Reed cited *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 (HL), 575 (Lord Browne-Wilkinson), 591 (Lord Steyn), in support of his argument.
[39] *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 2 WLR 813, [58] (Lord Neuberger).
[40] Recall that we must *impute* an intention on the legislature because of the epistemological difficulties associated with discerning the intention of a large body made up of many members.
[41] I do so drawing on the framework given in Chapter 2.

III. Re-Ordering Orthodoxy: The Rule of Law, Common Law Rights, and Legislative Competence

Drawing on the work of, *inter alia*, T R S Allan, this section suggests that, far from being revolutionary, the idea that Parliament's powers are limited by the rule of law makes logical sense when we appreciate that the foundation of Parliament's powers is itself premised, in part, on the principle of legality or the rule of law.[42] Further still, this Chapter points out something that has been apparent for a long time: the absolute nature of Parliamentary sovereignty is *not* something that has never been questioned. Instead, judicial *dicta* have considered hypotheticals about the limits of Parliament's legislative powers. Yet it is true, this Chapter suggests, that to put any limit on unlimited power is to render that power limited.

III. A. Judicial Questioning of Parliamentary Sovereignty

In this section I will point to three cases from the last 15 or so years that point to a judicial questioning of the principle of Parliamentary sovereignty in an absolutist form. The orthodox view, as described above, would have the reader believe that Parliament is not only sovereign but there has never been a serious suggestion that it is not. Yet this is not the case; there have been soundings from the highest levels that Parliament has limits. If Parliament is not sovereign then there is no reason for us to accept the orthodox view that Parliament can cut across rights found at common law. If that is the case then we can see the constitutional resilience of common law rights, founded on the rule of law in the domestic constitution, as being far higher than the HRA, which can, of course, be repealed by the legislature at any given time.[43] In using these cases I only wish to point out that the idea of Parliamentary sovereignty is not uncontested; that is, I use these cases as evidence of the argument I go on to advance more fully.

The first case of note is *R (Jackson and others) v Attorney General*.[44] The facts of this case are well known and require little rehearsal here.[45] In short, s 2(1) Parliament Act 1911 provides that legislation made in accordance with the provisions of that section become an Act of Parliament notwithstanding that the House of Lords have not consented to the Bill. The issue, in the narrow sense, in *Jackson* was whether the Parliament Act 1949, which made it easier to use the 1911 Act to bypass the House of Lords, had been passed validly under the 1911 Act (since the Lords did

[42] The putative value of legality is used here to mean the rule of law; the two terms are interchangeable.
[43] Though do note the HRA is a constitutional statute so it cannot be impliedly repealed: see Chapter 3.
[44] [2005] UKHL 56, [2006] 1 AC 262.
[45] See Elizabeth Wicks, "R *(Jackson) v Attorney-General* [2005]: Reviewing Legislation" in Juss S and Sunkin M (eds), *Landmark Cases in Public Law* (Hart 2017) for a detailed rehearsal of the facts of the case.

not agree to such an extension of the 1911 Act). If it had not, then it could not have been used to pass the Hunting Act 2004, which would have rendered the 2004 Act invalid, which was in essence what the Claimant wanted to show. The main question in the case turned on the construction of s 2(1).[46]

Given the unusual nature of the question presented to the court it is perhaps not surprising that broader questions of Parliamentary sovereignty and its nature were considered in the case. Some of these quotations are worth stating in full. Lord Steyn said that:

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental [sic] which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.[47]

Likewise, whilst maintaining Parliamentary sovereignty in one breath[48] Lady Hale immediately qualifies it in the next when she states:

> The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.[49]

Further still, Lord Hope said that, whilst s 2(1) does not contain any limits that "does not mean that the power to legislate which [s 2(1)] contains is without any limits whatsoever. Parliamentary sovereignty is an empty principle if legislation is passed which is so absurd or so unacceptable that the populace at large refuses to recognise it as law".[50] Indeed, Lord Hope goes so far as to say that:

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[46] Lakin (n 33) 721-1.
[47] Emphasis added. *Jackson* (n 35) 302-3 (Lord Steyn).
[48] ibid 318 (Lady Hale).
[49] ibid (Lady Hale).
[50] ibid 308 (Lord Hope).

> Nor should we overlook the fact that one of the guiding principles that were identified [by Dicey] was the universal rule or supremacy throughout the constitution of ordinary law. Owen Dixon….was making the same point when he said that it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, *whether legislative or administrative*, which exceed the limits of the power that organ derives from the law….this principle protects the individual from arbitrary government. The rule of law, enforced by the courts, is the ultimate controlling factor on which our constitution is based.[51]

It is clear then that some of the Law Lords envisaged, in *dicta*, *some* limitations on Parliament's powers. Whilst the kind envisaged are about access to the courts in extreme (and, hopefully, unlikely) hypotheticals it is worth noting two points here: first, as will be discussed later in this Chapter any limitation is, by definition, a refutation of Parliament's unlimited powers; by definition if something unlimited becomes limited it is no longer unlimited. Second, Lord Hope explicitly ties the limitations on Parliament's powers to the rule of law, which, for him, is the "controlling factor" of the constitution; since the rule of law, as I have argued, grounds common law rights we have every reason, at this stage, to be more than open to the possibility that common law rights are, as part of the rule of law, logically prior to Parliament's legislative prowess so that Parliament cannot cut across them.

The second case worthy of note explicitly contemplates restrictions on Parliament's legislative authority in common law rights terms. *Moohan and another v Lord Advocate*[52] received thorough discussion in Chapter 4 and I do not intend to rehearse much of that here. What is worth noting, though, is that this is a case about the right to vote, prisoners' voting, and whether there is a common law right to vote.[53] Whilst Lord Hodge recognised a basic right to vote he did not find that there was a universal right to enfranchisement for prisoners in the case before him.[54] However, he did state that he did not "exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise…, the common law, informed by principles of democracy and the rule of law…would be able to declare such legislation unlawful".[55]

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[51] ibid 304 (Lord Hope).
[52] [2014] UKSC 67, [2015] AC 901.
[53] It will be recalled that Lady Hale says there is not a right to vote but Lord Hodge says that there is at common law. In Chapter 4 I contrasted their approaches and found Lord Hodge's more satisfactory vis-à-vis its coherence within a common law and rule of law framework.
[54] This contrasts him with Lady Hale, who thought there was no right to vote *at all* at common law; Lord Hodge, whilst ultimately not going far enough, recognised the core principle of common law rights vis-à-vis the rule of law.
[55] *Moohan* (n 52) [35] (Lord Hodge).

AXA[56] further demonstrates these issues. This case focused on the Supreme Court's powers to judicially review legislation passed by the Scottish Parliament. Whilst deciding that technically such legislation is a type of secondary legislation[57] and therefore amenable to judicial review on common law grounds the courts would be hesitant to do so because of its characteristic as a democratic legislature.[58] Whilst the case at hand did not directly involve questions about the ability of the Westminster Parliament to cut across common law rights such questions were implicitly looked at in the Scottish Parliament context. In a passage reminiscent of *Jackson* Lord Hope held:

> It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. *The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.*[59]

III. B. The Rule of Law and Parliamentary Sovereignty

The foregoing was meant to establish one thing only: that the debate about Parliament's legislative prowess is just that, a debate. The orthodox view would have one believe that there has been no judicial questioning of the principle of Parliamentary sovereignty but this is demonstrably not the case. Further, it demonstrates that there is no settled "rule" whose application all officials agree on all of the time; it is, simply, not that simple.[60]

The orthodox view, this part of this Chapter suggests, puts the cart before the horse. By suggesting that Parliament can legislate to cut across the rule of law, to curtail common law rights, is to suggest that Parliament is somehow above or superior to the rule of law. Instead, I suggest, the rule of law is logically prior to any powers of the legislature. Such powers, therefore, must be utilised in line with the rule of law; we must reject as a statute anything that cannot be understood in line with common law rights. That is why, in the previous Chapter, I argued that judges, when interpreting statutes, must reject any interpretation that curtails common law rights; to do otherwise would be to accept that Parliament intends to, and in fact can, limit the rights of

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[56] *AXA* (n 37).
[57] Due to the fact that legislation from the Scottish Parliament is only possible due to authorisation from the United Kingdom Parliament at Westminster in the form of an Act of Parliament.
[58] *AXA* (n 37) [49] (Lord Hope). More will be said about the principle of democracy as the justifier of legislative power later in this Chapter.
[59] Emphasis added. ibid [51] (Lord Hope).
[60] Recall Chapter 2, which dismissed the idea of a settled rule of recognition that helped us to recognise the validity or otherwise of propositions of law by reference to *Evans*.

citizens. Yet the (unlikely) event could conceivably still occur: there might be a situation, however remote, where we cannot understand the text of a statute as anything other than an unjustifiable curtailment of the rights citizens enjoy at common law, which themselves are an expression of the rule of law. In this scenario the courts have two broad options: to accept that interpretation and see the statute as having legal force or to reject it[61] as being an actual statute.

Orthodoxy would have one believe that the latter of the two proposed options is not an option; the simple version of Parliamentary sovereignty would suggest that the rule of law must give way if only interpretations that are not compliant with the rule of law are open to the court. Yet why is this so? The theoretical arguments in favour of Parliamentary sovereignty were discussed in Chapter 2 and are rigorously examined in others' work.[62] It will be recalled that in Chapter 2 I argued, after Dworkin, that the rule of law is logically prior to Parliament's powers. This has the implication, as Lakin puts it, that it:

> [I]s paradoxical to debate whether Parliament could *override* the principle of legality….This is not to rank the principle of legality *above* Parliamentary sovereignty; nor is it to suggest that the principle of legality *limits* or *qualifies* Parliamentary sovereignty…it is to reject altogether the currency of the concept of sovereignty.[63]

On its face, of course, this tells us little about what that *actually* means in practice; all it tells us is that the rule of law is prior to Parliamentary legislative powers. It tells us that Parliament cannot cut across the rule of law; that the courts must reject an interpretation of a statute that is not compliant with the rule of law and if no other such interpretation can be found we must reject the purported statute as just that, a statute with genuine legal force. The rule of law is, of course, a contested principle.

Without rehearsing arguments made in previous Chapters[64] in too much detail it is worth noting the following. The rule of law "promises protection…against the arbitrary exercise of power"[65] because it is "a bulwark against any assertion of arbitrary power".[66] This means that the law "must itself be non-arbitrary, in the sense that it is justified in terms of a *public or common good*- one

[61] What form this repudiation can take is something discussed later in this Chapter.
[62] See Lakin (n 33).
[63] Emphasis original. ibid 731.
[64] Specifically Chapters 2 and 4.
[65] Gerald J Postema, "Fidelity in Law's Commonwealth" in Austin L M and Klimchuk D (eds) *Private Law and the Rule of Law* (OUP 2014) 17.
[66] Allan (n 6) 93.

that we can fairly suppose favours a similar freedom for all".[67] The rule of law, in this sense, is against arbitrary distinctions between persons or groups; instead, objective legitimate justification for action is needed.[68] As stressed in Chapter 4, this is nothing new: Lord Donaldson MR held that "it is a cardinal principle…that all persons in a similar position should be treated similarly"[69] and Lord Bingham held "it is generally desirable that decision makers…should act in a broadly consistent manner". Likewise Lord Denning held that the courts "will not allow a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules or in the enforcement of them".[70] A broad statement comes from Lady Hale, who tells us that arbitrary treatment "Is the reverse of the rational behaviour we expect from government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions". [71] The mere fact that it is the legislature in Westminster making law (as opposed to, say, secondary legislation made by the executive) does not mean that they escape this duty. Legal power has to conform with the rule of law.

As Allan puts it:

> Even if Parliament retains the power to repudiate decisions of the European Court of Human Rights, it cannot destroy the most fundamental elements of the unwritten constitution from which its own lawmaking power is ultimately derived. The presumption that Parliament intends to legislate in accordance with the Convention may be rebuttable; but the presumption that Parliament acknowledges the rule of law…is surely more secure…No declaration of incompatibility can be given in respect of a statute that threatens the rule of law, for no such statute…could be acknowledged as truly law.[72]

That is, whilst Parliament may of course direct the United Kingdom's withdrawal from the European Convention of Human Rights (ECHR)[73] as a supranational legal treaty and, further still, may, or at least *could if so minded*, repeal the HRA the rule of law, which serves as a cornerstone of the constitution and as the foundation of rights at common law, is not removable by Parliament. Quite the reverse; the rule of law constrains Parliamentary law making powers. As

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[67] ibid.
[68] See Ronald Dworkin, "Is there a right to pornography?" (1981) OJLS 177.
[69] *R v Hertfordshire CC, ex p Cheung* The Times, April 4, 1986 (CA) (Lord Donaldson MR).
[70] *Edwards v SOGAT* [1971] Ch 354 (CA).
[71] *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557, [132] (Lady Hale).
[72] T R S Allan, "Parliament's Will and the Justice of the Common Law" (2006) CLP 28, 41.
[73] Or possibly the government could chose to do so without Parliamentary approval. The status of the royal prerogative's power vis-à-vis withdrawal from treaties is currently in doubt: *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 1 All ER 593. For academic commentary on this point see Mark Elliott, "The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle" (2017) 76(2) CLJ 257, 265-6.

argued in Chapter 6[74] this means that interpretations of statute that would cut across the rule of law ought to be rejected; here, I argue a logical extension and conclusion of that: if a statute *cannot* be read in a way that accords with the rule of law then it ought to be rejected as a statute. It is this idea of interpretation being used to find a meaning that accords with the rule of law that is present in Lord Philip's evidence to the House of Commons Political and Constitutional Reform Committee, where he says:

> One would be considering a constitutional crisis before you could envisage the courts purporting to strike down primary legislation. Before you got that, the courts would say, "Parliament couldn't possibly have meant that because—" and therefore would have given an interpretation to the legislation that it, faced with it, couldn't bear it, but would have chucked the gauntlet back to Parliament, saying, "We have pulled you back from the brink. Are you really going to persist with this?" That is what the House of Lords did….in *Anisminic*. They threw down the gauntlet and it was not taken up. Judges do have ways of finessing the intention of Parliament from time to time.[75]

If a statute is arbitrary, in that it cuts across the rights of a citizen,[76] then it has to be rejected as a statute. Legal powers are grounded in a commitment to the rule of law; anything that cuts across that ought to be rejected as involving law properly so called.

This may seem at odds with the judicial *dicta* pointed out above. Indeed, Elliott makes clear that the orthodox view is that the rule of law, even if it limits Parliament's powers, only does so in extreme cases.[77] Yet we are never told what is extreme. We seem to think removing the franchise would be extreme enough to refuse to give effect to an Act.[78] Yet why? I argue that it is extreme because it is an attempt to circumvent or otherwise cut across the rule of law. Drawing on others, I have argued throughout this thesis that the rule of law is logically prior to legal powers. Any infringement is "extreme" in the sense that it goes against the source of legal powers. This robs an Act of legal force and justifies refusing to treat a purported Act as an Act of Parliament with legal force. All arbitrariness, in the sense of using state power to attempt to cut across the rule of law, is extreme; all arbitrariness, in the way I developed in Chapter 4, is outside the scope of legal powers. Whilst some infringements (e.g. removal of access to the courts) may seem more

[74] Largely after T R S Allan.
[75] House of Commons Political and Constitutional Reform Committee, *The Constitutional Role of the Judiciary if there were a Codified Constitution* (HC 802, 2013-14), para 41.
[76] Note rights, according to the argument I made in Chapter 5, are not absolute in the sense that a right to free speech does not include a right to hate speech. A balancing exercise must take place; if the state interferes with a purported right it must show that they are *not* treating the individual arbitrarily, in the sense of ignoring his dignity, because there are objective justifications for their action.
[77] Elliott (n 25).
[78] See Lord Hodge in *Moohan* (n 52).

extreme than others (e.g. refusing to allow people of colour to adopt Caucasian children) they are, in principle, the same: they treat citizens arbitrarily and, as such, cut across the rule of law. Since Parliament cannot legally do this the purported statute is just that: a *purported* statute.

III. C. Objections

There are two broad objections to the foregoing that need to be looked at here: (i) democracy; and (ii) the practical implications of recognising a hitherto unrecognised power to refuse to recognise a purported statute as a statute. I will take each of these objections in turn but, in short, I argue that (i) the principle of democracy, properly understood, coincides perfectly with the view of the rule of law I traced out in Chapter 4 and applied in Chapters 5, 6, and the present one in that democracy, far from embracing absolute majority rule, inherently implies a respect for equal treatment and dignity of the individual; it involves and endorses, that is, the concept of non-arbitrariness. As to (ii) I will argue that these practical considerations, whilst they ought to focus judicial minds when deciding whether to exercise their powers, do not mitigate against the *use* of such judicial powers since not using them, in an appropriate case, would be an abdication of legal duty by the judiciary, which is inherently constitutionally problematic.

Starting with the democratic objection it, generally, takes the following form: we live in a democracy and, as such, laws are made by democratic institutions, which should therefore be respected by undemocratic judges.[79] If the legislature decides, for instance, to try to limit the voting rights of a particular religious minority then, whilst this may be *normatively undesirable*, the courts have a duty to apply the law; a court ignoring or dis-applying the law would be acting undemocratically. This comes out, for instance, in the work of Conor Gearty,[80] Jeremy Waldron,[81] Richard Bellamy,[82] Geoffrey Goldsworthy,[83] and Adam Tomkins.[84] Recently, for example, Michael Gordon has said that the core or main normative principle at play vis-à-vis Parliamentary sovereignty (traditionally understood) is that it "ensures the constitutional primacy of (majoritarian) decision making"[85]; sovereignty is, apparently, about "working things out

[79] Note that I do not intend to go into a discussion here on how democratic the Westminster Parliament *actually is*; suffice to say, for current purposes, it is more democratic (in a narrow sense at least) than the judiciary.
[80] Conor Gearty, *Principles of Human Rights Adjudication* (OUP 2004).
[81] Jeremy Waldron, "Judicial Power and Popular Sovereignty" in Graber M and Perhac M (eds) *Marbury versus Madison: Documents and Commentary* (CQ Press 2002).
[82] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).
[83] Jeffry Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press 1999) 277-9 and Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 9-13, 80-3, 86-90, 202-24.
[84] Adam Tomkins, *Our Republican Constitution* (Hart 2005).
[85] Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics, and Democracy* (Hart 2015) 6.

through democratic processes".[86] Drawing upon Waldron,[87] Gordon says that it is problematic to insulate particular rights from being altered through regular political mechanisms.[88] Further Gordon says there can be no limits, substantive or otherwise, on Parliament's legal powers.[89] Democracy, Gordon argues, is important because it recognises and engages with the right to political participation; to place limits on democracy is to limit those rights.[90]

The idea that Parliament has unlimited legislative power and anything else is a slight to democracy is certainly an idea that has taken hold of some of the judiciary. For example, in *Evans* Lord Wilson says that the proposed interpretation of FoIA "re-wrote" the statute and ignored "the most precious [of constitutional principles] that of parliamentary sovereignty, emblematic of our democracy".[91] Likewise, Lord Hoffmann has said that decisions "require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democracy process. If the people are to accept…such decisions they must be made by persons whom the people have elected and whom they can remove".[92] Lord Hoffmann further said, in *Bancoult (No 2)*[93] that Orders in Council, whilst primary legislation, are not immune from the ordinary doctrines of judicial review in the same way as Acts of Parliament because:

> The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone.[94]

This is all well and good; it has the advantage of being easy to follow and, perhaps, using an understanding of the principle of democracy that is, at a superficial level at least, one that many endorse. Indeed, as a general theory it does work; generally speaking there is no issue with Parliament being able to alter doctrines of common law. However, does the democratic pedigree of the legislature (at least relative to the judiciary) justify, in and of itself, a power to encroach on rights found in the common law vis-à-vis the rule of law? To put the same thing a different way,

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[86] ibid 47.
[87] Jeremy Waldron, *Law and Disagreement* (1999) 303: "everything *is* up for grabs in a democracy, including the rights associated with democracy itself".
[88] Gordon (n 85) 37.
[89] ibid 35, 289.
[90] ibid 38. Gordon is drawing on Waldron here: Jeremy Waldron, "A Rights Based Critique of Constitutional Rights" (1993) 13 OJLS 18, 50.
[91] *Evans* (n 39) [168] (Lord Wilson).
[92] *R v Secretary of State for the Home Department, ex parte Rehman* [2001] UKHL 47, [2002[1 All ER 122 62 (Lord Hoffmann).
[93] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2)* [2008] UKHL 61, [2008] 4 All ER 1055.
[94] ibid [35] (Lord Hoffmann).

if Parliamentary sovereignty is based on or justified by the principle of democracy then "it is reasonable to suppose that [the principle's] nature and scope…express a defensible conception of democracy".[95] Basing one's justification on democracy requires a justifiable form of democracy; it is itself a contested principle, which, properly understood, contains appropriate nuance to protect citizens' rights. More specifically, democracy inherently respects rights. You cannot invoke democracy, on a defensible understanding of its own terms, to justify treating citizens arbitrarily.

Pure, majoritarian democracy, is, I suggest after Dworkin,[96] inconsistent with the principles underlying and justifying democracy. In short, democracy, the idea that people ought to participate in the decision making process that will result in state backed coercive powers, is underpinned or justified by a commitment to the idea of equality. Democracy is justified because it respects individuals; it allows individuals to register their preferences. As Gordon puts it majoritarian decision making is justified because it involves a commitment to give equal weight to each person; democracy involves political equality because citizens have equal voices in the system.[97] Yet if democracy is premised and/or justified on an idea of equality then surely it cannot be used to dismantle or otherwise cut across rights associated with equality? It is worth noting here that I developed, in Chapter 4, the basis of common law rights as concerned with the moral equality of the citizen against the state. The justification for democracy itself involves a commitment or reliance on the equal worth of the citizen. If this is correct then it is hard to not agree with Dworkin when he says that "democracy means government subject to conditions…of equal status for all citizens".[98] This means there are limits to democracy. First, democratic bodies cannot do anything undemocratic; the principle of democracy cannot reasonably be understood as removing things logically associated with democracy. It is unintelligible, for example, for Parliament, basing its power in a democratic mandate, to side-line the rule of law and remove the franchise for women.[99] Parliament could not, in such a situation, say a refusal to apply the legislation is anti-democratic because the purported *legalisation itself* offends democracy properly understood.[100] The same would be true if, for example, Parliament tried to do something like remove democratic accountability for its composition.[101]

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[95] T R S Allan, "Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*" (2016) 75(1) CLJ 38, 46.
[96] Dworkin's views are expounded across many volumes and works.
[97] Gordon (n 85) 36.
[98] Ronald Dworkin, *Freedom's Law: The moral Reading of the American Constitution* (OUP 1996) 17.
[99] *Moohan* (n 52) [35] (Lord Hodge): "exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise…, the common law, informed by principles of democracy and the rule of law…would be able to declare such legislation unlawful".
[100] As Dworkin puts it, such a thing would defeat "the egalitarian cast of the apparently neutral utilitarian constitution….the apparently neutral provision is then self-undermining because it gives critical weight…to the

Democracy, premised and justified by an underlying commitment to equality, however, goes further than merely protecting or assuming rights concerned with seemingly more direct cases of democratic issues (e.g. removing the franchise); the concept of equality equally justifies a wide range of rights. I will not rehearse here arguments made in Chapter 4 yet the following is worth noting: I premised common law rights on the rule of law; the rule of law itself promises protection from arbitrary interference. The reason for this is that the rule of law expresses a broader ideal of *equality before the law*.[102] Democracy, as an expression of equality, must therefore also, like the rule of law, respect consistency in principle.[103] The principle of democracy, in short, represents and endorses a commitment to equality of dignity; as George Letsas puts it "the right to be treated with equal respect and concern by one's government, and the right to be treated as someone whose dignity matters and matters equally to those of others".[104] As I argued in Chapter 4, equality provides a basis of legitimising and conditioning state power: equality demands that state power should show equal concerns for its citizens. There is, therefore, no conflict between democracy, on the one hand, and the rule of law, which founds common law rights, on the other hand. Both, properly understood, endorse or find their normative justification in the same idea: equality of concern for the dignity of the individual. You can no more justify an intrusion of common law rights[105] by reference to democratic concerns than you can by appealing to the rule of law itself. The recognition of limits to democracy is not, however, anti-democratic on this account; democracy, properly understood, means that the majority may only do things that respect individual rights founded on the idea of equality of concern for dignity. On this account, then, the argument against limitations on the powers of Parliament vis-à-vis common law rights premised on democratic concerns lose their power; democracy, properly understood, is limited by precisely the kind of normative concerns that underpin the rule of law. As Allan puts it:

> People have moral rights to be treated with dignity and respect…The underlying idea of equal citizenship is ultimately the foundation for *both* the rule of law and democracy, requiring both the fair treatment of persons and fair arrangements for the exercise of power. The rule of law is a modest theory of *constitutional* justice,

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views of those who hold the profoundly un-neutral theory that the preferences of some should count for more than those of others": Ronald Dworkin, "Is there a right to pornography?" OJLS (1981) (1(2) OJLS 177, 202.

[101] See *Jackson* (n 35)

[102] Ronald Dworkin, *Law's Empire* (HUP 1987) 227.

[103] Allan (n 6) 123.

[104] George Letsas, "Dworkin on Human Rights" (2015) 6(2) Jurisprudence 327, 333.

[105] For a fuller account of how the rule of law, non-arbitrariness, and equality of concern ground common law rights see Chapter 4.

> whose requirements any acceptable version of liberal democracy should be expected to satisfy.[106]

The second objection to recognising rule of law based limits on Parliament's powers is more practical in nature. Dawn Oliver puts this most succinctly when she said that one of the problems with challenges to the validity of primary legislation is that it "would expose the judges to political pressure and criticism, not only from politicians but also often from the press and sections of the public".[107] The argument is not that judicial recognition of limitations premised on the rule of law of Parliament's powers are illegitimate but they ought not to exercise their powers because of a political/media induced backlash. I think this is problematic for three reasons: (i) it suggests that the judiciary have not already been subject to vitriolic attacks in the past; (ii) it suggests that such non-legal, practical concerns ought to influence judicial obligation; and (iii) endorsement of an illegality.

As to (i) this is not the case. The judiciary are routinely subject to criticism for making perfectly reasonable legal judgments that fit within our constitutional framework. The most obvious example is the reaction of the popular press to the High Court's decision in *Miller*.[108] Most notably *The Daily Mail* printed the judges' faces on the front page under the headline "Enemies of the People".[109] It is hard to imagine the press reacting any more strongly or in a way that is sufficiently ontologically different if a court were to, for example, refuse to apply a statute that provided for, for example, Muslims to be extradited solely due to their religion. No one expected the Supreme Court, in the face of public and press hostility, to do anything different than apply the law as they (rightly or wrongly) saw it when *Miller* was appealed to that Court.[110]

The second point links strongly to the first: such practical concerns do not constitute *legal* concerns; the worry about a Minister or newspaper complaining about a particular decision does not justify *not* taking that decision if it is legally correct to do so. As Allan puts it in a slightly different context, "the judicial enforcement of rights may make great intellectual demands on

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[106] Emphasis added for the first italicised word; original for the second. T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 29. Note that when Allan says this is "theory" and involves "moral" rights that does *not* mean they are *external* values to law; they are very much internal.

[107] Political and Constitutional Reform Committee (n 75). Oliver's view is expanded upon in Dawn Oliver, "Parliament and the Courts: A Pragmatic (or Pirncipled) Defence of the Sovereignty of Parliament" in Horne A and Drewry G (eds), *Parliament and the Law* (Hart 2018) 303-7.

[108] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768, [2017] 1 All ER 158.

[109] Claire Philips, "British newspapers react to judges' Brexit ruling: 'Enemies of the people'" (*The Guardian*, 4 November 2016) https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling(accessed 3 June 2018). Do note that *The Telegraph* also ran with "Judges versus the People" and *The Express* with "Yesterday three judges blocked Brexit".

[110] *Miller* (n 73).

judges, who are required to exercise *judgment* in what may often be finely balanced disputes, but it does not involve *discretion*, in the sense in which other state officials may enjoy a legitimate freedom of choice between competing alternatives".[111] A judge is, simply, tasked with deciding a case in accordance with legal principles; this will not always be intellectually easy but that does not make it wrong to do so. To refuse to apply the law because of non-legal factors is, I suggest, a dereliction of judicial duty.

As to the third point this, too, links with points (i) and (ii). A court, recognising both that a statute can leave no interpretation open but one that violates the rule of law and the common law rights built on it and that the rule of law is logically prior to Parliament's powers (and therefore limits Parliament's powers) would be endorsing that illegality if it refused an appropriate remedy.[112] A court, by doing nothing about a breach of the rule of law and the rights arising from it, is itself accepting the breach. The courts are guardians of the rule of law; they are there to apply the law in an even-handed manner. Their own powers, since they are legal, are conditioned by the rule of law. To ignore this, as already stated, is to fall short of the courts' obligation to apply the law.

None of the foregoing is to suggest that judges' minds should not be (re)focused on the importance of their task by the external factors surrounding a complicated, important, and/or high profile legal dispute. The perception of justice is, after all, important; that is not the same as saying that justice must be decreed according to public perception of what that *involves*. Law ought to be applied regardless of extrinsic thoughts, views, or opinions of the press, politicians, or public. This includes refusal to recognise a purported Act of Parliament as an Act of Parliament. The importance of the judicial task, viz applying the law, is underscored by public attention on a case; Oliver's argument seems to suggest that the reverse is true. It is not.

IV. Constitutional Resilience of Common Law Rights: Disapplication and Declarations

All of the foregoing only takes us so far. To recap, I have argued that common law rights, which find their basis in the rule of law, are far more constitutionally resilient than the HRA, which effectively lends statutory recognition of a not dissimilar pre-existing state of affairs vis-à-vis the common law properly understood.[113] I argue this for the simple reason that the HRA can be

[111] Allan (n 6).
[112] On remedies see below in this Chapter.
[113] On this point see Chapter 4.

repealed at any time by the legislature[114] but, as argued above, the legislature cannot, no matter how clear its wording or intention,[115] legislate contrary to the rule of law, which is logically prior to Parliament's powers and underpins *legal* powers.

None of the foregoing directly says, however, how the courts ought to proceed when faced with legislation that cannot be understood as anything other than breaching the rule of law; what, in short, should the courts do? If the courts are faced with a piece of legislation that cannot intelligibly be understood in a way that does not cut across the rule of law then the courts, I suggest, have three options: (a) refuse to grant a remedy, thereby implicitly treating the legislation as valid; (b) issue a declaration of incompatibility at common law; and/or (c) explicitly disapply the legislation to the extent it violates rule of law principles vis-à-vis common law rights.

As to (a) whilst this is, of course, a possibility it is not one that is appealing. As stated in Chapter 4, it is well established that there is a right at common law of access to the courts; Collins J makes this clear when he says that "the courts of this country have always recognised that the right of a citizen to access a court is a right of the highest constitutional importance and that legislation removing that right is *prima facie* contrary to the rule of law".[116] A logical implication of this must be that a remedy ought to be available if the claimant has the better legal case. If a citizen has the right, as Scrutton J says, to "appeal to the…Courts if he alleges that a civil wrong has been done to him"[117] then that must involve a remedy unless there are strong reasons to the contrary. The necessity of this implication has a history of recognition; for example, Sir Edward Coke wrote that every subject who has injury done by another "may take his remedy by the course of the Law, and have justice, and the right for the injury done to him, freely without sale, fully without any denial, and speedily without delay".[118] Likewise in *UNISON*[119] Lord Reed noted the relation between the right of access to the courts and the right to a remedy in accordance with law.[120] Further, it is worth pointing out that, as argued in Chapter 2, the courts themselves are bound by the rule of law; for a court to completely ignore a violation of the rule of law and allow it to go on would be condoning a violation, which the courts have no power do to since they themselves find their powers in the rule of law. The rule of law, that is, conditions courts' jurisdiction and

[114] It is, of course, a question of politics whether it *will actually* be repealed. Before the EU referendum the HRA was squarely in the firing line. Brexit may have earned the HRA quite the reprieve.
[115] On which see Chapter 6.
[116] *A v B (Investigatory Powers Tribunal: jurisdiction)* [2008] EWHC 1512 (Admin), [2008] 4 All ER 511 [12] (Collins J).
[117] *In re Boaler* [1915] 1 KB 21, [1914-25] All ER Rep 1022.
[118] Sir Edward Coke, *Institutes of the Laws of England* (1642).
[119] *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, [71] (Lord Reed).
[120] ibid [71] (Lord Reed).

powers and therefore their discretion; they cannot abdicate their responsibility and still be a judiciary worthy of respect.

The option of a declaration is, however, far more interesting but ultimately flawed or, at least, not as different from strike down as supposed because declarations rely on a version of Parliamentary sovereignty that this thesis rejects. As said in Chapter 3, s 4 HRA provides a statutory basis for the courts to declare that legislation is incompatible with ECHR rights. The HRA itself says that this power does not affect the validity of legislation.[121] As such the courts have emphasised that a s 4 declaration does not put them into conflict with the legislation; they are simply putting the ball back in the legislature's court to make amendments as they see fit under the HRA framework of Parliamentary process.[122] Without the HRA one could argue that this power, which acts as a compromise between strike down and no remedy whatsoever, would be lost. Yet the possibility of a declaration exists *at common law* outside of any statutory authorisation.

This comes out most clearly, in relation to human rights, in the recent New Zealand case of *Taylor*,[123] which is currently going before the New Zealand Supreme Court having been decided by the New Zealand Court of Appeal.[124] In 2010 the New Zealand Parliament amended the Electoral Act 1993 to extend the prohibition on some prisoners voting to cover all prisoners. The applicants brought proceedings to the New Zealand High Court seeking a declaration that the amendment was inconsistent with their right to vote, as protected by the New Zealand Bill of Rights Act 1990 (NZBORA).[125] Heath J, sitting in the High Court, made such a declaration.[126] The Attorney General appealed on the basis, *inter alia*, that the High Court did not have jurisdiction to make such a declaration. It is worth noting that NZBORA does not have a s 4 HRA equivalent. The questions for the Court of Appeal, therefore, were (a) whether the court had jurisdiction; and (b) where it came from, the common law, NZBORA, or both?[127] The Court of Appeal said that the judicial function "extends to answering questions of law, and as a general proposition it does not require legislative authority. Inconsistency between statutes is a question

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121 S 4(6)(a) HRA.
122 See *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, [63] (Lord Hutton).
123 *The Attorney-General v Taylor and others* [2017] NZCA 215.
124 For a discussion see Alison L Young, *Democratic Dialogue and the Constitution* (OUP 2017) and Andrew Geddis, "'Declarations of Inconsistency' under the New Zealand Bill of Rights Act 1990" UK Const L Blog (19 June 2017) https://ukconstitutionallaw.org/2017/06/19/andrew-geddis-declarations-of-inconsistency-under-the-new-zealand-bill-of-rights-act-1990/ (accessed 3 March 2018).
125 *Taylor v Attorney-General* [1015] NZHC 1706, [2015] 3 NZLR 791.
126 ibid [79] (Heath J) for the wording of the declaration.
127 *Taylor* (n 123) [4].

of interpretation and hence of law, and it lies within the province of the courts".[128] As such, the power to make a declaration was found in the common law and further supported by ss 2-6 NZBORA and the case law surrounding the Act.[129]

In a way, this is different to declarations on common law rights since the New Zealand courts were issuing a declaration of inconsistency as between two pieces of legislation. What could be proposed is a declaration of inconsistency between legislation and common law rights. As said above, the New Zealand Court of Appeal said that it had the power, at common law, to make declarations as to *matters of law*. Issuing a declaration as to a clash between the common law and a statute would, similarly, be recognising a legal state of affairs. From this perspective, it would not be different in principle to make a declaration of inconsistency between common law principles and a statute and two statutes. Both such declarations are authoritative judicial enunciations on questions of law, which is the courts' function *par excellence*.

Such constitutional declarations have not taken place in the United Kingdom.[130] Yet there is no reason they cannot do so; declarations as to the legal state of affairs are not unusual in judicial review.[131] It does not, however, contain an order that can be enforced against a defendant.[132] The issue, however, is that declarations of inconsistency under *Taylor* do not challenge the validity of legislation. Quite the reverse; *Taylor* explicitly recognised the primacy of Parliament.[133] Likewise, whilst David Jenkins calls for declarations of unconstitutionality they would, for him, have no *legal* effect because Parliament is sovereign; all such a declaration would be doing, on this account, is alerting the political branches of the state to such an issue. It would be for them to rectify if they chose to do so.[134] Such declarations, on his approach, have dialogic value only. Yet, given the framework laid out for the rule of law and Parliament in this thesis, it is untenable to say that that is all such a declaration would do.

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[128] ibid [62]. Put another way, the Court of Appeal said "We have rejected [the Attorney-General's] narrowly circumscribed view of the judicial function, holding rather that it extends generally to answering questions of law and specifically to questions of consistency between legislation and protected rights": ibid [77].
[129] ibid [108].
[130] Similar to what David Jenkins would call "declarations of unconstitutionality": see David Jenkins, "Common law declarations of unconstitutionality" I CON (2009) 7(2) 183. Though do note Jenkins is wedded to the idea of Parliamentary sovereignty in its orthodox form so his view of such declarations is inherently different to mine.
[131] Woolf *et al* (eds), *De Smith's Judicial Review* (7th edn, Sweet and Maxwell 2015) [18-037].
[132] See *Webster v Southwark LBC* [1983] QB 698 (Forbes J).
[133] Such a declaration "determines no legal rights and conveys no legal consequences as between the parties": *Taylor* (n 12) [66].
[134] Jenkins (n 130).

A declaration, recognising the breach of the rule of law by a purported statute, would, logically, be *recognising* the invalidity of that legislation because, as argued, something *cannot* cut across the rule of law and be legislation properly so called; it would lack legal force. A parallel can be drawn here between a declaration of unconstitutionality and a quashing order. Both, it is argued, recognise, in this framework, the *voidness* of the act; a decision maker cannot act *ultra vires* and, if he does, an action that is *ultra vires* was *never* an action in law (as opposed to in fact) regardless of any court order recognising it as such.

Similarly, an action by Parliament that is *ultra vires* (here, legislating contrary to common law rights and thus the rule of law) is also void; that is, it never existed. This is brought out clearly in the non-legislative context in *Ahmed (No 2)*.[135] In this case the claimants' assets were frozen in accordance with Orders by the Treasury. The Orders were in wide terms and provided for the freezing of financial assets and economic resources save for the most basic of expenses. The Supreme Court found the Orders to be *ultra vires*. Despite the fact that the Orders were illegal, obviously, third parties had acted as if they were legal until the litigation was settled, most particularly the banks holding funds affected by the Orders. Even after judgment was given the Treasury was "anxious" that third parties continue respecting the Orders and so "submitted that the court should suspend the operation of the orders that it proposes to make declaring [the orders] *ultra vires* and quashing them".[136] Whilst accepting the Court *could* suspend a quashing order however "the problem…is…that the court's [quashing] order…will not alter the position in law. It will declare what that position is. …these are provisions that are *ultra vires* and of no effect in law. The object of quashing them is to make it quite plain that this is the case. The effect of suspending the operation of the quashing order…would be to give quite the opposite impression".[137] Further still, Lord Philips hints at a rule of law issue with the suspension of a quashing order when he says that "the court should not lend itself to a procedure that is designed to obfuscate the effect of its judgment".[138]

The reasoning of Lord Philips in the Supreme Court vis-à-vis secondary legislation and suspension of quashing orders seems to me, within the general tenor of this and the preceding Chapters, to fit declarations of unconstitutionality vis-à-vis primary legislation too. A court, by

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[135] *Ahmed and others v Her Majesty's Treasury (Nos 1 and 2)* [2010] UKSC 5, [2010] 2 AC 534. Do note that Lord Hope dissents on this point. For reasons of space, I do not propose to engage with his arguments here. Nor do I propose to engage with the void/voidable argument here.
[136] ibid [2] (Lord Philips).
[137] ibid [4]-[5] (Lord Philips).
[138] ibid [8] (Lord Philips).

recognising that a purported statute (or part thereof) is inconsistent with the rule of law (whether through a reasoned judgment, a declaration of inconsistency, or an order striking down the purported Act) is doing just that: *recognising that the purported statute is* ultra vires. The judicial recognition of that pre-existing legal fact does not alter or in some way *change* or *make that fact so*. It merely judicially (and therefore authoritatively) recognises the fact as true. A purported statute would cut across the rule of law and is therefore not a statute. Declarations have their place and a value in a hypothetical world in which Parliament is sovereign but that is not the legal reality once the rule of law's place is properly understood. As such, when a statute purports to cut across the rule of law we must reject it as a statute; a declaration has no place as a mediator in this framework because the court's function is not to make a piece of purported legislation *intra* or *ultra vires*. If a purported statute is the latter then it has no legal effect regardless of what a court says. A declaration is not a step down from strike down proper; both recognise the pre-existing state of affairs. Instead, a declaration would just serve to obfuscate the legal position as it exists; it would or at least could confuse people as to the legal status of a purported piece of legislation, which, since legal certainty is part of the rule of law, is something best avoided.[139] As Allan puts it, "no declaration of incompatibility can be given in respect of a statute that threatens the rule of law, for no such statute…could be acknowledged as truly law".[140] Therefore, a declaration, whilst interesting and constitutionally possible (in that the senior courts do have an inherent power to issue declarations as to the state of the law) would not be that different to a full strike down power except insofar as they would serve to obfuscate the legal position and status of a purported Act to citizens and those administrative decision makers tasked with making decisions under the Act.

This leaves us with the final possibility that was described at the beginning of this section: explicitly disapplying legalisation to the extent that it cuts across the rule of law. As pointed out above, whilst this has not happened in the common law arena,[141] it is something that has been envisaged.[142] It ought to be noted now that the term "strike down" envisages something dramatic happening; instead, I suspect a court, exercising such powers, would merely say that a particular

[139] None of this says anything about the use of prospective declarations, i.e. ones that say if an Act was passed it would or would not be *vires*. This is complicated and not subject to speculation in this thesis for reasons of space.
[140] Allan (n 72) 41.
[141] Though, of course, it has in relation to the application of and the supremacy of European Union law, given effect domestically by virtue of the European Communities Act 1972. See *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 (HL) as the seminal case of disapplying Parliamentary legislation where it is inconsistent with European Union law.
[142] *Jackson* (n 35) and *Moohan* (n 52). Likewise this has been envisaged in New Zealand too: "some common law rights…lie so deep that even Parliament could not override them" *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (Sir Robin Cooke).

section of a statute had no legal force and therefore any state actor purportedly acting under it would not be doing so in accordance with law, thus rendering their powers *ultra vires*. Immediately, I suspect, the foregoing will trigger accusations of judicial supremacy; as Goldsworthy puts it, in questioning Parliamentary sovereignty, "what is at stake is the location of the ultimate decision-making authority- the right to the 'final word'- in a legal system".[143] Yet let us recap what I have so far advocated: Parliament cannot legislate contrary to common law rights because said rights find their basis in the rule of law,[144] which is logically prior to Parliament's *legal* powers[145]. I have also argued it is for the judiciary to refuse to give effect to purported legislation that would cut across the rule of law; this is for the simple reason that if Parliament was exclusively the body that got to decide if Parliament had acted in accordance with the rule of law then Parliament's power would truly be unlimited since it would be deciding the scope of its own jurisdiction or, at least, deciding if it has acted *within* its own jurisdiction, which amounts to the same thing.[146]

However, none of this is to say that Parliament cannot have a role or that these are easy questions to answer. There is a role for deference to the legislature in appropriate circumstances[147] though it may not be of a kind that is expected. First, I briefly discuss what the standard of review is or would be in such a case.[148] Recalling the arguments presented in Chapter 5 we can see that there is one principal way in which governmental (in this case, legislative) action can violate the rule of law vis-à-vis common law rights: failing to treat the citizen with equal concern for their dignity. This manifests itself in two ways in which the state can breach common law rights: (a) by acting for an improper purpose or an irrelevant consideration; and (b) even when acting for a legitimate reason acting disproportionately to that reason. Either (a) or (b), on the argument in Chapter 5, would constitute a violation of the rights one holds as a citizen. I suggested that (a) is a correctness standard, in that a consideration either is or is not relevant; it is a binary construct. Likewise (b), I argued, is a proportionality standard in the variable sense (that is, in the human rights context it looks very much like orthodox proportionality). The same standards apply to review of legislation; there is no reason why the standards, which are themselves premised on the rule of law, ought to change because of which body of the state is

[143] Goldsworthy (n 83) 126.
[144] See Chapter 4.
[145] *Jackson* (n 35) (Lord Hope).
[146] A cardinal aspect of the rule of law is, of course, ***nemo iudex in causa sua***.
[147] I do not intend on saying too much about this here; the framework of deference I support is found in greater detail in Chapter 5.
[148] On the distinction between standard and intensity of review see Chapter 5. As said there, I take these terms from Mark Elliott, "From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification" in Wilberg H and Elliott M (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart 2015) 70.

acting in a particular circumstance. As stated throughout, the rule of law controls and conditions *legal* powers; this does not change depending on who or what is exercising legal powers.

The more interesting question is whether the *intensity* of review ought to change. One view could be, of course, that whilst Parliament may not *in theory* cut across the rule of law, and thus accept the arguments so far made, the courts should show absolute deference to the legislature so that they say that the question is essentially one for Parliament. The standard of review remains the same but the courts would effectively abdicate responsibility by lowering the intensity of review to zero. Yet why? On what *grounds* would this deference be based? As suggested in Chapter 5, there are two bases of deference in administrative law: (i) democratic; and (ii) instrumental. The former is based on the status of the decision maker; it is, as Lord Sumption says, about "respect for the constitutional functions of decision makers who are democratically accountable".[149] The latter is about institutional competence, to reiterate what Lord Sumption said about this:

> It does not follow from the court's constitutional competence to adjudicate on an alleged infringement of human rights that it must be regarded as factually competent to disagree with the decision-maker in every case or that it should decline to recognise its own institutional limitations…. the executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her.[150]

As argued in Chapter 5, I am not certain why or how democratic deference is relevant to human rights disputes. If a court needs to know if Parliament crossed a constitutional line then why does the fact that part of the legislature is elected mean that courts should defer? I argued in Chapter 5 that the role of the court in a human rights case is diagnostic: has a right been breached or not? The courts saying it has or has not does not *change the fact* of the breach; the courts are looking to see if there has been a breach. There is no epistemological value in a body being democratically elected. Appeals to democratic pedigree do not help us to know if constitutional boundaries have been crossed. Likewise, democracy, even outside of epistemological utility, is, as argued above, no reason to defer: democracy involves rights and rights protection. You cannot invoke democracy to circumvent democratic concerns by shielding your decisions from review. Further still, one could easily argue that Parliament should not be able to invoke its democratic credentials alone as a reason for judicial deference because to do so would be allowing Parliament to essentially act as a judge in its own cause; you would be saying that Parliament cannot act against the rule of law,

[149] *R (Lord Carlile) v Home Secretary* [2014] UKSC 60, [2014] 3 WLR 1404 [28] (Lord Sumption).
[150] ibid [32] (Lord Sumption).

which founds common law rights, but that it is for Parliament *to decide if it has done so*. It is trite to say that the rule of law requires bodies be subject to proper review and to not decide their own cases.[151]

The better argument would be deference based on instrumental concerns: there may well be times when the intensity of review ought to be calibrated to match the expertise of the respective actors. As Lord Mance puts it deference can be based on "questions of institutional competence", specifically on the basis that "these may well be issues with which a court is less well equipped and Parliament is better equipped to address [than the courts]…On some issues…the judiciary can claim greater expertise than it can on some others. The same applies to the legislature".[152] Herein lies the crux of this part of the argument: the legislature can, of course, *earn* deference by showing that it has particular expertise or otherwise has undertaken a thorough process. As argued in Chapter 5, you have *more of a reason* to defer to experts than novices.[153] Obviously this is to be done on a case by case basis; there is no guarantee that the legislature will *always* be better equipped to decide a particular issue yet the fact remains: Parliament may well be better equipped in some cases to decide if something is a breach of rights at common law in line with the framework articulates in Chapters 4 and 5. If that is so in a given case then deference consummate with said expertise is appropriate since the judicial function is essentially diagnostic; the courts are there to *get to the right answer*, i.e. in the given case were rights breached or not? Parliament, therefore, can and should have a role in human rights decision making at common law, even one that recognises a strike down power; it is only that a *good Parliament*, i.e. one that, *inter alia*, follows due process and consults with experts, is entitled to such a role. A Parliament that acts bullishly will not be able to merely rely on its democratic credentials relative to the judiciary's to claim deference or an adjudicative role in human rights disputes at common law.

V. Conclusion

This Chapter has dealt with one of the most important constitutional issues in the United Kingdom. Despite the fact that, as set out in Chapter 6, it should never, or at least very rarely, occur the question persists: what is the relationship between Parliament and the rule of law? More pertinently, what is the relationship between the legislature and rights found at common

[151] See, for example, *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[152] R *(Nicklinson and another) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, [164] (Lord Mance).
[153] This is what Lord Sumption is, I think, getting towards when he says, "the Parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. The legislature has access to a fuller range of expert judgment and experience than forensic litigation can possibly provide. It is better able to take account of the interests of groups not represented or not sufficiently represented before the court in resolving what is surely a classic 'polycentric problem'": ibid (Lord Sumption).

law, which are themselves, as argued in Chapter 4, founded on the rule of law? This thesis has tried to compare the rights at common law with those found under the HRA. I have done so on three vectors and the constitutional resilience of those rights, that is, their constitutional durability, is the final of those three. I have argued in this Chapter that the HRA can, of course, be repealed by an express Act of Parliament; indeed, such action is officially government policy and no doubt the wheels of legislative change would have begun in earnest if the United Kingdom's exit from the European Union was not, at the time of writing, occupying the vast majority of government time. From this perspective, which ignores political or popular resistance that may or may not emerge at any serious attempt to repeal the HRA and instead focuses solely on the legal landscape, the HRA is not particularly constitutionally resilient; it is, ultimately, there due to on going legislative consent. If Parliament wished to repeal the HRA, and, even further, to withdraw from the Council of Europe then it would certainly be capable of doing so.[154] The simple reason for this is that the rights located in the HRA find their existence based on an Act of Parliament; Acts are, simply, under the control and purview of Parliament. Parliament can repeal Acts that it has brought into existence.

Common law rights are, however, of a different character altogether. They do not find their existence due to Parliamentary consent; they exist by virtue of the rule of law. Whilst it is true to say that Parliament, generally speaking, can displace and replace common law doctrine this is a *general rule* an exception to which are common law rights founded upon the rule of law. The rule of law, unlike an Act of Parliament or ordinary common law doctrine,[155] cannot be displaced by Acts of Parliament because, simply, the rule of law is logically prior to Parliamentary legal powers[156] and common law rights are concrete expressions of the rule of law's promise against arbitrary power.[157] From this perspective common law rights are far more constitutionally resilient than the rights found in the HRA because they cannot be removed by the legislature in the current constitutional framework. To give a simple example, Parliament could vote, if it wished, to remove Article 6 ECHR from the rights protected by the HRA, thus removing the right to a fair hearing from the *statutory* framework however it could not remove such a right from the *common law* framework and any attempt to do so should, and hopefully would,[158] be met

[154] Though the precise constitutional mechanisms for withdrawing from the Council of Europe are, as previously said, uncertain post-*Miller*.
[155] Eg libel law or occupiers' liability.
[156] On which see Chapter 2.
[157] On which see Chapter 4.
[158] The word "should" here indicated what the correct legal approach is; the word "would" acts more of a predictor of what the courts would do. Obviously, whilst we hope for a strong correlation between these two concepts, courts

with the utmost judicial hostility such that the courts would either interpret the statute so as to be compliant with the rule of law based concept of access to the courts or, if that proved impossible,[159] be prepared to refuse to apply such a provision due to its incompatibility with the rule of law. Common law rights as I have articulated them are based on the rule of law and the rule of law is, itself, constitutionally resilient; it cannot be changed by the legislature. Of course our understandings of the rule of law may vary and be contested but the concept itself, loosely defined as promise against arbitrary state action, cannot be changed. Rights founded upon the rule of law, in short, common law rights, are resilient against legislative hostility both on their own terms and in relation to the HRA. Law reigns supreme and promises the citizens it governs freedom from arbitrary decisions; as I have articulated throughout this thesis this grounds rights at common law against the state, including the legislature.

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can and do get decisions wrong and fail to enforce rights at common law. An obvious example being *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA).

[159] Which should, of course, be exceptionally unlikely: see Chapter 6.

Chapter 8

Conclusion

I. Statement of Thesis

The role of the Human Rights Act 1998 (HRA) has been increasingly questioned by politicians, who no doubt find it to be a constraint on the powers of the executive,[1] and the Supreme Court has encouraged advocates bringing human rights cases to rely on the common law as their first port of call.[2] Given the timeliness, this thesis has sought to debunk a misconception in debates around constitutional and administrative law: that the HRA is a necessary piece of constitutional architecture to protect rights, as the common law alone is not sufficient.[3]

I drew attention to the centrality of the rule of law, which is the golden thread running through the constitution. It controls legal powers; to understand law is to acknowledge the rule of law. Sidelining the rule of law, which many do, ignores the normative foundations of the constitution; if we neglect the foundations then our views of the architecture are suspect.

Viewing the constitution through the lens of the rule of law, its controlling factor, we see that the common law goes as far as the HRA in terms of rights protection. The rule of law's reliance on principle prohibits arbitrary treatment, which is reflected in common law doctrine properly understood in line with the rule of law. Once this is appreciated this thesis argued that the HRA is not necessary for the protection of rights as the reach of common law rights, their rigour of protection, and their constitutional resilience are all much stronger than orthodoxy imagines.

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[1] The 2017 Conservative Party Manifesto only promised to "not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes": Conservative Party, "Forward, Together" (2017), 37. Available at: https://s3-eu-west-1.amazonaws.com/2017-manifestos/Conservative+Manifesto+2017.pdf (accessed 5 June 2018). For a more strident Conservative Party critique of the HRA see Conservative Party, "Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws" October 2014. Available at: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf.

[2] See, *inter alia*, *Kennedy v The Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808; *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115; and *A v BBC* [2014] UKSC 25, [2014] 2 WLR 1243. This increased focus on the domestic constitution is also found in the European Union context in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

[3] I stress I only mean this in the *legal* sense; I say nothing about the political climate or how a repeal of the HRA would affect political discourse.

II. Thesis Overview

In debunking orthodoxy the thesis has ranged across several areas of constitutional and administrative law and challenged the classic assumptions or conclusions many writers make. In Chapter 2 I argued, first, that the underlying methodological assumption in the debate about the power of common law rights is misguided. Most writers suppose a positivistic method, which, at least loosely, follows a Hartian approach. By examining the judicial disagreement in *Evans*[4] I suggested, following the work of Ronald Dworkin, that the identification of legal rights, powers, and duties is, at least in part, normatively motivated and requires normative argument and evaluation of the point or purpose of law. I suggested that an approach that is simply "descriptive" as to the content of law fails; instead, the rule of law, or legality, takes centre stage in legal debate.[5] I argued in that Chapter that once this is appreciated the landscape of academic discussion vis-à-vis common law rights becomes far less arid as we move towards normative debates about what the rule of law requires and how that affects which rights exist at common law and how they are protected. With the methodological framework thus established, this thesis moved on to look at the doctrinal issues that it raised.

After Mark Elliott, I argued that there are three vectors against which one might measure the power of common law rights as compared to the HRA, namely (i) reach; (ii) rigour; and (iii) resilience[6] and I examined each of these in turn. In Chapter 4 I looked at the orthodox view, which is that the rights found in the HRA go much further than those at common law. I argued there that the orthodox methodological approach, that is, utilising an empirical approach to identify *which* rights exist at common law was prevalent and led to the view that the common law does not go as far as the HRA in its reach.[7] I argued that this view was wrong; as described in Chapter 2, the rule of law is central to the identification of common law rights. In Chapter 4 I showed that the rule of law underlies many common law rights decisions[8] and as such we have

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[4] *R (Evans) v Attorney General* [2015] UKSC 21, [2015] 2 WLR 81.

[5] See further Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28(4) OJLS 70.

[6] Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68 CLP 85.

[7] See, *inter alia*, Lady Hale, "UK Constitutionalism on the March" (2014) 19(4) JR 201; Roger Masterman and Seshauna Wheatle, "a common law resurgence in rights protection?" [2015] EHRLR 57, Richard Clayton, "The empire strikes back: common law rights and the Human Rights Act" [2015] PL 3, Conor Gearty, "On Fantasy Island: British Politics, English Judges, and the European Convention on Human Rights" [2015] EHRLR 1, and Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) CLP 1. This view was taken in *Moohan and Another v The Lord Advocate* [2014] UKSC 67, [56] (Lady Hale).

[8] See, *inter alia*, *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL), 125 (Lord Steyn), *A v B (Investigatory Powers Tribunal: Jurisdiction)* [2008] EWHC 1512 (Admin), [2008] 4 All ER 511, [12] (Collins J), *R v Secretary of State for the Home Department, Ex parte Pierson* 1998] AC 539 (HL), 591 (Lord Steyn), and *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 4 All ER 903, [64] , [66], and [76] (Lord Reed).

no reason to suppose that it would not underlie as yet unrecognised rights. The mere fact that a right has not yet been *recognised* does not mean that it does not *exist* at common law. A judge's role is diagnostic: they are there to say what the law *is*. As T R S Allan put it "the common law constitution is chiefly characterized by its dependence on legal principle"[9]; in Chapter 4 I argued the common law sceptics have sidelined the rule of law to the detriment of discourse.

Chapter 4 went on to consider what values the rule of law encapsulates; I argued that because the rule of law "promises protection…against the arbitrary exercise of power" [10] we should understand it as requiring justification for differing treatment.[11] It is in this way that the rule of law reflects equality; it is about consistency in principle at its most fundamental. I suggested, therefore, that you cannot, for example, deprive someone of the opportunity to adopt a child just because they are in a same-sex marriage even though the common law has not, so far, recognised a right to adopt. The specific rights are manifestations of a broader right: the right not to be treated arbitrarily, which is firmly established in common law and is, indeed, central to the rule of law. Common law sceptics sideline this principle-orientated nature of the common law yet once this is appreciated, I argued, one can see a much broader array of rights at common law and the differences between the common law and HRA rights are not so stark; both rely on legal principle for their fruition.

This said nothing about *enforcement* of those rights; it is one thing to hold a wide range of rights but quite another to be able to enforce them.[12] Chapters 5 and 6 moved on from *which* rights to the *rigour of their protection*. This was broken down into two broad areas: Chapter 5 looked at judicial review of executive action in both procedural and substantive terms; and Chapter 6 looked at the interpretation of legislation at common law in line with common law rights. In Chapter 5 I argued, first, that when reviewing executive action to see if decision makers have breached common law rights the first port of call should be to see if they have taken account of irrelevant considerations, which correlates to the need for a legitimate aim under the HRA. I argued here that when a decision maker makes a decision he must not treat the citizen arbitrarily; that is, he must show equal concern for the dignity of the individual. He cannot take account of external preferences; he cannot act on subjective preferences when deciding the opportunities or

[9] T R S Allan, "The Moral Unity of Public Law" (2017) 67 UTLJ 1, 2.
[10] Gerald J Postema, "Fidelity in Law's Commonwealth" in Austin L M and Klimchuk D (eds) *Private Law and the Rule of Law* (OUP 2014) 17.
[11] Ronald Dworkin, "Is there a right to pornography?" (1981) OJLS 177.
[12] The average citizen likely does not care about which rights they *hold*; they, presumably, mainly care about which rights they can *enforce*.

liberties of citizens. You cannot, I argued, decide that children cannot be placed with a same-sex couple just because you think that same-sex couples are not as good for children as opposite-sex couples. In Chapter 4 I said that the rule of law encapsulates, at common law, the idea that decision makers cannot treat citizens arbitrarily; when treating a citizen differently from other citizens they must show that there was an objective, morally justified reason for doing so. So when depriving someone of an opportunity (here adoption) or a liberty (let us say the right to vote) some reasons will not be capable of justifying such deprivations. If an action is predicated on external preferences then these are not objectively justified and thus the right is violated. Process review acts as a "reason-blocking" mechanism to uphold a right.[13]

Even if an action is for a legitimate reason that does not mean the state can do anything it wants; I argued in Chapter 5 that substantive review enters the legal framework. I argued that the traditional *Wednesbury*[14] approach to judicial review in the domestic system accommodates human rights and can be as rigorous as proportionality in appropriate cases because the standard of review *Wednesbury* sets is variable in much the same way as proportionality is. The rule of law, I argued, does not allow for arbitrariness and the standard of review, in this sense, varies according to the number of decisions that can be considered arbitrary. There is nothing, I suggested, in the structure of *Wednesbury* or in its ontological nature that means it cannot be as effective at protecting rights as proportionality under the HRA. As I pointed out proportionality is itself a flexible standard that becomes more exacting in human rights cases and less exacting in, *inter alia*, issues to do with national level economics, policy, and international relations. Further, both tests require a court to engage in questions of weight and judgment and it is a mistake to think otherwise.

I concluded, therefore, that the rigour of rights protection vis-à-vis review of executive action is at the same protective level under the common law as the HRA. The divergence between the two that common law sceptics elucidate is, I suggested, flawed in that it is stuck in ostensible orthodoxy and fails to account for the rule of law.[15]

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[13] George Letsas, "The Scope and Balancing of Rights: Diagnostic or Constitutive?" in Brems and Gerards (eds), *Shaping Right sin the ECHR: The Role of the European Court of Human Rights in determining the scope of human rights* (CUP 2014).

[14] *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[15] Likewise it fails to account for recent jurisprudence; common law sceptics are as likely to rely on *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA) as *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591. Jurisprudence has moved on in the last twenty years.

I then moved to look at the relationship between Parliamentary legislation and common law rights. Public decision makers can argue that their actions are authorised by Parliamentary legislation and, as such, the courts cannot question it. This led us to question how we understand legislation that purportedly authorised common law rights abrogation. Can decision makers rely on this? The solution since the HRA came into effect is to use s 3, which states "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". We saw in Chapters 3 and 6 that this is a potent statutory power. It has also attracted a particular ire from the Conservative party, which stated in 2014 it wished to repeal the HRA to "Prevent our laws from being effectively re-written through 'interpretation'. In future, the UK courts will interpret legislation based upon its normal meaning and the clear intention of Parliament".[16] The orthodox view here is, of course, that the principle of legality means that legislation will be taken to respect rights at common law unless Parliament makes itself clear. Section 3, the orthodox view holds, goes further than this. Yet I argued, again, that this is mistaken: first, I suggested that there are clear epistemological problems with ascertaining what Parliament's intention actually is and we should always assume Parliament intends to legislate in line with the rule of law. Moreover, I suggested that we have good theoretical reasons for suggesting this. I argued that the rule of law underpins and is logically prior to law; in line with Chapter 2, I suggested that we cannot sideline the rule of law when ascertaining what a piece of legislation means.

Once this is appreciated, I said, we recognise that we have no choice but to acknowledge that legislation *must* be compliant with the rule of law; to take Parliament to have intended otherwise is to impute an intention to Parliament that cannot be. Parliament cannot, properly understood, be taken as giving a legal power that cuts across the rule of law; we cannot, logically, accept that Parliament wished to do so. There may be cases where it is hard to know if the rule of law is *in fact* threatened[17] but this is what matters: constitutional substance over statutory semantics; the rule of law is paramount.[18] The rule of law forms part of the constitutional context in which legislation is passed; legislation can only, I argued, be understood according to such context. As such, the rule of law, which underpins common law rights, shapes our understanding of legislation at common law. A repeal of s 3 does nothing to annihilate this fact; the common law,

[16] Conservative Party (n 1) 6.
[17] I cited *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868, [2018] 1 WLR 2572, as an example.
[18] On which see Thomas Fairclough, "*Privacy International*: Constitutional Substantive over Semantics in Reading Ouster Clauses" UK Const L Blog (4 December 2017) https://ukconstitutionallaw.org/2017/12/04/thomas-fairclough-privacy-international-constitutional-substance-over-semantics-in-reading-ouster-clauses/ (accessed 25 April 2018).

via the principle of legality, which ensures due respect for the rule of law, achieves much the same ends as s 3 HRA.

This led us to one of the most fundamental questions in British constitutional discourse: what happens when a statute cannot be intelligibly understood in a way that respects the rule of law? My argument was simple: despite perceived orthodoxy, we cannot understand such a thing as a statute properly so called. In Chapter 7 I discussed the ramifications of this. I said that Parliament, since it is bound by the rule of law, cannot violate common law rights as they find their foundation in the rule of law; the rule of law, the controlling factor in the constitution,[19] promises consistency of treatment, it encapsulates an idea of equal respect for the dignity of individuals. Parliament cannot violate the rule of law; therefore, a purported statute that cannot be understand as anything other than an attempt to cut across common law rights cannot be understood as having legal force. A court would be justified, indeed mandated,[20] to disapply such a piece of purported legislation. This does not disavow a role for the legislature; as said in Chapter 6 most pieces of legislation will not come near encroachment of the rule of law and, even if they do, it will often be difficult to *know* if they do. In such cases there is, I argued, a role for deference based on expertise. The legislature is entitled to have its views heard by the courts and the more comprehensive they are the greater weight they will deserve; all I suggested is that the courts are not subservient to the views of the legislature. The constitutional resilience of common law rights, founded on the rule of law, is therefore greater than their statutory counterparts in the HRA.

From the perspective of the rule of law, its status in the United Kingdom, its centrality in the legal system, and its promise against non-arbitrary action by the state I have argued that common law rights, properly understood, give rise to protection similar to that of a codified Bill of Rights. The HRA has many advantages and is admirable: it creates a human rights culture in the political system, is a symbol of the United Kingdom's commitment to rights protection, and acts as a statute that citizens can look at and see the general rights they enjoy. Yet the question for this thesis is does the legal protection of human rights stop without the HRA? The answer is that they do not; they carry on, separately, at common law. The reach of common law rights is wide; the rigour of their protection strong; and they are resilient to hostile legislative actions. In short, they provide a solid base for rights protection; orthodoxy rejects this because it sidelines the rule of

[19] *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56, [107] (Lord Hope). On this see Chapter 2 and Lakin (n 5).
[20] The precise nature of the court's role was considered in Chapter 7.

law to focus on "rules" but, as I have shown, once the rule of law is properly situated and accounted for orthodoxy falls away.

III. Areas of Further Investigation

This thesis has raised a number of disparate areas including, *inter alia*, statutory interpretation, strike down of legislation, the *Wednesbury*/proportionality debate and so on. The aim has been to draw these different areas together in such a way as to demonstrate that, once one recognises the power of the rule of law, which is the central thread in the constitutional order that influences legal discourse, common law rights, properly understood by reference to the rule of law, give protection to rights to a similar extent to the HRA.

Yet the reader may well be left with a number of questions; whilst writing this thesis I have become aware that it touches on some unresolved debates that are not explicitly addressed in the thesis. Here, I suggest areas of further research. I do not intend to answer questions raised here but they are useful in framing what the thesis has left out and where it could lead vis-à-vis future research.

II.A. *Ultra Vires* Theory and Common Law Constitutionalism

There is clearly a large, though, perhaps, currently dormant, debate in administrative law about the constitutional foundations of judicial review.[21] The closest this thesis comes to substantively engaging in this discussion is by rejecting a strictly positivist account of law in Chapter 2, when I instead urge a focus on the rule of law and endorse a view of the rule of law that is substantive. In this way, I give implicit support to a view of law that would more traditionally be associated with the common law theory of review position (itself a broad church that, *inter alia*, has those that support Parliamentary sovereignty and those that do not).

Yet in this thesis I have urged a refocusing of the rule of law; from this perspective, it may well be that it is not from Parliament's intention or from judicial decision making that the grounds of judicial review find their source. Instead, it could be the rule of law itself that informs and creates the grounds of judicial review. This principle is logically independent of either branch of the state though dependent on concrete enunciation by authoritative bodies.

[21] For an overview see Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001). For a varied collection of essays see Forsyth C (ed), *Judicial Review and the Constitution* (Hart 2000).

We would usually expect such bodies to be judicial; as such, there might be little difference between my own position and the strict common law theorist. However, an area of further research is the way in which the grounds of judicial review could be a joint enterprise; whilst the courts may have the final say the argument I gave for instrumental deference in Chapter 5 may well play into judicial review in a broader sense. If the rule of law is separate from judicial creation, instead dependent on the courts merely for its enunciation, then we may see the binary distinction between the courts and the legislature in creating the grounds of judicial review as false.[22] There may be, in appropriate circumstances, situations in which the legislature earns sufficient deference to be able to influence to scope or grounds of judicial review if what it is really doing is giving its own, informed and authoritative, view as to what the rule of law requires.

II.B. The Rule of Law and Non-Rights Disputes

The foregoing, in turn, raises a related but distinct question: to what extent can the rule of law and the approach advocated in this thesis be applied to cases that do not expressly involve common law rights?

My approach, which centralises the role of the rule of law as a principle that protects against arbitrariness in legal decision making and reflects the value the legal system places on equality of concern for the dignity of citizens, works, I argue, in human rights cases, where the dignity of the citizen is central (e.g. were the citizen's rights violated when he was denied registration to vote in a general election? Was tapping a suspect's phone a violation of their rights? Was ignoring parents' wishes in determination of treatment for their child a breach of their rights?).

Yet does the approach advocated work in all judicial review cases (e.g. bias, legitimate expectations, a duty to give reasons, etc.) or is there a bifurcation between rights judicial reviews and strict administrative judicial reviews? This, in turn, plays into whether we view judicial review, in a broad sense, as about good administration or individual rights (or some composite of the

[22] This, I suggest, is different to the modified *ultra vires* theory of Elliott (ibid). His view is that we can assume Parliament intends to legislate in line with the rule of law and it is the judiciary's role to say what the rule of law means; this unites Parliamentary intention (*ultra vires*) with common law creation (common law theory) yet, I suggest, does so in a way that ultimate preserves Parliamentary intention as being the grounding force for judicial review, which I reject (see Chapter 7).

two).[23] This is an open question; it is not one this thesis purports to answer but is one, I suggest, that would logically follow as an area of research from this thesis.

II.C. Process Review, Substantive Review, and Deference

An area of immense interest is, I suggest, the nature of deference, how it is earned, and its affect on adjudication. Specifically, whether the view I have taken links process and substantive review. In Chapter 5 I rejected democratic deference because it does not get us towards an answer; as stated there, the role of the courts is diagnostic. The courts are there to discover if there has or has not been a breach of the law by an administrative body in a judicial review case. This is not to imply that it is always straightforward or easy.

There are lots of cases were we simply *do not easily know* if a particular action or decision has *in fact* rendered a decision *ultra vires*. For example, was a legitimate expectation legally frustrated in a case involving polycentric economic considerations? Was the duty to give reasons sufficiently discharged in a case involving national security? It seems that, in considering these questions, the degree of deference a decision maker ought to be afforded by the reviewing court is not determined by their democratic pedigree but, instead, by their institutional expertise and the quality of the process undertaken. If a decision maker is well qualified, has looked at all of the facts, sounded out expert opinion above and beyond his legal duty to consult, and so on then, it seems, he is *more likely* to be right than a decision maker who has done none of these things. The reviewing court would, on the framework I have advocated in Chapter 5, be legitimate in taking this into account and linking deference to such process and expertise. This begs the question of whether process review is intrinsically linked to substantive review; i.e. the better the process the more deference can be afforded to the decision maker.[24]

II.D. Common Law and Socio-Economic Rights

This thesis has primarily focused on so-called civil political rights, such as the right to free speech, freedom from torture, right to vote, and so on. It has almost entirely ignored a very important debate on a set of rights that are known as socio-economic rights.[25] A further thesis

[23] See Jason NE Varuhas, "Taxonomy and Public Law" in Elliott M, Varuhas J NE, and Wilson Stark S (eds), *The Unity of Public Law? Doctrinal, Theoretical, and Comparative Perspectives* (Hart 2018).
[24] For similar in the EU setting see Darren Harvey, "Towards Process-Orientated Proportionality Review in the European Union?" (2017) EPL 23(1), 93.
[25] See Jeff King, *Judging Social Rights* (CUP 2012).

could be written on whether the rule of law, promising freedom from arbitrary behaviour, can be used to justified a right to, say, healthcare in the same way as it can to, say, a right to vote. To an extent it can; recalling Chapter 4, if you are denied medical treatment because you are, for example, black then that is a breach of the right not to be treated arbitrarily. Contrariwise, if you are denied medical treatment because you are not a British national then that may be sufficient to justify the differing treatment. Yet this is different to saying there is a freestanding entitlement to some good on the basis of a human right. Further investigation is needed as to the extent, if any, to which the view of the rule of law I have utilised could also be invoked to protect socio-economic rights. Even if it could, further work would be needed to combine that with the view of deference I provided in Chapter 5.

IV. Final Thoughts

This thesis has taken nearly three years to submit; it has been almost four years since the idea for it was first conceived. In the time I have been researching and writing, a number of cases have been decided that have influenced my view of the rule of law, the common law, and rights[26] and so it is clear that the common law's power to protect rights is very much still in (at least some) people's contemplation. I very much hope that my view of common law rights, which I have ardently argued for, as a crystallisation of principle, specifically the principle of the rule of law, adds to that framework and enriches the somewhat arid debate about their potential.

When I started work on this thesis the HRA's repeal seemed to be imminent; indeed, the Conservative Party had just won its majority in the 2015 General Election. The HRA has been given a reprieve by the result of the referendum on membership of the European Union. Yet its repeal is still on the political table; its vulnerability exposed. In this climate, it is of use to focus on the common law, the law that is not reliant on supranational treaties or statute for its basis.

It is in the common law that we truly find the rights citizens enjoy; the common law, at least in cases involving rights, founded on the rule of law, is not as malleable to political expediency as Acts of Parliament are. The focus in this thesis on the common law is therefore of great practical use. The focus, by some counsel, judges, and academics, on the HRA has obfuscated the power of the common law; yet this ignores the fact that if the HRA is ever repealed the common law will still be there and able to protect citizens' rights.

[26] Most prominently, *UNISON* (n 8).

Even if it is not repealed in the near future, focus on the common law is justified. Ignoring the common law whilst the HRA is on the statute books risks ignorance of the common law if the HRA were to ever be repealed, which would create a self-fulfilling prophecy. The level of legal rights protection would be lowered not because the HRA was no more but because the common law had been largely forgotten and would not be as invoked as it could and should be. That, I suggest, would be to forget the foundations of the constitution, a situation that this thesis rallies against. It is not, in conclusion, the repeal of the HRA that is the real threat to rights but, instead, our collective forgetting, dismissal, or ignorance of the common law, the rule of law, and domestic rights. Ignorance of our domestic common law tradition risks ignorance of our rights, wherein a threat to them truly lies.

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