

**TITLE:**

**THE MORAL READING OF THE BRITISH CONSTITUTION**

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**Degree: PHD**

**DECLARATION OF AUTHENTICITY**

'I, Mr. Stuart James Lakin confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.'

**Signed**.....

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## ABSTRACT

This thesis investigates the philosophical assumptions which underpin established theories of the British constitution, paying particular attention to the influence of traditional (and sometimes outdated) theories of legal positivism. I attempt to identify, analyze and challenge these assumptions, exploring how recent developments in legal theory can inform and enrich our approach to British constitutional theory. Drawing, in particular, on the anti-positivist theory of Ronald Dworkin, I contend that an understanding of the British constitution must begin with an understanding of the principle of legality: that is, the principle that government may only exercise coercive force in accordance with standards established in the right way before that exercise. The principle of legality (properly understood as reflecting the value of integrity), I argue, shapes or controls the many other principles that underpin British constitutional practice, principles such as the separation of powers, democracy and individual human rights.

Once it is appreciated that each and every fact about British constitutional practice must be justified by arguments of political morality, there is little difference, I argue, between the so-called 'unwritten' British constitution and the 'written' constitution of, say, the United States. In particular, there is no plausible philosophical basis for ascribing unlimited legislative powers to the Westminster Parliament. The extent of Parliament's legislative powers (and the extent of the powers of the executive branch of government), I suggest, must depend on how we conceive of the legal principles that justify Parliamentary power, most notably the principle of democracy. Democracy, properly understood, I argue, means that Parliament (or government) has a duty to treat each member of the British community as an equal; or, to state the right which corresponds to that duty, democracy means that individuals have a moral right against government to be treated as an equal.

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## **Bibliography**

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I would like to dedicate my thesis to my mother, Pamela Lakin, and to the memory of my father, John Michael Norman Lakin, who was diagnosed with multiple myeloma in 2004 and died in late 2006.

## Introduction

In this thesis, I set out to hold a moral lens up to British constitutional theory and practice. My central argument is that a theory of the British constitution must begin with an understanding of what it means for officials to exercise power in accordance with law; the theory must begin, that is, with an understanding of the principle of *legality*. It is only once we have settled the meaning of legality, I will argue, that we can make sense of the many other political principles that underpin British constitutional practice, principles such as the separation of powers, democracy and individual rights. While the primary aim of this thesis is to recommend the argumentative framework for British constitutional theory just described, my secondary aim is to propose a particular moral reading of the British constitution, one based on the Dworkinian conception of legality as integrity (or equality under the law, properly understood). It will be argued that the value of integrity best explains and justifies the way in which the different political principles (of the sort referred to above) figure in the scheme of the British constitution.

I will advance the central argument of this thesis by way of an attack on a cluster of ideas, derived from different versions of legal positivism, which I take to represent the orthodoxy in British constitutional theory. Most prominent amongst these are the twin ideas that Parliament is sovereign and that, given Parliament's sovereign powers, the role of judges must be to give effect to Parliament's *intentions*. In spite of the increasing vigour with which several judges and leading academics have sought to qualify the idea of Parliamentary sovereignty, I will suggest that this idea continues to impede the development of British constitutional theory. Once it is appreciated that neither the idea of Parliamentary sovereignty, nor the idea that judges give effect to Parliament's intentions can withstand philosophical scrutiny, a very different picture of British constitutional theory emerges. What are, on their face, rather arid, conceptual debates on such questions as the possible limits on Parliamentary sovereignty and the meaning of Parliamentary intentions, may be recast as a set of rich debates in political morality about the proper powers of Parliament and courts, and the rights of individuals in a Western liberal democracy.



Before outlining the arguments of individual chapters, it will be helpful to lay down three caveats about the general ambitions of this thesis. My principal aim, I have said, is to offer a fresh perspective on British constitutional theory and practice. Given the centrality of the principle of legality to this project, it will be necessary to enter into a range of controversial questions in legal philosophy, most notably the age-old question about the nature and meaning of the concept of law. While I endeavour to justify my position on this question and others, this thesis is not intended as a work in legal philosophy, and so no attempt is made to explore all (or even most) of the arguments which may be made either in favour of or against the positions that I adopt. If nothing else, it is hoped that dissatisfied legal philosophers will appreciate my more modest aim, which is to emphasize the foundational importance of legal philosophy to constitutional theory.

The second caveat is aimed, on the one hand, at constitutional lawyers whose principal interest is in the merits of contemporary constitutional reforms, and, on the other hand, at public lawyers who eschew abstract arguments of political morality in favour of extensive and detailed doctrinal analysis. I have confined this thesis to an inquiry about the nature of, and inter-relationship between, certain organizing principles in the British constitution. As a consequence, I have not addressed a great many issues which, it might be objected, ought to belong to any account of the British constitution. For instance, I have not directly addressed the topic of devolution, or the many changes occurring under Constitutional Reform Act 2005, or questions about electoral systems and reform. Similarly, while I have much to say in this thesis about the way in which judges do and should decide cases, and about the principles which underpin particular doctrinal areas of law, it might be objected that there is insufficient analysis of the current state of the law. Suffice it so say in response to these types of objections that, before we can appraise particular constitutional reforms or particular judicial decisions, we first must have in mind a general background moral theory against which such appraisals can be made. It is this challenge which I take up in this thesis.

The third caveat is aimed at political scientists or sociologists of law. My project in this thesis is to offer a *normative justification* for the powers of institutions and the rights of individuals in the British constitution. As such, I have not sought to offer any

views on sociological questions about the different trade-offs and strategies that one might identify in the decision-making of judges or politicians. For instance, some theorists have argued that judges routinely defer to the opinion of elected politicians for the sake of achieving ‘comity’ or good relations between the different branches of government;<sup>1</sup> or that we can explain the willingness of ministers to answer questions in Parliament in terms of the sense of co-operation that this might engender in members of the House of Commons.<sup>2</sup> These types of observations are important to be sure; but, in my view, they cannot help with the normative questions with which I am concerned in this thesis. Indeed, it will be seen that I am consistently resistant to the notion that we can explain the powers of institutions and the rights of individuals by reference to the behavioural or attitudinal characteristics of particular constitutional actors.<sup>3</sup>

In **chapter 1 (Debunking the Idea of Parliamentary Sovereignty: the Controlling Factor of Legality in the British Constitution)**, I attempt to remove the central plank from traditional theories of the British constitution, namely the idea that Parliament is sovereign. I suggest that a commitment to Parliamentary sovereignty – or, for that matter, *judicial* sovereignty – only makes sense against a background commitment to the jurisprudence of the 19<sup>th</sup> century jurist, John Austin (whose ideas have been perpetuated through the work of Dicey). While traditional British constitutional theory has arguably remained frozen in the 19<sup>th</sup> century, legal theory has moved on apace. Generations of legal theorists, most notably Herbert Hart, have discredited the Austinian ‘command’ theory and offered rival theories in its place. Common to the work of both Hart and Hart’s own chief critic, Ronald Dworkin, is the idea that the powers of Parliament must be explained, not by the conceptual necessity of an ultimate sovereign, but by the existence of a normative standard that comes prior to those powers. By way of a case study of *Jackson v Her Majesty’s Attorney-General*,<sup>4</sup> I suggest that that normative standard cannot be an empirically determined *rule* as Hart supposed. Since judges *disagree* about Parliamentary and judicial powers, and given the principled character of

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<sup>1</sup> See, for instance, Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> edn, New Haven: Yale University Press, 1986); D Oliver, *Constitutional Reform in the UK* (Oxford University Press, 2003) ch 2 and at 95.

<sup>2</sup> I am grateful to Dawn Oliver for this example.

<sup>3</sup> See, in particular, chapters 1-3 and, especially, chapter 6.

<sup>4</sup> [2005] UKHL 56.

those disagreements, the normative standard must be a *principle* of political morality. This principle, I suggest, is the principle of *legality*.

In the last part of chapter 1, having rejected each of the prominent philosophical bases for idea of Parliamentary sovereignty, I lay the groundwork for the remainder of the thesis. After putting forward a preliminary formulation of the concept of legality, I illustrate the way in which different conceptions of legality will shape or control our understanding of many other principles which underpin the British constitution, principles such as the separation of powers, democracy and individual human rights. A theory of the British constitution, I suggest, may be thought of as a ‘web of conviction’ whereby the way in which a theorist conceives of the principle of legality will influence his views about the place of other political principles in the scheme of the British constitution.

In **chapter 2 (Understanding the Principle of Legality)**, building on the last part of chapter 1, I offer an account of how to make sense of the concept of legality. In order to understand the principle of legality it is crucial, I argue, that we understand the character of *disagreement* about the meaning of this principle. All theorists of legality must be taken to accept (albeit implicitly) the same abstract concept of legality: they must all be in the same ball-park when they debate the meaning of legality. I suggest (after Ronald Dworkin) that this abstract concept may be expressed as the idea that *officials should only exercise power in accordance with standards established in the correct way before that exercise*. Disagreement about the meaning of legality is a disagreement about the nature of those ‘standards’ and the way in which they must be ‘established’. These things will depend, I suggest, on the *value* that a theorist finds in the ideal of requiring officials to exercise power in accordance with pre-existing standards. The familiar debate between so-called ‘formal’ and ‘substantive’ theorists of legality, I suggest, fails adequately to capture the sense of disagreement just described.

In part 2, I consider two potential challenges to the account of disagreement just described. The first challenge broadly represents the position of so-called ‘descriptive’ positivists: it denies that there is any necessary connection between legality and morality. It is mistaken, according to this argument, to suggest that disagreement about legality is a disagreement about the *value* of that principle. The second challenge seeks to pre-empt

disagreement about the meaning of legality in a very different way. This argument accepts that the meaning of the principle of legality does depend on an understanding of its underlying value, but it maintains, for *epistemological* reasons, that this value can *only* be a formal or procedural ideal; it can have nothing to say about the substance of the law.

In part 3, I employ the argumentative framework set out in part 1 to contrast two different conceptions of legality (and the model of adjudication implied by each different conception). The first conception is based on such values as certainty, predictability and protected expectations. These types of values, it is suggested, provide the best justification for many of the theories that fall under the umbrella of legal positivism. The second conception is based on the value of integrity or equality before the law. This account of legality supposes that the truth conditions for any proposition of law depend on the interpretation of the principles of justice, fairness and procedural due process that best justifies the past decisions of Parliament and courts. Only this latter (Dworkinian) conception of legality and adjudication, I argue, can justify the abstract formulation of legality identified at the start of the chapter: it is only this latter conception that accounts for the way in which officials (including judges) exercise power according to *existing* standards.

In **chapter 3 ('Principles of (Administrative) Law')**, I attempt to show how a conception of legality as integrity can help us to make sense of English law adjudication and, more broadly, how this conception of legality and adjudication informs the separation of powers between courts and the political branches of government. By way of illustration, I focus on adjudication in the doctrinal area of *administrative* law, for it is in relation to this area of law, perhaps more than any other, that English public lawyers have had most to say about the grounds of legal validity and about the proper powers of institutions. Indeed, a secondary aim of this chapter is to demonstrate the problematic nature of the traditional debate in English public law about the constitutional foundations of judicial review.

At the start of the chapter, I pose the following general question: *which standards, established in which way, provide the best justification for administrative law decisions?* In the remainder of the chapter, I then consider several different responses to that question, asking in each case whether the response can be said both to 'fit' and 'justify'

(to adopt Ronald Dworkin's two dimensions of interpretation)<sup>5</sup> the way in which judges decide administrative law cases. I describe the first response to the general question as the 'intentions theory'. This response, which has received most critical attention in the guise of the *ultra vires* theory of judicial review, supposes that a proposition of law is true or valid when it in some way reflects the intentions of Parliament. The most plausible justification for the intentions theory, *ultra vires* theorists of judicial review contend, is one based on the principles of democracy and judicial legitimacy: legal rules and principles necessarily reflect the will of the elected Parliamentary assembly; and judges possess the constitutional warrant to ensure that ministers or other officials act in accordance with that parliamentary will.

Before we can assess possible justifications for the intentions theory, it is first necessary, I argue, to establish whether or not the very notion of a collective Parliamentary intention is intelligible, or whether the intentions theory 'fits' English administrative law adjudication. If not, then the intentions theory will fall at the first hurdle. On close inspection, it rapidly becomes apparent that the task of identifying a single, collective, Parliamentary intention is hopeless. The intentions theorist must decide which types of motivations, of which of the hundreds of people directly or indirectly involved in the legislative process, at which point in time, should determine the meaning of the statutory text. This is a task, I argue that lies beyond most assiduous and resourceful team of psychologists and sociologists, let alone a judge or panel of judges sitting in a courtroom. The intentions theory fails, I conclude, for the reasons that the theory mistakenly looks to the 'conversational' intentions of the *author* of a statute rather than the 'constructive' *intent* (in the sense of 'aim' or 'purpose') of a statute imposed on that statute by the *interpreter* of the statute.

In part two, I consider two further responses to the question posed at the start of the chapter (*viz. which standards, established in which way, provide the best justification for administrative law decisions?*) These responses are based on the two conceptions of legality and adjudication described in chapter 2: first, the rule-based or 'conventionalist' account, and, secondly, the conception of legality as integrity. By way of an analysis of

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<sup>5</sup> Dworkin, *Law's Empire* (Harvard University Press, Cambridge, Massachusetts 1986) 139.

the decisions in *Simms*<sup>6</sup> and *Coughlan*,<sup>7</sup> I attempt to demonstrate the way in which the abstract arguments of chapter 2 generate two competing theories of administrative law adjudication. It is only a conception of legality as integrity, I conclude, that can make sense of these two decisions and which, more broadly, can make sense of the standards that provide the best justification for administrative law adjudication.

Having laid the groundwork in the first three chapters of the thesis for an account of the British constitution based on a conception of legality as integrity, I turn in **chapter 4** (**‘Democracy, Human Rights and the Proper Role of Judges’**) to a set of questions which must lie at the heart of any theory of the British constitution. These questions relate to the proper constitutional relationship between the political branches of government, courts and citizens. The first question concerns the extent of the legislative powers that Parliament possesses. Can Parliament ‘make or unmake any law’ in the way that Dicey suggested, or are there certain things that Parliament does not have the power to do? The second question for consideration is inextricably connected to the first, although the precise nature of that relationship will require careful accounting. The question is this: in what senses, if any, can it be said that individuals possess *moral rights* against the state? The final question is an institutional question. If individuals possess moral rights against the state, then what role, if any, should *courts* have in giving effect to those rights? More particularly, given our understanding of democracy and human rights as moral ideals, what is the proper adjudicative role of judges under the Human Rights Act 1998?

In part 1, I suggest that the powers of Parliament are justified by the principle of *democracy*. The key question is therefore how to understand this principle. Drawing on the account of disagreement outlined in chapter 2 (in relation to the concept of legality), I suggest that different theories of democracy necessarily revolve around a single point, purpose or value, which all theorists take to represent the bare concept of democracy. This value, I suggest, is that each member of a political community should have an *equal stake* in the way that they are governed or, more broadly, that they should be treated in a way that respects the value of *equality*.

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<sup>6</sup> *R v Secretary of State for the Home Department, ex parte, Simms and Another* [2000] 2 AC 115.

<sup>7</sup> *Regina v North and East Devon Health Authority ex p Coughlan* [2000] 2 WLR 622.

In order to test our understanding of the value of an equal stake or equality, I consider three different conceptions of that value. The first two conceptions each place majoritarian decision-making at their heart; they each emphasize the *process* by which decisions are taken, rather than the *outcome* of those decisions; and, in that sense, they each reflect the *procedural* ideal of *treating people equally*. While the two majoritarian theories share these theoretical tenets, they do so for very different reasons. The first conception rests on a utilitarian or (more broadly) consequentialist background political theory, a theory which is sceptical of the existence of moral rights; the latter conception, by contrast, is premised on the very fact that individuals do enjoy certain moral rights – of which the paramount right is the right to participate in decisions on matters of principle or rights.

Having rejected the former of these accounts, I question whether the latter rights-based account (advanced, most notably, by Jeremy Waldron) can stand as an adequate account of an equal stake for the purposes of understanding the principle of democracy. I conclude that it cannot. The *procedural* right to participate – which is foundational within Waldron's theory – cannot be availed of, I argue, unless certain prior *substantive* rights have been secured, rights such as freedom of expression, association and assembly. A better account, and the third conception of an equal stake that I consider in this section, rejects majoritarianism in favour of the idea that individuals enjoy rights *against* the majority. This conception rests on the idea that officials should exercise power in a way that treats people *as equals*, both in terms of the choice of procedures and in the outcomes of those procedures.

Being treated as an equal (as opposed to being treated equally), I explain, implies full 'moral membership' of a political community; this is a condition precedent for the democratic ideal that each member of a political community has an equal stake in the way that they are governed. Furthermore, if the principle of democracy entails a duty on the part of a state to treat each member of a political community as equals, then democracy further entails that individuals have a corresponding moral *right* to be treated as an equal. Democracy and rights are, in this sense, complementary. The right to be treated as an equal – and the concrete rights that flow from it – I suggest, operates to block or 'trump' certain inequalitarian (and typically, utilitarian) reasons for state action.

In part 2, building on the foregoing discussion of democracy and rights, I address a question which I label the ‘institutional question’: namely, which *people* or which *institution* should have responsibility for determining which concrete, *legal* rights flow from the abstract moral right to be treated as an equal? Before it is possible to answer the institutional question directly, I suggest that it is first necessary to appreciate that there is (and should be) a necessary division of *functions* or *powers* in the processes of government. The important division for the purposes of addressing the institutional question is the division between the judicial and political functions. This division is well accounted for, I argue, in Ronald Dworkin’s distinction between matters of *principle* (or ‘rights’) and matters of *policy* (or ‘collective goals’), where the former type of decision defines the judicial function, and latter type of decision defines the political functions.

That judges (non-elected, apolitical individuals, with security of tenure, who exercise the judicial function alone or with others in an institution that is separate from the legislature) should not decide questions of *policy* is largely uncontroversial; more controversial, I suggest, is the question of whether the people who make political decisions on questions of policy should also make judicial decisions on matters of principle. I argue by way of a critique of the rights-based defence of majoritarian decision-making advanced by Jeremy Waldron that the principle of *fairness* requires that an independent branch of government safeguards the conditions of equal treatment under which Parliamentary and governmental decision-making must take place.

In part 3, I offer a sketch of how the background theories of democracy, rights and adjudication discussed in this chapter can inform our understanding of adjudication under the ECHR and HRA 1998. In line with the approach taken in earlier sections, I approach this exercise with two distinct questions in mind: first, what is the nature of the legal rights under the Act; secondly, what role should judges have in giving effect to those rights. In response to the first of these questions, I suggest that the rights enumerated in the Convention are best understood in terms of the theory of rights as trumps described in part 1. This is to say that these rights represent the types of grounds on which the institutions of the state are most likely to treat certain individuals or groups as inferiors. It follows, in relation to the second question, that the primary role of judges under the Convention and Act is to block impermissible reasons for state action, a task



that judges achieve under sections 3 and 7 of the Act. The granting of a declaration of incompatibility under section 4 of the Act can only be justified (if it can be justified at all), I argue, by the principle that certain categories of human rights violations – those with particularly far-reaching social ramifications – are best rectified by Parliament through legislation.

In **chapter 5 ('Legal Duties and Constitutional Duties in the British Constitution')**, I attempt to meet the first of a series of potential objections to the account of British constitutional theory and practice advanced in previous chapters (objections which I describe collectively as the 'political objection'). The British constitution, the first limb of the political objection runs, is dominated not by questions of legality, courts and individual rights, but by a network of informal, unwritten rules or 'constitutional conventions'. While these conventions are occasionally 'recognized' by courts, they are rarely 'enforced' by courts; and this is for good reason. According to the political objection, those areas of British constitutional practice that are governed by convention are, by definition, *political* and non-justiciable in character. In this way, the law/convention dichotomy is said to serve two purposes. First, it underscores the sense in which the British constitution is a 'political' and 'unwritten' constitution rather than a 'legal' and 'written' constitution. Secondly, it clearly demarcates those areas in which law and judges have or do not have a constitutional role to play.

In part 1 of chapter 5, I suggest that the law/convention dichotomy makes better sense as a distinction between two different types of moral duties: *legal* duties on the one hand, and *political* or *constitutional* duties on the other. Political philosophers have often theorized on an abstract level about the difference between different types of moral duties; but if – as the political objection holds – it is thought that these two different types of duties are the key to differentiating the political and legal parts of the British constitution, then there must be some sort of categorical litmus test for knowing when one or other type of duty arises.

In part 2, I consider two different attempts at devising such categorical tests. The first attempt involves designating a duty as a *legal* duty when it is *enforced* or *enforceable* in a court of law. This test, I suggest, mistakenly conflates two separate questions: first, the question of what makes it the case that a particular proposition of law is true or valid (the

question of legality); and, secondly, the question of which institution or institutions (if any) should *enforce* true or valid propositions of law (the question of enforcement)? In short, before a judge can enforce a legal rights, duties or powers, that judge must *already* have settled as at an analytically prior stage the question of *what makes it the case* that there is a legal right, duty or power to enforce. The enforcement/enforceability tests, I suggest, relies implicitly on the discredited legal theory of nineteenth century command theorists such as John Austin whose argument is that law must emanate directly from the sovereign (or indirectly from judges).

The second attempt to distinguish legal and constitutional duties rests on the rule-based legal theory of Herbert Hart (and reflects, more generally, the legal positivist view that legal duties can be readily distinguished from other types of duties). According to this theory, a non-legal duty (such as a constitutional or political duty) exists in virtue of the fact that a certain group of people accept (i.e. take the Hartian ‘internal view’ towards) a particular standard or set of standards. If we apply this theory to those aspects of the British constitution that are commonly said to be governed by convention – for instance, the doctrines of Ministerial responsibility – we would say something like the following: a minister has a constitutional duty to account to Parliament for the failings of his or her department because most ministers, other political actors and citizens *accept* this as a standard of conduct by which they will criticize their own conduct and the conduct of others.

In part 3, I attempt to explain how the Hartian account of non-legal duties cannot provide the categorical test that the political objection requires. In the first place, the fact that a particular group of people *do* accept a particular standard of conduct by which they will criticize their own conduct and the conduct of others, is not to say that those people are under a *duty* to act in the way that the standard prescribes: an *is* does not make an *ought*. Secondly, people *disagree* about which ‘standards’ govern the conduct of ministers and other political actors. In the face of these disagreements, legal positivists must either say (implausibly) that ministers have *no* constitutional duties (because it cannot be said that they accept any particular, ascertainable standard or norm), or they must concede (contrary to the central plank of legal positivism) that the existence of a duty necessarily depends on complex judgments of political morality about why a

minister *should* have particular duties and powers. Such a concession, I argue, would be to deny that any aspect of British constitutional practice is governed by convention.

There are two further reasons, I argue throughout chapter 5, as to why it is not possible to draw a sharp distinction between the legal and political parts of the British constitution. First, whatever we have to say about the rights, duties and powers of constitutional actors *reflects some proposition of law*. If the Queen has a duty to dissolve Parliament when so advised by the Prime Minister, then *it is the law that* the Queen has such a duty. And if it is the case that the Prime Minister has the power to sack a minister, or to force a Minister to resign for intentionally misleading Parliament, then *it is the law that* the Prime Minister possesses such a power; and *it is the law that* the Minister has no right not to be sacked. In other words, the law is not *silent* (to speak metaphorically) on any feature of constitutional practice (or any other social practice). Secondly, the same action or decision by a constitutional actor may engage legal rights, duties, or powers *and* other types of rights, duties and powers. A minister may have the *legal* power to fund an overseas project *and* the minister may be under a *constitutional* duty to justify this decision in Parliament. For these additional reasons, any attempt to compartmentalize different *areas* of constitutional practice into the legal and conventional is bound to fail.

In the final part of the chapter, I attempt to illustrate the arguments of earlier sections. I focus principally on decisions relating to the judicial review of prerogative powers. While, on the face of things, judges have historically sought to draw a bright line between ‘justiciable’ and ‘non-justiciable’ questions according to the *area* or *subject matter* in which an official is operating, a closer analysis reveals that it is not possible to compartmentalize different areas of government (or, more accurately, different types of duties) in this way. The question of whether an official has one type of duty or the other (or both), I argue, depends on a complex moral judgment about the principles which best justify the powers and duties of a particular official in the relevant context.

At the start of **chapter 6 (Conclusion: The Moral Reading of the British Constitution)**, I offer an overview of the thesis in the course of which I attempt to explain the sense in which the arguments of previous chapters recommend the ‘moral

reading’ – to use Dworkin’s celebrated phrase – of the British constitution.<sup>8</sup> In the remainder of the chapter, I return to the ‘political objection’ described at the start of chapter 5 (broadly the objection that the British constitution is ‘political’ rather than ‘legal’). This objection, I suggest, can be reduced to two propositions: first, that the British constitution is *unwritten* and therefore largely based on informal rules or constitutional conventions; second that, given the absence of a written constitution, judges do not (or *should* not) have the power to bring their own liberal theories to their adjudicative task; and, above all, judges should not have the power to strike down or invalidate Acts of Parliament.

The first limb of the political objection rests, I contend, on the false assumption that the law of the constitution is only that which is found in the clear language of statutory texts (or indeed the text of a written constitution) or in judicial decisions; and that any norm or standard which is operative in the constitution, but which cannot be found in such texts, is necessarily non-legal or conventional. In response to this objection, I return to the argument made in previous chapters that the law of the constitution is determined not by the words in legal texts, but by the principles which justify the force and meaning of those legal texts. In this respect, constitutional adjudication in the British constitution should be understood in much the same as that in the United States.

In relation to the second limb of the political objection, I return to the arguments of chapter 4. The idea that a constitution founded on the principle of legality and judicial review is a recipe for juristocracy rather than democracy, I suggest, rests on a misunderstanding of democracy, and a misunderstanding of the precise nature of the judicial role *vis-à-vis* the political branches of government. Once it is appreciated that democracy means government subject to certain constraints, the principle of fairness demands that it be an independent branch of government which gives effect to those constraints. However, far from being an opportunity for judges to impose their own liberal philosophies, or to decide questions of policy or politics, the judicial role is itself constrained by the value of (constitutional) integrity. This is to say that judges are

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<sup>8</sup> R Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press, Oxford 1996).

confined to applying the legal rights and duties which flow from principles to which the British political community is committed through its past institutional decisions.

## Chapter 1: Debunking the Idea of Parliamentary Sovereignty: the Controlling Factor of Legality in the British Constitution

On what basis can it be said that Parliament is sovereign in the British constitution; and, if there is no adequate philosophical basis for this idea, how can we make sense of long-running debates in British constitutional theory about the meaning and possible limits on Parliamentary sovereignty?<sup>1</sup> These are the questions that I want to address in this opening chapter. In part 1, I will use the work of Dicey as a gateway into two general types of claims that theorists make in support of the idea of Parliamentary sovereignty.<sup>2</sup> The first type of claim is found, most notably, in the work of John Austin.<sup>3</sup> It supposes that law, wherever it is found, must derive its validity from an ultimate sovereign (whether in the form of a Parliament or something else). The second type of claim is found in its strongest form in the work of Herbert Hart who supposes that we can identify the ultimate criteria of legal validity and political power in a state or constitution by means of an empirically determined ‘rule of recognition’.<sup>4</sup> For Hart, Parliament is sovereign, if it is, in virtue of the fact that most officials accept this to be so.<sup>5</sup>

In part 2 of the chapter, after rejecting the first type of claim described above, I will examine the Hartian account by way of an analysis of the decision in the recent *Jackson*<sup>6</sup> case. It will be argued that this account too must be rejected as an explanation for the idea of Parliamentary sovereignty. It makes little sense to explain the basis of legal validity and political power in the British constitution by an empirically determined rule.<sup>7</sup> Judges determine these things, not by means of an empirical survey of what most other judges and officials accept, but through *normative* arguments that speak directly to the powers of Parliament, government and courts, and to the rights of individuals. This is brought out clearly, I will say, by the fact of *disagreement* amongst judges on such

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<sup>1</sup> For a helpful overview of these debates, see A Bradley, ‘The sovereignty of parliament, form or substance?’ in J Jowell and D Oliver (eds), *The Changing Constitution* (6th edn, Oxford University Press, Oxford 2007).

<sup>2</sup> See AV Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982 [reprint of 8th ed., 1915])

<sup>3</sup> J Austin, Wilfred E Rumble (ed.) *The Province of Jurisprudence Determined* (1832) (Cambridge University Press, Cambridge 1995).

<sup>4</sup> See H L A Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford 1994).

<sup>5</sup> *Ibid.*, ch 6.

<sup>6</sup> *Jackson v Her Majesty’s Attorney-General* [2005] UKHL 56.

<sup>7</sup> In making this argument, I will draw upon Ronald Dworkin’s sustained critique of Hart’s work. See R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), *Law’s Empire* (Harvard University Press, Cambridge, Massachusetts 1986), *Justice in Robes*, (Harvard University Press, Cambridge, Massachusetts 2006).

questions as the meaning of the concept of ‘Parliament’; the required ‘manner and form’ of legislation; the meaning of legislation enacted by Parliament; and the question of whether certain things lie altogether beyond the legislative competence of Parliament. But even where judges *agree* on such questions, their agreement, it will be suggested, is based on moral arguments and not, as Hart perhaps implies, for reason of other judges’ and officials’ acceptance.<sup>8</sup>

Given the philosophical inadequacy of each of the prominent arguments in support of the idea of Parliamentary sovereignty, it will be argued in part 3 that this idea is misconceived. The key to understanding the British constitution can instead be found by building on Hart’s central insight in the *Concept of Law*. In his claim that there must be some normative basis for the powers of Parliament and courts, it will be argued that Hart lays the foundations for a theory of the British constitution based on the ideal of government under law or the principle of *legality*. In this way, traditional debates in British constitutional theory (ostensibly) about the meaning and possible limits on Parliamentary sovereignty are best understood as disagreements about the legal principles that condition the exercise of political power. Drawing on the work of Ronald Dworkin, it will be argued that the nature of these principles will depend on the putative *value* that we find in requiring officials to exercise power in accordance with law. It is in this sense that the principle of legality is, as Lord Hope suggests in *Jackson*, the ‘controlling factor on which our constitution is based’.<sup>9</sup>

## 1. In Search of the Philosophical Foundations of Parliamentary Sovereignty

Towards the beginning of his seminal work, *Introduction to the Study of the Law of the Constitution*, Dicey suggests several ways in which the idea of Parliamentary sovereignty represents the ‘dominant characteristic’<sup>10</sup> in the British constitution. For ease of

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<sup>8</sup> I endorse what I take to be Dworkin’s reading of Hart on this point: that, on the best reading of *The Concept of Law* (both the original edition and the postscript), Hart is committed to a conventionalist understanding of the rule of recognition. This is to say that there must be *moral* reasons to count the convergent attitudes of officials as being partly determinative of what we count as law. For a meticulously argued defence of a non-conventional reading of Hart, see Julie Dickson, ‘Is the Rule of Recognition Really a Conventional Rule’ (2007) 27 OJLS 373-402. Dickson argues that there is a distinction – which, as a biographical matter, Hart accepted – between the *existence conditions* of the rule of recognition and any *reasons* that judges may have for following it.

<sup>9</sup> Above (n 6) 107.

<sup>10</sup> Above (n 2) 3

reference, I have highlighted these with bold numbering. He describes his project as an attempt to

'[C]arry a step further the proof that, under the English constitution, Parliament [1] does constitute such a supreme legislative authority or sovereign power as, according to Austin and other jurists, [2] must exist in every civilised state, and for that purpose to examine into the validity of the various suggestions, which have from time to time been made, as to the possible limitations on Parliamentary authority, and to show that none of them are countenanced by English law',<sup>11</sup>

He continues some pages later:

'In England [3] we are accustomed to the existence of a supreme legislative body, i.e. a body which can make or unmake every law; and which, therefore, cannot be bound by any law. This is, from a legal point of view, the true conception of a sovereign, and the ease with which the theory of absolute sovereignty has been accepted by English jurists is [4] due to the peculiar history of English constitutional law. So far, therefore, from its being true that the sovereignty of Parliament is a [5] deduction from abstract theory of jurisprudence, a critic would come nearer the truth who asserted that Austin's theory of sovereignty is [6] suggested by the position of the English parliament...'<sup>12</sup>

In the first place, Dicey distinguishes the view that Parliament *does* constitute the sovereign power [1] from the view that a sovereign power *must* exist in a civilised state [2]. Let us call the first claim an *empirical* claim and the second a *structural* claim.<sup>13</sup> I will discuss these in reverse order.

### A. The Structural Claim

There are several versions of the claim that a sovereign *must* exist in every state or constitution. This type of claim perhaps originated in the idea that a King or Queen rules by divine right over his or her subjects.<sup>14</sup> Hobbes, by contrast, advocates the need for

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<sup>11</sup> Ibid 19

<sup>12</sup> Ibid 27

<sup>13</sup> It should be stressed that I am not setting out to present Dicey's theory as either a structural or empirical claim, but rather to use his arguments as a gateway into these different types of theories. Indeed, in line with the general argument in this chapter, it is my view that Dicey can *only* be understood as making the normative claim that it is right and proper that Parliament *should* possess an all-embracing legislative authority. This position, I think, represents a particular conception of *legality* and not of sovereignty. See part 4 below.

<sup>14</sup> See, for instance, R Filmer, J P Sommerville (ed.) *Patriarcha and Other Writings* (Cambridge University Press, Cambridge 1991).



an ultimate sovereign as a matter of normative political philosophy. In every state, he says, there must be a *Leviathan* to lift mankind out of its war-like State of Nature.<sup>15</sup> I want to consider two forms of this first type of claim that, I think, have somewhat greater resonance within orthodox British constitutional theory. Both, in different ways, treat the existence of a sovereign as part of the *structure* of a state or constitution.

(i) Parliament as the Austinian sovereign

Dicey alludes at [5] to the ‘abstract theory of jurisprudence’ of John Austin as one possible basis for the idea of Parliamentary sovereignty. Austin tells us that wherever there is law, there must be a sovereign whom others habitually obey but who is not in the habit of obeying any other.<sup>16</sup> Laws take the form of ‘commands’ issued by the sovereign to her subjects; and where the law is silent on a given point, judges must make new law in the exercise of their discretion, which the sovereign may either overturn or tacitly accept. With his customary clarity, Hart says the following of this type of theory:

[A] vertical structure composed of sovereign and subjects is, according to the theory, as essential a part of a society which possesses law, as a back bone is of a man. Where it is present, we may speak of the society, together with its sovereign, as a single independent state, and we may speak of *its* law: where it is not present, we can apply none of these expressions, for the relation of sovereign and subject forms, according to this theory, part of their very meaning.<sup>17</sup>

On this account then, the existence of a sovereign belongs to the very structure of the concept of a state. There is a strong sense, I think, in which many judges, lawyers and academics conceive of the British constitution in this way. It is thought to be *axiomatic*, for instance, that the role of judges is to give effect to the express or implied intentions of Parliament, and that Parliament has the power to overturn common law doctrines. These features of English legal practice – which judges and lawyers tend to derive from Dicey’s statement of the orthodox doctrine of Parliamentary sovereignty – arguably take their roots in the Austinian ideas that all legal norms must emanate from an all-powerful

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<sup>15</sup> See T. Hobbes, C.B. Macpherson (ed.) *Leviathan* (Penguin Books, London 1986). For a recent interpretation of Hobbes as supporting a theory of the state in which the powers of a legislature is limited by the principle of legality, see D Dyzenhaus, ‘Hobbes republican theory of law’, (unpublished). Delivered in the UCL Colloquium in Legal and Social Philosophy, Feb 11, 2009.

<sup>16</sup> Above (n 3), Lecture vi. For an excellent discussion of the differences in emphasis in the work of Austin, Bentham and Hobbes, see D Dyzenhaus, ‘The Genealogy of Legal Positivism’ (2004) 24 OJLS 39-67.

sovereign, and that the sovereign may either overturn or give tacit consent to judge-made law. If Parliament is the Austinian sovereign then, in Dicey's words, it must have the right to 'make or unmake any law...' <sup>18</sup> and it must be the case 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'. <sup>19</sup>

Perhaps the most striking manifestation of this Austinian influence on British constitutional theory is the widespread agreement among judges and lawyers that a sovereign Parliament may suspend or abrogate even so-called 'constitutional' or 'fundamental' rights by sufficiently clear and unequivocal language. <sup>20</sup> That Parliament possesses the authority to legislate in such extreme and oppressive ways can be easily explained if we take Parliament to be the Austinian sovereign. Similarly, in debates about the introduction of European Community Law into domestic law, one can detect the view that it is a *logical impossibility* that Parliament can have surrendered its sovereignty. Hence most judges and theorists, in the spirit of Austin, are quick to explain any apparent threats to the orthodox doctrine of Parliamentary sovereignty as being willed by a sovereign Parliament. <sup>21</sup> There is also a sense in which long-running debates about the constitutional foundations of judicial review take place within an Austinian framework. While *ultra vires* theorists insist that 'what an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly', <sup>22</sup> several common law theorists contend that the doctrine of Parliamentary sovereignty is a doctrine *created by judges*. <sup>23</sup> These two views, in common with the other doctrines discussed, are each suggestive of the Austinian view that the law-making powers of the sovereign

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<sup>17</sup> Above (n 4) 50.

<sup>18</sup> Above (n 2) 3.

<sup>19</sup> *Ibid* 3.

<sup>20</sup> See, for instance, *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 at 131. Even the most progressive constitutional theorists seem to accept this position. See, for example, P Craig, 'Ultra Vires and the Foundations of Judicial Review' [1998] CLJ 63-90 at 86; J Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' [1999] PL 448-460 at 458-9 and J Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671-683 at 675. But cf. J Jowell, 'Parliamentary Sovereignty under the New Constitutional Hypothesis', [2006] PL 562-580 at 565-6.

<sup>21</sup> See the speech of Lord Bridge in *R v Secretary of State for Transport, ex parte Factortame (No. 1)* [1990] 2 AC 85 at 140. See also, P Craig, 'Sovereignty of the United Kingdom Parliament after Factortame' (1991) 11 YBEL 221-55. Cf. HWR Wade, 'Sovereignty-Revolution or Evolution' (1996) 112 LQR 568-75.

<sup>22</sup> See C Forsyth, 'Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, The Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122-40 at 133.

<sup>23</sup> See, for instance, Sir John Laws, 'Law and Democracy' [1995] PL 72-93 at 84-7. For a recent judicial endorsement of this view, see the opinions of Lord Steyn and Lord Hope in *Jackson* above (n 6) 102 and

(whether Parliament, the courts or some other person or body) cannot be derived from, or conditioned by, any superior authority or anterior legal rule or principle.<sup>24</sup> I will have more to say about this approach below in the course of discussing Hart's theory.

(ii) The constitution as a concept of a natural kind

There is a second and slightly different sense in which it might be said that a sovereign *must* exist in every constitution. This is to claim that a sovereign entity forms part of the very *essence* of a constitution; that, minus this element, it would be a mistake to describe something as a constitution. This type of reasoning – which philosophers associate with so-called concepts of ‘natural kinds’ – applies most readily to chemicals or animals.<sup>25</sup> When we try to identify a chemical or animal, we study their atomic or anatomic structure, or their DNA. This information is a matter of scientific fact: chemicals and animals have a molecular structure, even if scientists do not have all the means of identifying that structure. Can the same be said of *political* ideals such as a state, or a constitution or democracy? It is sometimes said that democracy *means* majority rule, and that anyone who uses the term democracy in any other way is making a mistake about what democracy *really is*.<sup>26</sup> Similarly, people will say that there are *limits* to democracy, or that democracy *conflicts* with individual rights, with the implication that the meaning of democracy (and rights) is fixed.<sup>27</sup>

Unlike a chemical or an animal though, that which we refer to as ‘democracy’ or a ‘constitution’, or sovereignty are not ‘things’ out there in the world which can be put under a microscope. We cannot take a sample of democracy in the way that we would a plant. It is not at all obvious then how one would go about identifying the *structure* of democracy, a constitution or sovereignty. Philosophers might claim to be able to unlock

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126. I discuss the philosophical significance of these judicial dicta in part 3 below. See also (below) ch 3 part 2C.

<sup>24</sup> Austin allowed though for the possibility of *non-legal* constraints on the action of a sovereign. See above (n 3) 215-6.

<sup>25</sup> For a detailed discussion, see N Stavropoulos, *Objectivity in Law* (Clarendon Press, Oxford 1996), ch 2.

<sup>26</sup> See R Dworkin, *Justice in Robes* above (n 8) 142-3 who offers this example. It should be stressed that this is not Dworkin's own view for which see R Dworkin, *Freedom's Law*, (Oxford University Press, Oxford 1996) ‘Introduction: The Moral Reading and the Majoritarian Premise’.

<sup>27</sup> One finds this type of argument in relation to the adjudication under the European Convention on Human Rights. Chapters 8-12 of the Convention invite judges, firstly, to decide what the right is, and then to decide whether the state can legitimately *interfere* with that right. This analysis implies that the right has a prior fixed content before the court considers any legitimate reasons that the state may have for its decision or action. For a robust argument against this type of approach, see G Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford University Press, Oxford 2007), chs 5 and 6.

their structure using special ‘meta-ethical’ techniques that are removed from the day-to-day arguments of judges and lawyers, but it is difficult to imagine what these could be.<sup>28</sup> Nonetheless, there is a sense in which Dicey and subsequent theorists of the British constitution can be understood as making this type of claim. The idea of Parliamentary sovereignty, the argument might run, forms part of the DNA of a state or constitution; and the idea, say, that Parliament has the right to ‘make or unmake any law...’ it might be said, forms part of the DNA of ‘sovereignty’.

## B. The Empirical Claim

Dicey seemed underwhelmed by the view that a sovereign power *must* exist in a civilised state, hence his rather pejorative characterisation of this view as a ‘deduction from abstract jurisprudence’ [5]. Instead, he clearly wanted to make a positive case for the view that ‘*Parliament does* constitute [the] supreme legislative authority or sovereign power’ in the British constitution (my italics). The sovereignty of Parliament, he says, is something to which ‘we are accustomed’ [3] and something that is ‘suggested by the position of the English parliament’ [6]. This claim – which I will present at this stage as an *empirical claim* – is of an entirely different type to the structural claim above. The existence of a sovereign entity on the structural account is an *essential property* of a state or a constitution. On the empirical account, by contrast, the existence of a sovereign entity is an *accidental property* of a state or constitution in that it depends on the way in which a political community in fact functions.<sup>29</sup> The latter type of theorist must therefore decide which types of behaviour are relevant to the question of whether Parliament is sovereign.<sup>30</sup> There are a number of possibilities but I will consider just three candidates.

### (i) Use of the *word* constitution

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<sup>28</sup> See, generally, R Dworkin, *Justice in Robes* above (n 7) ch 6.

<sup>29</sup> For the philosophical distinction between essential and accidental properties, see <http://plato.stanford.edu/entries/essential-accidental/>

<sup>30</sup> It might be argued that Austin himself treats the existence of a sovereign as an *accidental* property of a state or constitution in so far as its existence is contingent on ‘habits of obedience’ by subjects towards a sovereign.

In the first place, we could simply look at the conventional, ordinary usage of the word 'constitution' and the word 'sovereignty' as a way of understanding those concepts.<sup>31</sup> This would be to treat these concepts as *criteria* concepts, or concepts whose meaning depends on uncovering a set of shared linguistic criteria.<sup>32</sup> Many concepts are criterial in this sense. For instance, most people agree that the word 'bachelor' means an unmarried man, or that the word 'table' means a flat surface with legs. There is no way of identifying the meaning of these words other than by tracking their common usage. Of course, people may disagree about precisely which criteria do apply when people use words. They may disagree, for instance, about whether people use the word bachelor as much in relation to a lifestyle as a marital status, or whether the concept of a table necessarily implies a *flat* surface. But these disagreements would be characteristically *empirical* disagreements about the criteria that most people do in fact use when they make use of such concepts.<sup>33</sup> Such disagreements can normally be settled by consulting some authoritative source of linguistic practice, most obviously a dictionary.<sup>34</sup>

It may be then that Dicey approached the British constitution in this way. The idea of Parliamentary sovereignty, he may have supposed, is one widely accepted linguistic criterion of the concept of a state or constitution: it figures in the ordinary usage of those words. Equally, the definition of Parliamentary sovereignty, he may have thought, depends on the way in which people use that phrase. Just as we could confidently say that people would be making a mistake about the concept of a table if they suggested that it was, say, a flying machine, so we could point to a mistake in the use of the word 'sovereignty' if people supposed that there are limits on the things that Parliament can do by legislation.

(ii) The attitudes of 'officials'

Dicey's claim that parliament '*does* constitute a supreme legislative authority or power in the British constitution...' arguably reached its philosophical apotheosis in the work of

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<sup>31</sup> Hart seemed to express some sympathy with this approach, which derives from 'ordinary language' philosophy. For instance, he endorses the view of J.L. Austin, that '...we are using a sharpened awareness of words to sharpen our perception of the phenomena.' See Hart above (n 4) 14; J L Austin, 'A Plea for Excuses', *Proceedings of the Aristotelian Society*, vol. 57 (1956-7) at 8. Hart later sought to refute this association though. See Hart, above (n 4) 246-8. Cf. N Stavropoulos, 'Hart's Semantics' in Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Clarendon Press, Oxford 2001).

<sup>32</sup> See R Dworkin, *Justice in Robes* above (n 7), Introduction, chs 6 and 8.

<sup>33</sup> *Ibid*

<sup>34</sup> See, Simon Winchester, *The Meaning of Everything* (Oxford University Press, Oxford 2003).

Herbert Hart. Hart identifies a number of difficulties with the first type of structural type of claim described above. Chief amongst these is the difficulty of explaining the continuity of legal systems if sovereign law-making powers depend on the ‘habits of obedience’ of its subjects.<sup>35</sup> At the same time, Austin’s account, Hart suggests, fails to give the sense in which a law-maker exercises power *as of right*.<sup>36</sup> Hart’s solution is to suggest that the law-making powers in a state or constitution are best explained by a particular *rule* telling us where such powers reside. In every state, he says, one finds a master ‘rule of recognition’ providing the ‘the criteria by which the validity of other rules of a system is assessed’.<sup>37</sup> This rule ‘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. Its existence is a matter of fact’.<sup>38</sup>

In what sense is the rule of recognition a *matter of fact*? At first sight, this seems to confuse the normative sense of a *rule* with the descriptive idea of a *fact*.<sup>39</sup> In order to understand this idea, we first need to imagine someone looking into a community from the outside and observing particular patterns of behaviour amongst its officials. That observer takes what Hart describes as the ‘external point of view’ and, for him, those patterns amount to nothing more than the coincidence of activity or habit without any normative aspect.<sup>40</sup> Those patterns of behaviour take on a normative aspect when the officials of the system adopt the ‘internal point of view’ towards them: that is, when they ‘regard [them] as common standards of official behaviour and appraise critically their own and each other’s deviations as lapses.’<sup>41</sup> The rule of recognition is a ‘matter of fact’ in that its content depends on a morally neutral description of whichever standard of official behaviour officials accept at any given point in time.<sup>42</sup>

Hart emphasises the sense though in which the rule of recognition may also be seen as a matter of *law*. He says

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<sup>35</sup> See Hart, above (n 4), chs 2-4.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid 105.

<sup>38</sup> Ibid 110.

<sup>39</sup> See T Endicott, ‘Adjudication and the Law’ (2007) 27 OJLS 311-26 at 312.

<sup>40</sup> Above (n 4) 90.

<sup>41</sup> Ibid 117

<sup>42</sup> Ibid 111-2. For a recent defence of this position, see Marmor, ‘Legal Positivism: Still Descriptive and Morally Neutral’ (2006) 26 OJLS 683-704.

‘The case for calling the rule of recognition ‘law’ is that the rule providing criteria for the identification of other rules of the system may well be thought a defining feature of a legal system...’<sup>43</sup>

Indeed, by his refutation of the Austinian type of theory described above, there is a sense in which Hart moves altogether away from the idea of sovereignty, and towards the idea of ‘government under law’ or *legality*.<sup>44</sup> This can be illustrated quite simply. On the Austinian account, the power of Parliament, say, to overturn the common law principles of judicial review (if true) is explained by the fact that all laws necessarily derive their validity from the will of the sovereign. The Hartian account, by contrast, supposes that the power of Parliament to overturn common law principles (if true) is explained by the fact that *most officials accept* that Acts of Parliament are superior to common law precedents.<sup>45</sup> For the Austinian theorist then, a sovereign Parliament (or some other sovereign), being the *source* of legal validity is necessarily ‘above the law’.<sup>46</sup> For Hart, by contrast, the powers of Parliament derive from a rule which is *logically prior* to those powers. Parliament must therefore act in accordance with whichever conditions this rule sets down. In this respect, Hart seems an unlikely source of support for any theory of *sovereignty* in the British constitution. Nonetheless, as we will see below, Hart and subsequent theorists have suggested that the prevailing rule of recognition in the British constitution is something like ‘what Parliament enacts is law’ and/or the idea that Parliament enjoys ‘continuing sovereignty’.<sup>47</sup>

There is a further reason though as to why Hart’s theory is perhaps not the ideal theory to summon as long-term support for the orthodox view of Parliamentary sovereignty in the British constitution. We can see how Dicey’s account of the constitution might be understood in terms of a Hartian rule of recognition. For instance, in his claim that the sovereignty of Parliament is something ‘to which we are accustomed’, we might

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<sup>43</sup> Above (n 4) 111-2.

<sup>44</sup> See J Waldron, ‘Hart and the Principles of Legality’ (unpublished) delivered in The Legacy of H.L.A. Hart Conference, Cambridge, July 27-8, 2007

<sup>45</sup> Hart anticipates possible confusion between these two different views where he warns that ‘It is important to distinguish [the] *subordination* of one criterion to another from *derivation*, since some spurious support for the view that all law is essentially...the product of legislation, has been gained from confusion of these two ideas...’ Above (n 4) 101.

<sup>46</sup> Hence, Austin’s theory is often described in terms of the rule of *men*, rather than the rule of *law*. See R Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*, (2nd edn, LexisNexis Butterworths, London 2003) at 70. See also R Bellamy (ed.) *The Rule of Law and the Separation of Powers*, (Ashgate Publishing, Aldershot, Hampshire 2005) ‘Introduction: the Rule of Law as the Rule of Persons’.

understand Dicey as saying that most officials *accept it to be so*. Yet, if Hart's scheme helps us to understand Dicey's conclusions, it does not necessarily endorse them. The features of the constitution will always be contingent on what most officials think them to be in that particular place and at that particular point in time. Indeed, Hart suggests that the norms contained within the US constitution, and the power of judges to strike down legislation that is incompatible with the constitution, form part of the rule of recognition in that country.<sup>48</sup> Equally, there is nothing within the logic of Hart's argument to preclude the notion that the ultimate rule of recognition in Britain today is (or could, in future, be) something like: 'what judges decide is law'.<sup>49</sup>

(iii) The powers and functions of institutions

In his celebrated chapter, *The Political Constitution*,<sup>50</sup> Professor Griffith argues that there are certain realities about the British constitution. One such reality is that certain actors 'happen to exercise power'<sup>51</sup> but have no moral right to do so. Another reality is that individuals do not invoke 'rights' but make 'political claims'.<sup>52</sup> Another reality is that conflicts between individuals or groups and those who happen to exercise power are *political* conflicts. At the same time, Griffith identifies a set of 'metaphysics' which, he suggests, are designed by natural lawyers to conceal these realities. The 'state' is one such metaphysic; 'rights' are another. Indeed, Griffith seems to treat the very idea of a 'constitution' as another metaphysic by his oft-quoted remark that:

'... the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also'.<sup>53</sup>

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<sup>47</sup> See Hart, above (n 4) 148 and 151. For a recent defence of Hart's account of Parliamentary sovereignty, see J Goldworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford 1999), especially chs 2 and 10.

<sup>48</sup> Above, (n 4) 247. See also Hart, 'Positivism and the Separation of Law and Morals', 71 *Harvard Law Review* 598-629 (1958). In the posthumously published postscript to *The Concept of Law*, Hart endorses so-called 'soft' positivism according to which it is acceptable for moral norms to be incorporated by reference into the ultimate rule of recognition. Above (n 4) 250-4. This is to be contrasted with so-called 'hard' positivism, which does not allow for any recourse to morality in identifying the law. See, for instance, J Raz, *The Authority of Law, Essays on Law and Morality* (Clarendon Press, Oxford 1979).

<sup>49</sup> Indeed, this is a claim made by a number of eminent constitutional theorists. See section 2 below.  
<sup>50</sup> (1979) 42 MLR 1-21.

<sup>51</sup> *Ibid* at 16

<sup>52</sup> *Ibid*.

<sup>53</sup> Above (n 50) 19. See also Griffith, 'Judicial Decision-Making in Public Law' [1984] PL 564-82.



Like Hart, Griffith suggests that the existence and locus of sovereignty in the British constitution is an empirical question.<sup>54</sup> But, as if to deny the normative aspect of Hart's claim, Griffith does not look to the *attitudes of acceptance* by particular officials or citizens as a determinant of the ultimate criteria of legal validity. His approach to the constitution rests rather on a description of the *function* or *powers* that different institutions 'happen to exercise', a view that might be likened more to Hart's 'external' point of view. Griffith's views on the question of sovereignty in the British constitution perhaps come out most clearly in his exchange with Sir Stephen Sedley. Sedley argues in favour of the 'bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable – politically to Parliament, legally to the courts'.<sup>55</sup> In response to this view, Griffith objects that it is the Government that *in fact* exercises sovereign power in the British constitution. As he says:

'first...few would deny that Government, both politically and legally, may overturn judicial decisions by legislation made specifically for that purpose...second...it is the Government that has made the legislation and, through its majority, has required the Houses of Parliament to consent...'<sup>56</sup>

For Griffith then, if *Parliament* is sovereign, this is so in virtue of the fact that Parliament *happens to exercise* sovereign power.<sup>57</sup>

## 2. The Structural and Empirical Claims Considered

I have considered two general bases on which a theorist of the British constitution might seek to defend the idea of Parliamentary sovereignty. The first type of argument supposes that a sovereign – whether in the form of a Parliament or something else –

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<sup>54</sup> For a similar reading of Griffith, see A Tomkins, *Our Republican Constitution*, (Hart Publishing, Oxford 2005) at 37-9. Cf. T Poole, 'Tilting at Windmills? Truth and Illusion in 'The Political Constitution'' (2007) 70 MLR 250-277 at 253 and, especially, at 274-7. See also T R S Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry? [2002] CLJ 87-125 at 91-2.

<sup>55</sup> See S Sedley, 'The Sound of Silence' Constitutional Law without a Constitution' (1994) 110 LQR 270-291; 'Human Rights: a Twenty-First Century Agenda' [1995] PL 386-400 at 389, and 'The Common Law and the Constitution', in Lord Nolan of Brasted and Sir Stephen Sedley (eds), *The Making and Remaking of the British Constitution* (Blackstone Press, London 1997) at 26.

<sup>56</sup> See J Griffith 'The Common law and the political constitution', (2001) 117 LQR 42-67.

<sup>57</sup> Commentators sometimes refer to Griffith as a 'functionalist'. There is some disagreement though as to whether such a label implies a 'descriptive' or 'prescriptive' approach, or both. See M Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361-403, 368. Cf. A Tomkins, above (n 54) 39.

belongs to the very structure of a state or constitution. One can detect the Austinian version of this claim, I suggested, behind much of orthodox British constitutional theory. If this is correct, then it is highly perplexing. It suggests that traditional British constitutional theory is over a century behind in terms of legal theory. It has neither responded to Hart's devastating assault on Austin's theory, nor has it grappled with the many recent theories of positivism and 'anti-positivism' which seek to refine or challenge Hart's own theory. I propose to say nothing more about the Austinian type of claim beyond disregarding it as an adequate philosophical basis for the idea of Parliamentary sovereignty. Nor, it must be said, does it make any sense to treat a constitution as a concept of a natural kind. It is wholly implausible to suppose that sovereignty is a thing 'out there' in the world whose meaning can be discovered by scientific analysis.

The second type of argument seems more promising. It supposes, I said, that we can identify the ultimate criteria of legal validity in a state or constitution by looking to certain empirically determined facts. Importantly, each of the different forms of this claim implies that the relevant facts can be identified without engaging in any moral evaluation. The theorist who treats the concept of a constitution as a criterial concept purports to describe that concept in terms of the agreed linguistic criteria that make up the concept. He does not ask what *value* there is in those criteria. Hartian theorists are interested in the standards that most officials accept; it is not necessary, they argue, for those standards to be *morally acceptable*. And for Professor Griffith, the question of who wields sovereign power depends simply on 'what happens'. There is no question about what *value* there is in those things.

I now want to test this second type of claim focussing, in particular, on Hart's account. The question for consideration is this: is it possible to capture the idea of Parliamentary Sovereignty (and, more generally, the ultimate basis of legal validity and political power in a state) in a Hartian rule or set of rules? The recent decision in *Jackson*<sup>58</sup> will provide the ideal vehicle for exploring this question. In the first place, the House of Lords broke with common law tradition and agreed to rule on the validity of a statute. Questions about the basis of legal validity and legislative power were therefore directly in point. Secondly, judges sitting in both the Court of Appeal and House of Lords seemed to be in sympathy with a Hartian approach to these questions.<sup>59</sup>

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<sup>58</sup> Above (n 6).

<sup>59</sup> *Ibid.* See, in particular, Lord Hope at 124, Lord Bingham at 36, Lord Nicholls at 63, and the Court of Appeal [2005] Q.B. 579 at 97.

A. Jackson v Her Majesty's Attorney General

The legal issues in *Jackson* are well known. Briefly, section 2(1) of the Parliament Act 1911 provides that legislation made in accordance with the procedures set out in that section – relating to the number of sessions and years that need to have elapsed before an Act will receive the Royal Assent – shall ‘become an Act of Parliament on the Royal Assent being signified...notwithstanding that the House of Lords have not consented to the Bill.’ The issue in *Jackson* was whether the Parliament Act 1949 and the Hunting Act 2004, both of which had purportedly been passed under the 1911 Act, were valid Acts of Parliament. This turned, in the first place, on whether the 1949 Act was delegated legislation (delegated from Parliament as a whole to the House of Commons alone) and, if so, whether it improperly modified or enlarged the scope of the 1911 Act. The court unanimously rejected this argument. The purpose of the 1911 Act, Lord Bingham said, was not to delegate power to the Commons but to restrict the power of the Lords and to obviate the need for the monarch to create new Peers.<sup>60</sup> The judgments focussed mainly then on the construction of section 2(1) of the 1911 Act. The court was, in effect, asked to rule on what it meant for a Bill to be passed ‘in accordance with’ section 2(1) of the 1911 Act?

Given that the phrase ‘Act of Parliament’ in section 2(1) was not ‘doubtful, ambiguous or obscure’, there could be no question, Lord Bingham said, that the 1949 and 2004 Acts were both Acts of Parliament.<sup>61</sup> Section 2(1) of the 1911 Act, he said, had created a ‘new way of enacting primary legislation’.<sup>62</sup> The only limit to the use of the 1911 Act (in its current state), he said, was that expressly stated in section 2(1), namely an attempt by the Commons to extend the maximum duration of Parliament beyond five years. In using the phrase ‘*any* public bill’ [my italics] in section 2(1), the Parliamentary draftsmen had made it as clear as could be that there were no further limits.<sup>63</sup> This was also clear, he said, from the historical record of numerous failed attempts to insert additional limits. This also meant that the Commons could (legally speaking) use the 1911 and 1949 Acts to pass an Act amending the 1911 Act, and then enact legislation allowing for the

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<sup>60</sup> Ibid 25.

<sup>61</sup> Ibid 24.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid 32.

extension of the Parliamentary term beyond five years.<sup>64</sup> The remainder of the court agreed that the 1949 and 2004 Acts were validly passed, but most<sup>65</sup> judges disagreed with Lord Bingham on the question of whether the Commons could unilaterally extend the Parliamentary term using the 1911 Act. If the Commons could take an indirect route to achieve this, Lord Nicholls said, then ‘express legislative intention could readily be defeated’.<sup>66</sup> Therefore, he said, ‘this *implied* restriction is necessary in order to render the *express* restriction effectual’.<sup>67</sup> This, he said, was the only limit on the use of the 1911 Act though. On the same point Lord Steyn said that: ‘In the context of a Parliamentary democracy the language of section 2(1) and section 7 [entails that the indirect route is not available]’.<sup>68</sup>

Unsurprisingly, the judgments in *Jackson* strayed beyond the specific question of how to construe the 1911 Act to the broader issue of Parliamentary sovereignty. Lord Steyn said:

‘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 [court] may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish...’<sup>69</sup>

Lord Hope said:

‘It is sufficient to note at this stage that a conclusion that there are no legal limits to what can be done under section 2(1) does not mean that the power to legislate which it 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’.<sup>70</sup>

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* With the possible exception of Baroness Hale at 166.

<sup>66</sup> *Ibid.* 59. Lord Carswell explicitly agrees with Lord Nicholl’s reading at 175.

<sup>67</sup> *Ibid.* 61.

<sup>68</sup> *Ibid.* 79. Similarly see Lord Roger at 139.

<sup>69</sup> *Ibid.* 102.

<sup>70</sup> *Ibid.* 120.

And Baroness Hale said:

‘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 individuals from all judicial scrutiny’,<sup>71</sup>

Can the decision in *Jackson* be explained by reference to one or more rules of recognition and, more particularly, a rule that expresses the idea of Parliamentary sovereignty? In other words, can it be said that the court identifies the ultimate criteria of legal validity and political power in the British constitution by way of an *empirical survey* of what most other judges and officials accept?

The first difficulty with this type of explanation is that it is resoundingly rejected by at least two of the Law Lords. Both Lord Steyn and Lord Hope are explicit in saying that it is *judges* alone who ‘created’ the idea of Parliamentary sovereignty through the common law, and that judges have the sole power to adopt a ‘new hypothesis of constitutionalism’ in the event, say, that Parliament attempted to abolish judicial review.<sup>72</sup> Hartian theorists have dismissed these types of dicta as being ‘historically false’,<sup>73</sup> and ‘jurisprudentially absurd’.<sup>74</sup> They are historically false, it is said, because judges did not *in fact* create the doctrine of Parliamentary sovereignty. As Goldsworthy puts it:

‘The historical evidence demonstrates that for several centuries, at least, all three branches of government in Britain have accepted the doctrine that Parliament has sovereign law-making authority’,<sup>75</sup>

They are jurisprudentially absurd, it is said, because:

‘...judges are no more qualified than Parliament to be regarded as the Hobbesian sovereign, ultimately responsible for the creation of all law. The authority of either Parliament, or the judges, or both, must be based on laws that neither was responsible for creating’,<sup>76</sup>

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<sup>71</sup> Ibid 159.

<sup>72</sup> Ibid 102 per Lord Steyn and 126 per Lord Hope. Baroness Hale perhaps implicitly agrees with these views given that she entertains the possibility of courts rejecting an attempt by parliament to deny access to a court.

<sup>73</sup> See R Ekins, ‘Acts of Parliament and the Parliament Acts’, (2007) LQR 91-115 at 102.

<sup>74</sup> Ibid.

<sup>75</sup> Above (n 47) 236.

<sup>76</sup> Ibid 240. See also J Goldsworthy, ‘Is Parliament Sovereign? Recent Challenges to the Doctrine of Parliamentary Sovereignty’ (2005) 3 *New Zealand Journal of Public and International Law* 7-37 at 7.

In the second of these contentions Goldsworthy presents the claims of Lord Steyn and Lord Hope as an Austinian (or Hobbesian) type of claim (which I have described above as a ‘structural’ claim). While the dicta of Lord Steyn and Lord Hope can clearly be interpreted in this way,<sup>77</sup> enough has been said, I hope, to show that this type of claim is unsustainable as a matter of legal theory. The important philosophical question for present purposes is therefore not whether judges *created* the doctrine of Parliamentary sovereignty, but whether the Hartian type of claim adopted by Goldsworthy can adequately explain such law-making power as Parliament and judges do possess. This takes us to Goldsworthy’s first contention. The Hartian objection to Lords Steyn and Hope, he suggests, is as follows: it is an *empirical mistake* to say that judges have the ultimate authority to control Parliamentary action. If we look closely at the behaviour of Parliament, government and the courts, it is clear that each branch of government accepts – and has historically accepted – that Parliament is sovereign.

Does it make sense to characterise the type of disagreement between Goldsworthy and Lords Steyn and Hope as a morally neutral, empirical disagreement about what most other judges and officials think (or have historically thought)? The immediate difficulty with this type of account is the way in which these Lords and others seek to *justify* the respective powers of Parliament and the courts. For instance, in their initial decision to accept jurisdiction in *Jackson* (and thereby rule on the validity of the 1949 and 2004 Acts) the Lords cite the fact, firstly, that the court would not be investigating the ‘internal workings and procedures of Parliament’;<sup>78</sup> thus, there would be no breach of the *separation of powers*. Secondly, they state that, since the appellants had raised a question of law (the interpretation of s. 2(1) of the Parliament Act) which could not be resolved by Parliament, the *rule of law* requires that the court should resolve it.<sup>79</sup> Moreover, Lord Steyn, Lord Hope and Baroness Hale explicitly recognise certain things that lie *beyond* the competence of Parliament, and which the courts would not permit. Parliament could not ‘abolish judicial review or the ordinary role of the courts’;<sup>80</sup> nor could it pass legislation which is ‘so absurd or so unacceptable that the populace at large refuses to recognise it as law.’<sup>81</sup> One does not have to look far for similar arguments of

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<sup>77</sup> This is particularly so in relation to the dictum of Lord Hope (above (n 70)) who seems to suggest in characteristically Austinian fashion that the limits on sovereignty are *extra-legal* rather than legal limits.

<sup>78</sup> Distinguishing this case from *Pickin v. British Railways Board* [1974] AC 765.

<sup>79</sup> *Jackson* above (n 6) 25 and 110.

<sup>80</sup> *Ibid* 102 and 159.

<sup>81</sup> *Ibid* 120.

principle from the academic community. Sir William Wade,<sup>82</sup> Trevor Allan,<sup>83</sup> and Sir John Laws<sup>84</sup> have argued with great force and elegance that the sovereignty of Parliament depends on the willingness of the *judiciary* to recognise Parliamentary enactments as valid law. Others have argued that Parliamentary power depends, say, on the agreement<sup>85</sup> or participation<sup>86</sup> of most *citizens*. It seems unreal to describe these different views as empirical disagreements about what most officials think.

The inadequacy of the Hartian account can be further illustrated by attempting to formulate some rule – on which most officials agree – which captures the idea of Parliamentary sovereignty. It may be helpful to work backwards from Hart’s own suggestion that the rule of recognition in the British constitution is the rule: ‘whatever the Queen in Parliament enacts is law’.<sup>87</sup> If this rule represents the rule of recognition, then officials must:

‘regard [it] as [a] common [standard] of official behaviour and appraise critically their own and each other’s deviations [from it] as lapses.’<sup>88</sup>

What ‘common standard of official behaviour’ does the phrase ‘whatever the Queen in Parliament enacts is law’ provide though? To begin with, we might ponder what ‘Parliament’ means. In *Jackson*, Lord Steyn distinguishes the ‘static’ concept of Parliament, meaning the fixed elements that make up Parliament – the House of Commons, House of Lords and the Queen in Parliament – from the ‘dynamic’ concept, which refers to the different ways in which those elements combine to create legislation.<sup>89</sup> On what basis though does the notion of Parliament bear either of these meanings? The Hartian story is simple: to the extent that Parliament figures in the

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<sup>82</sup> Wade ‘the Basis of Legal Sovereignty’ (1955) 13 CLJ 172-197.

<sup>83</sup> See generally, Allan, *Law, Liberty and Justice, the Legal Foundations of British Constitutionalism* (Oxford University Press, Oxford 1993); *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2003).

<sup>84</sup> See Sir John Laws, ‘Law and Democracy’, [1995] above (n 23). For an excellent discussion of the similarities, on this point, between Wade and Laws, see Craig, ‘Competing Models of Judicial Review’ in Forsyth (ed.) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000).

<sup>85</sup> This reflects the classical ‘social contract’ position whereby citizens give their tacit consent to the authority of the state only under certain conditions, say, of liberty and equality. See, for instance, J Locke, Peter Laslett (ed.), *Two Treatises of Government* (Cambridge University Press, Cambridge 2003).

<sup>86</sup> This type of approach is found in theories of civic republicanism. See, for instance, Tomkins, above (n 54). See also Lord Woolf CJ in the Court of Appeal in *Jackson* who includes attitudes of ‘the populace’ in the calculation, above (n 63).

<sup>87</sup> See Hart, above (n 4) 148

<sup>88</sup> *Ibid* 117

<sup>89</sup> See *Jackson*, above (n 6) 81.

relevant ‘standard of official behaviour’, the meaning of Parliament is that which *most officials accept*. Indeed, with a clear nod to Hart, Lord Hope says in relation to Lord Steyn’s ‘dynamic’ concept of Parliament that

‘The restrictions on the exercise of the power of the House of Lords that the 1949 Act purported to make have been so widely recognised and relied upon that these restrictions are, today, a political fact.’

The implications of this type of reasoning, it is suggested, are wholly counterintuitive. It would imply that, given the necessary acceptance by officials, Parliament could mean *anything*.<sup>90</sup> Thus, if most officials were to accept in future that Parliament means ‘the Knights Templar and the Freemasons’ then, for that reason alone, this would constitute the ‘static’ concept of Parliament. And if they were to accept that ‘the Most Senior Freemason’ has power to legislate unilaterally, say, on all financial bills, then this would constitute one manifestation of the ‘dynamic’ concept. This surely fails to make sense of their Lordships’ reasoning on the meaning of Parliament.<sup>91</sup> Baroness Hale, for instance, is explicit in offering a *justification* for the 1911 Act – and for the ‘dynamic’ meaning of Parliament that it entails – based on the principle of democracy.<sup>92</sup> Equally, in ruling out the unilateral use of the 1911 Act by the Commons to extend the Parliamentary term beyond five years, most members of the Lords rule, in effect, that such action would be undemocratic. The latter ruling perhaps makes better sense still as being justified by the principle that the House of Lords exists to exert ‘checks and balances’ on the Government and House of Commons.<sup>93</sup> Contrary to the Hartian account then, the reasoning in *Jackson* reveals that the meaning of the concept of ‘Parliament’ is responsive to certain principles. It is these principles that justify the very

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<sup>90</sup> This applies, *a fortiori*, to Griffith for whom the identity of the ultimate lawmaker does not even require acceptance by officials: Parliament is whatever it happens to be. See above (n 50) 16.

<sup>91</sup> To use Dworkin’s two dimensions of interpretation, this reasoning neither ‘fits’ nor ‘justifies’ the fact that *Parliament* possesses legislative powers in the British constitution. See R Dworkin, *Law’s Empire*, above (n 7) 139.

<sup>92</sup> See *Jackson*, above (n 6) 157. This principle, I think, justifies the view expressed by different judges that the point of the 1911 Act was to restrict the power of the House of Lords.

<sup>93</sup> The principles of democracy and checks and balances are, of course, precisely the types of principles that have historically motivated political debates about the reform of Parliament. See, for instance, Report of the Royal Commission on the Reform of the House of Lords (Chair: Lord Wakeham) Cmnd 4534, 2000). It would be odd then if these principles played no part in the way that judges define the concept of Parliament.



fact that it is *Parliament* – and not ‘the Knights Templar and the Freemasons’ – which exercises law-making powers in the British constitution.<sup>94</sup>

This reasoning, it is suggested, must extend to Hart’s parallel claim that the rule of recognition in the British constitution entails the fact that Parliament possesses ‘continuing’ rather than ‘self-embracing’ sovereignty.<sup>95</sup> The question of whether Parliament can entrench certain procedural or substantive laws (and whether a later Act will always impliedly repeal an earlier Act) also cannot be answered by looking to whether officials *accept* that Parliament has ‘continuing’ or ‘self-embracing’ sovereignty. The legality of such action will depend, once again, on whether such action is consistent with the principles that justify Parliament’s law-making powers. A decision to entrench a Bill of Rights by requiring, say, the support of two-thirds of both Houses of Parliament and a positive return in a referendum, it might be supposed, would be consistent with such principles.<sup>96</sup> But it could surely not be said that Parliament, acting as a Parliament, could alter the procedures by which laws must be enacted in a way that completely excludes *both* Houses of Parliament, for example, by giving the Speaker the sole power to assent to a bill.<sup>97</sup>

If we return to Hart’s original formulation of the rule of recognition in the British constitution *viz.* ‘what the Queen in Parliament enacts is law’, there is a further difficulty still with the idea that judges treat this as an empirically determined ‘standard of official behaviour’: judges *disagree* about the meaning of the thing ‘enacted by the Queen in Parliament’.<sup>98</sup> We see at least five approaches to the question of how to interpret the meaning of section 2(1) of the 1911 Act in *Jackson*. Lord Bingham looks to express Parliamentary intent; Lord Nicholls looks to the implied restrictions that give effect to express legislative intent; Lord Steyn looks to the context of a Parliamentary democracy; each of the judges treats the use that Parliament has made of the amended 1911 procedure

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<sup>94</sup> I certainly do not mean to imply that there cannot be law unless there is democracy. If it were plausible to suppose that Freemasons and Knights of the Realm (or whomever) do in fact exercise legislative power in British legal practice, then it may be that we could justify that power according to, say, the principle of protected expectations or certainty if most people in fact obeyed their edicts. Cf. Allan, who expresses sympathy with Dyzenhaus’s ‘culture of justification’ in that he ‘equates the rule of law with a certain conception of democracy’. T R S Allan, *Constitutional Justice* above (n 83); D Dyzenhaus, ‘Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review?’, in C Forsyth (ed.) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000) at 71.

<sup>95</sup> See Hart, above (n 4) 151.

<sup>96</sup> For an insightful discussion of the legal and constitutional implications of this type of development in Britain, see R Dworkin, *A Bill of Rights for Britain*, (Chatto & Windus, London 1990).

<sup>97</sup> Baroness Hale plays with these types of ideas but she does so, it is suggested, without recognising that there are certain principled limits to the ways in which Parliament *qua* Parliament can redefine itself. See *Jackson*, above (n 6) 163.

as being relevant to its meaning;<sup>99</sup> and both Lord Nicholls and Lord Steyn give limited support to the use of ministerial statements as an aid to interpretation.<sup>100</sup> Once again, it seems unreal to describe these different views as empirical disagreements about what most officials think.

If Goldsworthy is to maintain that there is an empirical consensus in favour of the view that Parliament is sovereign, then he must find some way of explaining away both the principled character of judicial reasoning on questions relating to Parliamentary and judicial power, and the fact of widespread disagreement between judges on these questions. There are two different Hartian responses to this challenge. The first response is to treat such disagreements as falling within a ‘penumbra of uncertainty’ around the core idea of Parliamentary sovereignty (on which most officials agree).<sup>101</sup> Thus, Lords Steyn and Hope could be taken to be refining or clarifying the rule that expresses the idea of Parliamentary sovereignty, or perhaps even proposing some more desirable rule of recognition. But this response is deeply problematic. Unlike disagreements about the meaning of the word ‘bachelor’ or ‘table’, there simply is no widely accepted ‘core’ of acceptance about the relative powers of Parliament and the courts.<sup>102</sup> On the contrary, it is clear from the reasoning of the judges in *Jackson* (and the reasoning of other judges and academics besides) that there is a deep disagreement of principle between those who think that Parliament has the power, say, to ‘make or unmake any law’, and those who think that judges have the power to block certain types of Parliamentary action. Nor is it open to Goldsworthy to distinguish (and discount) ‘ideal’ theories of whose attitudes *should* count, from empirical or factual accounts of whose attitudes *do* count.<sup>103</sup> In the face of principled disagreement about the powers of Parliament and courts, any attempt to privilege one theory over others as being empirically or factually true is bound to be question begging.

The second response is to suggest that the many principles that figure in judges’ reasoning about the powers of Parliament and courts *form part of* the rule of recognition.<sup>104</sup> Thus, it might be said that most officials accept, say, that Parliament must act in accordance with such principles as the separation of powers, the rule of law

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<sup>98</sup> See Dworkin, *Taking Rights Seriously* above (n 7) 54-8; and *Law’s Empire* above (n 7) ch 4.

<sup>99</sup> See *Jackson*, above (n 6) 67-9 and 171.

<sup>100</sup> Under the rule in *Pepper v. Hart*. [1993] 1 All ER 42. See *Jackson*, above (n 6) 65, 97 and 98.

<sup>101</sup> See Hart, above (n 4) 123, 147-54 and 251.

<sup>102</sup> See, generally, Dworkin, *Justice in Robes* above (n 7), chs 1 and 2.

<sup>103</sup> See Griffith, ‘The Brave New World of Sir John Laws’, (2000) 63 MLR 159-76.

<sup>104</sup> Again, this is the position of so-called ‘soft’ or ‘inclusive’ positivists. See above (n 48).

and democracy. This seems hopeless though. Judges will disagree about which principles justify the powers of Parliament and courts, and they will disagree about the meaning of any such principles. It would prove impossible then to encapsulate any definitive set of principles within a single rule.<sup>105</sup> At the same time, this second response would implausibly suppose that judges rely on principles such as the separation of powers and the rule of law for the reason that *other judges and officials accept* those principles as the basis of legal and political power in the British constitution. It is clear though that Lord Hope (and others) advance arguments that speak *directly* to the respective powers of courts and legislatures, and which do not depend in any way on an empirical consensus amongst officials.<sup>106</sup>

### 3. Legality as the ‘Controlling Factor’ in the British constitution

I have argued in the preceding section that the idea of Parliamentary sovereignty cannot be explained as the rule of recognition in the British constitution. Such an account cannot explain the way in which judges *justify* the law-making powers of Parliament and courts through arguments of political principle; and it cannot explain the fact that judges *disagree* deeply about these principles. Such disagreements do not tell us that the rule of recognition is uncertain; they tell us that there is no rule. This conclusion raises an uncomfortable question for those theorists who advocate the idea of Parliamentary sovereignty. If it can neither be said that Parliament is the Austinian sovereign, nor that there is an empirically determined fact or rule which tells us that Parliament is sovereign then what work, if any, is the idea of Parliamentary sovereignty doing in the British constitution?

In order to explore this question, we need to think again about how the idea of sovereignty figures in orthodox British constitutional theory. Theorists typically debate such questions as whether there are any *limits* to the doctrine of Parliamentary sovereignty, or whether Parliament can *override* the rule of law. At the same time, they debate whether, given that Parliament is sovereign, the legitimacy of judicial review depends on judges giving effect to Parliamentary intent when reviewing official decisions

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<sup>105</sup> See R Dworkin, *Taking Rights Seriously*, above (n 7) 39-45.

<sup>106</sup> Dworkin helpfully expresses these differences in reasoning in terms of ‘concurrent’ and ‘conventional’ morality. As he says, ‘A community displays a concurrent morality when its members are agreed in asserting the same, or much the same, normative rule, but they do not count the fact of that agreement as an

(the *ultra vires* theory),<sup>107</sup> or whether judges exercise their review function, at least in part, independently of such intent (the common law theory).<sup>108</sup> Craig suggests that these debates:

‘[Concern] whether power should be regarded as exclusive or shared...It speaks to the respective powers of courts and legislature in a constitutional democracy. It reflects contending views as to the autonomy of courts when developing judicial review. It encapsulates differing views about the relationship between the rule of law and Parliament’<sup>109</sup>

The idea of ‘sovereignty’, it should be noted, is conspicuously absent in this passage. The key principles in play are instead democracy, the separation of powers and the rule of law. Elsewhere though, Craig defends the common law model of judicial review – based on the notion of ‘shared power’ – as being:

‘in accord with the proper division of power between courts and Parliament in a constitutional democracy, and...consistent with the sovereignty of Parliament. The common law model thus expressed a conception of shared sovereignty’<sup>110</sup>

What are we to make of the two uses of the concept of ‘sovereignty’ in this passage? The phrase ‘shared sovereignty’, if it is not an oxymoron, seems simply to refer to a division of *powers, functions* or *responsibilities* between different branches of government.<sup>111</sup> In this case, the use of the word ‘sovereignty’ with its absolutist, Austinian connotations, is a particular unhelpful misnomer.<sup>112</sup> It would be far clearer, it

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essential part of their grounds for asserting that rule. It displays a conventional morality when they do’.

Ibid at 53.

<sup>107</sup> See, for example, Forsyth, above (n 22). The so-called ‘modified’ *ultra vires* theory seeks to preserve this basic intuition albeit that Parliament is said to have an abstract intention that judges give effect to the rule of law rather than concrete intentions as to particular principles of judicial review. See C Forsyth and M Elliott, ‘The Legitimacy of Judicial Review’ [2003] PL 286-307.

<sup>108</sup> See, for instance, D Oliver: ‘Is the *Ultra Vires* rule the basis of judicial review?’ [1987] PL 543-69; P Craig, ‘*Ultra Vires* and the Foundations of Judicial Review’, [1998] CLJ 63.

<sup>109</sup> See P Craig, ‘Constitutional Foundations: The Rule of Law and Supremacy’ [2003] PL 92-111 at 93

<sup>110</sup> Ibid.

<sup>111</sup> This, I think, is clearly the meaning afforded to the term ‘sovereignty’ by a number of other leading constitutional theorists. See Sedley above, (n 55); T R S Allan, above (n 83).

<sup>112</sup> UK lawyers commonly use phrases such as ‘shared sovereignty’ or ‘pooled sovereignty’ (among many other variations) when they refer to the relationship between the United Kingdom and the EU institutions. See, for example, Neil Walker, ‘Late Sovereignty in the European Union’, in Walker (ed.) *Sovereignty in Transition* (Hart Publishing, Oxford 2003) at 10-18. In the European context, just as in the context of the powers of institutions within a state, the word sovereignty, I think, seems to connote something like ‘power’ or – perhaps more aptly – ‘competence’. Other commentators have lately dispensed with the

is suggested, to say straightforwardly that the judicial review debate concerns the separation of powers between Parliament, the executive and the judiciary. Craig says further though that the conception of shared sovereignty is *consistent with the sovereignty of Parliament*. It would make little sense if this latter use of the word sovereignty carried the same meaning as the former use. This would produce the truism: Parliament's power/function/responsibility is consistent with Parliament's power/function/responsibility. What then might this latter use of the word sovereignty mean within the scheme of the British constitution? With *what* must the respective powers of courts and Parliament be consistent?

Before it is possible to talk about the 'proper division of power between courts and Parliament in a constitutional democracy', we must first establish the *basis* of Parliamentary and judicial power. The question is this: why should the decisions of Parliament and courts be relevant to the question of what the law is? It will be useful at this point to return once more to the work of Hart. Hart's central insight in the *Concept of Law*, it will be recalled, is the idea that the powers of Parliament and courts cannot derive from a sovereign person or entity; they can only be explained, he says, by reference to a normative standard which is logically prior to those powers. I have argued above (after Ronald Dworkin) that this standard cannot be an empirically determined rule: it must be a principle of political morality.<sup>113</sup> More particularly, it must be a distinctively *legal* principle which conditions the exercise of Parliamentary, governmental and judicial power, and which speaks to the grounds on which a proposition of law is true or valid in the British constitution. It will by now be apparent that Hart and Dworkin together lay the foundations for a theory of the British constitution based on the ideal of government under law or the principle of *legality* (otherwise referred to as the 'rule of law'). It must be said that a distinguished minority of judges and academics have advocated this position over many years;<sup>114</sup> but it is arguably the

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language of sovereignty and described the relationship between member states and the EU as one of 'legal pluralism'. See N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, Oxford 1999); Eleftheriadis, 'The idea of a European Constitution' (2007) 27 OJLS 1-21 at 14. In the context of public international law too, there appears to be a movement away from the idea of absolute sovereign states towards the idea that there are certain normative conditions attached to the exercise of state power. See Koskenniemi, *From Apology to Utopia*, (Cambridge University Press, Cambridge 2005), ch 4.

<sup>113</sup> As Jowell has recently put it, the allocation of political power depends on 'a moral claim to its exercise (or limitation)'. See Jowell, 'Parliamentary Sovereignty' above (n 20) 565-6.

<sup>114</sup> The most assiduous proponent of this type of theory is T R S Allan. See above (n 83). See also Lord Woolf 'Droit Public – English Style' [1995] PL 57-71.

judgment in the *Jackson* case that marks the first explicit judicial endorsement of this position.<sup>115</sup> Lord Hope memorably says that

‘The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.’<sup>116</sup>

Once it is appreciated that the powers of each branch of government are *determined* by the principle of legality, it is plain that Craig (above) can only be understood as saying that the respective powers of Parliament and courts must be consistent with *this* principle rather than the concept of sovereignty. This conclusion can be seen more clearly still if we try to make sense of the familiar claim that there are normative *limits* to Parliamentary sovereignty or – what expresses the same idea – that there are normative *justifications* for Parliamentary sovereignty. Lord Hope articulates something like this claim in the following passage in *Jackson*:

‘Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute... Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.’<sup>117</sup>

Leaving to one side the contentious question of how best to interpret the work of Coke, Blackstone and Dicey,<sup>118</sup> to the extent that the position described by Lord Hope envisages *legal* limits to the things that Parliament may do, it is plain that the concept of sovereignty is entirely redundant. To say that there are legal limits to Parliamentary power is to say (as Lord Hope himself does elsewhere) that such powers as Parliament possesses are *determined* by the principle of legality. In this case, it makes no sense to debate whether the principle of legality (or any other legal principle for that matter) *limits*

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<sup>115</sup> It might be argued though that the House of Lords has recognised the primacy of the principle of legality through its ‘constitutional rights’ jurisprudence. See generally Jowell above (n 20); chapter 6 (above) part 2.

<sup>116</sup> *Jackson* above (n 6) 107 (my italics). And see O Dixon, ‘The Law and Constitution’ (1935) 51 LQR 590-611 at 596.

<sup>117</sup> *Jackson* above (n 6) 104. See also similarly P Craig above (n 109) 107-111 who suggests that sovereignty does not mean ‘absolute’ sovereignty; judges place a variety of different constraints on sovereign power through various different forms of statutory interpretation. Craig makes his argument in response Allan’s view that the idea of Parliamentary cannot permit of any limits to Parliament’s power. See T R S Allan, ‘Conceptual Conundrum’ above (n 54) 89-90.

or *qualifies* Parliament's powers: Parliament's powers are what they are. And it is paradoxical to debate whether Parliament could *override* the principle of legality: this puts the cart before the horse.<sup>119</sup> If, on the other hand, the position described by Lord Hope envisages the existence of a Parliament with legally unlimited (and unjustified) legislative power (albeit that there may be certain moral, political and other *non-legal* limits to the exercise of that power), then we are forced to pose our original question once again: what is the philosophical basis of that absolute legislative power? I have argued at length in this chapter that neither Austin nor Hart – at least when taken to provide a morally neutral theory – can provide an adequate answer to that question.

To summarise the last part of the argument, I have suggested that the foundational principle of British constitutional theory and practice is 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; nor is it to make a choice between two equally viable concepts: it is to reject altogether the currency of the concept of sovereignty. Given that Parliament derives its powers from law, we have a *normative reason* to erase the concept of sovereignty from our constitutional landscape. Of course, the significance of this renewed perspective on the British constitution can hardly be overstated. It demands that Parliament may only exercise power in accordance with the principles – whatever they may be – that justify that power.

I now want to leave the idea of Parliamentary sovereignty behind and think about what it means to say, as Lord Hope puts it, that the principle of legality is the 'ultimate controlling factor' in the British constitution'.<sup>120</sup> This claim will no doubt trigger a flurry of objections about judicial supremacy, and the subordination of politics and democracy to law. On its face though, it does not imply anything about the respective powers of Parliament, government or the judiciary. These things must depend on precisely *how* we understand the principle of the rule of law or legality. Lord Hope tells us that

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<sup>118</sup> For detailed discussion on this question, see, for instance, Goldsworthy above (n 47) 250, P Craig, Public law, political theory and legal theory [2000] PL 211-39 at 217-222.

<sup>119</sup> Indeed, even if one were to adopt an Austinian or Hartian account of the power of law-makers, it would make no sense to speak in terms of *legal* limits on sovereignty. The Austinian sovereign is, by definition legally unlimited; and for Hart, the law-making powers of Parliament (or some other law-maker) are *determined* by a rule of recognition. In this respect, it is submitted that Allan (above (n 117)) must be correct.

<sup>120</sup> *Jackson* above (n 6) 107.

‘[I]t 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’<sup>121</sup>

This formulation captures the basic idea discussed above in relation to the work of Hart and Dworkin: that government or officials (which, it should be said, must also include courts) must exercise power in accordance with the legal principle(s) that justify that power (which principles must be established *in advance* of the exercise of that power).<sup>122</sup> This only takes us so far though. It is not enough simply to say that officials must act in accordance with legal principle(s); we need to know what these principles are. This, it is suggested, will depend on the *value* we find in requiring officials to exercise power in accordance with law.<sup>123</sup>

Consider a judge who thinks that laws must be *certain, predictable, and authoritative* so that individuals can plan their lives freely in the knowledge that they are not acting illegally.<sup>124</sup> For him, whether something *counts* as law will depend on these types of values. Such a judge is therefore likely to be satisfied that a statute *is* a statute when it is enacted by procedures that are clear, well-known and widely accepted.<sup>125</sup> Similarly, this judge is likely to be satisfied that a common law doctrine or rule *is* a common law doctrine when most judges accept that rule or doctrine, and when that rule or doctrine is clear in its terms.<sup>126</sup> In terms of identifying the meaning of a statute, this judge is likely to advocate the literal or plain-meaning-of-words interpretation of statutes in so far as these different modes of interpretation promote certainty, predictability and authority. At the same time, such a judge is likely to have firm views about the proper role of judges. Judges, he might think, should generally ‘apply’ the law and should not legislate. For them to do otherwise would present judges with challenges for which they

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<sup>121</sup> Ibid.

<sup>122</sup> See Dworkin, *Justice in Robes* above (n 7) 170.

<sup>123</sup> For a good overview of different conceptions of legality, see P Craig ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] PL 467-87. See, more recently, J Jowell, ‘The Rule of Law and its Underlying Values’, above (n 1) 210.

<sup>124</sup> See Hart above (n 4) 91-7. Raz, *The Authority of Law* above (n 48), 210.

<sup>125</sup> Hence, many judges require only that a document appear ‘on the Parliamentary roll’. See Lord Hope in *Jackson* above (n 6) 112.

<sup>126</sup> These conditions equate roughly to Hart’s emphasis on consensus and the core meaning of words. See sections 1 and 2 above. Dworkin recasts Hart’s ‘descriptive’ theory as an ‘interpretive’ morally-engaged theory which he describes as ‘conventionalism’. See Dworkin, *Law’s Empire* above (n 7) ch 4. According to this *interpretation* of British legal practice, there are *moral* reasons to count clear, well-known and widely accepted rules as the operative standards in the constitution. As I have explained above (n 8), I endorse this reading of Hart.



are institutionally unsuited; it would also be undemocratic and unfair in so far as it should be elected Parliamentarians, and not unelected judges, who should decide what the law should be.<sup>127</sup> Above all then, judges should not have the power to ‘strike down’ statutes (assuming that they have been passed by the necessary clear, well-known and widely accepted procedures). This would entail the invalidation of perfectly valid law; and it would entail the direct usurpation by judges of the Parliamentary role.

Consider a different judge who thinks that the point of law is to ensure that the principles of *justice, fairness* and *procedural due process* to which a political community is committed should apply equally to all citizens in that community.<sup>128</sup> For this judge, what *counts* as a legal right or duty will depend on the interpretation of the past political decisions in that community that best captures these different principles. Accordingly, this judge will look to the principles that justify the fact that the decisions of *Parliament* and *courts* count as law in that community. Parliament’s law-making powers, she might think, are justified by the principle of democracy; and the powers of courts by the need for an independent branch of government to stand as a bulwark between the individual and the state, functioning to ensure that officials do not act in a way that treats individuals as inferiors. The meaning of a given statute or judicial decision will depend for this judge on the different principles of justice, fairness and procedural due process that make best sense of the past enactments of Parliament, and the past decisions of courts on the particular doctrinal issue in question. This interpretive task, she believes, does not entail judicial *legislation* since she is giving effect to existing legal principles. Nor is such a role undemocratic. Democracy, properly understood, she thinks, means that officials should only be able to act in a way that respects certain individual rights. Judges, she believes, are particularly well placed to give effect to such rights. For this judge, it may well be conceivable that she and her colleagues will have reason to strike down an (purported) Act of Parliament at some stage in so far as Parliament seeks to act in a way that negates the very principles that justify its law-making role.

It will be apparent, I hope, that these two stories broadly reflect the two different approaches to the *Jackson* case discussed in part 3 above. Crucially, each story is driven by the distinctive *value* that a judge finds in requiring officials to act in accordance

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<sup>127</sup> This is the position taken by so-called ‘ethical’ positivists. See, for instance, Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (Routledge-Cavendish, 2004); Waldron, ‘Normative (or Ethical) Positivism’ in J Coleman (ed.), *Hart’s Postscript* above (n 31), ch 12.

<sup>128</sup> This is a rough account of Dworkin’s theory of law as integrity. See Dworkin, *Law’s Empire* above (n 7) ch 6.

with law. We see in these stories, moreover, that that value will shape the way in which a judge thinks about the many other principles that determine the powers of officials – principles such as the separation of powers, democracy, equality, liberty and individual rights. This is not to conflate the principle of legality with these other principles,<sup>129</sup> but to appreciate that each of these principles can only be understood in the light of each other as part of a ‘web of conviction’.<sup>130</sup> It is in this special sense, it is suggested, that the principle of legality – and, more specifically, the *value* of that principle – is the ‘ultimate controlling factor on which our constitution is based’.<sup>131</sup> Of course there will be disagreement about which value does make best sense of the ideal of officials acting in accordance with law. The stories that I have offered above, as I have said, reflect a disagreement between those theorists who take this value to be something like *certainty*, and those who take the value to be something like *integrity* or *equality*.<sup>132</sup> While I have given implicit support to the latter account in part 3 (above), my purpose in this chapter has not been to press a particular conception of legality. Rather it has been to reorientate British constitutional theory towards this type of inquiry, and away from obsolete debates about Parliamentary sovereignty. It will be the task of the next two chapters to examine more closely the nature of disagreement about the principle of legality, and to propose an account of legality which best justifies that concept.

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<sup>129</sup> A number of theorists have objected to an expansive definition of the concept of legality on the basis that it robs the concept of any independent value. See Raz, above (n 48) 299. See also Jowell, ‘The Rule of Law and its Underlying Values’ above (n 1) 16.

<sup>130</sup> Dworkin, *Justice in Robes* above (n 7) 172.

<sup>131</sup> *Jackson* above (n 6) 107.

<sup>132</sup> Others have argued in support of some other value or values. Sir John Laws, for example, has placed the value of *autonomy* at the heart of his constitutional theory. See Sir John Laws ‘The Constitution: Morals and Rights’ [1996] PL 622-35.

## Chapter 2: Understanding the Principle of Legality

In the previous chapter, I suggested that the idea of Parliamentary sovereignty is redundant in British constitutional theory and practice. It is an unfortunate legacy of the once-widespread belief that the laws and law-making powers in a state must derive from a single, sovereign entity. While several contemporary constitutional theorists and judges have recognized the deficiencies in this Austinian jurisprudence, few have been willing to abandon the idea of Parliamentary sovereignty altogether. Some have argued that Parliamentary sovereignty remains a *general* principle in the British constitution, but that it is *qualified* or *limited* by other principles such as the rule of law and the separation of powers.<sup>1</sup> This strategy, I suggested, leaves no logical space remaining for a concept of sovereignty.<sup>2</sup> Others have turned to Austin's chief critic, Herbert Hart.<sup>3</sup> The traditional, Diceyan account of Parliamentary sovereignty – that Parliament can make or unmake any law, and that no person or body may set aside an Act of Parliament – is true, they argue, in virtue of the fact that *most officials accept* this to be so: these are the 'standards of official conduct' that constitute the Hartian rule of recognition in the British constitution.<sup>4</sup>

It is ironic, it might be thought, that Goldsworthy and others summon the work of Hart in support of a theory of *sovereignty*. In so far as the idea of sovereignty implies the existence of an all-powerful person or body at the apex of a legal system from which all law derives, this is precisely the idea that Hart takes as his target in the *Concept of Law*. Such a theory, Hart demonstrates, fails to account for the way in which Parliament (or some other institutional authority) exercises power *as of right*; and it fails to explain how power can pass from one Parliament to the next.<sup>5</sup> In the light of these difficulties, it must be the case, Hart suggests, that the power of Parliament, and the grounds of legal

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<sup>1</sup> See, for example, P Craig, 'Constitutional Foundations: The Rule of Law and Supremacy' [2003] PL 92-111. For a clear judicial statement of this approach, see *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56 per Lord Hope at 104.

<sup>2</sup> See generally ch 1 (above), part 4.

<sup>3</sup> See, for instance, J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford 1999), especially chs 2 and 10; R Ekins, 'Acts of Parliament and the Parliament Acts', (2007) LQR 91.

<sup>4</sup> H L A Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford 1994), chs 5 and 6.

<sup>5</sup> *Ibid*, esp. chs 4 and 5.

validity in a state or constitution flow from a normative standard which is logically *prior* to those powers. Far from supporting a theory of an all-powerful sovereign then, Hart suggests that the extent of the powers of any institution will depend on the content of this normative standard.

In the last chapter, I argued that Hart takes us only so far with this powerful insight. The normative standard at the base of the constitution cannot be a morally neutral, empirically determined rule as Hart himself supposed. Such an account fails to capture the sense in which judges, lawyers and academics advance competing arguments of political morality by way of *justification* for the powers of Parliament, government and courts. The normative standard at the base of the British constitution, I suggested, is best understood as the principle of *legality*, otherwise referred to as *the rule of law*.<sup>6</sup> It is this principle that determines the powers of Parliament and courts; and it is this principle that determines the grounds of legal validity – or the test by which we identify *the law* – in a state or constitution.<sup>7</sup> In this way, the principle of legality, I suggested, will control or shape the way in which we conceive of other political principles such as the separation of powers and individual rights: it is hardly possible to theorise about the powers of Parliament and the grounds of legal validity without theorising at the same time about such things as the proper role of judges and the nature of individual human rights.

While the conclusion that the British constitution rests on the principle of legality may help to move British constitutional theory away from philosophically obsolete debates about Parliamentary sovereignty, this conclusion admittedly presents a new set of questions. What does it mean to say that the principle of legality *determines* the powers of institutions and the grounds of legal validity? And in what sense does the principle of legality shape our understanding of other political principles such as the separation of powers? Towards the end of the previous chapter, I offered an outline response to these questions. The powers of institutions, the grounds of legal validity, and our

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<sup>6</sup> I will use these terms interchangeably throughout this chapter. Some theorists do make a distinction however, in so far as they take the term ‘legality’ to denote a *formal* conception of the rule of law, and the term ‘rule of law’ itself, to denote a *substantive* conception. See, for example, C Gearty, *Principles of Human Rights Adjudication* (Oxford, Oxford University Press, 2004); T.R.S. Allan, ‘The Rule of Law as the Rule of Reason: Consent and Constitutionalism’ (1999) 115 LQR 221, 243. For a critique of the formal/substantive distinction, see part I below.

<sup>7</sup> See R Dworkin, *Justice in Robes*, (Harvard University Press, Cambridge, Massachusetts 2006), 13.

understanding of other political principles, I suggested, must depend on the *value* that we find in the ideal of officials acting *in accordance with law*.<sup>8</sup>

I now want to develop that response and examine in more detail the types of arguments that will help us to understand the principle of legality (and its relationship to other political principles). In part 1, I shall elaborate the sense in which judges, lawyers and citizens *disagree* about the meaning of the principle of legality. Such disagreements, I will say, necessarily imply a background of *agreement* about roughly what this principle refers to. When judges, lawyers and citizens refer to the principle of legality, we must suppose that they possess a shared understanding of the abstract *point* or *purpose* of legality. Disagreement about the meaning of legality, I will suggest, is a disagreement about which value(s) *justifies* this abstract point or purpose. In order to bring out the nature and importance of this type of disagreement, I shall offer a critique of the traditional debate in English public law on the question of whether legality is a *formal*, *procedural* or *substantive* ideal. In my view, this debate suffers from three shortcomings. In the first place, it fails to take cognizance of the sense in which judges and lawyers disagree about the *same concept* of legality. Secondly, it assumes a problematic distinction in political morality between questions of form and substance. Finally, it fails to connect the legality debate with the day-to-day arguments of judges, lawyers and citizens.

In part two, I shall attempt to clear the way of two arguments which threaten to pre-empt the approach to disagreement that I have just described. The first argument broadly represents the position of so-called ‘descriptive’ positivists: it denies that there is any necessary connection between legality and morality. It is mistaken, according to this argument, to suggest that the concept of legality does have a distinctive *value*. The second argument seeks to pre-empt disagreement about the meaning of legality in a very different way. This argument accepts that the meaning of the principle of legality does depend on an understanding of its underlying value, but it maintains, for *epistemological* reasons, that this value can *only* be a formal or procedural ideal; it can have nothing to say about the substance of the law.

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<sup>8</sup> See chapter 1, part 4.

Finally, in part three, I shall develop the two conceptions of legality (and the theory of adjudication that each conception recommends) outlined in chapter 1. The first conception holds that the principle of legality is justified by values such as *certainty* and *predictability*. I will argue that this conception, while familiar and intuitively appealing to English lawyers, fails to justify the abstract point or purpose of the political ideal of legality. The second conception is one that recognises the value of *integrity* or *equality before the law* (properly understood). This second conception, I will say, provides the most morally compelling account of legality and adjudication, and it is by reference to this account that we should seek to identify the truth conditions of particular propositions of English law.

### **1. Disagreement about the Meaning of Legality**

References to the principle of legality or the rule of law are a familiar part of everyday life. Judges, politicians, journalists and civil libertarians may speak of there being an ‘affront to the rule of law’ when they wish to criticize an instance of heavy handed policing, or a particular policy of the Government, or a piece of legislation, or an oppressive regime overseas. On the other hand, they may speak of the ‘vindication of the rule of law’, or a ‘proud day for the rule of law’ when somebody is successfully prosecuted for a crime, or when the decision of a Government minister is quashed by the High Court, or when the Government fails in its bid to push through some particularly illiberal legislative proposal. As often as not, these references to the rule of law are accompanied by references to other political principles. The rule of law is sometimes said to be the hallmark of a democratic state (and the antithesis of a dictatorship), and a necessary precondition for liberty and human rights. Indeed, the rule of law often seems to operate as shorthand for the many political ideals that figure in the political morality of a state.

Whether or not we are able to articulate precisely what such references to the rule of law mean, and whether we agree or disagree with any particular appeal to the rule of law, there is a sense in which we must all share (albeit implicitly) a common view about

roughly what the principle of the rule of law refers to. This is to say that we must agree on some abstract level, about the *point* or *purpose* of this principle as an ideal. It would be hopeless if one theorist took the concept of legality to refer, say, to the laws of physics, or to the alignment of the stars, if another took the concept to refer to the laws that concern courts and legislatures. This type of exchange could not be characterised as a *disagreement* about the concept of legality; it would simply be two people talking past each other.<sup>9</sup>

In the last chapter, I suggested that when we refer to the rule of law, we are referring roughly to the ideal that government or officials act *in accordance with law*. Thus, if a Police Commissioner prohibits a public demonstration, or a Minister approves the construction of a new airport terminal, we might object to these decisions on the grounds that these decision-makers had *no lawful authority* to act in that way. And we may praise the decision of the High court to quash each respective decision for the reason that this *gives effect to the law*. Many theorists throughout history have distinguished a political system in which officials act in accordance with law from one in which officials exercise power *arbitrarily* or at their *pleasure* or *discretion*.<sup>10</sup> As far back as ancient Greece, Aristotle wrote:

‘He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast.’<sup>11</sup>

And John Locke famously said:

‘Wherever law ends, tyranny begins, if the Law be transgressed to another’s harm.’<sup>12</sup>

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<sup>9</sup> See, generally, R Dworkin, *Law’s Empire* (Harvard University Press, Cambridge, Massachusetts 1986) ch 1; *Justice in Robes* above (n 7) ch 1.

<sup>10</sup> See for instance, Dicey, A.V. *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982 [reprint of 8th edn, 1915], 110.

<sup>11</sup> *Politics*, III, 16, 146. For an excellent survey of historic theories of legality, see M Loughlin, *Sword & Scales*, (Oxford, 2000), ch. 5.

<sup>12</sup> J Locke, Peter Laslett (ed.), *Two Treatises of Government* (Cambridge University Press, Cambridge 2003), Second Treatise, ch XI, para. 202.

These are powerful claims, but such claims often leave unanswered an important question: *on what basis* can it be said that an official has acted in accordance with law (and not acted at their own pleasure)? To put this differently, what *makes it the case* that an official has acted in accordance with law?

English lawyers might be tempted to answer this question in the following way: an official acts in accordance with law when that official can point to a recognised *source* of law – principally statute law, common law or the royal prerogative – before they exercise power. As Lord Coke put it in *Entick v Carrington* (a case which is often said to represent the high watermark of the ideal of government under law): ‘if it is law, it will be found in our books. If it is not to be found there, it is not law’.<sup>13</sup> This is too quick though. While judges, lawyers and academics may all agree that the past decisions or enactments of Parliament, Government and Courts confer powers, and generate legal rights and duties, they disagree deeply about *why* this is so, and they disagree about *when* it is the case that such powers, rights and duties have been generated. They disagree, for instance, about what Parliament has to do in order to enact a valid Act of Parliament; and they disagree about how to interpret statutes, and how to apply common law precedents.<sup>14</sup> The meaning of the phrase ‘in accordance with law’ will therefore depend on what position a judge takes on these types of questions.

We are in need of a more focussed statement of the abstract principle of legality, one which identifies the points on which theorists of legality agree – their shared assumptions about the point or purpose of legality – and those on which they disagree. Dworkin helpfully suggests the following formulation:

‘Legality is engaged, we might say, when political officials deploy the state’s coercive power directly against particular persons or bodies or groups... Legality insists that such power be exercised only in accordance with standards established in the right way before that exercise.’<sup>15</sup>

Adopting this formulation, most theorists agree, we may suppose, that the principle of legality is a *political* ideal in the sense that it concerns the exercise of *state* power against

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<sup>13</sup> (1765) 19 Howell’s State Trials 1030.

<sup>14</sup> See ch 1, part 2.

<sup>15</sup> Dworkin, *Justice in Robes*, above (n 7), 169.



particular persons or bodies or groups.<sup>16</sup> They recognise too that legality concerns the exercise of *coercive* state power (as opposed, say, to the power of the state to advise or warn its citizens). Finally, they recognise, crucially, that legality concerns certain standards that have been established *in advance of* the exercise of power. It is in this sense that official action is guided by the rule of *law* and not the rule of *men* (or the beast!).<sup>17</sup> Against this background of *agreement*, we can now see more clearly the basis of *disagreement* about the principle of legality: theorists disagree about which types of standards, established in which way, count as *legal* standards.<sup>18</sup> For example, some judges treat the *intentions of Parliament* as the relevant standards; others treat the *literal meaning of words* in a statute as the relevant standards; others treat widely accepted *rules* as the relevant standards; others treat *certain principles of political morality* as the relevant standards.<sup>19</sup>

Now, assuming that there is an *objectively correct* understanding of the concept of legality (an understanding which reflects the *true* basis of legal rights and duties),<sup>20</sup> we need some way of appraising different responses to the question of which standards, established in which way, count as legal standards. Why, that is, should a theory of legality based, say, on Parliamentary intentions, or on the literal meaning of words fail where a theory based on particular principles of political morality succeeds? And what

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<sup>16</sup> It should be emphasized that the different propositions within Dworkin's formulation are not intended to represent *conceptual truths* about the meaning of the concept of legality. They are merely a starting point from which to launch moral disagreement about the meaning of the concept. For an interesting example of a potential misreading of Dworkin on this point, see J Gardner, 'Law's Aims in *Law's Empire*' in S Hershovitz (ed.) *Exploring Law's Empire* (Oxford University Press, 2006).

<sup>17</sup> Cf. Bellamy, who argues that the rule of law must ultimately mean the rule of *men* (legislators). Bellamy distinguishes the rule of *law* (made by legislators), from the rule *by law* (where legislators themselves are bound by certain legal standards). See R Bellamy (ed.), *The Rule of Law and the Separation of Powers*, 'Introduction: the Rule of Law as the Rule of Persons' (Ashgate Publishing, Aldershot, Hampshire 2005). This type of approach, I suggested in chapter 1, springs from the legal theories of such 'command' theorists as Austin, Bentham and Hobbes. See chapter 1, part 1.

<sup>18</sup> See R Dworkin, *Justice in Robes* above (above) n 7. Dworkin describes political concepts such as 'legality' and 'democracy' as *interpretive* concepts. See R Dworkin, *Law's Empire* above (n 9) chs 2 and 3. For a contrasting account of disagreement about political concepts, see J Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21 *Law and Philosophy* 137.

<sup>19</sup> See, generally, chapter 3 (above).

<sup>20</sup> I will assume although I will not spend any time defending the position that disagreement about a concept or practice presupposes the existence of a *correct* understanding of that concept or practice. For a sample of the vast literature on this issue, see B Williams, *Morality, An Introduction to Ethics* (Canto, 1993); R Dworkin 'Law and Indeterminacy' in Guest (ed.), *Positivism Today*; 'Objectivity and Truth: You'd Better Believe it' *Philosophy and Public Affairs*, Vol. 25, No. 2 (Spring, 1996), 87-139; N Stavropoulos, 'Objectivity in law' (Clarendon Press, Oxford 1996).

do the terms ‘succeed’ and ‘fail’ denote in this context? Here, I think, is the key to answering these questions. Given that there can be no empirically determinable test as to which standards count as legal standards (for the reasons I offered in chapter 1),<sup>21</sup> each different theory must be understood as a set of interlocking arguments of political morality about which *value* or *principle* provides the *best justification* for the practice of officials exercising power in accordance with standards established before that exercise. To put this differently, each different theory must be understood as a moral *conception* of the abstract concept of legality.<sup>22</sup> Let us think about how we might construct such a conception.

First, we must propose some putative *value* or *principle* for each different theory. For instance, we might say that a theory which takes the relevant standards to be the intentions of Parliament rests on the principle of (majoritarian) democracy, or on the value of fairness; and a theory which takes the relevant standards to be the literal meaning of words arguably rests on the values of certainty and predictability. Importantly, the value we attribute to a given theory must in fact be capable of justifying the standards we associate with the theory. If the principle of democracy (properly understood) means that the will of Parliament should not always determine the existence of legal rights and duties (because fundamental rights should sometimes supersede Parliament’s will), then there would clearly be a disjunction between the justifying principle and the standards that are supposed to instantiate the principle.<sup>23</sup> Equally, if it not possible to ascertain a single ‘literal’ meaning of words in a statute (for the reason that people *disagree* about the meaning of words), then the values of certainty or predictability could not justify a theory based on these standards.<sup>24</sup>

Secondly, having imposed some value on a given theory of legality, we need to consider whether that value – and the standards which embody that value – is capable of making sense of our suggested central point or purpose of legality. For instance, if we take the

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<sup>21</sup> See, ch. 1, part 3. See also part 2A below.

<sup>22</sup> For the distinction between a concept and a conception of a concept, see R Dworkin, *Law’s Empire* above (n 9) 71-2.

<sup>23</sup> See ch. 3, part 1.

<sup>24</sup> See R Dworkin, *Law’s Empire* above (n 9) ch, 1.

relevant standards to be ‘the requirements of justice’, then we would have to ask whether the distinctive value in officials exercising power in accordance with standards established in the right way before that exercise is to ensure *just* outcomes. It might be argued in the negative that judgments about justice are *forward looking*, in which case this conception of legality would fail to capture the virtue in officials exercising power according to standards established *in advance* of that exercise.<sup>25</sup>

At this second stage, the *facts* of legal practice are particularly important. Our ultimate objective is to understand the grounds on which propositions of law within the *English* legal system are true or valid. For this reason, a theory of legality must be capable of explaining and justifying the salient features of English legal practice.<sup>26</sup> For instance, a theory must be able to explain the fact that it is a *Parliament* which enacts legislation, and that it is *courts* which make common law decisions; in this case, the theory must include some account of how to interpret statutes, and it must include an account of the doctrine of *precedent* or *stare decisis*. Finally, the theory must be able to account for the fact that judges, lawyers and citizens frequently *disagree* about legal rights and duties. In particular, the theory must explain how, notwithstanding such disagreements, it can be said the judges apply legal standards established in *past* decisions to decide *present* cases.

#### A. Formal and Substantive Conceptions of Legality

Before considering two potential challenges to the general argumentative framework described above, I first want to emphasize certain aspects of this framework by way of a critique of the debate in English public law about the meaning of the principle of legality. English public lawyers have theorised about the principle of legality in terms of whether legality is a *formal* or *substantive* ideal (where the term ‘formal’ is sometimes taken to

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<sup>25</sup> See part 3 (below).

<sup>26</sup> See, further, chapter 3 (above) 9-10. For two excellent accounts of the relationship between facts about legal practice and normative justifications for the concept of legality see N Stavropoulos, ‘Interpretivist Theories of Law’ in the *Stanford Encyclopedia of Philosophy*. Available at <http://plato.stanford.edu/entries/law-interpretivist/>; Mark Greenberg ‘How Facts make Law’ *Legal Theory* Vol. 10, 157-198 (2004).

embrace both formal and *procedural* conceptions of legality).<sup>27</sup> Craig helpfully summarises this distinction in the following passage:

Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm. (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met. Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between 'good' laws, which comply with such rights, and 'bad' laws which do not.<sup>28</sup>

Both formal and substantive conceptions of the principle of legality seek to provide answers to the questions posed above. Each conception tells us which types of standards, established in which way, count as *legal* standards. There are three potential difficulties with the terms of the formal/substantive debate though, each of which, I think will help us to appreciate more clearly the argumentative approach that I have recommended above.

The first difficulty with the formal/substantive debate, in my view, is that it fails to give the sense in which judges, lawyers and academics *disagree* about how best to understand the political ideal of legality. The legality debate, as described by Craig above and in the remainder of his article, has the feel of a mechanical exercise in pigeonholing different theorists into either one slot or the other. Dicey, Raz and Unger are said to be formal rule of law theorists, while Dworkin, Sir John Laws and Trevor Allan are said to be substantive rule of law theorists.<sup>29</sup> When presented in this way, one

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<sup>27</sup> For a helpful discussion, see P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) P.L 467-87. The leading *proceduralist* account is that offered by Jeremy Waldron. See Waldron, 'The Rule of Law as a Theatre of Debate' in Justine Burley (ed.) *Dworkin and his Critics with replies by Dworkin*. I discuss Waldron's theory in part 2 (below) and in chapter 4.

<sup>28</sup> Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' above (n 27) 467.

<sup>29</sup> *Ibid* at 470-7

is left with the impression that the legality debate is entirely polarized and rather futile.<sup>30</sup> Indeed, some theorists have even implied that these two sets of theorists are talking about *different* concepts: where the former set of theorists advances a theory of *legality*, the latter set advances a theory of the *rule of law*.<sup>31</sup>

I have tried to emphasise above that different theorists of legality offer competing justifications of the *same shared concept*. Each theorist is attempting to offer the most morally compelling account of the ideal that the power of officials be exercised only in accordance with standards established in the right way before that exercise. Moreover, different theorists set out to demonstrate that their account is somehow *better* than rival accounts.<sup>32</sup> Those theorists who argue, for instance, that the principle of legality must be insulated from other political ideals presumably think that our understanding of legality would be *poorer* if were we to assimilate this principle to those other ideals. And those theorists who argue that the principle of legality implies certain substantive rights presumably have something to say about the supposed deficiencies of an account that denies that thesis. Once again, the measure of success of any particular conception of legality is its ability to justify the central ideal of that principle. As we shall see in part 3 below, it must be considered a failing for a theory of legality if, for instance, that theory implies that officials generally do not exercise power in accordance with standards established *before* that exercise.

The second difficulty with the formal/substantive debate, in my view, is its central premise: that there is a sharp distinction in political morality between questions of form and substance.<sup>33</sup> This distinction, it is suggested, is illusory. A theorist who argues that laws must be clear, certain and predictable – the types of values which Craig associates with a formal conception of legality – will necessarily be committed to some background story about *why* laws should reflect these values. Some theorists may argue, as Craig

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<sup>30</sup> A theorist who is sceptical of there being an objectively correct meaning to the concept of legality may purposefully present the debate in this way. As if to lay the ground for this view, Craig notes that ‘There are 1,076 entries to the ‘rule of law’ in the list of periodicals. This is the tip of the iceberg: the figure can be multiplied twenty-fold if one includes literature on individual aspects of doctrine, or particular constitutional rights...’ See P.P. Craig, ‘Legislative Intent and Legislative Supremacy: A Reply to Professor Allan’ (2004) 24 OJLS 585.

<sup>31</sup> See above (n 4).

<sup>32</sup> See above (n 20).

<sup>33</sup> I will explore an argument in part 2 (below) which denies this claim.

points out, that these values promote the deeper value of *autonomy* or *freedom*<sup>34</sup> in that people can ‘plan their lives’. Other theorists may argue that the values of certainty and predictability are instrumental to certain goals such as *efficiency*<sup>35</sup> or *co-ordination*.<sup>36</sup> There is no plausible sense then in which ‘formal’ values such as clarity, certainty and predictability can be completely separated from deeper ‘substantive’ political and ethical ideals.<sup>37</sup> This can be no more clearly illustrated than in the work of John Finnis who offers a philosophically rich story about *why* laws must be predictable. Those in power, Finnis says, have a duty to further the ‘common good’ of human flourishing (derived from the requirements of practical reasonableness) through the institution of law (and all other human institutions).<sup>38</sup> A legal order exists in order to ‘shap[e], suppor[t], and further[r] patterns of co-ordination...’<sup>39</sup> Such co-ordination is achieved by rules, procedures and understandings which are designed to secure the predictability *necessary for individuals to flourish*. It is in this way that law serves the common good.

The final difficulty with the formal/substantive rule of law debate is its failure to connect with the day-to-day arguments of judges, lawyers and citizens. The formal/substantive debate tend to focus either on extreme hypothetical cases – such as whether the Nazi ‘legal system’ created valid laws<sup>40</sup> – or on the most controversial

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<sup>34</sup> We see the connection between ‘formal’ values and deeper substantive values reflected in the following oft-cited passage from Maitland: ‘known general laws, however bad, interfere less with freedom than decisions based on no previously known rule.’ Maitland, *Collected Papers* (1911) i. 81.

<sup>35</sup> This is the type of value associated with utilitarianism or the economic analysis of law. See, for instance, Posner, Richard A. [1973] *Economic Analysis of Law*, Boston: Little Brown (1<sup>st</sup> edition)

<sup>36</sup> See J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press 1980), X.

<sup>37</sup> As Allan puts it: ‘nor can substantive and procedural fairness be easily distinguished: each is premised on respect for the dignity of the individual person...’ See T R S Allan, *Law, Liberty and Justice* (Oxford, Clarendon Press 1993) 21; *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2003) 20. This is not to say though that every theory of legality must be committed to the values of clarity, certainty and predictability. Craig suggests that ‘substantive’ rule of law theorists ‘accept that the rule of law has...formal attributes [such as clarity, certainty and predictability], but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law’. Craig, above (n 27) 467. We will in part 3 (below) though that the theory of legality espoused by Ronald Dworkin – which Craig treats as the paradigm of a substantive theory of legality – rejects values such as certainty and predictability as justifications for the ideal of legality.

<sup>38</sup> J Finnis above (n 36) IX.4 and XII.

<sup>39</sup> *Ibid* at X. 3, 267.

<sup>40</sup> The famous exchange between Hart and Fuller Hart revolved around this question. See H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harv. L. Rev. 593-629; L Fuller, ‘Positivism and Fidelity to Law – a Reply to Professor Hart’ (1958) 71 Harv. L. Rev. 630-672.

Parliamentary or Governmental action of the day.<sup>41</sup> In my view, this focal point for debate tends to detract from the way in which a theory of legality underpins the *whole* of our legal practice, ranging from the most important constitutional cases down to the most mundane traffic offences.<sup>42</sup> Whenever a judge makes a decision, her decision (if true or valid)<sup>43</sup> is true or valid in virtue of a general theory of what makes *any* proposition of law true or valid; and whenever a lawyer is asked by their client to advise them on their respective rights and duties, the advice the lawyer gives will necessarily be based on some general background theory about how to work out what the law is on the point in question. There is a direct connection then between a general theory of legality and the question of what *the* law is on any given issue. Dworkin captures this connection in the following passage:

‘Conceptions of legality differ...about what kinds of standards are sufficient to satisfy legality and in what way these standards must be established in advance; claims of law are claims about which types of standards of the right sort have in fact been established in the right way. A conception of legality is therefore a general account of how to decide which particular claims of law are true’<sup>44</sup>

In the next chapter, I will focus explicitly on the way in which different abstract theories of legality help us to understand concrete propositions of English administrative law

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<sup>41</sup> The concept of the rule of law tends to be invoked, in particular, in debates about the extent to which individual liberties (e.g. against detention without trial) should be sacrificed for greater collective security. Indeed, there is a sense in which academic debate about the rule of law is concerned primarily with the question of whether Parliament or government can *abandon* the rule of law in extreme circumstances. See, for instance, D Dyzenhaus, *The Constitution of Law, Legality in a Time of Emergency*, (Cambridge University Press, 2006); Lord Steyn, ‘Guantanamo Bay: The Legal Black Hole’, (2004) 53 *International and Comparative Law Quarterly*, 1-15.

<sup>42</sup> Increasingly, judges and lawyers have been forced to address the question of legality in a very direct way. This is seen most clearly in adjudication under the European Convention on Human Rights (ECHR) – and now the Human Rights Act 1998. Under Articles 8-11 of the ECHR the court (whether international or domestic) must determine whether an interference with one of these rights by a state (or public authority) was ‘in accordance with law’ (see, for example, art 8(2)) or ‘prescribed by law’ (see, for example, Art. 9(2), 10(2) and 11(2)). These provisions effectively require courts to enter into the question of which types of standards, established in which way, count as legal standards in the British constitution. See *Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A, No. 30: (1979-80) 2 EHRR 245; *Malone v. United Kingdom*, Judgment of 2 August 1984, Series A, No. 82; (1985) 21 EHRR 14. For a detailed analysis of the relevant case law under the ECHR see Jacobs & White, *European Convention on Human Rights*, 3<sup>rd</sup> edition, Oxford 2002, pp 201-204.

<sup>43</sup> As I will explain below and in subsequent chapters, the law is not necessarily what judges say or think it is. It may be that a judge is mistaken about what the law requires. See R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 118-123. See chapter 3, part 1C (above).

<sup>44</sup> See R Dworkin, *Justice in Robes* above (n 7) 170.

(and, at the same time, help us to understand the models of adjudication that different theories of legality recommend).

## 2. Two Threshold Objections

I have so far been attempting to describe the types of arguments that will help us to understand the political ideal of legality. It may help briefly to summarise what I have been saying. I have suggested that all theorists of legality – judges, lawyers, academics and citizens – share the same concept of legality: all theorists implicitly accept when they refer to the ideal of legality that this principle refers, in its most abstract form, to the ideal that officials should only be able to exercise power in accordance with standards that have been established in the right way before that exercise. Theorists of legality disagree deeply though about what these standards should be; and they disagree about how these standards should be established. These disagreements, I have suggested, revolve around the *value* or *principle* that any theorist takes to justify the central point of legality. It is in this sense that theorists of legality construct competing *justifications* for, or *conceptions* of, the same concept of legality. These different conceptions of legality, I have suggested, cannot be neatly divided into ‘substantive’ and ‘formal’ conceptions. Amongst several shortcomings with such a distinction, it is not possible to draw a sharp distinction in political morality between form and substance.

I now want to clear the way of two threshold objections to the idea that theorists of legality disagree about the *value* of the political ideal of legality. The first objection will take us back to the discussion in the previous chapter about Herbert Hart’s ‘rule of recognition’. It is the objection made by many legal positivists that the identification of the types of standards that count as legal standards in a state or constitution is a *morally neutral* and *descriptive* exercise rather than an evaluative one. Call this the *moral neutrality* objection. The second objection seeks to pre-empt the legality debate in a quite different way. This objection accepts that the political ideal of legality must be justified according to some value, but it contends that this value can only be *formal* or *procedural* in character. A conception of legality which makes the validity of law dependant on certain *substantive* moral rights, the objection holds, is unworkable given



that there is no way of *knowing* whether a particular law does capture those rights. Call this the *epistemic* objection. I shall now consider each of these objections in turn.

### A. The Moral Neutrality Objection

The moral neutrality objection may be stated very succinctly: if (‘analytic’ or ‘descriptive’) legal positivism is true, then the account of disagreement about legality that I have offered in section 1 above is false. Legal positivists are united in arguing that the validity of law depends on its sources, not its merits.<sup>45</sup> We saw in the last chapter that the leading version of this theory is that offered by Herbert Hart who tells us that the criteria of legal validity (and political power) in a state or constitution can only be identified by describing *as a morally neutral, empirically determined fact* the common standards of official behaviour that most officials accept. These common standards of official behaviour constitute the ‘rule of recognition’ in that state or constitution. According to the moral neutrality objection then, the identification of the criteria of legal validity in a given state or constitution is an exercise which is entirely distinct from questions of political morality, including questions about the *value* in officials exercising power in accordance with standards established in the right way before that exercise.<sup>46</sup>

In the previous chapter, I argued by reference to the decision in *Jackson*<sup>47</sup> that it is not possible to *describe* empirically a set of standards, accepted by most officials, which constitute a normative rule about the grounds of legal validity and the power of institutions.<sup>48</sup> An understanding of the concept of legality, I argued, inescapably demands arguments of political morality about the *value* of legality. It may now be useful to revisit the central argument in support of that position, an argument to which we will return to in part 3 (below). In short, descriptive legal positivism cannot adequately

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<sup>45</sup> For a witty and informative account of the different ways in which theorists supposedly misrepresent legal positivism, see J Gardner ‘Legal Positivism: 5½ Myths’, 46 Am. J. Juris. 199 (2001).

<sup>46</sup> For a robust defence of this distinction, see M Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007). Endicott has gone further in suggesting that different versions of legal positivism are altogether unable to accommodate the ideal of the rule of law (for the reason that judicial decisions will often involve a quasi-legislative role in which a ‘new’ legal rule is applied *retroactively* to the case at the bar). See T Endicott, ‘The Impossibility of the Rule of Law’ (1999) 19 OJLS 1-18. See further part 3 (below).

<sup>47</sup> *Jackson v Her Majesty’s Attorney-General* [2005] UKHL 56.

<sup>48</sup> See chapter 1, part 3.

account for the way in which judges, lawyers and citizens routinely *disagree* as a matter of political morality about the grounds of legal validity and political power. They disagree, for instance, about the meaning of the concept of ‘Parliament’; the required ‘manner and form’ of legislation; the meaning of legislation enacted by Parliament; and the question of whether certain things lie altogether beyond the legislative competence of Parliament.

Hartian positivists, I said, have employed two strategies in an attempt to explain away these disagreements. The first strategy is to treat such disagreements as falling within a ‘penumbra of uncertainty’ around a core of agreement about the grounds of legal validity and political power (which core of agreement constitutes *the rule*).<sup>49</sup> I tried to show in chapter 1 through an analysis of the judgments in *Jackson* that this strategy cannot succeed: there simply is no underlying core of acceptance around which judges, officials and lawyers disagree; their disagreements go all the way down to the deepest convictions in political morality of these different constitutional actors. If there is no core of agreement, then there can be *no rule*.<sup>50</sup> The second strategy is to concede that judges and other constitutional actors draw upon principles of political morality in the way just described, but to contend that these different principles can all be captured *by the rule*.<sup>51</sup> This second strategy fails, I argued, on the basis that it will never be possible to enumerate the many different principles, and their shifting dimension of weight and intensity, which figure in legal argument.<sup>52</sup>

Far from pre-empting the type of disagreement that I have described in part 1 above, the theory espoused by Hart, I suggested in chapter one, must be seen as *part of* that disagreement. This is to say that Hart’s theory of primary and secondary rules itself must be taken to represent a morally engaged *conception* of legality, one that takes the grounds of law and the powers of institutions to be determined by values such as *certainty* and *predictability* (I will examine this conception of legality in detail in part 3 below). It is in this sense that the ‘moral neutrality’ objection, as I have described it, is

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<sup>49</sup> See H.L.A. Hart, *The Concept of Law* above (n 2) at 123, 147-54 and 251.

<sup>50</sup> Jules Coleman has attempted to meet this objection by formulating the Hartian rule in the most abstract terms. See J Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory*, (Oxford, Oxford University Press 2001). For a devastating review of Coleman’s argument, see R Dworkin, ‘Thirty Years On’ (Book Review) *Harvard Law Review*, Vol. 115, No. 6 (Apr., 2002), 1655-1687

<sup>51</sup> This manoeuvre gives rise to the idea of so-called ‘soft’ positivism.

<sup>52</sup> See R Dworkin, *Taking Rights Seriously* above (n 43) Model of Rules I and II.

unfounded. Before leaving this objection behind though, it is worth pausing to note the connection between the positivist/anti-positivist debate and the formal/substantive legality debate discussed above. In his summary of the formal/substantive debate, Craig tells us that

'Formal conceptions of the rule of law do not...seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met... [according to] substantive conceptions of the rule of law [c]ertain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between 'good' laws, which comply with such rights, and 'bad' laws which do not.'<sup>53</sup>

There is a sense, I think, in which both 'formal' and 'substantive' theories of legality (at least as described by Craig) reflect the (descriptive) positivist view of legality just described (which, when taken on its own terms, is not a *conception* of legality at all). It is only if we accept that the grounds of legal validity may be determined without recourse to questions of political morality that it makes sense to speak of judging 'the actual content of the law itself' and to speak of 'good' and 'bad' laws. If we adopt the anti-positivist position, then the very identification of law is inextricably bound up with moral judgments: in this case, there is no 'actual law' which can be identified independently of those moral judgments.<sup>54</sup> To put this point differently, questions such as 'is law distinct from morality?' or 'is law 'good' law', arguably already have built into them the positivist premise that law and morality are distinct.

## B. The Epistemic Objection

Jeremy Waldron has articulated what he describes as a 'proceduralist' theory of legality. As he puts it:

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<sup>53</sup> Craig above (n 17) 467.

<sup>54</sup> This point requires some clarification however. It is still intelligible for an anti-positivist to say of a particular legal right or duty that the law is *unjust* (and, in this sense 'bad'), or that it is *just* (and in this sense 'good'). As I will contend in part 3 (below) and in chapter 5 (above), the principle of legality occupies a part of political morality which is distinct from (ideal) justice.

‘A society is ruled by law in [the proceduralist] sense when power is not exercised arbitrarily, but only pursuant to intelligent and open exercises of public reason in institutions and forums set up for that purpose...’<sup>55</sup>

The value of legality on this account is something like *fair decision-making*. It is more important, Waldron suggests, that officials exercise power according to standards that have been established through fair decision-making procedures than it is to ensure that those standards reflect the true moral rights of individuals on some theory of justice.<sup>56</sup> Of particular interest for present purposes is a secondary argument with which Waldron seeks to buttress his defence of the proceduralist account. This argument may be stated as follows: given the impossibility of *knowing* whether or not a particular exercise of official power captures the legal rights and duties of individuals (according to some theory of justice), we can *only* assess such a decision by reference to the procedures by which the decision is made.<sup>57</sup> To put this differently, if it is not possible to demonstrate the true legal rights of individuals, then it is better (or even unavoidable) to focus on a theory of decision-making. This secondary defence of the proceduralist account of legality is based, not on arguments of political morality, but on an argument of *epistemology*.

Waldron summons support for this position from an unlikely source in the work of Ronald Dworkin.<sup>58</sup> As we shall see in part 3 (below), central to Dworkin’s theory of legality as integrity is the idea that a fictitious judge, Hercules, decides legal cases according to the scheme of principle that best justifies the past political decisions in a given community.<sup>59</sup> Where theorists such as Hart have argued that many questions of law – those on which there is no consensus amongst judges – are *indeterminate*, Dworkin contends that there are objectively correct answers to all questions of law (the ‘right

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<sup>55</sup> See J Waldron, ‘The Rule of Law as a Theatre of Debate’ above (n 27).

<sup>56</sup> For a fuller consideration of Waldron’s views, see ch. 4.

<sup>57</sup> The epistemic objection as I have called it is not a *sceptical* or anti-realist objection about the non-existence of right answers to questions of morality. See Waldron, *Law and Disagreement* (Oxford University Press, 1999) ch. 8.

<sup>58</sup> Waldron focuses, in particular, on the Dworkin’s argument that a state should be committed to the institutionalisation of the background *moral* rights of individuals. See, in particular, R Dworkin, *A Matter of Principle* (Harvard University Press, 1985), ch. 1.

<sup>59</sup> See R Dworkin, *Law’s Empire* above (n 9) chs 6 and 7

answer' thesis).<sup>60</sup> For this reason, Waldron suggests, Dworkin is commonly interpreted as 'us[ing] the idea of objective rights answers...to subvert conceptions of the rule of law orientated towards settlement, predictability, and determinacy'.<sup>61</sup> Waldron interprets Dworkin differently though. Given that it is not possible to demonstrate whether a judge has identified the true moral rights of individuals, Dworkin, Waldron suggests, is forced to privilege questions of procedure (who should make decisions) over questions of substance or outcomes (which decision would constitute the *correct* decision).<sup>62</sup> In this case, Waldron's argument runs, Dworkin has met the positivist ('rule-book') argument mainly by reference to *proceduralist* points rather than *objectivist* points.<sup>63</sup>

In my view, the proceduralist account of legality rests on two false assumptions which sit one on top of the other. The first assumption is one that I have already taken issue with above, namely that there is a clear distinction in political morality between questions of form, procedure and substance.<sup>64</sup> It is not possible, in my view, to isolate the ideal of fair decision-making and democracy from other (substantive) political principles such as equality and individual rights. The ideal of fair-decision making *presupposes* certain substantive rights which enable people to participate in political decision-making under conditions of fairness.<sup>65</sup>

The second assumption – which forms the basis of the epistemic objection itself – is that the question of whether a particular *procedure* is fair or just can be answered without controversy, but that the question of whether a given *outcome* reflects the true legal rights of an individual on some theory of justice is a controversial question of political morality which lies beyond our knowledge. There are at least two responses to this type of assumption or argument. First, the question of what counts as a fair procedure is *itself* a controversial question of political morality with a right answer.<sup>66</sup>

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<sup>60</sup> This is a thesis that runs throughout Dworkin's work on legal theory. For an early account, see *A Matter of Principle* Harvard University Press, 1985) ch. 5.

<sup>61</sup> J Waldron 'The Rule of Law as the Theatre of Debate' above (n 27) 325.

<sup>62</sup> *Ibid* at 323.

<sup>63</sup> *Ibid* at 320 *et seq.*

<sup>64</sup> See part 1 (above).

<sup>65</sup> See T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2003) 26-27. See further ch 4 (below), part 1C.

<sup>66</sup> See R Dworkin 'Reply to Critics' in *Dworkin and his Critics* above (n 27) 387. See also A Kavanagh 'Participation and judicial review: a reply to Jeremy Waldron' *Law and Philosophy* 22, 451-486, 467; J

We disagree just as much (if not more) about which institution should have ultimate decision-making authority, as we do about the proper outcome of a legal dispute. Indeed, Waldron implies as much himself where he says in relation to the judicial review procedure:

‘The case for judicial review must be won or lost on the moral and political merits of the matter, on the basis of moral arguments about fairness, justice and democracy. And that is likely to be an area where there is no less disagreement...than on the merits of the substantive decision itself’<sup>67</sup>

Secondly, according to a conception of legality as integrity (which I will defend in part 3 below), the question of whether a given outcome reflects the true legal rights of an individual will depend, in part, on the ‘rights people have to particular procedures’.<sup>68</sup> In other words, we cannot disentangle the question of which rights individuals have from the question of which institutional procedures should be available for the determination of those rights.

In summary, the epistemic objection – as I have labelled it – cannot pre-empt the type of inquiry into the meaning of legality that I proposed in part 1 (above). In so far as a proceduralist account of legality can plausibly be separated from deeper substantive values (something which I have doubted above), such an account must be defended by arguments of political morality, and not by arguments of epistemology.<sup>69</sup>

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Raz, ‘Disagreement in Politics’, *American Journal of Jurisprudence* 43 (1998) 47; C Fabre, ‘The Dignity of Rights’ (2000) 20 *OJLS* 271-282, 275.

<sup>67</sup> See J Waldron, *Law and Disagreement* above (n 57) 185. John Finnis makes a similar point where, having set out eight formal requirements for the rule of law, he emphasises the implications of each formal point for the ‘qualities of institutions and processes’. See Finnis, *Natural law and natural rights* above (n 36) X, 271.

<sup>68</sup> See R Dworkin ‘Reply to Critics’ in *Dworkin and his Critics* above (n 27) 388.

<sup>69</sup> Given the force with which Waldron has argued for the ‘irrelevance of moral objectivity’ it is surprising that he should attempt to use arguments of moral objectivity to support the proceduralist account. See Waldron, *Law and Disagreement* above (n 57) ch 8.

### 3. Two Conceptions of Legality

Having spent some time confronting possible objections to the type of argumentative technique described in section 1 (above), I now want to employ this technique and develop the two conceptions of legality outlined in chapter 1.<sup>70</sup> The nature of this exercise, I hope, will by now be clear. It will involve proposing a putative value to justify the ideal of requiring officials to exercise power in accordance with standards established in the right way before that exercise. This value will inform both the nature of the standards that count as legal standards, and it will inform the way in which those standards must be established. The exercise will then involve considering which value provides the *best* justification for the principle of legality in the sense that that value offers the most morally compelling account of the abstract purpose of that principle.

#### A. The Values of Certainty and Predictability

In setting out his blueprint for the post-State of Nature Commonwealth, John Locke famously says the following about the value of legality:

‘[W]hatever Form the Common-wealth is under, the Ruling Power ought to govern by *declared and received Laws*, and not by extemporary Dictates and undetermined Resolutions...For all the power the Government has, being only for the good of the Society, as it ought not to be *Arbitrary* and at Pleasure, so it ought to be exercised by *established and promulgated Laws*: that both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds, and not to be tempted, by the Power they have in their hands, to employ it to such purposes, and by such measures, as they would not have known, and own not willingly’<sup>71</sup>

Similarly, Dicey begins his definition of the rule of law as follows:

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<sup>70</sup> The two conceptions on which I have chosen to focus by no means exhaust the different ways in which theorists have sought to explain or justify the ideal of legality but they represent what I take to be the most plausible accounts of legality.

<sup>71</sup> Above (n 12) ch XI, para. 136. Locke was writing primarily against the existing regime of rule by an all-powerful Monarch. He was careful to emphasize though that the evil in this regime lay, not in rule by a *Monarch*, but in ‘absolute Arbitrary Power [W]hatever Form the Common-wealth is under’ (my italics). This is crucial argument, I think, against those who maintain that *absolute* power passed from the King to Parliament.

In the first place, [the principle of the rule of law means] that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.<sup>72</sup>

Both Locke and Dicey seek to justify the ideal of legality in a way that will be both familiar and intuitively appealing to many English lawyers. The value in requiring officials to exercise power in accordance with standards established in the right way before that exercise, they suggest, is to enable individuals and officials to know, with reasonable certainty and predictability, their legal rights, duties and powers. As discussed earlier, different theorists offer a variety of different stories about *why* it is a good thing for laws to be certain and predictable. For Joseph Raz laws that are certain and predictable promote *efficiency* in the sense that they will ‘...be capable of guiding the behaviour of its subjects’.<sup>73</sup> Law must therefore possess a number of ‘virtues’: ‘it must be prospective, open and clear and relatively stable; and the making of particular laws should be guided by open, stable, clear and general rules.’<sup>74</sup> Finnis, by contrast, argues that the values of certainty and predictability promote *co-ordination*. In this case, law should have no ‘gaps’ such that:

‘every present practical question or co-ordination problem has, in every respect, been so ‘provided for’ by some such past juridical act or acts (if only, in some cases by provisions stipulating precisely which person or institution is now to exercise a discretion to settle the question, of defining what precise procedure is now to be followed in tackling the question’<sup>75</sup>

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<sup>72</sup> Dicey, A.V. *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982 [reprint of 8th ed., 1915], 110.

<sup>73</sup> J Raz, *The Authority of Law*, (Oxford, 1979) 226.

<sup>74</sup> Raz is careful though to distance himself from the idea that any of these ‘virtues’ of law are *moral* in character. The rule of law, he says, is purely *instrumental* to law. As he puts it: ‘Law has special virtue which is morally neutral in being neutral as to the end to which the instrument is put. It is the virtue of efficiency; the virtue of the instrument as an instrument. For law this is the rule of law. Thus the rule of law is an inherent virtue of the law, but not a moral virtue as such.’ Ibid.

<sup>75</sup> See J Finnis *Natural Law and Natural Rights* above (n 36) 269.



An important dimension to this first conception of legality is its ambition to keep law and morality distinct. To this end, both Raz and Finnis argue (for the different reasons I have described) that law should provide individuals with ‘exclusionary reasons’ to obey, in the sense that it should not be necessary for individuals to re-enter questions of morality in order to identify the demands of law.<sup>76</sup>

A number of theorists who describe themselves variously as ‘normative’, ‘ethical’ or ‘democratic’ positivists offer a different story about the value in keeping law and morality distinct. The virtue in the separation of law and morality, such theorists argue, is twofold. In the first place, it inculcates a sense of public vigilance and public participation on moral issues.<sup>77</sup> Secondly, it keeps controversial disagreements about morality away from unelected judges who lack both the legitimacy and expertise to decide such matters, a position which Sunstein helpfully describes as ‘judicial minimalism’.<sup>78</sup> As Waldron puts it, practical instances of judges making moral judgments are:

‘unsatisfactory aspects of the law to be condemned and minimized. The legal system should be reformed so that moral decision-making, by judges or officials, is eliminated as far as possible’<sup>79</sup>

Finally, Raz suggests that there would be something *lost* by merging the rule of law with more general questions of morality. As he puts it:

‘if the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function’.<sup>80</sup>

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<sup>76</sup> Cf. J Raz, *Practical Reason and Norms* (Oxford University Press, 1999), 35-48, 58-73; J Finnis, *Natural law and natural rights* above (n 36) IX.2, 233-234

<sup>77</sup> See, for instance, Liam Murphy, ‘The Political Question of the Concept of Law’ in Coleman (ed.) *Hart’s Postscript* (Oxford, Oxford University Press, 2001) at 371; T Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth Publishing, 1996).

<sup>78</sup> See C Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999) discussed in D Dyzenhaus, *The Constitution of Law, Legality in a Time of Emergency* above (n 42) ch. 1.

<sup>79</sup> J Waldron, *Law and Disagreement* above (n 57) 167. See also, H.L.A. Hart, ‘The Separation of Laws and Morals’ 71 *Harvard Law Review* 593-629 (1958).

<sup>80</sup> Raz, *The Authority of Law* above (n 73)

Let us now try to construct this first conception of legality. Which types of standards, established in which way, would best reflect the values of certainty and predictability? Locke suggests that power ought to be exercised by ‘declared and received laws’ or by ‘established and Promulgated laws’, and Dicey talks about laws that have been ‘established in the ordinary legal manner’; but neither Locke nor Dicey provide an account of which particular *standards*, established in which way, should count as legal standards for the purpose of promoting certainty and predictability. As we have seen above and in chapter 1, it is Hart to whom many constitutional theorists have turned for such an account. Hart tells us, it will be recalled, that a legal system should be understood as a system of *rules* (reflecting the particular standards of conduct accepted by most officials) which identify the law-maker(s), and which identify the ways in which laws must be made and interpreted.<sup>81</sup> Thus, as we saw in chapter 1, it might be said of the British constitution that there is a rule to the effect that Parliament exercises legislative power – expressed in terms of ‘what the Queen in Parliament enacts is law’ – and a rule that ranks statute law above judge-made law. There will also be a series of rules which tells us how Parliament must act. There will be a rule, for instance, about when it is necessary for *both* Houses of Parliament to consent to the enactment of a Bill; and there will be rules about the circumstances in which only the House of Commons need give its consent. Finally, there will be rules about how judges should interpret the text of a statute.

It is clear how this Hartian conception of legality seeks to promote values such as certainty and predictability. If it is the case that officials may only exercise power in accordance with rules which have been established by institutions and procedures which are widely recognised and accepted, then people will be able to identify for themselves which rights and duties they possess. A legal right or duty exists where there is a settled rule to that effect: where there is no such rule, there is no right or duty. At the same time, the Hartian conception seems to recommend an attractive model of adjudication. It supposes that the identification of legal rights and duties does not depend on the individual moral convictions of judges: even where judges disagree with a settled rule, it is his or her duty to respect that rule. It is only in ‘hard cases’ – cases in which there is

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<sup>81</sup> H L A Hart, *The Concept of Law* above (n 4) esp. chs 5 and 6.

no settled rule – that judges should exercise their *extra-legal* discretion and *make* law in accordance, say, with what is ‘just’ or ‘economic’, or according to the way in which the legislature *would have* decided the case.<sup>82</sup>

I suggested in section 1 (above) that a conception of legality must satisfy two levels of justification. First, the relevant standards must truly reflect the value or principle which supposedly justifies those standards. Secondly, the conception must be capable of justifying our abstract concept of legality (*viz.* that officials only exercise power in accordance with standards established before that exercise), and it must be capable of explaining and justifying the salient features of English legal practice. We are now in a position to see precisely how the Hartian story fails on both of these levels. Beginning with the second level of justification, given the characteristic place of disagreement in judicial decision-making, it follows that most judicial decisions do not represent the application of *existing* legal rules (which, on the Hartian account, depend for their existence on judicial *consensus*). To put this in terms of our abstract formulation of the concept of legality, it cannot be said that officials generally exercise power ‘in accordance with standards established before the exercise of power’; rather, they exercise power in accordance with (strong) discretionary ‘standards’ created *ex post facto* and applied retrospectively to the case in hand.<sup>83</sup> It is clear that this story defeats each of the values put forward on this first conception as justifications for the principle of legality. It supposes that the outcome of most legal cases will be determined according to standards which neither party to a lawsuit could have known or predicted which, in turn, must undermine any deeper goals of the rule-based account such as promoting efficiency or predictability.<sup>84</sup> At the same time, the rule-based conception of legality affords judges

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<sup>82</sup> *Ibid.* ch 7 and *Postscript*

<sup>83</sup> This is a crude summary of Dworkin’s original set of objections to legal positivism. See R Dworkin, *Taking Rights seriously*, (Duckworth, 1977), Model of Rules I and II.

<sup>84</sup> This is the case, *a fortiori*, for so-called ‘hard’ positivists. Joseph Raz’s legal theory arguably leads to the counterintuitive conclusion that the abstract clauses of the US constitution are not *law*. See J Raz, *Ethics in the Public Domain; Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994). For a powerful critique of Raz’s theory, See R Dworkin, ‘Thirty Years On’ (Book Review) *Harvard Law Review*, Vol. 115, No. 6 (Apr., 2002), pp. 1655-1687. Several theorists have explicitly recognized the challenge for legal positivists to account for the ideal of the rule of law. See, for example, T Endicott, ‘The Impossibility of the Rule of Law’ above (n 46); J Waldron, ‘Hart and the Principles of Legality’ (unpublished) delivered in The Legacy of H.L.A. Hart Conference, Cambridge, July 27-8, 2007.

the role of a deputy-legislator and thus undermines the value in there being ‘judicial minimalism’ on controversial matters of morality and policy.<sup>85</sup>

On the first level of justification, if it is thought that law should be certain and predictable, then we would surely conceive of the principle of legality in a way which is radically different to the Hartian conception. Rather than allow legal disputes to be settled by the retrospective application of extra-legal, discretionary standards (as the Hartian conception recommends), we would do better to stipulate that a litigant should *only* win if he or she can point to an existing, explicit rule.<sup>86</sup> And where no such rule exists, we might propose that the particular issue should be referred to the legislature for it to create an explicit rule for the future.<sup>87</sup>

## B. The value of Integrity or Equality before the law

In order properly to understand the conception of legality as integrity, and the particular sense in which this conception of legality reflects the ideal of equality before the law, it will be helpful briefly to consider how the value of integrity relates to the principles of *fairness* or (ideal)<sup>88</sup> *justice*. Our starting point, it is suggested, must be the assumption that ‘each person or group in the community should have a roughly equal share of control over the decisions made by Parliament [and courts].’<sup>89</sup> But this assumption creates a conundrum: people (judges, lawyers, officials and citizens) *disagree* about which laws

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<sup>85</sup> Different positivist thinkers have attempted to mitigate the sense in which judges act as legislators, for instance, by assigning to judges the task of legislating in the way that the legislature itself *would have* decided. See, for example, J Raz, ‘Intention in Interpretation’ in R George (ed.) *The Autonomy of Law* (Oxford: Clarendon Press, 1996). For an excellent discussion of the application of Raz’s theory to adjudication under the HRA 1998, see A Kavanagh, ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’ (2004) 24 OJLS 259-285.

<sup>86</sup> In this connection, Dworkin proposes a theory which he describes as ‘unilateral conventionalism’: ‘Roughly unilateralism provides that the plaintiff must win if he or she has a right to win established in the explicit extension of some legal convention’. See R Dworkin, *Law’s Empire* above (n 9) 142.

<sup>87</sup> This type of approach is perhaps most recognisable in the work of Jeremy Bentham. See J Bentham, *An Introduction to the Principles of Morals and Legislation*, J.H. Burns and H.L.A. Hart (eds) (London: Athlone Press, 1970); J Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986). Of course, we would have to reject this conception of legality for the reason that it could not begin to explain or justify the salient facts about how legal practice *in fact* works.

<sup>88</sup> I have placed the word ‘ideal’ in parenthesis in order to emphasise the difference between the *best* theory of justice (in the abstract), and the particular conception of justice to which a political community is committed through its past institutions decisions. The latter account belongs to a conception of legality as integrity (see below)

<sup>89</sup> R Dworkin, *Law’s Empire* above (n 9) 178.

Parliament should pass, and which decisions courts should make. We are therefore in need of some way of ensuring, in the face of these disagreements, that the collective decisions made by a political community somehow afford to members of the community some form of equal control.

One potential solution to the problem of equal control would be to ensure that the standards by which a community is governed (through its institutions) are those which produce the greatest overall *fairness*. But, as Dworkin points out, this solution can produce some surprising and counterintuitive results. The *fairest* method of legislating, we might say, is for Parliament to create ‘checkerboard’ statutes which accurately reflect the division of opinion in the community. For example, if 50% of the community are pro-abortion, and 50% of are pro-life, then the fairest legislative scheme would arguably be one, say, of permitting woman born in even years to have an abortion, but denying the same to women born in odd years.<sup>90</sup> Yet such a solution would surely be inimical to both pro-abortion and pro-life advocates for the reason that it creates an *arbitrary distinction* between different women.

Can the principle of *justice* furnish an account of the ‘equal control’ desideratum? Most theorists of legality make a distinction between the principle of legality and the principle of (ideal) *justice*.<sup>91</sup> In particular, very few theorists hold the view that an unjust law is no law (*lex iniusta non est lex*). The theory (or group of theories) which we might most readily associate with the principle of justice is natural law theory. But John Finnis, the leading contemporary natural lawyer, has argued forcefully that even Sir Thomas Aquinas – whose work is commonly perceived as supporting the *non lex* principle – did not in fact hold this view.<sup>92</sup> Equally, to the extent that Lon Fuller falls within the natural law camp, we see in his work an explicit distinction between legality or the rule of law (in the form of the ‘inner morality of law’) and justice (in the form of the ‘external’ morality of law).<sup>93</sup>

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<sup>90</sup> Ibid.

<sup>91</sup> See D Dyzenhaus ‘Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review’ in Forsyth (ed.) *Judicial Review and the Constitution*, (Hart Publishing, Oxford and Portland, Oregon, 2000) 147. For an interesting exception, see S Guest, ‘Integrity, Equality and Justice’ in Allard, Frydman (eds.) *Dworkin with his replies*. Revue Internationale de Philosophie series (Bruxelles: Diffusion: Presses Universitaires de France) 335-362.

<sup>92</sup> Above (n 36) II.

<sup>93</sup> L Fuller, *The Morality of Law* (Yale University Press, 1964).

What is the difficulty with assimilating the principle of legality to the principle of (ideal) justice? We commonly speak of judges ‘doing justice’; and when we discover that a person has been wrongly convicted and imprisoned for a criminal offence, it seems natural to describe this as a ‘miscarriage of justice’.<sup>94</sup> Notwithstanding these familiar references, the difficulty with a conception of legality as justice, it is suggested, is its inevitable failure to produce some *coherent and consistent scheme of principle* across the institutional decisions of a community. If judges were enjoined to decide legal disputes according to ‘what is just’ then we could expect a constant stream of fresh judgments about the requirements of the law (read: the requirements of justice) from judge to judge and from case to case. The libertarian judge would routinely reach different views to the utilitarian or economic egalitarian judge, and so on.<sup>95</sup> There could then be no plausible sense in which members of a political community could claim *equal control* over those decisions: for the collective decisions of the community would be riddled with inconsistencies – or *inequalities* – in treatment which may or may not result in a net gain in justice.<sup>96</sup>

The value of integrity, it is suggested, captures the special sense in which individuals can claim equal control over the enactments of Parliament and the decisions of courts. A political community acts with integrity, Dworkin argues, when it ensures that the particular scheme of principle (the particular *conception* of justice, fairness and procedural due process) to which the community is committed through the past decisions of its political and legal institutions is applied equally to all members of that community.<sup>97</sup> Importantly, the value of integrity is not, as Guest has suggested, a *compromise* between the principles of justice and fairness, or the ‘second best’ substitute for a system based on one or other principle.<sup>98</sup> To the contrary, as Dworkin puts it: ‘in a community divided in moral and political judgment and instinct, [the value of integrity] is

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<sup>94</sup> See S Guest, ‘Why the Law is Just’ [2000] *Current Legal Problems* 31.

<sup>95</sup> For a very effective thought experiment on conflicting theories of justice, see Amartya Sen, *The Idea of Justice* (forthcoming, Cambridge University Press) ‘Introduction’ at 13. A draft of this chapter was presented at the UCL colloquium in Legal and Social Philosophy, on Jan 28, 2009.

<sup>96</sup> See R Dworkin ‘reponse aux articles’ in *Dworkin with his replies* (above) n 91 at 437; *Law’s Empire*, 189.

<sup>97</sup> *Law’s Empire* 227.

<sup>98</sup> See S Guest ‘Integrity, Equality and Justice’ above (n 91).

a peculiarly important dimension of equal respect'.<sup>99</sup> More specifically, it is the distinctive dimension of equal respect that we associate with the ideal of 'equality before the law' or 'treating like cases alike'.<sup>100</sup>

As we will see in chapter 3, a conception of legality as integrity recommends a very particular programme of adjudication. It implies that the judicial role is one of *identifying* the principles that are presupposed or entailed by the past political decisions of courts and legislatures. This judicial task cuts across the traditional debate about whether judges 'make' or 'discover' law, or whether adjudication is 'inductive' or 'deductive'.<sup>101</sup> It supposes that the judicial role is forward and backward looking; conservative and creative. It is backward looking in the sense that judges are constrained by the principles that justify *past* political decisions within a community; and it is forward looking in the sense that it is the task of judges, like authors in a chain novel, to apply those principles to meet the demands of new factual situations.<sup>102</sup>

Can we justify the conception of legality as integrity against the parameters of our abstract concept of legality? It will be apparent that this conception differs markedly from the first conception of legality described above. On the first conception, I said that very few cases will be decided according to the existing legal rights and duties of the parties. The decisions will instead generally depend on the way in which judges draw upon extra-legal principles and policies in the exercise of their discretion. According to this second conception, by contrast, we have seen that there is always a 'right answer' to a legal dispute (based on the best understanding of legal principles across each doctrinal area of law), and a judge will almost always be under a duty to decide a case according to the existing legal rights and duties of the parties in the case.<sup>103</sup> A conception of legality as integrity, it is suggested, captures exactly the point and purpose of the abstract concept of legality described above. It supposes that officials will always exercise power in accordance with standards, established in the correct way, before that exercise, namely,

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<sup>99</sup> See R Dworkin 'reponse aux articles' in *Dworkin with his replies* above (n 91) at 436.

<sup>100</sup> Dworkin finds further connections between the value of integrity or equality before the law, and 'fraternity' or 'community'. *Law's Empire*, 185-190.

<sup>101</sup> *Ibid.* 228. The *locus classicus* of the 'declaratory' theory is Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1977).

<sup>102</sup> For the chain-novel analogy, see R Dworkin, *Law's Empire* ch 7.

<sup>103</sup> Save in cases where the judge has a moral duty to ignore the law. Dworkin refers to this as the 'adjudicative stage' of legal theory. See *Justice in Robes* above (n 7) 18.

the principles of justice, fairness and procedural process that justify past political decisions in a given political community. In addition, a conception of legality as integrity maintains the ideal separation of powers in that judges are in no sense *legislating* in their adjudicative function.

In the following chapter, I want to consider the way in which the abstract conception of legality as integrity just described can help us to understand particular doctrinal areas of British constitutional law. I shall focus, in particular, on *administrative* law decisions, an area which has attracted a particularly rich body of academic writing, and judicial reasoning, about the justification for the supervisory role of courts. The task will be to try to locate the different strands of traditional administrative law theory within the debates explored in the present chapter, and to try to interpret past legislative and judicial decisions *in the light of* a conception of legality as integrity.<sup>104</sup> It will be seen that much of the academic literature and judicial dicta in this area of law mistakenly presupposes something like the rule-based account of legality described and rejected above.

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<sup>104</sup> This process may be likened to the way in which Dworkin brings together his ‘aspirational’ and ‘doctrinal’ concepts of law. Ibid. 13.



### Chapter 3: Principles of English (Administrative) Law

What makes it the case that any proposition of administrative law is true or valid? When a judge decides that a minister acted unlawfully, say, because the minister failed to afford a fair hearing to an individual, or because she acted for improper purposes, what *makes it the case* that the minister acted unlawfully? English public lawyers have long debated this type of question, not as a question about the grounds of legal validity, but as a question about the constitutional justifications for judicial review. As is very well known, *ultra vires* theorists contend that judges are justified in quashing the decision of an official when that decision is in some way contrary to the intentions (or ‘intent’)<sup>1</sup> of Parliament.<sup>2</sup> Common law theorists reply that this is not the whole story. Judges, they say, also apply principles of the common law that are wholly independent of Parliament’s intentions.<sup>3</sup> Others have argued that judges give effect to the principles that belong ‘within the framework of a liberal European Democracy’,<sup>4</sup> or to the ‘fundamental precepts of the rule of law – those basic commitments that almost everyone can reasonably be taken to endorse, at least at a suitably abstract level’.<sup>5</sup>

It is not difficult to see the relationship between the question (of legal philosophy) about the grounds on which a proposition of administrative law is true or valid, and the question (of political philosophy) of how best to justify judicial review. If it is accepted that the primary role of judges is to identify and give effect to the existing legal rights, duties and powers of individuals and officials, then a theory of judicial review must rest on a theory of how we *determine* those legal rights, duties and powers.<sup>6</sup> It must rest, that is, on a theory of *legality*. It is only once we have established the meaning of legality that we will be in a position to advance a theory of adjudication and, more broadly, a

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<sup>1</sup> For the distinction between ‘intentions’ and ‘intent’, see part 2 (below).

<sup>2</sup> See, for instance, C Forsyth, ‘Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, The Sovereignty of Parliament and Judicial Review’ (1996) 55 CLJ 122-40

<sup>3</sup> See, for instance, P Craig, ‘Competing Models of Judicial Review’ in Forsyth (ed.) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000)

<sup>4</sup> *R. v. Secretary of State for the Home Department, ex p. Pierson* [1998] A.C. 539 at 575 per Lord Steyn; and see, generally, J Jowell, ‘Of Vires and Vacuums: The Constitutional Context of Judicial Review’ [1999] PL 448-460.

<sup>5</sup> See T R S Allan, ‘Constitutional Dialogue and the Justification of Judicial Review’ (2003) 23 OJLS 563, 571; ‘The Rule of Law as the Rule of Reason: Consent and Constitutionalism’ (1999) 115 LQR 221, 224.

<sup>6</sup> Of course, many (positivist) theorists deny that the primary role of judges is to give effect to existing legal rights and duties. See, for instance, T Endicott ‘Adjudication and the Law’ (2007) 27 OJLS 311-26, 311. At the opposite end of the spectrum, Dyzenhaus has argued (correctly in my view) that judges have a duty to apply legal principles even in times of emergency. See, generally, D Dyzenhaus, *The Constitution of Law, Legality in a Time of Emergency*, (Cambridge University Press, 2006).

theory of the separation of powers between courts and the political branches of government: the question of legal philosophy drives the questions of political philosophy.

In the last chapter, I argued after Ronald Dworkin that the principle of legality – the principle that officials may only exercise power in accordance with standards established before that exercise – is best understood as reflecting the value of *integrity* or *equality before the law*. My general aim in this chapter is to show how a conception of legality as integrity can help us to make sense of English law adjudication. As indicated above, I will focus on *administrative* law decisions (specifically, the practice of judicial review), for it is in relation to this doctrinal area of law perhaps more than any other that English judges and lawyers have had most to say about the grounds of legal validity, and about the proper role of judges.<sup>7</sup> Indeed, English judges and lawyers often give the impression that questions concerning the principle of legality and the proper role of judges are *peculiar* to administrative law; that the principles of administrative law are peculiarly *rule of law* principles.<sup>8</sup> It is hoped that enough was said in chapter 2 to show that this view is misleading. A theory of legality (and the model of adjudication that it recommends), I argued, must be capable of explaining decisions in *any* doctrinal area of law, and it must be able to explain both statutory interpretation and common law adjudication.<sup>9</sup> It is for this reason that I have placed the term ‘administrative’ in parenthesis in the title and at various points in the chapter.

In order to bring out the virtues of a model of administrative law adjudication as integrity, I will consider three contrasting models of adjudication. The focus for comparison will be the way in which each model addresses the following question: *which standards, established in which way, provide the best justification for administrative law decisions?* It will be apparent that this question echoes the question posed in chapter 2 in relation to the meaning of the abstract concept of legality.<sup>10</sup> Our purpose in this chapter, as I have said, is to consider how that abstract account of the concept of legality informs concrete decisions in the area of English administrative law.

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<sup>7</sup> This is reflected in the vast body of literature on the question of the constitutional foundations of judicial review. See, for instance, C Forsyth and I Hare (eds), *The Golden Metwand and Crooked Cord: essays in honour of Sir Williams Wade Q.C.* (Oxford University Press, 1998); Forsyth (ed.) *Judicial Review and the Constitution* (Hart Publishing, Oxford and Portland, Oregon, 2000).

<sup>8</sup> See, for instance, *R (on the application of Corner House Research and Others) v. Director of the Serious Fraud Office* [2008] EWHC 714 (Admin), para. 67 per Moses LJ: ‘The courts fulfil their primary obligation to protect the rule of law, by ensuring that a decision-maker on whom statutory powers are conferred, exercises those powers independently and without surrendering them to a third party.’

<sup>9</sup> See chapter 2, part 1. For a similar point, see P Craig, ‘The Common Law, Shared Power and Judicial Review’ (2004) 24 OJLS 237, 241

<sup>10</sup> See chapter 2, part 1.

The first model of adjudication, which I will address in part 1, lies at the foundations of the *ultra vires* theory of judicial review. It supposes that judges should give effect in some way to the meaning that Parliament *intended* in the relevant statute. I will argue that the idea of a Parliamentary intention (in its various different forms) is an empty metaphor which may only be cashed out in terms of principles of political morality. The meaning of the text in a statute will depend, not on the intentions of the *author* of the statute, but on ‘intent’ imposed on a statute by the *interpreter* of that statute, which intent will flow from the general background theory of legality favoured by that interpreter. In part 2, I will consider two further models of adjudication, using the cases of *Simms*,<sup>11</sup> and *Coughlan*<sup>12</sup> as case studies. The second model derives from the rule-based conception of legality described in chapter 2. It supposes that judges should give effect to the clear and settled meaning of words in a statute. In ‘hard cases’ – cases in which the text admits of no clear and settled meaning – judges should legislate interstitially in a way that accords, say, with what Parliament *would have* done, or what is just or efficient. Finally, I will develop and defend a model of adjudication based on the conception of legality as integrity discussed above and in the last chapter.

Alongside the project just described, a secondary aim of this chapter is to make sense of the long-running debate in English public law about the constitutional foundations of judicial review (which, for convenience, I will refer to as the ‘*ultra vires*’ debate). My general argument – which I will make by way of a series of discussions interspersed throughout the chapter – will be that theorists on all sides of the *ultra vires* debate have paid insufficient critical attention to the background theory of legality that their theory assumes. As a consequence, this debate, I will suggest, has done more to obscure than illuminate our understanding of administrative law adjudication.

### 1. The ‘Intentions Theory’

So embedded in the mindset of English judges, lawyers and academics is the idea that judges give effect in some way to the intentions of Parliament (which, for convenience, I will call the ‘intentions theory’) that it almost seems heretical to call it into question.<sup>13</sup> But why should any judge, lawyer or academic be committed to the intentions theory?

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<sup>11</sup> *R v. Secretary of State for the Home Department, ex parte, Simms and Another* [2000] 2 AC 115.

<sup>12</sup> *Regina v North and East Devon Health Authority ex p Coughlan* [2000] 2 WLR 622

<sup>13</sup> For the leading account of the traditional approach to statutory interpretation, see R. Cross, *Statutory Interpretation*, J. Bell & G. Engle (eds) (London: Butterworths, 3rd edn, 1995) 14.

We can quickly dispense with one familiar response to that question. It is not enough to say, as *ultra vires* theorists of judicial review frequently do, that judges give effect to the intentions of Parliament simply because Parliament is *sovereign*, and that, as matter of ‘constitutional logic’,<sup>14</sup> ‘what an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly’.<sup>15</sup> I argued in chapter 1 that this view, which seemingly relies on the jurisprudence of the 19<sup>th</sup> century jurist John Austin, cannot withstand the devastating assaults of legal philosophers such as Hart, Dworkin and Raz.<sup>16</sup> If the intentions theory is to succeed as a theory of administrative law adjudication, then the arguments in its defence must be found elsewhere.

The intentions theorist (like every other theorist of (administrative law) adjudication), it is suggested, faces a double challenge. In the first place, she must demonstrate that the intentions theory is capable of providing a general and plausible explanation for the way that judges in fact decide cases. This is to say that the intention theory must *fit* English administrative law adjudication. At the same time, the intentions theorist must be able to offer some *justification* for the intentions theory in terms of the *value(s)* that the theory serves.<sup>17</sup> This is to say that the theorist must show that the intentions theory places the practice of administrative law adjudication in its best (moral) light.<sup>18</sup> The most likely justification for the intentions theory may be expressed as follows: the principle of *democracy* entails that the will of elected representatives, and not unelected judges, should constitute law.<sup>19</sup> As Elliott and Forsyth put it in relation to the so-called ‘modified’ *ultra vires* theory:

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<sup>14</sup> See C Forsyth and M Elliott, ‘The Legitimacy of Judicial Review’ [2003] PL 286-307, 288-289

<sup>15</sup> Forsyth, ‘Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, The Sovereignty of Parliament and Judicial Review’ (1996) 55 CLJ 122, 133.

<sup>16</sup> See chapter 1, part 2. As if to betray their adherence to Austinian positivism, *ultra vires* theorists of judicial review have conceded that a successful challenge to the doctrine of Parliamentary sovereignty will necessitate some basis for judicial review other than Parliamentary intention. See Forsyth and Elliott, ‘The legitimacy of judicial review’ *op.cit.* 291; M Elliott, ‘The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review’ (1999) 115 LQR 119, 136-7.

<sup>17</sup> Dworkin describes the requirements of ‘fit’ and ‘justification’ as two dimensions of ‘constructive interpretation’. As he puts it: Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. See R Dworkin, *Law’s Empire* (Harvard University Press, Cambridge, Massachusetts 1986)) 52

<sup>18</sup> *Ibid.* See also chapter 2, part 1 (above).

<sup>19</sup> This democratic justification for – what I have described as – the intentions theory has its parallel in US constitutional theory in the form of ‘originalist’ or ‘textualist’ theories of interpretation. See, most notably, A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 2007). For a recent critique of originalist approaches to the interpretation of the European Convention on Human Rights, see G Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford University Press, Oxford 2007), ch. 3.

‘...most importantly, [the modified *ultra vires* doctrine] reconciles constitutional orthodoxy – in which the judiciary is in the final analysis subject to the democratic will as expressed through Parliament – with the reality that the extension of judicial review was a process in which judicial creativity and ingenuity played a prominent role.’<sup>20</sup>

We need to be careful with a claim based on ‘democratic will’ though. While it may be the case that there is a democratic justification for treating the text of a statute as relevant to the content of administrative law, it does not necessarily follow from this that the text of the statute must reflect the *intentions of Parliament*. To put this differently, a democratic justification for the legislative powers of Parliament may be compatible with – or even *better* reflected in – some theory of legality and adjudication other than the intentions theory.<sup>21</sup> Indeed, I will argue below that democracy is best served when judges give effect to the principles which provide the best justification for the past enactments of Parliament, and the past decision of courts.<sup>22</sup>

### **A. Unpacking the Idea of a Parliamentary Intention**

In our everyday conversations, we try to understand what people mean when they speak, often with some difficulty. In so doing, we determine the meaning of the words or phrases used primarily by reference to the *mental state* of the speaker – the meaning that they *desire* or *hope* to convey. Can we treat the intentions of a *Parliament* in this same way? The first difficulty lies in the fact that, unlike the words used in everyday conversation, statutory language typically takes a very sparse and open-textured form. Administrative lawyers, for instance, are highly accustomed to making arguments about the meaning of such phrases as ‘the Minister may act as he/she thinks fit’ or ‘the Council may act in a way that benefits its area’. Given these linguistic difficulties, and the obvious impossibility of entering into any kind of dialogue with the statute, the intentions theorist must decide where to look for clarification.

Since he considers the text of a statute to be a form of speech or communication, it must be *people* to whom he looks for clarification, most obviously the people involved in

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<sup>20</sup> Forsyth and Elliott, ‘The Legitimacy of Judicial Review’ *op. cit.* at 287.

<sup>21</sup> See P Craig, ‘The Common Law, Shared Power and Judicial Review’ above (n 9) 243. See further p 10 (below)

<sup>22</sup> See part 2B (below).

the legislative process.<sup>23</sup> But, as Dworkin notes, this immediately raises a host of difficult threshold questions:

‘Which historical people count as the legislators? How are their intentions to be discovered? When these intentions differ from one to another, how are they to be combined in the overall, composite institutional intention? [The] answers [to these questions] must, moreover, establish a fixed moment when the statute was spoken, when it acquired all the meaning it ever has’<sup>24</sup>

In order to answer these types of questions, a judge must embark on a series of complex investigations. He must decide which types of motivations, of which of the hundreds of people directly or indirectly involved in the legislative process, at which point in time, should determine the meaning of the statutory text. It might be argued, for instance, that the intentions of only those who voted should count, or that the intentions of only those who attended each of the legislative debates should count. It may even be thought that the decision (if it can be called that) of most Parliamentarians today *not* to repeal a given Act of Parliament, should be of paramount importance in determining the meaning of a statutory text.<sup>25</sup> At every turn, the judge committed to the intentions theory is faced with difficult choices about what counts as the relevant intention. It is clearly not open to him to look to Parliamentary intentions as a guide to making these choices, for he is attempting to work out what it means to look to Parliamentary intentions.<sup>26</sup> And, even if a judge can justify focussing on one particular type of motivation, of one set of people, at one particular time, the task of assembling this data surely lies beyond the abilities of the most assiduous and resourceful team of psychologists and sociologists, let alone a judge or panel of judges sitting in a courtroom.<sup>27</sup>

Do the types of difficult questions just described present an insuperable obstacle to the intentions theory? In *Pepper v. Hart*,<sup>28</sup> the House of Lords proposed a solution to some of these difficulties. Lord Brown-Wilkinson laid down certain conditions under which

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<sup>23</sup> See R Dworkin, *Law's Empire* above (n 17) 335-336 (hereafter '*Law's Empire*'). The arguments that follow are largely based on those advanced by Dworkin.

<sup>24</sup> *Ibid* at 316.

<sup>25</sup> *Ibid* at 317.

<sup>26</sup> *Ibid* at 319.

<sup>27</sup> Waldron argues further that the text of a statute 'has canonical status in legislation that is different in kind from any common view or shared sense of purpose that one might discern in the committee rooms or in the parliamentary corridors'. See J Waldron, *Law and Disagreement* (Oxford University Press, 1999) 145.

<sup>28</sup> [1993] AC 593.

judges would be able to examine Parliamentary materials as an aid to identifying the intentions of Parliament:

‘The exclusionary rule [precluding the courts from referring to Parliamentary materials] should be relaxed so as to permit reference to Parliamentary materials where: (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear...’<sup>29</sup>

Two questions arise out of this dictum, which broadly reflect the first and second of the series of questions posed by Dworkin above. The first question is one of *constitutional principle*: why should the courts take the statement(s) of a ‘Minister or other promoter of the Bill’ to represent the meaning of an Act of Parliament? The second question is a *practical* one: having decided whose intentions should count, how is it possible for a judge to identify precisely what those intentions were?

In response to the first of these questions, Lord Steyn (writing extra-judicially) has argued that the ruling in *Pepper v Hart* constitutes a flagrant breach of the separation of powers. As he puts it:

‘To give the executive, which promotes a Bill, the right to put its own gloss on the Bill is a substantial inroad on a constitutional principle, shifting legislative power from Parliament to the executive’<sup>30</sup>

There is a sense though in which this objection of principle (or, to use Dworkin’s interpretive language, ‘justification’) to the ruling in *Pepper v Hart* lies downstream from a more serious objection of ‘fit’. In objecting to the idea that special weight should be given to the intention of a *Minister* (or other sponsor of a Bill), Lord Steyn *presupposes* an answer to the second, practical question posed above: he presupposes that judges *will* often be able to ascertain the intention of Parliament by reference to the statement of a minister or other proposer of a Bill, in combination with the text of the Bill itself and ‘other such Parliamentary materials as is necessary...’ In my view, there is good reason to doubt this presupposition, in which case Lord Steyn’s argument of principle needs to

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<sup>29</sup> Ibid at 640C.

<sup>30</sup> See Lord Steyn, “Pepper v Hart: A Re-examination” (2001) 21 OJLS 59, 68. Cf. Vogenauer, “A Retreat from Pepper and Hart?: A Reply to Lord Steyn” (2005) 25 OJLS 629; Lord Cooke, “The Road ahead for the Common Law” (2004) 53 ICLQ 273.

be understood somewhat differently. In short, there is a crucial distinction between the intentions of an individual legislator, Minister or other sponsor of a Bill and the intentions of an ordinary person in discussion. As Dworkin puts it:

‘People who talk to each other in the ordinary way can choose their words, and so choose words they expect to have the effect they want. They expect to be understood the way they hope to be understood. But some people are not in charge of their own words: a hostage telephoning at gunpoint may very much hope not to be understood the way he expects to be. Or someone who signs a group letter he cannot rewrite for the group, or the author of that letter who drafts it to attract the most signatures possible.’<sup>31</sup>

In order to ascertain the intentions of the sponsor of a Bill – unlike the intentions of a person in ordinary conversation – a judge faces precisely the same complex investigations that I have described above. He must decide, first, which of the possible motivations the sponsor had in making statements in support of a Bill should count as the relevant motivation. The *hopes* or *moral convictions* of the sponsor may have diverged significantly from her *expectations*. She may have hoped, in accordance with her conscience, that the Bill would produce one particular result; but she may have expected, given the way in which the Bill had been drafted, and the various pressures she felt from her party or Government (pressures which may pull in different directions), that it would produce another result.<sup>32</sup> If we take the facts of *Pepper v Hart* itself, it may well have been the case that the Financial Secretary to the Treasury (who was deemed to have sponsored the relevant taxation Bill) *expected* that the Bill would be interpreted in a way that favoured the Inland Revenue; but it may have been his *hope* or *moral conviction* that the Bill would be interpreted in a way that favoured the individual. Secondly, having decided which type of motivation counts, the judge must also select a precise point in time at which that motivation should be recorded. The sponsor of a Bill is liable to be strongly influenced by the views she considers between giving her own statements (if there is more than one), and by the Parliamentary debates that follow her statements. Her hopes may grow stronger, and her expectations weaker (or vice versa), as she listens to more and more arguments, and contemplates more and more amendments. We see then

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<sup>31</sup> *Law's Empire*, 322

<sup>32</sup> *Ibid* 321-324. One topical example is the dilemma faced by Republican senators in late 2008, in deciding whether or not to vote for an enormous financial bailout to financial institutions. Those who voted in favour may have done so a) for the reason that they saw some necessary limits to the free-market ideology; or b) because they wished to save their political career!



that the ruling in *Pepper v Hart* replicates rather than provides a solution to the difficult questions posed by Dworkin above.

Can it be argued that the difficulties I have described above in relation to the intentions theory are illusory? Goldsworthy suggests two different ways in which this may be so. First, he contends that it will often be possible to identify behind the text of a statute some underlying *collective* Parliamentary intention. As he puts it:

‘Despite occasional suggestions that collective intentions are mythical entities that cannot exist, it is obvious that they can. We see them in action when we watch team sports, and hear them when we listen to orchestras.’<sup>33</sup>

We can quickly see that this takes us nowhere. In so far as the members of an orchestra or sports team possess a *collective* intention – an intention which is shared by *all or most* of its members – that intention would have to be so abstract as to be practically useless to anybody attempting to understand these practices. At most, we could say that the orchestral players or sportsman collectively intend ‘to play well’, or, in the case of orchestral players, that they collectively intend ‘to follow the conductor and/or the Leader (of the orchestra)’. The equivalent intention amongst legislators could only be something as abstract as an intention ‘to vote’ or ‘not to vote’ which, taken by itself, provides no guidance at all to a judge attempting to interpret the text of a statute. As soon as a judge attempts to discover some more concrete intentions, he will find that he faces all of the questions, and others, that I have explored above.<sup>34</sup>

The second way in which Goldsworthy seeks to salvage the intentions theory runs as follows:

‘It must be admitted that in many cases, what the judges describe as Parliament’s implicit intention is a counter-factual rather than an actual intention, a matter of what Parliament would have intended if it had anticipated the problem.’<sup>35</sup>

We are now asked to imagine a judge pondering what a particular legislator or group of legislators *would have* thought had they put their mind to a particular issue, or how they

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<sup>33</sup> J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford 1999) 251.

<sup>34</sup> For further discussion on the notion of an ‘abstract’ intention, see part C (below).

<sup>35</sup> Goldsworthy *op. cit.* at 252.

would have voted had they been given the opportunity to vote on a particular amendment. Far from providing a way out of the difficulties with *actual* legislative intent though, the counter-factual argument arguably compounds those difficulties. The judge is now required to *speculate* on which (notional) motivations of which (notional) legislators at which (notional) point in time should count. Given the infinite number of reasons that a legislator may have either for supporting or rejecting an amendment, the task envisaged for judges by the counter-factual argument is again wholly unrealistic.

The intentions theory, I suggested towards the start of this chapter, is inspired by the ideal that the democratic will of the legislature should prevail over the will of unelected judges, and that the rights, duties and powers of individuals and officials should not be determined according to the moral and political philosophies of individual judges. I have attempted to show that the intentions theory does not *fit* the way in which judges decided administrative law cases: this is to say that we cannot count the intentions theory as a plausible account of how judges in fact decide cases.

If, for the sake of argument, we put to one side the arguments against the intentions theory based on ‘fit’, can the intentions theory *justify* the practice of administrative law adjudication? In so far as the best justification for the intentions theory is one based on the principle of democracy, we might pause to consider whether the best understanding of democracy entails that the will of the legislature should, in all cases, prevail over other principles. I propose only to adumbrate an argument now which will be central to the next chapter.<sup>36</sup> While a straightforward majoritarian conception of democracy would seem to be supportive of the intentions theory, a rights-based conception of democracy would count against the idea that judges should give effect to the will of the legislature when that will runs contrary to fundamental human rights. If it turns out that the rights-based conception of democracy is a better account of that concept, then the intentions theory would fail both for reasons of fit *and* justification.

## **B. The Inadequacy of the Common Law Critique of the Intentions Theory**

Before moving forward with our argument in part C (below), it will be instructive briefly to outline the way in which the so-called ‘common law’ theory of judicial review (or at

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<sup>36</sup> See (below) chapter 4, part 1.

least one of the major elements of that theory) fails, in my view, adequately to confront the intentions theory (and therefore fails to confront the *ultra vires* theory of judicial review). The relevant element of the common law theory may be expressed quite simply: since judges often review the exercise of *non-statutory* powers (such as prerogative powers), the intentions theory cannot account for all of the decisions that judges make in their supervisory jurisdiction.<sup>37</sup> Call this the ‘*over-inclusiveness argument*’. This argument, it is submitted, claims too much in one respect, and too little in another.

The over-inclusiveness argument *claims too much* in so far as it assumes that intentions theorists (in the guise of *ultra vires* theorists of judicial review) necessarily aim to explain *every* proposition of law in terms of the intentions of Parliament. This may be so, but it will ultimately depend on the background theory of legality in play. If, as I have suggested elsewhere,<sup>38</sup> *ultra vires* theorists of judicial review are committed to an Austinian-style ‘command’ theory of legality, then the argument of common law theorists would have some force; for, on this Austinian theory, the truth or validity of *every* proposition of law will depend on the express or implied intention of the sovereign.<sup>39</sup> If, on the other hand, *ultra vires* theorists are committed to a rule-based conception of legality, then the common law argument stated above can no longer embarrass the intentions theory. On this rule-based account of legality, it is entirely open to the *ultra vires* theorist to argue that there exist settled rules of the following description: a) that when judges interpret statutes, they should give effect to the will of Parliament; and b) that when judges review, say, the exercise of prerogative powers, they give effect to the rights, duties and powers clearly established in past judicial decisions; and c) that if there is a conflict between the intentions of Parliament and the past decisions of courts, the conflict should be resolved in favour of the former.<sup>40</sup> In other words, a rule-based theory of legality can plausibly accommodate multiple sources of law without tracing each and every law back to the single source of the intentions of Parliament.<sup>41</sup>

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<sup>37</sup> For the original statement of this type of objection, see D Oliver, ‘Is the *Ultra Vires* rule the basis of judicial review?’ [1987] PL 543, 546 *et seq.*

<sup>38</sup> See (above) chapter 1, part 1

<sup>39</sup> *Ibid.*

<sup>40</sup> See further (below) part 2, part A.

<sup>41</sup> This rule-based defence of the *ultra vires* theory perhaps helps us to understand the contention by Forsyth that there can be a *different* justification (i.e. a justification which does not depend on Parliament’s express or implied intention) for the review of non-statutory powers (based, Forsyth suggests, on the need to control monopoly powers. See C Forsyth, ‘Of Fig Leaves’ above (n 2).

The over-inclusiveness argument *says too little* in so far as it is based on the *generality* of the intentions theory rather than the *quality* of that theory. Rather than attack the very concept of a Parliamentary intention, the argument merely questions whether Parliament can have intended the very many things that judges do in their supervisory jurisdiction.<sup>42</sup> To put this differently, the objection does nothing more than point out the logical limits of the *ultra vires* theory *taken on its own terms*. For a good illustration of this point, we need look no further than the acceptance by common law theorists – in common with *ultra vires* theorists – of the so-called ‘principle of legality’ articulated by Lord Hoffmann in the case of *Simms*:

‘That, in the absence of clear words to the contrary, Parliament is presumed not to have intended to legislate contrary to fundamental rights.’<sup>43</sup>

Given that common law theorists accept this presumption, the difference between the common law theory and the *ultra vires* is almost negligible: for common law theorists, Parliamentary intentions apply in only a negative way, and only where fundamental rights are engaged; whereas for *ultra vires* theorists, Parliamentary intentions apply in more positive way to the general principles of judicial review.<sup>44</sup> As Allan rightly implies, this would seem to be more a difference in emphasis than a fundamental difference of conviction.<sup>45</sup>

In placing an emphasis on what I have called the over-inclusiveness argument, common law theorists of judicial review have, in my view, misdirected their challenge to the intentions theory (or the *ultra vires* theory of judicial review). An effective challenge must be directed, first, towards the background theory of legality against which the intentions theory is advanced and, secondly, towards the very concept of a Parliamentary intention. If, as I have argued above, it turns out that the very idea of a collective

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<sup>42</sup> This point is made in two different ways by common law theorists. First, it is said that, given the abstract text of a statute, it is not plausible to suppose that Parliament intended the many principles that judges apply. Secondly, a theory based solely on Parliamentary intention cannot explain cases in which courts have reviewed the exercise of non-statutory powers. See, generally, P Craig, ‘*Ultra Vires* and the Foundations of Judicial Review’ [1998] CLJ 63.

<sup>43</sup> Above (n 11) at 131 per Lord Hoffmann.

<sup>44</sup> For a similar point, see C Forsyth and M Elliott, ‘The Legitimacy of Judicial Review’ above (n 14) at fn 14. This commonality of views can be explained by the commitment by both *ultra vires* theorists and common law theorists to the view that Parliament is sovereign. See, for example, P Craig, ‘Competing Models of Judicial Review’ above (n 3) 390.

<sup>45</sup> See T.R.S. Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ [2002] CLJ 87-125, 91 *et seq.*

Parliamentary intention is misconceived, then arguments about the generality of its application are beside the point.

### C. Legislative *Intent*

Before our brief digression into the *ultra vires* debate, I concluded in part A (above) that the intentions theory neither fits nor justifies administrative law adjudication. We now need to confront the following type of objection to that conclusion. If, when faced with a statutory text, judges do not give effect to Parliament's intentions, then, the objection runs, they must instead be giving effect to *their own* intentions, or to the meaning that they think a statute *should* have.<sup>46</sup> In this case, we have moved away from a system based on Parliament *democracy* towards one of judicial supremacy or *juristocracy*.

The problem with this objection, it is suggested, is that it assumes the truth of the very theory which we have shown above to be false: the intentions theory. The objection falsely assumes, that is, that the *only* way in which judges can give effect to Parliament's will is by giving effect to Parliament's intentions; and that where judges impose some meaning on a statute other than that intended by Parliament, they necessarily disregard the will of Parliament.<sup>47</sup> I now want to square this apparent circle, and explain the sense in which judges can respect the will of Parliament without embarking on the hopeless task of identifying the intentions of individual legislators, or the collective intentions of the legislature. The key to this task can be found in the following oft-cited passage of Lord Reid:

'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words that Parliament used. We are seeking not what Parliament meant but the true meaning of what they said'.<sup>48</sup>

Building on this dictum, we can usefully distinguish between the *intention of Parliament*, and the *intent of a statute*. The former concept, we have seen, refers to the mental states

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<sup>46</sup> See, for instance, J Goldworthy, 'Legislative Intentions, Legislative Supremacy, and Legal Positivism' in J Goldworthy and T Campbell (eds), *Legal Interpretation in Democratic States* (Aldershot: Ashgate, 2002), 66.

<sup>47</sup> See, Allan 'Constitutional Dialogue' *op.cit.* 571.

<sup>48</sup> *Black-Clawson International Ltd v. Papierwerke Waldhof Aschaffenburg AG* [1995] AC 591, 613. See T.R.S. Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' (2004) 63 CLJ 685, 689.

of individual legislators: it takes the meaning of a statute to depend on the *author's* intentions. The latter concept, by contrast, refers to the general background theory of legality which a judge employs in identifying the meaning of words in a statutory text: it takes the meaning of a statute to be that which is imposed on the words of a statute by the *interpreter* of the statute.<sup>49</sup> Given the impossibility of ascertaining the mental states of legislators, it is only this latter concept, I think, which can enable us to understand the special interpretive technique by which judges respect the will of Parliament.

What does it mean to say that judges *impose* meaning on a statute according to some background theory of legality? We have already seen an example of this practice in our consideration of the intentions theory above. When judges claim to be giving effect to the intentions of Parliament, they must be taken to have made a *choice* about which theory of legality makes best sense of the text of a statute; to use our abstract formulation from chapter 2, they have made a choice about which standard, established in which way, count as legal standards.<sup>50</sup> That choice, I explained above and in chapter 2, is based on the value or principle – perhaps the principles of ‘democracy’ or ‘fairness’ – which a judge takes to justify the very fact that statutes count towards (or perhaps *determine*) the content of the law.<sup>51</sup> In part 3 (below), I will consider two further background theories of legality – and two different sets of value or principles – which a judge might employ in the task of interpreting the text of a statute.

Crucially, it is in this attempt by judges (or interpreters of the practice of administrative law adjudication) to find some *value* in the fact that Parliament enacts statutes, that we find the answer to the ‘judicial supremacy’ objection above. Judges give effect to the will of Parliament in the sense that they locate the text of a statute within a broader theory of legality, one which settles on a particular justification for the force of Parliamentary legislation.

There are two important clarificatory points to make about the idea of legislative intent before we can progress to part 3 of this chapter.

First, we need to guard against treating the notion of ‘legislative intent’ as a species of legislative *intention*. This danger is manifest, I think, in attempts to present the true

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<sup>49</sup> *Law's Empire*, ch 2.

<sup>50</sup> See chapter 2, part 1.

<sup>51</sup> *Ibid.*

meaning of a statute as reflecting such things as the ‘abstract’<sup>52</sup> or ‘constructive’<sup>53</sup> intent of Parliament, or the ‘general intention’<sup>54</sup> of Parliament, or the ‘reasonable’,<sup>55</sup> ‘shared’<sup>56</sup> or ‘implicit’<sup>57</sup> assumptions or presumptions that form the backdrop of statutory interpretation. Given that theorists of administrative law *disagree* about which background theory of legality provides the best justification for the practice of statutory interpretation, it cannot lend any weight to a particular conception of the rule of law, in my view, to present that conception as the one that Parliament would surely accept, or which we can reasonably assume that Parliament would accept.<sup>58</sup>

Secondly, the meaning of a statute – or the background theory of legality which provides the best justification for statutory interpretation – cannot depend on the *language* used by judges in their decisions. It may well be that judges regularly *claim* to be giving effect to the intentions of Parliament; but this is not decisive of whether the intentions theory provides the best justification for their decisions. As I explained towards the beginning of this chapter, the true meaning of a statute will depend on the background theory of legality and adjudication which best *fits* and *justifies* the practice of administrative statutory interpretation.<sup>59</sup> In other words, the meaning will depend on a ‘constructive’ rather than a ‘conversational’ interpretation of the practice.<sup>60</sup> Crucially, a successful theory of the practice – one that fits and justifies the practice – must be able to explain and justify the fact judges *do* treat the text of a statute as being relevant to the content of the law. A theory which envisages that judges reach decisions without *any* regard for the

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<sup>52</sup> The so-called ‘modified’ *ultra vires* theory seeks to preserve this basic intuition albeit that Parliament is said to have an abstract intention that judges give effect to the rule of law rather than concrete intentions as to particular principles of judicial review. See C Forsyth and M Elliott, ‘The Legitimacy of Judicial Review’ above (n 14).

<sup>53</sup> Allan ‘Constitutional Dialogue’ above (n 5) 565. As Allan puts it: ‘there is a perfectly cogent, if ‘constructive’ sense in which we may attribute to members of Parliament a general intention to preserve the essentials of the rule of law.’

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.* at 566.

<sup>58</sup> Craig ‘The Common Law, Shared Power and Judicial Review’ above (n 9) 242.

<sup>59</sup> See part 1 above. Goldworthy seems to confuse the notion of ‘constructive’ and ‘conversational’ interpretation when, having apparently accepted the former he defends the intentions theory (and the *ultra vires* theory of judicial review) on the basis that judges often *say* that they are giving effect to the intentions of Parliament. See above (n 33) 250-1. For a further example of this confusion, see C Forsyth and M Elliott, ‘The Legitimacy of Judicial Review’ above (n 14) 287 and n 8.

<sup>60</sup> *Law’s Empire*, ch. 2.

text of a statute would have failed to account for this key feature of administrative law adjudication.<sup>61</sup>

## 2. Two Alternative Models of (Administrative Law) Adjudication

The meaning of the words used by Parliament in any particular statute, I have argued above, must depend on the general background theory of the principle of legality – the principle that officials must exercise power in accordance with standards established in the correct way before that exercise – which provides the best justification for the practice of statutory interpretation. In chapter 2, I outlined two contrasting abstract theories of legality, one based on values and principles such as certainty and predictability, and the other based on the value of integrity or equality before the law.<sup>62</sup> I now want to demonstrate how these different conceptions of legality translate into two different theories of administrative law adjudication; or, to restate our original question in this chapter, I want to offer two further responses to the question: *which standards, established in which way, provide the best justification for administrative law decisions?* In order to bring out the differences in these responses, I will take as a focus for analysis two different judicial decisions, the first of which involves statutory interpretation, the second of which involves common law reasoning. It will be helpful to provide a brief description of these decisions at the outset.

*Simms*<sup>63</sup>

The House of Lords had to decide whether it was lawful for the governors of prisons (applying a policy of the Home Secretary) to restrict the access of journalists to prisoners for the purpose of giving oral interviews. The relevant legislative provision was section

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<sup>61</sup> We might argue that the theory of legality as *justice* espoused by Guest should fail for this reason (see chapter 2 (above) part 3B). Guest implies that judges should sometimes ignore the text of statutes where justice so requires. See S Guest, 'Integrity, Equality and Justice' in Allard, Frydman (eds.) *Dworkin with his replies*. Revue Internationale de Philosophie series (Bruxelles: Diffusion: Presses Universitaires de France) 335-362. Similarly, Dworkin rejects the theory which he describes as legal 'pragmatism' (a theory which seems to represent an amalgam of legal realism, critical legal theory, and legality as justice) for the reason that such a theory cannot account for the fact that judges (at least seem to) have regard to the past enactments of Parliament and the past decisions of courts. See *Law's Empire*, ch.5. For the importance of facts for a normative theory of legality, see chapter 2 (above) part 1.

<sup>62</sup> See chapter 2, part 3.

<sup>63</sup> Above (n 11).



47(1) of the Prison Act 1952 which enabled the Home Secretary to make rules for ‘the regulation and management of prisons...and for the ...treatment, employment, discipline and control of persons required to be detained therein’. Although there were rules allowing prisoners to correspond with journalists and their legal adviser, paragraphs 37 and 37A of the relevant prison rules provided that journalists were only permitted to give oral interviews upon signing a disclaimer that they would not use information obtained in their professional capacity.

It was the avowed policy of the Secretary of State that there should be a blanket ban on oral interviews with journalists on the grounds that such interviews would ‘undermine the discipline and control which are unquestionably essential conditions in a prison environment’.<sup>64</sup> The claimant prisoners argued that paragraphs 37 and 37A, the policy of the Home Secretary to impose a blanket ban, and the decision of the governors of prisoners made pursuant to the Home Secretary’s policy, were *ultra vires* and irrational in so far as they interfered with the prisoners’ right of freedom of expression, and, more specifically, their right to have the safety of their convictions further investigated and tested with the potential for reconsideration of their convictions.

Each of their Lordships emphasised the right of freedom of expression, drawing on English decisions such as *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109 and *Derbyshire County Council v. Times Newspapers Ltd.* [1993] A.C. 534 and the decisions of the European Court on Human Rights and the US Supreme Court.<sup>65</sup> Lord Steyn remarked that, together with the intrinsic value of the right of freedom of expression, this right had an instrumental importance as (*inter alia*) a means of ‘facilitat[ing] the exposure of errors in the governance and administration of justice of the country.’<sup>66</sup> On the question of the meaning of paragraphs 37 and 37A, after invoking the ‘principle of legality’ *viz.* ‘that, in the absence of clear words to the contrary, Parliament is presumed not to have intended to legislate contrary to fundamental rights’<sup>67</sup>, Lord Steyn concluded that, even in the absence of an ambiguity in the language of paragraphs 37 and 37A, these provisions had left untouched the right to freedom of expression. Similarly, Lord Hoffmann said

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<sup>64</sup> Ibid 120, *per* Lord Steyn

<sup>65</sup> Ibid 125-127, 130 131 *per* Lord Hoffmann

<sup>66</sup> Ibid 126

<sup>67</sup> Ibid 130 and 131 *per* Lord Hoffmann

'Prison regulations expressed in general language are also presumed to be subject to fundamental human rights. The presumption enables them to be valid. But, it also means that properly construed, they do not authorise a blanket restriction which would curtail not merely the prisoner's right of free expression, but its use in a way which could provide him with access to justice.'<sup>68</sup>

Lord Hobhouse said

'Nor is it fully clear what are the parameters of the policy. The Prison Rules and the Standing Orders certainly do not necessitate the conclusion that a total ban is being imposed; in part the evidence leads to the same conclusion. This illustrates that it is the policy of the department rather than the Standing Orders themselves that are under attack'.<sup>69</sup>

He concluded (citing the case of *Raymond v. Honey*<sup>70</sup>) that the policy of the Secretary of State to impose blanket exclusion of journalists was 'both unreasonable and disproportionate and cannot be justified as a permissible restraint upon the rights of the prisoner'.<sup>71</sup>

*Coughlan*<sup>72</sup>

The applicant was seriously disabled lady who, with seven comparably disabled patients had been moved with her agreement to Mardon House, a National Health Service facility for the long-term disabled, which the health authority assured them would be their home for life. The health authority subsequently decided to close Mardon House and to transfer the long-term general nursing care of the applicant to the local authority, although no alternative placement for her was identified. The applicant applied for judicial review of this decision. The ground of challenge on which I will focus is whether the decision frustrated an substantive legitimate expectation held by the applicant.

In the Court of Appeal, Lord Woolf said that it was common ground between the parties that 'in public law the health authority could break its promise to Miss Coughlan that Mardon House would be her home for life if, and only if, an overriding public

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<sup>68</sup> Ibid 132

<sup>69</sup> Ibid 132 and 141

<sup>70</sup> [1983] A.C. 1

<sup>71</sup> *Simms* above (n 11) at 142 per Lord Hobhouse

<sup>72</sup> *Regina v North and East Devon Health Authority ex p Coughlan* [2000] 2 W.L.R. 622

interest required it.’<sup>73</sup> His Lordship then outlined three different categories of expectation, and the role for the court that each category implied. It will be necessary to quote this and subsequent passages in full:

57. ... (a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds ( *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 ). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see *In re Findlay* [1985] AC 318 ; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906 (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontroversial that the court itself will require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it (see *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 ) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive* , not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.<sup>74</sup>

In terms of how a judge should decide which, if any, of these categories a given case belongs within, his Lordship said:

In many cases the difficult task will be to decide into which category the decision should be allotted. In what is still a developing field of law, attention will have to be given to what it is in the first category of case which limits the applicant's legitimate expectation (in Lord Scarman's words in *In re Findlay* [1985] AC 318 ) to an expectation that whatever policy is in force at the time will be applied to him. As to the second and third categories, the difficulty of segregating the procedural from the substantive is illustrated by the line of cases arising out of decisions of justices not to commit a defendant to the Crown Court for sentence, or assurances given to a defendant by the court: here to resile from such a decision or assurance may involve the breach of legitimate expectation: see *R v Grice* (1977) 66 Cr App R 167 ; cf *R v Reilly* [1982] QB 1208 , *R v Dover Magistrates' Court, Ex p Pamment* (1994) 15 Cr App R(S) 778 , 782. No attempt is made in those cases, rightly in our view, to draw the distinction. Nevertheless, most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation

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<sup>73</sup> Ibid 52

<sup>74</sup> Ibid 57

the character of a contract. We recognise that the courts' role in relation to the third category is still controversial; but, as we hope to show, it is now clarified by authority.<sup>75</sup>

In the event, Lord Woolf placed the facts the *Coughlan* case itself in the third category (expectation of a substantive benefit), and he concluded that the Health Authority had acted so unfairly as to have abused its power. This, he said, was for the following reasons:

First, the importance of what was promised to Miss Coughlan...; second, the fact that promise was limited to a few individuals, and the fact that the consequences to the health authority of requiring it to honour its promise are likely to be financial only.<sup>76</sup>

After a detailed survey of the caselaw on the many different types of official conduct that may amount to an 'abuse of power', Lord Woolf said the following of the general doctrinal area of legitimate expectations:

Legitimate expectation may play different parts in different aspects of public law. The limits to its role have yet to be finally determined by the courts. Its application is still being developed on a case by case basis. Even where it reflects procedural expectations, for example concerning consultation, it may be affected by an overriding public interest. It may operate as an aspect of good administration, qualifying the intrinsic rationality of policy choices. And without injury to the *Wednesbury* doctrine it may furnish a proper basis for the application of the now established concept of abuse of power.<sup>77</sup>

### **A. A Rule-Based Model of Administrative Law Adjudication**

This first model of administrative law adjudication, which derives from the 'rule-based' theory of legality described in chapter 2, will perhaps seem the most plausible and intuitively attractive to English public lawyers, and so this model will occupy us for several pages. The principal role of judges on the rule-based model, it will be recalled, is to give effect to *settled rules* about the legal powers, rights and duties of individuals and officials; and in 'hard cases' – cases in which there is no such settled rule – judges must modify existing rules or create new legal rules which will then be applied retroactively to

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<sup>75</sup> Ibid 59

<sup>76</sup> Ibid 60

<sup>77</sup> Ibid 71

the case. The value in administrative law and administrative law adjudication, so conceived, is one of legal certainty or protected expectations: an individual can plan and lead their life certain in their knowledge of the rights that they enjoy against the state; and officials can exercise power certain in their knowledge of the scope of that power.<sup>78</sup>

Does this conception of legality *fit* and *justify* the decisions in *Simms* and *Coughlan*?

Beginning with decision in *Coughlan*, the question (within the framework of the rule-based theory of legality) is as follows: which *rule* or *rules* governed the question of whether, and when, an individual enjoys a substantive legitimate expectation (or when an official has a duty to respect such an expectation)? The ‘parent’ rule guiding the court’s decision might be expressed as follows (modifying the relevant dictum of Lord Woolf): ‘that in public law a public authority can break its promise to an individual if, and only if, an overriding public interest requires it’.<sup>79</sup> It might then be said that each category of expectation identified by Lord Woolf represents a sub-rule, for instance, the third category might be expressed as follows (again to modify the dictum of Lord Woolf): ‘that, where a lawful promise induces a legitimate expectation of a substantive benefit, the court will give effect to that expectation if taking a new and different course would be so unfair as to amount to an abuse of power’. A supplementary rule (or set of rules) might then be added to this: ‘that a promise will so unfair as to amount to an abuse of power ‘where a promise is confined to one person or a few people, giving the promise or representation the character of a contract, and where the requirements of fairness to the individual are not outweighed by any overriding interest relied upon for the change of policy’.

It will be recalled from chapters 1 and 2 that the very concept of a rule, according to theorists such as Hart and Raz, is such that we must be able to ascertain its content and meaning empirically, that is, without recourse to morality or other extraneous considerations; disagreement can only be about such things as how to *modify* or *improve* an existing rule, or about the form that a *new* rule should take. These are the ways in which the rule-based theory seeks to promote such values as certainty and predictability. It is immediately difficult to see how any of the ‘rules’, ‘sub-rules’ or ‘supplementary rules’ that I have proposed above could be taken to represent such a settled, ascertainable, rule about the respective legal rights and duties of individuals and officials. Each of these ‘rules’ is replete with abstract terms such as ‘promise’, ‘fairness’, ‘an overriding

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<sup>78</sup> See ch 2 (below) part 3A.

<sup>79</sup> *Coughlan* above (n 72) 52.

public interest', 'substantive', 'procedural' and 'abuse of power', terms about whose meaning and application judges will inevitably *disagree*. So much is apparent from Lord Woolf's repeated references to the difficulties in placing any given set of facts within one category of expectation or another, and to the fact, noted by many other judges and legal commentators, that this is a 'developing field of law'.<sup>80</sup>

If, as I have suggested, there were no settled rules about the basis for a substantive legitimate expectation at the time that the *Coughlan* case came to court then, according to the rule-based model, the decision in favour of Mrs Coughlan could not have reflected the enforcement of *existing* legal rights and duties. Can it instead be said that the decision in the *Coughlan* case represented the retroactive application of a rule *created* by judges to capture her case (and other similar cases)? There are at least three difficulties with such an account. In the first place, it is hard to imagine what the *new* rule might be. Lord Woolf singles out three factors which are apparently decisive in the case: the importance of the promise to Mrs Coughlan, the fact that the promise was limited to a few individuals, and the financial consequences to the health authority. But these factors can hardly be said to reflect a settled understanding about the grounds on which a substantive legitimate expectation will arise. Judges will inevitably disagree on the questions of whether a particular promise is sufficiently 'important', and whether it was limited to a 'few' individuals; and it can *always* be said that there are financial consequences involved in holding a public authority to a particular decision or promise.

The second difficulty goes to the question of whether the Court of Appeal in *Coughlan* was *legislating* (as the rule-based account would suppose) or giving effect to an *existing* legal right (or rule). The judgment in *Coughlan* reveals a distinctive aspect of common law reasoning: it reveals the way in which judges make extensive references to past decided cases (whether in the same doctrinal area law or in an analogous area). If the court in *Coughlan* was *creating* a new rule to capture her case, then it would seem to have been unnecessary and even misleading for judges to refer to the many past decided cases that figure in Lord Woolf's judgment. It would have been unnecessary in so far as Lord Woolf was free to apply such moral, political and other standards as he thought appropriate, *irrespective* of what other judges had said in the past; it would have been

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<sup>80</sup> See P Craig, *Administrative Law* (5<sup>th</sup> edition) (Sweet & Maxwell, 2008).

misleading in so far as his Lordship may have given the false impression that he was giving effect to an existing legal right (rather than *creating* such a right).<sup>81</sup>

The third difficulty with the rule-based model of administrative adjudication takes us back to the arguments of chapter 2. Given that there will often be uncertainty (of the sort seen in *Coughlan* itself) about whether there is an existing rule on some point of law, it must be the case (within the rule-based model) that the *majority* of cases are not decided according to *existing* rules. This has two significant implications. In the first place, it implies that the rule-based model falls foul of the central ideal of the principle of legality: that officials exercise power according to standards established *before* that exercise. Moreover, as we saw in chapter 2, the rule-based model fails to promote the very values and principles on which it is founded, namely certainty and predictability. Secondly, the rule-based model would seem to subvert the central ideal of administrative law: that judges decide cases according to the *legality* of the decision rather than the *merits*. What is surely an anathema to administrative lawyers, a judge *creating* a legal rule will inevitably be forced to consider the moral and political wisdom of any particular executive decision (or category of executive decisions).<sup>82</sup>

If we turn now to the *Simms* decision, we will see precisely the same difficulties with the rule-based account of administrative law adjudication. The rule-based theorist might argue that the decision in *Simms* represented the application of the following types of rules (on matters of both substantive doctrine and interpretation): first, that ‘words should generally be given the meaning which the normal speaker of the English language would understand them to bear in the context in which they are used’;<sup>83</sup> secondly, that, if the ordinary meaning of a statute leads to a result which is contrary to the ‘purpose’ of the statute, a judge should look for some other possible meaning of the words which could avoid this result;<sup>84</sup> thirdly, that ‘in the absence of clear words to the contrary, Parliament is presumed not to have intended to legislate contrary to fundamental rights’; and, fourthly, that freedom of expression is a fundamental right.

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<sup>81</sup> *Law’s Empire* ch. 5.

<sup>82</sup> See, for example, Lord Irvine, ‘Judges and Decision Makers: The Theory and Practice of *Wednesbury* Review’ [1996]

<sup>83</sup> See Cross above (n 13) 1, 22; see also Z. Bankowski & N. MacCormick, ‘Statutory Interpretation in the United Kingdom’ in N. MacCormick & R. Summers (eds) *Interpreting Statutes* (Aldershot: Dartmouth, 1991) 382.

<sup>84</sup> A Kavanagh, ‘The Role of Parliamentary Intention in Adjudication under the HRA 1998’ (2006) 26 OJLS 179-206, 184 (citing Cross *op.cit.* n 15 and 17).

Of course, if there are multiple rules in play of the sort listed above, then there must be ‘meta’ rules about the order of priority of these rules. Kavanagh suggests, for instance, that judges should prioritise ‘enacted’ intentions (‘those which are expressed in the words of a statute itself’) from ‘unenacted intentions’ (broadly, the variety of different motivations that legislators may have in enacting a statute)<sup>85</sup> or ‘presumed intentions’ (such as the so-called ‘principle of legality’). Thus, as a possibility which I anticipated towards the beginning of this chapter, Kavanagh defends the intentions theory (as I described it above), by means of a rule-based conception of legality. As she puts it:

[Enacted] intentions are not fictional; they are determined by a set of rules or conventions, such that the intentions which are expressed in the statutory text (having gone through all the requirements of the legislative process) *are* the intentions of Parliament.<sup>86</sup>

If the *Simms* case is best explained by reference to a set of rules, then there must be a settled understanding of what counts as the ‘ordinary’ or ‘express’ or ‘enacted’ meaning of words. Yet we see that Lords Steyn, Hoffmann and Hobhouse *disagree* on whether the words of paragraphs 37 and 37A are clear and unambiguous, in which case, they disagree about the existence or meaning of ‘express’ words. Lord Steyn finds that there is no ambiguity and that, ‘literally construed’ there is force in the submission that the paragraphs effect a blanket ban on oral interviews with prisoners;<sup>87</sup> Lord Hoffmann finds the language to be ‘general’, and Lord Hobhouse finds that the language does not necessitate the conclusion that there was a blanket ban. Given these different opinions on the language of paragraphs 37 and 37A, the decision by each of their Lordships to interpret the paragraphs in the light of the right to freedom of expression can hardly be said to derive from a settled rule of statutory interpretation about when that right is triggered.

Similarly, on the question of the meaning of ‘freedom of expression’, it is clear that there was no existing settled rule about whether the right of expression encompassed the right of a prisoner to have oral interviews with journalists. As a consequence, the decision to rule in Mr Simms favour would have to be understood, on the rule-based model, as the creation and retroactive application of a new rule affording him this right. But this conclusion carries each of the difficulties identified above. First, it is difficult to

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<sup>85</sup> *Ibid* at 181 *et seq.*

<sup>86</sup> *Ibid* at 182

<sup>87</sup> *Simms* above (n 11) at 130.



imagine what the new rule could be. Their Lordships rule against the imposition of a *blanket* ban, but they seem to leave open the question of whether there could be particular circumstances in which such a ban would be permissible. Given the scope for disagreement on this question, we can again dismiss the notion that their Lordships' ruling establishes any *rule* about the meaning and application of the right of freedom of expression to prisoners. Secondly, we see in the *Simms* decision extensive references to past decided cases on freedom of expression, particularly in relation to cases involving prisoners.<sup>88</sup> Enough has been said to show how these references cast doubt on the explanatory potential of the rule-based model. Finally, the rule-based model flouts the cardinal features of legality and the separation of powers identified above.

The difficulties in applying the rule-based model to the decision in *Coughlan* and *Simms* can be extended more generally, I think, to the practice of judicial review as a whole. The leading textbooks on administrative law each devote different chapters to the three general 'grounds' or 'heads' of judicial review, 'illegality', 'procedural impropriety' and 'irrationality'. And administrative lawyers invariably frame their legal submissions by reference to one or more of these heads. The implication of this approach, we might say, is that each of the different heads of review represents a settled rule about when an official will have acted unlawfully, or when an individual has a legal right against a particular person or entity. Of course, any administrative law theorist will be quick to point out that the courts appeal to a great many other standards when arguing or deciding administrative law cases.<sup>89</sup> A finding of illegality, for instance, might flow from a finding that a decision-maker fettered his discretion, or reached a decision for an improper purpose; and a finding of procedural impropriety might flow from a finding that a decision-maker failed to afford an individual a hearing, or failed to observe some other aspect of natural justice. But, again, the rule-based theorist might contend that each of the discrete bases of unlawful official conduct constitutes a sub-rule which gives content to the general rules or heads of review.<sup>90</sup>

The difficulty with this rule-based account of judicial review is that none of the purported 'rules' or 'sub-rules' described above reflect some clear, ascertainable standard in the way that Hart, Raz and others stipulate. On the contrary, judges, lawyers and

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<sup>88</sup> See, in particular, the judgments of Lords Steyn and Hobhouse.

<sup>89</sup> See Craig, 'The Common Law, Shared Power and Judicial Review' above (n 9) 244.

<sup>90</sup> *Ibid* 245.

academics, characteristically *disagree* about the nature and extent of the controls that should be placed on executive action; and – in so far as this is of interest to anybody but textbook writers – they disagree about which controls properly fall under which head of review (whether, for instance, a breach of a substantive legitimate expectation belongs within the ‘illegality’ rule, the ‘*Wednesbury* unreasonableness’ rule or neither). These disagreements cannot go to the *content* of the rule, for this would mean that there is *no* rule. But nor does it make any sense to think of these disagreements as modifications or refinements to *the* rules.<sup>91</sup> In so far as *the* rules are thought to be the general heads of review, it is clear that these heads of review have no determinate content – or, to use Herbert Hart’s language, no ‘core of certainty’ – which can be modified or refined.<sup>92</sup> As Allan puts it, the heads of review are merely ‘empty-vessels’ or ‘conclusions’ which, taken alone, reveal nothing about the grounds on which courts should impugn official action.<sup>93</sup> Similarly, it is unhelpful, I think, to distinguish between the general *grounds* (or *heads*) of judicial review – and the concrete *application* of those grounds.<sup>94</sup> Such a distinction once again incorrectly assumes that there is some determinate core of meaning within each of the grounds of review which can be applied differently in different contexts.<sup>95</sup>

## **B. Administrative Law as Integrity**

We have seen that the rule-based model neither fits nor justifies administrative law adjudication. We are in need of an account of adjudication which can adequately explain

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<sup>91</sup> This seems to be the implication of Craig’s argument that the courts have developed a detailed set of principles *within* the heads of review. P Craig ‘The Common Law, Shared Power and Judicial Review’ above (n 9) 245.

<sup>92</sup> See H L A Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford 1994) 123, 147-54 and 251.

<sup>93</sup> See T.R.S. Allan ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry’ [2002] CLJ 87; T.R.S. Allan, ‘Doctrine and Theory in Administrative Law: An Elusive quest for the Limits of Jurisdiction’ [2003] PL 429.

<sup>94</sup> For this distinction, see Allan, ‘Constitutional Dialogue’ above (n 5) 567.

<sup>95</sup> For a similar type of argument to that put by Allan, see Jowell and Lester, ‘Proportionality: neither novel nor dangerous’ in Jowell and Oliver (eds) *New Directions in Judicial Review* (London, 1988). The authors argued, first, that the *Wednesbury* formulation is tautologous: each use of the adjective ‘reasonable’ begs the question as to its meaning. Secondly, the authors suggest that many cases decided under the banner of *Wednesbury* unreasonableness could be better explained as an application of a principle of proportionality. The broader point to take from the authors’ argument, it is suggested, is the hopelessness of any an attempt to capture a wide range of legal principles in a single rule. See also Jowell and Lester, ‘Beyond *Wednesbury*: substantive principles of administrative law’ 1987 PL 368. Similarly, Allan questions whether Parliament could pin-point any fixed meaning to the principle of proportionality in order to abolish that principle. Allan, ‘Constitutional Dialogue’ above (n 5) 576.

and justify the place of *disagreement* in adjudication; an account which can explain and justify the special ‘gravitational pull’<sup>96</sup> of past decided cases; and an account which can accommodate the ideal that judges give effect to *existing* legal rights, duties and powers. The first point to appreciate is the *types* of standards which judges apply in their adjudicative role. We have seen that a judge faced with the question, say, of whether a particular applicant was treated ‘fairly’, or whether a Minister acted ‘rationally’ will not find the answer in Parliament’s *intentions*; nor will he find the answer in a set of *rules*. To return to the question driving this inquiry – *viz. which standards, established in which way, provide the best justification for administrative law decisions?* – we can now eliminate ‘rules’ as the relevant ‘standards’, just as we eliminated ‘parliamentary intentions’ as the relevant standards in part 1 (above).

Here is a familiar – and, in my view, better – alternative to the two accounts of legality that we have examined above. The only standards that can properly make sense of administrative law decisions, it is suggested, are the different *principles* and (where statutes are concerned) *policies* which can be summoned to justify the meaning of a statutory text or a common law doctrine, and which will inform the proper role of judges vis-à-vis political decision-makers.<sup>97</sup> Of course, to say that judges apply *principles* and *policies* in their adjudicative function may seem to imply, at first blush, that judges have *carte blanche* to impose whichever scheme of principle or policy reflects their own individual moral and political preferences.<sup>98</sup> Indeed, the intentions theory and rule-based theories considered above both may be seen as attempts – albeit unsuccessful – to avoid this conclusion.<sup>99</sup> But if we examine the character of judicial reasoning in *Coughlan* and *Simms*, it will soon become apparent that judges observe a special constraint in terms of the *particular* principles and policies which figure in their decision-making.

In order to understand this constraint, we need to return to the conception of legality as integrity (and the programme of adjudication that it recommends) outlined in chapter 2. If we understand the principle of legality – the principle that officials exercise power in accordance with standards established before that exercise – as embodying the value of *integrity* or *equality before the law*, then the standards which figure in judicial reasoning

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<sup>96</sup> See R Dworkin *Taking Rights Seriously* (Harvard University Press, 1977) 112-5.

<sup>97</sup> *Ibid.* chs 1, 2, and 4.

<sup>98</sup> This type of objection is regularly made against Dworkin’s theory of adjudication. See, for example, J Griffith, *The Politics of the Judiciary* (London, Fontana, 1997, 5<sup>th</sup> edn).

<sup>99</sup> See Goldsworthy ‘’ above (n 33).

are only those principles of justice, fairness and procedural due process which are *presupposed or entailed* by the past decisions of Parliament and courts.<sup>100</sup> This is to say that judges must subordinate their own moral and political convictions to the scheme of principle which underpins the collective institutional decisions in a particular political community. This scheme of adjudication differs from both the conception of legality as justice described in chapter 2, according to which, judges must decide cases according to the demands of (ideal) *justice*;<sup>101</sup> and it differs from the rule-based account of legality described above, according to which judges will normally bring their own moral and political convictions to their frequent *quasi*-legislative task.

How then does the conception of administrative law as integrity translate into administrative law adjudication? I noted above that the judgments in *Coughlan* and *Simms* both illustrate the way in which judges refer to past decided cases in support of their decision in the instant case. It is trite British constitutional theory that judges practice the doctrine of precedent or *stare decisis* in their decision-making, but we can now make sense of this practice by reference to the value of *integrity*.<sup>102</sup> In *Simms*, their Lordships located the principle of freedom of expression in past decided cases such as *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109 and *Derbyshire County Council v. Times Newspapers Ltd.* [1993] A.C. 534 and the decisions of the European Court on Human Rights.<sup>103</sup> To this, we might add that the principle of freedom of expression is presupposed or entailed by the very fact that legislation is passed by *Parliament*: if the powers of Parliament are justified by the principle of democracy, then the principle of democracy must figure amongst the legal principles which will help us to determine the proper powers of Parliament, and which will help us to make sense of any statute.<sup>104</sup> Democracy, properly understood, we might argue, implies that each member of a political community should enjoy the right to express their views on how their community should be governed.<sup>105</sup>

The task of judges, according to a model of administrative law as integrity, is, as Dworkin puts it, ‘relentlessly interpretive’:<sup>106</sup> it involves a continuing process of a

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<sup>100</sup> See chapter 2, part 3B.

<sup>101</sup> See chapter 2, part 3.

<sup>102</sup> For an excellent account of the way in which the value of integrity can shape our understanding of the doctrine of *stare decisis*, see S Hershovitz, ‘Integrity and Stare Decisis’ in S Hershovitz (ed.) *Exploring Law’s Empire* (Oxford University Press, 2006).

<sup>103</sup> Lord Steyn 125-127, 130; Lord Hoffmann 131;

<sup>104</sup> See chapter 4, part 1.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Law’s Empire* 105.

‘constructive interpretation’ of the different principles and policies that underlie a given doctrinal area, and which make best sense of the past decisions in English law as a whole.<sup>107</sup> The court in *Simms* was therefore required to interpret the principles of freedom of expression and judicial independence, along with the policy of maintaining good order in prisons, in a way that best *fits* and *justifies* English legal practice as a whole.<sup>108</sup> It will be the task of chapter 4 to explore fully the type of theory of democracy, human rights and judicial review that could justify the decision in *Simms* and other cases involving human rights. Suffice it to say in anticipation of that discussion that the *Simms* decision may be justified according to the view that the principle of freedom of expression *trumps* the (utilitarian) policy of maintaining prison security; or, to put this differently, the Home Secretary offered an *impermissible reason* for his decision.<sup>109</sup>

Turning now to the *Coughlan* decision, rather than treat the different categories of expectation – and the different factors that might place a given case in one category or another – as hermetically sealed *rules*, the integrity-based model treats these different categories as a set of principles which form the object of judges’ constructive interpretation. The contrast between a rule-based and principle-based analysis of the legitimate expectation jurisprudence comes out nicely in the following dictum of Lord Justice Laws in *Nadarajah*:<sup>110</sup>

I think it superficial to hold that for a legitimate expectation to bite there must be something more than failure to honour the promise in question, and then to list a range of possible additional factors which might make the difference. It is superficial because in truth it reveals no principle. Principle is not in my judgment supplied by the call to arms of abuse of power. Abuse of power is a name for any act of a public authority that is not legally justified. It is a useful name, for it catches the moral impetus of the rule of law. It may be, as I ventured to put it in *Begbie*, ‘the root concept which governs and conditions our general principles of public law’. But it goes no distance to tell you, case by case, what is lawful and what is not. I accept, of course, that there is no formula which tells you that; if there were, the law would be nothing but a checklist. Legal principle lies between the overarching rubric of abuse of power and the concrete imperatives of a rule-book.<sup>111</sup>

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<sup>107</sup> *Ibid.*

<sup>108</sup> For a similar analysis (from a surprising source) of the decision in *R v Lord Chancellor ex parte Witham* [1998] Q.B. 575. See Elliott and Forsyth, ‘The Legitimacy of Judicial Review’ above (n 14) 304-5. The authors argue that the principle of access to justice was used by Laws J to shape the meaning of the relevant legislation itself.

<sup>109</sup> For a similar analysis, see T R S Allan, ‘Constitutional Dialogue’ above (n 5) 579.

<sup>110</sup> *Nadarajah, Abdi v. Secretary of State for the Home Department* [2005] EWCA Civ 1363.

<sup>111</sup> *Ibid.* 67. For a similar judicial analysis of common law reasoning see *Wainwright v. Home Office* [2004] 2 AC 406, 423 per Lord Hoffmann.

Whether we accept the subsequent conclusion of Laws LJ in *Nadarajah* that the organising principle in the legitimate expectations jurisprudence (or in administrative law as a whole) is ‘fairness’ or ‘good administration’, the fact remains that the decision in *Coughlin* could only be based on the principle or set of principles which provided the best justification for the past decisions of courts in this doctrinal area of law. The decision could plausibly be justified, for instance, on the basis that a public decision-maker has a duty to demonstrate a heightened degree of trustworthiness when an ascertainable group of particularly vulnerable individuals are in question.

I said above that a theory of administrative law adjudication must be able to explain and justify the place of *disagreement* in adjudication; it must be able to explain and justify the special ‘gravitational force’ of past decided cases; and it must be able to accommodate the ideal that judges give effect to *existing* legal rights, duties and powers. The integrity-based model, it is submitted, satisfies each of these desiderata.<sup>112</sup> If the role of judges is to give effect to the principles of justice, fairness and procedural due process which best justify any given doctrinal area, then disagreement can only be understood as a disagreement of political morality about the nature of these principles, and as a disagreement on the question of how such principles should determine the outcome of a particular case. Furthermore, the integrity-based model provides a compelling justification for the abstract ideal of legality and the separation of powers outlined in chapter 2. If the legal rights, duties and powers of individuals and officials flow from the past decisions of Parliament and courts, then the role of judges is always to give effect to *existing* legal rights. At the same time, the judicial role is always one of *interpretation*, and never one of *legislation*.

### **C. Administrative Law as Integrity and the *ultra vires* debate**

How, if at all, does the model of administrative law as integrity just described differ from the common law theory of judicial review (or indeed the modified *ultra vires* theory of review)? According to common law theorists, judges apply common law principles when they interpret statutes; or, where appropriate, judges apply both common law

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<sup>112</sup> For a sympathetic account of administrative law as integrity, see T R S Allan ‘Dworkin and Dicey: the Rule of Law as Integrity’ (1988) 8 OJLS 266

principles and principles which can be inferred from the statutory context. Craig has suggested further that the relevant common law principles are those principles which are ‘sensible, warranted and justified in the light of the aims of the particular doctrinal area in question’.<sup>113</sup> According to modified *ultra vires* theorists of judicial review, judges should draw only upon principles which appear on the face of a statute, or which can be inferred from a statute, or which belong within the rule of law.<sup>114</sup> It would ‘subjugate the will of Parliament’<sup>115</sup> say modified *ultra vires* theorists if it were left to judges to decide (via their common law jurisdiction) which ‘fundamental values’ condition the exercise of Parliament’s powers.

The crucial difference between the model of administrative law as integrity and the different justifications for judicial review put forward within the *ultra vires* debate, I think, is the way in which the latter types of justification each focus on the *source* of the principles of judicial review rather than the *justification* for those principles. This is to say that the *ultra vires* debate takes place within a legal positivist framework: common law theorists seem determined to demonstrate that it is *judges* who authorise (and fashion) the principles of review, while *ultra vires* theorists seem determined to demonstrate that it is *Parliament* which authorises judges to fashion the principles of review. I have tried to show in this chapter and in chapter 2 that theories about the *sources* of law – whether cast in terms of sovereign commands, or Hartian rules – cannot be sustained. The law is neither what Parliament says or intends, nor what judges say or intend; rather, the truth or validity of any proposition of law, I have argued, depends on our understanding of the very principles which justify the powers of Parliament and courts, and on our understanding of the different principles and policies that underpin different doctrinal areas of law.<sup>116</sup> To repeat the mantra of the past three chapters, it is the principle of legality which determines the power of institutions and, more broadly, which shapes or controls our understanding of the separation of powers.

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<sup>113</sup> P Craig, ‘Ultra Vires and the Foundations of Judicial Review’ [1998] CLJ 63, 87.

<sup>114</sup> C Forsyth and M Elliott, ‘The Legitimacy of Judicial Review’ above (n 14) 305 and n 69.

<sup>115</sup> Ibid 295.

<sup>116</sup> Allan helpfully captures this idea in the metaphor of an ‘imaginary dialogue’ between different principles and policies. See Allan ‘Constitutional Dialogue’ above (n 5) 571. It may be that Allan has modified his view in recent years. In his earlier work, Allan repeatedly emphasized the centrality of the common law (see, for instance, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford, Clarendon Press, 1993) 4-16.

## Chapter 4: Democracy, Human Rights and the Proper Role of Judges

'In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.'

Lord Hoffmann *R (on the application of ProLife Alliance) v. British Broadcasting Corporation* [2003] UKHL 23, [2004] 1 A.C. 185, at [75]

In the first three chapters of this thesis, I have challenged two ideas which have for long been dominant in orthodox British constitutional theory. These are the twin ideas that Parliament is sovereign and that, as such, the law of the constitution ultimately depends on Parliamentary *intentions*. The most sophisticated philosophical defence of these two ideas, we have seen, involves the contention that the powers of the different political institutions, and the grounds on which any proposition of law is true or valid, depend on the existence of settled *rules* about those things. There is a settled rule, it is said, to the effect that 'what the Queen in Parliament enacts is law', and there are a range of settled rules about the different assumptions, presumptions and other canons of statutory interpretation that enable us to identify Parliament's intentions.<sup>1</sup> These rules depend for *their* existence and validity on what officials or judges *say* or *think*, and so the task of the constitutional theorist is simply to record empirically what it is that officials and judges have in fact said or thought.

The first stage in my argument against this rule-based account of the British constitution has been to establish that the idea of Parliamentary sovereignty is a red-herring. Disagreements about the powers of institutions and about the grounds of legal validity in the British constitution, I suggested in chapter 1, revolve, not around the concept of sovereignty, but around different conceptions of the principle of *legality* – the principle that officials (or institutions) may only exercise power in accordance with standards established before that exercise. The best conception of this principle, I then

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<sup>1</sup> See chapter 2, part 1.



argued in chapters 2 and 3, is not a rule-based conception, but a conception based on the value of integrity or equality before the law. This is to say that the ‘standards’ in accordance with which officials must exercise power are the principles of justice, fairness and procedural due process to which a community is committed through the past decisions of its political and legal institutions. The value of integrity demands that these principles should be extended equally to each member of that community. It is in this sense that the principle of legality – and, more specifically, the value of integrity – shapes or controls the many other principles which underpin the British constitution.

What do these conclusions tell us about the nature of the British constitution and British constitutional theory? They tell us, it is suggested, that we can only reach an understanding of the British constitution by engaging directly in arguments of political morality about which principles *do* justify the powers of the political and legal branches of government, and which principles *do* make best sense of the past decisions of those institutions. British constitutional theory is, in this sense, quintessentially an exercise in moral argumentation about how best to understand the facts of British constitutional history and practice. On the other hand, the above conclusions tells us that British constitutional theorists should abandon philosophically ill-conceived debates about sovereignty, Parliamentary intent, and the existence and content of rules, which debates have served only to obscure the important questions of political morality just described.

Against the background of these conclusions, we are now in a position to launch directly into a set of questions which, it is suggested, must lie at the heart of any theory of the British constitution. These questions concern the proper constitutional relationship between government (which throughout this chapter I will take to mean the legislature and executive) courts and citizens. The key question is one concerning the extent of the legislative powers that Parliament possesses.<sup>2</sup> Can Parliament ‘make or unmake any

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<sup>2</sup> It should be said that Parliament does not have a monopoly on legislative power in the British constitution. For instance, the executive legislates by Orders in Council, and by producing a vast amount of secondary legislation. In my view, the same principle of democracy justifies the legislative powers of Parliament and the executive, and so any reference to Parliament in this chapter should be taken to encompass the legislative powers of both the legislature and executive. For an interesting judicial account of the relative weight to be paid to legislative and executive decisions, see *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EW CA Civ 158, paras 83 to 87 per Lord Justice Laws.

law' in the way that Dicey suggested, or are there certain things that Parliament cannot do? It will by now be apparent that this question does not depend on the concept of sovereignty. It depends rather on the principle or principles of law which justify the fact that it is a *Parliament* (as opposed to some other person or body) which exercises legislative power in the British constitution. The second question is inextricably connected to the first, although the precise nature of that relationship will require careful accounting. The question is this: in what senses, if any, can it be said that individuals possess *moral rights* against the government? While many theorists agree that individuals do possess such rights, there is considerable disagreement about the nature of such rights. The final question is an institutional question. If individuals possess moral rights against the government, then what role, if any, should *courts* have in giving effect to those rights? To put this differently, how might a background theory of the *moral* rights of individuals inform the existence and content of *legal* rights and duties?

### 1. Justifying the Powers of Parliament

I have suggested in previous chapters that it is the principle of *democracy* which justifies the fact that *Parliament* (as opposed to some other person or body) exercises legislative power in the British constitution. To put this differently, the principle of democracy figures amongst the legal principles which will help us to determine the proper powers of Parliament, and which will help us to make sense of any statute.<sup>3</sup> It is in this vein that Lord Steyn has said that: 'Parliament does not legislate in a vacuum; it legislates for a modern European liberal democracy';<sup>4</sup> and that: '[i]n the context of a *Parliamentary democracy* the language of section 2(1) and section 7 [entails that an indirect route to amending the Parliament Act 1911 is not available]'.<sup>5</sup> The principle of democracy is also now formally recognised in an English statute as a result of the incorporation of certain parts of the ECHR by the HRA 1998. Articles 8 to 12 of the Convention include the following words: 'There shall be no interference with the right except as is *necessary in a democratic society*' (my italics). Of course, if it is accepted that Parliament possesses

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<sup>3</sup> See chapter 3, part 3.

<sup>4</sup> *R. v. Secretary of State for the Home Department, ex p. Pierson* [1998] A.C. 539, 575.

<sup>5</sup> *Jackson v Her Majesty's Attorney-General* [2005] UKHL 56, 79. Similarly see Lord Roger at 139.

only such powers as are justified by the principle of democracy, then this formal reference to democracy in the ECHR is otiose; for we would then be saying that Parliament *in virtue of being a Parliament* is only empowered to act in a way that serves the principle of democracy.<sup>6</sup>

The principle of democracy is firmly embedded then in British constitutional practice, but what does this principle mean? Some have defined democracy in grand terms as government ‘of the people, by the people, for the people’, but this type of definition does not take us very far. First, we need to hear some theory of who counts as ‘the people’, a question which historically has been highly controversial and remains so.<sup>7</sup> Secondly, in a large, populous and complex modern state, it is surely impracticable to allow all or even most individuals to be involved in the task of government. Government ‘by the people’ is really only intelligible therefore if we think of ‘the people’ as popular *representatives*.<sup>8</sup> Finally, we need to hear some story about what government *for* the people means. Does this mean that government should be directed towards giving people what they want, or giving *most* people what they want; or does government for the people mean that government should be directed towards ensuring that each members of a political community is treated in a particular way?

Others have (no doubt unconsciously) treated the concept of democracy as a *concept of a natural kind*: the very DNA of democracy, they suggest, is the idea of majoritarian rule; and the very DNA of human rights is the idea of limits on majority rule.<sup>9</sup> Democracy and human rights, on this approach, are therefore in an inescapably antagonistic, conflictual relationship with each other such that when the will of the majority gives way to judicially enforced human rights this must be deemed ‘morally regrettable’ as a matter of fairness.<sup>10</sup> I argued in chapter 1 that we have no reason to

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<sup>6</sup> See (below) p 15 *et seq.*

<sup>7</sup> There is much contemporary debate, for instance, about whether and to what extent asylum seekers should enjoy the protection of the British government. See, for instance, the decision in *R v Secretary of State for the Home Department ex parte Limbuela* [2005] UKHL 66.

<sup>8</sup> In this sense, the etymology of the word democracy (demos (the people) + crato (rule)) can be misleading in a modern state. The need for representatives has long been an issue for political philosophers in terms of reconciling the natural right to freedom with the need for government or authority. See, for instance, J Locke, Peter Laslett (ed.), *Two Treatises of Government* (Cambridge University Press, Cambridge 2003)m Second Treatise, chapter VIII, para. 154.

<sup>9</sup> See chapter 1, part 1.

<sup>10</sup> See R Dworkin, *Freedom's Law*, (Oxford University Press, Oxford 1996) 16-17.

think that political concepts such as democracy or human rights can be analysed and identified in the way that we analyse and identify an animal or a plant; on the contrary, our day-to-day disagreements about such concepts are characteristically based on competing arguments of political morality, arguments which are not amenable to scientific analysis.

A better starting point in trying to understand the principle of democracy, it is suggested, is to try to identify the point, purpose or value of this principle.<sup>11</sup> This takes us back to the argumentative framework proposed in chapter 2 for an understanding of the principle of legality. We must suppose, I suggested in that chapter, that people who theorise and disagree about the meaning of political concepts such as legality or democracy share the same concept: they must all be in the same ‘ball park’ when they disagree about those concepts (otherwise, we could not intelligibly describe their exchanges as *disagreements*).<sup>12</sup> We need to begin therefore by attempting to identify the basic plateau of *agreement* which enables theorists to disagree about the concept. Here is a working suggestion: most people agree, it may be supposed, that the value in democracy is to enable each member of a political community to have an *equal stake* in the way that their community is governed.<sup>13</sup> If this is the shared concept of democracy, then a proper understanding of the concept will ultimately depend on how we understand the notion of an ‘equal stake’ or, more broadly, how we understand the value of ‘equality’.

I now want to outline three theories or conceptions of an equal stake, each of which rests on a particular conception of the abstract concept of equality. The first two conceptions both place majoritarian decision-making at their heart, but they do so for very different reasons. The last conception rejects majoritarian decision-making in

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<sup>11</sup> Ibid at 15.

<sup>12</sup> See chapter 2, part 1.

<sup>13</sup> For the concept of an ‘equal stake’, see R Dworkin, ‘Equality, Democracy, and Constitution: We the People in Court’, *Alberta Law Review* 28 (1990): 324-346. There is clearly a connection between the principle of democracy and the value of integrity described in earlier chapters. In each case, the emphasis is on ensuring that each member of a political community is treated as an equal. See T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2003) 29 and chapter 2 (above) part 3B. Importantly though, the value of integrity would remain a guiding value in a political community even if that community could not plausibly be described as a *democracy*. In other words, the principle of democracy is a legal principle in the British constitution *because* the value of integrity picks out this principle from facts about British constitutional practice.

favour of the idea that rights exist *against* the majority. As I have indicated above, the view that one takes on which of these three (or some other) conceptions of an equal stake best explains and justifies the concept of democracy is of the utmost constitutional importance: if the principle of democracy figures amongst the principles which justify the powers of Parliament, then that same principle (properly understood) will inform the true extent of Parliament's legislative powers (and the powers of the executive) in the British constitution.

### A. The Majoritarian Conception

For proponents of the majoritarian conception, the principle of democracy is embodied in the ideal of representative government and the untrammelled power of a legislature.<sup>14</sup> Since Parliament derives its power from 'the people' – an idea which is sometimes expressed in terms of 'popular sovereignty'<sup>15</sup> – it is right, as a matter of democratic principle, that Parliament should be free to act in any way it pleases, and that it should not be thwarted by the unelected judiciary.<sup>16</sup> The majoritarian conception further implies that every member of a community should have an equal *input* into their political system, typically in the form of casting a vote for a political representative, but perhaps in terms of more developed modes of popular participation.<sup>17</sup> To make some use of the grand definition of democracy mentioned above, rule 'by the people', on the majoritarian account, relates to the involvement of each person in the *process* by which decisions are made. Rule is then said to be 'for the people' in so far as the *outcome* of that process should be for the benefit of everybody (given their equal input).<sup>18</sup>

On the face of things, the majoritarian conception of democracy just described seems to fit British constitutional practice squarely. The view widely held among judges and

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<sup>14</sup> See, for instance, C Gearty, *Principles of Human Rights Adjudication* (Oxford University Press, 2004) ch. 2.

<sup>15</sup> See, for instance, J Waldron 'Judicial Power and Popular Sovereignty' published in Mark Graber and Michael Perhac (eds) *Marbury versus Madison: Documents and Commentary* (CQ Press, 2002), 181-122; K Ewing 'The Human Rights Act and Parliamentary Democracy' (1999) 62 M.L.R. 79, 98-99.

<sup>16</sup> Many theorists locate this view within theories of civil republicanism. See, most recently, R Bellamy, *Political Constitutionalism A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); A Tomkins, *Our Republican Constitution*, (Hart Publishing, Oxford 2005).

<sup>17</sup> Bellamy, *op.cit.* ch. 5.

<sup>18</sup> See R Dworkin above (n 10) 16.

academics that Parliament can ‘make or unmake any law’, while usually (but mistakenly) expressed in terms of a theory of sovereignty, is perhaps best understood as a statement in support of the majoritarian conception of democracy.<sup>19</sup> The same can be said of so-called ‘principle of legality’ viz. that, in the absence of express, unambiguous, words to the contrary, the courts will presume that Parliament did not intend to interfere with fundamental human rights.<sup>20</sup> This interpretive presumption reflects the view that Parliament (or the majority) should have the last word on matters of human rights and other fundamental principles. Similarly, the courts have developed a principle of – what may be called – ‘democratic deference’ towards the executive branch of government in cases decided under the HRA 1998. This is the idea that the balance between liberty and security should be made by elected officials and not by unelected judges.<sup>21</sup> As Lord Hoffmann puts it in *Rehman*:

‘...it is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.’<sup>22</sup>

We need to be cautious though about how we treat these and other (ostensible) expressions of support for the majoritarian conception. In the first place, the meaning of democracy does not depend on what most people (or indeed what most judges or officials) *think* it means; rather it depends, I have argued above, on the meaning which, as a matter of political morality, best captures the idea that people should have an *equal stake* in the way that their community is governed. If we find that democracy, properly

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<sup>19</sup> Arguments by public lawyers *against* the majoritarian conception of democracy have also been expressed (mistakenly) in terms of sovereignty. Jowell has argued, for instance, that ‘...some of those conditions [i.e. of a constitutional democracy], such as free and regular elections, underlie the legitimacy of the principle of parliamentary sovereignty itself’. See J Jowell, ‘Parliamentary Sovereignty under the New Constitutional Hypothesis’, [2006] PL 562-580, 579.

<sup>20</sup> *R v. Secretary of State for the Home Department, ex parte, Simms and Another* [2000] 2 AC 115, 131 per Lord Hoffmann

<sup>21</sup> For a robust argument against the idea that judges should defer to Parliament on democratic grounds, see Jowell, ‘Of Vires and Vacuums: The Constitutional Context of Judicial Review’ [1999] PL 448-460; ‘Judicial Deference: Servility, Civility to Institutional Capacity’ [2003] PL 592, 597; Woolf, Jowell and Le Sueur, *De Smith’s Judicial Review* (London, Sweet & Maxwell, 2007) 18.

<sup>22</sup> *Secretary of State for the Home Department ex parte Rehman* [2001] UKHL 47, 62.

understood, implies certain limits to the things that a majority can do, then the question of whether the principle of democracy is instantiated in British constitutional practice will depend on the extent to which those limits are in fact reflected in the past political decisions of Parliament and courts. If they are not, then we may be forced to conclude that it would be inaccurate to describe Britain as a democracy (or, at least, to conclude that certain aspects of British constitutional practice are undemocratic).

Secondly, it remains to be seen what would happen if Parliament (or ‘the majority’) did attempt to suspend or abrogate well-established rights. There are no clear precedents for such action in recent times.<sup>23</sup> Orthodox constitutional theory tells us that provided Parliament uses clear, unequivocal words, judges would give effect to such a decision. But we have seen in our analysis of *Jackson* in chapter 1 and *Simms* in the last chapter, that this orthodox theory is empty. Judges characteristically *disagree* about the meaning of words and phrases in a statutory text depending on how they justify the force of statutes in general, and on how they interpret the background scheme of principle in any particular doctrinal area of law.<sup>24</sup> In this way, the question of whether Parliament has the legislative power to enact some illiberal measure will depend on judgments of political morality rather than on semantics.<sup>25</sup> Should Parliament ever attempt to enact some egregiously oppressive measure – the Blue Eyed Babies Act or the Abolition of Democracy Act – it may well be that judges would invoke such principles as democracy and human rights to justify striking down such purported Acts (or at least to interpret such Acts in a way that would negate their otherwise oppressive effects). Britain may yet have its own *Marbury v Madison*.<sup>26</sup>

The majoritarian conception of democracy, I have said, takes the concept of an equal stake – or the concept of ‘equality’ – to mean that each member of a community should

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<sup>23</sup> Dicey sought to demonstrate Parliamentary omnipotence by reference to the enactment of the Septennial Act (extending the life of Parliament from three years to seven years). See AV Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982 [reprint of 8th ed., 1915] chapter 1, part 1. Recent judicial decisions would suggest that a similar attempt to extend the life of Parliament today might be ruled invalid. See *Jackson* above (n 5) discussed in chapter 1 (above), parts 2 and 3. See also *R. (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498 at 46 per Sedley LJ discussed in chapter 5 (below), part 3.

<sup>24</sup> See chapter 3, part 2A.

<sup>25</sup> See chapter 1, part 2.

<sup>26</sup> 5 US (1 Cranch) 137 (1803). The possibility that the House of Lords might ‘strike down’ a statute is far more real following the decision in *Jackson*. See my discussion (above) in chapter 1, part 2. See also chapter 6 (above).

have an equal *input* into the decision-making processes (whether in the form of votes for local and national representatives, or in the form of some deeper form of participation or popular deliberation). I now want to draw a contrast between two very different justifications for this *process*-based account of majoritarian decision-making. The first justification treats the input of each member of a community as a *preference* to be fed into an overall utilitarian calculation about the maximisation of welfare or happiness in that community.<sup>27</sup> We might express this conception of equality as the ideal of *treating people equally* in the sense that everybody is afforded the same minimal entitlement, namely the casting of a preference or a vote.<sup>28</sup> This (utilitarian) justification is sceptical of the existence of natural or moral rights in the sense that it rejects any determinant of justice and rights other than the (consequentialist) test of maximising utility.<sup>29</sup> This is to say that this justification rejects any prior rights-based or *deontological* grounds for limiting the powers of the government; the ‘rightness’ of any political decision is determined solely on the basis of the *consequences* of that decision.<sup>30</sup>

I do not propose to deal at any length with this first justification for majoritarian decision-making, although I will offer some arguments against it below in the course of defending a ‘reason blocking’ theory of human rights and adjudication.<sup>31</sup> Suffice it to say for now that the utilitarian justification for majoritarian decision-making can neither fulfil its liberal egalitarian ambitions as a general theory of morality (for the reason that a

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<sup>27</sup> For an excellent overview of different theories of utilitarianism, see N Simmonds, *Central Issues in Jurisprudence* (3<sup>rd</sup> edn, Sweet and Maxwell, 2008); J.J.C. Smart & Bernard Williams, *Utilitarianism For and Against*, (Cambridge University Press, 1973); Jeremy Waldron (ed.) *Nonsense on Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987).

<sup>28</sup> This conception of equality is also sometimes described as *formal* equality. For an excellent discussion of whether Dicey’s conception of the rule of law supports a formal or substantive conception of equality, see Craig, ‘Formal and Substantive Conceptions of the Rule of Law’ (1997) P.L 467-87, 472 *et seq.* See also J Jowell, ‘Is Equality a Constitutional Principle?’ (1994) 47 Current Legal Problems, (Part 2); J Jowell, ‘The Rule of Law and its Underlying Values’ in J Jowell and D Oliver (eds), *The Changing Constitution* (6th edn, Oxford University Press, Oxford 2007), 23.

<sup>29</sup> This is not to say that individuals cannot be granted ‘rights’ in some sense. One form of utilitarianism – *indirect* utilitarianism – holds that the greatest happiness for the greatest number may be best achieved if a government does give protection to individual rights. Of course, the ‘rights’ in this situation are instrumental to the utilitarian goal rather than intrinsically valuable. For a helpful discussion on this point, see W Kymlicka, *Contemporary Political Philosophy: An Introduction* (Clarendon Press, Oxford 2002) ch 2.

<sup>30</sup> For a detailed discussion of deontological and consequentialist ethics, see Larry Alexander and Michael Moore ‘Deontological Ethics’ available at <http://plato.stanford.edu/entries/ethics-deontological/> For an interesting discussion of how these competing philosophies manifest themselves in judicial judgments, see D Vick, ‘Deontological dicta’ (2002) 65 MLR 279-289.

<sup>31</sup> See below at 14-18.



majority of people may express a preference that some other person or group should be treated as an inferior);<sup>32</sup> nor can it fulfil its goals of certainty and rationality as a theory of political decision-making (for the reason that there is no universally accepted way either of expressing or measuring the *aim* of utilitarianism).<sup>33</sup> To the extent that a utilitarian justification lies behind the view that Parliament (or ‘the majority’) can legitimately make or unmake any law’ or abolish any extant individual rights, we should reject this view of Parliament’s legislative powers. It may be thought that there is a second, and very different *rights-based* justification for majoritarian decision-making, and it is this alternative justification to which I will now turn.

## **B. A Rights-Based Conception of Majoritarian Decision-Making**

Jeremy Waldron has argued that there are *rights-based* reasons for leaving decisions about the rights of individuals to a majority of legislators (and for not leaving such decisions to unelected judges).<sup>34</sup> If we accept that individual members of a political community enjoy certain moral and legal rights against the government, it does not follow, Waldron argues, that decisions about the nature and content of these rights should be removed from the majority (in practice Parliament or Congress) and assigned to courts. Judges possess no special powers of moral reasoning over and above that of legislators or ordinary citizens.<sup>35</sup> And since we disagree on questions of rights, and can never *know* the true rights of individuals, we should favour entrusting decisions about rights to a political assembly where the full range of moral and ethical issues can be debated fully.<sup>36</sup> There are *rights-based* reasons (as opposed, say, to reasons of

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<sup>32</sup> See R Dworkin, *Rights as Trumps* in Waldron (ed.) *Theories of Rights*. (Oxford: Oxford University Press, 1984), 153.

<sup>33</sup> See N Simmonds, *Central Issues in Jurisprudence* above (n 28) 25-26; B Williams above (n 27) *passim*; J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press 1980) 111-118.

<sup>34</sup> This is a theory that Waldron has developed over many years. See, for instance, J Waldron ‘A Rights-Based Critique of Constitutional Rights’ (1993)13 OJLS 18-51; *Law and Disagreement* (Oxford University Press, 1999), 239-243 (hereafter *Law and Disagreement*); ‘The Core Case Against Judicial Review’ 115 *Yale Law Journal* (2006); J Waldron, ‘Some Models of Dialogue Between Judges and Legislators’, 23 SUP. CT. L. REV. 2d 7, 9-21 (2004); ‘Do Judges Reason Morally’, delivered in the Oxford/UCL Colloquium 2009, available at [http://www.ucl.ac.uk/laws/jurisprudence/docs/08\\_waldron.pdf](http://www.ucl.ac.uk/laws/jurisprudence/docs/08_waldron.pdf)

<sup>35</sup> J Waldron, *Law and Disagreement*, *op. cit.* 184

<sup>36</sup> *Ibid* at 232.

institutional competence) for leaving decisions about rights to a majority in the sense that the ultimate ‘right of rights’ is the right to *participate*.<sup>37</sup> As Waldron puts it:

‘Some of us think that people have a right to participate in the democratic governance of their community, and that this right is quite deeply connected to the values of autonomy and responsibility that are celebrated in our commitment to other basic liberties. We think moreover that the right to democracy is a right to participate on equal terms in social decisions on issues of high principle and that it is not to be confined to interstitial matters of social and economic policy’<sup>38</sup>

Like the utilitarian process-based theory described above, Waldron’s theory is a *procedurally egalitarian*<sup>39</sup> conception of an equal stake which may similarly be expressed in terms of *treating people equally*. Unlike the utilitarian theory though, Waldron’s theory is not sceptical of rights; rather it connects the right to participate with the values of individual autonomy and responsibility – the very values which underpin our ‘other basic liberties’.

Much has been said and written about Waldron’s theory and this is not the place to attempt a point-by-point critique.<sup>40</sup> Instead, I want to pursue a specific question within the framework of our inquiry into the meaning of democracy, namely whether the idea of *treating people equally* – the input or process-based conception of equality – within Waldron’s theory provides the best understanding of the concept of an equal stake or equality. We can usefully put the question in the following way: is the fact of an individual having had an equal input into the system in the form of participation sufficient to give that individual a sufficient stake in any governmental decision, and sufficient to legitimise any decision that may run contrary to their own interests or preferences? In order to respond to this question, we need to consider carefully the

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<sup>37</sup> Ibid.

<sup>38</sup> J Waldron, ‘A Rights-Based Critique’ above (n 35), 20.

<sup>39</sup> For this terminology, see A Kavanagh ‘Participation and judicial review: a reply to Jeremy Waldron’ *Law and Philosophy* 22, 451-486, 453.

<sup>40</sup> For a sample of the extensive literature responding to Waldron’s work, see A Kavanagh *op. cit.*; C Fabre, ‘The Dignity of Rights’ (2000) 20 *OJLS* 271-282 (a review of *Law and Disagreement*); D Kyritsis, ‘Representation and Waldron’s Objection to Judicial Review’ (2006) *OJLS* 26 733-751; Adrienne Stone ‘Judicial Review Without Rights; Some Problems for the Democratic Legitimacy of Structural Review’ (2008) *OJLS* 28 1-32.

conditions under which an individual will be sufficiently tied to a political community to accept a decision made in his name. As Dworkin puts it:

We must describe some connection between an individual and a group that makes it *fair* to treat him – and *sensible* that he treat himself – as responsible for what it does.<sup>41</sup>

For Waldron, we have seen that this connection is *on the face of things* limited to the fact that each member of the group has an equal right to participate in debates and deliberations on all questions of government (both on matters of ‘high principle’ and on ‘interstitial matters of social and economic policy’). I have italicized the words ‘on the face of things’ for the reason that Waldron makes a number of background assumptions about the *circumstances* in which majoritarian decision-making and the right to participate can flourish (or the circumstances in which judicially enforced rights against the majority will *not* be necessary). In order for these circumstances to obtain, there must be the following ‘institutional and political features of modern liberal democracies’:

‘(1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.’<sup>42</sup>

The need for these circumstances reveals several difficulties, I think, with Waldron’s account. First, it is doubtful whether these circumstances exist in any developed nation. To say that majoritarianism would be the best mode of decision-making in a Utopia may be interesting as a matter of abstract political philosophy, but it hardly advances the case for dispensing with (judicially enforced) rights against a majority in contemporary political communities. But there is a second and greater difficulty for Waldron’s procedural account: if majoritarian decision-making and the right to participate can only

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<sup>41</sup> R Dworkin, *Freedom’s Law* above (n 10) 23.

<sup>42</sup> J Waldron, ‘The Core Case Against Judicial Review’ above (n 35) 1360.

be justified under conditions of a modern liberal democracy, then the right to participate is less the *foundational* ‘right of rights’ and more the fruits of a set of prior rights and principles which *enable* participation. In order for democratic institutions and a healthy culture of disagreement about rights to exist, every individual must *already* have freedom of speech, assembly and association; every individual must be free from torture or arbitrary arrest; and so on.<sup>43</sup> It is one thing to argue – as many civic republican theorists do – that individual rights exist to ‘ensure the realization of the conditions for an authentic deliberative democracy’;<sup>44</sup> it is quite another thing to assume the existence of a deliberative democracy (in the form of a general right to participate), and then to argue that individual rights emerge out of the processes of deliberative democracy.<sup>45</sup>

### C. Rights *against* the Majority

I have suggested that Waldron’s rights-based defence of majoritarian decision-making gets things the wrong way round. It treats popular participation in government as the foundation of rights and democracy without recognizing that this process or input based right *presupposes* a richer set of substantive rights and values. We are in need of a more developed theory of these background substantive rights and values, and a better account of what it means for individuals to have an equal stake in the way in which they are governed. I said above that the key to understanding the concept of an equal stake is to appreciate the type of connection that an individual must have with other members of a political community. Dworkin finds this connection in the idea of ‘moral

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<sup>43</sup> A similar objection may be made against John Rawls’ theory of ‘justice as fairness’. See Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1980). In order to achieve the circumstances of the Original Position and the Veil of Ignorance, we must *already* assume the existence of certain rights and principles. To put this differently, there must be certain principles of *justice* which are logically prior to the principle of *fairness*. See R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 181; T R S Allan, ‘Constitutional Dialogue and the Justification of Judicial Review’ (2003) 23 OJLS 563, 571 (n 30).

<sup>44</sup> See M Loughlin ‘Rights, Democracy and Law’ in Gearty and Tomkins (eds) *Sceptical Essays on Human Rights* 44; cf. C Gearty ‘Democracy and Civil Liberties: a Reappraisal’ talk given at Centre for Human Rights, LSE, 27 January 2004, at 3.

<sup>45</sup> Kavanagh makes the different objection (following Joseph Raz) that, even if the full conditions of participation are met, the decisions that emerge may fall foul of the ‘Instrumentalist conditions of good government’. This is to say that, even if the procedures are just there may still be injustice if the results are ‘wrong, unfair or unjust’. See Kavanagh above (n 39) 460-464; J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), 117.

membership’,<sup>46</sup> and the conditions of such membership in the idea that the government should *treat everyone as equals*. Chief amongst these conditions, Dworkin suggests, is the idea of ‘moral independence’. This is the idea that members of a political community regard themselves as ‘partners in a joint venture’:

A genuine political community must...not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage them to arrive at beliefs on these matters through their own reflective and finally individual conviction.<sup>47</sup>

We see then that being treated as an equal, on Dworkin’s account, entails the positive idea of allowing people to make choices for themselves about the good life, and the negative idea of not interfering with someone’s choices on the basis of one’s own preferences.<sup>48</sup> Importantly, these conditions of equal treatment are *democratic* conditions in the sense that they are necessary in order to satisfy the very *point* of democracy: namely, that each individual has an equal stake in the way in which they are governed.

We are now in a position to return to the question motivating this part of the chapter. What are the implications of the argument that a political community should treat all individuals as equals (as opposed to treating all individuals equally)<sup>49</sup> for the powers of Parliament in the British constitution? Here is the striking answer to that question. If the powers of Parliament are justified by the principle of democracy, and the principle of democracy means that the political institutions in a community may only act in a way that respects the conditions of equal treatment, then, quite simply, Parliament may only act in accordance with these conditions. To put this differently, individuals have an abstract moral right *against* Parliament (or ‘the majority’) to be treated as an equal. Far from being antithetical to democracy, this abstract right (and the concrete rights that flow from

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<sup>46</sup> See R Dworkin, *Freedom’s Law* above (n 10) 17.

<sup>47</sup> *Ibid* at 26.

<sup>48</sup> More recently, Dworkin has expressed these two ideas in terms of two connected principles, the principle of ‘intrinsic value’, and the principle of ‘personal responsibility’. See R Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2006) 9-10 and *passim*.

<sup>49</sup> For a clear account of the difference between these two conceptions of equality, see Charles Beitz, ‘Procedural Equality in Democratic Theory: A Preliminary Examination’, in Roland Pennock and John Chapman (eds.), *Nomos XXV: Liberal Democracy* (New York: New York University Press, 1983) 71.

it) is a necessary corollary of democracy.<sup>50</sup> Of course, this egalitarian conception of democracy takes us some way from the orthodoxy in British constitutional theory, that Parliament can ‘make or unmake any law’, or that Parliament can suspend or abrogate fundamental rights by the use of express language. In fact, it takes us towards the system of government that we tend to associate with most other liberal democracies, a system in which the powers of the legislature are limited by a written constitution or Bill of Rights. This a point to which I will return in the final chapter of the thesis.

### *Rights as ‘Trumps’*

What does it mean to say that individuals have an abstract moral right against government to be treated as an equal; and how do we determine which concrete rights flow from this abstract right? The right to be treated as an equal, Dworkin suggests, blocks or ‘trumps’ certain types of reasons for governmental action, namely those reasons which fail to recognize the dignity of individual members of a political community, or reasons which otherwise treat particular individuals or groups as inferiors.<sup>51</sup> According to this reason-blocking model of rights, the concrete rights of individuals are those that reflect the grounds on which government is most likely to treat individuals or particular groups as inferiors, for instance, on the grounds of their gender, race or their religious or sexual beliefs and practices.<sup>52</sup>

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<sup>50</sup> R Dworkin, *Freedom’s Law* above (n 10) ch 1 *passim*. See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, (Harvard University Press, 1980). Ely was one of the first writers to recognize that some constitutional constraints *facilitate* democracy.

<sup>51</sup> R Dworkin, *Taking Rights Seriously* above (n 43) 198-9.

<sup>52</sup> *Ibid.* The reason-blocking account of rights may be contrasted with an ‘interests-based’ account whereby rights are treated as a set of interests which are deemed to be sufficiently important to warrant their protection by a right. See, for example, Waldron J (ed.) *Theories of Rights* above (n 32) 6; J Waldron ‘A Rights Based Critique’ above (n 35) 30; J *The Morality of Freedom*. Space does not permit any detailed consideration of the relative merits of interested-based and reason-blocking theories of rights. Letsas defends the reason-blocking theory, first, for the reason that it makes better sense of the idea of rights as being *absolute* (rather than subject to balancing); secondly, that it implies a less burdensome role for judges who are ‘not asked to establish what interests human rights should serve, in what ways and to what extent’ and, thirdly, on the basis that an interests based theory reflects a perfectionist theory (which is arguably less desirable than a liberal theory). See G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), ch 5. For an interesting exchange on the question of whether Dworkin’s theory of rights as trumps is best understood as a ‘reason blocking’ or ‘interests based’ theory, see R Pildes, (1998) ‘Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism’ 27 *J. Legal Stud.* 725; J Waldron (2000) ‘Pildes on Dworkin’s Theory of Rights’, 29 *J.*

The particular type of impermissible reason envisaged by the reason blocking theory is one based on utilitarian reasoning (government may wish to improve overall efficiency or the general welfare by pursuing some collective goal at the expense of some individual interest).<sup>53</sup> But the reason-blocking theory of rights can be understood as also blocking certain non-utilitarian reasons.<sup>54</sup> By way of illustration, suppose that Parliament legislates to permit the detention of foreign nationals suspected of committing terrorist activities without first charging them with an offence, and without allowing them the opportunity to contest their detention in a court of law.<sup>55</sup> Let us suppose further that the reason offered by the Government for making use of this legislative provision is the need to protect national security and to safeguard the rights of others. Now, there are at least three different bases on which the Government's decision (and/or Parliament's legislation) might be deemed impermissible within the reason blocking theory:

1. First, it may be that, given the absence of any compelling evidence to show that foreign nationals pose a threat to national security or the rights of others, the governmental action is clearly not directed towards these purposes. We might infer that the true reason for the action or decision was, say, the utilitarian reason of making most people feel more secure.
2. Secondly, given the absence of any compelling evidence to show that *foreign* nationals pose a particular threat to national security or the rights of others, we might infer that the governmental action betrays a prejudice towards non-

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*Legal Stud.* 301; R Pildes (2000) 'Dworkin's Two Conceptions of Rights' 29 *J. Legal Stud.* 209; P Yowell (2007) 'A Critical Examination of Dworkin's Theory of Rights' 52 *Am. J. Juris.* 93.

<sup>53</sup> Dworkin's builds his theory around the idea that rights should trump the *external* preferences of individuals in a utilitarian calculation. This is to say that no individual should 'suffer disadvantage in the distribution of goods or opportunities on the ground that others think he should have less because of who he is or is not or that others care less for him than they do for other people'. See R Dworkin, 'Rights as Trumps' above (n 32).

<sup>54</sup> See Hart, H.L.A. (1980) 'Between Utility and Rights' *Col. L. Rev.* 79; (1983) *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1993) 217. See also Raz, J. (1978) 'Professor Dworkin's Theory of Rights' 26 *Pol. Stud.* 123, 131.

<sup>55</sup> This example is based loosely on the facts of the 'Belmarsh' case. See *A v. Secretary of State for the Home Department; X v. Secretary of State for the Home Department* [2005] UKHL 56.

nationals in general, or against particular targeted groups, most obviously, on the grounds of their race or religion.<sup>56</sup>

3. Thirdly, we might conclude that the government action reflects some attempt to balance the right not to be detained without trial with the right of others, say, to safety or security, but that the resulting burden on non-nationals offers only the most marginal or speculative improvement to the safety or security of others. In this situation, we would say that government action was *disproportionate* (although it might alternatively be argued that the reasoning in this third example necessarily conceals the type of reasoning to be found in one or other of the first two examples).<sup>57</sup>

In each of these examples, we would say that the governmental had failed to treat non-national detainees as equals for different substantive moral reasons which may be, but need not be, utilitarian in character.

If we approach things from the other direction, what type of reason would count as a legitimate or permissible reason for detaining certain individuals or groups without trial? Or, to put this differently, how could government satisfy the democratic requirement of treating people as equals? Two types of permissible reasons are available, it is suggested. The first reason involves a genuine attempt by government to make some judgment about the strength or nature of *competing rights or principles*. Government does not treat an individual as an inferior if its reasons for action are based precisely on the protection of individual rights. And since citizens, lawyers, judges and officials *disagree* about the nature and strength of competing rights, and we cannot know with any certainty which rights individual have, the most that we can ask of government in this case is that it makes a *bona fide* attempt at this judgment.<sup>58</sup> Secondly, if it can be

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<sup>56</sup> This reason arguably lay behind their Lordships decision to find a breach of Art 14 (in conjunction with art 5) in *Belmarsh*. See also *R (European Roma Rights Centre) v. Immigration Officer, Prague Airport* [2003] EW CA Civ 666 [2003] 4 All ER 247 criticized in R Singh, 'Equality: the Neglected Virtue' LSE Working Paper, available at

<http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20031126Singh.pdf>

<sup>57</sup> See R Dworkin, 'What are Human Rights', unpublished article, available at:

<http://www.law.nyu.edu/clppt/program2003/readings/dworkin.pdf>.

<sup>58</sup> *Ibid.*



clearly demonstrated that there is an exceptional emergency ‘threatening the life of the nation’,<sup>59</sup> or representing what Oliver Wendell Holmes described as a ‘clear and present danger’,<sup>60</sup> this may arguably justify the decision to restrict some fundamental right or liberty. It might be said though that this second reason is really a restatement of the first in so far as the derogation from one right is really the recognition of the exceptional strength of some other right or rights.<sup>61</sup>

## 2. The Proper Role of Judges (in the British constitution)

I have argued above that individuals enjoy an abstract moral right to be treated as equals in the British constitution (and that Parliament may only legislate in a way that respects individuals in this way). This right is derived, in part, from the principle of democracy – the principle which justifies the fact that *Parliament* exercises legislative power – but it is derived also from the free-standing, anti-consequentialist, principle of human dignity: the Kantian notion that individuals should not be treated as a means to an end, but as an end in themselves. Now, if we can agree that individuals enjoy this background moral right, this still leaves open the question of which *people* or which *institution* should have responsibility for determining which concrete, *legal* rights flow from that abstract moral right. Call this the ‘institutional question’. As Vile puts it:

‘The history of Western political thought portrays the development and elaboration of a set of values – justice, liberty, equality, and the sanctity of property – the implications of which have been examined and debated down through the centuries; but just as important is the history of the debates about the institutional structures and procedures which are necessary if these values are to be realized in practice’.<sup>62</sup>

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<sup>59</sup> This is the test by which a government can derogate from certain rights under ECHR article 15.

<sup>60</sup> See *Schenck v United States* 249 U.S. 47 (1919).

<sup>61</sup> Whether this second reason amounts to a *restriction* of a right or a recognition of a right will depend on whether one support an interests-based theory of rights or a reason-blocking theory of rights. See above (n 52).

<sup>62</sup> M.J.C. Vile *Constitutionalism and the Separation of Powers* (2<sup>nd</sup> edn) (Liberty Fund, 1998) 1.

In particular, there is an age-old debate about whether it should be unelected judges or elected legislators who decide controversial questions of political morality such as the meaning of free-speech, or the right to life.

The first important point to make is that the principle of *democracy* does not dictate an answer either way to the institutional question.<sup>63</sup> While it would make sense to say that elected legislators should have the final say on questions of rights if democracy meant ‘majoritarian rule’, we have seen that this conception of democracy is deficient; the principle of democracy is best understood as embodying the requirement that every member of a political community should be treated as an equal.<sup>64</sup> On the other hand, there is no default position in favour of it being unelected judges who should have the final say on questions of rights. It might be argued, for instance, that a majority of elected legislators are equally well, or even better equipped than unelected judges to make judgments about the requirements of treating people as equals. In short, the institutional question requires arguments from some reason or principle other than the principle of democracy (although I will suggest below that democracy is *improved* when unelected judges exercise the judicial function).<sup>65</sup>

There are two further important preliminary points to make. First, as Locke<sup>66</sup> and Montesquieu<sup>67</sup> have taught us, there is (and should be) a division of *functions* or *powers* in the processes of government. In modern constitutional thinking, we distinguish between the *legislative*, *executive* and *judicial* functions.<sup>68</sup> Where there is a ‘pure’ separation of functions, these functions are carried out by different categories of people belonging to distinctive institutions whose name corresponds to these functions; but in other systems, including the British system, it may be that the same person or set of

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<sup>63</sup> R Dworkin, *Taking Rights Seriously* above (n 43) 142.

<sup>64</sup> See section 1 (above).

<sup>65</sup> See p 29 (below).

<sup>66</sup> J Locke, Peter Laslett (ed.), *Two Treatises of Government* (Cambridge University Press, Cambridge 2003), chapter VII, para. 87.

<sup>67</sup> Montesquieu, *The Spirit of the Laws*, (trans. Thomas Nugent) (New York: MacMillan, 1949).

<sup>68</sup> Interestingly, Locke did not talk explicitly about a *judiciary* although he refers to ‘magistrates who execute the law’. Instead, he divides the functions of government into the legislative, executive and *federative*. See above (n 66).

people performs more than one of these functions.<sup>69</sup> Given that each system of government must instantiate these functions in one or other of these ways, our institutional question, it is submitted, is not *whether* judges should have the final word on questions of rights, but *who* should be the judges. If it is thought that elected officials should perform both the legislative *and* judicial functions then we need to hear some story about how the judicial and legislative functions can be carried out by the same set of people. And if it is thought that unelected individuals sitting in courts of law should exercise the judicial function, then we similarly need to justify this claim by reference to some principle or principles.<sup>70</sup>

There is a sense in which my second preliminary point answers the first. I have tried to emphasise in previous chapters that my aim in this thesis is not to reinvent the British constitution, but to try to make best sense of facts about contemporary British constitutional practice. It is a fact about British constitutional practice that the judges of the system are unelected, apolitical individuals, with security of tenure, who exercise the judicial function alone or with others in an institution that is separate from the legislature (in future, when I use the term ‘judges’ or ‘judiciary’ I will be referring to this category of person). In this respect, the institutional question cannot be approached as a matter of pure abstract political philosophy in the manner of my first preliminary point; and there is little value in making the argument that judges should have *no* role in determining the rights of individuals. Nonetheless, the fact that we can agree that judges do, in some way, engage in rights adjudication is not to say that we will all agree about how best to understand this practice. As I have emphasised in earlier chapters, our disagreements about law and adjudication will inescapably involve competing arguments of political morality about which particular conception best fits and justifies the facts of the practice.

In chapters 2 and 3, I suggested that a conception of legality as integrity (which I defended as the best understanding of the concept of legality) recommends a general model of adjudication or judicial decision-making. The judicial role, I said, should be to

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<sup>69</sup> The overlapping model is sometimes described as a ‘fusion of powers model or a ‘checks and balances’ model. For an insightful discussion of these different models, see E Barendt, ‘Separation of Powers and Constitutional Government’ (1995) P.L. 599.

<sup>70</sup> For recognition of the fact that there is nothing axiomatic about which group of people exercise which function, see V Sadursky, ‘Judicial Review and the Protection of Constitutional Rights’ (2002) 22 OJLS 275-299.

engage in an interpretive process whereby judges settle on the best interpretation of the principles of justice, fairness and procedural due process which are presupposed or entailed by the past decisions of Parliament and courts. I offered two particular arguments in favour of that model of adjudication.<sup>71</sup> First, if judges give effect to principles which are embedded in the past decisions of Parliament and courts, they are not engaging in the forward-looking process of *legislating*. Secondly, if – as the theory supposes – there is always an objectively correct answer to a legal dispute (based on the best interpretation of existing principles), then there is no sense in which a ruling in a ‘hard case’ – a case in which legal rights and duties are uncertain – involves the retroactive imposition of a newly created legal right or duty.

These arguments, I think, go only so far in helping with the institutional question. They give us some idea of what judges should and should not do, but we are still in need of a positive justification for the fact that it is *judges* who give effect to legal rights and duties (by way of the interpretive process described above). We are also in need of a clearer idea of how the judicial function differs from the legislative function – for instance, the sense in which the judicial function is backward-looking, and the legislative function is forward-looking – and why it should be elected politicians (if indeed it should) who carry out the governmental functions.<sup>72</sup>

We can sharpen our understanding of the proper division between the judicial and governmental functions, it is suggested, by reference to Ronald Dworkin’s celebrated distinction between matters of *policy* and *principle*:<sup>73</sup>

‘Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favour of a subsidy for aircraft manufacturers, that the subsidy will protect national defence, is an argument of policy. Arguments of

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<sup>71</sup> See, generally, chapters 2 and 3 (above).

<sup>72</sup> Again, I use the term ‘governmental’ to denote both legislative and executive action.

<sup>73</sup> This is a distinction which Dworkin has developed throughout his work on legal theory. See R Dworkin *Taking Rights Seriously* above (n 43) chs 2 and 4; *A Matter of Principle* (Harvard University Press, 1985), 33-71; *Law’s Empire* (Harvard University Press, Cambridge, Massachusetts 1986) 87-113. In his later work, Dworkin adopts a parallel distinction to the policy/principle distinction between *choice-sensitive* matters on the one hand, and *choice-insensitive* matters on the other. See *Sovereign Virtue* (Harvard University Press, 2000) 208-9.

principle justify a political decision by showing that the decision respects or secures some individual or group right.<sup>74</sup>

The central case or paradigm of the governmental (which, again, I will take to mean legislative and executive) functions, it is suggested, is to formulate, enact and implement *policies* (in the above sense of ‘collective goals’).<sup>75</sup> While the political branches of government do not have the power to pursue goals which treat particular individuals or groups as inferiors (a point to which I will return below), they are otherwise unconstrained in the policies that they may pursue. Thus, to use Dworkin’s example (above), a government is free (subject, perhaps, to the principle of rationality) to choose to subsidise aircraft manufactures rather than ship manufacturers, or to choose to build a sports stadium in Wembley rather than Birmingham.<sup>76</sup> It is uncontroversial, I think, that policy decisions should be made by elected officials, and not by unelected judges. Judges possess neither the electoral mandate, nor the institutional capacity (in terms of adequate time, procedures, expertise and so on) to make difficult choices about which collective goals a community should pursue.<sup>77</sup> The more difficult questions are these. First, in what sense is the *judicial* function defined by the task of deciding matters of principle, and, secondly, why should it be *judges* (as defined above) who give effect to matters of principle?

Before we can answer these questions directly, we need to emphasise the special sense in which the term ‘principle’ is here being used. In one respect, the political branches of government necessarily make decisions based on principle. The collective goals or aims they pursue will (one hopes) reflect some coherent background theory of distributive and

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<sup>74</sup> Dworkin, *Taking Rights Seriously* above (n 43) 82-3.

<sup>75</sup> The term ‘legislative’ should be understood to include the creation of subordinate or secondary legislation which, in practice, is the context in which specific goals are formulated by the government pursuant to powers conferred by a primary Act of Parliament. The legislative function should also be taken to include the exercise of prerogative powers in so far as the exercise of such a power involves the pursuit of some collective goal.

<sup>76</sup> This example is admittedly rather out of date. A governmental subsidy to a given industry would doubtless fall foul of the EC law on state aid. The reader is asked to put this complication to one side when considering the example!

<sup>77</sup> R Dworkin, *Taking Rights Seriously* above (n 43) 85. This is a point that has been developed by a number of constitutional lawyers in Britain and the US. See, for example, L Fuller, ‘The Forms and Limits of Adjudication’, 92 *Harvard Law Review* 353 (1978); A Chayes, ‘The role of the judge in public law litigation’, (1976) 89 *Harvard Law Review* 1281; J Jowell, ‘Of Vires and Vacuums’ above (n 21) at 451; C Harlow, ‘Public Law and Popular Justice’ (2002) 65 *MLR* 1-18.

corrective justice, a theory which will ordinarily reflect the political ideology of the governing party. For present purposes though, a decision of principle does not relate to a political choice about which theory of justice, fairness and procedural process to pursue in relation to some collective goal; it relates rather to the question of which *rights, duties and powers* flow from the scheme of justice, fairness and procedural due process embedded in *past* legislative decisions in relation to *some individuated claim*.<sup>78</sup> It is this latter question, I think, which defines the judicial role. To put this differently, the role of the political branches of government concerns the *forward-looking* question of which policies and principles to pursue;<sup>79</sup> the judicial role concerns the *backward-looking* question of which policies and principles a legislature *has* pursued in its past decisions, and which legal rights, duties and powers flow from those principles and policies for the purposes of resolving a litigant's claim. In this way, the judicial role tracks the value of *integrity or equality before the law*, while the political role involves broader questions about which decision would be the most just, efficient, effective, and so on.<sup>80</sup> This distinction, I think, helps us to understand the following celebrated dictum of Lord Diplock in the *IRC* case:

It is not . . . a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.<sup>81</sup>

We can now usefully link this discussion of policy and principle, I think, to our earlier discussion on the nature of rights. I suggested above (after Ronald Dworkin) that rights are best understood as blocks on, or trumps over, particular types of reasons for

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<sup>78</sup> Dworkin, *Taking Rights Seriously* above (n 43) 90.

<sup>79</sup> Dworkin has argued though that a legislature has a duty to observe the principle of *legislative integrity* such that the laws it enacts reflect a coherent scheme of principle. See R Dworkin, *Law's Empire* above (n 73) ch 6.

<sup>80</sup> See chs 2 and 3 (above).

<sup>81</sup> *IRC v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 at 644. Of course, many commentators have doubted a) whether a distinction between matters of policy and principle is sustainable; and b) whether judges do in fact respect such a distinction. See, for example, J Griffith, *The Politics of the Judiciary* (London, Fontana, 1997, 5<sup>th</sup> edn).

governmental action, namely those reasons which treat individuals as inferiors. We can translate this theory of rights into the language of the policy/principle distinction in the following way: principles (or rights) will trump policies or policy decisions which are premised on impermissible reasons. This is to say that a legislative or governmental choice which engages some legal principle or right (which choice cannot therefore be described as a 'pure' policy choice), for this reason engages the judicial function. In this situation, a political decision-maker has a *duty* and not merely a *choice* to act in a way that respects the relevant right or principle; and a judge has a *duty* to give effect to the principle or right which trumps the policy.

By way of illustration, consider the example given above. The decision as to whether to build a sports stadium in Wembley rather than Birmingham, I suggested, is a pure question of policy (subject, perhaps, to the principle of rationality): this is to say that there is no right or principle which constrains or limits the choices available to the decision-maker. But the decisions as to whether or not to consult interested parties in making that decision, or whether to give reasons for the decision, or whether to honour some sort of legitimate expectation, are questions of *principle*. It may be that it would more just, efficient and so on to grant a subsidy without consulting anybody, or without giving reasons; but if certain individuals have a *right* to consultation or the provision of reasons (according to the best understanding of the principles embedded in the past decisions of Parliament and courts), then a decision-maker may *only* act in a way that these rights and principles permit; and these rights and principles will trump any purported decision that ignores such rights and principles.

Having improved our sense in which the political and judicial functions differ, we are now in a better position to tackle the institutional question posed at the outset of this section. The question can be put thus: what reasons can we give in support of assigning the judicial function of blocking impermissible reasons (or giving effect to rights or principles) to *judges* (unelected, apolitical individuals, with security of tenure, who exercise the judicial function alone or with others in an institution that is separate from the legislature); and are there negative arguments against assigning this role to *legislators* (elected, party political individuals who sit in a Parliamentary chamber and exercise the

legislative function)? I want to consider two different criteria for assessing these questions. The first criterion is the *soundness* of decisions. In other words, is one set of actors more likely to generate *accurate* decisions than the other, in the sense that the decisions come closer to reflecting the true legal rights of individuals? The second criterion is the *fairness* of the decision.<sup>82</sup>

(i) *Soundness*

Do we have any reason to think that judges have a superior (or inferior) ability over legislators to decide, say, whether freedom of speech includes the right to burn a national flag, or to decapitate a wax-work of a former Prime Minister? Or, to frame this in terms of a theory of rights as trumps, are judges better able than legislators to determine whether the reasons offered by officials for prohibiting such practices is based on a permissible or impermissible reason? There are three important points to make before we can attempt to embark on this type of comparison.

First, an inter-institutional comparison based on the criterion of soundness can only work on an *all-other-things-being-equal* basis. We must assume, that is, that judges and legislators will make *bona fide* (non-prejudiced, non-biased, non-partisan etc) judgments about the rights of individuals. I will consider below under the heading of ‘fairness’, whether this is a plausible assumption.

Secondly, we need to be absolutely clear on what we mean by the ability to decide matters of principle. The question is not whether judges or legislators have a superior ability to engage in *general moral reasoning*, but whether one or other type of institutional actor possesses superior abilities in the specific judicial function outlined above, namely the ability to make a judgment about the principles which best justify the past decisions of Parliament and courts in relation to some individuated claim. To illustrate this point, the question a) of whether euthanasia is a morally acceptable practice, or a practice which a political community would prefer not to permit, is different

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<sup>82</sup> I have borrowed these two criteria from Dworkin. See *Taking Rights Seriously* above (n 43) 141-147.



from the question b) of whether Article 2 of the European Convention on Human Rights permits a doctor or spouse to carry out euthanasia.<sup>83</sup> If it is thought that a legislature possesses a superior ability to engage in general moral reasoning of type a), it may not follow that it possesses a superior ability in the special type of moral reasoning involved in the judicial task involving the reasoning in type a).

Thirdly, as Waldron has argued persistently, legislators, judges, lawyers and citizens *disagree* about the nature and content of rights; and we have no ‘epistemology’ for knowing which view is correct (always assuming that there are ‘correct’ answers to questions of law and other dimensions of morality).<sup>84</sup> In this sense the question of moral objectivity is irrelevant to the soundness comparison.

In the light of the three points just made, and our earlier discussion, it will be apparent that there is a conceptual problem with this first criterion of comparison. In short, there is nothing to compare. If the same people who exercise the legislative function also exercise the judicial function, then, on the occasions that those people exercise the judicial function, they act not as legislators but as judges: the judicial function remains the judicial function irrespective of which group of people or institution performs that function. In response to this argument, it might be argued that the people exercising the legislative function are more in number, have greater time, great resources, greater access to experts and so forth than unelected (etc...) judges. But even if we suppose (somewhat controversially) that these types of factors would improve judicial decision-making, this would simply be an argument for reforming existing judicial procedures rather than entrusting the judicial function to the same people who exercise the legislative function.<sup>85</sup> To summarise this last point, there is no sense in which there is a *competition* between the legislative and judicial functions: each function forms an independent part of British constitutional practice. The important question is *who* should exercise each function and,

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<sup>83</sup> *R (on the application of Pretty) v. Secretary of State for the Home Department* [2001] UKHL 61.

<sup>84</sup> J Waldron, *Law and Disagreement* above (n 34) ch 8. See also chapter 2 (above) part 2B.

<sup>85</sup> On the other hand, it might be argued that (unelected) judges have more experience, and are better trained to engage in judicial reasoning. But this would again be an argument in support of offering similar training and opportunities to gain experience for elected legislators.

as I will now consider, whether it is objectionable for the *same* group of people or institution to exercise both the judicial and political functions.

(ii) *Fairness*

If the criterion of soundness is unhelpful, can it be said that it is *fairer* to allow the same people who exercise the legislative function also to exercise the judicial function? Jeremy Waldron has offered two connected arguments in support of this view. First, since we *disagree* about rights, it should be a majority who decides which rights we have. Secondly, ‘decisions about rights are best taken by those who have a sufficient stake in the matter to decide responsibly’,<sup>86</sup> and by those on whom rights impact the most.<sup>87</sup> In relation to the first of these arguments, a growing number of theorists have raised the following compelling objection: that there can be no *default* position in favour of participatory majoritarianism simply in virtue of the fact that we disagree; for we disagree just as much about *procedures* as we do about results.<sup>88</sup> The question of whether a particular procedure for decision-making is fair – like the question of whether a particular outcome is just – can only be supported by substantive arguments of political morality.

Does Waldron’s second argument supply such a moral argument? In so far as Waldron envisages that it is *individual citizens* who should directly determine the nature and content of rights, Kavanagh makes the following observation:

‘[I]t is not immediately obvious why being affected by a decision creates an entitlement in the person so affected that he or she should make the decision. There are many situations where the opposite is the case. In the case of medical decisions which clearly affect us in significant ways, we often think it is better to leave them to doctors. Similarly, we often leave legal decisions to our lawyers, financial decisions to accountants/financial advisers etc.’<sup>89</sup>

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<sup>86</sup> Waldron, *Law and Disagreement* above (n 34) 253

<sup>87</sup> *Ibid* at 238

<sup>88</sup> See A Kavanagh above (n 39) 467; J Raz, ‘Disagreement in Politics’, *American Journal of Jurisprudence* 43 (1998) 47; C Fabre, ‘The Dignity of Rights’ above (n 40) at 275. See generally chapter 2 (below) part 2B.

<sup>89</sup> Kavanagh *op. cit.* 470

There is of course nothing alien about allowing some person or body to take decisions on our behalf. As Kavanagh observes, we customarily entrust decisions about the public interest to elected representatives.<sup>90</sup> This is no doubt partly for practical reasons, but also for the reason that individuals are likely to be biased and self-interested in their decision-making, something that would run entirely contrary to the democratic ideal of treating people as equals.<sup>91</sup> In any case, the real question, and the question with which we have been concerned in this section, is whether *elected representatives* should make judicial decisions about matters of rights or principle.

Why then should elected representatives not perform the judicial function of determining matters of principle or rights in relation to individuated claims? The reason is not difficult to find. Just as there would be a risk that individuals would make biased and self-interested decisions on matters of principle if entrusted with such decisions, so there is a risk that elected representatives would do the same. Given that the political branches of government are in the business of pursuing collective goals (or ‘policies’) in as efficient, effective and economical way as possible, it would almost seem a logical impossibility for these same branches of government to identify and observe the situations in which individual rights should trump those collective goals. More cynically, we might say that individual legislators are motivated primarily by the wish to be re-elected, in which case the will of the majority is bound to be their primary concern. The principle here, of course, is that no man (or majority) should be a judge in his (or its) own cause (*‘nemo iudex in sua causa’*).<sup>92</sup> In other words, *as a matter of fairness*, it must be an independent branch of government (or group of people) which should adjudicate on the question of whether governmental action that interferes with a right is taken for a permissible reason, a branch of government that has ‘no mail bag or lobbyists or pressure groups, to compromise competing interests in their chambers’.<sup>93</sup> To connect the idea of

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<sup>90</sup> Ibid 471. See also D Kyritsis, ‘Representation and Waldron’s Objection to Judicial Review’ (2006) 26 733-751

<sup>91</sup> Kavanagh *op. cit.* 472.

<sup>92</sup> See R Dworkin, *Taking Rights Seriously* above (n 43) 142-143; Dworkin, *A Matter of Principle* above (n 73) 24. Cf. Lawrence Sager, ‘The Incurable Constitution’ *New York University Law Review* 65 (1990) 956.

<sup>93</sup> See R Dworkin, *Taking Rights Seriously* above (n 43) 85; Kavanagh above (n 39) 476-7 who argues that the risk of self-interested decision-making is sufficient to warrant judicial review; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980) *passim*. Cf. J Waldron, who finds that this view incorrectly dismisses the fact that ‘voters and legislators

judicial independence to our earlier conclusions in relation to Waldron's theory of participatory majoritarianism, it is judges who are uniquely well placed to give effect to the very rights which *enable* equal participation, rights such as freedom of speech, association and assembly.<sup>94</sup> It is in this sense, it is suggested, that the judicial protection of principle or rights is *complementary* rather than antagonistic to the principle of democracy.<sup>95</sup>

### 3. Human Rights Adjudication under the HRA 1998

In the previous sections of this chapter, I have explored the sense in which individuals enjoy certain moral and legal rights against government, and I have offered arguments to justify the role of judges in giving effect to those rights. These arguments, while of interest in their own right as questions of abstract political philosophy, have been directed towards improving our understanding of the particular constitutional arrangements and practices in the British constitution. With this in mind, I now want to offer a sketch of how these moral justifications for the powers of Parliament and courts, and the rights of individuals can help us to understand concrete questions about British constitutional practice.<sup>96</sup> The HRA 1998 will serve as a suitable focus for discussion.

#### A. The Nature of Rights Under the ECHR

Members of the Council of Europe have a legal obligation not to act contrary to the rights enshrined in the ECHR.<sup>97</sup> As Letsas puts it: 'the ECHR is part of the normative materials that make each and every proposition of domestic law true'.<sup>98</sup> The immediate

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are capable of focusing their deliberations on the general good and on some sense of the proper balance that should be held among individual interests in society'. See J Waldron, *Law and Disagreement* above (n 34) 417. And see Waldron, 'Rights and Majorities: Rousseau Revisited', in *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993).

<sup>94</sup> See section 1B and C (above).

<sup>95</sup> See R Dworkin, *Sovereign Virtue* above (n 73) 208-9. Similarly, see Kavanagh above (n 39) 481 *et seq.*

<sup>96</sup> For a detailed analysis of the best interpretation of adjudication under the European Convention on Human Rights, see G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* above (n 52). Letsas explicitly defends a Dworkinian reason-blocking theory of right.

<sup>97</sup> See ECHR arts 32, 34 and 46.

<sup>98</sup> Letsas *op. cit.* at 35. Waldron J (ed.) *Theories of Rights* above (n 32) at 15.

question for our purposes is how best to understand these rights. Like other human rights documents found around the world, the rights and freedoms contained in the ECHR are drafted in highly abstract terms. There is ample room then for disagreement about how to interpret these rights and freedoms. It might be argued, for instance, that a rule-utilitarian model of rights fits the *language* of the ECHR most closely, in so far as a government can supposedly justify interfering with the rights contained in arts 8-12 of the Convention on certain ‘public interest’ grounds such as ‘the economic well being of the country’ or ‘the protection of health and morals’.<sup>99</sup> I suggested above though that utilitarianism cannot provide an adequate justification for democracy and – in so far as any utilitarian political theory can accommodate them – individual rights.<sup>100</sup> Instead, I defended a reason-blocking model of rights (a theory which operates, at least in part, as a corrective to utilitarianism).<sup>101</sup> How then can this account of *moral* rights help us to understand the *legal* rights contained in the ECHR? I will offer just a few suggestions before considering at greater length the way in which the HRA 1998 shapes the role of institutions:

First, if the rights contained in the ECHR are understood as trumps, then each of the rights enumerated in the Convention should be taken to represent the types of general grounds on which the government is most likely to treat certain individuals or groups as inferiors. This is to say that the Convention represents an attempt to capture the moral right to be treated as an equal.<sup>102</sup>

Secondly, if the rights contained in the ECHR are understood as trumps, then each of these rights is *absolute* in the following two senses: first, they cannot be ‘balanced’ against other interests;<sup>103</sup> secondly, the rights are only engaged or activated when impermissible reasons are in play, whereupon they function to trump or block these reasons. This second point has a striking effect on the way that we understand the so-

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<sup>99</sup> See Letsas *op. cit.* at 100.

<sup>100</sup> See (above) section 1A.

<sup>101</sup> *Ibid.*

<sup>102</sup> Within an interests-based theory of rights, the rights would represent particular interests grounded in a person’s well-being. See Letsas *op. cit.* 103.

<sup>103</sup> Again, contrast this point with the balancing of interests that takes place within the framework of an interest-based theory of rights. *Ibid.* 104 and 117.

called ‘qualified’ rights of the ECHR (Arts 8-12). The structure and language of these articles would suggest that the first part of these articles contains *the* right, while the second part of the article contains different grounds on which the government might legitimately *interfere* with the right. This would make perfect sense within an ‘interests-based’ theory of rights.<sup>104</sup> But within a reason-blocking model of rights the right can only be seen as the *product* of arguments about when the government can legitimately act. To put this differently, we can only define the right *after* factoring in the types of grounds listed in the second part of the Convention articles.

Finally, as we will see below, if the rights contained in the ECHR are understood as trumps, then the judicial role is a minimal one: it is to screen governmental decisions for impermissible reasons. Significantly, this judicial role has no obvious place for a principle of *proportionality* (beyond treating this principle as a diagnostic test for identifying impermissible reasons for governmental action).<sup>105</sup> Nor is there a place for a concept of *deference* (beyond treating this term as the expression of a principled conclusion about the proper role of courts vis-à-vis the political branches of government).

## **B. The Proper Role of judges under the HRA 1998**

The HRA 1998, I have suggested, does not alter the nature of the rights protected by the ECHR (rights which, I have argued, are best understood as trumps over impermissible reasons for governmental action): individuals enjoy these *legal* rights independently of the provisions of the HRA 1998 (and, it should be said, they enjoy the *moral* rights to be treated as an equal independently of the provisions of the ECHR).<sup>106</sup> The importance of the HRA 1998, in my view, is the way that it conditions the role of domestic institutions in giving effect to ECHR rights at the behest of individual applicants or ‘victims’. The

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<sup>104</sup> See above (n 52).

<sup>105</sup> For one possible way in which the idea of proportionality remains relevant within a model of rights as trumps see (above) p 128.

<sup>106</sup> For an excellent discussion of the relationship between moral and legal rights, see Dworkin, *Taking Rights Seriously* above (n 43) ch. 7.

key question under the Act is how best to understand the judicial role in relation to sections 3 and 4, and it is these sections on which I will concentrate.

The first important point to make is a general one about statutory interpretation. The jurisprudence and academic literature on the proper interpretation of sections 3 and 4 of the HRA 1998 is replete with references to the ‘intention of Parliament’ – either in respect of the 1998 Act itself, or in respect of the Act whose compatibility with the ECHR is challenged. And recourse is often had to Hansard,<sup>107</sup> and to the government White Paper preceding the Act in an attempt to divine one or other Parliamentary intention.<sup>108</sup> I argued in the chapter 3 that the notion that courts identify the meaning of an Act of Parliament by looking to Parliamentary *intentions* (or indeed, to the intentions of one or more ministers or other sponsors of a bill) is fallacious. This can be no more clearly seen in relation to the language of the HRA 1998 where argument has revolved to a large degree around the outstandingly opaque phrase ‘so far as it is possible to do so’.<sup>109</sup>

The meaning of an Act of Parliament, I suggested, instead depends on the *intent* of the statute: that is, the meaning imposed on the statute by the interpreter of the statute (typically a judge). This interpretation is best understood in terms of the conception of legality as integrity which I defended in chapter 2 and 3. According to this conception, it will be recalled, the meaning of a statute must depend on the best interpretation of the principles of justice, fairness and procedural due process which are presupposed or entailed by that particular statute, by the principles that best justify that general doctrinal area of law, and by the principles which best justify the role of the different branches of government. Our task in trying to make sense of the HRA 1998 is therefore to try to make sense of the scheme of principle that underpins this Act. In order to bring out

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<sup>107</sup> For instance, Lord Steyn notes in *R v A (No 2)* [2002] 1 AC 45 at 44, that ‘In the progress of the Bill through Parliament the Lord Chancellor observed that “in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility” and the Home Secretary said “We expect that, in almost all cases, the courts will be able to interpret the legislation compatibility with the Convention”: Hansard (HL Debates), 5 February 1998, col 840 (3rd Reading) and Hansard (HC Debates), 16 February 1998, col 778 (2nd Reading)’.

<sup>108</sup> Rights Brought Home: The Human Rights Bill (CM.3782, 1997)

<sup>109</sup> HRA 1998, s 3. There is a vast body of literature on the meaning of this provision. See, for example, C Gearty ‘Reconciling Parliamentary Democracy and Human Rights’ (2002) 118 L.Q.R. 248; G Phillipson, ‘(Mis)Reading Section 3 of the Human Rights Act’ (2003) 119 L.Q.R. 183; ‘The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998’, (2004) 24 OJLS 259-285.

some of the implications of this approach, I will briefly discuss one of the leading cases on the interpretation of sections 3 or 4 of the Act.

*Ghaidan*<sup>110</sup>

The facts of *Ghaidan* are very well known. The question for the court was whether the survivorship provisions of the Rent Act 1977 – which clearly applied at least to a surviving *spouse* occupying a dwelling-house as his or her residence<sup>111</sup> – also applied to unmarried same-sex couples. The arguments revolved around the meaning of paragraph 2 of schedule 1 to the 1977 Act (for convenience, I will refer to this provision as ‘paragraph 2’):

‘(2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.’

The House of Lords had decided in *Fitzpatrick*,<sup>112</sup> prior to the coming into force of the HRA 1998, that the 1977 Act applied only to persons in an opposite-sex relationship. The task for their Lordships in *Ghaidan* was therefore to determine how the HRA 1998 impacted on the meaning of paragraph 2. The applicant, Mr Godin-Mendoza, contended that paragraph 2, as interpreted in *Fitzpatrick*, infringed his right against non-discrimination in the exercise of his article 8 right to private and family life, in so far as it drew an impermissible distinction between homosexual and heterosexual individuals on the grounds of sexual orientation. The House of Lords accepted that argument and, using section 3 of the 1998 Act, read into paragraph 2 the words ‘as if’ to achieve the effect of extending that provision to same-sex couples.

The first important point to make in the light of the arguments of this chapter and previous chapters is as follows. If, as Letsas suggests, ‘the ECHR is part of the normative materials that make each and every proposition of domestic law true’,<sup>113</sup> then

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<sup>110</sup> *Ghaidan v Godin-Mendoza* [2004] 2 A.C. 557

<sup>111</sup> Paragraph 2(1) of Schedule 1.

<sup>112</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

<sup>113</sup> Above p 140.



*it is the law* that Parliament (and government) has no power to act contrary to the rights of the ECHR. To put this differently, the principles and rights enshrined in the ECHR figure amongst the legal principles which will help us to determine the proper powers of Parliament, and which will help us to make sense of any statute.<sup>114</sup> In order to appreciate the significance of this point, we need to consider the types of interpretive tests adopted by the court in *Ghaidan*. These tests can be reduced to the following two propositions:<sup>115</sup>

First, Section 3 of the HRA 1998 can be used to change the unambiguous meaning of a statutory provision provided that this usage does not run contrary to ‘a fundamental feature of the legislation’ or ‘the underlying thrust of the legislation being construed’, or ‘the grain of the legislation’.<sup>116</sup>

Secondly, to quote Lord Nicholls, the courts should not ‘make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation’.<sup>117</sup>

The first of these propositions reveals a characteristic but, in my view, mistaken feature of the standard approach taken by judges to statutory interpretation under the 1998 Act. To suggest, as Lord Nicholls does, that judges should not use section 3 to depart from *the* underlying thrust of a statute implies that statutes have a meaning which is *independent* of the principles of the ECHR, and which can be ascertained *prior* to any consideration of those principles. Thus, adjudication under s.3, on the standard approach, takes place in two stages. At the first stage, judges effectively close their eyes to the principles and rights of the ECHR and identify the ‘human rights free’ meaning of any given statute applying ‘the legislation in its natural and ordinary meaning’.<sup>118</sup> Only then do judges

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<sup>114</sup> I have made a more radical claim still than this above: namely, that the truth conditions of any proposition of law include the principle of *democracy* and the rights that flow from this principle. This is to say that the ECHR and HRA 1998 arguably replicate principles that already belong to the British constitution, and which would survive the repeal of the HRA 1998. See above section 1C.

<sup>115</sup> For a helpful analysis, see Craig, *Administrative Law* (5<sup>th</sup> edn) (Sweet & Maxwell, 2008) 559-560.

<sup>116</sup> *Ghaidan* above (n 110) at 33 per Lord Nicholls.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid* at 60 per Lord Steyn.

consider the effect that the ECHR rights have on *the* meaning of the statute.<sup>119</sup> This approach is seen most clearly in the dissenting judgment of Lord Millet, who found that *the* meaning of paragraph 2 depended on the ‘words that Parliament has chosen to use’,<sup>120</sup> and on the *pre*-HRA 1998 legislative history.<sup>121</sup>

The mistake in this approach, it is submitted, is that the meaning of a statute must depend on the best interpretation of *all* of the principles and policies that are presupposed or entailed by the statute.<sup>122</sup> This is to say that, the ‘fundamental feature’ or ‘underlying thrust’ of any Act of Parliament must *include* the principles and rights of the ECHR.<sup>123</sup> For this reason, the judgment of the majority in *Ghaidan* is best understood, I think, as involving one stage and not two: the *true* meaning of paragraph 2 depended on the best understanding of ECHR arts 8 and 14 *in conjunction with* the policy of allowing two cohabiting individuals to enjoy security of tenure.<sup>124</sup>

What do these conclusions tell us about the nature of adjudication under the HRA 1998? Crucially, if we assume that judges have correctly interpreted the different principles and rights under the ECHR, and the relationship of these principles and rights to the policies implicit in a given Act of Parliament, then the question of whether to use section 3 or 4 cannot hang on the distinction between judicial *interpretation* and *legislation* in the way that is commonly suggested: for *any* action taken by judges under s. 3 which is directed towards giving effect to ECHR rights would be directed toward giving effect to the existing legal rights of individuals under the ECHR (it would be different if judges ignored or misapplied Convention rights, for instance, by engaging in so-called ‘rights inflation’ in which case, we would say that they were legislating).<sup>125</sup>

How then can we justify the use of section 3 or 4? The most obvious justification for the use of section 3, it is suggested, is that judges have a duty to *remedy* rights

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<sup>119</sup> For a clear academic statement of this approach, see C Gearty above (n 109).

<sup>120</sup> *Ghaidan* at 70 per Lord Hope

<sup>121</sup> *Ibid* at 83 *et seq.*

<sup>122</sup> See chapter 3 (above) part 2B.

<sup>123</sup> A number of judges and commentators have made a similar (albeit using the unhelpful phenomenology of ‘Parliament’s intention’) but narrower point. The argument runs as follows: that the meaning of any Act of Parliament must depend primarily on Parliament’s intention in relation to the *HRA 1998* (rather than in relation to the Act whose compatibility with the ECHR is under challenge) that all primary and secondary legislation should be read compatibly with Convention rights. See G Phillipson above (n 109).

<sup>124</sup> *Ghaidan* above (n 110) at 17 per Lord Nicholls

<sup>125</sup> See Letsas above (n 52) at 126 *et seq.*

infringements (in the sense that judges are under a duty to give effect to rights and principles by *blocking* impermissible reasons for legislative and governmental action). It is only by the use of s. 3, we might say, that judges can properly achieve this end. One further justification might be added. Although I have argued that the true meaning of paragraph 2 extended to heterosexuals and homosexuals *even before* judges made use of s. 3, we might say that the insertion of the words ‘as if’ into paragraph 2 achieves a textual form that *better captures* the true substantive rights of individuals, and which achieves greater clarity for those looking to the statute for guidance.

Can there ever be a justification for the use of s. 4? The strongest potential justification lies, I think, in the second proposition stated above *viz.* that courts should not ‘make decisions for which they are not equipped [since] [t]here may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation’.<sup>126</sup> This is to say that there may be cases in which a change to a statutory provision might have far-reaching ramifications for different areas of law and social life, ramifications which Parliament (or the government) could more easily assess.<sup>127</sup> Thus, in *Bellinger v Bellinger*, we might justify the decision of the House of Lords to make a declaration of incompatibility on the basis that Parliament (or the government) is better placed to assess the implications of a change to gender-recognition for such things as tax law, inheritance law, criminal records and insurance.

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<sup>126</sup> *Ghaidan* above (n 110) at 33 per Lord Nicholls.

<sup>127</sup> [2003] 2 A.C. 467.

## Chapter 5: Law, Constitutional Conventions and Political Principles

It might be objected that this thesis has so far has been dominated by questions of legality, legal principles, and courts at the expense of the *non-legal* aspects of the British constitution. The greater part of British constitutional practice, it is often said, is played out in the corridors of political power rather than in the courtroom. Indeed this is said to be one of the principal virtues of the ‘unwritten’ British constitution as compared to the ‘written’ constitutions of, say, the United States or Germany. The different political institutions operate, not within the straightjacket of written laws, but under a regime of shifting and adaptable constitutional conventions or unwritten rules. In so far as these conventions are enforced, their enforcement depends on mechanisms of political accountability and the force of tradition rather than on courts. The British constitution is, in these different senses, a ‘political’ rather than a ‘legal’ constitution.<sup>1</sup>

In this chapter and the next, I intend to challenge each of these types of objections, objections which, collectively, we might call the ‘political’ objection. In the present chapter, I will concentrate on a number of philosophical objections to a distinction between law and convention. Contrary to the political objection, I will maintain that the principle of legality is central to each and every aspect of British constitutional practice. In the next chapter, I will attempt to explain – by way of a conclusion to the thesis – the sense in which it is unhelpful and misleading to characterise the British constitution as either a ‘legal’ or ‘political’ constitution, or as a ‘written’ or ‘unwritten’ constitution.

### 1. Why Distinguish Between Law and Convention?

It is well-established orthodoxy that the British constitution comprises constitutional *law* on the one hand, and constitutional *conventions* on the other.<sup>2</sup> Most commentators would doubtless agree, for instance, that the requirement that a minister belongs to one or

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<sup>1</sup> .See, for instance, Griffith, ‘The Political Constitution’ (1979) 42 MLR 1; A Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 OJLS 157-175. For more detailed consideration of the type of claim made by these theorists, and two different senses in which such theorists employ the phrase ‘political constitution’, see chapter 6 (above).

<sup>2</sup> See, for instance, Hood Phillips and Jackson, *Constitutional and Administrative Law* (8<sup>th</sup> edn, Sweet & Maxwell) ch 7.

other House of Parliament, and the requirement that the Queen gives the Royal Assent on the advice of her Ministers, are *conventional* in character,<sup>3</sup> while the duty of a minister to act fairly in making a decision about an individual, or the duty of a minister not to make a decision for improper purposes, are *legal* in character. Yet if we are able to point to paradigms or central cases of the legal and the conventional, it is a daunting task to derive from those central cases a comprehensive test for distinguishing the one type of constitutional practice from the other. Constitutional theorists across the ages have struggled to identify any such tests.<sup>4</sup> Some have doubted whether there is any meaningful distinction;<sup>5</sup> and one leading theorist has recently argued that there is a 'softness [in the]...line between informal social rules [or conventions] and a legal system'<sup>6</sup> such that any difference between them is 'a matter of degree'.<sup>7</sup>

Why should we be interested in distinguishing constitutional laws from constitutional conventions? Perhaps a useful starting point in answering that question is to recast the law/convention dichotomy in terms of different types of *rights, duties and powers*. When a Government minister (or some other official) makes a decision, for example, about whether an asylum seeker should be deported, or whether permission should be granted for the construction of a new airport terminal, we tend to think of the minister as having various *legal* duties and powers (if not rights), for instance, to take into account relevant considerations, and to employ fair decision-making procedures. On the other hand, we tend to think of the minister as having a *political* or *constitutional* duty<sup>8</sup> to appear before Parliament to report on the actions (or inactions) of their department, or to adhere to the Ministerial Code.<sup>9</sup> It makes sense to think of judges too as having certain duties. Judges are under a duty, I have argued in previous chapters, to give effect to the

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<sup>3</sup> Examples of other constitutional conventions are: the Queen will never refuse royal assent once the Bill has passed through the necessary Parliamentary process; Royal assent is granted by the Queen on the advice of her ministers; High Court judges hold their offices during good behaviour, and are disqualified from membership of the Commons; Westminster will not legislate for the devolved bodies (the Sewel Convention) or for former Colonies.

<sup>4</sup> The classic 'enforcement' test is that of A V Dicey. See A.V. Dicey, *Introduction to the Law of the Constitution*, 10th edn (1962), a 417. See part 2A (below).

<sup>5</sup> See T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford, Clarendon Press, 1993) ch 10.

<sup>6</sup> See N Barber, 'Laws and Constitutional Conventions' (2009) 125 LQR 294-309, 307.

<sup>7</sup> Ibid at 308.

<sup>8</sup> I treat the terms 'constitutional' and 'political' duty as being synonymous but I will mainly use the latter term during the course of this paper.

<sup>9</sup> *Ministerial Code* (2007).

principles of justice, fairness and procedural due process which provide the best justification for the past decisions of Parliament and courts.<sup>10</sup>

In each of these examples, it would seem too weak to say that the minister or judge merely ‘chooses’ to act in these different ways, or has a ‘habit’ of acting in these ways, or acts because they feel that they ‘ought’ to act in these ways, or because they ‘make it a rule’ to act in these ways.<sup>11</sup> Nor would it be adequate to say that we can ‘predict’ that the minister or judge will act in particular ways. Each of these weaker statements of the position of minister or judge, it is suggested, fails to capture the *normative* or *binding* force of the different requirements facing these actors in the situations described.<sup>12</sup> It hardly seems intelligible to treat the decision of a minister or judge *not* to perform any of these different requirements as carrying no greater significance than the decision, say, to break their habit of taking coffee at 9 am, or a decision (by the Prime Minister) not to holiday in Chequers at Christmas time.<sup>13</sup>

To return to the original question then, we might want to distinguish between law and convention for the reason that we want to distinguish the *legal* duties of constitutional actors from their *political* or *constitutional* duties. Law (or legal practice), it might be argued, is a distinctive and particularly important political concept (or practice), such that we should attempt to isolate it from the broader domain of political or constitutional morality.<sup>14</sup> Dworkin, for example, has argued that law uniquely justifies the use of state coercion against members of a political community, and that a conception of law as integrity defines a political community in a way that rights and duties within the more general domain of constitutional morality (or from other branches of morality such as

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<sup>10</sup> Some positivist theorists have interpreted Hart as arguing that judges are under no such duty. See, for instance, Julie Dickson, ‘Is the Rule of Recognition Really a Conventional Rule’ (2007) 27 OJLS 373-402.

<sup>11</sup> Mitchell makes a similar point in distinguishing between conventions and mere practices. See J.D.B. Mitchell, *Constitutional Law*, 2<sup>nd</sup> edn (Edinburgh, 1968) 39. Dicey appears to make this mistake in that he groups together ‘conventions, understandings, habits, or practices’ (see Dicey, *op.cit.* 23-24).

<sup>12</sup> Hart famously objected to John Austin’s legal theory on the basis that, in his emphasis on the ‘habits of obedience’ of subjects (as a means of identifying the ‘sovereign’), Austin failed to provide any account of normative duties and obligations. See H L A Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford 1994), especially chapters 2-4.

<sup>13</sup> See J Waldron, *The Law* (London, 1990) at 64.

<sup>14</sup> Cf. Raz, who suggests that law is an instrument for giving effect to reasons which individuals have independently of law. See, generally, Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994).

‘justice’) could not.<sup>15</sup> Finnis, by contrast, has argued that law and legal institutions are the only means of securing certain core human goods in order that people can lead flourishing lives.<sup>16</sup> This argument rests on a developed theory of what is distinctive about law – or, to use Finnis’ own language – what counts as a ‘central case’ of law (as opposed to some other social practice).<sup>17</sup>

If all theorists can agree that constitutional actors have certain *legal* duties which are somehow distinct from their *political* or *constitutional* duties, there are two divergent responses to the question of *how* to distinguish between these different types of duties. It is this question that will occupy us for much of this chapter. One response to this question is to admit that there is no scientific way of drawing a sharp distinction between legal and constitutional or political rights, duties, and powers. The most that we can do, it might be argued, is to offer some abstract account of the value or values that distinctively justify legal practice, which value or values will then inform in a very general way the question of whether particular concrete decisions or actions are lawful or not. A second and quite different response to the question is to insist that there must be some kind of ‘litmus test’ for identifying when a given right, duty or power is legal, and when it is merely constitutional or political. This response is reflected in the legal positivist view that law is (or should be) readily distinguishable from morality.<sup>18</sup> Indeed, it is no doubt in this positivist spirit that a number of constitutional theorists have historically equated constitutional conventions with constitutional *morality* (the implication being that constitutional law is conceptually *distinct* from constitutional morality).<sup>19</sup>

In the remainder of this paper, I shall argue that the second (positivist) response to the question posed above is unsustainable. To summarise, it will be contended, first, that the positivist (litmus test) response cannot withstand that fact that we *disagree* as a matter of

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<sup>15</sup> See R Dworkin, *Law’s Empire* (Harvard University Press, Cambridge, Massachusetts 1986) ch 3.

<sup>16</sup> J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press 1980) ch I.

<sup>17</sup> *Ibid.*

<sup>18</sup> For the classical statement of this position, see H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harv. L. Rev.* 593-629.

<sup>19</sup> Dicey described conventions as ‘the positive morality of the constitution’ (Dicey *op. cit.*); similarly, Austin described conventions as ‘a whole system of political morality, a whole code of precepts for the guidance of public men.’ See J Austin, Wilfred E Rumble (ed.) *The Province of Jurisprudence Determined* (1832) (Cambridge University Press, Cambridge 1995) 259.

political principle about the particular rights, duties and powers of officials in different fact situations. Crucially for the purposes of this chapter, such disagreements belie the existence of any *conventions* whose existence, by definition, depends upon some widely agreed standard of conduct. Secondly, in so far as any proposed litmus test rests on some empirical fact about what particular people think or say, such a test cannot explain how the fact that people *do* behave in a particular way implies that they are under a *duty* to act in that way: in other words, an *is* cannot become an *ought*.<sup>20</sup> Given the non-availability of a litmus test, the most that can be done in the way of distinguishing between legal practice and other social practices, I will say, is to offer some abstract account of the value of law in line with the first response described above. But the question of whether, in a particular situation, an official has some particular *legal* right or duty must depend on a complex moral judgment, sensitive to the facts of that situation. While this judgment takes place against the background of an abstract account of the value of legal practice, that abstract account cannot provide the categorical tests that legal positivists seek.

There are further difficulties, I will say, with any attempt to draw a bright line between law and convention, or between legal duties and constitutional or political duties. First, whatever we have to say about the rights, duties and powers of constitutional actors *reflects some proposition of law*. If the Monarch has a duty to dissolve Parliament when so advised, then *it is the law that* the Monarch has such a duty.<sup>21</sup> And if it is the case that the Prime Minister has the power to dismiss a minister, or to force a Minister to resign for intentionally misleading Parliament, then *it is the law that* the Prime Minister possesses such a power; and *it is the law that* the Minister has no right not to be dismissed. In other words, the law is not silent (to speak metaphorically) on any feature of constitutional practice (or any other social practice). Here is a second difficulty: the same action or decision by a constitutional actor may engage legal rights, duties, or powers *and* other types of rights, duties and powers. A minister may have the *legal* power to fund an overseas project *and* the minister may be under a *constitutional* duty to

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<sup>20</sup> The illicit inference from an 'is' to an 'ought' is associated with the work of David Hume. For a detailed discussion, see <http://plato.stanford.edu/entries/hume-moral/>. I will return to the significance of the is/ought distinction for the notion of constitutional conventions in part 3.9 (below).

<sup>21</sup> To take a non-constitutional example, we could say in relation to the duty to keep promises that it is the law that a person may break their promise to meet their partner at the coffee shop. There may be some other type of moral duty to keep promises.



justify this decision in Parliament.<sup>22</sup> For this additional reason, any attempt to compartmentalize different *areas* of constitutional practice into the legal and conventional I will argue is bound to fail.<sup>23</sup>

## 2. Two Attempts to Distinguish Legal Duties from Political Duties

I have set out above the general conclusions that I want to draw on the question of how to distinguish between constitutional laws and constitutional conventions. I now want to show how I have reached those conclusions. I will do so by examining two prominent ways in which different theorists have sought to distinguish between law and convention, or between legal duties and constitutional or political duties. The first method is the classical test espoused by Dicey, which derives from the jurisprudence of the 19<sup>th</sup> century jurist John Austin.<sup>24</sup> This test can be expressed quite simply: constitutional laws are enforced by courts; constitutional conventions are not. The second method, which derives from the legal theory of Herbert Hart,<sup>25</sup> is a (necessarily) more sophisticated attempt to define different types of duties *independently of their enforcement (or enforceability)*. According to this account, *non-legal* duties arise out of ‘social rules’ which, in turn, emerge out of the attitude of acceptance by a particular group towards a particular standard of conduct or behaviour. *Legal* rights, duties and powers are legally valid in virtue of the fact that they can be traced back to an ultimate rule of recognition.

### A. Enforcement/Enforceability

The classical test for distinguishing between constitutional law and constitutional conventions is that offered by Dicey:

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<sup>22</sup> See *R v. Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 W.L.R. 386. For an interesting discussion of the way in which legal and political duties coincided in relation to a decision to fund the Pergau Dam, see J Jaconelli, ‘Do Constitutional Conventions Bind?’ (2005) 64 CLJ149-176, fnt 25.

<sup>23</sup> A similar point could be made about the supposed distinction between law and morality. There are laws against murder, but most people would say that we have an independent *moral* duty not kill: our legal and moral duties coincide.

<sup>24</sup> See Dicey, *op. cit.* 23-24; J Austin, above (n 19).

<sup>25</sup> Above (n 12).

The one set of rules are in the strictest sense ‘laws,’ since they are rules which... are enforced by the courts... The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power... are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may... be termed the ‘conventions of the constitution,’ or ‘constitutional morality’<sup>26</sup>

At first blush, this test seems promising. We do tend to think of courts (or tribunals, or other judicial bodies or bodies exercising quasi-judicial functions) as having a special responsibility to enforce laws. They do so by imposing some sanction, or providing some remedy for a breach of a given law. It might therefore seem entirely reasonable to conclude that laws are only those measures which courts *do* enforce, or in respect of which courts *do* impose some sanction, or grant some remedy. The enforcement test would also provide a neat answer to the oft-debated questions of whether constitutional conventions can transmute or crystallise into law, and (what amounts to the same question) whether constitutional conventions can become legally binding.<sup>27</sup> Quite simply, a convention can crystallise into law, we would say, when courts decide to enforce the convention.

Notwithstanding its superficial appeal, Dicey’s test, it is suggested, mistakenly conflates two separate questions: first, what makes it the case that a particular proposition of law is true or valid (the question of legality); and, secondly, which institution or institutions (if any) should *enforce* (or adjudicate upon) true or valid propositions of law (the question of enforcement)? Here is the problem: a judge does not decide to enforce something *in a vacuum*. Before a judge can decide whether or not to enforce a given measure the judge must already have employed some theory about *what makes it the case* that there is a legal right, duty or power to enforce. Within the context of the British constitution, the judge must already have decided, for instance, why the decisions of Parliament and courts (in the form of statutes and common law precedents) are relevant to the question of what the law is; and the judge must already have decided *how* those

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<sup>26</sup> Above (n 24). For a recent adoption of Dicey’s definition, see Sir William Wade, First Report of Foreign Affairs Committee (Kershaw Report) vol 11 HC 42-11 of 1980-81 memorandum at 24.

<sup>27</sup> For an extremely interesting discussion of this possibility, see M Elliott, ‘Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention’ (2002) 22 Legal Studies 340-376.

decisions are relevant (whether, for instance, rights, duties and powers of individuals and officials are those that reflect the intentions of Parliament, or those which have been established by a clear rule in some past judicial decision). We seen then that the first of the questions posed above (the question of legality) must be settled *prior* to, and independently of, the second question (the question of enforcement).

The landmark decision of the House of Lords in *GCHQ*<sup>28</sup> will serve well to bring out this point. As is very well known, their Lordships ruled, *inter alia*, that the question of whether power is susceptible to judicial review depended on the nature of the power, and not the source of that power.<sup>29</sup> In the light of this general principle, their Lordships ruled that the exercise of prerogative powers would, in principle, be subject to judicial review.<sup>30</sup> Prior to the *GCHQ* decision, it was widely thought that the various prerogative powers, including the power of the Minister for the Civil Service (in practice the Prime Minister) to control the civil service, were not subject to review by courts.<sup>31</sup> At most, the courts would merely declare the existence of such powers without ruling on the manner in which the powers were exercised.<sup>32</sup> Let us assume for present purposes, in line with Dicey, that in the pre-*GCHQ* period it was constitutional conventions that ‘determine[d] the mode and spirit in which the prerogative is to be exercised’.<sup>33</sup> The following question then arises: what effect did the decision in *GCHQ* have on those pre-existing conventions?

Applying Dicey’s enforcement test, we might say that the *GCHQ* decision represented the *enforcement* of those conventions, thereby converting those conventions to law. But this analysis, it is suggested, distorts the basis on which the House reached its decision. To begin with, we need to ask *why* the House of Lords decided that a minister could be under a duty to exercise prerogative powers in particular ways. Dicey’s enforcement test has nothing to say on this question. We are simply left to assume that judges decided in the abstract to enforce a particular measure (which measure was necessarily *non-legal* because not-as-yet-enforced). But if we look closely at the reasoning in *GCHQ*, we see

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<sup>28</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 (hereafter ‘*GCHQ*’).

<sup>29</sup> *Ibid* 417 per Lord Roskill.

<sup>30</sup> *Ibid*.

<sup>31</sup> This position reflected the historical view that the Monarch could do no wrong.

<sup>32</sup> *Attorney-general v De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, 526 per Lord Dunedin.

<sup>33</sup> Dicey *op.cit.* at 426.

that Dicey's test gets things the wrong way round. Central to the decision in *GCHQ* was the fact that there was no reason why a minister acting under prerogative powers should not be subject to the *same* principles of judicial review, *embedded in past judicial decisions*, which already circumscribed the exercise of statutory powers.<sup>34</sup> In other words, the focus of their Lordships' reasoning was on extending the reach of existing legal principles to a different types of executive power (in line with the theory of legality as integrity described in earlier chapters); there was no question of judges *creating* new legal rights and duties by the enforcement of certain constitutional conventions. In short, while it may well be argued that judges enforce only legal rights and duties, it cannot be said that a norm is a legal right or duty *because* judges have enforced it.

Can we iron out these difficulties with Dicey's enforcement test by modifying that test? One popular means of doing so has been to substitute for the 'enforcement' test, an 'enforceability' test.<sup>35</sup> This modification amounts to the concession that a law can be a law even if no judge has enforced it in the past (or indeed if no judge ever enforces it in future). But, in so far as the hallmark of a given measure's 'lawness' is now said to be its enforceability, this modified test once again gets things the wrong way round. We cannot say that something is legal *because* it is enforceable, since the very notion of enforceability again implies some theory about *what makes it the case that* there is an enforceable legal right or duty. At most we can say that something is enforceable because it is legal (according to some theory of legality). But even this latter proposition represents a controversial position on the question of enforcement posed above. We might plausibly argue that law has little or nothing to do with enforcement (or sanctions) in so far as the primary or purpose of law is to solve problems of coordination, or to guide people's conduct.<sup>36</sup>

I have noted elsewhere the curious time lag between debates in abstract legal theory, and debates in British constitutional theory.<sup>37</sup> While legal theorists have long since abandoned the Austinian jurisprudence on which Dicey relies, many British

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<sup>34</sup> *GCHQ*, 407 per Lord Scarman.

<sup>35</sup> See, for example, J Goldworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford 1999) at 11-12.

<sup>36</sup> This is a point that Hart makes persuasively against Austin. See above (n 12). See, more recently, J Raz, *The Morality of Freedom* (Oxford University Press, 1986), 154-62.

<sup>37</sup> See chapter 1(above).

constitutional theorists still cling to this jurisprudence.<sup>38</sup> The continuing place of Dicey's enforcement test in the modern law/convention debate is a testament to this tendency.<sup>39</sup> As the enforcement test has stretched to breaking point, rather than confront the test head on, contemporary constitutional theorists have instead adopted two different strategies in an attempt to rescue it. The first strategy has emerged in response to the occasional judicial references, say, to the doctrine of ministerial responsibility or Cabinet responsibility<sup>40</sup> (doctrines which, according to traditional constitutional theory, are governed by constitutional convention). Rather than automatically treat such judicial references as the *enforcement* of the doctrine of ministerial responsibility (which would bring about the supposedly undesirable consequence of converting this doctrine into a *legal* doctrine), judges and theorists have instead distinguished between a measure's enforcement and its mere 'recognition' (where only the former counts as a stamp of legal validity).<sup>41</sup> The decisive factor to bring a measure into the law bracket is invariably thought to be the presence or absence of a *sanction* for the breach of the measure.<sup>42</sup> But, for reasons that I hope are now apparent, the enforcement/recognition distinction cannot *determine* whether a given measure is legal or non-legal. Assuming that judges enforce only *legal* rights, duties and powers, the question of whether a judicial decision counts as enforcement or recognition (in so far as such a distinction is intelligible) will again depend entirely on some prior theory of the grounds on which a proposition of law is true or valid.<sup>43</sup>

The second strategy has been to concede that the enforcement test may be *uncertain* and *over-inclusive* in so far as it has the potential to bring areas of British constitutional practice, traditionally thought to be governed by constitutional convention, within the category of constitutional law, but that the test is otherwise workable. For instance, it

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<sup>38</sup> This is a point that Trevor Allan has made persistently in his writing. See, for example, Allan, above (n 5) 239. Cf. D Dyzenhaus, who suggests that Dicey has certain anti-positivist tendencies. *The Constitution of Law, Legality in a Time of Emergency*, (Cambridge University Press, 2006) at 71.

<sup>39</sup> See chapter 1 (above).

<sup>40</sup> *Att.-Gen. v. Jonathan Cape Ltd.* [1975] Q.B. 752, 767F per Lord Widgery CJ (hereafter 'Crossman Diaries').

<sup>41</sup> One can detect this type of distinction in *Reference re Amendment of the Constitution of Canada (Nos 1, 2 and 3)* (1982) 125 DLR (3d) 1.

<sup>42</sup> *Ibid.*

<sup>43</sup> For an argument to similar effect in relation to the Crossman Diaries decision, see T. R. S. Allan above (n 5) at 244.

might be argued that the doctrine of ministerial responsibility is enforced in the sense that the Prime Minister has a duty (analogous to that of a judge) to dismiss a minister or to require a minister's resignation.<sup>44</sup> But if the enforcement test is uncertain and over-inclusive, then this would seem to provide a strong reason to abandon that test – and, in the absence of some alternative test – to abandon the law/convention distinction that the test is supposed to prove: better to fit the shoe to the foot than the foot to the shoe.

In my view, these two argumentative strategies each miss the deeper difficulty with the enforcement/enforceability test that I have attempted to identify above. This difficulty bears repeating. Before we can say anything about the enforcement or enforceability of a legal right, duty or power (including the question of whether something is 'recognised' rather than 'enforced'), we must first have addressed a prior question about *why* courts enforce some measures and not others.<sup>45</sup> Judicial enforcement is not a latter day biblical parable in which judges touch some standard or norm and miraculously convert it into law. If there is some way of distinguishing categorically between law and convention, or between legal rights duties and powers and constitutional or political rights, duties and powers, then the argument for that distinction has to appear in the form of a developed theory of legality at an analytically prior stage to questions of enforcement.

Toward the beginning of this paper, I identified an important additional reason as to why we should reject the enforcement/enforceability tests (along with any other tests) as a way of distinguishing categorically between constitutional law and constitutional convention, or between legal rights, duties and powers and constitutional or political rights, duties and powers. The reason is this: it is wrong to suppose that there are some parts of British constitutional practice in respect of which the law is silent (to speak metaphorically). To put this differently, there is a sense in which *every* aspect of British constitutional practice is governed by law. If the Prime Minister has the power to dismiss a minister, then *it is the law that* the Prime Minister possesses that power. And

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<sup>44</sup> See Barber above (n 6) at 306-7. It is questionable whether the Prime Minister has a *duty* to dismiss a minister in any circumstances. It would be more accurate, it is suggested, to say that the Prime Minister has a *power* to dismiss. In this case, the analogy breaks down: we think of judges as having a *duty* and not a *power* to make decisions.

<sup>45</sup> This is arguably so even for Raz who argues that there are norms (legal norms) which *authorize* the courts to act. See J Raz, *The Authority of Law, Essays on Law and Morality* (Clarendon Press, Oxford 1979) 97-8; J Goldsworthy above (n 35) at 11.

if the Prime Minister has a political or constitutional duty to consult Parliament before deploying the armed forces, *it is the law that* the Prime Minister possesses this type of duty. Indeed, there is a sense in which every single aspect of daily life can be captured by some proposition of law. For instance, it is the law that I have the power to brush my teeth in the morning, and it is the law that I have the power to jog in a public park.

It will be useful to return to the *GCHQ* case once again in order to demonstrate the relevance of this last point. It is sometimes argued that the House of Lords did not make any *legal* ruling on the prerogative power of the Minister for the Civil Service to prohibit civil servants at GCHQ from joining their Trade Union. Instead, the argument runs, the House ruled that this power was *non-justiciable* or, to use the language of Dicey's test, non-enforced (or non-enforceable). As such, we might say that the GCHQ decision established that the prerogative power of the Prime Minister to control the civil service is governed only by convention and not by law. But, in line with what I have said above, there is a clear sense in which the decision in *GCHQ* can be expressed in the following proposition of law: namely, that *it is the law that* the Minister for the Civil Service had the power to remove the right of workers at GCHQ to belong to a trade union without first consulting those workers. Once it is accepted that *all* aspects of constitutional practice can be so expressed, it makes little sense to attempt to compartmentalize *legal* from non-legal parts of the constitution: for *every* part of the constitution is governed by law in the sense that I have described.<sup>46</sup>

## **B. Legal and Constitutional Duties as Hartian 'Social Rules'**

How might we distinguish between legal and constitutional duties *before* entering into questions of enforcement or enforceability? In his monumental work *The Concept of Law*, Herbert Hart offers a celebrated answer to this type of question. The existence of

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<sup>46</sup> It is important to distinguish this position from the position of legal pluralists. It is not my claim that the 'laws' of, say, monopoly or football are no different to laws which emanate from a legislature. Law or legality, I have argued in previous chapter, is distinctively associated with the coercive force of past decisions by Parliament and courts (see, especially, chapter 2 (below)). Law (properly understood) governs monopoly or football only in the sense that the state will ordinarily have no legal power to interfere with an individual's enjoyment of these games (although the state may well have such a power if, for instance, the monopoly players substituted cannabis for monopoly money, or if footballers committed criminal assault).

an obligation or duty depends, he says, not on the prediction that some (judicial) sanction might follow for breach of the relevant standard, but on some normative standard which exists *independently* of, and prior to, any sanction or other institutional intervention.<sup>47</sup> Importantly, for the purposes of this chapter, Hart seeks, first, to explain the general basis of duties and obligations and, secondly, to explain how *legal* duties differ from other types of duties. It is little surprise then that several British constitutional theorists have summoned the work of Herbert Hart in defence of the idea of a distinction between constitution law and constitutional convention.<sup>48</sup>

In order to assess this theory as a candidate for explaining the traditional law/convention dichotomy, we first need to look again at the mechanics of Hart's theory.<sup>49</sup> Hart explains the existence of a duty or obligation by his 'social rules' theory (which is often referred to as his 'practice theory' of rules). A duty or obligation exists, Hart tells us, when there is a social rule supporting such a duty. And a social rule exists when people take the 'internal point of view' towards a particular pattern or standard of behaviour:

'What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism, demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find the characteristic expression in the normative terminology of 'ought', 'must' and 'should', 'right' and 'wrong'.'<sup>50</sup>

Against the background of this general theory of social-rules, Hart introduces the key to distinguishing *non-legal* duties from *legal* duties. He does so by use of a thought-experiment. In a primitive, 'pre-legal' community, the only means of social control would be the general attitude of acceptance by the group as a whole towards its own standards of behaviour – what we might call 'customary' law. But such a system would suffer from a number of defects. Chief amongst these defects would be the problem of

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<sup>47</sup> Above (n 12), chapters 2-4.

<sup>48</sup> See J Jaconelli, 'the Nature of Constitutional Convention' (1999) 19 LS 24, 28-29. Colin Munro, 'Laws and Conventions Distinguished', (1975) 91 *Law Quarterly Review* 218

<sup>49</sup> I discussed Hart's rule of recognition in some detail in ch. 1 (above).

<sup>50</sup> Above (n 12) at 57.



*uncertainty*, in that there would be no way to distinguish between valid legal rules and other types of rules, and there would be no way of identifying the precise legal powers, rights and duties of individuals and officials. The remedy for this defect, Hart suggests, is a 'Rule of Recognition' which provides the criteria of legal validity in a community. Crucially, the rule of recognition is itself a social rule in that it depends for its existence and content on the acceptance *by the officials of the system* of particular standards of behaviour. Thus we see that Hart ultimately grounds *all* duties and obligations – both moral and legal – in his theory of social rules.<sup>51</sup>

How does Hart's theory bear on the distinction between constitutional laws and constitutional conventions, or between legal duties and constitutional or political duties? If we take the duty of a Minister, say, to take into account relevant considerations when determining an asylum application, we might say that that this is a *legal* duty, first, because most officials accept as a 'standard of official public behaviour' the judgments of courts; secondly, because a court has declared that such a duty exists; and finally, because no superior court or legislature has ruled that there is no such duty. What about the duty of a minister to render an account to Parliament or to follow the Ministerial Code? Supposing that such duties cannot be traced back to the rule of recognition in the same way, we might say that these duties are *constitutional* or *political* duties. They exist, not because they derive from a common public set of standards of behaviour accepted by officials, but because most constitutional actors (say, ministers, Parliamentarians and perhaps citizens)<sup>52</sup> *practise* these rules: that is, they accept the underlying standards that constitute the rule, criticize ministers for falling short of those standards, and demand compliance with those standards.<sup>53</sup>

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<sup>51</sup> Hart is careful to emphasise though that not *all* conventional practices generate duty imposing rules. In addition to the requisite attitudes of acceptance, a convention must have three further characteristics. In the first place, there must be *serious social pressure* to comply with the underlying standard; and the failure to comply with that standard must meet with *serious* criticism. Secondly, the standard must relate to some *prized feature of social life*. Finally, it must be possible that the standard may conflict with what a person who owes the duty may *wish* to do. In this way, a duty imposing rule can be distinguished, say, from the rules of a game or some relatively unimportant aspect of social life. See Hart above (n 12) at 86.

<sup>52</sup> There is constant problem of identifying *which* actors must accept a given practice. See N MacCormick, *H L A Hart* (Stanford University Press, 1981).

<sup>53</sup> The precise nature of the different non-legal duties will therefore depend on the domain in which they are accepted.

It is worth emphasising the important difference within Hart's scheme between legal duties and other types of duties. The very point of the rule of recognition (*viz.* to cure the defect of uncertainty in a primitive legal community) is such that the existence of legal duties cannot depend on the fact that these duties are generally *practised*; their existence depends rather on the fact (which may be empirically determined) that these duties arise out of rules which can be traced back to the rule of recognition.<sup>54</sup> To illustrate this point, if certain government ministers were to refuse to obey the judgments of courts, their refusal would not affect the *legal validity* of those judgments. Such judgments are valid, on Hart's account, because they can be traced back to the rule of recognition, and not because they are practised or generally accepted. If, on the other hand, most ministers were to refuse to render an account of the actions of their department of state to Parliament, this may well negate or modify any *constitutional* or *political* duty that may previously have existed on Hart's account; for where *non-legal* duties are concerned, the existence of those duties is wholly determined by the attitudes of acceptance by particular groups of people.

Hart's theory is beautiful in its simplicity, and it would seem to provide a firm basis for a distinction between legal duties and constitutional or political duties (and a corresponding distinction between law and convention).<sup>55</sup> Crucially, the factor which drives Dicey's theory on the distinction between law and convention is relegated to the margins of Hart's theory, namely, whether judges *enforce* a given measure, or whether a given measure is *enforceable*. For Hart, the primary question is one of how to account for, and how to distinguish between, different types of duties; the question of enforceability is a separate, and secondary, question about adjudication.

Does Hart's theory support the view that conventions can transmute or crystallise into laws? Arguably so. If we define a constitutional convention as a (constitutional) norm or standard which is accepted by most constitutional actors, then a constitutional convention could transmute into a *legal* standard if most officials were to accept that 'the standards which most constitutional actors accept' constitutes a criterion of legal validity. This would present an obvious problem for Hart though. If one of the criteria of legal

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<sup>54</sup> See generally chapter 1 (above).

<sup>55</sup> Indeed, several eminent constitutional theorists (including Jacob Jaconelli and Nick Barber) have explicitly sought to explain the nature of constitutional conventions by reference to Hart's legal theory.

validity requires an examination of what most constitutional actors believe or practise, then the very point of the rule of recognition would be lost, namely to provide legal certainty. This would be to turn Hart's thought experiment (described above) on its head: the developed legal system would revert back to the primitive pre-legal system of social rules and nothing else.<sup>56</sup> In the light of this difficulty, perhaps the perhaps the only way in which the doctrine of ministerial responsibility (for example) could become a *legal* doctrine would be for Parliament to enact a statute to that effect, or for courts to create a common law rule to that effect.<sup>57</sup>

### 3. The *Moral* Foundations of Legal and Constitutional Duties

While few would play down Hart's influence on legal theory (and beyond), he has not, of course, been without his critics. Within the Anglo-American tradition of legal theory, these criticisms have mainly come from two different directions, first, the anti-positivism or 'interpretivism' of Ronald Dworkin,<sup>58</sup> and secondly the 'hard' or 'exclusive' positivism of Joseph Raz.<sup>59</sup> It is Dworkin's critique – and the account of rights and duties that he proposes – on which I want to focus. It is not my intention to enter into the rich and voluminous debate about the force of Dworkin's critique of Hart's social rules theory.<sup>60</sup> Rather, I will assume for the purposes of this chapter that his critique is effective, and concentrate on how this critique impacts on the two corresponding distinctions with which we have been concerned in this chapter: namely, the distinction between law and convention, and the distinction between legal duties, and constitutional or political duties.

The question that motivates Dworkin's critique of Hart is this: when we say that a individual or official is under a duty to act in a particular way, or has some power to act, is it always the case that we appeal either to one or more rules of recognition (in order to identify his *legal* duties and powers), and to some other social rule in order to identify his

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<sup>56</sup> I have here adapted an argument by Ronald Dworkin in a slightly different context. See R Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), Model of rules I and II (hereafter 'MoR').

<sup>57</sup> Sir Richard Scott VC, 'Ministerial Accountability' [1996] PL 410, 426.

<sup>58</sup> It is Dworkin's earliest critique in MoR I and II on which I will focus.

<sup>59</sup> Above (nts 14 and 45).

<sup>60</sup> For a particularly insightful set of essays on the Hart/Dworkin debate, see Coleman (ed.) *Hart's Postscript* (Oxford, Oxford University Press, 2001).

*non-legal* duties and powers? I argued in chapter 1 that the notion of a rule of recognition cannot explain the powers of Parliament and courts, or the grounds on which a proposition of law is true or valid. It will be useful at this point to summarise the reasons offered by Dworkin for rejecting the social rules theory as a more general account of duty or obligation:

(a) First, people commonly appeal to duties that have no grounding in any social rule i.e. duties which it could not be said are *generally accepted* in the way that the social rules theory requires. For instance, a vegetarian plausibly appeals to a duty not to kill or animals notwithstanding that very few people hold such a view.<sup>61</sup>

(b) Secondly, when a group of people do seem to agree about the existence of a right or duty, they will often not count the fact of that agreement as being relevant to its existence. Everybody may think that there is a duty not to lie, or a duty to keep promises, but they hold this view, not because *other people hold that view*, but because they think that there are independent moral principles which justify the existence of such a duty.<sup>62</sup> In this case, it is the background principles that are doing all the work.

(c) Thirdly, even when people do count the fact that others hold the same view about rights and duties as being partly relevant to the existence of those rights and duties, they disagree, as a matter of principle, about the precise *content* of those rights and duties. All judges may agree that Acts of Parliament are relevant to the question of what rights and duties exist, but judges characteristically disagree about *why* an Act of Parliament is relevant, and they disagree about *how* an Act of Parliament is relevant (i.e. how best to interpret any given Act).<sup>63</sup> Similarly, we may all agree that a minister has a general duty

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<sup>61</sup> MoR II at 52.

<sup>62</sup> Dworkin helpfully expresses these differences in reasoning in terms of ‘concurrent’ and ‘conventional’ morality. As he says, ‘A community displays a concurrent morality when its members are agreed in asserting the same, or much the same, normative rule, but they do not count the fact of that agreement as an essential part of their grounds for asserting that rule. It displays a conventional morality when they do’. Ibid at 53. Hart concedes this point in the Postscript to the *Concept of Law* above (n 12) 256.

<sup>63</sup> See chapter 1 (above).

to account to Parliament for the failings of her department; but we will often disagree about the precise nature and scope of that duty.<sup>64</sup>

(d) Fourthly, it is not possible to separate in some scientific way all those principles which justify *legal* duties and power (which principles belong *within* the rule of recognition), from all those principles which justify *non-legal* principles (which principles belong *outside* of the rule of recognition).<sup>65</sup>

(d) Fifthly, it may sometimes be the case that a group of people will accept a particular standard of conduct which is pointless or absurd. In these circumstances, an individual will not say that there is a duty but it would be better if there were not; on the contrary, that individual will deny there to be any such duty.<sup>66</sup>

The central thrust of Dworkin's critique then is that the existence and content of individual rights, duties and powers within some complex social practice cannot depend on an empirical description of the standards of conduct that are *accepted* by any particular group.<sup>67</sup> Even if it were possible to identify some such commonly accepted standard, the mere fact that a group *does* believe that it should follow a particular standard does not entail that the group *should* follow that standard: an *is* does not necessarily imply an *ought*.<sup>68</sup> Rather, Dworkin suggests, the existence of particular rights, duties and powers must depend on a complex evaluative or 'interpretive' judgment about how best to justify the facts of a practice.<sup>69</sup>

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<sup>64</sup> One such memorable disagreement concerned Mr Derek Lewis. There had been a series of escapes from prisons around the UK. Mr Lewis was the head of the Prisons Agency, a so-called 'Next Steps Agency' set up by the Government to run the Prison Service. Michael Howard, the then Home Secretary, decided to dismiss Mr Lewis. In an action for unfair dismissal, Mr Lewis contended that Mr Howard had constantly interfered with the operational running of the prison service. A debate ensued about whether ministerial 'responsibility' was different to ministerial 'accountability', and whether a minister had a duty to resign over 'operational' and/or 'policy' failures. For a helpful discussion, see D Woodhouse, 'Ministerial responsibility; something old, something new' (1997) PL 262-282.

<sup>65</sup> MoR I *passim*.

<sup>66</sup> MoR II at 58.

<sup>67</sup> It may be that there are certain forms of social life which are governed by convention, for instance, the rules of a game or the rules of etiquette at a dinner party.

<sup>68</sup> See above (n 20).

<sup>69</sup> Dworkin uses the device of 'constructive interpretation' to explain the structure of the justificatory task. See LE, ch 2. Several British constitution theorists have displayed the intuition that a conventional practice

It will now be useful to see these arguments at work. I want to begin by focussing on the claim – central to traditional theories of the British constitution – that there are certain types of powers, or certain *areas* of governance, in respect of which government ministers have only *political* or *constitutional* duties, and which raise no questions of law on which a court can adjudicate. This type of claim is typically made in relation to particular prerogative powers.<sup>70</sup> As Lord Roskill put it in the *GCHQ* case:

‘Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.’<sup>71</sup>

Before discussing this dictum, it will be helpful to quote Lord Scarman in the same case:

‘[T]he law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.’<sup>72</sup>

Each of their Lordships, it should be noted, begins with the question of *justiciability*: namely, is the *subject matter* or *area* in which a decision is taken suitable for adjudication by a court. The approach taken by judges to this question is broadly as follows: if the subject matter is one of ‘high policy’ then it will be non-justiciable; if the subject matter is one of ‘individual rights’, then it will be justiciable.<sup>73</sup> To convert this test into the language used throughout this chapter, matters of high policy give rise only to *political* or *constitutional* duties, whereas matters of individual rights give rise to *legal* duties.

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must have some *reason* or *justification* behind it. See, for example, Sir Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn) 1959) 136; J D B Mitchell, *Constitutional Law*, 2<sup>nd</sup> edn (Edinburgh, 1968) 68.

<sup>70</sup> The claim I have described extends to areas of constitutional practice not normally associated with the royal prerogative, for instance, the doctrine of ministerial accountability. See part 3 (below). The exercise of prerogative powers, it has historically been argued, could only be policed by Parliament. See Blackstone W., *Commentaries on the Laws of England*, 15 edn, (Chicago: University of Chicago Press, 1977) vol. 1, 252.

<sup>71</sup> *GCHQ* 417.

<sup>72</sup> *Ibid* 407.

<sup>73</sup> I have here adapted a dictum of Taylor LJ in *R v. Secretary of State for Foreign and Commonwealth Affairs Ex p. Everett* [1989] Q.B. 811.

It will be apparent that the approach just described is very much along the lines of the classical ‘enforcement’ test developed by Dicey for distinguishing law (or legal duties) from convention (or political or constitutional duties).<sup>74</sup> Lord Scarman tells us that the principles developed in respect of the review of the exercise of statutory power apply *because* a particular power is justiciable (or enforceable). This is to say that legal rights, duties and powers exist *because* judges can (or do) enforce them. Enough has been said in the first part of this chapter, I hope, to show that this test reverses the correct order of things. It cannot be the case that a legal duty exists *because* a given power or duty is justiciable or enforceable by courts. Judges do not decide to enforce something *in the abstract*; they enforce a legal right or duty because they believe that such a right or duty exists according to some prior background theory of the principle of legality.<sup>75</sup> We must therefore turn our attention back to the question of how best to understand the principle of legality.

At the start of this section, I set out the objections made by Dworkin to Hart’s general ‘social rules’ theory of duties and obligations. Of course, it is on the back of these objections that Dworkin has advocated the conception of legality as integrity with which we have been concerned for much of this thesis. This conception of legality, it will be recalled, entails that judges are under a duty to give effect to the principles of justice, fairness and procedural due process which best justify the past decisions of courts and Parliament. It will now be seen that this conception of legality (which embodies each of Dworkin’s criticisms of Hart) has two significant and connected implications for the present discussion on the availability of judicial review of prerogative powers.

First, there is no area or subject matter which can be pre-emptively ruled out as not engaging legal principles or legal rights and duties, and which can therefore be pre-emptively excluded from the reach of judicial review. To adapt Dworkin’s helpful

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<sup>74</sup> See part 2A (above).

<sup>75</sup> The concept of justiciability, like the concept of deference discussed in chapter 4, is a *conclusion* to the question of how best to justify the role of courts in the British constitution. In this sense, there is no scope for an *independent* theory of justiciability. See T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2003) 10 and, generally, ch 6.

metaphor, it will always be open for some (traditionally non-justiciable) matter of policy to enter the (judicial) ‘forum of legal principle’.<sup>76</sup>

Secondly, given that it is not possible to anticipate which legal principles will be engaged in some novel fact situation, it is not possible to identify concrete rules *ex ante* – as the Hartian account discussed above envisages – about the precise circumstances in which an official will be under a legal duty as opposed to a political or constitutional duty, or both. As I have said, the nature of an official’s duty will always depend on a complex moral (or interpretive) judgment about how best to understand the relevant legal principles. In this sense, it is unhelpful to talk in terms of *the* prerogative power of X, Y, or Z, or *the* doctrine of ministerial responsibility, which mistakenly implies that there are discrete and ascertainable powers and duties that can be defined in advance of their exercise.

These two points can be illustrated clearly, I think, from the decisions and dicta in cases decided since *GCHQ* (on the question of when the courts have been willing to review the exercise of prerogative powers in particular areas of governance). In *Bentley*,<sup>77</sup> for instance, the question was whether the minister had a legal duty to grant a posthumous pardon to Bentley (or a legal power to refuse to grant such a pardon). If the court had adopted Lord Scarman’s approach (above), it would first have had to establish that the general area or subject matter of the granting of pardons was justiciable; only then could any consideration of legal rights and duties begin. But, for the reasons that I have given above, the reasoning of the court is best understood as the reverse of Lord Scarman’s approach: the single question for the court was instead whether there were particular legal principles embedded in the past decisions of courts which, properly understood, justified the existence of such a duty. It is in this sense that Watkins L.J. considered the following hypothetical:

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<sup>76</sup> R Dworkin, *A Matter of Principle* (Harvard University Press, 1985) ch 2. For a persuasive endorsement of this argument in the context of English administrative law, see T.R.S. Allan, ‘Dworkin and Dicey’ 275 *et seq*; *Constitutional Justice op. cit.* at 13 and, generally, ch 6;

<sup>77</sup> *R v Secretary of State for the Home Department Ex p. Bentley* [1994] Q.B. 349.



‘If...it was clear that the Home Secretary had refuse to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.’<sup>78</sup>

In the event, the Court of Appeal applied a different well-established legal principle – a failure to take into account relevant considerations – and ordered the Secretary of State to retake the decision. We can also see from Watkins L.J.’s hypothetical, and from the decision in the case just described, the difficulty in formulating in advance any *rule* about the nature and scope of a minister’s power in relation to the act of pardoning an individual. If it is thought that a minister’s powers in relation to the granting of pardons can be clearly divided, by means of one or more rules, into those aspects governed by law (or legal duties and powers), and those governed by convention (or political or constitutional duties and powers), then such a rule would have to anticipate the existence and weight of each and every possible legal principle that might condition the minister’s power. This would clearly be a hopeless task.

More recently, in the case of *Abbasi*,<sup>79</sup> the Court of Appeal had to consider whether the Foreign Secretary had a duty to make representations to the United States Government on behalf of the applicant in relation to his detention in Guantanamo Bay. Where Lord Scarman’s test would surely have led to a pre-emptive finding that the subject matter of foreign diplomatic relations was non-justiciable, the Court of Appeal focussed on the question of legality or legal principle, and found that the promulgation of a policy by the Foreign and Commonwealth Office gave rise to a legitimate expectation for the applicant. Again, any legal *rule* about the nature of the duties and powers of the Foreign Secretary would implausibly have had to encapsulate the plethora of principles relating to legitimate expectations, along with the existence and weight of any other legal principle which might in future be engaged in this area of government.

Finally, in *Bancoult*,<sup>80</sup> the question was whether the Secretary of State for Foreign and Commonwealth Affairs had lawfully exercised a power under an Order in Council to

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<sup>78</sup> Ibid at 453.

<sup>79</sup> *R. (on the application of Abassi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1470.

<sup>80</sup> *R. (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498.

act for the ‘peace, order and good government’ of an overseas territory. In the Court of Appeal, Lord Justice Sedley hypothesised that each of the ‘excluded’ powers listed by Lord Roskill in *GCHQ* (quoted above), might conceivably engage some legal principle which would justify judicial review:

‘It can be observed without disrespect, particularly since Lord Roskill was careful to express himself tentatively, that a number of his examples could today be regarded as questionable: the grant of honours for reward, the waging of war of manifest aggression or a refusal to dissolve Parliament at all might well call in question an immunity based purely on subject-matter’<sup>81</sup>

It is no surprise then that Sedley L.J. envisaged circumstances in which a minister could abuse the power to act for the ‘peace, order and good government’, for instance on the grounds of jurisdictional error or malpractice, or if the subject matter ‘is manifestly not the peace, order or good government of the colony’.<sup>82</sup> These dicta illustrate as clearly as could be the problems with both the enforcement/justiciability approach of the court in *GCHQ*, and the attempt to demarcate different types of duties by concrete Hartian rules.

If we move away from the issue of prerogative powers and consider other areas of British constitutional practice, it is apparent that there is similarly no scope for drawing a sharp distinction between areas of governance controlled by law and areas controlled by constitutional convention. It is often said, for instance, that the Queen gives the Royal Assent on the advice of her ministers *as a matter of constitutional convention* (or that the Queen has only a constitutional or political duty, but no legal duty, to give the Royal

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<sup>81</sup> Ibid at 46

<sup>82</sup> Ibid. Of course, while my primary aim in this section is to show that judges *do* not pre-emptively exclude any area of government from judicial scrutiny, we should recall the important reasons as to why judges *should* not approach their adjudicative task in this way. The British constitution, I have argued in previous chapters, rests on the principle of legality. This is to say that officials should exercise power only in accordance with the principles, embedded in the past decisions of courts and Parliament that licence the exercise of that power. Judges are under a duty, I have argued, to give effect to these principles (or rights) which operate as trumps over the inegalitarian decisions of government. Now, if judges demonstrate a willingness to exclude certain areas of government from judicial, the principle of legality, and the value of integrity, is lost. Thus, we might criticize the House of Lords in *Bancoult (op. cit.)* in so far as their Lordships seemingly refused to accept that the relevant power could *ever* be judicially reviewed. Similarly, in the recent case of *R (on the application of Corner House Research) v Director of Serious Fraud Office* [2008] UKHL 60; [2008] 3 W.L.R. 568 (HL) the House of Lords seemed pre-emptively to exclude the subject matter of diplomatic relations (with Saudi Arabia) from the principle of legality. For a powerful recent argument against the insulation of particular areas of government from judicial review, see T R S Allan, ‘Human Rights and Judicial Review: a critique of “due deference” (2006) CLJ 65, 671-695.

Assent (when so advised by her ministers). But, for the reasons that I have given above, it makes no sense to designate the giving or withholding of the Royal Assent as a non-justiciable area or subject matter which, for that reason, is necessarily devoid of any implications for legal rights, duties and powers. One can imagine any number of situations in which the Queen might be under a legal duty not to grant the Royal Assent.<sup>83</sup> The starting point must be to consider how best to justify the fact that the Royal Assent forms a necessary element of the legislative process. It might plausibly be argued that the power of the Queen to give (or refuse) the Royal Assent is justified by the principle, say, that the Monarchy is the final barrier against legislative tyranny, oppression and corruption. In this case, if legislature were to act in these ways, it would be entirely plausible to say that the Queen would be under a legal duty (or at that the Queen would have a legal power) to refuse the Royal Assent. By the same token, it would be plausible to say that the Queen has a legal duty in virtue of the principle of democracy to give the Royal Assent provided that such extreme abuses of legislative power are not apparent.<sup>84</sup>

Before concluding this chapter, it will be instructive briefly to consider one very recent illustration of the way in which legal duties intertwine with political or constitutional duties. This is the recent saga involving the shadow Home Office MP, Damien Green, who was arrested by counter-terrorism police for the common law offense of ‘aiding, abetting, counselling or procuring misconduct in public office’ after passing certain sensitive government documents to the press. The intriguing constitutional question to emerge out of these events was whether Mr Green enjoyed Parliamentary privilege against such incursion by the police (or such incursion by *law*) into matters traditionally thought to belong within the exclusive jurisdiction of Parliament.<sup>85</sup> As if to bring out the difficulty involved in deciding whether Mr Green’s

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<sup>83</sup> It should be noted that section 1 of the Royal Assent Act 1967 reads: ‘(1) An Act of Parliament is duly enacted *if Her Majesty’s Assent thereto*’ (my italics).

<sup>84</sup> Another interesting possibility is that a minister may be under a duty to advise the Queen *not* to give the Royal Assent. See the recent decision in *R (on the application of Barclay & Ors) v The Secretary of State for Justice & Ors* [2008] EWCA Civ 1319.

<sup>85</sup> Many commentators have observed in recent years that there is some uncertainty about the extent of Parliamentary privilege. Barber has argued that the question of which institution regulates the conduct of MPs is ‘indeterminate’. See N Barber, ‘Sovereignty Re-examined: the Courts, Parliament and Statutes’ (2000) 20 OJLS 131-154.

situation engaged political or constitutional right and duties, legal rights and duties, or both, Jack Straw, the Minister for Justice, adverted to three competing principles which he thought were relevant to the events described:<sup>86</sup>

First, MPs must be free to go about the legitimate business on behalf of constituents and political party, especially if in opposition;

Secondly, there is great importance attached to the independence and integrity of the police to pursue investigations without direction by politicians;

Thirdly, there is great importance attached to protecting secrecy and confidentiality where it is necessary in Government. This is a matter that affects all governments and all political parties.

In the light of the uncertainty about how these and other principles apply to a situation such as that faced by Damian Green, and indeed how different principles apply in every area of British constitutional practice, it must finally be admitted that there can be no litmus test by which we can distinguish *ex ante* (that is, prior to, and independently of, arguments of political morality) between constitutional law and constitutional convention, or by which we can distinguish between legal duties and political or constitutional duties of constitutional actors. The classical enforcement test propounded by Dicey, I have said, mistakenly conflates the question of enforcement with the question of legality. And the solution offered by Herbert Hart, while extremely appealing in its simplicity and neatness, cannot account for the distinctive character of disagreement about the requirements of a complex social practice.

I have argued instead that the question of which rights, duties and powers a constitutional actor has in a given situation will always involve a complex moral judgment about which principles justify those rights, duties and powers. At the same time, I have maintained – in line with the overarching argument of this thesis – that the principle of legality is the controlling factor in the British constitution: one way or

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<sup>86</sup> Speaking on the BBC Radio 4 *Today* Programme, Dec 1.

another, law speaks to each and every aspect of our daily lives. The effect of these two arguments, I think, is to counter the argument often made in support of the view that the British constitution is 'political', namely the erroneous argument that British constitutional practice is governed predominantly by constitutional conventions.

## Chapter 6: Conclusion: In Defence of the Moral Reading of the British Constitution

‘It is sometimes said that Britain has no constitution, but that is a mistake. Britain has as unwritten as well as a written constitution, and part of the former consists in understandings about what laws Parliament should not enact.’<sup>1</sup>

### 1. A Thesis Overview

This thesis has had a negative aspect and a positive aspect. In its negative aspect, I have attempted to expose a number of unsound philosophical assumptions to be found in traditional accounts of British constitutional theory and practice. Above all, I have sought to debunk the twin ideas that Parliament is sovereign and that, as such, the law is that which Parliament *intends*. These ideas, I argued in chapter 1, are rooted in the obsolete and discredited legal theory of the 19<sup>th</sup> century jurist John Austin, a theory which has been perpetuated through the work of A.V. Dicey (whose writings have attracted an almost religious following in the English legal world). In its positive aspect, I have sought in this thesis to explore the different ways in which the legal theories of Herbert Hart and Ronald Dworkin can inform and enrich our understanding of the British constitution. While Herbert Hart’s rule-based account of legal validity and political power ultimately proves to be unsustainable in its own right, I have suggested that Hart provides one hugely valuable insight into these matters: namely, that we can only account for the powers of Parliament and other institutions by reference to a normative standard which is *logically prior to* those powers.<sup>2</sup> This normative standard, I have argued, is the principle of *legality* – the principle that officials (or political and legal institutions) must exercise power in accordance with standards established in the right way before that exercise.<sup>3</sup>

In chapters 2 and 3, I argued that the principle of legality is best understood as reflecting the value of *integrity* or *equality before the law*. This is to say that the ‘standards’ according to which officials must exercise power (which standards

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<sup>1</sup> R Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford University Press, Oxford 1996) 16.

<sup>2</sup> See chapter 1, part 3.

<sup>3</sup> See chapter 2, part 1.

*determine* the powers of officials) are the principles of justice, fairness and procedural due process to which the British political community is committed through its past institutional decisions. I then sought in chapter 4 to demonstrate the way in which a conception of legality as integrity will shape or control our understanding of the many other political principles which underpin British constitutional practice, principles such as the separation of powers, democracy, and individual human rights. More broadly, I sought to demonstrate the way in which the discipline of British constitutional theory should be characterised by substantive arguments of political or constitutional morality about the justification for the powers of Parliament and courts, and the nature of the moral and legal rights of individuals. It is these types of arguments – arguments which might be described after Dworkin as the ‘Moral Reading’ of the British constitution<sup>4</sup> – which, in my view, have for too long been obscured by artificial and over-technical debates about the possible limits on Parliamentary sovereignty and the relationship between judicial review and the intentions of Parliament.

The (admittedly abstract) arguments of this thesis carry several important implications, I think, for our understanding of the British constitution. Most importantly, these arguments deny the orthodox view that Parliament can ‘make or unmake any law’, or suspend or abrogate fundamental rights at will. I have argued to the contrary that Parliament possesses only such powers as can be justified by legal principles, most notably the principle of democracy (the principle which justifies the fact that it is a *Parliament* as opposed to some other person or body which exercises legislative power).<sup>5</sup> Democracy, properly understood, entails that individual members of a political community enjoy certain moral rights which will trump those collective decisions which fail to treat people as equals.<sup>6</sup> And judicial review, properly conceived of in terms of the application of *principle* and not *policy*, I have argued, is the best way of safeguarding these democratic conditions of government. In this way, the principle of democracy forms the backdrop of principle against which government acts in the British constitution. Far from being ‘antithetical to the principle demand of constitutionalism’<sup>7</sup> and ‘being a concept which has much

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<sup>4</sup> This phrase is taken from Dworkin above (n 1)

<sup>5</sup> See chapter 4 (below), part 1.

<sup>6</sup> Ibid.

<sup>7</sup> See E Barendt, ‘Is there a UK Constitution?’ (1997) 17 OJLS 137, 141.

political, but relatively little legal significance',<sup>8</sup> the principle of democracy, in my view, is a legal principle which lies at the foundations of British constitutionalism.

## 2. The Political Objection

In the remainder of this chapter, I shall offer an outline defence of my thesis against a set of objections which I described collectively at the start of chapter 5 as the 'political objection'. Broadly speaking, the political objection holds that the British constitution is a *political* rather than a *legal* constitution; or, to put this differently, the objection holds that the British constitutional practice reflects (or *should* reflect) the political theory of *republicanism* rather than *legal-liberalism*<sup>9</sup> or *common law constitutionalism*.<sup>10</sup> Of course, there is much disagreement about the meaning of each of these terms, and it may be that no two theorists who align themselves with any one of these political theories occupy precisely the same theoretical space.<sup>11</sup> Nonetheless, the political or republican objection can helpfully be reduced to the following two propositions, which can either work in combination, or independently of each other.

First, the political objection rests on the descriptive premise that the British constitution is *unwritten* in the sense that there is no single document containing the main details of the constitution; rather, the objection runs, the British constitution is made up of a miscellany of statutory and common law provisions. The many 'gaps' in between these provisions are filled by informal rules or constitutional conventions.

Secondly, the political objection holds that, in the absence of any written constitution, (or Act of Parliament giving explicit rights to individuals), judges have no 'constitutional warrant',<sup>12</sup> to enforce such rights. The many (unauthorized) principles applied by judges to the decisions of Government should be viewed

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<sup>8</sup> Ibid at 142.

<sup>9</sup> For the term 'legal-liberalism' see M Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Oxford, Hart Publishing, 2000) 5.

<sup>10</sup> For a helpful survey of different theories of common law constitutionalism, see T Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23 OJLS 435.

<sup>11</sup> For evidence of disagreement about the nature of republicanism, see M Loughlin, 'Towards A Republican Revival' (2006) 26 OJLS 425-437; T R S Allan, 'Our Republican Constitution' (Publication Review) (2006) PL 172, 173.

<sup>12</sup> See M Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001).



therefore as illicit attempts to place politics within the ‘staitjacket of law’<sup>13</sup> or to establish the superiority of law over politics.<sup>14</sup> In this way, the theory of ‘legal liberalism’ or ‘common law constitutionalism’ relegates political deliberation and political decision-making to the margins of constitutional practice: democracy is substituted for juristocracy.<sup>15</sup>

Before considering these two propositions, we first need to distinguish two different versions of the claim that the British constitution is political rather than legal. I suggested in chapter 1 that the theory of the political constitution famously espoused by John Griffith<sup>16</sup> is best understood as a *sociological* or *functionalist* theory about ‘what happens’ in the British constitution.<sup>17</sup> Griffith observes (in the manner of Herbert Hart’s ‘external point of view’) that, contrary to the views of those who contend that political power resides with Parliament and/or courts, it is the Government which *in fact* exercises power. Others have similarly argued that power is concentrated in the Government in the British constitution in so far as it possesses exclusive powers of *dominium* (meaning the way in which it uses the resources of the state to pursue policy goals).<sup>18</sup>

It is certainly intelligible, I think, to argue on this sociological or functionalist level that power in the British constitution resides with the political branches of government (or, in reality, the Government). Indeed, it may be that *as a matter of brute power* Parliament (at the behest of the Government) could enact the most oppressive piece of legislation, or repeal the most fundamental statutes or common law principles (and that the courts would recognize such measures). And it may be that the Government could instruct the police or military to detain judges who refuse to recognize such actions (and that the (remaining) judges would recognize such action). These are not the types of claims with which I have been concerned in this

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<sup>13</sup> Loughlin above (n 9).

<sup>14</sup> See A Tomkins, *Our Republican Constitution*, (Hart Publishing, Oxford 2005) 11-14; ‘In Defence of the Political Constitution’ (2002) 22 OJLS 157-175, 162.

<sup>15</sup> A variation on this second type of proposition is that judges inevitably bring their own *party* political sympathies to bear on their decision-making. For a robust argument against this view, see R Dworkin, ‘Political Judges and the Rule of Law’ in R Dworkin, *A Matter of Principle* (Harvard University Press, 1985), ch 1.

<sup>16</sup> J Griffith, ‘The Political Constitution’ (1979) 42 MLR 1-21.

<sup>17</sup> See chapter 1, part 2.

<sup>18</sup> See T.C Daintith, ‘The Techniques of Government’ in Jowell and Oliver (eds) *The Changing Constitution* 1<sup>st</sup> edn (Oxford University Press, 2000). For a very helpful discussion, see Oliver, *Common Values and the Public Private Divide* (Cambridge University Press, 1999), 36 *et seq.*

thesis, and these are not the types of claims that I want to address below. My concern in this thesis, and the set of claims to which I intend to respond below, are *normative* or *moral* claims about the justification for the powers of each branch of government, and the justification for the moral and legal rights enjoyed by individual against the political branches of government. To put this differently, there is a difference in kind between a proposition of type a) that the Government *does* dominate the legislative process; and type b) that the Government *should* not be permitted to dominate the legislative process.<sup>19</sup> In a stable Western democracy, there is a strong case, I think, for directing our energies more towards making arguments about proposition type (b) than proposition type (a).<sup>20</sup> In any event, this is the approach that I have taken in this thesis.

## A. The ‘Unwritten’ British Constitution

Sir Stephen Sedley has said:

‘But there is another and subtler sense in which it can be said that in this country we have constitutional law without having a constitution, not because our constitution is unwritten but because our constitutional law, historically at least, is merely descriptive: it offers an account of how the country has come to be governed; and, importantly, in doing so it confers legitimacy on the arrangements it describes. But if we ask what the governing principles are from which these arrangements and this legitimacy derive, we find ourselves listening to the sound of silence.’<sup>21</sup>

In order to illustrate his point about the absence of ‘governing principles’ in the British constitution, Sedley points to the ‘silent’ fact of British constitutional practice that the exercise of powers by ministers of the Crown are amenable to judicial review, but that the institution of the Crown in the person of the Monarch is not;<sup>22</sup> similarly he

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<sup>19</sup> See T R S Allan, ‘The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?’ [2002] CLJ 87-125 at 91-2.

<sup>20</sup> The first type of proposition would clearly be of far greater importance in relation to a developing nation in which a government paid little or no attention to law or the constitution. See, for instance, H W O Okoth-Ogendo ‘Constitutionals without Constitutionalism: Reflections on an African Political Paradox’ in Greenberg D. et al (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, 1993).

<sup>21</sup> Sir Stephen Sedley, ‘The Sound of Silence: constitutional law without a constitution’ (1994) 110 LQR 270-291, 270.

<sup>22</sup> Sedley derives this proposition from the decision in *M v. Home Office* [1993] 3 W.L.R. 433 (H.L.). Sedley *op. cit.* 271.

refers to the privileges of Parliament as the ‘Bermuda Triangle’<sup>23</sup> of the constitution. Indeed, throughout his article, Sedley highlights similar silences, gaps, spaces or lacunae in both the British (and US) constitution which he suggests are in need of a coherent legal framework.

Sedley’s concerns are symptomatic of a view that I have sought to resist in this thesis. It is the (legal positivist) view that the law of the constitution is only that which is found in the clear language of statutory texts or decisions by courts; and that any norm or standard which is operative in the constitution, but which cannot be found in such texts, is necessarily non-legal or conventional.<sup>24</sup> I have defended a very different Dworkinian account of law and legality, an account which holds that a proposition of law is true or valid, not when it is captured by some ascertainable rule, but when it reflects the interpretation of the principles of justice, fairness and procedural due process which best justify the past political decisions of Parliament and courts (including the principles which justify the fact that Parliament and courts exercise power). If we think of law in this way, then there may be law even where there is no statute, and even where no court has explicitly spoken; for we work out legal rights, powers and duties by extrapolating from general legal principles, or by thinking hypothetically about how general principles might apply to specific factual situations.<sup>25</sup>

One consequence of thinking of law in this way, I argued in chapter 5, is that we cannot clearly demarcate the legal parts of the constitution from the political parts of the constitution (or legal duties from constitutional or political duties), for instance by designating certain *areas* or *subject matter* as being beyond the reach of law. If we take the issue of the amenability of the decisions or actions of the Monarch to judicial scrutiny, the fact that there is no explicit statutory provision or judicial dictum which speaks to whether the Monarch has particular legal powers and duties says nothing about whether the Monarch *has* such powers and duties. As I argued in chapter 5, we can argue quite plausibly – drawing on general legal principles – that the Monarch is

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<sup>23</sup> Ibid.

<sup>24</sup> Sedley belies his own argument elsewhere, I think, where he proposes the bi-polar sovereignty of Parliament and courts as *legal* principles. See S Sedley ‘Human Rights: a Twenty-First Century Agenda’ [1995] PL 386-400 at 389, and ‘The Common Law and the Constitution’, in Lord Nolan of Brasted and Sir Stephen Sedley (eds), *The Making and Remaking of the British Constitution* (Blackstone Press, London 1997) at 26.

<sup>25</sup> See N Stavropoulos, ‘Why Principles?’ (unpublished) available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1023758](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1023758).

under a legal duty to refuse the Royal Assent to a bill where it represents an extreme abuse of legislative power, and that the Monarch has a legal duty in virtue of the principle of democracy to give the Royal Assent (provided that such extreme abuses of legislative power are not apparent).<sup>26</sup> We see then that, to the extent that different theories of the ‘political constitution’ depend on sharp distinctions between the legal and political areas of British constitutional practice, it must be accepted that such theories are unsustainable.

This brings us to the significance of there being no single document setting out the details of the constitution. The crucial point to appreciate once again, it is suggested, is that the text of a ‘written’ constitution such as that in the US is no more determinative of *the law* than the text of statutes or common law judgments in Britain. The force and meaning of the abstract clauses of the US constitution depend, not on the literal meaning of words in the text, or on the meaning that the original drafters of the text intended, but on the background principles of political or constitutional morality which judges bring to their interpretive task, principles which are always open to reinterpretation.<sup>27</sup> This can be seen no more clearly than in the US Supreme Court decision in *Marbury v Madison*.<sup>28</sup> Notwithstanding that there was no explicit textual provision or past judicial decision to this effect, Chief Justice Marshall appealed to the principle of the separation of powers, embedded in the provisions of the constitution, and reasoned that judges of the US Supreme Court were under a duty to invalidate legislation that infringed the provisions of the constitution.<sup>29</sup>

In summary, it is my argument that judges in the British constitution face precisely the same challenge as those in the US: in each case, they must settle on the best interpretation of the different principles of political morality which justify facts about legal and constitutional practice. In this way, Dworkin’s advocacy of the Moral Reading of the abstract clauses of the US Constitution resonates just as much in

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<sup>26</sup> Sedley’s example of Parliamentary privilege would serve just as well to illustrate my thesis. See the discussion of the Damien Green saga at the end of chapter 5.

<sup>27</sup> See R Dworkin, *A Bill of Rights for Britain*, (Chatto & Windus, London 1990) 27; *Freedom’s Law* above (n 1) ‘Introduction: The Moral Reading and the Majoritarian Premise’; cf. A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 2007).

<sup>28</sup> 5 US (1 Cranch) 137 (1803)

<sup>29</sup> R Dworkin, *Law’s Empire* (Harvard University Press, Cambridge, Massachusetts 1986) 356; T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford 2003), 163.

relation to the British constitution as it does in relation to the US constitution.<sup>30</sup> Three recent judicial dicta, I think, bring out this parallel particularly clearly. In *Simms*, Lord Hoffmann explicitly likened the interpretive duty of English judges in giving effect to ‘constitutional ‘rights to the role of judges in the United States:

‘In the absence of express language or necessary implication to the contrary the courts...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, though acknowledging the sovereignty of Parliament, **apply principles of constitutionality little different from those which exist in countries where the powers of the legislature is expressly limited by a constitutional document.**<sup>31</sup>

Similarly, Lord Steyn has said that

‘Parliament does not legislate in a vacuum; it legislates for a modern European liberal democracy’<sup>32</sup>

And Lord Justice Laws has distinguished between ‘constitutional’ and ‘ordinary’ statutes where the former type of statute cannot be impliedly repealed. A constitutional statute, according to Laws is

‘one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.’<sup>33</sup>

Once it is appreciated that the existence of individual rights, and the proper scope of judicial and legislative power does not depend on questions of semantics about when words are sufficiently ‘express’, or when rights are (or whether rights can be) excluded by ‘necessary implication’, each of these dicta must be understood in precisely the way I have suggested above. The meaning of the text of a statute, and the question of whether an earlier statute should give way to a later statute, must depend on arguments about the most morally attractive meaning of the text, and

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<sup>30</sup> See T R S Allan, *op.cit.* 4-5. In a recent book, David Dyzenhaus has defended what he calls the ‘common wealth constitution’ in order to bring out the sense in which common principles underpin different constitutional orders. See Dyzenhaus, *The Constitution of Law, Legality in a Time of Emergency*, (Cambridge University Press, 2006) at 5.

<sup>31</sup> *R v. Secretary of State for the Home Department, ex parte, Simms and Another* [1999] 3 All ER 400 at 412.

<sup>32</sup> *R. v. Secretary of State for the Home Department, ex p. Pierson* [1998] A.C. 539 at 575.

<sup>33</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) at 62.

arguments about how best to justify the force of statutes. In this way, we have no reason to condemn the refusal by judges to give effect to a purported ‘ouster’ clause;<sup>34</sup> for the meaning of the text must depend on the proper understanding of the principle, embedded in British constitutional practice, of access to justice or access to a court.<sup>35</sup> Similarly, we have good reason to think that the Westminster Parliament no longer possesses the power to legislate for former colonies (or the power to repeal statutes granting independence to former colonies); for strong arguments could be made, I think, to the effect that such principles as protected expectations and legislative autonomy militate against Westminster retaining such powers.<sup>36</sup>

## **B. Democracy or Juristocracy?**

I have suggested that there is no moral significance to the bare fact that the British political community does not possess a ‘written’ constitution (in the sense of a single document setting out the rights of individuals and the powers of institutions). Yet if proponents of the political objection accept this much, they might nonetheless contend that, *irrespective* of whether a community possesses a written or unwritten constitution, it should be government (the legislature and executive) rather than the judiciary which has the last word on controversial questions of principle.<sup>37</sup> For judges to seize final authority on these matters for themselves, the objection might run, inevitably places the deliberations of legislative assemblies in the shadow of ‘dogmatic’<sup>38</sup> and ‘individualistic’<sup>39</sup> judicial theories of common law liberalism,

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<sup>34</sup> See, for example, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>35</sup> For an excellent discussion of the role of constitutional principle in relation to purported ouster clauses, see T R S Allan, ‘Constitutional Dialogue and the Justification of Judicial Review’ (2003) 23 OJLS 563, 576-8. See the decisions in *R. v Secretary of State for the Home Department Ex p. Leech* [1994] Q.B. 198; *R v Lord Chancellor ex parte Witham* [1998] Q.B. 575.

<sup>36</sup> Again, for an excellent discussion of the role of constitutional principle in this context, see T R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford, Clarendon Press, 1993) 254 and 288-290 (analyses of the decision in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645. Cf M Elliott, ‘Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention’ (2002) 22 Legal Studies 340-376. Elliott argues that Parliament may, over time, lose the power to legislate for former colonies on the basis that an appropriate constitutional convention to this effect might transmute into a legal principle. For an argument against this approach, see chapter 5 (above) part 2.

<sup>37</sup> Jeremy Waldron has advanced his arguments against judicial review principally by reference to the role of judges in interpreting a written constitution. See generally chapter 4 (above). In this respect, Waldon’s argument cuts across the supposed divide between written/unwritten constitutions.

<sup>38</sup> T Poole, ‘Dogmatic Liberalism? TRS Allan and the Common Law Constitution’ (2002) 65 MLR 463.

<sup>39</sup> A Tomkins, *Our Republican Constitution* above (n 14) 15-16.

theories which mistakenly suppose that ‘we ought to be able to find the answer to all political disputes in law’.<sup>40</sup>

I have attempted in this thesis to explain the very particular and necessary sense in which judges give effect to matters of *principle* in their adjudicative role.<sup>41</sup> I have suggested (after Ronald Dworkin) that judges are constrained by, or bound by, the value of (constitutional) integrity.<sup>42</sup> This is to say that judges are under a duty to identify and give effect to the principles and policies to which a political community is committed through the past decisions of its political and legal institutions. This role, I argued, is democracy *reinforcing* in the sense that it is for judges to ensure that each member of the British political community is treated as an equal (the very *point* of democracy). The charge of juristocracy rests, in my view, on a parody of Dworkin’s theory of adjudication. Few (if any) legal or constitutional theorists – least of all Dworkin – make the argument that judges have a licence to bring their own Utopian political philosophy to their adjudicative task without having regard for the past decisions of Parliament and courts.<sup>43</sup> And no theorist can plausibly argue, I think, that the judicial role is to resolve ‘political’ disputes (in the sense of making decisions about which collective goals or aims the British political community should pursue). In short, the British constitution is neither ‘legal’ nor ‘political’: it is founded on principles, embedded in the past institutional decisions of Parliament and courts, which determine the rights, duties and powers of government, the judiciary and individual members of the British political community.<sup>44</sup>

### 3. Closing Reflections

One of my principal aims in this thesis has been to bring questions of legal theory to the forefront of British constitutional theory. My focus has been the shortcomings – according to an anti-positivist, Dworkinian perspective – of a *positivist* account of British constitutional theory and practice, and in particular an account based on the work of John Austin or Herbert Hart. It is by reference to the work of these theorists,

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<sup>40</sup> A Tomkins, ‘In Defence of the Political Constitution’ above (n 14) 172.

<sup>41</sup> See chapter 4, part 2.

<sup>42</sup> R Dworkin, *Freedom’s Law* above (n 1) 10-11.

<sup>43</sup> For one possible exception, see S Guest (whose theory I discuss in chapter 2 (above) part 3).

<sup>44</sup> Allan similarly describes the distinction between a ‘legal’ and ‘political’ constitution as a ‘false antithesis’. See above (n 11) 174.

I perceive, that lawyers and academics have increasingly sought to defend the traditional Diceyan vision of the British constitution.<sup>45</sup>

Given the general aim that I have just described, and given my regular insistence in this thesis that constitutional theory must keep apace with developments in legal theory, I am conscious of one notable failing in my project which awaits rectification in future research. While Herbert Hart's theory is rightly regarded as a major turning point in positivist legal theory, it can no longer be said that Hart's theory represents the strongest version of legal positivism. The new 'battleground' for legal and constitutional theory, I think, is the question of whether the work of Joseph Raz – Hart's protégé and joint-chief critic – and Razian sympathizers meets the anti-positivist critique of Ronald Dworkin (and vice versa).<sup>46</sup> It is hope that enough has been said in this thesis to emphasize the importance for British constitutional theorists of joining this 'battle'.

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<sup>45</sup> See, in particular chapter 1 (above).

<sup>46</sup> Joseph Raz has recently been highly critical of theorists who continue to attack Hartian positivism. See J Raz, 'The Argument from Justice: Or How Not to Reply to Legal Positivism' available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=999873](http://papers.ssm.com/sol3/papers.cfm?abstract_id=999873). It is hoped that I have offered an adequate justification for my emphasis on Hart.



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