WRITTEN AND UNWRITTEN CONSTITUTIONS

The Modality of Change

Paul Craig

1. INTRODUCTION

Written constitutions are the norm, unwritten constitutions the rare exception. There is much that can be said as to the commonalities and differences between them. There are, nonetheless, two principal variables that underscore the respective forms of constitution, which in turn impact on the modality of change: the extent to which the constitution is committed to writing, and the extent which the constitution is perceived to be separate from, and superior to, ordinary law.

These twin variables are commonly perceived to be linked. There is empirical warrant for this assumption. The paradigmatic written constitution, which contains the principal constitutional norms in a single document, will commonly also enshrine, expressly or impliedly, constitutional review through which courts subject ordinary statute to review for constitutional compliance; the constitutional norms of the paradigmatic unwritten constitution will normally be found in a plethora of sources, and ordinary statute will customarily have pride of place in the constitutional schema.

There is, however, no a priori normative reason why these twin variables should be linked in this manner. The embodiment of constitutional norms in a canonical document does not predetermine the content of the constitution, nor does it impel the conclusion that constitutional review exercised by a court must be part of the resulting schema. This is exemplified, as will be seen below, by the UK, where some suggestions for the shift to a written constitution are premised on the assumption that parliamentary sovereignty remains a cornerstone of the constitutional ordering. It is, by parity of reason, equally possible in principle to think of an unwritten constitution, the central features of which are markedly similar to those of the paradigmatic written constitution, such that it is accepted by all relevant players that ordinary legislative power is bounded by certain structural and rights-based precepts that are enforced, inter alia, by the courts. The manner through which this might occur will be considered more fully below.

It follows from the foregoing that while the extent to which constitutional norms are committed to writing is of significance in distinguishing the two forms of constitution, the second variable is more important in normative terms, and shapes the way in which change is effectuated. The contrast in this respect is sharp. The foundational starting point of the standard written constitution is the distinction between law-making through ordinary politics and the constitution; the latter circumscribes the former, such that the terrain of ordinary politics is bounded by the constitution. The foundational starting point of the UK unwritten constitution is that parliamentary sovereignty is the principal constitutional principle; the terrain of ordinary politics is boundless and parliamentary sovereignty instantiates and elevates ordinary statute as the vehicle for its delivery.

This contribution in honour of Bruce Harris explores the foregoing ideas and their implication for the modality of constitutional change.

Issues of constitutional change within the unwritten constitution have been one of the main themes in Harris's scholarship.[1]

The discussion of written constitutions begins with certain preliminaries as to the origins of the modern constitutional form. It is followed by consideration of constitutional content, distinguishing between the horizontal, vertical and structural features generally found in written constitutions, and includes discussion of over- and under-constitutionalisation. The analysis concludes with brief reflection on the manner of constitutional change.

The focus then turns to the UK unwritten constitution. It begins with certain preliminaries as to historical origins. The ensuing discussion considers the horizontal, vertical and structural provisions of the UK unwritten constitution and the way in which they are shaped by parliamentary sovereignty. The analysis includes the emergence of parliamentary sovereignty in the UK constitutional order, the parallel historical discourse concerning fundamental law, the resultant centrality of parliamentary sovereignty and the ways in which this was justified over time. The inquiry concludes with the modality and frame for constitutional change in the UK.

2. WRITTEN CONSTITUTIONS

2.1. PRELIMINARIES

Constitutions have existed for a very long time. This is a trite proposition. The relative provenance of the 'modern' written constitution is, however, contested, as are the criteria that should count in this respect, and the cause of its emergence. This is not the place for exegesis on this issue, which could well occupy an article or book. Some sense of the argumentation is, nonetheless, helpful for the ensuing analysis. Dieter Grimm's account is helpful in this regard.[2]

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1 See, for example, BV Harris "The Constitutional Future of New Zealand" [2004] NZ L Rev 269; BV Harris "Constitutional Change" in Raymond Miller (ed) *New Zealand Government and Politics* (4th ed, Oxford University Press, Melbourne, 2006) 115.

2 Dieter Grimm *Constitutionalism, Past, Present and Future* (Oxford University Press, Oxford, 2016).

He argues that the modern written constitution should be dated from the American and French revolutions, and the subsequent constitutional settlements. The term 'constitution' can be found earlier, but it generally denoted 'the condition or situation of a state', as shaped by 'historical development, natural features and legal order'.[3] In this sense 'every state was in a certain "constitution", and where no constitution could be identified, no state existed'.[4] This older conception of the constitution was thus principally empirical, by way of comparison to the modern constitution that was normative, insofar as it prescribed how state power should be established. The modern constitution thus 'constituted' rule, it was 'comprehensive' in the sense of regulating the entirety of rule, and also 'universal' in that it benefited all persons subject to rule.[5] For Grimm, the distinguishing feature of the American and French revolutionaries was that their discontent was 'not limited to the person of the ruler, but encompassed the system of rule'.[6] The forces that shaped the modern constitution appear from the following passage.[7]

> Historically, constitutions are a product of the conflict between the liberal bourgeoisie and the absolute monarchy. The bourgeoisie was seeking to emancipate the production and commercial sphere from hierarchical direction and to guarantee the predictability of state power. To this end, it demanded the limitation of princely competence to questions of security and order as well as participation in state decision-making concerning issues of freedom and property. These demands were justified on the basis of natural law and were to be secured through positive law. The means was the constitution, which regardless of how it came to be in each individual case had a contractual character. It typically contained basic rights to re-define the social sphere of freedom, on the one hand, and rules regulating the holders and modalities of the exercise of state power on the other. In particular, it provided for representational bodies to communicate civic interests to the state, a guarantee that the state complied with the decisions of these bodies, together with the establishment of independent courts as a complementary safeguard.

For Dieter Grimm, the single biggest challenge to this conception of the constitution has been the changing nature of state obligations, principally, albeit not exclusively, through the emerging conception of the social state,

3 At 44.
4 At 44.
5 At 43.
6 At 6.
7 At 128–129.

with the consequence that the 'constitution can no longer restrict itself to organizing the state apparatus and limiting state power', but must 'order not only the state, but society as well'.[8]

2.2. CONTENT: HORIZONTAL, VERTICAL AND STRUCTURAL

Constitutions vary significantly in terms of the topics covered, and the depth of the coverage. This is an issue that will be addressed below when considering over-constitutionalisation. This heterogeneity should not, however, conceal the commonality of subject-matter as between written constitutions, and this is so notwithstanding the obvious fact that different polities may choose to address such issues in different ways. The common core consists of constitutional provisions that are horizontal, vertical and structural in nature.

The horizontal dimension speaks to the procedural and substantive rules that establish and regulate the principal organs of government, their constitution and powers. These rules classically relate to the legislature, executive and judiciary. They will identify the respective organs, and specify their powers. Procedural norms will, for example, specify how legislation is to be passed, whether special majorities are required and the like. Substantive norms will, for example, denominate the legislature and the nature of its power, the same being true for the executive and the judiciary. There can be difficulties in defining the institutions that exercise certain types of power, and there can also be difficulties in deciding on the precise powers that a certain institution should have. This is especially so in relation to executive power. Constitutions are, in general, not good at defining the executive, or the scope of its powers.[9] This is so for a concatenation of reasons, a principal cause being the duality in the meaning of the term executive. It can mean the body charged with developing policy and the legislative agenda; it can also connote the body charged with implementing legislation. The increased use of agencies that exercise executive powers, and operate outside the strict confines of departmental structures, has exacerbated the difficulties in identification of the executive and the delineation of its powers. Constitutional uncertainty concerning

8 At 135.

9 See Paul Craig and Adam Tomkins (eds) *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford University Press, Oxford, 2005).

the location and scope of executive power then generates rival theories that give diverse answers to these issues, which play out not just in law review exchanges, but in high-level politics.

The vertical dimension of the constitution traditionally captures constitutional rules that regulate the interrelationship between citizen and state. The paradigm situation is rights-based constraints on government action, through a Bill of Rights enshrined in the Constitution. This may form part of the initial constitution, as is commonly the case with constitutions created after 1945. It may be added later through constitutional amendment, as with the US Constitution. There will then be a range of second order issues that fall to be resolved, most prominently the rights to be included in the constitutional document. There is significant choice in this respect, ranging from the traditional focus on civil and political rights, to more expansive documents that also include social and economic rights, such as the EU Charter of Rights. The other central issue concerns the reach of the Bill of Rights, whether it operates only on a vertical plane, or whether it also has a horizontal impact as between private parties. This choice may be made explicitly in the Bill of Rights, but where there is uncertainty, it falls to the courts to make the interpretive choice.

The structural dimension of the constitution in nation states that are federal is concerned with the division of power between the federal and state level. A written constitution may also contain analogous provisions that demarcate the boundaries between central power and that of regions where there is a measure of devolution. The constitutional criteria used for such division or demarcation of power are varied, including specification of subject matter and impact across intra-state territorial boundaries. The criteria often lack pristine clarity, thereby sowing the seeds for contestation as to the boundaries of power that fall to be resolved in the courts. This uncertainty can impact diverse issues, including the allocation of regulatory authority as between the federal and state level, and the federal constraints on state rules concerning who can vote in federal elections.

There will, however, always be an unwritten element in all written constitutions, even those that are more detailed. There may be issues that were never addressed in the constitution, because they were never thought about by those who drafted the document. There may be certain constitutional provisions, whether horizontal or vertical, which are set at a high level of abstraction, thereby requiring further specification through legislation, judicial interpretation or administrative practice, or an admixture of all three.

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2.3. CONTENT: OVER- AND UNDER-CONSTITUTIONALISATION

Constitutions vary significantly when judged by a plethora of criteria. A significant factor in this respect is the constitution's relative breadth or narrowness, as judged by the range of its coverage and the detail thereof. To put the point more starkly, constitutions can be relatively fat or thin. There is no a priori reason to prefer one over the other. The choice betwixt the two can be the result of conscious constitutional design, or adventitious historical circumstance flowing from the founding constituent moment. A range of considerations may well play into the option thus selected. The choice will perforce have consequences. Thus, other things being equal, the greater the constitutional coverage, the more issues are taken off the agenda of normal politics, or the normal political process is circumscribed. This in turn prompts inquiry into the problem of over-constitutionalisation.

This can be exemplified by discourse in the EU, most notably by Dieter Grimm.[10] His central thesis is that the EU Treaties are over-constitutionalised, with the consequence that issues are thereby taken off the agenda of normal politics, notwithstanding the fact that they might be regarded as within the province of ordinary law in Member States: 'in the EU the crucial difference between the rules for political decisions and the decisions themselves is to a large extent levelled'.[11] It is inherent in the nature of constitutions that they function as the framework for political decisions, with the consequence that elections 'do not matter as far as constitutional law extends'.[12] There may be too little constitutionalism, but there may also be too much, with the consequence that the democratic process is fettered.[13] While there are no universally applicable principles for determining the content of a constitution, the 'function of constitutions is to legitimise and to limit political power, not to replace it',[14] with the consequence that constitutions are a 'framework for politics, not the blueprint for all political decisions'.[15]

For Grimm, the EU Treaties fulfil many functions of national constitutions, specifying matters such as the inter-institutional distribution of power,

10 Dieter Grimm "The Democratic Costs of Constitutionalisation: The European Case" (2015) 21 ELJ 460.
11 At 470.
12 At 463.
13 At 464.
14 At 464.
15 At 464.

the mode of law-making, and the respective competence of the EU and Member States. They also go significantly beyond the remit of national constitutions, with the consequence that a wide range of matters becomes constitutionalised and taken off the agenda of normal politics. The effect of this is further enhanced by the constitutional doctrines of direct effect and supremacy, which transformed the four economic freedoms from 'objective principles for legislation into subjective rights of the market participants who could claim them against the Member States before the national courts'.[16]

This then meant that there were two modes of EU integration. The Treaty precepts could be advanced through legislation enacted by the EU institutions, or they could be taken forward through judicial decisions, which were imbued with considerable force through direct effect and supremacy.[17] Member States had limited influence over the latter, and this was particularly important since the lack of differentiation between the constitutional law level and the ordinary law level meant that the 'constitutionalization of the treaties immunizes the Commission and particularly the ECJ against any attempt by the democratically responsible institutions of the EU to react to the Court's jurisprudence by changing the law'.[18] For Grimm, the remedy was to limit the EU Treaties to their truly constitutional elements and downgrade other Treaty provisions that were not constitutional nature to the status of secondary law.

2.4. CHANGE: MODALITY AND FRAME

This brief excursus into written constitutions ends with consideration of the modality and frame though which constitutional change occurs. There are four principal modes in this respect.

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The most obvious is perforce formal constitutional amendment,[19] the catalyst for which varies.[20] In some instances, it is the realisation that the

16 At 467.

17 JHH Weiler "The Community System: The Dual Character of Supranationalism" (1981) 1 YBEL 267 and "The Transformation of Europe" (1991) 100 Yale LJ 2403 at 2412–2431; PP Craig "Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law" (1992) 12 OJLS 453.

18 Grimm, above n 10, at 471.

19 Richard Albert *Constitutional Amendments, Making, Breaking and Changing Constitutions* (Oxford University Press, New York, 2019); Yaniv Roznai *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, Oxford, 2017).

initial constitutional design is imperfect; in others it is the result of new political configurations that wish to re-shape the country's institutional and constitutional architecture; in yet other instances, the motives may be darker, such that current majorities seek to reinforce their power through constitutional amendment designed, for example, to limit the power of the judiciary.[21]

The second impulse for constitutional change is judicial interpretation. This language is, however, inherently tendentious, since it is based on assumptions as to how courts do and should interpret the constitution. The very idea that the constitution has or has not been changed depends, inter alia, on the theory of constitutional adjudication accepted by that legal order or espoused by academic commentary. This is the site of well-known battles, including that between constitutional originalists, and those who subscribe to a more Dworkinian view of constitutional interpretation. Matters are rendered more complex by the plethora of very different theories of what constitutional originalism means, and by similar variation in the latitude afforded by non-originalist theories.[22] This is quite apart from the small matter as to whether court decisions over time can be said to subscribe to any consistent view within a particular jurisdiction.

The third driver of constitutional change is constitutional legislation, which is somewhat less obvious, but equally important. It is normatively and pragmatically mistaken to draw a rigid line between the constitution and legislation that is designed to fill out the meaning of its provisions, and it is misguided to elide the existence of the same provision in many constitutions with equivalence of application. Constitutional legislation is in many respects the lifeblood of the constitution. Other things being equal, the thinner the constitution and the more abstract its provisions, the greater the role for constitutional legislation and adjudication to imbue the terms

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20 Compilation of Venice Commission Opinions concerning Constitutional Provisions for Amending the Constitution, CDL-PI (2015) 023; Venice Commission, Report on Constitutional Amendment, CDL-AD(2010)001.

21 Kim Lane Scheppele "Autocracy under Cover of the Transnational Legal Order" in Gregory C Shaffer, Tom Ginsburg and Terence C Halliday (eds) *Constitution-Making and Transnational Legal Order* (Cambridge University Press, Cambridge, 2019) ch 7.

22 See, for example, Jeffrey Goldsworthy "Constitutional Interpretation: Originalism" (2009) 4 Philosophy Compass 682; Keith E Whittington "Originalism: A Critical Introduction" (2013) 82 Fordham Law Review 375; Symposium on Originalism in (2019) 37(3) Law and History Review; John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, 1980); Ronald Dworkin *Taking Rights Seriously* (Harvard University Press, Cambridge, 1978).

with more concrete meaning. Such legislation is nonetheless important in all constitutions, although its incidence may vary. The constitution may contain noble provisions concerning free and fair elections, but the reality can only be tested by examination of the detailed electoral legislation that puts flesh on these constitutional bones. It is powerfully attested to by recent legislation in some states of the US, which has placed increased barriers on people's ability to vote in state and federal elections. There may be laudable constitutional guarantees for political parties, only for these to be heavily circumscribed by legislation that defines the qualifications for a political party to appear on the ballot. The force of constitutional protections for free speech may be qualified by legislative rules related to association. The need to be mindful of the link between constitutional terms and consequent legislation is important in relation to many other issues commonly found in constitutions, such as principles concerning equality, the judiciary and the like, which are then articulated in more detail in, or affected by, legislation.

The final factor in this respect is constitutional practice, which may take various forms. There may be institutional conventions, or perceptions of the constitution by the people. There may be practice by the relevant players, which either undermines the formal constitutional norms, or imbues them with greater force than they would otherwise have as judged by their formal text. There may be events that test the ambit of formal constitutional provisions, with the resolution of the contestation casting the constitutional norms in a somewhat different light than hitherto.

3. UNWRITTEN CONSTITUTIONS

3.1. PRELIMINARIES

Most current constitutions are written. Unwritten constitutions are the exception. This, like the proposition that began the previous section, is trite. However, in common with that discussion, matters rapidly become more complex and contestable when we move beyond this simple terrain. This is more especially so, if the inquiry is as to why a particular polity chose to buck the trend, and to stick with an unwritten constitution. The answer will perforce depend, inter alia, on an admixture of historical, social and economic circumstance. These issues are beyond the remit of the present contribution and would require an article or book to do justice

to the topic. Nor is the intent to engage in the debate as to whether the UK should have a written constitution.[23]

This preliminary foray is limited to making a simple conceptual point, which will be developed hereafter. The content of unwritten constitutions can, in principle, vary significantly. There is, moreover, no a priori reason why a state might not choose to stick with an unwritten constitution for an admixture of historical, social and economic circumstance, and yet still replicate, in unwritten form, many features commonly found in a written constitution. It might limit the remit of ordinary statute in accord with constraints typically found in written constitutions, and these rules might be accepted as obligations by the key political and legal players. The net effect might be a constitutional order that is similar to, and equally efficacious as, its written constitutional cousin.

There can, however, also be an unwritten constitution, such as that in the UK, where the animating constitutional principle is that of parliamentary sovereignty. This constitutional choice is premised on normative assumptions that are very different from those that underpin written constitutions, and the alternative unwritten constitution sketched above. This in turn affects the modality and scope for constitutional change. It should, moreover, be recognised that if a polity decides to shift from an unwritten to a written constitution it has considerable choice as to its content. Thus, an interesting consideration in the context of the present discussion is that many of the proposals for a written constitution in the UK are predicated on preservation of parliamentary sovereignty, or something closely akin thereto.[24]

3.2. CONTENT: PARLIAMENTARY SOVEREIGNTY, THE HORIZONTAL, VERTICAL AND STRUCTURAL

There can, as noted above, be difficulties in determining the more particular content of written constitutions. Difficulties are, however, relative by

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23 The principal proposals for a written constitution can be found in Jo Eric Khushal Murkens "A Written Constitution: A Case not Made" (2021) 41 OJLS 1. See also, Vernon Bogdanor and Stefan Vogenauer "Enacting a British Constitution: Some Problems" [2008] PL 38; Nick Barber "Against a Written Constitution" [2008] PL 11; Political and Constitutional Reform Committee *A New Magna Carta?* (House of Commons, 463, July 2014); Vernon Bogdanor *Beyond Brexit: Towards a British Constitution* (Hart, Oxford, 2019).

24 Murkens, above n 23, at 6–8.

nature, and they are greater when trying to determine the content of an unwritten constitution, such as the UK. We can, nonetheless, make progress in this respect. The basic taxonomy of horizontal, vertical and structural constitutional provisions is equally pertinent to an unwritten constitution as to the more common written version.

There is no doubt that the UK unwritten constitution contains rules that speak to the horizontal, vertical and structural features commonly found in written constitutions. Thus, there are a number of statutes dealing with the horizontal dimension, insofar as this connotes the powers vested in the legislative, executive and judicial branches of government, including, inter alia, the Bill of Rights 1689, Act of Settlement 1700, Parliament Acts 1911 and 1949, Ministers of the Crown Act 1975, and hitherto the European Communities Act 1972. The statutes that address the vertical features of a constitution include the Bill of Rights 1689 and the Human Rights Act 1998. The structural constitutional dimension is exemplified by the legislation relating to devolution, the modern incarnation of which began with the Scotland Act 1998 and the Government of Wales Act 1998. This legislation has been held by the courts to have constitutional status, which has, as will be seen below, implications for the manner of change.[25]

There are, in addition, important constitutional precepts such as the rule of law. This is not the place for exegesis on the meaning of the rule of law, and its significance within the UK unwritten constitutional order. Suffice it to say that it is of considerable importance, as manifest in principles of judicial interpretation whereby statutes that limit access to courts will be narrowly construed, as will legislation that limits human rights. The rule of law also shapes the legislative process, through the importance attached to ensuring that statutory provisions are clear and prospective, and it underpins judicial review, such that power accorded to ministers and agencies is held to account. There are, nonetheless, abiding difficulties concerning the scope and source of executive power, which is a powerful theme in Bruce Harris's work.[26]

It is, nonetheless, necessary to confront the centrality of parliamentary sovereignty in the UK unwritten constitution. It is the dominant occupant of this conceptual terrain. The orthodox reading of parliamentary sovereignty is that Parliament is omnipotent, and thus can be subject to no

25 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

26 See, for example, BV Harris "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626; "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225; "Government 'Third Source' Action and Common Law Constitutionalism" (2010) 126 LQR 373.

substantive or procedural limits. This precept is subject to one exception, which is that Parliament cannot bind its successors. The thesis is thus one of continuing parliamentary sovereignty, such that each successive Parliament is invested with the same omnipotence as its forbears, thereby reflecting the normative claim that each Parliament is entitled to the same authority flowing from the fact that it has equal democratic pedigree to the Parliaments that preceded it.

The possible twin qualifications to this proposition are well known and do not warrant detailed explication here. They relate to the possibility of procedural constraints on sovereignty, whereby Parliament would be bound by manner and form provisions contained in earlier legislation, unless and until they are altered; and to the possibility that the courts might, in extreme circumstances, refuse to apply legislation that is deeply problematic in terms of substance.

These possible qualifications should not mask the centrality of parliamentary sovereignty to the UK unwritten constitution, or the contrast with the basic precepts of written constitutions. The foundational starting point of written constitutions is the distinction between ordinary politics and the constitution; the latter circumscribes the former, such that the terrain of ordinary politics is bounded by the constitution. The foundational starting point of the UK unwritten constitution is that parliamentary sovereignty is the principal constitutional principle; the terrain of ordinary politics is boundless and parliamentary sovereignty instantiates and elevates ordinary statute as the vehicle for its delivery.

This in turn leads to the following irony. Written constitutions have an inherent weakness, insofar as they do not have the same enforcement mechanism as ordinary statute. There are to be sure methods of enforcement through constitutional courts and the like, but this does not dispel the preceding concern. An unwritten constitution grounded on parliamentary sovereignty obviates this problem, by the very fact that ordinary statute, cloaked with the mantle of parliamentary sovereignty, is constitutional centre-stage, and partakes of enforcement mechanisms attendant on normal legislation.

This naturally invites inquiry as to why the UK opted for an unwritten constitution with parliamentary sovereignty as its central component, given that the latter is not a pre-ordained component of the former. The reasons are assuredly eclectic and linked.[27] They reside in part in

[27] Christopher Hill *The World Turned Upside Down, Radical Ideas During the English Revolution* (Penguin, 1972) ch 7; Donald Veall *The Popular Movement for Law Reform,*

historical circumstance.[28] The Bill of Rights 1689 was only a partial constitutional settlement. It did, however, circumscribe monarchical power, and bolster that of Parliament. The nobility and the middle class did not feel the imperative for a formal written constitution to safeguard their rights, and the flipside of this same coin was that they did not wish for limits on the powers of a Parliament over which they had control. The emergence of parliamentary sovereignty was, moreover, influenced at various junctures by Parliament's status as the highest court, as well as the legislature.[29] It was also affected by the writings of Hobbes[30] and Filmer,[31] who lent credence to the idea that there had to be a locus of undiminished power. The dispatch of the Stuarts and the post-1689 settlement laid to rest the remnants of previous debate about the possessor of sovereign power. Sovereignty resided in the King-in-Parliament, in the sense that it was the King acting in conjunction with the Commons and Lords which possessed all-embracing power.

The gradual emergence of parliamentary sovereignty in something akin to its modern form by the end of the 17th century should not, however, lead to neglect of the concept of fundamental law, or the relationship between fundamental law and the constitution, to which reference was made throughout the century and beyond. English scholars of the Tudor age used Aristotelian ideas of 'politeia' but did not speak of an English constitution.[32] Recourse to the term 'constitution' in connection with forms of government began in the 17th century. Its roots lay, in part, in analogies between nature and politics, as epitomised in the ideal of a healthy body and a healthy body politic; and in part in development from the Latin term '*constitutio*', which was used in Roman law to connote imperial decrees, and by the mid-17th century was employed to capture the fundamental constitution of the kingdom.[33] It is, nonetheless, clear

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1640–1660 (Oxford University Press, Oxford, 1970); Stephen Sedley and Lawrence Kaplan (eds) *A Spark in the Ashes, The Pamphlets of John Warr* (Verso, London, 1992).

28 See Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, New York, 2010) for detailed discussion of contending views as to the nature of parliamentary sovereignty in the 17th century.

29 JW Gough *Fundamental Law in English Constitutional History* (Clarendon Press, Oxford, 1955) at 82–84 and 171–173.

30 Thomas Hobbes *Leviathan* (WG Pogson Smith, Clarendon Press, Oxford, 1909).

31 Peter Laslett (ed) *Patriarcha and other works of Sir Robert Filmer* (Garland, New York, 1984).

32 Gerald Stourzh *Fundamental Laws and Individual Rights in the 18th Century Constitution* (Claremont Institute, Bicentennial Essay Number 5, 1984) at 2–3.

33 At 3–6.

that the concept of fundamental law bore various meanings, but did not generally connote the idea of a constitution policed through courts and judicial review,[34] notwithstanding that writers drew on the work of Coke in support of such developments in the US.[35] In England, it was used to capture a plethora of ideas, including the social contractarian nature of the bond between the people and their representatives; the existence of certain liberties and rights that should be protected; that politics was subordinate to moral obligation; and that there should be constraints against arbitrary power, inter alia, by ensuring that there were checks and balances within government broadly conceived. There was resort to fundamental law by all sides in the 17th-century conflicts, and unsurprisingly the meaning accorded to it shifted depending on the position of the particular party.[36]

Recourse to ideas of fundamental law waned as conceptions of parliamentary sovereignty gained traction. However, as John Gough duly notes, this coincided with more detailed attempts to justify the emerging constitutional order, to show that the omnipotence was defensible and would not jeopardise rights and liberties valued by the people.[37] This was readily apparent from discourse in the 18th, 19th and 20th centuries, wherein different arguments were advanced for the constitutional centrality of parliamentary sovereignty and ordinary law.

Blackstone furnished the principal argument in the 18th century. He followed Coke and affirmed that the power and jurisdiction of parliament was so transcendent and absolute, that it could not be confined, either for causes or persons, within any bounds, nor could it be controlled by an external body.[38] The existence of this power was, however, premised on a political theory of balanced constitutionalism expounded by Blackstone, whose reasoning echoed earlier discourse, most notably that of Harrington and the republican tradition.[39]

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34 Gough, above n 29, at 2–3 and 206–207.

35 See, for example, Edward S Corwin "The 'Higher Law' Background of American Constitutional Law" (1928) 42 Harv L Rev 149 at 365.

36 Gough, above n 29, 162–163.

37 At 173; Stourzh, above n 32, at 8–9.

38 William Blackstone *Commentaries on the Law of England* (16th ed, Cadell and Butterworth, London, 1825), Vol I, Bk 2, at 160–61.

39 James Harrington "The Commonwealth of Oceana" in JGA Pocock (ed) *The Political Works of James Harrington* (Cambridge University Press, Cambridge, 1977); JL de Lolme *The Constitution of England, or an Account of the English Government* (Robinson, 1796 ed). See generally JGA Pocock *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, Princeton, 1975); Corinne Weston *English Constitutional Theory and the House of Lords 1556–1832* (Routledge and Kegan Paul, London, 1965).

The famous Blackstonian quotation appeared at the end of a long chapter, in which he described how Parliament functioned. Tyrannical governments were, said Blackstone, those in which the power of making and enforcing laws was vested in the same person. Things were different where the legislative and executive authority were in different hands, since 'the former will take care not to entrust the latter with so large a power as may tend to the subversion of its own independence, and therewith the liberty of the subject'.[40] In England power was thus divided. The legislative branch was the Parliament, which consisted of the King, Lords and Commons; the executive branch consisted of the King alone.[41] The relationship between them was vital:[42]

> It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, but not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power.

For Blackstone the 'true excellence' of English government was that all parts operated as a mutual check upon each other. In the legislature, the people were a check on the nobility, and the nobility a check upon the people, through 'the mutual privilege of rejecting what the other has resolved'.[43] The King was a check upon both, which preserved the executive power from encroachments. The executive power itself was checked and kept within due bounds by the two houses, through the privilege of inquiring into, impeaching, and punishing the conduct, not of the King or Queen since this would destroy their constitutional independence, but of 'evil and pernicious counsellors'.[44] The two houses of Parliament naturally represented different interests, and the Crown yet another. They mutually kept each other from exceeding their proper limits. It is only after this discourse that the quotation about parliamentary omnipotence appears, and the body 'thus united' is the body functioning in the manner described above.

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40 Blackstone, above n 38, at 146.
41 At 146–7.
42 At 153–4.
43 At 154–5.
44 At 155.

Dicey furnished the leading reaffirmation of parliamentary sovereignty in the 19th century, drawing on Coke and Blackstone. However, the normative justification for this ascription of parliamentary power differed.[45] He recognised that he could not simply draw on the Blackstonian normative argument, since it would not have been applicable, without substantial modifications, to the changed conditions of the 19th century. Dicey, therefore, constructed an alternative normative argument to justify the parliamentary sovereignty that he had empirically described.

The essence of the argument was that a parliament, duly elected on the extended franchise, represented the most authoritative expression of the will of the nation. The Parliament thereby elected should therefore be able to carry out any action. Dicey believed that Parliament would control the executive and that MPs would not pass legislation contrary to the interests of those who elected them. Constitutional protections against the exercise of parliamentary power were not therefore required, since 'the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors; that which the majority of the House of Commons command, the majority of English people usually desire'.[46] The normative argument was, therefore, apparently simple. UK democracy was founded upon a channel of authority flowing from the bottom upwards. The expanded electorate chose representatives. The Parliament thus chosen had legitimacy because of the extended franchise and should therefore have all embracing powers. The elected MPs articulated the views of those who had chosen them, and they controlled the executive. Legislation that was constitutionally questionable would not, therefore, be passed, or would be repealed expeditiously. Parliamentary sovereignty would not place the rights of individual citizens in jeopardy. The defects in this mode of argument have been examined elsewhere.[47] Suffice it to say for the present that our system of democracy never really operated in this self-correcting way, and this vision of the relationship between electors, Parliament and the executive certainly does not accord with present reality.

The 20th-century normative argument for parliamentary sovereignty as the cornerstone of the UK constitutional order differs yet again from the Blackstonian and Diceyan antecedents, in part at least because the ideals

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45 Paul Craig *Public Law and Democracy in the United Kingdom and the United States of America* (Clarendon Press, Oxford, 1990) ch 2.

46 AV Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1959) at 83.

47 Craig, above n 45, at ch 2.

of balanced constitution and self-correcting democracy no longer have purchase. The 20th-century claim is therefore commonly grounded on two complementary arguments. There is the contention that a parliament duly elected on a full democratic franchise has legitimacy and thus should have such sovereign authority. This is complemented by the argument that it should not be subject to limits such as constitutional review, whereby the court can invalidate legislation. This reasoning underpins much political constitutionalist thought. Waldron[48] and Bellamy[49] are the leading opponents of rights-based constitutional review of statute.[50] Waldron is a court-sceptic, but not a rights-sceptic. Bellamy's position is more complex. He is certainly a court-sceptic, and is also more sceptical about rights, insofar as he believes that citizenship should not be equated with a narrow concept of individuals being rights-holders against the state, but comprises a 'continuously reflexive process, with citizens reinterpreting the basis of their collective life in new ways that correspond to their evolving needs and ideals'.[51] There is, nonetheless, much common ground in the reasons for their court-scepticism. Thus, the central premise to Waldron and Bellamy's argument is the prevalence of disagreement concerning the rights that should be included in a Bill of Rights and their interpretation. For both writers such disagreement pervades the very foundational ideas of justice on which society is grounded. They maintain therefore that whether viewed in terms of process, or in terms of outcome, it is preferable for such matters to be decided ultimately by the political and not the legal process.

3.3. CONTENT: OVER- AND UNDER-CONSTITUTIONALISATION

The preceding analysis considered the issue of over- and under-constitutionalisation in the context of written constitutions. The issue is

48 Jeremy Waldron *Law and Disagreement* (Oxford University Press, New York, 1999) and "The Core Case against Judicial Review" (2006) 115 Yale LJ 1346.

49 Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007).

50 See also, Mark Tushnet *Taking the Constitution away from the Courts* (Princeton University Press, Princeton, 1999); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, New York, 2004).

51 Richard Bellamy "Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act" in Tom Campbell, Keith Ewing and Adam Tomkins (eds) *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001) 15.

also relevant for unwritten constitutions, and the answer will depend on the relative breadth and depth of its coverage. It is possible in theory for an unwritten constitution to be relatively dense in terms of the mesh of rules that speak to constitutional issues. The empirical reality tends to the contrary, such that the constitutional frame is more skeletal in this respect. This is more especially so where the dominant constitutional principle is parliamentary sovereignty, which, as seen above, weakens the binding force of other constitutional constraints. There is then a greater danger of under-constitutionalisation. Whether this would be alleviated by a written constitution depends in large part on the content thereof, and its animating principles. Thus, a UK written constitution crafted on the bedrock of parliamentary sovereignty could still be under-constitutionalised. Having said this, it should be acknowledged that the very ascription of the label under-constitutionalised to such a putative written constitution is predicated on certain normative assumptions, the principal one being that Parliament should not have such legal omnipotence. This assumption is normatively contestable, but so too is the contrary assumption. The under-constitutionalised nature of the UK unwritten constitution can, nonetheless, be exemplified by experience with Brexit.

Take by way of example the way in which the devolved regions were treated in the Brexit process. They were denied effective voice in the shaping of the Brexit process, ever more so the longer it went on; and their substantive preferences received scant attention.[52] Whether matters would have been different if we had a written constitution would depend very markedly on its terms. It is possible to imagine a UK written constitution that embodied the legal status quo, in which case the position of the devolved regions would be no better than at present. It is, by way of contrast, possible to imagine a very different form of constitutional ordering, which gave greater procedural protection to regional voice, invested the Sewel convention, namely that the Westminster Parliament cannot normally legislate on a matter within devolved competence without the consent of the devolved legislatures,[53] with binding constitutional force, and made constitutional provision for protection of the regions' substantive political preferences, within the areas that fell within their scope of authority.

Take by way of another example the balance between prime ministerial, executive and legislative power revealed by Brexit. The executive, and increasingly the Prime Minister, dominated the Brexit process. Whether

52 P Craig "Brexit, A Drama: The Interregnum" [2017] Yearbook of European Law 1.

53 Scotland Act 2016, s 2.

a written constitution would have made any difference would depend on its terms. This is more especially so, since constitutions do not have a good track record at identifying the nature of executive power and the boundaries thereof.[54] Nor are they particularly good at specifying the more granular detail of relations between the executive and the legislature. However, if the UK had a written constitution, then it is likely that UK membership of the EU would have been enshrined therein. It would have had constitutional status, the corollary being that it could only be changed by the process for constitutional amendment. Whatsoever such requirements for change might be, the reality is that a referendum, followed by an ordinary statute, would almost certainly not suffice to change the constitution.

3.4. CHANGE: MODALITY AND FRAME

There can assuredly be change in unwritten constitutions. The ability to adapt is indeed said to be a virtue of this constitutional form. There is some truth in this. The claim is nonetheless commonly overplayed, insofar as it fails to distinguish between the ability of a system to adapt existing constitutional rules to novel circumstance, and its capacity to meet change because there are no constitutional rules that govern the matter. The focal point of the ensuing discussion is, however, somewhat different. It concerns two related issues: the way in which constitutional change can occur in a system premised on parliamentary sovereignty; and the way in which parliamentary sovereignty frames this process. They will be considered in turn.

3.4.1. Modality

The key to an understanding of the way in which constitutional change can occur is that the orthodox proposition concerning parliamentary sovereignty is empirical, not a priori. It is dynamic and not static and hence can alter over time. The rule concerning parliamentary sovereignty, as set out above, can be regarded as the rule of recognition of the UK system, in the sense that it is the ultimate rule of the legal system, to which the validity of all other legal rules can be traced. Its validity is not, however, dependent on the rules that constitute its content at any point in time,

54 Craig and Tomkins, above n 9.

since that would be bootstrapping. It is rather dependent upon social acceptance by those within the polity.[55]

The proposition that statutes duly enacted have the force of law, and that subject to this so too do judicial decisions, constitutes the core of the rule of recognition because it is accepted by those within the system, including the legislature and the courts. The enactment of a statute attesting to this fact could not itself invest statute with this status. A statute cannot, therefore, in itself, alter the rule of recognition, but it can act as the catalyst for a shift in the social acceptance on which the rule of recognition depends.

It follows that the rule of recognition is inherently dynamic, not static. The version we currently operate with, that Parliament can do whatsoever it likes through statute duly enacted by simple majority, has not always been so. It was certainly not the ultimate test of legal validity prior to the latter part of the 17th century, and it is over-simplistic to imagine that Parliament's status thereafter was secured in the manner that it is commonly regarded now. The dynamic nature of the concept means, moreover, that the rule might change and having done so it might revert in the future to the status quo ante, as the result of developments that trigger shifts in the social acceptance that underpin the concept.[56] The initial catalyst for change might come from Parliament, the executive or the courts. Change in the rule of recognition will, however, normally require acceptance from all such key players.

This can be exemplified by the accommodation of EU law prior to Brexit, as evidenced by the leading UK decisions.[57] The UK courts held that the relationship between EU law and national law in terms of supremacy was to be decided by the UK courts as a matter of UK constitutional law, taking account of any statutes enacted by Parliament. They also held that the concept of *implied repeal*, or *implied disapplication*, under which inconsistencies between later and earlier norms were resolved in favour of the former, would generally not apply to clashes concerning EU and national law, with the consequence that if Parliament wished to derogate from its EU obligations, then it would have to do so *expressly and unequivocally*. The reaction of our national courts to such an eventuality was never tested. The courts might have chosen to follow the latest will

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55 HLA Hart *The Concept of Law* (Oxford University Press, Oxford, 1961) at 97–107.

56 At 144–150.

57 *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603; *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1; *Thoburn v Sunderland City Council* [2003] QB 151; *HS2*, above n 25.

of Parliament, or they might have decided that it was not open to the legislature to pick and choose which obligations to subscribe to while still remaining within the EU.

This still left open the way in which this change should be conceptualised. There were suggestions that this could be achieved through *statutory construction*. This was, however, problematic. While all would agree that if a statute could be reconciled with an EU norm through construing the statutory words without unduly distorting them then this should be done. However, the species of statutory construction considered here was more far-reaching, because the rule of 'construction' was more akin to a 'priority' rule, whereby inconsistencies *would* be resolved in favour of the EU law, *unless* Parliament indicated clearly and ambiguously that it intended to derogate from EU law. The degree of linguistic inconsistency between the statute and the EU norm was not the essential point of the inquiry.

An alternative explanation could, however, be cast in terms of change to the rule of recognition, through a technical legal revolution. On this view, the case law considered above, combined with acceptance by the leading political players, brought about modification of the rule of recognition. An accurate rendition of the ultimate legal principle during the pendency of UK membership of the EU would then have been as follows: Parliament can do anything that it wishes through statute enacted by simple majority, including implied repeal or amendment, except in the areas covered by EU law where Parliament would have to legislate expressly and unequivocally in order to derogate from EU law. This modification of the top rule of the system was, as noted above, not immutable. The rule of recognition could have been recast, so as not to include the preceding qualification. This might have occurred if the UK courts had changed their legal position concerning the relationship between UK and EU law while the UK was still a Member State, and the other organs of government accepted the change. The fact of Brexit, *ex hypothesi*, did recast the rule of recognition, since the very rationale for accommodating EU law had been removed. However, the legal Brexit arrangements attest to the continuing force of the preceding reasoning, since Parliament, pursuant to its sovereignty, decided to continue to accord authority to EU law in certain respects, which has been accepted by the courts.[58]

The modality of change in the rule of recognition, and the limits thereto, can be further exemplified by devolution. The enactment of

[58] European Union (Withdrawal) Act 2018, ss 5–6.

devolution legislation by the Labour government in the late 1990s, the Scotland Act 1998 and the Government of Wales Act 1998, was significant in political terms, through the very grant of autonomy over the devolved issues. This was further enhanced through subsequent legislation, notably the Government of Wales Act 2006, the Wales Act 2014 and the Scotland Act 2016, which further augmented their respective powers.

There is little doubt that the enactment of this legislation might have had implications for the rule of recognition. It would not, for the reasons given above, have effectuated this change in itself, but could have been the catalyst for alteration in the social acceptance that underpins the rule of recognition. The reality is that any such change has been relatively minor. This is in part because of the terms of the enabling legislation, which make clear that the Westminster Parliament can still make laws for Scotland and Wales.[59] It is in part because of political considerations. The UK government is opposed to the Scottish National Party's separatist ambitions and opposed also to the holding of a referendum to determine the wishes of the Scottish people. This has played out in constitutional terms, with the UK government emphasising the sovereignty of the Westminster Parliament and the fact that its consent is a condition precedent to the holding of a referendum. The limits to any change in the rule of recognition also flow in part from judicial decisions. Courts interpret legislation and not infrequently make choices as to the consequences that should flow from statutory amendments. This is readily apparent from the judicial reaction to the change in the Sewel Convention, which established that the Westminster Parliament would not legislate on devolved matters without the consent of the Scottish Parliament. The Convention was embodied in the Scotland Act 1998[60] as a result of the Scotland Act 2016. However, in *Miller* the Supreme Court held that this legislative amendment did not render the Sewel Convention legally enforceable.[61] Courts of law 'cannot enforce a political convention'.[62] Judges were 'neither the parents nor the guardians of political conventions; they are merely observers'.[63] The fact that the Sewel Convention had been enshrined in legislation by s 2 of the Scotland Act 2016 did not thereby render a political convention legally enforceable.

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59 Scotland Act 1998, s 28(7).

60 Section 28(8).

61 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [136]–[137].

62 At [141].

63 At [146].

The devolution legislation has, therefore, not been the trigger for significant change in the rule of recognition so far as Scotland, Wales and Northern Ireland are concerned. It would, however, be misguided to assume that it has had no such effect. Consider in this respect the constitutional reaction to wholesale repeal of this devolution legislation, such that all matters without exception were run from the Westminster Parliament, with the consequence that the principal devolved political institutions were dissolved. Whatsoever the judicial response to such legislation might be, it would almost certainly be regarded as a constitutional revolution. This reaction would be premised on the assumption that post-1998 the constitutional settlement in the UK was one in which Scotland, Wales and Northern Ireland should have some considerable authority over their own affairs. This, in turn, would be reflected in the rule of recognition, which would, in essence, have read that while Parliament could do anything that it wished by simple majority, it would not generally do so in the devolved areas without securing their assent through their respective political institutions. Repeal of the devolution legislation would thus be regarded as a re-orientation of the rule of recognition.

3.4.2. Frame

Change in the rule of recognition is, therefore, perfectly possible. Parliamentary sovereignty, conceptualised in terms of the absence of substantive and procedural limits as to what can be done through ordinary legislation, nonetheless frames this process. This is manifest in at least four ways.

First, there is the flipside of the point in the previous section, which is also salient here. Thus, while limits on parliamentary sovereignty might develop through change in the social acceptance that constitutes the rule of recognition, the assumed starting point is that there are no substantive and procedural limits as to what can be done through ordinary legislation, the corollary of which is that social acceptance as manifest by the key institutional players might revert back to this position, even if there has been movement therefrom.

Secondly, elevation of the traditional conception of parliamentary sovereignty as the key constitutional principle has implications for any limits placed thereon. Consider in this respect the way in which we conceptualise constitutional statutes.[64] The recognition afforded to this concept is to be

[64] *Thoburn*, above n 57 at [59]–[63]; *McWhirter v Secretary of State for Foreign and Commonwealth Affairs* [2003] EWCA Civ 384 at [14]; *H v Lord Advocate* [2012] UKSC 24;

welcomed. It is, nonetheless, acknowledged that the ascription of this status is limited in terms of consequences. It is still open to Parliament, in accord with its sovereignty, to repeal or amend any statutes commonly included on this list, subject to the injunction that it must do so expressly and unequivocally, with only very limited, if any, room for implied change. Consider further in this respect the way in which we think of the principle of legality. It captures the idea that Parliament can do anything it likes by statute duly enacted, subject to the interpretive precept that the courts will not read general statutory words so as to interfere with fundamental rights. Parliament must, as Lord Hoffmann stated,[65] pay the political cost of its action, which meant that if it wished to limit such rights it would have to do so clearly and unequivocally through language that revealed that Parliament understood what it was doing. It is, however, still open to Parliament to take such action and any challenge based on the Human Rights Act 1998 is bounded by s 4, which limits the court to a declaration of incompatibility, while leaving the validity of the legislation unaffected.

Thirdly, the traditional conception of parliamentary sovereignty frames government thinking and reform initiatives in the public law context. This is exemplified by Ministry of Justice initiatives concerning judicial review,[66] and the HRA.[67] These initiatives have been fuelled prominently, albeit not exclusively, by claims of judicial overreach, the allegation being that the courts have trespassed too far on terrain that is properly the preserve of the legislature and/or the executive. The terms of reference for the HRA review are motivated by similar considerations, as evident in questions as to whether the courts have been too intrusive in their interpretation of s 3 of the HRA. The claims of systemic judicial overreach do not withstand examination,[68] and the argument that the courts have overstepped proper bounds in the context of the HRA has been rejected by the Joint Committee on Human Rights.[69] The apposite point for present purposes is that a particular conception of parliamentary sovereignty frames these inquiries and the current executive's approach to them.

HS2, above n 25; David Feldman "The Nature and Significance of 'Constitutional' Legislation" (2013) 129 LQR 343; PP Craig "Constitutionalizing Constitutional Law: *HS2*" [2014] PL 373; Farrah Ahmed and Adam Perry "Constitutional Statutes" (2017) 37 OJLS 461.

65 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.

66 *Independent Review of Administrative Law* (CP 407, 2021).

67 *Independent Human Rights Act Review* (IHRAR, 2021).

68 PP Craig "Judicial Review, Methodology and Reform" [2022] PL ~~(forthcoming)~~.

69 Joint Committee on Human Rights *The Government's Independent Review of the Human Rights Act* (HC 89, HL Paper 31, 8 July 2021).

Finally, there is a second order dimension to the way in which parliamentary sovereignty frames UK constitutional discourse. This connotes the way in which the concept underpins, or influences, other constitutional doctrine. Consider, by way of example, the law relating to parliamentary privilege, and judicial strictures that courts should not look beyond the parliamentary roll. There are assuredly multiple purposes served by doctrines of parliamentary privilege, and they are not logically dependent on parliamentary sovereignty. This can be accepted. There is, nonetheless, a sense in which the overall contours of such doctrine are shaped by parliamentary sovereignty. The primacy accorded to ordinary statute grounded in Parliament's electoral legitimacy is external in its orientation. The privilege afforded to Parliament in the conduct of its own proceedings is an internal manifestation of Parliament's sovereign position, a recognition that it should be master of its internal domain.

4. CONCLUSION

There are, to draw on a common metaphor, many views of the cathedral. This very fact is enriching, since it can thereby furnish fresh perspectives on oft-discussed issues. This contribution does not claim such novelty in this respect. It has, nonetheless, sought to highlight the significance of the difference between the normative precepts that underpin the standard written constitution and the unwritten constitution that has parliamentary sovereignty as its centrepiece. The normative rationale for the ascription of parliamentary sovereignty has, as we have seen, altered over time and it continues to shape the modality and frame for constitutional change in the UK.