

The Impact of Implied Constitutional Principles on Fundamental Rights Adjudication in Common Law Jurisdictions

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ABSTRACT

This thesis explores the roles played by implied constitutional principles in fundamental rights cases in the common law jurisdictions of Canada, Australia, the Commonwealth Caribbean, and the United Kingdom. The two principles selected for this research are the separation of powers and the rule of law, both of which are relied upon in courts in common law states. The thesis examines the types of cases in which such principles are used, the possible reasons for the appeal of these principles, and the functions that they play in fundamental rights adjudication.

The thesis begins with a brief discussion of the applications of the rule of law and the separation of powers, outlining the content of these principles as applied by the courts. However, the bulk of the analysis throughout the thesis is concerned with a thematic study of the functions played by the principles. It is argued that the principles are used as interpretative aids, as independent grounds for invalidating legislation, and as gateways to comparative legal analysis. The thesis ends by showing the necessary preliminary work that must be undertaken in order to engage in a thorough normative analysis of the use of implied principles in rights adjudication.

Throughout the thesis, several themes are identified as key to our understanding of the functions played by implied principles in the cases discussed. One such theme is legitimization, specifically the role the principles play in the attempt to legitimize arguments, state institutions (particularly the courts), and the state itself. The theme of institutional self-protection also arises; it is evident in the use of principles to protect the

jurisdictional sphere of the courts. The analysis of the operation of implied constitutional principles also highlights the legacy of Empire and the deployment of traditional principles to signal the maintenance of democratic traditions and institutions.

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AG	Attorney General
CA	Court of Appeal
CCJ	Caribbean Court of Justice
CRA	Constitutional Reform Act
Cth	Commonwealth (of Australia)
DPP	Director of Public Prosecutions
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
HC	High Court
HL	House of Lords
HRA	Human Rights Act
OUP	Oxford University Press
SC	Supreme Court
SSHD	Secretary of State for the Home Department
UKSC	United Kingdom Supreme Court
UP	University Press

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CHAPTER ONE – INTRODUCTION: THE DOCTRINAL AND INSTITUTIONAL CONTEXT

Implied constitutional principles form part of the landscape of the development of fundamental rights in common law jurisdictions. This thesis examines the phenomenon of the use of implied constitutional principles in *judicial* decision-making in fundamental rights cases. This judicial practice is significant, because reasoning by implied principles can have a broad influence in individual cases, affecting cases considering issues ranging from the remuneration of judges,¹ to the appropriation of property by the state.² Its significance is also attributable to the fact that these principles can be used to invalidate legislation, as has been held by the Judicial Committee of the Privy Council.³

This thesis centres on the constitutional principles of the separation of powers and the rule of law, as these principles, which feature significantly in judicial decisions, are foundational to our very understanding of the constitutional democracies in which our courts function. Thus, Donald Lutz, in writing of the principles of constitutional design, and Trevor Allan, in expounding on constitutional justice, maintain that constitutionalism

¹ *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 (SC, Canada) (*Provincial Judges Reference* or *Remuneration Reference*).

² *Toussaint v Attorney General of St Vincent* [2007] UKPC 48, (2007) 70 WIR 167 (Judicial Committee of the Privy Council (JCPC), St. Vincent and the Grenadines).

³ *DPP of Jamaica v Mollison* (2003) 64 WIR 140 (JCPC, Jamaica).

implies the presence of the principles of the separation of powers and the rule of law.⁴ Frequently, these principles are implied rather than expressly stated in constitutional documents. There is abundant theoretical debate over the meaning of each principle, and there is also scholarly literature addressing the normative question of the legitimacy of judicial use of implied constitutional principles.⁵ For instance, Mark Walters has written in defence of the invocation of implied constitutional principles, partly by identifying a connection between this practice and the use of *lex non scripta* (law which does not derive its normative status from being in written form).⁶ The legitimacy of the recourse to implied principles in cases involving challenges to the constitutionality has been addressed by Jean Leclair in a critical article titled ‘Canada’s Unfathomable Unwritten Constitutional Principles’.⁷

This thesis contributes to the existing scholarly literature in two respects. First, this scholarship is augmented by providing a more pragmatic analysis of the meaning and use of such principles through the lens of case law. The term ‘pragmatic’ is used here in opposition to a purely theoretical approach, and not as part of the debate between pragmatic constitutional development versus an ideological approach to constitutional

⁴ TRS Allan, *Constitutional Justice: A liberal Theory of the Rule of Law* (OUP 2001) 1-5; Donald Lutz, *Principles of Constitutional Design* (Cambridge UP 2006) x, 3,5.

⁵ See, eg, Jean Leclair, ‘Canada’s Unfathomable Unwritten Constitutional Principles’ (2002) 27 *Queen’s LJ* 389; Mark Walters, ‘Written Constitutions and Unwritten Constitutionalism’ in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge UP 2008); F.C. DeCoste, ‘Smoked: Tradition and the Rule of Law in *British Columbia v. Imperial Tobacco Canada Ltd*’ (2006) *Windsor Y.B. Access Just.* 328.

⁶ Walters, ‘Unwritten Constitutionalism’ (n 5).

⁷ Leclair (n 5).

development.⁸ Second, the thesis engages in a thematic analysis of the functions played by such principles in judicial decision-making. The objective is not to propose a normative argument regarding the use of implied constitutional principles or particular conceptions of such principles. Rather, by critical thematic examination of case law, I will discuss the ways in which these principles are used as a means of legitimating judicial decisions in rights cases, and the difficulties that arise from this practice. This presents a necessary companion to the existing normative analyses. This thematic work is essential because, as courts continue to engage in the practice of invoking implied constitutional principles in rights cases, it is imperative to understand the features of cases in which courts use these principles and the work to which the principles are put.

Several terminological issues affect the way the scope of the thesis should be understood. One such terminological issue is what is meant by the use of the term ‘fundamental rights adjudication’. In this thesis, that term is used to refer to cases in which it is alleged that the act or omission of a governmental organ violates an individual’s liberty. The term ‘liberty’ as used here includes positive and negative conceptions of liberty and is not limited to liberties expressed in a constitutional or rights instrument.⁹ Further, while there is academic debate on the correct adjectival terminology to attach to rights, such as ‘human rights’, ‘constitutional rights’, or ‘fundamental rights’,

⁸ On the debate on the pragmatic versus the ideological approach, see, eg, Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1963) especially 8-9, 157; Christopher McCrudden, ‘Northern Ireland, and the British Constitution’ in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (6th edn, OUP 2007) 228-31.

⁹ Christopher McCrudden and Gerald Chambers, ‘Introduction: Human Rights in British Law’ in Christopher McCrudden and Gerald Chambers (eds), *Individual Rights and the Law in Britain* (Clarendon Press 1994) 9.

this thesis does not engage with this debate because nothing in the thesis hinges on which term is used.¹⁰

The vast majority of the adjudication used throughout the thesis is comprised of appellate judgments from the common law jurisdictions selected. The thesis includes analysis of constitutional case law in which fundamental rights are both directly and indirectly in issue, as including consideration of the latter is sometimes necessary to address the content or applications of the implied constitutional principles, and because there is sometimes useful and relevant *obiter dicta* on the fundamental rights implications of the reasoning or decision in such cases. Further, though this is a thesis on the implementation of these principles in constitutional cases, use will also be made of administrative law cases in addition to constitutional and human rights judgments, since administrative law is sometimes the ground of implementation of such constitutional principles such as the rule of law.¹¹

I - Methodology

The research presented in this thesis is conducted through the use of comparative methodology, as a comparative approach reveals a more complete, more nuanced picture

¹⁰ On some of the arguments in this debate, see, eg, Joseph Raz, 'Human Rights Without Foundations' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (OUP 2010) 328-29, 336-37; Jeremy Waldron, 'Human Rights: A Critique of the Raz/Rawls Approach' available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745###> accessed 22 June 2013. On 'fundamental rights', see Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010) 17-21.

¹¹ Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver, *The Changing Constitution* (OUP 1994) 73; Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001) 251.

of the workings of the implied constitutional principles.¹² The jurisdictions examined are Canada, the Commonwealth Caribbean, Australia, and the United Kingdom. These jurisdictions possess important similarities such as a common law tradition and a ‘Westminster-style’ parliamentary democracy.¹³ ‘Westminster-style’ or ‘Westminster model’ constitutional system is used to describe a constitutional design that incorporates an executive selected largely from, and responsible to, a legislature (that is, a system of responsible government).¹⁴ I have therefore adopted the ‘most similar case’ research design to focus on the most similar jurisdictions to allow for deep analysis of the factors that are common to the jurisdictions as well as to identify the relevant differences that arise. The selection of jurisdictions with these similarities enables the project to control for variables that are not central to the purpose of this research.¹⁵

This methodological design permits the testing of theories regarding the functions played by the implied principles across four common law jurisdictions. In particular, the thesis adds to the current literature by including detailed, contextual analysis of case law from the Commonwealth Caribbean, a jurisdiction that is largely ignored in the existing literature. It is important to include Caribbean case law in the discourse on implied

¹² Ran Hirschl, ‘On the Blurred Methodological Matrix’ in Sujit Choudry, *The Migration of Constitutional Ideas* (Cambridge UP 2006) 45-46.

¹³ Vivek Krishnamurthy, ‘Colonial Cousins: Explaining India and Canada’s Unwritten Constitutional Principles’ (2009) 34 *Yale J.Int’l L.* 207, 211; David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (OUP 2010) 5-6; Vicki C. Jackson, ‘Comparative Constitutional Law: Methodologies’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1168-69.

¹⁴ *R v Kirby, ex p Boilermakers’ Society of Australia* (1956) 94 CLR 254 (HC, Australia) 275; Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Principles and Limitations* (Hart 2009) 35.

¹⁵ Hirschl (n 12) 48.

constitutional principles as it brings the post-colonial element of the law in newly independent states into sharp relief. Thus, the methodological choices made also present the opportunity to examine the case law within a post-colonial context, taking account of historical factors and the tensions between nationalistic inclinations and foreign influences in constitution-building. These aspects of the historical and socio-political context are raised throughout the thesis, showing the role of implied principles against that contextual background.

The methodological approach used in carrying out this comparative study is simultaneously functional and contextual. It is functional in that it seeks to discover why particular constitutional principles are utilized, the functions for which they are employed, and how these functions operate in the institutional contexts identified in this thesis.¹⁶ The case material will also be studied in its historical context, seeking to gain an understanding of the impact of social and political history. Specifically, I will consider the impact of history on the aspirations of the institutional apparatus of the state, and how these aspirations are reflected in the citation of the constitutional principles.¹⁷ There is also some classificatory work, particularly with respect to the rule of law, in an attempt to monitor trends in the understanding of the rule of law in the common law jurisdictions.¹⁸ This classificatory approach is an important precursor to developing our understanding of judges' engagements with differing rule of law conceptions.

¹⁶ On functional comparative work, see Jackson (n 13) 62-63.

¹⁷ See Jackson (n 13) 67.

¹⁸ See Jackson (n 13) 57-58.

II - Map of the Thesis

The thesis is organized in two parts. Part I (comprising Chapters 2-4) first engages with conceptual debates surrounding the contestable concept of ‘principles’; it also considers the key question of what constitutes ‘implying’ a norm primarily into constitutional or other legislation protecting rights, and the issue of the selection of the rule of law and separation of powers as the principles forming the primary areas of study. Part I also outlines the content of each principle to be subjected to thematic analysis. This is an essential prior issue which allows us to clarify what meanings are attributed to the principles as used by judges in the jurisdictions examined. Part II of the thesis (comprising Chapters 5-8) proceeds to identify the functions played by implied principles in rights adjudication and the factors that contribute to each function. The Conclusion summarises the main themes explored in the thesis and the main findings that emerged from the research. The remainder of this chapter briefly outlines the main issues considered in each chapter.

Chapter Two constructs a conceptual understanding of ‘implied constitutional principles’. Part I of the Chapter analyses the term ‘implied principles’. This is achieved by first explaining the meaning ascribed to the term ‘implied’ in the thesis and classifying the methods of implication utilized by judges in the jurisdictions examined. Next, there is analysis of the meaning of the term ‘principles’, drawing on the theories of Ronald Dworkin and Robert Alexy to distinguish principles from other norms.¹⁹ I draw on Alexy’s analysis despite the fact that he writes within the context of the civil law system

¹⁹ Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978) Chapter 2; Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) Chapter 3.

in Germany. This does not present a problem as I draw from Alexy only the conceptual apparatus; the differences that arise between the civil and common law in this area are differences in application and institutional apparatus, and these differences do not undermine the relevance of Alexy's conceptual ideas.

Part II of this chapter seeks to demonstrate the significance of the separation of powers and the rule of law in the discourse on the use of implied principles in fundamental rights adjudication. It is argued that the centrality of the rule of law and the separation of powers to constitutionalism is a critical aspect of the appeal of these principles in resolving rights issues. It will also be argued that though there are other implied constitutional principles that may merit further study, there are features that distinguish the rule of law and separation of powers from such other principles. First, the rule of law and separation of powers are interrelated foundational principles of constitutional democracies.²⁰ Lutz argues that 'constitutionalism implies ... popular sovereignty, which in turn implies at least some minimum separation of powers' and that 'rule of law and popular sovereignty virtually define constitutional democracy'.²¹ Second, these principles are part of the unwritten British constitution and were subsequently incorporated in the constitutional arrangements of the other Commonwealth jurisdictions.

In this chapter, there is discussion of some elements of the historical and institutional contexts of the case law that will be considered in detail subsequently. For instance, there is brief discussion of the role of parliamentary supremacy in constitutional

²⁰ Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (n 4); Lutz (n 4).

²¹ Lutz (n 4) 3, 5.

and rights development in the respective jurisdictions. This issue is part of the institutional dimension that influences the interpretation and application of the Constitutions and Bills of Rights and, as such, it resurfaces in subsequent chapters.

In Chapter Three, on Judicial Conceptions of the Rule of Law, I proceed to try to understand what is meant when judges refer to the ‘rule of law’ and, generally, what the judicial decisions reveal about the meaning of the concept. There is much theorising about the appropriate conception of the rule of law, as expressed in the writings of Joseph Raz and Ronald Dworkin as well as in more recent analyses.²² In a more pragmatic study, Jeffrey Jowell has written on the conceptions of the rule of law reflected in UK case law.²³ However, there is a dearth of academic literature conducting comparative analysis of where the case law in the respective jurisdictions rests along the spectrum of conceptions of the rule of law. This Chapter adopts Jowell’s pragmatic approach but uses comparative methodology to test the theories. First, the theoretical discourse is briefly outlined; then there is a focus on a thematic analysis of the case law. I do not contend that there is one conception of the rule of law that is reflected in the jurisdictions examined, but rather, analyse what judicial decisions reveal about the specific applications of the rule of law by judges.

Chapter Four applies the same pragmatic approach to the separation of powers principle. The meaning of the term ‘separation of powers’ has long been disputed in

²² See, eg, N.W. Barber, ‘Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?’ (2004) 17 *Ratio Juris* 474.

²³ Jeffrey Jowell, ‘The Rule of Law and Its Underlying Values’ in Jeffrey L. Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011). See also Alison L Young, ‘The Rule of Law in the United Kingdom: Formal or Substantive?’ (2012) 6 *ICLJ* 259.

academic discourse, Geoffrey Marshall having described the term as ‘one of the most confusing in ... constitutional and political thought’.²⁴ Part I of the Chapter outlines the relevant theoretical framework of the separation of powers.²⁵ The discussion of separation of powers does more than provide fodder for academic debate as it has resulted in landmark decisions in Commonwealth jurisdictions.²⁶ Thus, Part II of the Chapter discusses the content of the ‘Westminster model’ of separation of powers as revealed through case law. It is argued that in the context of ‘Westminster style’ systems, the term ‘separation of powers’ is often used as an equivalent of the concept of ‘judicial independence’. Part III of the Chapter situates the separation of powers principle within the context of rights adjudication, discussing the use of the principle in the resolution of rights issues. Finally, Part IV of the Chapter addresses the impact of the Constitutional Reform Act 2005 (UK) and the Human Rights Act 1998 (UK) on the application of the separation of powers in the UK, as evidenced through judicial decisions.²⁷ This discussion reveals a complex picture regarding the court’s role as a check on other organs of the state and the tension between judicial supervision and judicial restraint in fundamental rights adjudication.²⁸

²⁴ Geoffrey Marshall, *Constitutional Theory* (OUP 1971) 97.

²⁵ The most recent contributions to the theoretical discussions include Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (OUP 2009) and Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013).

²⁶ See, eg, *Hinds v R* [1977] AC 195 (JCPC, Jamaica); *New South Wales v Commonwealth of Australia* (1915) 20 CLR 54 (HC, Australia) (*Wheat* case).

²⁷ See Vernon Bogdanor, *The New British Constitution* (Hart 2009) 287-89; Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge UP 2011).

²⁸ See, eg, *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903 [14] (HL); Aileen Kavanagh, ‘Defending Deference in Public Law and Constitutional Theory’ [2010] LQR 222.

In exploring the literature and case law on the applications of the rule of law and separation of powers principles, it will be argued that while there is no unity of definition of the two principles, in that they are by no means identical, there is some overlap in the ways in which they are applied by courts. Notably, they are both often applied as expressions of judicial independence.

With that, the thesis then moves to Part II, in which the functions played by implied constitutional principles are considered. In Chapter Five, I examine the use of implied principles as aids in the interpretation of statutory text. This chapter examines the reasons for the appeal to these principles by the judiciary and the interpretative functions played by the usage of such principles. Part I of the chapter proposes explanations for judges' recourse to the rule of law and separation of powers as interpretative aids. It is argued that implied constitutional principles are employed as 'distancing devices'²⁹ in hard cases, which includes cases in which fundamental rights are implicated. Part II of the Chapter uses the debate over privative clauses to reveal the operation of the principles in dialogue between the judiciary and Parliament, and in the debate over the limits of the courts' intervention in issues regarding fundamental rights.³⁰ The decisions relating to privative clauses expose some of the institutional elements of the use of the implied principles. The privative clause cases highlight the use of the implied constitutional principles as bases of argumentation for the preservation of the function of the judiciary

²⁹ Joseph Raz, 'On the Authority and Interpretation of Constitutions' in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge UP 1998) 190.

³⁰ The term 'privative clause' is used in reference to a clause that purports to oust judicial review. The terms 'privative clause' and 'ouster clause' are used interchangeably.

to conduct judicial review of administrative action and to adjudicate allegations of rights violations.

Chapter Six examines the phenomenon whereby judges hold (or state in *obiter dicta*) that the implied constitutional principles can serve as independent grounds for invalidating legislation. Part I of the Chapter proposes that there are three circumstances in which judges take this course of action. The first occurs where there is a gap in the bill of rights with respect to the fundamental right that is engaged in the case before the court. The second occurs where there is a gap in the power granted to the court to invalidate legislation by the text of the constitution or bill of rights. The third occurs where legislation challenges the court's power to review governmental action that affects individual rights. In examining such cases, it will be argued that two trends are evident. First, where courts have held or stated in *obiter dicta* that legislation may be invalidated on the ground of one of the implied principles, they have placed reliance on an application of the principle that protects jurisdictional boundaries. Thus, in these cases, either the separation of powers was the implied principle on which the decision was based or, if the rule of law was used, it was an application of the conception of the rule of law that mandates the separation of organs of the state. Within this larger trend, there is a second trend whereby courts are most protective of the borders of the judicial sphere.

Chapter Seven explores the connections between reasoning by implied principles and judicial engagement with comparative legal analysis. The chapter begins by proposing reasons why judges cite foreign judgments and arguing that the appeal of

comparative law intersects with the appeal of implied principles in rights adjudication.³¹ This analysis highlights the importance of the legitimation of institutions, institutional processes, and the state. A dominant theme in this discussion is the reputational currency of implied principles used in conjunction with foreign legal analysis. Part II of this chapter discusses ways in which the implied principles function as gateways to foreign judgments, arguing that the practice appears to be directed towards the reinforcement of the legitimacy of the court as an institution.³² Part III of the Chapter discusses the extent to which the courts are developing common approaches to common problems, and the impact of the exchange of ideas and methodology across the jurisdictions considered in this thesis.

Chapter Eight adds to the current literature by showing the necessary preliminary work to be undertaken as a prolegomenon to a normative analysis. It presents four main factors that influence the normative issue of the legitimacy of the use of implied constitutional principles in adjudication. The first factor is the method by which the principle is implied. This section of the Chapter incorporates analyses of the nature and purpose of interpretation. In this discussion, I draw significantly on Raz's argument that interpretation is both forward and backward looking.³³ The second factor is the specific

³¹ See, eg, Gary Jacobsohn, 'Constitutional Values and Principles' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012).

³² This discussion is influenced by ideas from Anne-Marie Slaughter, 'Judicial Globalization' (1999-2000) 40 *Va J Int'l L* 1103 and Christopher McCrudden, *Human Rights and Judicial Use of Comparative Law*, in Esin Öricü (ed), *Judicial Comparativism in Human Rights* (Martinus Nijhoff Publishers 2004).

³³ Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *OJLS* 259; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009).

use for which the implied constitutional principle is employed, that is, whether it is used as an interpretive aid, a gateway to foreign law, or a ground for invalidating legislation. This discussion is connected to the issue of the institutional legitimacy of the courts and to the question of whether the use of implied principles leads to the displacement of bills of rights. The third factor is the level of determinacy of the constitutional principle in question, which addresses the charge that the content of the principles is unacceptably vague.³⁴ The fourth factor is the degree of similarity between reasoning by implied principles and adopting doctrines that permit judicial invalidation of enacted constitutional amendments.³⁵

III - Recurring Themes

There are several recurring themes that emerge throughout the thesis, particularly in the Second Part of the thesis examining the functions played by the implied principles. One theme that is apparent in the analysis of the functions served by the principles is the theme of legitimization. This includes the quest to legitimize arguments, reasoning, institutions of state (particularly the courts), institutional processes, and ultimately, the legitimization of the state *qua* state. Another significant theme that emerges is that of institutional self-protection, which highlights the attempt of institutions of the state, particularly courts, to protect their jurisdictional sphere against interference and diminution by other organs of the state. The legacy of Empire is also a critical element in

³⁴ The discourse on indeterminacy includes Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 70-72, 181-82; Timothy Endicott, 'Linguistic Indeterminacy' (1996) 16 OJLS 667, 669; Kavanagh 'Elusive Divide' (n 33);.

³⁵ See Gary J. Jacobsohn, *Constitutional Identity* (Harvard UP 2010) 34-83.

the proceeding discussions. It will be argued that the desire to preserve a British legacy of the rule of law and democratic institutions affected and continues to affect constitutional development in the former colonies of Canada, Australia and the Commonwealth Caribbean.³⁶ It becomes apparent that the perception and use of language occupies a place in the legacy of Empire and the delivery of legal judgments. In these respective realms, language performs both a binding function (a connector that continues to tie the old Empire and the new Commonwealth) and a freeing function (that maintains flexibility in legal judgments and permits fluidity in the development and application of legal norms).

Throughout the case law examined in the course of this thesis, there is a strong sense of the connections between the laws and institutions of the past and those of the present, as well as an attempt to reconcile the demands of changing circumstances with tradition. It is partly this sense of time, and the tension between continuity and change, that permeates much of the use of the rule of law and the separation of powers by common law courts. It is partly this sense of time that also contributes to the legitimization of state institutions through appeal to the implied constitutional principles, either as representations of continuity between the laws and institutions of the former imperial ruler or as indications of fidelity to precedent and to the very foundations of democratic constitutionalism. There is also a spatial or distancing element to the use of the implied principles, as there is an appeal to these principles as an attempt to distance judges from the appearance that they are making moral or political decisions. The spatial element is also manifest in a quite different sense, in that the use of the rule of law and

³⁶ See, eg, David Brooke, 'The Rule of Law and the British Empire – Part II' (2013) 8 Irish Law Times 121, 122-23.

separation of powers filters across the geographical boundaries of common law jurisdictions, contributing to similarities of language and of decision-making methodology.

Thus, this thesis seeks to explore the use of the rule of law and the separation of powers as legal principles by judges, and to show the connections between such usage and the broader development of rights adjudication both within and across the jurisdictions in question. This analysis can then help to further inform more normatively driven scholarship on the use of these principles in general and the legitimacy of courts' use of such principles in particular.

PART I

THE CONCEPTUAL CONTEXT AND THE MEANINGS OF THE IMPLIED CONSTITUTIONAL PRINCIPLES

CHAPTER TWO - IMPLIED PRINCIPLES AND CONSTITUTIONALISM

Introduction

Critical to the examination of the judicial use of implied constitutional principles in fundamental rights adjudication is a firm conceptual understanding of ‘implied principles’, and their place in a constitutional democracy and in adjudication. The task of laying that basic conceptual groundwork is undertaken in this chapter. The chapter begins by engaging in analytical discussion of the term ‘implied principles’.¹ This is achieved by first explaining the meaning ascribed to the term ‘implied’ in the context of this thesis and identifying the methods of implication utilized by judges in the jurisdictions under review. Next, there is a brief analysis of the meaning of the term ‘principles’, drawn from legal and constitutional theory. In the second part of this Chapter, I demonstrate the significance of the separation of powers and the rule of law in the discourse on the use of implied principles in constitutional and fundamental rights adjudication. This chapter explains that the centrality of the rule of law and the separation of powers to constitutionalism is a key aspect of the appeal of these principles in resolving constitutional and fundamental rights issues.

¹ Throughout this thesis, the terms ‘unwritten principles’ and ‘implied principles’ are used interchangeably.

I - On Implied Principles

It is useful to disaggregate the words in the term ‘implied principles’ in order to develop the concepts behind the term and the sense in which the term is employed in this thesis. In this first part of the chapter, I will first explain what is meant by the term ‘implied’. Second, there is analysis of the term ‘principle’, in particular, delineating the concept of principles in contrast to the concept of rules. Third, I will briefly identify the circumstances in which principles are used by courts in the process of adjudication.

i. ‘Implied’

The principles discussed here are ‘unwritten’ or ‘implied’ in the sense that they do not appear in the substantive text of the written constitutions or bills of rights of the jurisdictions in question. This thesis treats references to principles in the *preamble* as references to implied principles. This is consistent with the manner in which preambles have been characterised by treatises on statutory interpretation, which describe the preamble as distinct from the text of the instrument.² It is also consistent with the manner in which courts have characterized references to principles in the preamble. For instance, in a seminal case on the use of implied principles in Canadian constitutional law, *Reference re Manitoba Language Rights*, the Supreme Court of Canada noted that the reference to the rule of law in the preamble to the Constitution Act 1982 (Canada) reflected an ‘unwritten postulate’, which is part of ‘the very foundation of the

² FAR Bennion, *Bennion on Statutory Interpretation: A Code* (5th edn LexisNexis 2008) 731-33; Daniel Greenberg (ed.) *Craies on Legislation: A Practitioners’ Guide to the Nature, Process, Effect and Interpretation of Legislation* (10th edn Sweet & Maxwell 2012) [2.5.10]. [26.1.2] – [26.1.4].

Constitution of Canada'.³ This is similar to the sense ascribed to the term 'unwritten' by Chief Justice Lamer in the Canadian Supreme Court decision in *Reference re Remuneration of Judges of the Provincial Court (Provincial Judges Reference)*. Lamer CJ stated that judicial independence was 'at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*'.⁴ This represents an understanding that if a principle is not expressly included in the substantive sections of the Constitution, it is considered unwritten, even if it is included in the preamble.

It is imperative that we note at this stage that preambles are often fertile ground for references to the implied constitutional principles. In a constitution or bill of rights, the preamble is the introductory statement to the instrument, which may bear the title 'Preamble' but may also bear another or no title.⁵ In Australia, the relevant preamble appears in the opening sentences of the Commonwealth of Australia Constitution Act 1900 (Constitution of the Commonwealth of Australia 1900). The relevant preamble invoked in the Canadian cases is the opening sentence of the British North America Act 1867 (now referred to as the Constitution Act 1867). The Constitutions of the

³ *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 (Manitoba Language Rights Reference or Reference re Manitoba Language Rights)* [1985] 1 SCR 721 [70].

⁴ *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 (SC, Canada) [83].

⁵ Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 ICON 714, 715-16; Anne Twomey, 'Constitutional Recognition of Indigenous Australians in a Preamble' (Constitutional Reform Unit, Sydney Law School 2011) 16.

Commonwealth Caribbean include opening sentences to the fundamental rights chapter, and those introductory clauses have been designated as preambles by the courts.⁶

There are two complementary inquiries that are beneficial in examining the functions played by preambles in constitutional and fundamental rights law. First, we can seek to discover the main roles played by the preamble, as apparent on the face of the Constitution or Bill of Rights. Second, we should look to the legal status of preambles as determined by judicial usage.⁷ On the first question, the preamble may be explanatory, exhortatory, formative or symbolic. In its explanatory role, the preamble may provide the reader with relevant aspects of the factual background of the constitution, including references to consultations preceding the enactment of the document.⁸ It may also be explanatory in a purposive sense, by outlining the purposes or objects behind the document. Thus, in this role, it ‘serves to specify the reasons for the constitution’s enactment, its *raison d’etre* and eternal ideals.’⁹ The formative function of the preamble consists of describing and consolidating the national identity of the state.¹⁰ As an exhortatory statement, it encourages respect for and obedience to the law. A venerated expression of this role of preambles is found in Plato’s work *The Laws*. For Plato, a preamble should encourage free compliance with the law, on the basis that the law is

⁶ *Lewis v AG* [2001] 2 AC 50 (JCPC, Jamaica); *AG v Joseph and Boyce* (2006) 69 WIR 104 (Caribbean Court of Justice (CCJ), Barbados).

⁷ Orgad (n 5) 722.

⁸ Twomey (n 5) 16.

⁹ Orgad (n 5) 722. See also Eric Voegelin, *Published Essays, 1934-1939*, vol 9 of *The Collected Works of Eric Voegelin* (University of Missouri Press 2001) 32.

¹⁰ Orgad (n 5) 722.

virtuous, rather than through the threat of sanctions.¹¹ Finally, the preamble may play a symbolic role, which may be manifested in the preamble's recognition of past offences of the state, an attempt to assuage concerns of groups that have been aggrieved by the state in the past, and intentionality for a new direction for the state.

Turning to judicial treatment of preambles, these clauses play a meaningful role in constitutional and rights adjudication. Liav Orgad provides a tripartite typology of preambles, which largely relies on the ways in which courts marshal preambles in adjudication: the ceremonial-symbolic preamble, the interpretive preamble and the substantive preamble. Ceremonial-symbolic preambles are viewed as educative and exhortatory but 'are not regarded as [an] integral part of the law and do not create any rights or have binding interpretative power.'¹² The interpretive and substantive preambles, as the names suggest, refer to preambles that are accorded greater legal status and power. In the interpretive use by courts, the preamble may guide the court's interpretation of the document but there are two potential frameworks in which this may occur. First, judicial use of preambles in interpretation may be limited to circumstances where there is ambiguity in a substantive term or section to be interpreted.¹³ The use of preambles to resolve ambiguities in the body of a statute is of historic vintage, and was supported in Blackstone's Commentaries on the Laws of England.¹⁴ Of course, questions

¹¹ The reader may observe that the explanatory and the hortatory roles may also serve an educative function. Both those roles may include information that assists members of the general populace obtain an understanding of the constitution and its history.

¹² Orgad (n 5) 722.

¹³ Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution' (2001) 24 UNSWLJ 382, 387; Twomey (n 5).

¹⁴ McKenna (n 13) 723-24.

do arise regarding the circumstances in which a term or section of a statute is to be considered ‘ambiguous’ and it has rightly been observed that constitutions and bills of rights are often drafted using vague or open-ended terms which may give rise to frequent characterisations of ambiguity.¹⁵ However, it is not settled that the legal role of preambles must be limited to resolving ambiguity. Therefore, an alternative formulation of the role of preambles in constitutional or rights interpretation is that the preamble is generally relevant in construing the instrument as a whole.¹⁶

The preambles in the Constitutions of Australia,¹⁷ Canada¹⁸ and the Commonwealth Caribbean states¹⁹ have been given interpretive force by the superior courts in those jurisdictions. This interpretive force has been used to support the court’s use of implied principles in adjudication.²⁰ For instance, the Supreme Court of Canada adopted this approach to the preamble to the Constitution Act 1867 of Canada in *Reference re Secession of Quebec*. Having identified the relevance and importance of constitutional principles in the Canadian constitutional framework, the Court proceeded:

Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference* we cautioned that the recognition of these constitutional principles ...could not be taken as an invitation to dispense with the written text of the Constitution... However, we also observed in the

¹⁵ Twomey (n 5).

¹⁶ Twomey (n 5) 20.

¹⁷ Twomey (n 5) 42-44. Cf McKenna (n 13) 386-93.

¹⁸ Twomey (n 4) 29-33.

¹⁹ *Lewis* (n 6); *Natalie Campbell-Rodriguez* [2007] UKPC 65, [2008] 4 LRC 526 (JCPC, Jamaica), 533.

²⁰ There are, of course, also ample examples in civil law systems: Orgad (n 5).

Provincial Judges Reference that the effect of the preamble to the Constitution Act, 1867 was to incorporate certain constitutional principles by reference...²¹

Returning to Orgad's classification, the preamble is given substantive force where it operates as an independent source of rights or obligations. While the courts in Australia, Canada, and the Caribbean generally give interpretive force to the preamble, in the latter two jurisdictions, courts have at times treated the preamble as somewhere along the boundary between interpretive and substantive. Hence, in the *Provincial Judges Reference* case, La Forest JA, who dissented in part, complained that Lamer CJ had essentially given substantive force to the preamble, which was an illegitimate technique. La Forest JA commented, 'I take issue, however, with the Chief Justice's view that the preamble to the Constitution Act, 1867 is a source of constitutional limitations on the power of legislatures to interfere with judicial independence.'²² La Forest JA clearly construed Lamer CJ's use of the preamble as one that extended beyond interpretation and entered the realm of substantive force.

In the Caribbean as well, both the Privy Council and the Caribbean Court of Justice²³ have given indications of the substantive force of the preamble. In both courts, the preamble has been used as a source for the rule of law. In *Lewis v AG of Jamaica*, the Privy Council found that the term 'protection of the law' used in the preamble to the Bill

²¹ *Reference re Secession of Quebec* [1998] 2 SCR 217 (SC, Canada) [53] (citations omitted).

²² *Provincial Judges Reference* (n 4) [304].

²³ The Judicial Committee of the Privy Council is the final appellate body for the Commonwealth Caribbean states Antigua and Barbuda, Bahamas, Dominica, Grenada, Jamaica, St Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago but the newly established Caribbean Court of Justice is the final appellate tribunal for Barbados, Belize and Guyana.

of Rights in the Constitution of Jamaica 1962 invokes the concept of the rule of law and was violated by the decision of the executive to execute prisoners on death row before the determination of their petitions by an international human rights body.²⁴

The cases reinforce the definition of ‘implied’ articulated at the beginning of this chapter as principles which do not appear in substantive sections of written constitutions or bills of rights. Thus, preambles play a critical role in the judicial discourse on implied principles, but when courts invoke principles referred to in preambles, this practice is still characterized as a use of implied principles.

With this definition as a launching pad, we can itemise the processes by which principles are ‘implied’. The processes of implication can be organised in five categories: (1) there are terms in the text that may be interpreted as synonyms for the implied principle in question (the equivalence method); (2) there are terms or rights in the text, such as the right to equality, which are characterised as particular applications of the principle in question (the application method); (3) the principles are arguably implied by the structure of the text (the structural method); (4) the principles are not referred to in the substantive provisions of the Constitution or Bill of Rights, but are referred to in parts of the Constitution such as the preamble, which are not expressly justiciable (the preambular method); (5) the principles are said to emanate from the unwritten British constitution from which the constitutions in question derive much of their inspiration (the historical

²⁴

Lewis (n 6) 85.

method).²⁵ These methods of implication are not mutually exclusive and there is some overlap between the categories in practice.

In the first form of implication, the equivalence method, a term used in the text is viewed as synonymous with the constitutional principle. It is this technique that led the Privy Council in *Thomas v Baptiste* to find that the term ‘due process’ incorporates the notion of the rule of law, and therefore, to take the term ‘due process’ beyond procedural requirements regarding the conduct of a criminal trial and to incorporate ‘standards of justice’ observed by those jurisdictions which respect [or purport to respect] the rule of law.²⁶ Indeed, there does exist historical evidence that the idea of due process was meant to evoke the rule of law.²⁷

A more common implication device is the application method, whereby rights or duties referred to in the text are said to represent applications of the implied constitutional principle. This reasoning has been used to justify the use of the rule of law in the court’s reasoning, as well as to determine the content of the rule of law. For instance, in *Plaintiff S/157/2002 v Commonwealth* the High Court of Australia interpreted s 75(v) of the Constitution of the Commonwealth of Australia 1900, which confers on the High Court original jurisdiction to hear matters in which the remedies of mandamus, prohibition or

²⁵ See a similar categorization of the basis of judicial restraint of state power in John Basten, ‘The supervisory jurisdiction of the Supreme Courts’ (2011) 85 ALJ 273, 278-79. In jurisdictions that fall outside the purview of this study, such as Republic of India and the Republic of Ireland, principles are also derived from the “Directive Principles” outlined in the respective constitutions. These ‘Directive Principles’ are in the body of the text but are directed at the legislature rather than the courts and are expressed to be non-justiciable.

²⁶ *Thomas v Baptiste* [2000] 2 AC 1 (JCPC, Trinidad and Tobago) 22.

²⁷ Frederick Mark Gedicks, ‘An Originalist Defence of Substantive Due Process: Magna Carta, Higher Law Constitutionalism and the Fifth Amendment’ (2009) 58 Emory LJ 585.

injunction are sought against an officer of the Commonwealth, as entrenching what the court referred to as a ‘minimum provision of judicial review’. The Court proceeded to find that this section ‘constitutes a textual reinforcement’ of the rule of law as an assumption of the Australian Constitution.²⁸

The third, structural, method of implication has been instrumental in the implication of the separation of powers principle into constitutions. *Hinds v R*, in which the Judicial Committee of the Privy Council held that the separation of powers was an underlying principle of the Constitution, is a useful example. Lord Diplock, delivering the opinion of the Board, reasoned as follows:

All Constitutions on the Westminster model deal under separate Chapter headings with the legislature, the executive and the judicature... To the extent to which the Constitution itself is silent as to the distribution of the plenitude of judicial power between various courts it is implicit that it shall continue to be distributed between and exercised by the courts that were already in existence when the new Constitution came into force; but the legislature, in the exercise of its power to make laws for the ‘peace, order and good government’ of the state, may provide for the establishment of new courts and for the transfer to them of the whole or part of the jurisdiction previously exercisable by an existing court. What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution...²⁹

The fourth method of implication occurs where the principle is referred to in a preambular provision in the Constitution but where the principle is not expressly included in the substantive text of the Constitution. Two examples of this are the

²⁸ *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 (HC, Australia) [5], [103].

²⁹ *Hinds v R* [1977] AC 195 (JCPC, Jamaica) 213 (emphases added). See also *New South Wales v Commonwealth of Australia* (1915) 20 CLR 54 (HC, Australia) 90-93.

Constitution of Barbados 1966 and the Constitution Act 1982 (Canada). The opening paragraphs of the Constitution of Barbados include the following words:

Now, therefore, the people of Barbados-

...

b. affirm their belief that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law...

The Constitution Act 1982, opens with the words '[w]hereas Canada is founded upon principles that recognize the supremacy of God and the rule of law' and the Constitution Act Canada 1867 (Canada) refers to Canada having 'a Constitution similar in Principle to that of the United Kingdom.' The Supreme Court of Canada has invoked the preambles of the Constitution Acts in support of the identification and use by the courts of implied or unwritten constitutional principles. As we have seen earlier, in *Reference re Manitoba Language Rights*, the rule of law was cited by the Court as an 'unwritten postulate' of the Constitution of Canada. In its reasoning on this point, the Court placed emphasis on the words of the preambles. In the view of the Court, the rule of law 'becomes a postulate of our own Constitutional order by way of preamble to the Constitution Act, 1982, and its implicit inclusion in the preamble to the Constitution Act, 1867, by virtue of the words "with a Constitution similar in Principle to that of the United Kingdom"'.³⁰ In that case, the fifth method of implication was also evident. The Court took into account the longstanding position of the rule of law in the 'English Constitution':

The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, *The Law of the Constitution* (10th ed. 1959), at p.

³⁰ *Reference re Manitoba Language Rights* (n 3) [63].

183). It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act, 1982*, and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words ‘with a Constitution similar in principle to that of the United Kingdom’.³¹

This outline of the methods of implication of the constitutional principles invites us to reflect on the linked question of the sources of the implied principles as indicated in the judgments. From the five methods of implication we can identify four sources for the implied constitutional principles: the substantive provisions in the Constitution and/or Bill of Rights (used in the equivalence and application methods of implication), the preamble to the Constitution and/or Bill of Rights (central to the preambular method), the structure of the Constitution (used in the structural method), and the ‘unwritten’ English constitution (which is used in the historical method of implication).

There is some opacity regarding what is referred to as the ‘structure’ of the Constitution. There are three possible meanings of ‘structure’. On one level, the term ‘structure’ can be used as a reference to the arrangement of the constitutional document. This is the meaning suggested by Lord Diplock’s references in *Hinds* to the Chapters and drafting style of the new constitutions of the former colonies. He addressed the ‘structure’ of ‘Westminster Constitutions’ by referring to the fact that these Constitutions ‘deal under separate Chapter headings with the legislature, the executive and the judicature.’³² On a second level, the structure of the Constitution refers to the arrangement of the organs or institutions of the state, particularly in relation to each other. This is the meaning ascribed to ‘structural argumentation’ by Philip Bobbitt. He characterized ‘structural arguments’ as being based on ‘inferences from the existence of constitutional structures and the

³¹ *ibid.*

³² *Hinds* (n 29) 213.

relationships which the Constitution ordains among these structures' and as dependent on an assessment of 'the entire Constitutional text as a whole'.³³ There is a third sense in which the term 'structure' may be used. This is the expression of the structure of the Constitution as the 'fundamental structure', a term which was used by Isaacs J of the Australian High Court in *New South Wales v Commonwealth* (the *Wheat* case).³⁴ This third meaning evokes the image of the Constitution as resting on a foundational (and fundamental) structure, of which the implied constitutional principles forms part. The description of that structure as fundamental brings squarely to mind the question whether the structure shares with the written Constitution the status of fundamental law, or even constitutes a higher order law to which even the written Constitution is subordinated.

The methods of implication using the sources outlined above occur as part of the interpretive process. The extent to which these methods and the use of these sources comport with the nature and objectives of interpretation in rights cases is a necessary step towards determining whether judges *should* use these methods and sources. This evaluation is undertaken in Chapter 8 in the discussion of the legitimacy of courts' use of implied constitutional principles in rights adjudication.

ii. 'Principles'

In this thesis, the term principle is used in a sense analogous to its usage by Ronald Dworkin and Robert Alexy. Their writings explain that a principle is a norm that is distinguishable from rules with respect to their operation in cases of conflict with other

³³ Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (OUP 1982) 74; Robin Elliot, 'References, Structural Argumentation and the Organizing Principles of Canada's Constitution' (2001) *Canadian Bar Rev* 67, 74.

³⁴ *Wheat* case (n 29) 93.

norms and with respect to their respective mode of application.³⁵ In *Taking Rights Seriously*, Dworkin uses the term ‘principle’ as a standard that exists alongside rules to comprise the body of the law. He argues that ‘[r]ules are applicable in an all-or-nothing fashion’³⁶ whereas where two principles conflict, they can be accorded varying weight by judges and the principle survives even if it does not prevail.³⁷ The understanding of the term ‘principle’ as used in this thesis is also similar to the way in which Alexy uses the term. For Alexy, a norm is either a rule or a principle and the distinction between norms and principles is qualitative.³⁸

The distinction between the two writers lies in the detail and specificity Alexy gives to his distinction between principles and rules and his characterization of principles. Alexy views principles as ‘optimisation requirements’, as norms which require that something be achieved ‘to the greatest extent legally and factually possible.’³⁹ Accordingly, while a rule is either always fulfilled or not, a principle can be fulfilled to varying degrees and the level of fulfilment of a principle does not affect the validity of the principle.⁴⁰ Alexy criticizes Dworkin’s characterization that rules apply in an ‘all-or-nothing’ fashion, while principles only contain reasons pointing in a certain direction but

³⁵ Humberto Avila, *Theory of Legal Principles (Law and Philosophy Library)* (Springer 2007) 11-20.

³⁶ Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978) 24.

³⁷ *ibid* 35.

³⁸ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, Oxford UP 2002) 48.

³⁹ *ibid* 57.

⁴⁰ *ibid* 50.

not requiring a specific decision.⁴¹ His criticism is that Dworkin's characterization is too simplistic and that a proper account of the mode of application of rules requires more nuanced treatment if it is to account for exceptions to rules, some of which cannot be identified until they are created in a particular case, and if it is to account for burdens of argumentation in favour of certain principles over others.⁴² For Alexy, the possibility of exceptions to rules that cannot be exhaustively enumerated in advance changes the nature of the rule so that it does not apply in the strictly definitive way that Dworkin proposes.⁴³ Yet, Alexy is quick to point out that while this possibility of exceptions to rules weakens their definitive character, it does not weaken their definitive character to such an extent that it gives rules the same *prima facie* characteristics as principles. The obligatory nature of rules remains stronger than that of principles because of the existence and operation of those principles in the legal system that suggest upholding established rules.⁴⁴ Such principles (which Alexy designates 'formal principles') might outweigh principles in favour of upholding exceptions to the rule.⁴⁵

Alexy also indicates that there may be burdens of argumentation that favour one principle over another.⁴⁶ He gives the example of a conflict between a principle requiring respect for an individual constitutional right and a principle requiring the pursuit of

⁴¹ *ibid* 57-59.

⁴² *ibid*.

⁴³ Alexy (n 38) 58.

⁴⁴ Cf Kai Möller, 'Balancing and the Structure of Constitutional Rights' (2007) 5 *ICON* 453, 459.

⁴⁵ Alexy (n 38) 58. However, it could be argued that the exception is really integrated within the rule, which would render this line of argument unnecessary.

⁴⁶ *ibid* 58-59.

common interests. In such a conflict, there could be a burden of argumentation favouring the former over the latter. Again, however, he argues that this does not eliminate the distinction between principles and rules. He maintains that burdens of argumentation favouring one principle over another do not strengthen the *prima facie* character of principles to such an extent that they eliminate the need to ‘weigh’ principles against each other to establish which principle takes precedence in a given case.⁴⁷ Ultimately, then, Alexy concludes that the development of this more nuanced model does not undermine the argument that the *prima facie* character of rules and principles are fundamentally different.⁴⁸

Another possible distinction between the two theorists appears to be that Dworkin classifies principles as standards while Alexy classifies them as ‘optimisation requirements’. For Alexy, optimisation means ‘realizing to the greatest extent possible’.⁴⁹ In my view, despite the differences in expression, Dworkin’s and Alexy’s characterizations of principles are compatible. In describing principles as optimisation requirements, Alexy merely expounds on his understanding of the way in which standards work and why they are distinct from rules. If this explanation of principles as optimisation requirements is applied, it is possible to view the same principle as both a standard and an ideal. For instance, the rule of law can be seen as an ideal which ought to be satisfied to varying degrees.⁵⁰ This does not mean it is impossible to characterise it as

⁴⁷ *ibid.*

⁴⁸ *ibid* 59.

⁴⁹ *ibid* 47.

⁵⁰ Richard Fallon, 'The "Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 *Colum. L. Rev.* 1.

a standard. As a standard, it is a norm that can be considered and applied by the court and though it may not be completely fulfilled in a given case, it can be respected to a certain degree.

Alexy builds on this characterization of rules and principles by arguing that most constitutional rights norms are principles which are subject to balancing whenever there is a conflict between them.⁵¹ Kai Möller objects to Alexy's argument that, since a principle is an optimization requirement, in order to realize a principle to the greatest extent possible, if that principle conflicts with another, the two principles must be subject to a balancing exercise. Importantly, Alexy advocates this balancing of principles even where one principle is a constitutional principle related to individual rights while the other is based on a collective interest.⁵² For Alexy, principles representing collective interests include those featured in limitation clauses, 'institutional interpretations' of constitutional rights, and 'constitutional provisions which are not constitutional rights provisions'.⁵³ Here, Dworkin and Alexy diverge because Dworkin classifies some collective goals as policies. For Dworkin, there is an important distinction between principles and policies. Principles are justified by arguments based on the requirements of justice or rights while policies are concerned with the fulfilment of community goals such as collective economic or social objectives.⁵⁴ This definition of policies by Dworkin would include some collective goals that Alexy may classify as principles, most notably

⁵¹ Alexy (n 38) 65, 80-86.

⁵² *ibid* 81.

⁵³ Alexy (n 38) 80-81.

⁵⁴ Dworkin, *Taking Rights Seriously* (n 36) 90-93.

goals used as limitations on rights. Dworkin argues that while judges are entitled to arrive at their decisions by reasoning on grounds of principles and rules, judges should not (and do not) base their decisions on policy considerations. Further, Dworkin views rights as ‘trumps’ so when a right conflicts with normal policy concerns, the right trumps these concerns and will usually win.⁵⁵

This chapter is not concerned with the legitimacy of the balancing of principles because the question of this legitimacy is not relevant to how we understand the concept of implied principles. Accordingly, balancing will not be discussed here except to note that Möller identifies this as a point of distinction between Alexy and Dworkin. While Alexy advocates the balancing of constitutional rights (which Alexy considers principles) against each other and against principles that represent collective interests, Dworkin opposes the balancing of constitutional rights against policy concerns, arguing that rights are trumps.⁵⁶ Accordingly, Möller argues, if Dworkin were to accept that rights are principles, he would reject the notion that they should be balanced against normal policy concerns. Möller also maintains that Dworkin does not, like Alexy, immediately turn to balancing where there are competing rights. He correctly states that Dworkin would require a moral argument to determine which takes priority.

Ultimately, however, Möller does not attack the notion of principles as optimization requirements; what he attacks is Alexy’s reasoning that ‘when something is a principle understood as an optimization requirement, it “logically” follows that it is

⁵⁵ Ronald Dworkin, ‘Rights as Trumps’ in Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 152; Möller (n 44) 460.

⁵⁶ Möller (n 44) 460; Dworkin, ‘Rights as Trumps’ (n 55) 153.

subject to balancing'.⁵⁷ That argument is not material for the purposes of this thesis. Moreover, if we accept Möller's contention that describing principles as optimization requirements does not automatically require that conflicts must be resolved by balancing, then it is possible to accept Alexy's description of principles as optimization requirements, while avoiding the controversial notion of balancing constitutional rights norms.

The distinctions between norms as articulated by Dworkin and Alexy, are reflected in case law.⁵⁸ The Supreme Court of Canada in the *Secession Reference* case characterizes the Constitution of Canada as a web of principles and rules, in terms that echo the Dworkinian analysis:

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.⁵⁹

iii. Derivation of Constitutional Principles

Another facet of the theory regarding 'principles' which must be explored, is the method by which these theorists determine what constitutes (constitutional) principles.

⁵⁷ Möller (n 44) 461.

⁵⁸ The cases show that the courts acknowledge the distinction. This does not assume that they generally accept Dworkin's argument that policies should not influence judges in adjudication and there is much debate on that point in the scholarly literature. See, eg, EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge UP 2005) 197-200.

⁵⁹ *Secession Reference* (n 21) [32].

Dworkin provides some ideas which are useful in the examination of the way the content of these principles is derived by courts. In arguing for recognition of principles, Dworkin suggests citing judicial and legislative practice as well as citing other general principles that support the principle at issue.⁶⁰ He argues that:

It is true that generally we cannot demonstrate the authority or weight of a particular principle as we can sometimes demonstrate the validity of a rule by locating it in an act of Congress or in the opinion of an authoritative court. Instead, we make a case for a principle, and for its weight, by appealing to an amalgam of practice and other principles in which the legislative and judicial history figure along with appeals to community practices and understandings. There is no litmus paper for testing the soundness of such a case-it is a matter of judgment, and reasonable men may disagree.⁶¹

He further explains that the origin of legal principles lies ‘in a sense of appropriateness developed in the profession and the public over time’.⁶² If this sense of appropriateness fades, the principle is eroded. One question that Dworkin fails to address is, if the sense of appropriateness derives in part from ‘the public’, how does Dworkin and how do judges account for this in legal decision-making? If judges take account of the sense of appropriateness in the public, are they involved in judging public consensus? It would be problematic to propose that such assessment forms part of the proper province of judges. One solution could be that the sense of appropriateness that is felt within the public over time filters into the profession, and, by extension, the judiciary. In

⁶⁰ Dworkin, *Taking Rights Seriously* (n 36) 41.

⁶¹ *ibid* 36.

⁶² *ibid* 40.

this thesis, I will take account of the principles identified and developed in the laws of the state, specifically, in judicial decisions.⁶³

Dworkin's account of the development of principles is echoed by Alexy's explanation that principles 'can be derived from a tradition of detailed norm-creation and judicial decision-taking which are often the expression of widespread understanding of what the law ought to be.'⁶⁴ With specific reference to principles relevant to constitutional adjudication, Alexy has indicated that such principles include those that are related to individual rights as well as those related to 'collective interests.'⁶⁵ Principles relating to individual rights are said to be easily stated as, wherever a constitutional provision protects an individual right, there is at least one such principle behind it.⁶⁶ As stated above, for Alexy, principles related to collective interests can be derived from (1) limitation clauses, (2) 'an institutional interpretation of constitutional rights as part of their scope of protection', and (3) 'constitutional provisions which are not constitutional rights provisions'.⁶⁷ As examples of the third manner of derivation, Alexy cites principles of the social state and democracy.⁶⁸

⁶³ *ibid* 41.

⁶⁴ Alexy (n 38) 61.

⁶⁵ *ibid* 80.

⁶⁶ *ibid*; Gustavo Zagrebelsky, 'Ronald Dworkin's principle based constitutionalism: An Italian point of view' (2003) *ICON* 621.

⁶⁷ Alexy (n 38) 80-81.

⁶⁸ Article 20 of the Basic Law for the Federal Republic of Germany 1949 states that the Republic is a democratic and social federal state.

The principle of separation of powers fits most comfortably within Alexy's third category of derivation as it is primarily related to collective interests, and is in part derived from constitutional provisions which are not individual rights provisions.⁶⁹ This is consistent with the justification given by courts for their derivation of the separation of powers principle in constitutional cases. For instance, in *Hinds v R*, the separation of powers was said to be evident throughout the structure of the Constitution of Jamaica 1962, in particular, the provisions that address the powers and duties of each branch of government under separate chapter headings, labelled 'legislature', 'executive' and 'judiciary'.⁷⁰ The rule of law is more complicated as it can be related strongly to both individual rights and collective interests. Accordingly, the rule of law can be partly derived from rights provisions such as the right to equality⁷¹ and the rights to protection of the law or due process.⁷² It can also be derived from non-rights provisions such as the reference to the rule of law in section 1 of the Constitutional Reform Act 2005 (UK).

iv. When Do Judges Use Implied Constitutional Principles?

We examined above the ways in which constitutional principles are implied. This list addresses what happens subsequently; it briefly outlines the circumstances in which judges use these principles. These circumstances are apparent in judges' use of principles as interpretive aids, as grounds for invalidating legislation and as guides to comparative

⁶⁹ See analysis of the content of the separation of powers in Westminster style constitutions, in Chapter 4.

⁷⁰ *Hinds* (n 29) 213.

⁷¹ See, eg, *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 (HL) [9].

⁷² See, eg, *Joseph and Boyce* (n 6) [60]-[64].

law. They are, therefore, cross-cutting features that will be more thoroughly explored in the subsequent chapters.

Implied principles are sometimes invoked to solve ‘hard cases’, in the sense used by Dworkin. For Dworkin, ‘hard cases’ are those which it is difficult for the court to decide, because there is a conflict of principles. Put more comprehensively, a hard case exists ‘when competent lawyers are divided about which decision is required because the only pertinent statutes or precedents are ambiguous, or there is no doctrinal authority directly in point, or for some other reason the law is not ... settled.’⁷³ They are also sometimes invoked to fill ‘gaps’ in the law. This use of implied principles is reflected in the *Provincial Judges Reference*, in which Chief Justice Lamer stated in an *obiter dictum* that judicial independence was an ‘unwritten constitutional principle’.⁷⁴ According to the reasoning of Chief Justice Lamer, the constitutional principles play the role of the ‘filling of gaps in the express terms of the constitutional text’.⁷⁵

At a more fundamental level, principles may play a role in the attempt by judges to legitimate their decisions when the rules or text are either silent or insufficiently precise on the issue at hand, or where the issue is particularly controversial or politically divisive. In this context, judges may invoke principles as a form of ‘distancing device’. Joseph Raz has argued that where public officials, including courts, are faced with the task of choosing between incommensurable reasons, they must point to rational explanations for the decisions they make. In short, they ‘should develop or adopt

⁷³ Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 74.

⁷⁴ *Provincial Judges' Reference* (n 4) [83].

⁷⁵ *Provincial Judges' Reference* (n 4) [104].

distancing devices – devices they can rely on to settle such issues in a way that is independent of the personal tastes of the judges’.⁷⁶ This is particularly relevant in fundamental rights cases because the questions they involve, as well as the active role played by courts in resolving these questions, give rise to concerns regarding the legitimacy of the courts’ decision-making. The question of legitimacy asks whether the judge is actually making a legal (as opposed to political) judgment in human rights cases. Griffith, for instance, maintained that Bills of Rights ‘merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.’⁷⁷ If the judgment employed in human rights cases is seen as political, rather than legal, then the judge has no more authority or legitimacy in making such judgments than does a politician.⁷⁸ In fact, the judge may have less legitimacy than a politician because she is not democratically elected. Therefore, in order to establish that judgments in fundamental rights cases are like other legal judgments, judges may utilize these ‘distancing devices’. In addition to the authority of text and rules, the authority of principles may be considered distancing devices. The extent to which the invocation of principles is a successful distancing device is debatable and will be considered in this thesis.

⁷⁶ Joseph Raz, ‘On the Authority and Interpretation of Constitutions’ in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge UP 1998) 190.

⁷⁷ J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 MLR 1, 16; See also Adam Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 OJLS 157.

⁷⁸ Christopher McCrudden, ‘A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499, 502.

In discussing the content and continuing relevance of the rule of law, Jeffrey Jowell emphasised that in the UK, where there is no codified constitution, ‘the Rule of Law serves as a principle that constrains governmental power.’⁷⁹ A further element which may be of considerable importance in the former colonies of Canada and the Commonwealth Caribbean is the relevance of, and reliance on, implied principles in new or developing constitutional and legal systems. This phenomenon has been remarked upon with respect to the drafting and adoption of the South African Interim and Final Constitutions⁸⁰ and has been reflected in the development of international law, particularly through the Statute of the International Court of Justice (ICJ Statute).⁸¹ The discourse on the use of principles in new legal structures is indicative of two points. The first is that implied constitutional principles are not only features of the judicial process; they also feature in the legislative drafting process. The second is that, while these are instances of the use of implied principles in the drafting process, they also point to the significance of principles among jurists in general in developing constitutional or legal systems.

With respect to the ICJ Statute, Bin Cheng argues that:

The adoption of Article 38 of the Statute of the Court is, in fact, a repudiation of the theory that only rules created by means of a formal process are valid. It

⁷⁹ Jeffrey Jowell, ‘The Rule of Law and Its Underlying Values’ in Jeffrey L. Jowell and Dawn Oliver (eds), *The Changing Constitution* (7th edn, OUP 2011) 24.

⁸⁰ Gary Jacobsohn, ‘Constitutional Values and Principles’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 777-78; Heinz Klug, ‘South Africa’s Experience in Constitution-Building’ available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808168> accessed 23 June 2013, 3-5, 19, 31-38.

⁸¹ ICJ Statute, art 38, para 1(c).

upholds the view that, like municipal systems of law, international law contains a number of unformulated principles.⁸²

It has also been noted that:

In South Africa the elevated status of constitutional principles is traceable to that nation's unique constitution-making process, in which the adoption of a final document was contingent on the Supreme Court's certification that a set of mandated principled commitments had been scrupulously followed in establishing a code of governance.⁸³

This reflects a desire to anchor the new constitution and the new direction of the state in familiar and traditionally recognized principles that have gained broad acceptance around the globe. It is an attempt to connect the new constitution of the state to the outer world, to imbue it with a particular legitimacy both within and outside the country's borders. In this sense, the use of such principles is reputational; it is indicative of a departure from a past characterized by injustice and undemocratic governance.

This thesis will argue that in the Commonwealth Caribbean and Canada, this quest for legitimacy through the invocation of constitutional principles manifests itself in a display of continuity. It is argued that in Caribbean states, the appeal to English traditions represents an attempt to bolster the legitimacy of the post-independence constitutional arrangements by the interpreters and enforcers of the new constitutions.⁸⁴ Hence, references to constitutional principles are related to the desire of lawyers and judges to connect current constitutional arrangements to an enduring English tradition.

⁸² Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Reprint, Cambridge UP 1994) 23.

⁸³ Jacobsohn (n 80) 111-78.

⁸⁴ See Tracy Robinson, 'Gender, Nation and the Common Law Constitution' (2008) 28 OJLS 735.

II - The Significance of the Separation of Powers and the Rule of Law

Though there are other implied constitutional principles that may merit further study, such as equality, there are features that distinguish the rule of law and separation of powers from such other principles.⁸⁵ First, the rule of law and separation of powers are inherent foundational principles of democratic constitutionalism.⁸⁶ Donald Lutz argues that ‘constitutionalism implies ... popular sovereignty, which in turn implies at least some minimum separation of powers’ and that ‘rule of law and popular sovereignty virtually define constitutional democracy’.⁸⁷ Second, the rule of law and separation of powers were part of the unwritten English constitution and were subsequently incorporated in the constitutional arrangements of the other Commonwealth jurisdictions. Principles such as constitutional supremacy or parliamentary supremacy, for instance, assume a particular hierarchy in the sources of law and the institutions of state, which are not shared across democratic constitutional states.⁸⁸ Notions such as justice and equality, to the extent that they are accepted as elements of a state’s constitution, may flow from the foundational principles of the rule of law and the separation of powers, so the separation of powers and

⁸⁵ There is abundant literature on the principles that may qualify as implied constitutional principles. On equality, see Jeffrey Jowell, ‘Is Equality a Constitutional Principle’ (1994) 47 CLP 1; Wojciech Sadurski, *Equality and Legitimacy* (OUP 2008); Fabienne Peter *Democratic Legitimacy* (Routledge 2011).

⁸⁶ TRS Allan, *Constitutional Justice: A liberal Theory of the Rule of Law* (OUP 2001) 1-5; Donald Lutz, *Principles of Constitutional Design* (CUP, Cambridge 2006) x, 3,5.

⁸⁷ Lutz (n 86).

⁸⁸ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge UP 2013) 21-25.

rule of law remain the concomitants of constitutionalism, which act as fountainheads for other important principles in the modern democratic state.⁸⁹

As the rule of law and the separation of powers are here said to be bound up with the notion of constitutionalism, it is important to clarify what is meant by constitutionalism in this context. Constitutionalism, as used in this thesis, means a condition of limited government achieved through political and/or legal means. Referring to decades of writings on constitutions and constitutionalism, the *Social Science Encyclopedia* describes constitutionalism as ‘a political condition in which the constitution functions as an effective and significant limit on government’.⁹⁰ It does not require judicial review of legislative acts, nor does it require entrenchment of features of the constitution which may only be amended by special majority in the legislature.⁹¹ Thus the crucial notion in constitutionalism is ‘limited government’, where the constitution functions as a limitation which may occur in the form of judicial restraints as well as political restraints and cultural attitudes, and it may be represented by rules and ideals which may be written as well as unwritten.

Richard Bellamy emphasises that constitutionalism does not mandate that there should be minimal government. Instead, Bellamy argues that ‘constitutionalism seeks to

⁸⁹ *ibid.*

⁹⁰ Peter Russell, ‘Constitutionalism’ in Adam Kuper and Jessica Kuper, *The Social Science Encyclopedia* (3rd edn, Routledge 2009) 166 cf Cass Sunstein, ‘Constitutionalism after the New Deal’ (1987) 101 *Harvard Law Review* 421, 434-36. See also Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (3rd edn, OUP 2012) 14.

⁹¹ Peter Russell, ‘Constitutionalism’ (n 90) 167.

prevent arbitrary rule'.⁹² In a manner similar to the *Social Science Encyclopedia*, Bellamy indicates that the prevention of arbitrary government may be achieved through political mechanisms (political constitutionalism) as well as through judicially enforced individual rights (legal constitutionalism).⁹³ Bellamy criticizes legal constitutionalism and defends political constitutionalism as the model that is more suitable to democracies.⁹⁴ This argument is however, outside the scope of this thesis and is not relevant to the questions sought to be addressed here.

The theme of constitutionalism as a restraint on government is reflected in 'The Origins of Modern Constitutionalism' in which Francis Wormuth related constitutionalism to the use of devices to define and constrain government, and identified two devices that are employed to do so. The first he describes as checks and balances. The second is the notion that law is general and prospective, and Wormuth posits that the separation of powers was introduced in order to implement this second notion.⁹⁵ It is crucial to note that regardless of the differences among philosophers concerning the appropriate definition of the rule of law, Western philosophers often include within their description of the rule of law that law ought to be general and prospective. So, arising from Francis Wormuth's writings is the idea that restraints on government which are associated with the rule of law and the separation of governmental powers have

⁹² Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge UP 2007) 8.

⁹³ *ibid* 1-14. Cf Jeremy Waldron's view that modern constitutionalism is synonymous with legal constitutionalism in 'Constitutionalism – A Sceptical View' (2012) NYU School of Law, Public Law Research Paper No. 10-87 < <http://ssrn.com/abstract=1722771> > 36-40.

⁹⁴ Bellamy (n 92) 1-14.

⁹⁵ Francis D. Wormuth, *The Origins of Modern Constitutionalism* (Harper 1949) 3-4.

traditionally been embraced within the ‘tradition of constitutionalism’.⁹⁶ These devices are said to be marshalled in order to protect ‘substantial interests’ such as property, freedom of conscience, and fair trial rights. Thus, there is a relationship between the rule of law and the separation of powers, and the protection of substantial interests,⁹⁷ which are identified in some constitutional arrangements as rights. This relationship which is identified in the nature of constitutionalism is reflected through the case law and perhaps sheds some light on courts’ resort to inherent principles of constitutionalism in their reasoning in human rights cases.

There is an institutional element to this discussion. The resort to principles which are inherent in the notion of constitutionalism or limited government could arguably provide a defence to challenges that judicial reasoning by implied principles is illegitimate. Moreover, utilizing principles which are inherent in the notion of limited government may be one method for courts to add legitimacy to decisions in human rights cases, where the legitimacy of judicial decisions is often subject to criticism on grounds of illegitimacy.

There is also scepticism about the utility and necessity of constitutionalism (a scepticism championed by Jeremy Waldron⁹⁸) but that discussion is outside the bounds of this research project. It is not necessary for current purposes to discuss whether constitutionalism is necessary or which form (political or legal) ought to be preferred. What is important is the empirical fact that the jurisdictions examined in this study do

⁹⁶ ibid.

⁹⁷ ibid 4.

⁹⁸ Waldron, ‘Constitutionalism – A Sceptical View’ (n 93).

operate under a model of constitutionalism and that the rule of law and separation of powers are recognized as inherent within constitutionalism. This has been established above.

Legacy of Common Law Constitutionalism

An additional layer to our understanding of the context in which the separation of powers and the rule of law are used in adjudication is the construct of common law constitutionalism. The use of implied principles in Canada has been located within the tradition of ‘common law constitutionalism’, where ‘common law constitutionalism’ is understood as the notion of an unwritten fundamental law.⁹⁹ Mark Walters describes the connection between references to unwritten principles and common law constitutionalism by indicating that the notion of *lex non scripta* refers to law that is unwritten in that its normative force is not fully explicable by its written form, and that unwritten law and common law ‘were traditionally regarded as describing the same sort of laws.’¹⁰⁰

The significance of *lex non scripta* has re-emerged with renewed importance in the form of the theory and practice of common law constitutionalism. Common law constitutionalism incorporates a series of broad themes, including a substantive conception of the rule of law, ‘a reliance on fundamental values which gives rise to constitutional rights’, the argument that it is the common law that justifies judicial review, and that the principles of judicial review are derived from the common law.¹⁰¹ The field

⁹⁹ See Mark Walters, ‘The Common Law Constitution in Canada: The Return of *Lex Non Scripta* as Fundamental Law’ (2001) 51 U. Toronto L.J. 91.

¹⁰⁰ *ibid* 95.

¹⁰¹ Justin Leslie, ‘Vindicating Common Law Constitutionalism’ (2010) 30 Legal Studies 301, 305. See also Paul Craig, ‘Public Law, Political Theory and Legal Theory’ [2000] PL 211; Paul Craig,

of common law constitutionalists includes Trevor Allan, Paul Craig, Dawn Oliver, Sir John Laws and Jeffrey Jowell.¹⁰² In Walters's view, common law constitutionalism not only posits that there are common law principles that are 'unwritten' in the sense that they do not derive their normative force by a written form, and that these principles are legal norms that bind governments. For Walters, common law constitutionalism also connotes that these 'unwritten principles' are fundamental in the sense that they are superior to other laws.¹⁰³ Tom Poole has conducted a critique of common law constitutionalism in which he maintains that common law constitutionalists conceive of public law as a set of higher order values that are set above political decision-making.¹⁰⁴ Yet, in forceful and convincing responses, Paul Craig and Justin Leslie have demonstrated that this description of common law constitutionalism mischaracterizes the CLC adherents. For most, if not all the CLC adherents, common law constitutionalism may accommodate parliamentary supremacy.¹⁰⁵ For Paul Craig, common law constitutionalism 'does not "make the case" for US style constitutional review, whereby courts can invalidate

Administrative Law (7th edn, Sweet & Maxwell 2012) 17-18; W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge UP, 2007). On the criticism of common law constitutionalism, see J.A.G. Griffith, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159; J.A.G. Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42; Thomas Poole, 'Dogmatic Liberalism? T.R.S. Allan and the Common Law Constitution' (2002) 65 MLR 463

¹⁰² T.R.S. Allan, 'Questions of legality and legitimacy: Form and substance in British constitutionalism' (2011) ICON 155; Paul Craig, 'Public Law, Political Theory' (n 101); Paul Craig, *Administrative Law* (n 101) 22-27; Dawn Oliver, 'Is the Ultra vires Doctrine the Basis of Judicial Review?' (1987) PL 543; Sir John Laws, 'Law and Democracy' [1995] PL 72; Jeffrey Jowell, 'Of Vires and Vacuums: the Constitutional Context of Judicial Review' in C. Forsyth (ed.) *Judicial Review and the Constitution* (Hart 2000).

¹⁰³ Walters, 'Common Law Constitution in Canada' (n 99); Thomas Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' [2003] OJLS 435, 439 et seq.

¹⁰⁴ Poole, 'Back to the Future' (n 103).

¹⁰⁵ Leslie (n 101) 305.

legislation'.¹⁰⁶ What can be fairly said is that a 'strong form' common law constitutionalism may create a space for an argument that courts possess the power to invalidate legislation; this is the position taken by Sir John Laws who argues, extra-judicially, that common law principles form a 'higher-order law'. For Laws, then, '[t]he constitution, not the Parliament, is in this sense sovereign'.¹⁰⁷ For Laws, a higher order law confers power upon Parliament and 'must of necessity limit it.'¹⁰⁸

However, 'weak form' common law constitutionalism, such as that advocated by Dawn Oliver, does not take that position. Thus, Oliver is of the view that parliamentary supremacy is 'necessary for the maintenance of good relations between the courts and the other branches of government.'¹⁰⁹ A middle ground is occupied by Allan and Craig who advocate the concept of dual sovereignty whereby Parliament and the judiciary are each supreme in their own constitutional sphere.¹¹⁰ Further, even within this framework of dual sovereignty, Craig remains adamant that under current constitutional doctrine, Parliament has 'the last clear and unequivocal word.'¹¹¹ The concept of dual sovereignty brings the notion of a separation of state powers into the common law constitutionalism dialogue. In the framework of dual sovereignty, therefore, courts are required to protect the rule of law

¹⁰⁶ Paul Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) 23.

¹⁰⁷ Laws (n 102).

¹⁰⁸ *ibid* 87

¹⁰⁹ Dawn Oliver, *Constitutional Reform in the UK* (OUP 2003) 354.

¹¹⁰ TRS Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 OJLS 563, 578; Paul Craig, 'Constitutional Foundations, the Rule of Law and Supremacy' [2003] PL 92, 109.

¹¹¹ Craig, 'Constitutional Foundations' (n 110) 109; Craig, *Administrative Law* (n 101) 17, 27-28.

and the legislature is required to respect the separation of powers by recognizing and respecting the courts' role as rule of law-protector.¹¹²

Common law constitutionalism is reflected in case law as the idea that implied principles derived from the common law share supremacy with the constitutional text. The location of the courts' references to implied principles within the literature regarding the notion of an unwritten fundamental law receives some support from judicial statements that the constitutional framework includes principles which are 'vital un-stated assumptions'¹¹³ and that Westminster model constitutions left a great deal to 'necessary implication'.¹¹⁴ A further potential implication of common law constitutionalism for the discourse on implied constitutional principles is that the emphasis in common law constitutionalism on normative common law justifications for the content and the scope of judicial review may enable the courts to go beyond the constitutional text or even defy the constitutional text in order to review executive or legislative action for compliance with fundamental constitutional principles. It may even provide an avenue for the courts to assert the supremacy of unwritten principles over the constitutional text. Walters has suggested that in the judgment in the *Secession Reference*, the Court perceived unwritten principles as antecedent to, and in a sense supreme over, the constitutional text.¹¹⁵ Again, this is not a necessary or foregone conclusion of common law constitutionalism but the

¹¹² Allan, 'Constitutional Dialogue' (n 110) 580-81.

¹¹³ *Secession Reference* (n 21) [49].

¹¹⁴ *Hinds* (n 29) 211; Robinson, 'Gender' (n 84) 742.

¹¹⁵ Walters, 'Common Law Constitution in Canada' (n 99).

common law constitutionalist framework may create the conceptual space for such reasoning.

Common law constitutionalism was originally discussed as an alternative to political constitutionalism, but important research from Mark Walters and Tracy Robinson, writing in the context of Canada and the Commonwealth Caribbean, respectively, reveal that the discussion must now include a more complete set of alternatives in order to fully appreciate the terms and potential consequences of the debate. In that broader conversation, we see that there is a wider set of ideas for regulating or restraining government, ranging from political constitutionalism to common law constitutionalism, and codified/written constitutionalism. States in which there is a written constitution which confers on courts the jurisdiction to invalidate legislation have arguably left political constitutionalism behind and embraced legal constitutionalism. Also, since the constitutions are written, one would expect that common law constitutionalism has also been left behind. Yet, Walters and Robinson suggest, rightly, that such states still retain a legacy of common law constitutionalism that continues to impact their decisions in constitutional cases. In states where there is a written, codified constitution, the discourse on the use of constitutional principles by courts evokes questions regarding the interaction between common law constitutionalism and codified constitutionalism. This theme will be highlighted in the course of the thesis.

Along with the range of ideas for restraining government, including common law constitutionalism and written constitutionalism, there is also a spectrum that flows from parliamentary supremacy to constitutional (or judicial) supremacy. Within the UK, the doctrine of parliamentary supremacy has particular strength. Several commentators,

including Michael Akehurst and Trevor Allan have indicated that there has been pressure on the traditionally understood doctrine of parliamentary supremacy due to recent constitutional developments, including the European Communities Act 1972 (UK) (ECA 1972),¹¹⁶ enacted to give further effect to the UK's obligations under the EC (now EU) treaties, and the Human Rights Act 1998 (UK) (HRA 1998), enacted to give further effect to the UK's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Under section 2 (4) of the ECA 1972 all primary legislation whether enacted prior or subsequent to the ECA 1972 must take effect subject to the ECA 1972, and the courts have interpreted this section as a direction to the courts to 'disapply' legislation that is inconsistent with EC (EU) law.¹¹⁷ With respect to the HRA 1998, s 3(1) requires judges to interpret legislation so far as possible, in a manner consistent with the ECHR rights scheduled to the Act, and section 4(2) empowers judges to make declarations of incompatibility in respect of legislation that is incompatible with the ECHR. Nonetheless, it remains the orthodox view that the Westminster Parliament remains supreme. This orthodox view is supported by the fact that substantive limitations on legislative power have not been prescribed or permitted by a written Constitution, and,

¹¹⁶ Michael Akehurst, 'Parliamentary Sovereignty and the Supremacy of Community Law' (1989) 60 *British Yearbook of International Law* 351; TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 *Law Quarterly Review* 443; Jeffrey Jowell, 'Parliamentary Sovereignty under the New Hypothesis' [2006] *Public Law* 562; Aileen Kavanagh, 'Constitutional Review under the UK Human Rights' (Cambridge UP 2009) 411-15.

¹¹⁷ *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603 (HL); *R v Secretary of State for Transport, ex p. Equal Opportunities Commission* [1995] 1 AC 1 (HL).

second, from the institutional point of view, courts have not been granted the power to invalidate legislation.¹¹⁸

In Australia, parliamentary supremacy is also a recognized principle of the Constitution. Judicial review of legislation of the Commonwealth Parliament occurs because judges have implied the power of judicial review as a necessary tool for enforcement of the Commonwealth Constitution. Notably, the Commonwealth Constitution does not include a Bill of Rights that confers jurisdiction on the courts to review primary legislation for rights consistency. However, as Julie Taylor has observed, the fact that there is a written Constitution for Australia, which has been interpreted by the High Court to permit the judicial invalidation of legislation, distinguishes it from the UK.¹¹⁹ Thus, while parliamentary supremacy continues to play an important role in constitutional and rights development in Australia, it does not operate with the same vigour as it does in the UK.¹²⁰

In the Commonwealth Caribbean the Constitutions are expressly declared in the Constitution as the supreme law and the Constitutions expressly confer wide powers on the Court to provide redress for violations of fundamental rights recognized in the

¹¹⁸ Allison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009) Chapter 2; Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010) 24-25; 46-49; See also Nick Bamforth, 'Parliamentary Sovereignty and the Human Rights Act 1998' [1998] Public Law 572; Lord Irvine of Lairg QC, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] Public Law 308.

¹¹⁹ Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 Fed L Rev 57.

¹²⁰ *ibid* 60.

Constitution.¹²¹ These Constitutions thereby displace parliamentary supremacy and establish the supremacy of the Constitution. With respect to Canada, in current discourse on Canadian constitutional law, there are two schemes for characterising the current constitutional structure. Stephen Gardbaum characterises the current Canadian constitutional framework as part of a ‘new Commonwealth model of constitutionalism’ which, in Gardbaum’s words, rejects both ‘legislative supremacy’ and ‘judicial or constitutional supremacy’, preferring a model that ‘treats legislatures and courts as joint or supplementary rather than alternative exclusive protectors and promoters of rights, as under the two traditional models, and decouples the power of judicial review of legislation from judicial supremacy or finality.’¹²² Canada is also often described as possessing a dialogic model, which eschews the practice of giving judges the ‘final word’ on rights issues and instead fosters dialogue between the courts and the legislature. Peter Hogg and Alison Bushell were largely responsible for the popularization of the ‘dialogue’ discourse in relation to Canada.¹²³ Hogg and Bushell used the term ‘dialogue’ to refer to ‘cases in which a judicial decision striking down a law on Charter grounds is followed by some action by the competent legislative body’.¹²⁴ In a subsequent article by Hogg,

¹²¹ See, eg, the Constitution of Barbados 1966, section 1 of which states that the Constitution ‘is the supreme law’ and section 24 of which confers wide powers on the court to provide redress for violations of the Constitution’s fundamental rights provisions. Section 2 of the Constitution of Jamaica 1962 does not expressly state that the Constitution is the ‘supreme law’ but is to the same effect, providing that ‘if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.’

¹²² Gardbaum (n 88) 2.

¹²³ Peter Hogg and Alison Bushell, ‘The Charter Dialogue between Courts and Legislatures’ (Or Perhaps The Charter of Rights Isn’t Such a Bad Thing After All) (1997) 35 *Osgoode Hall Law Journal* 75. The language of ‘dialogue’ has since spread throughout other states, including other parts of the Commonwealth and the UK.

¹²⁴ *ibid* 82.

Thornton and White, ‘dialogue’ was also applied to the fact that such judicial decisions ‘usually leave room for a legislative response, and usually receive a legislative response’.¹²⁵

The Canadian courts have the power to invalidate laws, despite the absence of an express provision in the Charter of Rights and Freedoms 1982, granting such power. This power is understood to be the effect of the clause asserting the supremacy of the Constitution (section 52(1) of the Constitution Act 1982) and the clause requiring the enforcement of the Charter (section 24(1), Constitution Act 1982), and the courts have acted accordingly.¹²⁶ However, while the Canadian Supreme Court is empowered to invalidate legislation that violates the rights of the Charter, the ‘notwithstanding’ clause in section 33 of the Charter confers an override power on Parliament, permitting it to enact legislation ‘notwithstanding a provision included in section 2 or sections 7 to 15’ of the Charter. Thus Canada lies along the middle of the spectrum between constitutional supremacy and parliamentary supremacy.

Another consideration which forms part of the context of the cases examined is the question whether natural law theories are part of the historical framework for the discourse on the use of implied principles in adjudication. Both in respect of the development of common law and the development of constitutionalism, the argument may be made that there is some (unarticulated) bond between the concept of implied constitutional principles and natural law. Chief Justice McLachlin of the Supreme Court

¹²⁵ Peter Hogg, Allison Bushell Thornton, and Wade Wright, ‘Charter Dialogue Revisited- or “Much Ado About Metaphors”’ (2007) 45 Osgoode Hall Law Journal 1, 4.

¹²⁶ Gardbaum (n 88) 100-01.

of Canada, in extrajudicial remarks, has drawn a connection between the practice of reasoning by implied principles and the concept of natural law. McLachlin CJ has written that:

The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law. Like those conceptions of justice, the identification of these principles seems to presuppose the existence of some kind of natural order. Unlike them, however, it does not fasten on theology as the source of unwritten principles that transcend the exercise of state power. It is derived from the history, values and culture of the nation, viewed in its constitutional context.¹²⁷

Some commentators have argued that the concept of ‘unwritten fundamental law’ is rooted in ancient common law traditions which have been influenced by concepts of natural law or ‘right reason’.¹²⁸ The notion that the development of fundamental norms as an element of constitutionalism has some affinity with natural law theories is not novel. Such connections have been drawn, for instance by James Stoner and Paul DeHart.¹²⁹ Trevor Allan has also argued that the idea of a state’s constitution connotes more than a written constitution (if one exists for the state in question) and that it is allied with a concept of law which is ‘intimately connected with our pursuit of justice.’¹³⁰ Allan does not necessarily embrace a natural law basis for constitutionalism and constitutional law

¹²⁷ Beverly McLachlin, ‘Unwritten Constitutional Principles: What is Going On?’ (2006) 4 NZ J. Pub. & Int’l L. 147, 149.

¹²⁸ Walters, ‘Common Law Constitution in Canada’ (n 99) 136; McLachlin (n 127).

¹²⁹ James R Stoner, ‘Natural Law, Common Law and the Constitution’ in Douglas E Edlin (ed) *Common Law Theory* (Cambridge UP 2007); Paul DeHart, *Uncovering the Constitution's Moral Design* (University of Missouri Press 2007) esp. 4-10. See also Aileen Kavanagh, ‘The Irish Constitution at 75 Years: Natural law, Christian Values and The Ideal of Justice’ (2012) 48 Irish Jurist 71.

¹³⁰ TRS Allan, ‘Constitutional Justice and the Concept of Law’ in Grant Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge UP 2008) 221-23.

adjudication, but he does reject a strictly positivist approach by insisting that an account of constitutionalism must begin within an understanding of law as a pursuit of justice.

With respect to the common law, it has been convincingly argued that Coke – whose writings had a significant impact on the development of common law and judicial review- and his contemporaries, perceived a harmonious connection between natural law and common law.¹³¹ Of course, those that see implied constitutional principles as linked to historical natural law doctrines do not perceive a unified source for these two concepts. McLachlin CJ argues, along this vein, that the implied constitutional principles are usually based on ‘the history, values and culture of the nation’ as opposed to theology or divinity. Phrased in other terms, while there may be parallels with the old common law respect for natural law, the use of implied principles is not founded on a vague notion of ‘pre-political natural rights’, but on a particular conception of what law is and what pursuits it serves in the society in question.¹³²

If the idea of recourse to implied constitutional principles is linked to natural law, this evokes a notion that the fundamental law of the land is connected to a universal framework of laws that traverse political and geographical boundaries. This has implications for judicial engagement in comparative jurisprudence in the application of implied constitutional principles. It also has implications for normative assessments of the use of implied constitutional principles. These themes are explored in greater detail in the discussion of implied principles as a gateway to comparative judicial analysis in Chapter

¹³¹ RH Helms, ‘Bonham’s Case, Judicial Review, and the Law of Nature’ (2009) 1 *Journal of Legal Analysis* 332-34; Stoner, ‘Natural Law, Common Law and the Constitution’ (n 129) 171-72.

¹³² Mark D. Walters, ‘Written Constitutions and Unwritten Constitutionalism’ in Huscroft (n 130) 259.

Seven, and in the outline of issues relating to the legitimacy of the use of implied principles in rights adjudication in Chapter Eight.

Conclusion

The use of implied constitutional principles in the common law jurisdictions examined in this thesis is firmly rooted in the concept of constitutionalism and the idea of principles as norms applicable in interactions between the individual and the state. The necessary discourse reaches beyond the conceptual and theoretical context and encompasses the search for legitimacy on the part of the court and the state. Therefore, there is an interplay of institutional and doctrinal considerations that influence judicial reasoning by implied constitutional principles in fundamental rights cases.

The analyses in this chapter set the stage for much of the proceeding conversation in the thesis. Throughout the following chapters, I explore the possible reasons for the use of these implied constitutional principles in human rights adjudication, the functions played by the principles in rights cases, and questions regarding the legitimacy of the invocation of these principles by judges.

CHAPTER THREE – JUDICIAL CONCEPTIONS OF THE RULE OF LAW

Introduction

‘It has been through judicial review ... that the rule of law has had its most significant recent development and where it has revealed the detail of its content.’¹ This position has underpinned Jeffrey Jowell’s research on the ‘underlying values of the rule of law’. This view is also shared by Justin Leslie, who correctly states that in order to determine the ‘qualities’ of the rule of law, we must consider the ways in which courts use the term.² Certainly, in expounding on the meaning of the rule of law as a legal principle, it is crucial to engage with the question of what the judiciary – collectively one of the most important legal actors in the legal system - has to say about the rule of law.

This Chapter addresses the dominant judicial applications of the rule of law, as shown in judicial review cases. Here, I take Jowell’s approach of seeking to examine the principles in their practical application, rather than merely focussing on the philosophical debates. There is a rousing debate among legal philosophers regarding whether the rule of law is formal or substantive in nature. I will first outline the contours of this theoretical debate and then demonstrate, through comparative case law, that the dominant discourse

¹ Jeffrey Jowell, 'The Rule of Law's Long Arm: Uncommunicated Decisions' [2004] PL 246, 246.

² Justin Leslie, 'Vindicating Common Law Constitutionalism' (2010) 30 *Legal Studies* 301, 314; Elizabeth Carroll, '*Woolworths Ltd v Pallas Newco Pty Ltd*: A case study in the application of the rule of law in Australia' (2006) 13 *AJ Admin L* 87, 90.

among legal philosophers is inconsistent with the dominant judicial interpretation of the principle in common law jurisdictions. The inconsistencies I discuss mainly relate to the definition and application of the conceptions of the rule of law. Accordingly, the following section of the Chapter briefly outlines the relevant theoretical discourse on conceptions of the rule of law, focusing on the idea of formal and substantive conceptions of the rule of law. Parts II and III of the Chapter then analyse applications of the rule of law through the development of judicial review and through express references to the rule of law in the application of constitutions and bills of rights. Part IV addresses the transformation of the application of the rule of law in Canada, considering evidence of a shift from a substantive conception of the rule of law in the Canadian Supreme Court to a formal conception. In Part V, I address conflicts and tension that arise in the practical application of the rule of law in courts, using the application of the rule of law as equality as a case study.

I - Conceptions of the Rule of Law

The formal conception identified by some judges in the jurisdictions under review reflects a requirement ‘that whatever a government does, it should do through laws.’³ While Brian Tamanaha argues that ‘no Western legal theorist identifies the rule of law entirely in terms of rule by law’,⁴ there are Western judges whose account of the rule of law in their respective jurisdictions is tantamount to an account that merely requires rule by laws passed in accordance with requirements regarding the manner and form of the

³ Noel B. Reynolds, 'Grounding the Rule of Law' (1989) 2 Ratio Juris 1, 3.

⁴ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge UP 2004) 92.

legislative process. This is reflected in the Canadian case of *British Columbia v Imperial Tobacco Canada Ltd.*⁵ In that case, the Supreme Court rejected an argument that the rule of law embodies a requirement of non-retroactivity beyond the requirements for non-retroactivity of the criminal law prescribed in section 11(g) of the Constitution.⁶ The Court described as extreme the applicants' contentions that '... the rule of law requires that legislation (1) be prospective; (2) be general in character [and] (3) not confer special privileges on the government, except where necessary for effective governance'.⁷

Several theorists, on the other hand, go beyond this limited conception but still attempt to limit the rule of law to concerns regarding the manner in which law is made.⁸ Paul Craig has termed this the formal conception of the rule of law. Craig classifies Dicey's account of the rule of law as formal in this sense. Dicey's famous treatise, *Introduction to the Study of the Law of the Constitution*, gives three meanings of the rule of law. The first is that an individual can only be punished for breach of a law, the second, that there is equality before the law so that all persons are subject to 'ordinary law' and 'ordinary tribunals', and third, that constitutional law is the consequence of the rights of individuals as defined by the courts.⁹ Craig also classifies Joseph Raz's account of the rule of law as formal in this sense. Raz's list of the characteristics of the rule of law

⁵ [2005] 2 SCR 473 (SC, Canada).

⁶ *ibid* [69].

⁷ *ibid* [63].

⁸ See Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467; Tamanaha (n 4) 91.

⁹ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan 1959) 188-96.

include that laws should be prospective, stable and guided by open, general, and clear rules, that there should be an independent judiciary, and access to the courts.¹⁰

The substantive conception, on the other hand, is said to incorporate the formal elements, but also to demand that the law fulfil other values. Dworkin is a strong proponent of this conception, arguing that, if the rule of law is to be meaningful, it must incorporate substantive requirements as to the content of the law, and that citizens have moral and political rights that ought to be enforced through positive law.¹¹

The accuracy of Craig's classification has been challenged and alternative and more nuanced formulations of conceptions of the rule of law have been proposed.¹² For instance, contrary to Craig's categorisation, Nick Barber has convincingly argued that Raz's account of the rule of law includes considerations relating to the content of the law.¹³ While Barber proposes an alternative framework of conceptions organized along the lines of legalistic and non-legalistic conceptions, this chapter does not go so far; what I seek to do here is to adopt Barber's criticisms of the classification of Dicey's and Raz's rule of law conceptions as formal. What is relevant for the purpose of this Chapter is that Barber challenges the binary division between formal and substantive conceptions and

¹⁰ Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195; Craig, 'Formal and Substantive Conceptions' (n 8) 469. See also Peter W. Hogg and Carla F. Zwibel, 'The Rule of Law in the Supreme Court of Canada' (2005) 55 UTLJ 715.

¹¹ Ronald Dworkin, *A Matter of Principle* (OUP 1985) 11-32. See also John Laws, 'The Constitution: Morals and Rights' [1996] PL 622.

¹² See alternative formulations in N.W. Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17 Ratio Juris 474; David Dyzenhaus, *The Constitution of Law: Legality in Times of Emergency* (Cambridge UP) 1-16.

¹³ Barber (n 12) 474-75. See also a more nuanced alternative to the formal-substantive formulation in Jeremy Waldron, 'The Rule of Law as a Theater of Debate' in Justine Burley (ed) *Dworkin and His Critics: With Replies by Dworkin* (Blackwell Publishing 2004).

the characterization of supposedly formal conceptions. He proposes an alternative classificatory framework and this thesis proposes another. We need not accept Barber's alternative framework in order to acknowledge the wisdom of his critique of the classifications made by Craig. For instance, Barber rightly notes that the mandate that laws be prospective limits the goals which a law may achieve:¹⁴ a law does not comply with this requirement if it seeks to criminalize an act that was not criminal when it was performed. Similarly, the question whether a law satisfies the requirement of certainty will, in some cases, speak directly to the content of that law. Accordingly, the argument has been made that laws such as the offence of outrage to public decency and public nuisance are uncertain in that the content and reach of the prohibition cannot be defined with certainty and fall foul of the requirement that the law should be prospective.¹⁵ It is unconvincing to posit that these arguments have no relation to the substance of the law. Since Raz's conception can affect the law in this substantive sense, it is inaccurate to classify his conception as formal.

This criticism of the formal and substantive classification is borne out by the case law, in which three categories of applications of the rule of law can be discerned. The first is a formal conception of the rule of law as rule by law. The latter two conceptions are both substantive in the sense that they speak to the content of the law. Thus, the second is a legalistic conception that is mainly concerned with maintaining the principle of legality, and with the procedure and formulation of laws but which may affect the

¹⁴ Barber (n 12) 478.

¹⁵ The Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 193, 2010) 46-48, 52-54.

substance of the law. Finally, there is an even more valorized substantive strand that seems to embrace wider requirements regarding the content of the law, including requirements that advance rights.

Using this rubric, Raz's theory is therefore more accurately described as legalistic.¹⁶ Dicey's conception is more appropriately described as a valorized substantive conception.¹⁷ This is evident from his elaborations of the elements of the rule of law. With respect to his second element - equality before the law- it is not purely a question of procedural access to courts, but also condemns status-based immunities from the application of 'ordinary law'.¹⁸ His position that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals' eschews distinctions based on an individual's identification as part of a particular status group. In Dicey's writings, it was therefore a requirement of the rule of law that officials, like private citizens, should be 'brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.'¹⁹ In his third element of the rule of law, Dicey contended that the rule of law pervades the constitution because the constitution is derived from individual rights as described by the courts, and

¹⁶ Barber, 'Legalistic Conceptions' (n 12) 475. See also Luc Tremblay, *The Rule of Law, Justice and Interpretation* (McGill-Queen's UP 1997) 149-50.

¹⁷ See Barber, 'Legalistic Conceptions' (n 12) 479; Jeffrey Jowell, 'The Rule of Law and Its Underlying Values' in Jeffrey L. Jowell and Dawn Oliver (eds), *The Changing Constitution* (6th edn, OUP 2007) 11.

¹⁸ Barber (n 12) 480-81; Jowell, 'Underlying Values' (n 17) 11.

¹⁹ Dicey (n 9) 193.

that the common law was best suited for protection of these rights.²⁰ Craig has contended that this element should be construed as an argument that *if* it is desirable to protect individual liberties, then the common law provides a better venue than a written constitution. However, this construction seems to read down the meaning of Dicey's words. As Barber argues, Dicey proposed that a constitution infused with the rule of law provides a better tool for protection of individual liberties, and that therefore this system is to be preferred to the system of written constitutions.²¹ Moreover, since Dicey's championing of the rule-of-law-infused common law was premised on the idea that the common law gives rise to individual liberties, it is hard to justify a classification of his doctrine as an articulation of a formal version of the rule of law.²² Dicey was clearly concerned with the defence of a system of law that was well-equipped to protect (some) individual liberties; in his view, this was one of the virtues of the common law. Dicey's account of the rule of law is therefore more accurately characterized as a substantive, rather than formal, conception.

Accordingly, it appears that it is more accurate to classify rule of law conceptions as including a formal conception of rule by law, and with substantive conceptions that range from the legalistic strand to the valorized substantive strand. Using this tripartite division of formal, legalistic, and valorized conceptions, the analysis below will show that a substantive conception is reflected in the majority of the common law jurisdictions examined in the thesis. The valorized conception is reflected in decisions in the UK and

²⁰ Dicey (n 9) 195-202.

²¹ Barber (n 12) 480-81.

²² T.R.S. Allan, *Constitutional Justice: A liberal Theory of the Rule of Law* (OUP 2001) 18.

the Commonwealth Caribbean, and the legalistic conception appears in decisions of the High Court of Australia, with some judges delivering dicta which embrace a valorized conception. While the Canadian Supreme Court had in the past articulated a version of the rule of law capable of accommodating rights protections, recent judgments of that Court have tended towards the adoption of a rule by law conception by the current Bench. The courts' representation of particular conceptions of the rule of law will be revealed through analysis of (1) the development of heads of judicial review, particularly in the UK (2) the use of the principle of legality in interpretation, and (3) explicit references to the rule of law in applying the Constitution or Bill of Rights of the jurisdictions in question.

II - Development of Heads of Judicial Review

The development of heads of judicial review is largely based on the rule of law. The underpinning of heads of judicial review by the constitutional principle of the rule of law has been acknowledged by academics and members of the higher judiciary. Thus, Alison Young comments that '[t]he rule of law ... is being increasingly referred to in important judicial review decisions as a means of justifying judicial review generally, as well as underpinning specific heads of judicial review' and Jeffrey Jowell notes that 'the grounds of judicial review are in large part based upon the rule of law'.²³ The importance of this aspect of discovering the applications of the rule of law is relevant in all the common law jurisdictions but is particularly apparent in the UK, where there is no written constitution that confers the power of review on superior courts.

²³ Jeffrey Jowell, 'The Rule of Law: Rhetoric or Universal Principle?' (2012) 20 Asia Pacific Law Review 3, 6.

The three traditional grounds of judicial review- illegality, procedural impropriety, and irrationality- are all instances of the implementation of the rule of law.²⁴ In particular, the third ground of judicial review, that is, ‘irrationality’ or ‘Wednesbury unreasonableness’, is partly based on a substantive conception of the rule of law.²⁵ The use of the ground of irrationality demonstrates that courts have sometimes been concerned not merely with procedure, but also with substantive values. Thus, where the court conducts judicial review and examines the substance of the decision or act rather than the procedure by which the decision was made or the act taken, this reflects aspects of a substantive conception of the rule of law. Although the courts often do not expressly refer to the rule of law, decisions such as *ex p Leech*²⁶ (in which it was held that rules that impeded the free flow of communication between a prisoner and his legal representative violate a prisoner’s ‘constitutional right’ of access to justice) and *ex p Witham*²⁷ (in which it was held that the levying of substantial court fees violate an impoverished litigant’s access to justice) reflect a substantive account of the rule of law. *Leech* and *Witham* are used here as examples of cases where the court does not expressly refer to the rule of law but the judges’ reasoning nonetheless reflects review of the substance of decisions, rather than merely the procedure. In so doing, they reflect a substantive conception of the Rule of Law.

²⁴ Jowell, 'Underlying Values' (n 17).

²⁵ *ibid* 11. See also *R (Nadarajah) v SSHD* [2005] EWCA Civ 1363, *The Times* December 14 2005 (CA).

²⁶ *R v SSHD, ex p Leech (No. 2)* [1994] QB 198 (CA).

²⁷ *R v Lord Chancellor, ex p Witham* [1998] QB 575 (CA).

The use of proportionality in judicial review also evidences acceptance of the substantive concept of the rule of law. As Allan argues, ‘the doctrine of proportionality is clearly a feature of the ... substantive version: it entails an evaluation of public and private interests in accordance with criteria of justice and the common good.’²⁸ The doctrine of proportionality, then, requires the court to engage in an assessment of the substantive value of proposed solutions to social problems relative to the protected interest which is affected by that proposed solution.²⁹ The courts have therefore accurately acknowledged that the proportionality inquiry depends on a ‘value judgement’ of the government initiative and the interest in question.³⁰

Similar conclusions can be drawn from cases using the doctrine of legitimate expectations.³¹ Craig and Schönberg have argued that protecting legitimate expectations expresses ‘the requirements of predictability inherent in the rule of law.’³² This explanation provides an account of the basis of *procedural* legitimate expectations. However, with respect to *substantive* legitimate expectations, an account that

²⁸ T.R.S. Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 LQR 221, 233.

²⁹ Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge UP 2009) 233-34.

³⁰ *Wilson v First County Trust* [2003] 3 WLR 568 [62]-[63] (HL) (Lord Nicholls); *R v Secretary of State for the Home Department ex p Limbuela* [2006] UKHL 66, [2006] 1 AC 396 (HL) [55] (Lord Bingham).

³¹ For support for proposition that substantive legitimate expectation is based on the rule of law, see *R v Secretary of State for the Home Department, ex parte Pierson* [1997] UKHL 37, [1998] AC 539 (HL) 591 (Lord Steyn). See also T.R.S. Allan, 'Constitutional Dialogue and the Justification of Judicial Review' (2003) 23 OJLS 563, 572-73; Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (n 22) 132; Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart 2001) 100-104; Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671, 671-72, 674, 678.

³² Soren Schönberg and Paul Craig, 'Substantive Legitimate Expectations after Coughlan' [2000] PL 684, 697.

incorporates the rule of law's substantive aims is more relevant. Jeffrey Jowell's argument that the Rule of Law advances substantive aims is therefore more helpful.³³ This is the best way to explain why the doctrine of legitimate expectations has been interpreted as conferring a right not merely to a particular procedure, but rather, to the substance of the expectation. This is reflected in the weighing of public against private interests, which has become a feature of decisions on substantive legitimate expectations.³⁴ For instance, Lord Woolf MR, delivering the judgment of the Court in *R v North and East Devon Health Authority, ex p Coughlan*, held that the decision of the health authority to remove the applicants from a home constituted 'the unwarranted frustration of a legitimate expectation and thus ... a failure of substantive fairness.'³⁵

The doctrine of substantive legitimate expectations has also been accepted in the Commonwealth Caribbean. Thus, the doctrine formed the basis for the decision in *Leacock v AG of Barbados*. In that case, the applicant had been permitted by his employers to obtain a law degree and, relying on previous practice, he had expected that he would be granted study leave to obtain legal professional training. He was denied such leave and challenged his employers' decision, arguing inter alia, that the decision frustrated his legitimate expectation that he would be granted study leave. The Court upheld his claim, holding that while Leacock had no legally enforceable right to leave, he

³³ Jowell, 'The Rule of Law and its Underlying Values' (n 17) 20-21.

³⁴ Allan, 'The Rule of Law as the Rule of Reason' (n 28) 233. See also Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melb.U.L.Rev.* 470.

³⁵ [2001] QB 213 (CA) [76]. See also *Nadarajah* (n 25) [68].

had a ‘legitimate expectation of a substantive benefit’.³⁶ The position of the court shows the acceptance of the notion of substantive fairness as part of the framework of this ground of judicial review:

... it can now be said with confidence that the doctrine of legitimate expectation which originated as a public law innovation to ensure procedural fairness, such as to give the right to be consulted or be heard, has now evolved and expanded to protect benefits, advantages or interests of a substantive nature which an applicant can reasonably expect to be permitted to enjoy.³⁷

Similarly, substantive legitimate expectations have been protected by the two highest courts in the Commonwealth Caribbean: the Caribbean Court of Justice and the Privy Council.³⁸ The Caribbean Court of Justice in *AG v Joseph and Boyce* held that the appellants who had been sentenced to death had a substantive legitimate expectation that that they would be allowed to complete complaint proceedings before international human rights agencies prior to the execution of their death sentence.³⁹ Though the expectation was one of being allowed full access to a particular process, it was substantive in the sense that what was being challenged was not a denial of the right to be heard on the change of policy, but rather, the right to have the matter considered fully and to obtain a decision of an international rights body (a substantive right) before execution.

³⁶ (2005) 68 WIR 181 (HC, Barbados) [49].

³⁷ *ibid* [46].

³⁸ *AG v Joseph and Boyce* (2006) 69 WIR 104 (CCJ, Barbados); *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1 (JCPC, Trinidad and Tobago). The Caribbean Court of Justice is now the final appellate court for Barbados, Belize, and Guyana. The Privy Council remains the final appellate tribunal for the other Commonwealth Caribbean jurisdictions.

³⁹ *Joseph and Boyce* (n 38) [125]; Albert K. Fiadjoe, *Commonwealth Caribbean Public Law* (3rd edn, Routledge-Cavendish 2008) 218 et seq.

Moreover, courts have increasingly expressly invoked a substantive conception of the rule of law in judicial review. This is represented, for instance, in cases relating to the communication of legal decisions, rules, and guidelines. This application was adopted in the oft-cited decision of the House of Lords in *Anufrijeva*, in which it was held that the failure to communicate to the applicant a decision denying her continued income support constituted a violation of ‘the constitutional principle requiring the rule of law to be observed’.⁴⁰ The majority of the Bench justified their decision on the basis that the rule of law requires legality and accountability. Notably, though the Home Secretary’s decision accorded with the procedural requirements of the legislation, the Law Lords argued that to uphold the decision on this account would be ‘legalism and conceptualism run riot’.⁴¹

The House of Lords again called upon this application of the rule of law in *R (Purdy) v DPP*.⁴² It was held that the DPP had a duty to publish details of the factors he would take into consideration in deciding whether to prosecute for breach of the Suicide Act 1961 (UK). This publication was necessary to allow an individual to foresee the consequences of her actions and plan accordingly. Lord Hope cited a passage from a judgment of the ECtHR stating that:

In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the

⁴⁰ *R (Anufrijeva) v SSHD* [2003] UKHL 36, [2004] 1 AC 604 (HL) [28].

⁴¹ *ibid* [32] (Lord Steyn), with whom the majority of the Law Lords agreed. Jowell, ‘Underlying Values’ (n 17) 18-21.

⁴² *Regina (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2009] 3 WLR 403 (HL).

scope of any such discretion conferred on the competent authorities and the manner of its exercise.⁴³

This passage identifies the legalistic application of the rule of law as certainty but draws a clear and close connection between this application and ‘matters affecting fundamental rights’.

Principle of Legality

As a bridge between the development of heads of review and the references to the rule of law in interpreting constitutions and bills of rights, it is critical to draw attention to the important role of the principle of legality as a means of applying implied constitutional principles as a restraint on government. In constitutional and fundamental rights law in the Commonwealth, the rule of law has repeatedly been applied through the principle of legality. According to this principle, the Parliament is presumed not to legislate contrary to fundamental constitutional principles and fundamental rights and freedoms.⁴⁴ Well-known expressions of the principle of legality emerge from *ex p Pierson* and *Secretary of State for the Home Department, ex p Simms*.⁴⁵ In *Pierson* Lord Steyn articulated his view of the principle of legality as a technique of statutory interpretation:

it is to Sir Rupert Cross that I turn for the best modern explanation of "the spirit of legality", or what has been called the principle of legality. ... The passage appears in Cross, *Statutory Interpretation*, 3rd ed., at 165-166, ...:

‘Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to

⁴³ *ibid* [42].

⁴⁴ *Pierson* (n 31) 591 (Lord Steyn); *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131 (Lord Hoffmann).

⁴⁵ *Simms* (n 44).

act in accordance with well-recognised rules . . . Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. Examples are the principles that discretionary powers conferred in apparently absolute terms must be exercised reasonably, and that administrative tribunals and other such bodies must act in accordance with the principles of natural justice. One function of the word 'presumption' in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles. There is a 'presumption' that mens rea is required in the case of statutory crimes, and a 'presumption' that statutory powers must be exercised reasonably. These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'. ... These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text. . . .'

Lord Steyn then proceeded to establish a link between this principle and the rule of law, asserting that '[u]nless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.'⁴⁶

This vehicle for infusing legislation with the rule of law principle has been employed by judges from other superior courts in the Commonwealth, including the Australian High Court. The principle of legality was utilised in *Plaintiff S157/2002*⁴⁷ and in *Al-Kateb v Goodwin*.⁴⁸ The interpretative power of the rule of law was marshalled in *Al-Kateb v Goodwin* as underlying the principle of legality. In *Al-Kateb* the High Court was faced with a challenge to the detention of a stateless person in an immigration detention centre, in circumstances where his removal from the centre was not reasonably

⁴⁶ *Pierson* (n 31) 591.

⁴⁷ *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 (HC, Australia).

⁴⁸ *Al-Kateb v Goodwin* (2004) 219 CLR 562 (HC, Australia).

practicable in the foreseeable future. This detention was made under the Migration Act 1958 (Cth) and one question argued before the court was whether, on a proper construction of the relevant sections of the Migration Act 1958, the statute authorised or required the detention of an unlawful non-citizen even if his removal from Australia was not reasonably practicable in the foreseeable future. The majority of the court held that the statute did authorize the indefinite detention, while two dissenting judges (Justices Gleeson and Kirby) invoked the rule of law in justifying a more narrow interpretation of the statute. The principle of legality was used in support of both the majority judgment and the position of the minority. Justice Gleeson explained the operation of the principle and its connection to the rule of law:

Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. That principle has been re-affirmed by this Court in recent cases. It is not new. In 1908, in this Court, O'Connor J referred to a passage from the fourth edition of Maxwell on Statutes which stated that '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness'.

A statement concerning the improbability that Parliament would abrogate fundamental rights by the use of general or ambiguous words is not a factual prediction, capable of being verified or falsified by a survey of public opinion. In a free society, under the rule of law, it is an expression of a legal value, respected by the courts, and acknowledged by the courts to be respected by Parliament.⁴⁹

⁴⁹

ibid [19]–[20].

For Justice Kirby, the principle of legality is a feature of constitutional and rights reasoning in the common law legal family:

judges of our tradition incline to treat unlimited executive detention as incompatible with contemporary notions of the rule of law. Hence, judges regard such unlimited detention with vigilance and suspicion. They do what they can within their constitutional functions to limit it and to subject it to express or implied restrictions defensive of individual liberty.⁵⁰

Justice Kirby's statement evokes the elements of tradition, history, and cross-national trends that are associated with reasoning by implied constitutional principles.⁵¹

The exact contours of the operation of the principle of legality as a route for applying the rule of law do, however, suffer from lack of clarity.⁵² Firstly, it is not clear what application of the rule of law will be chosen by judges, whether a substantive valorised application or application of a legalistic conception of the rule of law, for instance. Secondly, the principle of legality maintains that a statute which appears to abrogate fundamental rights must be subject to 'strict construction', the standard of construction not clearly defined. While the standard of construction is strict, it is likely that there are degrees of construction connected to the nature of the specific fundamental right or principle in question and the nature of the interference presented by the statute in question.⁵³ We see the differences in application of the principle where Hayne J, who was in the majority in *Al-Kateb*, also referred to the principle of legality as a tool of

⁵⁰ *ibid* [161].

⁵¹ Tracy Robinson, 'Gender, Nation and the Common Law Constitution' (2008) 28 OJLS 735; Mark Walters, 'The Common Law Constitution in Canada: The Return of Lex Non Scripta as Fundamental Law' (2001) 51 U. Toronto L.J. 91.

⁵² Hon J J Spigelman AC, 'Principle of Legality and the Clear Statement Principle' (2005) 79 ALJ 769.

⁵³ *ibid* 779-80.

construction of the statute, but took the position that the words of the statute were clear and did authorise the detention of *Al-Kateb*.⁵⁴ On the other hand, Chief Justice Gleeson, dissenting, applied the principle of legality with the conclusion that the words of the statute speaking to detention were not sufficiently clear to meet the standard of construction required by the principle of legality.⁵⁵ It is revealing that whole Gleeson CJ stated that the principle of legality meant that the intent to abrogate rights must be ‘clearly manifested by unambiguous language’, Hayne J referred to no such stringent requirement.⁵⁶ Overall, stating that ‘strict construction’ is required tells us something about the court’s approach to interpretation but it does not tell the full story.

III - Explicit References to the Rule of Law in Applying a Constitution or Bill Of Rights

Despite the introduction of written constitutions and/or bills of rights in the jurisdictions examined, the rule of law has remained a feature of the construction and implementation of the constitutions and bills of rights. The High Court in Australia ‘considers that the rule of law is a fundamental element of the Australian legal system’,⁵⁷ and fundamental rights provisions in Caribbean constitutions have been described as expressions of the rule of law.⁵⁸

⁵⁴ *Al-Kateb* (n 48) [241] (Hayne J).

⁵⁵ *ibid* [19]-[22] (Gleeson CJ).

⁵⁶ Spigelman (n 52) 781-82.

⁵⁷ Carroll (n 2) 88.

⁵⁸ Fiadjoe, *Public Law* (n 39); *Joseph and Boyce* (n 38).

The seminal case on the position of the rule of law in Australian jurisprudence is *Australian Communist Party v Commonwealth of Australia*,⁵⁹ in which the High Court of Australia was asked to determine the validity of the Communist Party Dissolution Act 1950 (Cth), which declared the Australian Communist Party an unlawful association, dissolved it, and granted the Governor General the power to dissolve organizations associated with the Australian Communist Party. The majority of the judges held that the statute was *ultra vires* the power of the Commonwealth Parliament and invalid. In arriving at this conclusion, Dixon J considered whether this Act fell within an incidental or implied power of Parliament to uphold and preserve the Commonwealth and its institutions from subversion. Dixon J concluded that it did not, finding that, as the Act offers no objective test for determining when the power to dissolve a body ought to be exercised, the Act purported to make Parliament a judge in its own cause with respect to the operation of this power. In an important passage, Dixon J called in aid the rule of law:

The power is ancillary or incidental to sustaining and carrying on government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating judicial power from other functions of government, others which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or person to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and maintenance of the Constitution and the laws of the Commonwealth. Indeed, upon the very matters upon which the question whether the bodies or persons have brought themselves within a possible exercise of the power depends, it may be said that the Act would have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power.⁶⁰

⁵⁹ (1951) 83 CLR 1 (HC, Australia).

⁶⁰ *ibid* 193.

This passage evokes not only the idea that government must act under and according to law, but also, the requirement that there must be an independent judge of the extent to which the government complies with the law (in this case, the Constitution). This invokes the application of the rule of law in the legalistic sense of a requirement of an independent judiciary adjudicating the law.

There is doubt whether a valorized substantive conception of the rule of law is accepted in Australian jurisprudence. Gummow and Hayne JJ in *Kartinyeri v Commonwealth of Australia* noted that the rule of law may be relevant in the court's interpretation of the Commonwealth Parliament's power under s 51(xxvi) of the Australian Constitution to make laws with respect to the 'people of any race'.⁶¹ This reasoning extends the concept of the rule of law invoked by Dixon J in the *Commonwealth Party* case. Dixon J's reference to the rule of law fit within a legalistic conception of the rule of law but that voiced by Gummow and Hayne JJ in *Kartinyeri* suggests that the rule of law principle was relevant in determining questions of legislatively imposed race-based disadvantages. This moves beyond the legalistic realm and into the realm of a valorized substantive conception. It must be acknowledged that while the Australian High Court has clearly indicated that the rule of law is a constitutional principle applicable by the Court and that these judgments indicate applications of the legalistic conception of the rule of law, which as noted above, is a substantive conception but does not go as far as the *valorized* substantive conception. Most of the bolder pronouncements of Australian judges, judgments which have opted

⁶¹ (1998) 195 CLR 337 (HC, Australia) [89].

for a valorized substantive application of the rule of law, have been issued in dissenting judgments.

The legalistic conception was also reflected in *Plaintiff S157/2002 v The Commonwealth of Australia*. At issue in *Plaintiff S157/2002* was the effectiveness of a privative clause included in the Migration Act 1958 (Cth). In determining the scope of this clause, the High Court considered it alongside s 75(v) of the Constitution of the Commonwealth of Australia 1900, which grants the High Court jurisdiction to hear matters in which an order of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. The Court held that s 75 (v) entrenches ‘a minimum provision of judicial review’ which constrains attempts to limit judicial review of federal administrative acts. In a joint judgment, a plurality of the judges argued that by entrenching a minimum level of judicial review, s 75(v) ‘constitutes a textual reinforcement’ of the rule of law.⁶² Gleeson CJ, in agreeing with the conclusion of the Court, also contended that the ‘assumption of the rule of law’ was part of the context in which the case should be decided. For Gleeson CJ, the application of the rule of law of law meant that privative clauses must be ‘construed “by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied”’.⁶³ Gleeson CJ thereby called upon the principle of legality as a means of applying the rule of law as against executive action and as against the legislature.

⁶² *Plaintiff S157* (n 47) [103]; Leighton McDonald, ‘The entrenched minimum provision of judicial review and the rule of law’ (2010) 12 PLR 14.

⁶³ *Plaintiff S157* (n 47) [32], citing *Public Service Association (SA) v Federated Clerks’ Union* (1991) 173 CLR 132 (HC, Australia) [160].

Thus, the judges of the High Court of Australia have repeatedly asserted that the rule of law is an ‘underlying assumption’ of the Constitution, and applied the principle in cases that call for determination of the impact of governmental action on individual rights. The pronouncements of the Court have been more opaque than those in the UK and the Commonwealth Caribbean, but the statements of the Australian judges do suggest that the Australian High Court judges envision a wider conception of the rule of law than the rule by law conception. Specifically, the rule of law is applied as a requirement for an independent judiciary and the exercise of supervisory jurisdiction by the courts over parliamentary and executive action. There is room for further development of the application of the principle by the High Court, a possibility recognized by Gummow and Hayne JJ, who, noting the Court’s reference to the rule of law as an assumption of the Constitution, stated that ‘the occasion has yet to arise for consideration of all that may follow from [it].’⁶⁴

The development of Caribbean fundamental rights law has also been aided by rule of law reasoning. The interpretation of the terms ‘protection of the law’ and ‘due process of law’, terms which are used in the fundamental rights chapters of Caribbean constitutions,⁶⁵ by the Privy Council evidences that court’s adoption of a substantive conception of the rule of law. The Privy Council has held that the term ‘protection of the law’, which is mentioned in the preamble to the Jamaican Bill of Rights, and the term ‘due process of law’, which appears in the Constitution of Trinidad and Tobago 1976,

⁶⁴ *Kartinyeri* (n 61) [381].

⁶⁵ See, eg, s 11, Constitution of Barbados 1966; s 4, Constitution of Trinidad and Tobago 1976.

bear the same meaning.⁶⁶ The Board has accorded an interpretation to these terms that seeks to further a substantive aim of justice. This began with *Thomas v Baptiste*, in which Lord Millett, delivering the judgement of the Board, held that

... 'due process of law' ... invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law ... The clause thus gives constitutional protection to the concept of procedural fairness.⁶⁷

Though Lord Millett says the clause gives constitutional protection to the concept of 'procedural fairness', it is of great import that he did not hold that the clause was *limited* to procedural fairness. Further, Lord Millett expressly invoked 'universally accepted standards of justice observed by civilised nations' as part of the content of due process of law.⁶⁸

This line of reasoning was furthered a year later in *Lewis*. In that case, the Privy Council found that the 'protection of the law' conferred in the preamble to the fundamental rights chapter of the Constitution of Jamaica 1962 was violated by the decision of the Government of Jamaica to execute the appellants before the determination of their petitions before an international human rights agency.⁶⁹ Lord Slynn of Hadley, delivering the majority judgment in *Lewis*, argued that:

In their Lordships' view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 to

⁶⁶ *Thomas v Baptiste* [2000] 2 AC 1 (PC, T & T) 21; *Lewis v AG of Jamaica* [2001] 2 AC 50 (PC, Jamaica) 85.

⁶⁷ *Thomas* (n 66) 22.

⁶⁸ *ibid.*

⁶⁹ *Lewis* (n 66).

complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of the execution until those reports had been received and considered.⁷⁰

Lord Hoffmann dissented, accusing the majority of failing to give a logical explanation for the use of due process to ‘convert the ... executive action [of ratifying a human rights treaty] into the gold of legislative power’.⁷¹ One explanation for the Privy Council’s decision was that it moved beyond a formal conception of the rule of law by finding that the rule of law principle demanded more than conformity with domestic provisions and incorporated an obligation to permit the operation of unincorporated human rights treaties. The decision that the protection of the law would be violated if the applicants were executed before a determination of their petitions to the international human rights bodies, achieved through the back door a partial incorporation of human rights standards that may be higher than those prescribed in the Constitution.

IV - The Curious Case of Canada: A Switch to a Formal Conception of the Rule of Law?

The Canadian Supreme Court had formerly interpreted the rule of law as a principle that incorporates ‘constitutional principles and values’.⁷² In the *Patriation*

⁷⁰ *ibid* [85].

⁷¹ *ibid* [88].

⁷² *Reference re Secession of Quebec* [1998] 2 SCR 217 (SC, Canada) [71]-[72] (the rule of law as a requirement that government action comply with the law, including the Constitution) See also *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (Provincial Judges Reference or Remuneration Reference)* [1997] 3 SCR 3 (SC, Canada) [10] (judicial independence is necessary for the maintenance of the rule of law); On the rule of law and the vagueness doctrine, see *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 (Manitoba Language Rights Reference or Reference re Manitoba Language Rights)* [1985] 1 SCR 721 (SC, Canada) 747-52, 749; *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 (SC, Canada) 643. On the rule of law as access to courts, see *BCGEU v*

Reference in which the Supreme Court considered the constitutional requirements for amendment of the Canadian Constitution, the Court stated that:

[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.⁷³

The Supreme Court went further in the *Secession Reference*. The details of this case are explored in more detail in subsequent chapters, but here it suffices to note that the Court observed that '[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs' and that '[i]t provides a shield for individuals from arbitrary state action.'⁷⁴

However, the Supreme Court has recently applied a thinner rule of law model, holding that the rule of law, insofar as it is binding against the legislature, is limited to a requirement that laws comply with legislated manner and form requirements. This new approach was revealed in *Imperial Tobacco*. The case arose out of the British Columbia Tobacco Damages and Health Care Costs Recovery Act 2000 (British Columbia). The Act was directed at the manufacturers of tobacco products; it entitled the government to make claims against the manufacturers to recover the cost of health care benefits caused or contributed to by tobacco related wrongs. The tobacco manufacturers challenged the statute, arguing inter alia, that the retroactivity of the statute and the fact that it targeted a

British Columbia (AG) [1988] 2 SCR 214 (SC, Canada) 230. See also *Roncarelli v Duplessis*, [1959] SCR 121 (SC, Canada) 142; Hogg and Zwibel, 'Rule of Law' (n 10).

⁷³ *Reference re Resolution to Amend the Constitution* [1981] 1 SCR 753 (SC, Canada) (*Patriation Reference*) 805-06.

⁷⁴ *Secession Reference* (n 72) [70].

specific group of companies offended against the rule of law. The Supreme Court rejected the manufacturers' argument, stating in relation to the rule of law that,

This Court has described the rule of law as embracing three principles. The first recognizes that 'the law is supreme over officials of the government as well as private individuals and thereby preclusive of the influence of arbitrary power': ... The second 'requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order': ... The third requires that 'the relationship between the state and the individual ... be regulated by law'...

So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because *none of the principles that the rule of law embraces speak directly to the terms of legislation.*⁷⁵

While there was formerly a complaint that the Court had not been explicit and clear about the tenets of the rule of law concept that it applied,⁷⁶ this judgment expressed, however briefly, the Court's rejection of a substantive doctrine. *Imperial Tobacco* reflects a rule of law doctrine that, unlike the court's earlier decisions, is positivistic, relying more strictly on the text.⁷⁷ The Supreme Court entered a caveat to this decision in subsequent case *Christie v British Columbia (Attorney General)* by clarifying that the *Imperial Tobacco* case did not close the door on other principles being incorporated into the rule of law.⁷⁸ So the law in Canada on this point is not yet settled.

⁷⁵ *Imperial Tobacco* (n 5) [58]-[59] (Emphasis added. Citations omitted).

⁷⁶ Tremblay, *Rule of Law* (n 16) 25-28.

⁷⁷ Mark Carter, 'The Rule of Law, Legal Rights in the Charter and the Supreme Court's New Positivism' (2007) 33 *Queen's LJ* 453, 465-70,472. See also *Nova Scotia Pharmaceutical Society* (n 72) 641; Tremblay, *Rule of Law* (n 16) 26-27.

⁷⁸ [2007] 1 SCR 873 (SC, Canada) [21]. See also *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350 (SC, Canada).

Despite the Supreme Court's direct engagement with the question of the acceptable applications of the rule of law in Canadian constitutional law in *Imperial Tobacco*, it is difficult to extrapolate concrete reasons for the change in the tide in Canada from the meagre judgments delivered in *Imperial Tobacco* and *Christie v British Columbia*.⁷⁹ That said, there can be three lines of treatment of *Imperial Tobacco*. The first is that the court abandoned a substantive conception of the rule of law in favour of a more formal, rule by law conception. Under this view, while there was formerly a complaint that the Court had not been explicit and clear about the tenets of the rule of law concept that it applied,⁸⁰ this judgment expressed, however briefly, the Court's rejection of a substantive doctrine. Thus, under this view, *Imperial Tobacco* reflects a rule of law doctrine that, unlike the court's earlier decisions, is positivistic and nationalistic.⁸¹ The second possible treatment of the judgment is that the Court was not primarily speaking to the content of the rule of law but to the scope of its normative force. This position would view the Court's judgment as a holding that to the extent that the rule of law contains substantive content, this is opposable against the legislature and judiciary, but cannot be used as an independent ground to defeat legislation. This is what was arguably conveyed by paragraph 60 of the judgment, in which Major J stated:

the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply

⁷⁹ The judgment in *Imperial Tobacco*, for instance, was only 78 paragraphs long. This was less than one half of the length of the judgment in the *Secession Reference* and less than one third of the length of the majority opinion in the *Remuneration Reference*.

⁸⁰ Tremblay, *Rule of Law* (n 16) 25-28.

⁸¹ See n 77 above.

with legislated requirements as to manner and form (i.e. the procedures by which legislation is to be enacted, amended and repealed).⁸²

The third approach to the case is that while the Supreme Court did appear to reject a substantive conception of the rule of law in that case, this is not the final word of the Canadian Supreme Court on the rule of law. Notably, the Court entered a caveat to the *Imperial Tobacco* decision in a 2007 judgment in *Christie v British Columbia* by clarifying that the *Imperial Tobacco* case did not close the door on other principles being incorporated into the rule of law.⁸³ So it is quite reasonable to take the position that the Court did adopt a rule by law conception in *Imperial Tobacco* but that the law in Canada on this point is not yet settled and that there still remains the possibility that the Court might adopt a more substantive conception in later cases. This third reading of the cases is supported if we take into account the possibility that the Court was influenced by reluctance to enhance corporate interests. In *Imperial Tobacco*, the parties who sought to rely on the rule of law were tobacco manufacturers who were attempting to limit their liability⁸⁴ and in *Christie* the Supreme Court noted that if the applicants' argument that the rule of law supported a general right to a lawyer were to succeed, this right would apply to cases where 'corporate rights and obligations' were at issue.⁸⁵ I do think it is convincing to argue that whichever interpretation is given to the court's decision, there is room for further movement by the Court and the statement in *Christie* that the door has not been closed to further rule of law principles, coming only two years subsequent to

⁸² *Imperial Tobacco* (n 5) [60].

⁸³ *Christie* (n 78) [21]. See also *Charkaoui* (n 78).

⁸⁴ See Carter, 'Rule of Law' (n 77) 470-71.

⁸⁵ *Christie* (n 78) [13] (emphasis added); *ibid* 479.

Imperial Tobacco, is an indication of the ongoing nature of this discourse within the Court.

Substantive Due Process

The Supreme Court of Canada has long held that its due process clause in s 7 of the Charter of Rights and Freedoms 1982, which confers ‘the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’, contains both procedural and substantive branches. This was reflected in the decision in *R v Morgentaler* that the abortion provisions of the Criminal Code violated a woman’s right to liberty.⁸⁶

Despite Canada’s interpretation of the equivalent of the due process clause as including liberty as autonomy, this should not be interpreted as acceptance of a substantive rule of law concept because it must be weighed against the Supreme Court’s express rejection of the substantive concept. The express references to the rule of law in Canada contradict any argument that the Canadian courts have adopted a substantive conception of the rule of law.

The discussion above reveals that in the jurisdictions reviewed, the dominant view emerging in the case law is to regard the rule of law ideal as one that has implications for the substance of the law through either a legalistic rule of law model or a valorized rule of law model. What is revealed is that the dominant discourse among legal theorists is

⁸⁶ [1988] 1 SCR 30 (SC, Canada) 166-72. See also *Godbout v Longueuil* [1997] 3 SCR 844 (SC, Canada) 893 and *Blencoe v British Columbia* [2000] 2 SCR 307 (SC, Canada) 343.

inconsistent with the dominant judicial interpretation of the principle in common law jurisdictions.

V - Conflicts within the Rule of Law: Equality as an Application of the Rule of Law

The overall trajectory of the application of the rule of law in the jurisdictions examined is towards adoption of a substantive conception of the rule of law (whether in its bolder valorized strain or in the legalistic sense). Yet, the recognition of this trajectory should not mask the uncertainties that persist with respect to the interaction of different, sometimes conflicting operations of the rule of law. Such uncertainties may, for example, be manifested in the existence of a conflict between the application of the rule of law as certainty of the law and the application of the rule of law as a requirement for equality. There may also be uncertainties in the delimitation of the boundaries of each application of the rule of law such as the exact content of the requirement of equality as an application of the rule of law. The application of the rule of law as a requirement of equality therefore provides fertile ground for highlighting some of these uncertainties. As such, this section briefly uses this particular application of the rule of law to show the variation that still exists in determining the content or boundaries of an application of the rule of law.

The jurisdictions that have adopted a substantive conception of the rule of law view equality as one of its constituent principles. This view is reflected in the UK decisions prior to and subsequent to the enactment of the HRA 1998 and in the former British colonies of the Commonwealth Caribbean. Lord Woolf CJ has even declared that the ‘right not to be discriminated against is one of the most significant requirements of

the protection provided by the rule of law'.⁸⁷ A similarly forceful argument has been made in the Caribbean by Fitzpatrick JA in the Guyanese case of *Yassin*, who stated that 'equality and arbitrariness are sworn enemies; one belongs to the Rule of Law in a republic, (while) the other, to the whim and caprice of an absolute monarch.'⁸⁸

However, on the question of the meaning of this notion of 'equality' that forms part of the rule of law, there are divergent responses. There is a cleavage between commentators who see the rule of law requirement of equality as being restricted to equal application of laws, and those that witness a wider role for the requirement, as one that mandates that laws be equal in substance. Jeffrey Jowell contends that there is a principle of equality that requires not only equal application and enforcement of laws, but also equal laws. Yet, he denies that the latter is part of the rule of law.⁸⁹ On the other hand, Trevor Allan contends that Dicey's account of the rule of law may be updated to allow for a defence of equality as rationality which is opposable against Parliament. Allan's 'substantive principle' of equality embodies equality by requiring that likes be treated alike in terms of some conception of the public good. It embraces rationality by requiring that all classifications (which depart from like treatment) 'be reasonably related to legitimate, defensible public purposes'.⁹⁰ Allan deduces that when the rule of law is expressed in these terms, it demands 'equal citizenship'. He also points to intimations of

⁸⁷ *A v Secretary of State for the Home Department* [2004] QB 335 (CA) [7], reversed on unrelated grounds: [2005] 3 ALL ER 169 (HL).

⁸⁸ *Yassin v Attorney of Guyana* GY 1996 CA 3, 30 August 1996 (Fitzpatrick J.A.), quoting Bhagwati J. in *Gandhi v Union of India A.I.R.* [1978] SC 597 (SC, India).

⁸⁹ Jeffrey Jowell, 'Is Equality a Constitutional Principle' (1994) 47 CLP 1.

⁹⁰ Allan, 'The Rule of Law as the Rule of Reason' (n 28) 231.

the equal citizenship principle which are evident in Dicey's second meaning of the rule of law, that is, that persons are equal before the law. Lord Bingham in 'The Rule of Law' also argues that one principle of the rule of law is the equal application of the laws, except where differentiation is objectively and reasonably justified.⁹¹ He maintains that one aspect of the rule of law is that the law must protect 'fundamental human rights' and non-discrimination is included in his list of fundamental rights.⁹²

In the jurisdictions under examination, there are some indications that the courts embrace equality as a component of the rule of law that affects the substance of laws, and not merely the application of laws. In this sense, the value of equality that emerges from the rule of law is substantive and not merely formal. This idea is particularly strong in the UK, but there is less evidence of its acceptance in the other Commonwealth jurisdictions. The idea that equality is an aspect of the rule of law which requires that laws be substantively equal was evident in the UK before the advent of the HRA 1998 in the dissent of Ward LJ in *Fitzpatrick v Sterling Housing Association*:

I am entitled to presume that Parliament always intends to conform to the rule of law as a constitutional principle and accordingly to respect the constitutional rights of the individual to enjoy equality under the law.⁹³

Ward LJ's sentiments are now reflected in the decision in the post-HRA decision in *Ghaidan v Godin-Mendoza*. Lord Nicholls, with whom two of their Lordships agreed,

⁹¹ T. H. Bingham, *The Rule of Law* (Allen Lane 2010) 55-59.

⁹² For a contrary view, see Jowell, 'Equality' (n 89), where he argues that there is a principle of equality that requires not only equal application of laws, but also equal laws, he denies that the latter is part of the rule of law.

⁹³ [1998] 2 WLR 225 (CA) 256. The decision of the majority of the Court of Appeal was reversed by the House of Lords though not for the reasons given in Ward LJ's dissent. The majority of the House of Lords found that the case was not concerned with equality or non-discrimination.

held that '[d]iscriminatory law undermines the rule of law because it is the antithesis of fairness.'⁹⁴ The Court applied this understanding of the rule of law in holding that the exclusion of gay partners from secure tenancies violated the right to privacy, in conjunction with the right to non-discrimination, under the ECHR.

Recalling that judicial review exposes the content of the rule of law because the rule of law is a principled justification for review of executive action, judicial review cases also help to illuminate whether the notion of equality that forms part of the rule of law is formal or substantive in nature. The idea that discriminatory law (law that is discriminatory in its content and not just its application) undermines the rule of law is reflected in judicial review cases where the Court has found discriminatory decisions *ultra vires*. Accordingly, in *R v Immigration Appeal Tribunal, ex p Begum*, the court held that an immigration rule was *ultra vires* because it effectively disqualified citizens of poorer countries while allowing dependants from wealthier countries to be considered on more sympathetic grounds.⁹⁵ Similarly, the common law principle of equality was held to invalidate a decision on grounds of *Wednesbury* unreasonableness in *R (Gurung) v Ministry of Defence*.⁹⁶ According to the Court, the constitutional principle of equality meant that '[e]xcept where compellingly justified, distinctions must never be made on the ground of race, colour, belief, gender or other irrational ground.'⁹⁷

⁹⁴ [2004] UKHL 30, [2004] AC 557 (HL) [9].

⁹⁵ [1986] Imm AR 385 (QBD); Jowell, 'Equality' (n 89) 13.

⁹⁶ [2002] EWHC 2463; *The Times*, 28 December 2002, QBD (Admin Ct) quoting a Lecture delivered by Lord Steyn, 18 September 2002, 18.

⁹⁷ *ibid.*

In Australia, the issue of whether discriminatory law violates the rule of law has been raised before the High Court. As stated above, in the *Kartinyeri* case, in which the Australian High Court considered the permissibility of race-based distinctions in legislation, Gummow and Hayne JJ noted that the rule of law may be relevant in determining the constitutionality of the impugned legislation.⁹⁸ However, this was the view of the minority of judges in *Kartinyeri*, as the other judges decided the case on different grounds. Further, the judgment of Gummow and Haynes JJ is unique among Australian judgments for its engagement with equality as a direct application of the rule of law.

This ‘lively question’ regarding the extent to which the rule of law principle encompasses equality is likely to remain the subject of debate for many years to come. As with other applications of the rule of law, the application of the rule of law as a requirement of respect for equality continues to be developed by the courts and its exact contours remain contested. Yet, as will be discussed in Chapter Eight, this fact does not negate the existence of the rule of law principle as a legal norm applicable by the courts.⁹⁹

Conclusion

After reviewing case law in the UK, Justin Leslie concluded that ‘it would appear that a substantive rule of law operates within the courts. This conception has at its core human rights considerations and forms the intellectual basis for decisions concerning

⁹⁸ *Kartinyeri* (n 61)

⁹⁹ See Jowell, ‘Rhetoric or Universal Principle’ (n 23) 5.

rights.’¹⁰⁰ Though Leslie made these comments in reference to the application of the rule of law in the UK courts, his observation is equally applicable to the Commonwealth Caribbean. Thus, Albert Fiadjoe, a leading Caribbean public law author, contends that:

In West Indian public law ... the rule of law has come to mean the *exercise of State power according to law* and the *subjugation of State power to the constitution*. The phrase ‘the rule of law’ is thus a useful compendium to define the bundle of citizens’ rights or legitimate expectations to hold the State accountable for its actions.¹⁰¹

It is true that for some of the judgments that refer to the rule of law in a substantive sense, there is no articulation of a ‘guiding theory’ behind the conception adopted by the court. For some judges, it must be noted, a more complete guiding theory is expressed in their extrajudicial writings, for instance, in speeches and articles of Lord Steyn and Sir John Laws.¹⁰² Nonetheless, the absence of a guiding theory expressed in some of the cases can be readily explained by noting the institutional goals of courts. One function of the court in a common law jurisdiction is to resolve the disputes that arise in the cases before it. In this sense, the courts operate in a more responsive manner than theorists do. It is not at all surprising that they do not launch into lingering theoretical debates about the nature of constitutionalism and the rule of law when resolving the dispute before them.

There is room for discussion about the exact boundaries of the substantive content of the rule of law as is revealed by the discussion of the application of the rule of law as equality. Yet, those questions are outside the bounds of this study. What this Chapter

¹⁰⁰ Leslie (n 2) 315.

¹⁰¹ Fiadjoe, *Public Law* (n 39) 129 (emphasis added).

¹⁰² Sir John Laws, ‘Law and Democracy’ [1995] PL 72; Lord Steyn, ‘Democracy, the Rule of Law and the Role of Judges’ (2006) EHRLR 243.

sought to demonstrate is that the case law in the common law jurisdictions examined runs from acceptance of a rule by law conception to acceptance of a substantive conception of the rule of law (whether in its legalistic sense or in the bolder valorized sense). Overall, the majority of jurisdictions in this study apply a substantive conception of the rule of law, though there remain areas of uncertainty regarding the precise contours of substantive applications of the rule of law principle.

CHAPTER FOUR – THE APPLICATION OF THE SEPARATION OF POWERS

Introduction

To hearken back to a theme with which we opened our examination of the implications of the rule of law and the separation of powers in fundamental rights adjudication, the separation of powers is one attempt by proponents of constitutionalism to provide a solution to the dilemma of the ‘frank acknowledgement of the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power’.¹

The quest to define the term and delimit its application has given rise to various conceptions of the doctrine. In light of the debate as to which is more appropriate, this chapter will examine the content of the ‘Westminster model’ of separation of powers and the extent to which that model has evolved, particularly with the advent of the Human Rights Act 1998 (UK) (HRA) and the Constitutional Reform Act 2005 (UK).² It will be shown that in the context of the Westminster system, or Westminster style systems,³ the term ‘separation of powers’ is often used as an equivalent to, or conduit for the assertion

¹ M. J. C. Vile, *Constitutionalism and the separation of powers* (2nd edn, Liberty Fund 1998) 2.

² See Vernon Bognador, *The New British Constitution* (Hart 2009) 287-89; AW Bradley and KD Ewing, *Constitutional and Administrative Law* (15th edn Longman, Harlow 2011) 86-88.

³ As stated in Chapter 1, the term ‘Westminster style’ is used as a reference to constitutional systems in which there is a representative democracy and an executive responsible to the legislature.

of, judicial independence. The chapter will also address the way in which this separation of powers model informs the court's perception of its role as a check on other organs of government and the importance of exercising judicial restraint in fundamental rights adjudication.⁴ It is suggested throughout this thesis that a significant theme that enhances our understanding of the role played by constitutional principles in rights adjudication is the institutional element of these principles. This institutional theme is brought to the fore when evaluating the application of the separation of powers.

Part I of the Chapter addresses the relevant theoretical context for a discussion of the separation of powers in the Westminster model of government. This includes analysis of the pure and partial conceptions of separation of powers, as well as the distinction between the formal and material theories. The remainder of the chapter focuses on the development of the separation of powers principle in the Westminster system through the perspective of judicial decisions. In this discussion, while there is some case law from the other common law jurisdictions, most of the material relied upon is UK-based. There are two reasons for this. First, there have been significant developments surrounding the separation of powers in the UK subsequent to the HRA 1998 and the CRA 2005 and this Chapter seeks to explore these developments. Second, analysis of narratives of the transplantation of the Westminster model -inclusive of the separation of powers- to other jurisdictions is appropriately addressed in Chapter 7, on the use of implied principles as gateways to comparative judicial analysis. Therefore, in Part II of this Chapter, there is analysis of the practical application of the separation of powers in courts. This leads to the discussion of the effect of separation of powers arguments on fundamental rights

⁴ See, eg, *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903 [14] (HL); Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' [2010] LQR 222.

cases in Part III. Part IV then discusses the extent of the impact of the HRA 1998 and the CRA 2005 on the separation of powers in the UK, particularly as revealed in case law.

I - The Relevant Theoretical Framework

Before delving fully into an exploration of the doctrine in the Westminster system, it would be useful to consider the broader theoretical framework developed around the separation of powers. The meaning of the term ‘separation of powers’ has long been disputed in academic discourse and the term has been described by Geoffrey Marshall as ‘one of the most confusing in the vocabulary of political and constitutional thought’.⁵ Locke and Montesquieu were the first theorists to articulate modern theories of separation of powers. Locke provided a normative justification for the separation of the powers of the state. In his view:

It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.⁶

Yet Locke’s proposal for the division of powers is not identical to the tripartite division of powers that is commonly equated with separation of powers theory today. He only called for a separation of legislative and executive powers, but did not develop judicial power as a distinct element. This was despite the fact that he recognized the need for the independence and impartiality of the judiciary.⁷ Montesquieu, on the other hand, articulated a stricter separation of powers, arguing that:

⁵ Geoffrey Marshall, *Constitutional Theory* (OUP 1971) 97.

⁶ John Locke, *Second Treatise of Civil Government*, Ch XII, [143], cited in Vile (n 1) 62.

⁷ Vile (n 1) 64-65.

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically. Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

All would be lost if the same body of principal men, either of nobles or of the people, exercised these three powers: that of making the laws, that of executing the public resolutions and that of judging the crimes of the disputes of individuals.⁸

The literature on the doctrine has blossomed and the theoretical framework reveals that the separation of powers doctrine can be described along several conceptual spectrums. Chief among the spectrums relevant to the Westminster context are the conceptualization of a pure separation of powers versus a partial separation of powers, and along another axis, the conceptualization of the separation of powers as either a formal or a material doctrine. It is along these axes that the theory on the separation of powers will be outlined in brief. It is evident that a more detailed exposition of the content of this doctrine could not be contained within the confines of this thesis. Accordingly, this part of the chapter will focus on addressing the content of the principle in the terms of these axes insofar as this may elevate our understanding of the operation of the principle in Westminster-style systems.

On the pure-partial axis, the pure conception seeks to articulate ideas regarding the structure of the institutions of the state as distinct and entirely separate from each other. The ‘pure doctrine’ may be perceived as, in one sense, antecedent to a more

⁸ Charles de Secondat, baron de Montesquieu, *The Spirit of Laws* (Anne M. Cohler, ed an tr , Cambridge UP 1989) 157.

practical ‘partial doctrine’ which takes account of competing political and legal theories and of the practical realities of the functioning of the state. The pure doctrine is described thus by Vile:

It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way, each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.’⁹

The pure doctrine has been labeled ‘stark’,¹⁰ ‘extreme’,¹¹ ‘absolutist’,¹² and impossible to achieve in practice.¹³ The impracticality of this model of separation has been acknowledged by the judiciary, the Canadian Supreme Court having observed that the Constitution of Canada ‘does not insist on a strict separation of powers’.¹⁴ It is plagued by conceptual and practical difficulties, one of which is that it makes no allowance for the possibility that some governmental functions might not fit neatly into one branch to the exclusion of others.¹⁵ It articulates a vision whereby there is a system of negative checks and balances applied to the agencies of government. By this it is meant

⁹ Vile (n 1) 14.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (OUP 2009) 19.

¹³ *ibid.* 20.

¹⁴ *Reference re Secession of Quebec* [1998] 2 SCR 217 (SC, Canada) [15]

¹⁵ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge UP 2011) 11.

that no further device needs to be implemented in order to contain agencies within their proper functions and to prevent them from encroaching on the functions of other agencies.¹⁶ Thus, the pure theory does not indicate, as a practical matter, how agencies are to be effectively restrained from appropriating the functions of other agencies. A response to this deficiency was to articulate a system of positive checks and balances and to develop a partial theory of the separation of powers.

The notion of checks and balances itself exposes a crucial fissure among separation of power theorists, which is the divide over whether the act of one branch restraining another advances, undermines, or is a justifiable departure from the separation of powers.¹⁷ The partial theory can be accounted for as an attempt to incorporate a checks and balances model or simply an acknowledgement that a pure separation is impractical.¹⁸

This takes us to another axis along which the separation of powers is examined is the distinction between material and formal theories. Whether the pure or the partial theory is adopted, there must be a mechanism for determining how to divide the functions of the state in order to allocate these functions to corresponding sets of state institutions. The material theory seeks to solve this problem by asserting an inherent difference between the nature of the legislative, judicial, and executive functions, so it seeks to

¹⁶ Vile (n 1) 12-13.

¹⁷ Geoffrey Marshall, *Constitutional Theory* (Clarendon Press 1980) 102-03. See also Paul R Verkuil, 'Separation of Powers, the Rule of Law and the Idea of Independence' (1989) 30 *Wm & Mary L Rev* 301, 310.

¹⁸ Richard White, 'Separation of powers and legislative supremacy' (2011) 127 *LQR* 456, 459.

define each function and then allocate them to distinct sets of institutions.¹⁹ Thus the legislative function is described as rule-making, the judicial function as rule-adjudication, and the executive function as rule-application. The problem with this categorization is that it is difficult, if not impossible, to identify *inherent* differences between judicial, executive, and legislative functions. Further, each organ of government engages in activities that encompass all three types of rule relationships.²⁰ For instance, the practice of rule-adjudicating often involves a degree of rule-making and rule-execution. Jennings criticizes this flaw in the material theory in the following terms:

It is quite impossible to draw a distinction between 'judicial' and 'administrative' functions in terms of the nature or substance of the functions actually exercised by the courts and the administrative authorities in this country. The most that can be said is that the courts are much more concerned with questions of law, and the administrative authorities with questions of discretion. Nor is it possible to draw a precise distinction between the functions of Parliament and of the administrative authorities, subject always to the rule that Parliament can by legislation do what it pleases, and that most of the powers of administrative authorities (like the powers of the courts) derive from legislation.²¹

The salience of this critique of the material theory does not mean that we cannot identify core or primary functions of government and assign such functions primarily to one set of institutions over others.²² It merely questions the means by which this theory seeks to accomplish the task of allocation.

The formal theory seeks to resolve the allocative task through a different route. It starts where the material theory ends; under the formal theory we would examine the

¹⁹ *ibid* 459.

²⁰ Vile (n 1) 319-20.

²¹ Ivor Jennings, *The Law and the Constitution* (University of London Press 1959) 294.

²² *ibid* 361.

allocation of state powers to institutional groups within the state and only consequent upon that examination would we derive and describe the functions. The formal theory therefore differs from the material theory in that it rejects the idea of an inherent distinction between legislative, executive, and judicial branches. It emphasizes an examination of the structural and methodological features of institutions of the state, rather than an attempt to find intrinsic characteristics and differences. It has the appeal of being a more practical approach and avoids the definitional issues that plague the material theory. Yet, there is a hole left in the theory in that while the theory has merit as a descriptive exercise, it appears not to provide a prescriptive standard.

Richard White has identified two ways in which formal theories seek to resolve this flaw. One is to rely on the notion of balance of power to do the prescriptive work. Under this model, once there is a distribution of power among state institutions to ensure that there is a power balance, there is no need to rely on and subscribe to distinctions between legislative, judicial, and executive functions. A second option is to rely on a normative justification for the allocation of powers, that justification being something other than the inherent nature of the power being exercised. For instance, it could be argued that if an elected assembly is accorded the power to make rules of general application, which may override those of a court, this is justified on the ground that the assembly is elected by popular vote and is an expression of the popular will. Similarly, it may be maintained that a particular decision-making power should be exercised by a judge because she is impartial, independent of partisan political dictates, and/or because

the decision-making procedure employed by the judge must generally be in public view.²³

Finally, it must be noted that the orthodox tripartite separation of powers theory has itself been challenged. Most recently, Carolan has laid out two main bases for attacking the traditional trinitarian theory, whichever conception of that traditional theory is accepted.²⁴ The first ground of criticism is that the traditional theory is of little prescriptive value since it fails to provide reliable guidance for institutional design and power allocation to the institutions of the state. This alleged indeterminacy is said to arise partly from the impossibility of defining concrete distinguishing characteristics of the three functions of the state.²⁵ Carolan also maintains that the indeterminacy is partly the result the indeterminacy of the objectives of the separation of powers. Theorists have proposed a range of goals as the foundational objectives of the separation of powers, goals which vary from the prevention of tyranny and the maintenance of liberty, to the maintenance of a balance of power between different interest groups and, further along the spectrum, to the enhancement of efficiency in the performance of the tasks of the

²³ Jennings, *The Law and the Constitution* (n 21) 281. The distinction between material and formal theories in the UK must be distinguished from the formal-functional divide in the US discourse. Under the functionalist conception, disputes regarding the division of governmental functions should be resolved, not by adherence to fixed rules, but rather, by reference to 'an evolving standard designed to advance the ultimate purposes of a system of separation of powers'. By contrast, the formalist conception demands a textual basis in the Constitution for any exercise of governmental authority. The formalist-functionalist debate has not penetrated the discourse and judicial practice in the UK to the extent that it has animated debate on the other side of the Atlantic so it is less useful to us in our attempt to analyse the Westminster model as developed by the courts. See Thomas W. Merrill, 'The Constitutional Principle of the Separation of Powers' (1991) 7 *Supreme Court Review* 225, esp 230-31.

²⁴ Carolan (n 12) 18.

²⁵ Carolan (n 12) 25-26.

state.²⁶ The debate over the objectives of the doctrine reflects the debate regarding the conceptions of the rule of law, as one's acceptance of certain objectives and the ordering of those objectives affect the extent to which the doctrine is found to address the content of legislation.²⁷ Second, it is argued that the traditional theory fails to reflect the reality of modern governmental structures. With particular reference to the UK, it does not fully account for and answer the complications that arise from the growth of administrative agencies in the 20th and 21st centuries. Despite these criticisms, the tripartite division continues to be orthodox, indeed almost ubiquitous among theorists.²⁸ More importantly, as is revealed in the case analysis that follows this discussion, in the second part of this chapter, this division continues to be dominant in the courts' articulation of the separation of powers principle in constitutional and rights law. This framing is so widely accepted within the judicial and wider legal fraternity that Lord Hoffmann, one of the celebrated judges of the last century, has remarked that '[as] everyone knows, the separation of powers means that division of the executive, legislative and judicial departments of government which Montesquieu admired in the eighteenth century British constitution and which he thought to be the foundation of English liberty.'²⁹

There are thus three main ideas that emerge as points of commonality among the various theories of separation of powers. These are, first, the separation of functions of the state into usually three powers; second, the division of the institutions of the state into

²⁶ Carolan (n 12) 27-28.

²⁷ Carolan (n 12) 28.

²⁸ Carolan (n 12) 21. See Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013).

²⁹ Lord Hoffmann, 'The COMBAR Lecture 2001: Separation of Powers' (2002) JR 137, 137.

groups, each performing one of the functions of the state (though there may be overlap); and, finally, some degree of separation of the personnel of the state according to their work for each group of institutions. It is often the final idea that gives rise to the most serious debate about the existence and importance of the separation of powers in the Westminster system, due to the significant overlap of personnel, particularly between the executive and legislative branches. With this theoretical background, the next part of this chapter considers the practical application of the separation of powers theory in the Westminster system. The perception and use of the separation of powers by judges enables us to examine the development of the separation of powers as a *legal* doctrine in the legal system. This is not an attempt to denude the separation of powers of its political elements or to assert that there can or should be an isolation of the legal and political aspects of the separation of powers theory. Rather, this focus on the legal elements of the theory is instrumental in identifying the understanding of the separation of powers as a legal principle and in highlighting the themes that emerge when that legal principle is applied in human rights adjudication.

II - Practical Application of the Separation of Powers Principle in Courts in the Westminster-style system

A gulf exists between the theoretical discourse on the separation of powers and its practical application in case law in that while the existence and importance of the principle has been challenged by some notable academics or even ignored by them, eminent judges have shown firm acceptance of the principle. Case law reflects an adoption of a partial model of the separation of powers in the UK, which reveals that the close relationship between legislative and executive bodies in the UK ought to be viewed

as an instance of the practical reflection of the partial separation of powers within the constitutional context of the UK.³⁰ This section shows that the judges tend to paint a picture of the separation of powers as one whereby each arm of government occupies its own sphere, but where they are ultimately interdependent. The interdependence is particularly apparent in the relationship between the executive and the Westminster Parliament. Part of the dynamic among the three bodies is the recognition that parliamentary supremacy means that while there is a symbiosis among the three branches, there is not equanimity: Parliament remains supreme in relation to the other two branches.

The idea of separate functions performed by the respective branches was explained by judges in the Court of Appeal and the House of Lords in *M v Secretary of State for the Home Office*. Lord Donaldson of Lynton M.R. in the Court of Appeal characterised the constitutional landscape in the following terms:

Our unwritten constitution rests upon a separation of powers. It also rests upon a mutual recognition of those powers. It is for Parliament to make new laws and to amend old laws, including the common law. It is for the courts to interpret and enforce the law. It is for the government to govern within the law. Each in its own sphere is supreme.³¹

Similarly, in the House of Lords, where the decision of the Court of Appeal was upheld subject to a variation of the Court of Appeal's order, Lord Templeman put the matter thus, 'My Lords, Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law.'³² Both of these statements are, respectfully, an

³⁰ Eric Barendt, 'Separation of powers and constitutional government' [1995] PL 599.

³¹ *M v Home Office* [1992] QB 270 (CA) 306.

³² *In Re M* [1994] 1 AC 377 (HL) 395.

oversimplification of the true position, as will be discussed below. However, they provide a useful outlay of the division as seen by the courts. In the same case Nolan LJ expressed similar thoughts with reference to the relationship between the courts and the executive, adopting the formulation of counsel for the applicant, Stephen Sedley QC:

The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.³³

In that case the judges made clear that while it was the province of the Home Department and the Home Secretary to determine immigration policy, it was the court's province to determine the lawful limits of that immigration policy and the executive must respect that determination and respect orders of the court which seek to enforce such determinations. M, an applicant for asylum had been deported while his application for judicial review of the decision refusing asylum was before the court. A judge on the High Court made an order for the return of the applicant to the jurisdiction. In compliance with the order, Home Office officials began making arrangements for M's return. However, the Secretary of State, having received legal advice that the judge's order was made without jurisdiction, cancelled the return arrangements. The Court of Appeal held that the Secretary of State was required to comply with an order of the court to secure M's return to the UK. Lord Steyn has described Nolan LJ's observation as evidence of 'the constitutional principle of the separation of powers in action.'³⁴

³³ *M v Home Office* (n 31) 314-15.

³⁴ Lord Steyn, 'Democracy through law' (2002) 6 EHRLR 723, 726.

It is trite that there is a far greater separation between the judiciary on the one hand and the other branches on the other in the Westminster system. Under the Westminster model, both in the UK and in the newer jurisdictions examined, emphasis is placed on the separation and independence of the judiciary from other branches of government. This truism is reflected in judgments from the Commonwealth Caribbean, Australia, Canada, and the UK. For instance, in a House of Lords judgment in *Anderson v SSHD*, it was stated:

The relationship between the legislature and the executive is close. On the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government.³⁵

Similar views have been expressed in Commonwealth Caribbean case law³⁶ and, in Australia, the High Court has repeatedly upheld statutes granting wide powers to the executive to make delegated legislation,³⁷ the High Court holding that ‘the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law.’³⁸ These cases represent the impact of the Westminster design of ‘responsible government’ on the application of the separation of powers.

The requirement of separation of the judiciary is often expressed in the cases as the requirement for ‘independence of the judiciary’. This terminology reflects the degree

³⁵ *R (Anderson) v SSHD* [2002] UKHL 46, [2003] 1 AC 837 (HL) [39] (Lord Steyn).

³⁶ *DPP of Jamaica v Mollison* (2003) 64 WIR 140 (JCPC, Jamaica) [13] (Lord Bingham).

³⁷ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (HC, Australia) 100-01; *Giris Pty Ltd v Commissioner of Taxation (Cth)* (1969) 119 CLR 365 (HC, Australia) 373.

³⁸ *Victorian Stevedoring* (n 37) 101 (Dixon J).

to which the judicial branch is subject to a greater degree of separation from the other branches than the executive and legislature are in relation to each other. There are various facets of the independence of the judiciary, which have been secured to some extent by an interlocking web of statute, convention, and case law. The security of tenure of judges has been enshrined in the Act of Settlement 1701 (UK) for more than three hundred years. Article 3, Clause 7 of the Act provided that ‘judges’ commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established but upon the address of both Houses of Parliament it may be lawful to remove them.’ According to this clause, judges were to hold tenure during good behaviour and could only be removed from office upon a vote by Parliament.

The emphasis on the independence of the judiciary as an application of the separation of powers helps to highlight an overlap between the rule of law principle and the separation of powers principle. The protection of judicial independence emerges as an application of both principles. This is seen in the theoretical literature, for instance, with wide acceptance by writers ranging from Raz to Dworkin to Jowell, of the presence of an independent judicial body as a core requirement of the rule of law, and with Masterman and Barendt maintaining that the separation and independence of the judiciary is a central component of the separation of powers.³⁹ The overlap is also evident in the case law as

³⁹ Joseph Raz, 'The Rule of Law and Its Virtue' (1977) 93 LQR 195; Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986); Barendt (n 30); Masterman (n 15).

judicial independence and the need for adjudication by an independent and impartial tribunal have been characterised as necessary elements of both principles.⁴⁰

Despite the emphasis on judicial independence, one can discern a separation of functions even as between the legislature and the executive. The existence of a separation of functions as between the executive and the legislature can be represented by the respect for limitations on legislative power granted to the executive. In the UK, the courts are limited to enforcing these limitations only against the executive where it is shown that a member of the executive exceeds the power granted to it by Parliament and seeks to usurp Parliamentary power.

The courts have noted these limitations in cases such as *SSHD v Pankina*, in which the Court of Appeal of England and Wales held that immigration requirements stipulating the minimum sum of money which should be held in an applicant's bank account at the time of application for leave to work in the UK, were rules having the substance and force of law. As such, the court held that under the Immigration Act 1971 (UK) and constitutional law regarding law making power, the rules should have been laid before Parliament.⁴¹ In giving the judgment of the Court, Sedley LJ argued:

the law... cannot simply abandon a constitutional principle which for centuries has stood as a pillar of the separation of powers in what is today a democracy under the rule of law. ... ministers are expected to do what is required of them: Parliament will expect the Home Secretary to lay before it any rules by which he or she proposes to manage immigration; the courts will expect such rules, like any other source of law, to be those and only those which have Parliament's approval;

⁴⁰ *Australian Communist Party v Commonwealth of Australia* (1951) 83 CLR 1 (HC, Australia) 193; *Hinds v R* [1977] AC 195 (JCPC, Jamaica) 213; *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 (HC, Australia) [32].

⁴¹ [2011] QB 376 [20]-[21], [33]-[37] (CA).

and appellate tribunals will expect to find in the rules the certainty which rules must have if they are to function as law.⁴²

The rights element in *Pankina* arose in that the court held that the Home Secretary was obliged to take into account the potential impact on the applicant's private and family life, as protected by Art 8 ECHR. This rights component may have impacted on the court's reasoning, particularly by encouraging the judges to examine the issue as a deep constitutional question, as Sedley LJ argued, and not merely as a question of ordinary statutory interpretation. There are common threads that run through *Pankina* and the *Bancoult* case, which dealt with the legality of prerogative legislation affecting inhabitants of the Chagos Islands.⁴³ In *Bancoult*, inhabitants of the Chagos Islands had been compulsorily removed from their homes pursuant to an Immigration Ordinance made in 1971, in order to facilitate the use of the main island as a US military base. On a judicial review application, this Ordinance was quashed in 2000. However, the government later decided that resettlement was not feasible and acted to restrict return to the Islands. To this end, Orders in Council were drafted by ministers without Parliamentary debate or approval and were then assented to as an exercise of the royal prerogative. On an application for judicial review of the Orders in Council, the issue was raised whether the Orders, as an exercise of legislative power, were amenable to judicial review. The House of Lords held that it was entitled to review the Orders in Council, drawing a distinction on democratic grounds between legislative power exercised by Parliament and legislative power exercised by the executive. Of course, *Bancoult* and

⁴² *ibid* [35].

⁴³ *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] 1 AC 453 (HL).

Pankina do demonstrate the significant law-making powers possessed by the executive and, therefore, the substantial functional overlap between the different branches of government. Yet, another common theme that appears in these opinions is the court's steps to restrain the legislative power of the executive where the measures sought to be implemented through that power have not been given the imprimatur of Parliament.⁴⁴ The *Bancoult* case again shows the interplay in the UK between the separation of powers, parliamentary supremacy and democratic ideals. It was argued on behalf of the government in *Bancoult* that 'within the traditional tripartite separation of powers' the Order was an expression of legislative sovereignty and did not involve an exercise of executive authority. This argument was rejected by the House of Lords. In expounding on the difference between legislative power exercised by the executive and that exercised by Parliament, Lord Hoffmann underscored the sovereignty of Parliament and the normative foundation of that sovereignty: representative democracy. In his words:

the fact that such Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone.⁴⁵

Therefore, the distinction between the character of legislative power and executive power was used to justify, and indeed explain the need for, judicial scrutiny of executive action. The ideas expressed by Lord Hoffmann in *Bancoult* mirror similar

⁴⁴ Masterman, *Separation of Powers* (n 15) 109-10.

⁴⁵ *Bancoult* (n 43) 35.

thoughts expressed in the earlier case *ex p Fire Brigades Union*.⁴⁶ The Criminal Justice Act 1988 (UK) enacted a scheme providing for compensation for the victims of violent crimes, providing that the enacted provisions were to come into force on a day appointed by the Secretary of State. Years later, the Secretary of State decided that the provisions would not be brought into force and he purported to establish a tariff scheme for compensating victims. The House of Lords held that the Secretary of State's order establishing a new tariff scheme was unlawful as it effectively frustrated the will of Parliament to establish a statutory scheme, as expressed in the statute. Lord Browne-Wilkinson asserted that there was a division of powers between Parliament and the executive, and that the supreme legislative authority of Parliament acted as a check on the prerogative power of the executive. As His Lordship put it, 'It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body.'⁴⁷ This is a clear expression of the impact of separation of powers and parliamentary supremacy, or the 'hierarchical separation of powers' as it is described by Masterman. The hierarchical relationship places Parliament in a superior position to both the executive and the judicial branches. With respect to the judiciary, the hierarchical relationship was put in these terms by Lord Hoffmann: 'In this open country, the relationship between the judiciary and the

⁴⁶ *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL).

⁴⁷ *ibid* 552 (Lord Browne-Wilkinson).

legislature is one of partnership, but with the judiciary acknowledging the legislature to be the senior partner.⁴⁸

As noted in Chapter 2, this hierarchical relationship is not duplicated throughout the other jurisdictions in this study. For instance, in the Commonwealth Caribbean where constitutional supremacy has replaced parliamentary supremacy, each branch of government has its own sphere and the court has jurisdiction to review and invalidate Acts of Parliament. This important distinction between the Westminster system and its progeny was not mentioned by Lord Diplock in his reference in *Hinds v DPP* to the separation of powers underlying all ‘Westminster model’ constitutions.⁴⁹ As stated in the introduction to this Chapter, there are important questions to explore with respect to the transplantation of the Westminster style system and the distinctions between the UK and the newly independent jurisdictions. These questions tap into the comparative methodology used by the judges and they are explored in greater detail in Chapter 7 on ‘Implied Principles as Gateways to Comparative Law’.

III - Effect of the Separation of Powers on Human Rights

While the doctrine of the separation of powers is directed at inter-institutional conduct, it has significant implications for intra-institutional behaviour and for the interaction between state institutions and citizens of the state. The use of separation of powers reasoning in fundamental rights adjudication is evidence of the latter two sets of implications.

⁴⁸ Lord Hoffmann, ‘Separation of Powers’ (n 29) 141.

⁴⁹ *Hinds* (n 40).

The separation of powers, with its articulation of a separate judicial power, proves useful to advocates of judicial protection of fundamental rights. The proposition is that there are process values possessed by courts which are not possessed by institutions in the other two branches of government, in particular the position of courts as impartial arenas for the resolution of disputes over rights and obligations. Supporting this argument, Barendt has argued that ‘decisions on personal rights and liberties are inherently suitable for judicial resolution, and so must be made by a court, while the distribution of other goods and benefits may be regarded as a matter for administrative decision.’⁵⁰ This view is supported by members of the judiciary such as Lord Hoffmann, who maintains that human rights questions ‘are quintessentially matters for judicial decision’.⁵¹ Of course, the contrary position has been maintained by other commentators, who contend that rights claims ought to be debated in the political sphere and therefore, are suited to determination by the legislative branch. This is due to their views on the substance of rights claims and on the process which is best suited for resolving them. This naturally leads to a difference of opinion regarding which institution is best suited for resolving such claims. The judicial uses of these competing views of the impact of the separation of powers doctrine in rights adjudication are explored in more detail below.

As a practical matter, the overall impact of the separation of powers on fundamental rights adjudication is perhaps most clearly witnessed in the area of criminal penalties. There are two categories of impact that are relevant in this discussion. In the first, the separation of powers is applied to derive a requirement that the determination of

⁵⁰ Barendt (n 30) 605.

⁵¹ Lord Hoffmann, ‘Separation of Powers’ (n 29) 139.

the length of a sentence is maintained within the judicial branch. A representative statement of this requirement was the following by Lord Diplock in *Hinds v DPP*:

In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power.⁵²

An element of this requirement is that individuals ought to receive the benefit of the institutional processes of the judicial branch of government. This is an understanding which is sometimes expressed implicitly, and sometimes explicitly, in the judgments. An explicit expression of this idea occurs in *Polyukhovich v Commonwealth of Australia*, in which the High Court was asked to rule upon the constitutionality of the retrospective operation of s 9 of the War Crimes Act 1945 (Cth), which made it an offence for an Australian citizen to have committed war crimes in Europe during World War II. In delivering his opinion, Deane J explained his view of the objective of the separation of the judicial power. It is worth quoting his explanation at length:

The main objective of the sometimes inconvenient separation of judicial from executive and legislative powers had long been recognized at the time of the federation. It is to ensure that "the life, liberty, and property of the subject [is not] in the hands of arbitrary judges, whose decisions [are] then regulated only by their own opinions, and not by any fundamental principles of law" (Blackstone, Commentaries, 17th ed. (1830), vol. I, p. 269; and see, to like effect, Story, Commentaries on the Constitution of the United States (1833), §1568). That objective will, of course, be achieved only by the Constitution's requirement that judicial power be vested exclusively in the courts which it designates if the judicial power so vested is exercised by those courts in accordance with the essential attributes of the curial process (cf. *Re Tracey*; *Ex parte Ryan*). Indeed, to construe Ch. III of the Constitution as being concerned only with labels and as requiring no more than that the repository of judicial power be called a court would be to convert it into a mockery, rather than a reflection, of the doctrine of separation of powers. Common sense and the provisions of Ch. III, based as they

⁵² *Hinds* (n 40) 225 (Lord Diplock).

are on the assumption of traditional judicial procedures, remedies and methodology (see below), compel the conclusion that, in insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch. III, the Constitution's intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that that notion essentially requires. Accordingly, the Parliament cannot, consistently with Ch. III of the Constitution, usurp the judicial power of the Commonwealth by itself purporting to exercise judicial power in the form of legislation.⁵³

Here we see the elements of the protection of individual interests through the process of the courts, a process which includes the application of 'fundamental principles of law', rather than personal opinions, in the determination of disputes. This is a purposive approach to determining the implications of the separation of powers principle. Using that reasoning, Deane J issued a strong dissent in *Polyukhovich v The Commonwealth*, finding, contra the majority, that the retrospective operation of s. 9 of the War Crimes Act 1945 constituted a usurpation by the legislature of the exercise of judicial power.⁵⁴

What is also explicit in other judgments is the description of sentencing as part of the nature of the 'judicial power' or 'judicial function'. Thus, in *Anderson v SSHD*, Lord Bingham held that a decision fixing the level of punishment is a judicial function, and should, accordingly be made by judges rather than by members of the executive branch.⁵⁵ It was therefore held in *Anderson* that the power of the Home Secretary to set tariffs for prisoners convicted of murder violated the right to fair trial under article 6 of the ECHR.

The second form of application of the separation of powers in the field of criminal penalties is as a requirement of due process of the law. The judgments of the High Court

⁵³ (1991) 172 CLR 501 (HC, Australia) 606-07 (Deane J) (citations omitted).

⁵⁴ *ibid* 613-14 (Deane J).

⁵⁵ *Anderson* (n 35) [30] – [31] (Lord Bingham).

of Australia are particularly illuminating on the anchoring of due process protections in the separation of powers principle. The flagship case on separation of powers in Australia was *New South Wales v Commonwealth* (*Wheat case*) in which the Court referred to ‘the fundamental principle of the separation of powers as marked out in the Australian Constitution’,⁵⁶ deriving support for this principle from the demarcation of functions in Chapters I, II, and III of the Australian Constitution. In that case Isaacs J. described the ‘essential feature’ of the court as its role as an ‘independent and impartial tribunal’.⁵⁷ These ideas were developed in the Australian High Court’s judgment in *Leeth v Commonwealth of Australia*, which is a helpful representation of the application of the separation of powers principle to provide protection for the individual in its interaction with the state.⁵⁸ The issue in the *Leeth* case was the constitutional validity of section 4(1) of the Commonwealth Prisoners Act 1967 (Cth). The section provided that, when sentencing federal offenders, judges must fix a minimum period during which the federal offender is not eligible to be released on parole, which complies with the non-parole period of the laws of the state or territory in which the offender is convicted. The section thereby sought to establish a single parole system in each state, so that there would be no difference in parole regimes between federal prisoners serving a sentence in a state or territory prison and state or territory prisoners serving a sentence in the same prison.⁵⁹ However, another result of the section would be variations in the non-parole periods of

⁵⁶ *New South Wales v Commonwealth of Australia* (*Wheat Case*) (1915) 20 CLR 54 (HC, Australia) 88.

⁵⁷ *ibid* 93.

⁵⁸ *Leeth v Commonwealth of Australia* (1992) 174 CLR 455 (HC, Australia).

⁵⁹ *ibid* 478 (Brennan J).

federal offenders depending on the state or territory in which they were convicted. Leeth was convicted in Queensland under the Customs Act 1901 (Cth) of the offence of importing cannabis in commercial quantities, and was sentenced to 25 years imprisonment. He was prescribed a non-parole period of twelve and a half years in accordance with section 4, and argued before the High Court that section 4 discriminated among federal offenders by exposing some to more punitive regimes than others. A majority of the High Court (Mason CJ, Brennan, Dawson, and McHugh JJ) held that section 4 was constitutionally valid, while Deane, Toohey and Gaudron JJ dissented. What is particularly interesting for the purposes of this Chapter is that a majority of the judges (Mason CJ, Dawson, McHugh, Deane, Toohey, and Gaudron JJ) found an implied protection of due process or natural justice in the Constitution, based on the separation of the judicial power from other powers of government.⁶⁰ Mason CJ and Dawson and McHugh JJ referred to the requirement to act consistently with ‘the rules of natural justice’ while Deane and Toohey JJ referred to the ‘duty to act judicially’. The latter judges expressed the connection between this requirement and the separation of judicial powers in the following way:

...the doctrine of legal equality is, to a significant extent, implicit in the Constitution’s separation of judicial power from legislative and executive powers and the vesting of judicial power in designated ‘courts’... Thus, in Ch. III’s exclusive vesting of the judicial power of the Commonwealth in the ‘courts’ which it designates, there is implicit a requirement that those ‘courts’ exhibit the essential attributes of a court and observe, in the exercise of that judicial power,

⁶⁰ *ibid* 470 (Mason CJ, Dawson, and McHugh JJ), 486-87 (Deane and Toohey JJ), 502 (Gaudron J). The location of due process or natural justice requirements in Ch III was reinforced more recently in *Totani v South Australia* (2010) 242 CLR 1 [69] (French CJ); *Wainohu v New South Wales* [2011] HCA 24 (HC, Australia) [58] (French CJ and Kiefel J).

the essential requirements of the curial process, including the obligation to act judicially.⁶¹

Three of the judges in the case (Deane, Toohey, and Gaudron JJ) found that there was a doctrine of legal equality which was a necessary implication from the Constitution and derived that requirement of equality before the law from the Constitution's separation of powers.⁶² In the view of Gaudron J., 'the concept of equal justice ... is fundamental to the judicial process' and '[i]t is an essential feature of the judicial power that it should be exercised in accordance with the judicial process.' Accordingly, a statutory direction 'which would require a power vested in a court to be exercised other than in accordance with that process is necessarily invalid.'⁶³

The requirement of equality before the law based on the separation of powers is in one sense quite complex, and yet, in a sense, a traditional idea. It is complex in that it embodies a right which is derived from a principle that appears, at a basic level, to be organizational and directed at the institutions of state, rather than citizens of state. Yet, this is similar to the ultimate effect of the first category addressed above, that is, that criminal penalties are to be determined by the judicial branch. Though this first requirement is one that, on the surface, protects the judicial sphere within the organization of institutional power in the state, as its application in the cases shows, it is a

⁶¹ *Leeth* (n 58) 487.

⁶² *ibid* 486-87 (Deane and Toohey JJ); 502 (Gaudron J). Brennan J based his implication on the expression in the preamble of the 'constitutional unity of the Australian people "in one indissoluble Federal Commonwealth": 475.

⁶³ *ibid* 502 (Gaudron J). There has not been universal acceptance of the equal justice requirement on the High Court. See, eg, *ibid* 467- 68; PH Lane, 'Constitutional Implications and a Bill of Rights' (2001) 75 ALJ 469, 470; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 Federal Law Review 205, 205-06.

requirement that ultimately protects an individual's right to have a criminal penalty determined by the judiciary. Thus, both the first and second requirements derive rights from an organizational principle. The equality before the law requirement is also traditional in the sense that writers as far back as Dicey maintained that equality before the law was an element of the common law constitution. In fact, the opinion delivered by Deane and Toohey JJ in *Leeth* quoted Dicey's description of equality before the law as a requirement that 'every man, whatever be his rank or condition, is subject to the ordinary law... and amenable to the jurisdiction of the ordinary tribunals'.⁶⁴ What is particularly interesting about the modern cases deriving equality before the law from constitutional principles is that the right is characterised as fundamental and in the jurisdictions with a written Constitution, this fundamentality carries with it the potential for the right to be applied against legislation and defeat inconsistent legislation. Thus, despite that the majority in the *Leeth* case held that section 4(1) was constitutional, three of the judges (Deane, Toohey and Gaudron JJ) articulated an account of equality before the law based on the separation of judicial power from the executive and legislative branches, that would permit invalidation of legislation. The three judges then concluded that the section did violate equality before the law and that the court could declare it invalid on that basis. Thus, while having a traditional foundation, the modern application provides a role for equality before the law that extends beyond Dicey's conception in the sense that it can be applied to invalidate legislation. This shows that the partial adoption of implied principles from traditional writings on the English Constitution might lead to applications of the

⁶⁴ Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn Macmillan 1959) 193, quoted in *Leeth* (n 58) 485 (Deane and Toohey JJ).

principle to achieve more rights-consistent results than would have originally been conceived in those traditional writings.

The Australian High Court has engaged in more detailed discussion of the connection between the separation of powers and due process, but such a connection has been recognized in the UK House of Lords and Supreme Court. We saw above that in Australia, judges have opined that one requirement resulting from the separation of powers and the need to fulfil the objectives of the separation of powers is the guarantee of due process. In the UK, the purposive relationship is reversed, with the House of Lords finding that ‘[o]ne of the purposes of article 6 [ECHR], in requiring that disputes over civil rights should be decided by or subject to the control of a judicial body, is to uphold the rule of law and the separation of powers’.⁶⁵ These comments were made in Lord Hoffmann’s judgment in *Begum v Tower Hamlets LBC*, with which the remaining Law Lords on the Bench agreed.⁶⁶ The Tower Hamlets LBC had determined that Begum was homeless and that it had a duty to provide accommodation for her. The accommodation that was offered was rejected by Begum and it was determined by an internal review that the accommodation offered her was suitable and it was reasonable for her to accept it. Begum, however, contended that this review ought to have been conducted by an independent and impartial tribunal. The County Court had held that the failure of the local authority to refer the matter to an independent and impartial tribunal constituted a violation of art 6 ECHR. Before the House of Lords, the main issue was, as the internal

⁶⁵ *Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430 (HL) [27] (Lord Hoffmann), citing *Golder v United Kingdom* (1975) 1 EHRR 524.

⁶⁶ *Begum* (n 65) [1], [73], [107], [108].

review officer was not an independent and impartial tribunal, whether the County Court's jurisdiction on appeal satisfied the requirements of Art 6. The Law Lords held, unanimously, that the County Court's jurisdiction did satisfy Art 6 requirements. It was in arriving at this conclusion that the House of Lords engaged in a purposive interpretation of Art 6. This reflects that a recurring theme and practice across the two applications of the separation of powers principles briefly addressed here is a purposive approach to the separation of powers and to rights interpretation.⁶⁷ That is, the interpretation is informed by the interpreters' assessment of the objective of the norm in question, whether the separation of powers principle or fundamental rights norms. Lord Hoffmann's purposive analysis mirrors his views on Art 6 as expressed in *Matthews v Ministry of Defence*, which also concerned the scope of art 6, but on the very different issue of the entitlement of servicemen to institute an action for damages in tort against the Crown. Lord Hoffmann's view on the purpose of the natural justice protections in Art 6 has been endorsed in subsequent case law.⁶⁸

The requirements derived from the separation of powers with respect to the allocation of the task of fixing criminal penalties to judges and the requirements that the judicial task be carried out with respect for due process are consistent with Masterman's views on the operation of the separation of powers in the UK. Masterman argues that the application of the separation of powers in the UK requires judicial independence and that

⁶⁷ FAR Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (OUP 2009) 37-40. Bennion argues that in the common law world purposive construction of statutes is now accepted and expected, in preference to a purely literal approach. See Peter Gerangelos, *The separation of powers and legislative interference in judicial process: constitutional principles and limitations* (Hart 2009) 29-37.

⁶⁸ *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 (HL) [35] (Lord Nicholls).

the right to a fair hearing before an independent and impartial tribunal is ‘as much a part of’ the longstanding respect for independence of the judiciary ‘as it is of the rules of natural justice.’⁶⁹ The treatment of the relationship between these doctrines in Australia and the UK, jurisdictions which share a basis in the Westminster-style constitution, shows that due process rights can be implied from the separation of powers and, vice versa, that where due process rights are recognized in rights legislation, part of the objective of those rights is to uphold the separation of powers.

Deference and Judicial Restraint

The flexibility allowed by reasoning from the separation of powers is on display in the role that the principle plays in guiding the level of deference shown by judges in constitutional and fundamental rights cases. In this thesis, the term deference is used to describe the practice of judges ascribing varying degrees of respect to the judgement of the other branches of government, on the basis of institutional capacity or legitimacy.⁷⁰ We can discern two strains of reasoning in the impact of the separation of powers principle on the extent of judicial intervention in rights cases: a traditional restraint oriented understanding of the separation of powers and a more interventionist strain of reasoning. The traditional notion is that the institutional position of the judiciary demands judicial restraint in the review of tasks performed by the other branches of government.

⁶⁹ Roger Masterman, ‘Determinative in the abstract? Article 6(1) and the separation of powers’ [2005] EHRLR 628, 631.

⁷⁰ See Aileen Kavanagh, *Constitutional review under the UK Human Rights Act* (Cambridge UP 2009) 169; Jeffrey Jowell, ‘Judicial Deference: Servility, Civility or Institutional Capacity?’ [2003] PL 592.

This traditional view was expressed by Lord Diplock in *Duport Steels v Sirs*, in a passage which it is useful to quote at length:

My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral.⁷¹

Similarly, it was maintained by Lord Scarman, in the same case, that

in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes, and un-makes, the law: the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires... Great judges are in their different ways judicial activists. But the constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk.⁷²

These traditional sentiments were echoed by Lord Hoffmann extrajudicially in a lecture delivered in 2001, in which he argued that the judicial branch must show restraint as '[n]othing would be more destructive of its authority than a perception that it was making decisions which were properly the territory of the elected branches of government.'⁷³ Reasoning along these lines was also evident in the judgment of the High Court of Australia in *Al-Kateb v Goodwin*, in which the court was petitioned for a ruling

⁷¹ [1980] 1 All ER 529 (HL) 540.

⁷² *ibid* 168-69.

⁷³ Lord Hoffmann, 'Separation of Powers' (29) 139; Carolan (n 12) 30.

that the state's detention of a stateless person under the Migration Act 1958 (Cth, Australia) was unlawful. In concluding that the detention was lawful and that the detention of non-citizens by the Executive did not intrude upon the power allocated to the judiciary in Ch III of the Constitution of the Commonwealth of Australia, McHugh J issued the following comment on the limits of the court's powers:

It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution. The doctrine of separation of powers does more than prohibit the Parliament and the Executive from exercising the judicial power of the Commonwealth. It prohibits the Ch III courts from amending the Constitution under the guise of interpretation.⁷⁴

That traditional view is still sometimes reflected in fundamental rights cases but in jurisdictions where a fundamental rights instrument has been enacted which places the duty on the courts to interpret acts of public authorities in accordance with the rights therein declared, or to invalidate acts that do not comply with the rights instrument, the traditional view must contend with an altered constitutional context. In this context, continue to see incantations of institutional separation as a basis for judicial restraint but these arguments have in some cases been overshadowed by the invocation of the argument from democratic legitimacy to support judicial restraint, in addition to, or instead of, a separation of powers argument. In other notable fundamental rights cases, where judicial restraint was encouraged by a judge on the bench, the argument was fortified by the existence of other factors affecting the court's perception of its institutional legitimacy in relation to the question at hand, including the argument from democratic legitimacy or situational arguments specific to the court in question. Thus, in

⁷⁴ *Al-Kateb v Goodwin* (2004) 219 CLR 562 (HC, Australia) [74] (McHugh J.)

these jurisdictions, the separation of powers argument does not stand on its own. One such case was *Grape Bay Ltd v Bermuda (Attorney General)*. In delivering the judgment, the Privy Council explained that:

Their Lordships would accept that Bermudians are in the best position to know what the public interest of Bermuda requires. But the Constitution lays down a separation of powers between the executive, legislature and judiciary. On a matter such as the desirability or otherwise of franchise restaurants, which is a pure question of policy, raising no issue of human rights or fundamental principle, the decision making power has been entrusted to those Bermudians who constitute the legislative branch of government and not to the judges.⁷⁵

The *Grape Bay* case arose when an American restaurant franchise entered into agreements with the intention of opening branches of its franchise in Bermuda. Grape Bay Ltd was making arrangements to operate the restaurants on behalf of the American company. However, the legislature, having decided that it was undesirable to give free rein to overseas restaurants, passed legislation barring the operation of such restaurants in the future, except for such restaurants that were already in operation. The applicant company alleged a breach of its right not to be deprived of property without compensation. On appeal to the Judicial Committee of the Privy Council, it was held, inter alia, that the facts of the case did not give rise to a deprivation of property and that a wide margin of appreciation should be afforded the legislature in this case where the legislature was making a determination as to whether the public interest would be harmed by the operation of further franchise restaurants.

Similarly, in the rights context, when institutional arguments are made, arguments from democratic legitimacy often supply the basis for the restraint impulse or support the separation of powers argument being made. Viewed in this light, it is not the separation

⁷⁵ [2000] 1 WLR 574 (JCPC, Bermuda) 585 (Lord Hoffmann).

of powers principle on its own that is said to justify restraint, but rather the democratic underpinning of the legislative act in question. This was how the argument from judicial restraint was framed in cases such as *Lichniak*.⁷⁶ In considering whether the mandatory life imprisonment required by s 1 of the Murder (Abolition of Death Penalty) Act 1965 interfered with the appellants' ECHR rights, Lord Bingham took into account the view that 'the fact that section 1(1) represents the settled will of a democratic assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled'.⁷⁷ His Lordship made this point again in *R (Countryside Alliance) v Attorney General* in determining the consistency of legislation prescribing fox-hunting with the ECHR:

After intense debate a majority of the country's democratically elected representatives decided that there was a pressing need for the ban. It is of course true that the existence of duly enacted legislation does not conclude the issue... The degree of respect to be shown to the considered judgments of a democratic assembly will vary according to the subject matter and the circumstances.⁷⁸

When the institutional relationship is described in such terms, it is based on a view not merely of the imperative for divided governmental functions, but also, of the hierarchical ordering of the output of these institutions. The emphasis on democratic legitimacy in addition to separation of powers recognises that the human rights texts in these jurisdictions have altered the calculus of the division of functions such that the law-making power of the court is strengthened,⁷⁹ the ability of the court to make general laws

⁷⁶ *Lichniak* (n 4) [14] (Lord Bingham).

⁷⁷ *ibid.*

⁷⁸ *R (Countryside Alliance and others) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719 (HL) [45]; Kavanagh, *Constitutional Review under the UK HRA* (n 70) 192.

⁷⁹ Aileen Kavanagh, 'The elusive divide between interpretation and legislation under the Human Rights Act 1998' (2004) 24 OJLS 259.

on sensitive issues of policy affecting the populace being increased. In this setting, the traditional appeal to the division between the branches as a demand for judicial restraint is less compelling. In a constitutional setting in which there is a Bill of Rights, the separation of powers is also often used to support a more activist use of the judicial power. This ‘interventionist’ impact of the separation of powers is explored in the following section on the post-HRA use of the separation of powers principle.

IV - The Separation of Powers in UK Courts post- HRA

Commentators have discerned two effects of the HRA 1998 and the CRA 2005 on the separation of powers doctrine in the UK. The first is that the doctrine has evolved to require sharper distinctions among the legislative, executive, and judicial branches of government.⁸⁰ The second is that the doctrine has featured more significantly in superior court decisions.⁸¹

The first impact of the HRA on the implementation of the separation of powers in the UK is the sharpening of the distinctions between the personnel that fulfilled the respective functions of government. This was primarily accomplished with respect to the separation of the judicial branch from the executive and the judicial branch from the legislature. These changes were formally facilitated by the CRA 2005, but as shown below, the rights narrative that developed after the HRA 1998 partly informed the drafting of the CRA 2005. The sharpening of the distinctions between executive and judiciary were primarily apparent in the changes made to the position of the Lord

⁸⁰ Masterman, ‘Determinative in the abstract’ (n 69) 628-29.

⁸¹ *ibid* 628.

Chancellor. Prior to the Act, the Lord Chancellor was not only a member of Cabinet, but also the Head of the Judiciary, a judge, and Speaker of the House of Lords.⁸² In detailing the functions of the Lord Chancellor, the CRA 2005 preserves the Lord Chancellor's position as a Cabinet Minister (an executive post), but not the judicial functions. Pursuant to section 18 and Schedule 6 to the CRA 2005, the Lord Chancellor is no longer permitted to sit as a judge or to preside over legislative matters in the House of Lords. The enhanced distinctions between legislature and judiciary were also achieved by section 137(3) of the CRA 2005, which prevents members of the House of Lords from sitting or voting in the House or otherwise participating in the legislative business of the House while they hold a judicial office.

While the CRA 2005 was the immediate facilitator of this increased separation of personnel, these changes were precipitated by the HRA 1998. The very terms of the ECHR which are scheduled to the HRA 1998 called into question the institutional arrangements of the UK government, specifically the arrangements regarding the judiciary. Attention was drawn to art 6(1) ECHR, which states, in relevant part:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It was questioned whether the requirements of Art 6 (1) of the ECHR were flouted by the fact that the highest appellate tribunal in the state, the Judicial Committee of the House of Lords, was, as the name indicates, a committee of the Upper Chamber of Parliament, the House of Lords. The impact of the ECHR provisions on the terms of the CRA 2005 was apparent by the comments made in the lead up to the enactment of the

⁸² Jack Beatson, 'Reforming an Unwritten Constitution' (2010) 126 LQR 48, 54.

Constitutional Reform Act. Regarding Law Lords sitting and voting in the House of Lords, the Department of Constitutional Affairs commented:

The Human Rights Act, specifically in relation to Art.6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so. So the fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature.⁸³

The Department also stated that:

It can no longer be appropriate for a senior judge to sit in Cabinet or for a Government Minister to be our country's senior judge.⁸⁴

Additionally, by giving increased power to judges to review executive and legislative acts, and increasing their potential impact in politically sensitive cases, the HRA 1998 brought more media scrutiny to the judiciary.⁸⁵ This, therefore, heightened the importance of the structural design and personnel of the UK's highest appellate body.⁸⁶

The impact of the HRA on the separation of powers is also reflected in judicial decisions in which Art 6 played a role. The article has also been applied to the issue of separation of personnel. A particularly interesting example occurs in *Davidson v Scottish Ministers (No 2)*.⁸⁷ Davidson was an inmate in Barlinnie Prison in Glasgow. He complained that the prison conditions violated his rights guaranteed under Art 3 ECHR,

⁸³ Department of Constitutional Affairs, *Constitutional Reform: A New Supreme Court for the United Kingdom* (CP 11/03), July 2003 [3].

⁸⁴ Department of Constitutional Affairs, *Constitutional Reform: Reforming the Office of Lord Chancellor* (CP 13/03) September 2003, 5.

⁸⁵ Lord Mance, 'Constitutional reforms, the Supreme Court and the Law Lords' (2006) 25 CJQ 155, 164.

⁸⁶ *ibid.*

⁸⁷ [2004] UKHL 34; 2005 1 SC 7. See also *McGonnell v United Kingdom* (2000) 30 EHRR 289.

and requested a transfer. His application for judicial review was refused by the Lord Ordinary, on the ground, *inter alia*, that s 21 of the Crown Proceedings Act 1947 (UK) precluded the grant of any coercive order against the Scottish Ministers. The appellate court refused to grant an interim order of specific performance against the Scottish Ministers. Davidson then sought leave to appeal to the House of Lords. The application for leave was refused by an Extra Division of the Court of Session, a Bench that included Lord Hardie. Davidson subsequently learned that in his capacity as Lord Advocate, Lord Hardie had promoted the Scotland Act 1998 (UK) in the House of Lords and in the course of promoting the Bill, Lord Hardie had advised the House of Lords as to the effect of s 21 of the Crown Proceedings Act 1947 in the relation to the Scotland Act. Davidson applied to the Inner House to set aside the decision refusing permission to appeal, on the ground that Lord Hardie's participation in the appeal breached Art.6 of the Convention. Davidson argued that there was apparent bias and lack of impartiality on the grounds of Lord Hardie's legislative involvement as Lord Advocate, his advice to his ministerial colleagues on the issue of the scope of s 21 of the Crown Proceedings Acts and his resistance to an amendment to the provision which prevented the courts from making any order for specific performance against the Scottish Ministers. The Inner House granted the application and the Scottish Ministers appealed to the House of Lords. The Law Lords held, applying case law of the ECtHR on the requirements of Art 6, that there was a risk of apparent bias in the case.

Louis Blom-Cooper penned a blistering critique of the decision, arguing that the law as applied in *Davidson* failed to distinguish between preconceptions (which Blom-

Cooper maintains are natural in any human, and consequently, any judge) and bias.⁸⁸ Blom-Cooper also criticises the decision for failing to distinguish between the trial judge, who performs a fact-finding role, and the appellate judge, who reviews the law and who acts as one of (usually) three members of the appellate bench. His conclusion is that the law too easily leads to automatic disqualification. Despite the vigour of Blom-Cooper's commentary, it is respectfully submitted that his criticisms of the decision on the issue of bias can perhaps be viewed as missing a key aspect of the case. It is arguable that the decision, while framed and phrased in terms of judicial impartiality and bias, reflected a developing understanding of the demands of institutional and personnel division in the HRA era. The decision arguably represents a shift towards a stricter demand for separation of the personnel. This conclusion is supported by Lord Woolf's comments in the case that an issue of 'structural' impartiality was raised because the remarks were made by Lord Hardie in his capacity as a government minister. The position is further reinforced by Lord Cullen's statement that:

The fact that Lord Hardie expressed an opinion as to the effect of s 21 is not in itself decisive. What he said cannot be considered in isolation: he said it in the context of his role as a Government Minister in promoting the Bill, including its provision for the extension of the protection of s 21 to the Scottish Ministers. It follows that as a Government Minister, and presumably in the light of considerations of policy, he was promoting the protection of Scottish Ministers from judicial review. It was the exercising of that role, rather than simply his expression of an opinion about the effect of s 21, that persuades me that Lord Hardie was disqualified from sitting as a member of the Extra Division.⁸⁹

As Masterman argues, Lord Woolf's and Lord Cullen's judgments lend support to the position that the courts are requiring a stricter separation as between the judiciary and the

⁸⁸ Louis Blom-Cooper, 'Bias on Appeal' [2005] Public Law 225.

⁸⁹ Davidson (n 87) [81].

executive.⁹⁰ Two other judges (Lords Hope and Bingham) placed more emphasis not on the dual executive and judicial roles, but rather on the fact that the statements made by Lord Hardie in Parliament were on the same issue that arose in Davidson's case. Lord Bingham did state that his decision was not based on the 'theory of the separation of powers alone', but that is consistent with the ethos of this chapter, that the courts do not adopt and apply a purely *theoretical* concept of the separation of powers and that it is in the nuances of the application in the courts that much is revealed about the practical implications of the separation of powers as a legal principle. In fact, it is arguable that the totality of the judges' approach in this case is consistent with a purposive approach to the separation of powers principle, which considers the objectives of the doctrine and whether the functions of the relevant branch of government (in this instance, the court) were undermined in the case. In this case, the House of Lords decided that there was a risk of apparent bias arising from Lord Hardie's function as a judge considering the effect of legislation that he has drafted or promoted in the legislature.

A similar dynamic of art 6 resulting in stricter separation occurred in *R (Barclay) v Lord Chancellor*.⁹¹ Sark is a Crown dependency to which the ECHR and the First Protocol to the ECHR are applicable. The Acting Chief Judge of Sark was the Seneschal. The Seneschal was also President of Chief Pleas (which was the legislature and executive of Sark). In 2008 the Reform (Sark) Law 2008 received Royal Assent from Her Majesty in Council, on the advice of the Lord Chancellor and other officials with responsibility for advising on the matter. The Reform Law 2008 reformed constitutional arrangements

⁹⁰ Masterman, *Separation of Powers* (n 15) 235-36.

⁹¹ [2008] EWCA Civ 1319, [2010] 1 AC 464 (CA).

for Sark. Under the Law the Seneschal continued to sit as a member and President of the Chief Pleas as well as chief judge for Sark, though the Law removed his right to vote and speak in Chief Pleas. The claimants challenged the defendants' decision to advise the Queen to give Royal Assent to the Law, on several grounds, citing inconsistency with the ECHR and First Protocol. The claims were dismissed at first instance and on appeal to the Court of Appeal, one ground of appeal was that the functions and powers conferred on the Seneschal under the Reform Law are inconsistent with article 6 of the ECHR, in particular because under the Reform Law 2008 the Seneschal would continue to perform a dual role as President of Chief Pleas and senior judge on Sark. The Court of Appeal allowed the appeal on that ground, granting a declaration that the Seneschal's dual role violated art 6(1), but the Court refused to quash the defendants' decision.⁹² The claimants appealed to the Supreme Court but the Art 6(1) claim was not in issue there so it is the Court of Appeal judgment that merits our attention in this Chapter. The leading judgment in the Court of Appeal was delivered by Pill LJ, who explained that he perceived 'the combination in Sark of the judicial with the other functions of the Seneschal as inconsistent with the article 6 requirement to establish by law an independent and impartial tribunal' and that it is required that 'the principal judicial officer ... is not linked with the executive and legislature in the manner and to the extent that the Seneschal is.'⁹³ Pill LJ did explain that '[t]his is not slavish adherence to an *abstract* notion of separation of powers but a recognition that it follows from the Seneschal's functions in his non-judicial capacity in Chief Pleas, as already described, that his independence and

⁹² *ibid* [65]-[110].

⁹³ *ibid* [65].

impartiality are capable of appearing open to doubt.⁹⁴ Again, we see that the judges are not beholden to a theoretical concept of the separation of powers principle, but that the decisions applying Art 6 through the HRA 1998 have worked to emphasise the separation of the judicial branch.

An evolution in the jurisprudence on the separation of powers principle is also seen in ‘tariff’ cases. These cases emerged out of a series of challenges to the exercise of the power of the Home Secretary to fix a tariff for life sentence prisoners. In the tariff cases, we see judges ascribing greater force to the separation of powers principle, not in a way that justifies judicial restraint, but with a more defensive and in some cases, interventionist posture. In this way, the power of the Home Secretary to perform sentencing roles has been significantly limited by the courts. Most significant among these cases for the purposes of our discussion are *R v Secretary of State for the Home Department, ex parte Venables*,⁹⁵ decided prior to the entry into force of the HRA 1998, and *Anderson v SSHD*,⁹⁶ decided subsequent to the implementation of the HRA 1998. In both cases, the House of Lords deployed the separation of powers principle to articulate the position that sentencing is a judicial function. However, in *Anderson*, the principle was applied in interpreting Art 6 ECHR to result in a requirement of not only a functional distinction but also a personnel difference predicated on that function.

Venables and Thompson were convicted of a murder committed when they were both 10, and were sentenced to detention during Her Majesty's pleasure pursuant to

⁹⁴ *ibid* [67] (emphasis added).

⁹⁵ [1998] AC 407 (HL).

⁹⁶ *Anderson* (n 35).

section 53(1) of the Children and Young Persons Act 1933 (UK). The trial judge recommended to the Home Secretary that the minimum period of detention before consideration for release on licence (tariff) should be 8 years, while the Lord Chief Justice recommended ten years. The Secretary of State, in the exercise of his powers under the Criminal Justice Act 1991 (UK), set a tariff period of fifteen years. The Secretary of State indicated that he took into account petitions and correspondence from the public, and opinions supplied by a national newspaper, in support of a long or whole-life tariff. The appellants applied to the court to quash the Secretary of State's decisions. On appeal to the House of Lords, one issue was the nature of the tariff-fixing exercise and the material to be considered by the Secretary of State in setting the tariff. It was held that in fixing the tariff, the Secretary of State was performing a role analogous to that of a judge and that, in taking account of public protests, the Secretary of State had unlawfully exercised his discretion.⁹⁷

In *Anderson*, the House of Lords held that the power of the Home Secretary to set tariffs for prisoners convicted of murder could not persist under the HRA 1998. Anderson was convicted of two murders and sentenced to mandatory life imprisonment pursuant to section 1 of the Murder (Abolition of Death Penalty) Act 1965 (UK). The trial judge recommended that the appellant serve a minimum period of 15 years. The Secretary of State, pursuant to s 29 of the Crime (Sentences) Act 1997 (UK), received advice from the trial judge, the Lord Chief Justice, and departmental officials before deciding the appropriate tariff the prisoner had to serve before he could be released on licence. The Secretary of State then set a tariff of 20 years, a longer period than that recommended by

⁹⁷ *Venables* (n 94) 528.

the trial judge. Anderson challenged the Secretary of State's decision and raised the issue whether the Secretary of State's power to fix the tariff was inconsistent with art 6 ECHR. The Court of Appeal rejected Anderson's argument, finding that the jurisprudence of the ECtHR had recognised a distinction between mandatory and discretionary life sentences, and thus between the effects of tariffs in the context of art 6. Consequently, in the view of the Court of Appeal, the ECtHR jurisprudence did not require the Court to interfere with the Secretary of State's power. Subsequent to the Court of Appeal's decision, the ECtHR recognised that, for mandatory life sentences, the punitive element was generally reflected by the tariff, and that there was no material distinction between mandatory and discretionary life prisoners with respect to the nature of tariff fixing. On appeal to the House of Lords, the appellant Anderson was successful. It was held, referring to the recent ECtHR judgments, that art 6 demanded that fixing a tariff was a sentencing exercise which must be performed by the judicial arm of government. Lord Steyn spoke to the demands that art 6 places on the separation of powers in the UK, stating that, 'Article 6(1) requires effective separation of powers between the courts and the executive, and further requires that what can in shorthand be called judicial functions may only be exercised by the courts.'⁹⁸ Lord Steyn commented, quite appropriately, on 'the evolution and strengthening of the principle of separation of powers between the executive and judiciary which underlies article 6(1)' and the influence of this evolution and strengthening on the development of art 6 decisions relating to the sentencing exercise.⁹⁹

⁹⁸ *Anderson* (n 35) [40] (Lord Steyn).

⁹⁹ *ibid* [40]-[41].

Despite the sharpening of the distinctions between the branches that has resulted from the HRA 1998 and which therefore can be said to have led to observance of a stricter separation of powers doctrine, it is sometimes contended that the HRA 1998 has undermined the separation of powers by creating conditions for greater ‘politicisation’ of the judiciary.¹⁰⁰ It has been argued that the HRA 1998 increases the politicisation of the judiciary by giving judges substantial power to effect significant social and political change. This objection is also presented as a claim that the HRA 1998 invites judges to be legislators, and in so doing, undermines the separation between judges and the legislature. This increased politicisation is primarily said to flow from the exercise of the judicial duty arising from section 3(1) of the Act, which states:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Examples of the impact of section 3(1) can be seen in cases concerning equality such as *Ghaidan v Godin-Mendoza*,¹⁰¹ in which succession rights for same-sex couples was in issue, cases concerning national security such as *A v SSHD*¹⁰² in which the court ruled on central features of the Anti-Terrorism, Crime and Security Act 2001 (UK), and other cases concerning crime and punishment such as *Anderson v SSHD* in which, as discussed above, the power of the Secretary of State to set the tariff for life sentence

¹⁰⁰ Diana Woodhouse has stated that politicisation ‘tends to lack definition’: Diana Woodhouse, ‘The English judges, politics and the balance of power’ (2003) 22 MLR 920, 931.

¹⁰¹ [2004] UKHL 30, [2004] AC 557 (HL).

¹⁰² [2004] UKHL 56, [2005] 2 AC 68 (HL); Steve Foster, ‘Anti-terrorism, Human Rights and the Constitutional Role of the Courts’ (2005) 10 Cov LJ 63, 67-70.

prisoners was challenged.¹⁰³ There is a voluminous literature on the distinction between legislating and interpreting and on the extent to which judges act consistently with this distinction in applying the HRA 1998. Instead of rehashing those arguments, I will comment briefly on the extent to which judges have been criticised for engaging in socio-political engineering under the HRA 1998. I maintain here that, while there has been some politicisation of judges, this should not be exaggerated, and secondly, that despite greater politicisation of judges, the overall impact of the HRA has been to fortify the respect for the separation of powers in the UK.

Let us first consider the evidence of ‘politicisation’ of the court. Diana Woodhouse relies on evidence that the media has done more exploration into the values and backgrounds of judges involved in contentious cases. She gives the example of the media inquiry into the background and religious and moral values of the judges deciding the case *Re A (Children)*.¹⁰⁴ The case concerned the question whether the separation of Siamese twin sisters should be allowed where a decision not to separate them would condemn both to death whereas separation would allow one to live but result in the death of the other. In the course of the case, the court took into account the requirements of the right to life under the ECHR. Woodhouse saw the background scrutiny trend developing since the *Pinochet* case of 1999 and predicted that such scrutiny was ‘likely to become a feature of high profile human rights cases.’ Of course, this sort of scrutiny could have developed independently of the HRA 1998 and indeed, did begin to develop before the

¹⁰³ *Anderson* (n 35).

¹⁰⁴ [2000] EWCA Civ 254, [2000] 4 All ER 961 (CA); Diana Woodhouse, ‘Law and Politics: More Power to the Judges - and to the People?’ (2001) 54 Parliamentary Affairs 223, 228

implementation of the HRA 1998. We must not lose sight of the fact that judges were engaged in controversial fundamental rights review prior to the HRA 1998. Indeed, it has been noted that for centuries, the separation of powers ‘provided the means to enforce human rights through judicial review of executive action.’¹⁰⁵

Judges’ capacity for creating socio-political change has been lamented for years prior to the HRA 1998 by commentators such as JAG Griffith and Adam Tomkins.¹⁰⁶ Diana Woodhouse suggests that the HRA 1998 heightens these concerns by making this judicial capacity more overt. She maintains that the judicial impact in cases involving difficult moral or political decisions is more visible firstly, as judges must make a clear value judgment using rights language rather than the language of ordinary statutory interpretation, and, secondly, because, in her view, judges are now enabled, through the declaration of incompatibility, to effectively introduce legislation.¹⁰⁷ Her first proposition is convincing to some extent, with the qualification that judges in the UK have identified and protected common law ‘fundamental rights’, using the language of ‘fundamental rights’, or ‘constitutional rights’ for years before the enactment and implementation of the HRA 1998. Her latter proposition is much less convincing. The declaration of incompatibility is limited, as the name suggests, to a declaratory order:

4 (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

Further, the legal impact of the declaration is expressly limited by section 4 (6):

¹⁰⁵ Lord Hoffmann, ‘Separation of Powers’ (n 29) 140.

¹⁰⁶ J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1.

¹⁰⁷ Woodhouse, ‘Law and Politics’ (n 104) 234.

- (6) A declaration under this section (“a declaration of incompatibility”)—
- (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
 - (b) is not binding on the parties to the proceedings in which it is made.

Therefore, it has no coercive effect as a matter of law.¹⁰⁸ Perhaps as a matter of politics, the impact of the declaration may be to *prompt* legislative action on the part of *Parliament* but Woodhouse’s proposition that the section 4(2) power enables judges to effectively introduce legislation goes too far.

Perhaps another explanation for the increased scrutiny of judges along value-based and political lines lies in the simple fact that the extension of the court’s competence in general invites greater critical attention. This point has been made by the Hon Sir Gerard Brennan, former Chief Justice of Australia, who commented that:

[t]oday the community looks to the courts to adjudicate disputes in areas extending far beyond the areas of jurisdiction invoked 50 years ago. Reposing that function in the judiciary, the community examines judicial performance of the function more critically than hitherto.¹⁰⁹

Beyond the question of politicisation, there is also the question of whether the HRA 1998 has disturbed the hierarchical relationship between the UK Parliament and the courts. In reflecting on the changes made by the HRA to the separation of powers, we see a continuation of a recurring theme in British constitutional history: the confluence of constitutional law and political realities. As a matter of strict law, it is accurate to maintain that the hierarchical relationship between the courts and the legislature remains

¹⁰⁸ Timothy Macklem, ‘Entrenching Bills of Rights’, (2006) 26 OJLS 107, 109-111; Aileen Kavanagh, *Constitutional review under the UK HRA* (n 70) 277-78; cf Jonathan Morgan, ‘Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties’ in Tom Campbell and others (eds) *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 434-38.

¹⁰⁹ --- ‘Judicial Independence’, The Australian Judicial Conference, Australian National University, Canberra, 2 Nov 1996.

unchanged or barely affected. From the perspective of political reality, the legislature is significantly constrained by a declaration of a court of law that a legislative provision is incompatible with human rights. Two factors produce this result. The first is the moral power of ‘rights’ terminology¹¹⁰ and the second is the relative institutional legitimacy of the courts and Parliament on legal questions. On the institutional domains of the two branches, Tom Campbell observes that:

Interpretation is almost universally seen as the prerogative of the courts because it is part of adjudication, and that is taken to be their exclusive function. It is therefore not only politically difficult but also constitutionally questionable for parliaments to reject a court’s particular interpretations or even question a court’s interpretative methods.¹¹¹

In fact, it has been argued that this political reality may soon evolve into constitutional convention and, consequently, exist at the nexus between constitutional law and politics, probably drifting further and further into the legal realm. Masterman usefully sums up the position in the following terms:

... as Jeffrey Goldsworthy has written: ‘[t]here is clearly a difference between relinquishing or disabling one’s power to make certain kinds of decisions, and declining –even routinely– to exercise it.’ Yet it is undeniable that to entirely avoid the consequences of a declaration of incompatibility, then the elected branches would have to articulate carefully considered reasons for so doing, and would have to face the political consequences of rejecting a judicially declared assessment of what the law requires. On this reading, borne out by the experience of the HRA to date, the coercive powers of the courts over questions of rights are significant, with a judicial declaration of incompatibility difficult to overturn.¹¹²

However, until this crystallization of a constitutional convention occurs, I would submit that Alison Young’s assessment that the HRA 1998 has not subverted the supremacy of

¹¹⁰ Morgan, ‘Amateur Operatics’ (n 108).

¹¹¹ Tom Campbell, ‘Incorporation through interpretation’ in Campbell (n 108) 87.

¹¹² Masterman, *Separation of Powers* (n 15) 58-59.

Parliament over the courts is correct.¹¹³ Without legal entrenchment of the HRA and the power of the courts to invalidate legislation, the hierarchical position remains. Indeed, Masterman's description of the interaction between courts and Parliament subsequent to the HRA 1998 indicates that, as a question of law, Parliament's hierarchical position remains, even if as a matter of politics, Parliament would almost certainly act consistently with the court's declaration. Accordingly, while the HRA 1998 has resulted in more pronounced institutional definition and in increased power for the courts, the hierarchical dynamic outlined at the outset as part of the operation of the separation of powers in the UK remains. So at present, the legal position remains, as Christoph Moellers recently put it, that '[t]he Court cannot force Parliament to take action – its decisions remain formal suggestions.'¹¹⁴

Conclusion

In the era of rights instruments, the separation of powers principle has been a key argument in support of judicial efforts to scrutinize legislative and executive interference with individuals' fundamental rights. Further, as Tomkins and Masterman have noted, the separation of powers is increasingly cast in 'juridical' terms.¹¹⁵ It is no longer simply descriptive, but 'is increasingly used as a tool of judicial reasoning capable of lending

¹¹³ Allison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2008).

¹¹⁴ Möllers (n 28) 23. Subsequent chapters will discuss in greater detail suggestions by judges in *R (Jackson) v AG* [2005] UKHL 56, [2006] 1 AC 262 and *AXA General Insurance Ltd v The Scottish Ministers* [2011] UKSC 46, [2011] 3 WLR 871 (UKSC) that the common law may provide residual power to the courts to set aside parliamentary legislation.

¹¹⁵ Adam Tomkins, 'The Rule of Law in Blair's Britain' (2007) 27 *University of Queensland Law Journal* 255, 260-61; Masterman, *Separation of Powers* (n 15) 244.

coercive support' to the limits on governmental action.¹¹⁶ In the UK we also perceive a shift from a function-centred separation towards greater recognition of the need for separation of personnel, particularly as between the judiciary and the executive. This shift represents part of the impact of the HRA 1998 on the structural and institutional organization of state bodies in the UK. In this way, the HRA 1998 has sharpened the distinctions between state organs in the UK, and cases such as *Anderson* reveal that this is part of the evolution of the understanding and application of the separation of powers in the UK.

Overall, this chapter sought to demonstrate that the interaction of the separation of powers with the enforcement of fundamental rights standards by the courts is part of a complex dynamic interaction between activism and restraint, between the view of the court as the least dangerous branch and the perception of the court as the least democratic branch. The perception of the court as the least democratic branch was shown to be particularly significant in jurisdictions where parliamentary supremacy is still accepted as a mainstay of the constitution.

¹¹⁶ Masterman, *Separation of Powers* (n 15) 244.

**PART II – FUNCTIONS PLAYED BY THE IMPLIED
CONSTITUTIONAL PRINCIPLES OF THE RULE OF
LAW AND SEPARATION OF POWERS**

CHAPTER FIVE - IMPLIED PRINCIPLES AS INTERPRETATIVE AIDS

Introduction

It has been said that statutory construction represents the mechanism through which the fundamentality of constitutional norms is acknowledged.¹ The interpretative exercise provides an apparatus for revealing the constitutional principles of a state and the legal content of such principles. It is with this in mind that this chapter examines the reasons for the appeal to these principles among the judiciary and the functions played by the interpretative use of such principles. Part I of the chapter proposes explanations for judges' recourse to the rule of law and separation of powers as interpretative aids. It is argued that implied principles are employed as distancing devices in hard cases, which includes cases in which fundamental rights are implicated. Part II uses the debate over privative clauses to reveal the operation of the principles in the intercourse between the courts and Parliament, and the debate over the limits of the courts' intervention in issues regarding fundamental rights. The discourse relating to privative clauses exposes an institutional element of the use of the implied principles, in preserving the province of the judges to conduct judicial review and to adjudicate allegations of rights violations. This discussion also help to show the principles functioning as legal norms, with the principles being cited by judges, legal commentators, and parliamentarians as having specific legal effects.

¹ Christopher Forsyth and Mark Elliott, 'The Legitimacy of Judicial Review' [2003] PL 286.

I - Why Do Judges Have Recourse to the Rule of Law and the Separation of Powers?

It is particularly important to question the reasons for judges' recourse to invocations of implied principles because in some cases in which implied principles are used as interpretative aids, the court arrived at its holding based on a finding that the governmental act in question violated a provision of the relevant bill of rights or was *ultra vires* the powers conferred on the governmental authority in question by statute or another source. Accordingly, the decision did not rest on the inconsistency of the impugned governmental act with an implied principle. Nonetheless, one or more of the judges in the case proceeded to discuss the extent to which the impugned act measured up against the requirements of the rule of law or separation of powers. The laws were not invalidated *because* they violated the principle; the principle was an addition to the reasoning of the court.

Why did the judges think that this addition was desirable? One explanation may be that the views expressed regarding the principle in question reflect the judges' own philosophy or position regarding the content and application of the principle. Adam Tomkins has observed that a judge's legal philosophy and views on the role of state may have an impact on his or her judgments.² This appears to be one motivating factor behind Lord Steyn's reasoning in *Secretary of State for the Home Department, ex p Pierson*.³ In *Pierson*, the Secretary of State had fixed the minimum period (the tariff) to be served by a prisoner sentenced to life at twenty years. The tariff was based on an assessment that

² Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157, 161.

³ *R v Secretary of State for the Home Department, ex parte Pierson* [1997] UKHL 37, [1998] AC 539.

the murders of which he had been convicted constituted a premeditated double murder. It was later established that the murders were part of a single incident which was not premeditated, but the Secretary of State decided not to reduce the minimum sentence to reflect the new findings. The prisoner applied for judicial review of this decision. The case was appealed to the House of Lords where it was held that the retention of the twenty year minimum sentence constituted an unlawful increase of the minimum sentence. A plurality of the Law Lords expressed in their ratio that there was an effective increase in the minimum sentence, which was unlawful because the Secretary of State had no general power to increase a sentence that had already been fixed and communicated to the prisoner. Yet, Lord Steyn added further comments to the effect that the rule of law included standards of fairness and it must be presumed that Parliament intended not to legislate against such fundamental standards of fairness. One such standard was expressed as:

the fundamental principle that a sentence lawfully passed should not retrospectively be increased. Parliament must therefore be presumed to have enacted legislation wide enough to enable the Home Secretary to make decisions on punishment on the basis that he would observe the normal constraint governing that function.⁴

Since the statute which conferred on the Secretary of State the power to release prisoners did not expressly address the principle of non-retrospective penalties, the Secretary of State's powers were limited by this principle.

Lord Steyn's position on the content and application of the rule of law is reflected in his later judgments. In similar vein, Lord Steyn also delivered intriguing comments in *Jackson v AG* which reflect his view that the rule of law has substantive content and that

⁴ *ibid* 591.

it is a powerful normative force within the UK's constitutional structure. In response to a proposition by the Attorney General in that case that Parliament may have the legal capacity to alter the composition of the House of Lords, including abolishing that Chamber altogether, Lord Steyn remarked:

If the Attorney General is right the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. ... This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution ... the Human Rights Act 1998, created a new legal order. ... it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights ... 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...⁵

These statements are perhaps a reflection of Lord Steyn's theory on the content of the rule of law and the importance of its role in UK constitutional law. He has written extra-judicially that:

As the scope of judicial review came to be broadened, the rule of law has played an ever larger role. Initially, its role was largely restricted to ensuring procedural fairness. *Gradually, the rule of law acquired substantive content.*⁶

Accordingly, the reference to the rule of law in cases that can be, and were, decided on other grounds is perhaps a reflection of a judge's philosophy on the rule of law. This also serves to reinforce a point that is made repeatedly in this thesis, which is that in engaging in academic discourse on judicial decision-making, we ought to take judges' words seriously. As Michael Akehurst has remarked in his analysis of the *Factortame (No 2)* judgment, '[l]awyers in general, and judges in particular, are trained to use words

⁵ *R (Jackson) v AG* [2005] UKHL 56, [2006] 1 AC 262 (HL) [102]. The *Jackson* case is discussed in greater detail in Chapter 6 below.

⁶ Lord Steyn, 'Democracy, the rule of law and the role of judges' (2006) EHRLR 243, 248 (emphasis added).

carefully'.⁷ Thus, in analysing their judgments, we ought not to disregard their words as mere rhetoric without particularly strong justification.

Yet, the consistency of the references with the judge's own legal philosophy only tells part of the story. It does not explain why the judges seize upon the opportunity to expound their vision of the rule of law in particular cases. To help to complete the puzzle, we must not only take stock of the judge's personal legal philosophy, but also of the broader context of the laws in issue before the court and of factors related to the institutional role of the courts.

Hard Cases

An additional explanation for the attractiveness of references to the rule of law and the separation of powers as interpretative aids in these cases is that they appeal to judges in hard cases. As stated in Chapter 2 above, a hard case in the Dworkinian sense exists 'when competent lawyers are divided about which decision is required because the only pertinent statutes or precedents are ambiguous, or there is no doctrinal authority directly in point, or for some other reason the law is not ... settled.'⁸ Lord Steyn suggested this explanation in his judgment in *ex p Pierson*, where he opined:

The answer to the question before the House is important. It is a difficult question. Professor Neil MacCormick observed that: 'there is often a need in hard cases to dig down to the level of constitutional theory in order to solve questions about private rights and public powers': see 'Jurisprudence and the Constitution' (1983) 36 C.L.P. 13, 20. That is so in this case. The structure of the law matters. It is necessary to find the exact location of this case on the map of public law.⁹

⁷ Michael Akehurst, 'Parliamentary Sovereignty and the Supremacy of Community Law' (1989) 60 *British Yearbook of International Law* 351, 356.

⁸ Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 74.

⁹ *Pierson* (n 3) 584.

He then proceeded to outline what he described as the fundamental constitutional principles of the rule of law and of non-retrospectivity in sentencing. Interestingly, what Lord Steyn suggests in this excerpt from his judgment in *Pierson* is not only that principles may be useful in resolving questions in hard cases, but that the most useful principles may be those which are so fundamental that they reside at the level of constitutional theory. It is also significant that Lord Steyn, in citing Professor MacCormick, refers to the difficulty in solving ‘questions about private rights and public powers’. This suggests that there is something special about cases concerning allegations that a governmental act has interfered with individual rights. The *Pierson* case itself highlights some of the controversies surrounding fundamental rights cases. In *Pierson*, as explained above, the court had to address the extent of the sentencing powers of the Secretary of State in relation to mandatory life sentence prisoners, as well as the challenges to the legitimacy of judicial decision-making in rights cases, which was raised in argument by the Secretary of State.

The issues confronted in fundamental rights cases such as *Pierson* give rise to the courts’ appeal to ‘distancing devices’ such as constitutional principles including the rule of law, even where the case is ultimately resolved on other grounds. Thus, even where the implied constitutional principle does not form part of the ratio in a case, a judge’s reference to the principle in the reasoning may yet play a role in revealing institutional and doctrinal factors at play in the decision-making process. Joseph Raz has argued that where public officials, including judges, are faced with the task of choosing between incommensurable reasons, they must point to rational explanations for the decisions they

make. In short, they ‘should develop or adopt distancing devices – devices they can rely on to settle such issues in a way that is independent of the personal tastes of the judges’.¹⁰

References to implied principles do appear to function as a distancing device for judges in fundamental rights cases. An illustration of this dynamic is the *Secession Reference* case. The judgment in the *Secession Reference* case arose from a reference to the Supreme Court of Canada from the Governor-in-Council surrounding the issue of whether Quebec had the right to unilaterally secede from Canada. In addition to the debate over the substantive issue of whether there was a right to unilateral secession on the part of Quebec, it was also argued that it was not the proper role of the Court to deliver a judgment on this issue because to do so would amount to a usurpation of the democratic decision of the people of Quebec.¹¹ Though questions of justiciability are routinely raised when a court is asked to deliver a judgment on a reference or in its advisory jurisdiction, the challenge to the court’s jurisdiction in this case was particularly pointed in suggesting that a judgment of the court might usurp the democratic will of Quebecers. In crafting its opinion on this Reference, the court invoked the principles of federalism, the rule of law and constitutionalism, and the protection of minorities as constitutional principles that must be respected by the Court, the provinces, and the federal government. In its references to these principles, the Court spoke to their role and legal status, stating that ‘the principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of

¹⁰ Joseph Raz, ‘On the Authority and Interpretation of Constitutions’ in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (Cambridge UP 1998) 190.

¹¹ *Reference re Secession of Quebec* [1998] 2 SCR 217 (SC, Canada) [27].

our political institutions'.¹² This assistance provided by the principles was on display in the Court's reasoning. For instance, the Court considered the principles of constitutionalism and the rule of law in conjunction with each other. It was stated that 'the constitutionalism principle requires that all government action comply with the Constitution' and '[t]he rule of law principle requires that all government action must comply with the law, including the Constitution.'¹³ The Court took account of constitutional development in Canada, noting that 'with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy'.¹⁴ Accordingly, for the Court, obedience to the rule of law and the Constitution in this case meant that there must be recognition that the political representatives of a province have bound the province 'into the future', that the Constitution is entrenched and cannot be changed by a simple majority vote in the province. This reasoning contributed to the court's conclusion that secession of a province is, in legal terms, 'an amendment to the Constitution, which perforce requires negotiation.'¹⁵

Also instructive for these purposes is the *Remuneration Reference*, in which the Canadian Supreme Court was tasked with delivering an opinion on the constitutionality of pay reductions for provincial judges in certain provinces. The *Remuneration Reference* is a fundamental rights case in the sense used in this thesis; though the central issue

¹² *ibid.*

¹³ *ibid* [72].

¹⁴ *ibid.*

¹⁵ *ibid* [84].

concerned public sector pay reduction, the appellants argued that the pay reduction constituted a violation of section 11(d) of the Canadian Charter of Rights and Freedoms. Further, the judgment in the case is relevant to our discussion because the court ultimately held that there was a violation of section 11(d) of the Canadian Charter of Rights and Freedoms 1982 and utilized the separation of powers principle in interpreting that provision. The distancing device argument is particularly applicable to this case not only because a human rights provision was engaged, but also because, as Lamer CJ declared, ‘[t]he decision to reduce a government deficit ...is an inherently political decision.’¹⁶ Lamer CJ cast the case as one concerning judicial independence, which he described as a concept that was ‘inextricably bound up with the separation of powers’.¹⁷ For the Chief Justice, ‘the institutional independence of the judiciary reflects a deeper commitment to the separation of powers between and amongst the legislative, executive, and judicial organs of government’. It was held that the requirement of institutional financial security demands that a reduction in judges’ salaries should have resulted from the work of a body independent from the branches of government.¹⁸ Interestingly, a further reason that the distancing device argument is relevant to the invocation of judicial independence in this case is that the judgment resulted in the judiciary making a decision that sought to protect the financial interests of the judiciary itself. In such circumstances, it is arguable that the legitimacy of the court’s decision-making would be particularly open to criticism and the need for a distancing device more compelling.

¹⁶ *Reference re Remuneration of Judges of the Provincial Court (Remuneration Reference or Provincial Judges Reference)* [1985] 1 SCR 721 [142].

¹⁷ *ibid* [138]

¹⁸ *ibid* [147].

The challenge to the legitimacy of judicial decision-making in fundamental rights cases, which the concept of distancing devices seeks to meet, is also an institutional question. As such, a discussion of the courts' response to this challenge must incorporate institutional theory. Eoin Carolan uses institutional theory in his explanation of the way in which public adjudication functions as a medium for 'the presentation of conflicting normative views' in society.¹⁹ For Carolan, public adjudication is a means by which one of the state's institutions simultaneously maintains public faith in the central values of the constitution while persuading the public of its continued relevance as a response to changes in society. He argues that 'a developed notion of the process of public adjudication should acknowledge the way in which it allows the state to position any emerging social views within the parameters of the existing understanding of the constitution.'²⁰ This line of argumentation also reflects the interaction between the use of implied principles as interpretative aids and the notion of common law constitutionalism. It has been argued that common law adjudication plays a similar role of ensuring the responsiveness of the law to changing social mores while affirming the traditional. As Selznick puts it,

By inviting argument and making the law forever fluid and debatable, the common law tradition ensures that the law that is merges with the law that ought to be. ...Common law reason cannot escape social and political tradition: 'Custom must stand the test of reflection; reflection must yield to the verdict of experience.'²¹

¹⁹ Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (OUP 2009) 12.

²⁰ *ibid* 14.

²¹ Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press 1992) 450; Carolan (n 19) 14.

Carolan also correctly identifies that Dworkin's concept of 'interpretative integrity' is useful in unpacking the role of public adjudication in responding to emerging social views. Dworkin's concept is particularly helpful in considering the judges' response to hard cases in the field of human rights. Dworkin identifies the interplay of the future and the past, and of constancy and change, that are relevant in such cases. Dworkin's law as integrity 'insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.'²² Accordingly, the court invokes principles which have become authoritative by public repetition in order to justify changes in the understanding of the law. In so doing, the court is 'investing these new social understandings with the authoritative reputation cultivated by the public use and repetition of the 'old''.²³

The concept of interpretative integrity may assist in explaining the reference to the traditional principles of the rule of law and separation of powers in two contexts. The first is the development of the requirements of the law in hard cases that arise from controversial human rights issues. In this context, references to the separation of powers and the rule of law may perform the function of connecting tradition with changes in society. The second context occurs where there are competing views on a divisive social or political issue. In this context, references to the separation of powers or the rule of law allow the court to identify and present a notional common ground between conflicting normative positions on the issue in question.

²² Ronald Dworkin, *Law's Empire* (Harvard UP 1986) 225.

²³ Carolan (n 19) 14.

In the first context, references to implied constitutional principles may enable judges to tie traditional values with changes in society, thereby allowing judges to anchor evolution of the law and social mores to traditionally accepted principles. Accordingly, in *Ghaidan*, the House of Lords cited changing societal perceptions regarding the appropriate treatment of gay couples as one element in favour of including gay couples within the scheme for succession to secure tenancies.²⁴ The Law Lords held that the exclusion of gay partners from secure tenancies violated the right to privacy, in conjunction with the right to non-discrimination. In delivering the judgment of the majority, Lord Nicholls invoked the rule of law in admonition of discriminatory law.²⁵ Linking such evolution in social mores and the evolution in the law that will result from the court's decision to the need to respect the rule of law provides an air of tradition to an otherwise progressive development in the law and society.

In the second context, it appears that, as the rule of law and separation of powers are widely accepted and foundational principles, references to them may provide the appearance of common ground between the conflicting normative positions on the issue in question. *Pierson* and *Ghaidan* serve as examples of the relevance of the unifying common ground factor. Of course, the supposed common ground of respect for the 'rule of law' or 'separation of powers' often masks profound debates about the true content and appropriate usage of such principles.

²⁴ *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 (HL) [55] (Lord Millett).

²⁵ *ibid* [9] (Lord Nicholls).

As shown in Chapter 3, in the context of the rule of law, there is often significant debate about the specific content and applications constitutional principles. This is sometimes hidden by the generality of the principles, and the widespread acceptance of them in this general sense. Interestingly, this is key to understanding how courts respond to potential undesired or perceived immoral effects of implied principles. The principles operate at a sufficient level of generality that they can be moulded, adapted, or evolved to lead to results that are more consistent with the judges' or contemporary views or morality and justice. This is sometimes enabled by diverging applications of the rule of law. A good example of this is provided in the *Lewis* case, which was discussed in Chapter 3. The majority of the Privy Council held that the 'protection of the law' conferred in the preamble to the fundamental rights chapter of the Constitution of Jamaica 1962 was violated by the Government's decision to execute the appellants before the determination of their petitions before an international human rights agency.²⁶ In arriving at this holding, the majority asserted that the 'protection of the law' invokes the rule of law and that the rule of law required the completion of the appellants' human rights petitions and the consideration of the reports of the human rights bodies in the appellants' applications for mercy before the Jamaican Privy Council.²⁷ The latter holding on the procedure for the applications for mercy departed from previous decisions of the Judicial Committee of the Privy Council and this departure from previous authority led to a very different application of the rule of law by the dissenting judge in *Lewis*, Lord Hoffmann. For Lord Hoffmann, 'If the Board feels able to depart from a previous

²⁶ *Lewis v AG of Jamaica* [2001] 2 AC 50 (PC) 85.

²⁷ *ibid* 82-85.

decision simply because its members on a given occasion have a “doctrinal disposition to come out differently”, the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.’²⁸ Accordingly, while Lord Hoffmann applied the rule of law as a need for certainty in the law, the majority adopted an application that resulted in greater procedural protection for persons sentenced to death. This case therefore reflects the distinction between the general acceptance of the implied principle and the specific application of that principle, and how this difference can allow for applications of the principles that are consistent with the judges’ values or contemporary values.

In exploring the reasons for, and impact of, the use of such principles in human rights adjudication, we are also partly contemplating a question of the power of ‘the language of the law’. One function which legal principles play when they are employed by legal practitioners, particularly judges, is that they provide an anchor for an ‘ideological framework which grounds [court] decisions in legitimacy’.²⁹ Professor Sandra Harris, who has done thought-provoking research on language in political discourse and in the courtroom, observes that legal principles such as ‘impartiality of judgment’, ‘equality before the law’ or ‘the rule of law’ not only play the role of providing effective solutions to the problems presented to the bench, but also play a larger role in maintaining the perception of democracy and fairness.³⁰ In that sense, legal principles may have an ideological underpinning. Though ‘ideology’ is sometimes used

²⁸ *ibid* 90.

²⁹ Sandra Harris, ‘Ideological exchanges in British magistrates courts’ in John Gibbons (ed) *Language and the Law* (Longman Publishing Group 1994) 157.

³⁰ *ibid*.

in reference to belief in particular normative models of the proper relationship between the state and the citizen, such as ‘liberal’ or ‘conservative’ ideology, the term is used here to capture the general idea of belief in the constitutional democratic system in which the court operates.

In this sense, legal principles have the capacity to express faith in the maintenance and legitimacy of the legal system and the political democracy of the state. They function as an expression of confidence in the legal system in and of itself, in the legal system’s place within the state’s democracy, and as a prescription for the maintenance of the democratic system of the state. Therefore, there is a subtle interplay of the language of the law, the principles of the law, and the institutions of the law. The language of the constitutional principle may allow the judge, speaking as a member of the institution of the court, to reinforce belief in the legitimacy of that institution. This, in turn, works toward maintaining respect for, even if not agreement with, a decision in a ‘hard case’. In this way, there may be consensus that a decision of the court in a hard case ought to be accepted and respected, even if there was disagreement with the position actually taken by the court.

The linguistic expression of ideology has special significance in the post-colonial state. It is often through the language of the former coloniser that the new state expresses that it is civilised and its officials (including judges) express their own maturity and the maturity of the institutions they represent.³¹ The extent to which language is bound up with the acceptance of a people as civilised has been noted by Frantz Fanon and, more

³¹ On the connection between notions of maturity and colonialism, see Alastair Pennycook, *English and the Discourse of Colonialism* (Routledge 1998) 60-61.

recently, Alastair Pennycook. In his celebrated and influential publication ‘Black Skin, White Masks’, Fanon remarked that, ‘To speak means to be in a position to use a certain syntax, to group the morphology of this or that language, but it means above all to assume a culture, to support the weight of a civilization.’³² Pennycook argues that part of the colonial construct that has ‘lasting effects even today’ is that English is ‘the language that will apparently bestow civilization, knowledge and wealth’. Though Pennycook seeks to make a larger point about English generally being the language of colonialism and racial demarcations, it is the narrower point about the significance of the use of English England’s own colonies and former colonies that is relied upon here. In the former colonies, knowledge of and trafficking in, the English language is the symbol of being ‘perfectly civilised’.³³ Thus, in the former colonies, linguistic expression of fidelity to democratic constitutionalism is meant to project the institutional and constitutional maturity of the new state.

II - Constitutional Principles as Tools in the Debate over Ouster Clauses

Our discussion now turns to the debate regarding privative clauses or ouster clauses. The struggle over ouster clauses provides useful case studies that reveal the impact of rule of law and separation of powers arguments on the interpretation of legislation. The cases are consistent with the view expressed by leading administrative and constitutional law commentators that:

In matters of public law, the role of the ordinary courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of the Executive, tribunals and other officials exercising

³² Frantz Fanon, *Black Skin, White Masks* (Paladin 1970) 17-18.

³³ Pennycook (n 31) 4.

public functions, and to afford protection of the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law.³⁴

There has been a lengthy dialogue between the courts and parliament on the acceptable scope of ouster clauses. The rule of law has emerged as a powerful basis of argumentation within that conversation. Three case studies spanning more than forty years, demonstrate this point well. The focus of this discussion is on the case law emerging out of these case studies, but I will highlight discussions outside the courtroom by legal and political actors that contributed to the course of these debates. In the cases as well as the arguments made by legal commentators, practitioners, and parliamentarians, we see the implied principles being used as a source of other norms relating to access to courts and the requirement of supervisory jurisdiction by courts over tribunals and other bodies. The first case study centres on the Foreign Compensation Act 1950 (UK) and the *Anisminic* case, the second concerns the Asylum and Immigration Appeals Tribunal Bill and the *Jackson* decision, and the third concerns the Tribunals, Courts and Enforcement Act 2007 (UK) and the *Cart v Upper Tribunal* case.

The *Anisminic* case arose as a challenge to the decision of the Foreign Compensation Commission (FCC), established under the Foreign Compensation Act 1950. Under the Act, the FCC had the responsibility of distributing funds received from foreign governments to compensate for losses suffered by British nationals in overseas territories. At the time of the Suez incident, the appellants (then operating under the name Sinai Mining Co. Ltd.) mined manganese in the Sinai Peninsula under leases granted by the Egyptian government. After the Suez Incident, the government of the United Arab

³⁴ S.A. De Smith, *Judicial Review of Administrative Action* (Lord Woolf and others eds, 6th edn, Sweet & Maxwell 2007) [5-016].

Republic cancelled the mining leases, and liquidated certain other assets of mining companies, including the appellant company. The assets were sold to the Economic Board, which was a department of the Egyptian Government (TEDO) which established a new company. The appellant company changed its name to Anisminic Co. Ltd to distinguish itself from the new company formed in Egypt. The appellants made an application to the FCC claiming that they were entitled to participate in the Egyptian Compensation Fund. The FCC made a determination that Anisminic had sold its property to TEDO, that TEDO was the appellants' successor in title, and that, as TEDO was not a 'British national', and consequently Anisminic had not established its claim that it was entitled to receive compensation from the Fund.

Anisminic brought an action against the FCC for declarations that the Commission's determination was a nullity and that the appellants were entitled to participate in the Fund. On appeal, the House of Lords held that the FCC had made an error of law. The House of Lords had to overcome the hurdle of an ouster clause in s 4(4) of the Act, which read: '[t]he determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.' A majority of the House of Lords surmounted this hurdle by holding that the FCC made an error of law as to the very breadth of its powers, so since the FCC's error was a jurisdictional error, their 'determination' was a nullity and, in truth, no determination at all. Accordingly, the ouster clause was inapplicable. In response, the Government quickly introduced an amendment to a Foreign Compensation Bill which happened to be before the House of Commons. The purpose of the amendment was to nullify the *Anisminic* decision

prospectively. The Bill passed the House of Commons but then met with fierce opposition.

The legal profession reacted strongly, with a joint letter to *The Times* from Desmond Ackner, Chairman and General Council of the Bar, and H. Edmund Sargant, President of the Law Society, protesting the proposed provision. The letter was entitled ‘Foreign Compensation Bill: Threat to the Rule of Law’, and argued that the provision’s attempt to remove judicial scrutiny of the decisions of the FCC ‘is a serious encroachment on the Rule of Law and in our view should not be made part of the law of this country save after full and thorough debate and then only for compelling reasons.’³⁵ These eminent lawyers ended their letter by stating that they ‘consider that it is an undesirable development of the law to make the Commission sole and final judges of the limits of their own jurisdiction and to take away from the Courts the power, which they have always possessed and which is a vital facet of the Rule of Law, of ensuring that an inferior tribunal keeps within the four walls of whatever limited jurisdiction the legislature has entrusted to it.’³⁶ The letter was published on the morning of February 3 and that very afternoon, when the Bill was debated in the House of Lords, the privative clause was met with withering attacks from the Peers. A strong amendment was introduced and passed by the House of Lords, an amendment which was supported by the Law Lords sitting in the Upper Chamber.

³⁵ Desmond Ackner QC and Edmund Sargant, ‘Foreign Compensation Bill: Threat to the Rule of Law’ *The Times* (London, 4 February 1969).

³⁶ *ibid.*

In the Upper Chamber, Lord Denning levelled a scathing attack against the amendment. Lord Denning protested: ‘It was one of the cardinal features of the rule of law in this country that tribunals and other bodies should in the last resort be controlled by the judges of the High Court or of the Court of Appeal’.³⁷ Lord Denning’s remark identifies the extraction from the rule of law of a specific norm that courts should have supervisory jurisdiction over tribunals and executive bodies. We continue to see the identification of this norm as a requirement of the rule of law in subsequent cases and discussions. Ultimately, the Government capitulated; the eventual provision in the Foreign Compensation Act provides for appeal to the Court of Appeal on points of law. Otherwise, except in cases of breach of natural justice, any determination (included purported determinations) could not be called into question in any court of law.

The bold judgment in *Anisminic* led to strong and swift reaction of the Government to shield decisions of the FCC from judicial scrutiny but the breadth of the privative clause proposed by the Government led to rule of law arguments being strongly made within the legal fraternity and even by judges themselves in their capacity as members of the Upper Chamber. The deployment of the language of the rule of law was a meaningful part of this dialogic process and fits within the argument that the rule of law is used as an anchor for common values that are perceived as transcending issues, political positions and even institutions. This is not to suggest that all the different factions and institutions mean the same thing when they speak or hear the language of the rule of law, and it is not to suggest that there is no difference between the rule of law as

³⁷ HL Debate 04 February 1969, vol 299, col 55; See also Hugh Noyes, ‘Lords Attack Foreign Compensation Bill’, *The Times* (5 February 1969).

legal principle, as political principle, and the rule of law in any of its other permutations. What is argued here is that there is a tremendous amount of perceived power in this language, and this perception appears to be shared across institutions and across political factions. Accordingly, the lawyers and judges were able to deploy rule of law language convincingly in a dialogue with the Executive and Parliament.

As stated in the Introduction to this thesis, I include discussions of administrative law cases to the extent that these cases, despite not being ‘fundamental rights cases’, reveal applications of the implied principles that have implications for the use of these principles in fundamental rights adjudication. *Anisminic* was such a case; as is shown below, the House of Lords’ response to the ouster clause contributed to discussions on ouster clauses in cases where rights were engaged, and contributed to the development of the discourse on access to courts as a fundamental right itself.

A similar dynamic occurred in our second case study: the dispute over the Asylum and Immigration Appeals Tribunal. Analysing the saga that developed over this issue, Richard Rawlings aptly described the conflict as one that raised ‘a series of linked themes’, including ‘the practical interplay of rule of law arguments with developments in common law constitutionalism; and an expanded role for legal elements in the political process.’³⁸

At the time of the *Jackson* case (referred to above), the government had introduced the Asylum and Immigration Bill with a wide ouster clause, which had been denounced by a number of influential political and legal actors as a violation of the rule

³⁸ Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68 MLR 378, 378.

of law. Therefore, the dicta of Lord Steyn speaking to whether the Parliaments Acts of 1911 and 1949 ‘could theoretically be used to abolish judicial review of flagrant abuse of power by a government’ was meant to answer a question that was not quite so theoretical. The Asylum and Immigration (Treatment of Claimants, etc) Bill was introduced in response to government concern about judicial supervision of the immigration and asylum process through appeals and judicial review. The Bill sought to address the government’s concerns through three prongs. The first was restriction of the availability of funding for legal services in such cases. The second was a reduction in the formal right of appeal by abolition of the Immigration Appeal Tribunal, and the third was the attempt to oust the supervisory jurisdiction of the court with respect to status determination decisions in immigration and asylum cases.

We are most concerned here with the third prong, the ouster clause, which appeared in clause 14 of the Bill:³⁹

- (1) No court shall have any supervisory or other jurisdiction (whether statutory or inherent) in relation to the Tribunal
- (2) No court may entertain proceedings for questioning (whether by way of appeal or otherwise)
 - (a) any determination, decision or other action of the Tribunal (including a decision about jurisdiction). . .
 - (c) any decision in respect of which a person has or had a right of appeal to the Tribunal. . .
 - (d) a decision to remove a person from the United Kingdom, a decision to deport a person from the United Kingdom or any action in connection with [such] a decision. . . if the removal or deportation is in consequence of an immigration [or asylum] decision. . .

Subsection 3 of the clause then proceeded to plug any potential loopholes that might permit the courts to intervene:

³⁹ Formerly clause 11, when the Bill was before the House of Commons.

(3) Subsections (1) and (2)

(a) prevent a court, in particular, from entertaining proceedings to determine whether a purported determination, decision, or action of the Tribunal was a nullity by reason of-

(i) lack of jurisdiction,

(ii) irregularity,

(iii) error of law,

(iv) breach of natural justice, or

(v) any other matter [save for a Tribunal member acting in bad faith]

Notably, in light of *Anisminic*, the clause would have prevented the court from inquiring into a ‘purported determination’. This fact was noted by Lord Mackay of Clashfern (a former Lord Chancellor) in debate in the Upper Chamber:

Those who are familiar with that branch of the law will recognise those words as coming from a speech of the late Lord Reid in the case of *Anisminic*. Those were the grounds on which he held that the decision of the Foreign Compensation Commission in that case was not protected by the statutory ouster, which was elaborate, because the statutory ouster purported to protect determinations of the commission. However broad that protection is, if there is no true determination of the commission, there is nothing to protect. Alert to that problem, those who have put the Bill together sought to avoid it.⁴⁰

The proposed ouster clause was subjected to a blistering attack from members of the legal profession, including members of the senior judiciary. The rule of law and the separation of powers occupied a central place in those attacks. Within Parliament, the clause was assailed by the Joint Committee on Human Rights on the ground that ‘[o]usting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals.’⁴¹ Lord Mackay of Clashfern referred to the clause as ‘a serious affront to the

⁴⁰ HL Deb 15 March 2004, vol 659, col 67 (Lord Mackay of Clashfern).

⁴¹ Fifth Report of Session 2003-04, HL Paper 35, HC 304, 10 February 2004 [57].

rule of law', specifying that removing access to the courts even in the face of a breach of natural justice 'strikes at the very heart of the rule of law'.⁴² In thoughtful extra-judicial comments on the Bill, the Lord Chief Justice, Lord Woolf, revealed that:

This clause is undoubtedly unique in the lengths to which it goes in order to prevent the courts from adjudicating on whether the new appeal tribunal has acted in accordance with the law. As the House of Commons Constitutional Affairs Committee stated in its report of 26 February: 'An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake.' Extensive consultation took place with myself and other members of the judiciary before the Bill was introduced. ... our advice was that a clause of the nature now included in the Bill was fundamentally in conflict with the rule of law and should not be contemplated by any government if it had respect for the rule of law.⁴³

This statement informs us that the dialogue between the judges and the executive preceded the introduction of the Bill.⁴⁴ The pointedness and specificity of the comments reveal that this was not mere rhetorical grandiloquence; the comments reveal that in the view of these judges, access to the courts is essential to the maintenance of the rule of law.⁴⁵ This was a clear attempt to marshal a legal principle in the context of a political debate in order to achieve a legal consequence. The manner in which the rule of law was invoked in the debate in these case studies therefore supports Jeffrey Jowell's position that the rule of law is a legal principle from which courts can derive specific, applicable norms. This derivation of more specific norms from the implied principle is a process that

⁴² *ibid.*

⁴³ Lord Woolf, 'The Rule of Law and a Change in the Constitution' (2004) 63 CLJ 317, 328.

⁴⁴ The wisdom and constitutional propriety of this form of informal dialogue is open to doubt. See Rawlings, 'Review, Revenge and Retreat' (n 38) 400, 410.

⁴⁵ This is reflected in an opinion piece penned by Jeffrey Jowell: Jeffrey Jowell, 'Immigration Wars', *The Guardian* (London, 2 March 2004) <<http://www.guardian.co.uk/world/2004/mar/02/law.immigration>> accessed 4 April 2012.

was also observed by Robin Elliot in his examination of the Canadian Supreme Court's use of constitutional principles. He explained that in the *Secession Reference* judgment, the Court identified the principles of federalism, democracy, the rule of law, and the protection of minorities as 'organizing principles' of the Constitution and 'it then proceeded to fashion a set of rules to govern the secession of a province of Canada'.⁴⁶ Therefore, the evidence indicates that the principles do serve as grounds of argument on which the courts can and do base their application of particular norms to the facts of the case.

The rule of law arguments were reinforced by the claim that the ouster clause would also offend the separation of powers by interfering with the court's constitutional sphere. Some writers placed this separation of powers argument within the framework of the notion of dual sovereignty or bipolar sovereignty, whereby parliamentary supremacy is respected but it is also maintained that the courts are supreme within their province. Thus, Michael Fordham in an Opinion on the Act for the Refugee Legal Centre, which was presented to the Constitutional Affairs Committee, argued that:

The modern view of the constitution is not that Parliament has sole supreme power, but that it and the Courts each have constitutional sovereignty, based on a separation of powers involving mutual respect each for the other. A statutory ouster of judicial review would trespass on the duality, separation and mutual respect. It would raise a constitutional conundrum which ultimately the Courts themselves would have to resolve. One way of putting it is as follows. It would certainly be said that the constitutional function of the Court is to judicially review the legality of administrative action, not to review and disapply a provision of primary legislation. But to that powerful submission there is an extremely powerful response: in reviewing and disapplying a statutory ouster of judicial review, the Court is not extending and stepping outside its constitutional function of reviewing administrative action, but rather it is acting precisely to preserve and therefore discharge that constitutional function. Put another way, it would have

⁴⁶ Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67, 94.

been Parliament, and not the Courts, which would have failed to respect the dual sovereignty and mutual respect between legislature and judiciary, and the Court would be doing no more than restoring the proper division of labour reflected in the separation of powers on which ‘the British constitution, though largely unwritten, is firmly based’ (*Duport Steels Ltd v Sirs* (Lord Diplock)).⁴⁷

According to this reasoning, if the courts were to ‘disapply’ the ouster clause, they would be justified on the ground that they were acting within the judicial province, in which judges are supreme. Further, they would be taking the necessary measures to protect two constitutional fundamentals: the rule of law and the separation of powers. What is most interesting about the marshalling of the dual sovereignty argument in addition to rule of law arguments in this context, is that the dual sovereignty approach potentially resolves the tension between the rule of law as protected by the courts, and parliamentary supremacy, by framing the issue in the language of the separation of powers. Within a separation of powers framework, the courts would be entitled –in fact, duty-bound- to protect the rule of law against any encroachments, even encroachments by Parliament.

It would have been interesting to see these arguments tested in a case on the legality of the ouster clause but the government was apparently not eager to challenge the judiciary on this issue. The furore over the provision and the warnings issued by the members of the senior judiciary were heeded by the government, which agreed to withdraw clause 14 from the Bill. The significance of the warnings by the judiciary was noted by Lord Donaldson in a debate on the Bill in the Upper Chamber:

⁴⁷ Michael Fordham, 'Common Law Illegality of Ousting Judicial Review' (2004) 9 *Judicial Review* 86, 92 (citations omitted). These arguments were echoed by the Joint Committee on Human Rights: Fifth Report of Session 2003-04, HL Paper 35, HC 304, 10 February 2004, [58]-[60]. For more on dual sovereignty, see Sir Stephen Sedley, 'The Common Law and the Constitution' in Michael Patrick Nolan and others (eds), *The Making and Remaking of the British Constitution* (Blackstone 1997); Paul Craig, 'Public Law, Political Theory and Legal Theory' [2000] PL 211.

My Lords, many people, both within and outside this House, have condemned the ouster provisions ... as a constitutional outrage and an affront to the rule of law. Suffice it to say that I wholeheartedly agree. Fortunately, it appears that the Government have now had second thoughts. We need not, therefore, stop to consider, as otherwise we would have done, what would and should have been the response of the judiciary had the clause been law, interesting and important though that would have been.⁴⁸

The government settled on a provision that allowed some (albeit limited) access to the courts for review for error of law and appeals on a point of law.⁴⁹ Though the expansive ouster clause was removed from Asylum and Immigration Bill before it was enacted, the conversation regarding the extent to which tribunals could be placed outside the reach of the courts persisted. That conversation led to the Tribunals, Courts and Enforcement Act 2007 (UK) (Tribunals Act) and became part of the context of *Cart v Upper Tribunal* in which the issue was the scope for judicial review of unappealable decisions of the Upper Tribunal established by the Tribunals Act 2007.⁵⁰ The Act sought to unify the tribunals system, in response to the recommendations of the Report of the Legatt Committee. It created a unified structure, with a first-tier tribunal and an upper tribunal organized into chambers, each of which had its own president. Section 3(5) of the Act provides that ‘The Upper Tribunal is to be a superior court of record’. An important contextual note here is that when the government was developing its proposals for reform of the asylum and immigration decision-making process, one of the suggestions was that the Immigration Appeal Tribunal should be reframed as a superior

⁴⁸ HL Deb 15 March 2004, vol 659, col 72.

⁴⁹ Asylum and Immigration (Treatment of Claimants etc) Act 2004 (UK) s. 26(6).

⁵⁰ [2011] UKSC 28, [2012] 1 AC 663 (UKSC).

court of record. This suggestion and its purpose were advanced in the government's White Paper of February 2002:

As a Superior Court of Record there should be no scope for judicial review of its decisions, particularly of refusals to grant leave to appeal that are made in an attempt to frustrate removal. The Tribunal will focus entirely on the lawfulness of adjudicators' decisions rather than their factual basis. There will also still be a right of appeal from the Tribunal to the Court of Appeal on a point of law.⁵¹

The proposal was shelved following what a minister from the Lord Chancellor's department referred to as 'helpful discussions' with senior members of the judiciary. That the Upper Tribunal that emerged from the Tribunals Act of 2007 was legislatively termed a 'superior court' further serves to remind us of the continuing nature of the discussions regarding the supervisory jurisdiction of the ordinary courts over administrative tribunals.

The Upper Tribunal has three roles. First, it operates as a tribunal of first instance for some matters. Second, it has a judicial review jurisdiction which is equivalent to that of the High Court in England and Wales or Northern Ireland. This jurisdiction is exercisable only if certain conditions specified in the Act are met. Third, there is a right of appeal to the Upper Tribunal on a point of law arising from a decision of the First-tier tribunal, with the exception of decisions which are listed in the Act as 'excluded decisions'. There is no express provision in the Act limiting the supervisory jurisdiction of the High Court. However, the question arose whether the Act and the system it established had the effect of limiting the exercise of that jurisdiction. The Supreme Court held unanimously that in order to provide the independent scrutiny required by the rule of law, while respecting the tribunal structure established under the Act, judicial review by

⁵¹ Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (Cm 5387, 2002) [466].

the High Court of Upper Tribunal decisions was not excluded and should be exercisable upon the same criteria for which permission to make an appeal to the Court of Appeal was granted.⁵² This case was significant in that the rule of law was not merely raised as dicta but formed part of the ratio decidendi in the Supreme Court judgment. The judgment was built solidly and explicitly on the basis that the rule of law is the basis of judicial review and, accordingly, the ultimate factor in interpreting the relevant terms of the Tribunals Act 2007 was the scope of supervisory jurisdiction over the tribunals system demanded by the rule of law. Hence, Lady Hale's judgment, with which all the other justices concurred, stated that '[t]he real question, as all agree, is what level of independent scrutiny outside the tribunal structure is required by the rule of law.'⁵³

The privative clause debate has also fuelled rule of law arguments in Australia. Indeed, the developments in Australia may have influenced the background of discussions in the United Kingdom. Rawlings speculates that the ouster clause in the Asylum Bill was drafted to fend off judicial manoeuvring, in light of lessons learned from cases such as *Anisminic* and that these lessons were reinforced by comparative case law from Australia.⁵⁴ One such comparative development was the case *Plaintiff S157/2002* in which the High Court of Australia was required to determine the scope and

⁵² *Cart* (n 50) [37], [56]-[57].

⁵³ *Cart* (n 50) [51].

⁵⁴ Rawlings (n 38) 383.

meaning of the Migration Act 1958 (Cth).⁵⁵ The relevant sections of the Migration Act were sections 474 and 476. According to section 474,

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

“privative clause decision” means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

Section 476 stated that a Federal Magistrate’s Court had no jurisdiction in relation to a privative clause decision or purported privative clause decision made under the Act. A debate had erupted in Australia regarding the privative clause in the Act, with some senior members of the Australian judiciary expressing hostility towards the clause.⁵⁶

The plaintiff in the case was a Bangladeshi citizen who was refused a protection visa by the Refugee Review Tribunal. His application for a reversal of that decision was refused by the Federal Court of Australia. He applied to the High Court, seeking to invoke the jurisdiction of that court under section 75(v) of the Constitution to issue a writ of prohibition and mandamus against officers of the Commonwealth and to grant ancillary relief in the form of certiorari. He argued that there had been a denial of natural justice in his case and that the privative clause was inconsistent with section 75(v) of the

⁵⁵ *Plaintiff S157/2002 v Commonwealth of Australia* [2003] 211CLR 476. For an alternative account of UK and Australian courts’ treatment of privative clauses, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge UP 2006) 102-17.

⁵⁶ Paul Gerber, ‘Privative Clauses! The Last Hurrah?’ (2003) 13 *Revenue LJ* 85, 86.

Constitution and, consequently, was invalid. The court held that on its true construction the clause was only applicable to decisions made ‘under’ the Act. It therefore had no application to decisions which were made as a result of ‘jurisdictional error’. As jurisdictional errors were errors for which the writs of mandamus and certiorari would lie, the clause did not apply to limit the jurisdiction of the High Court under section 75 to issue those remedies. As the plaintiff’s case concerned a breach of natural justice, which was a jurisdictional error, the clause was held to have no application to his case. A dominant tool that was used by the court to interpret section 75(v) of the Constitution and its interaction with the privative clause was the use of the rule of law and the separation of powers as interpretative aids. Gleeson CJ remarked:

Privative clauses which deprive, or purport to deprive, courts of jurisdiction to review the acts of public officials or tribunals in order to enforce compliance with the law, or which limit, or purport to limit, such jurisdiction, may apply in either State or federal jurisdiction. Many of the considerations relevant to their interpretation and application are common to both. Speaking of a nation with a unitary constitution, Denning LJ said: ‘If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.’

In a federal nation, whose basic law is a Constitution that embodies a separation of legislative, executive, and judicial powers, there is a further issue that may be raised by a privative clause. It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power.⁵⁷

The marshalling of rule of law and separation of powers arguments is not limited to clauses that boldly attempt to completely oust the court’s jurisdiction. These implied principles have also been invoked in determining the contours of other restrictions on access to courts in fundamental rights cases. In Chapter 3 of this thesis, we saw how the

⁵⁷ *Plaintiff S157* (n 55) [7]-[9] (Gleeson CJ).

judicial protection of access to courts functions as an application of the rule of law through the principle of legality, which presumes an interpretation of legislation that is consistent with fundamental common law rights and fundamental constitutional principles.⁵⁸

The implied principles also play an interpretive role in construing legislation that limits access to courts where a rights instrument is relied upon by the claimant. This dynamic was present in *Matthews v Ministry of Defence* in which the rule of law and the separation of powers were used in construing the Crown Proceedings Act 1947 (UK) (CPA) and the HRA 1998. The claimant Matthews issued a claim for damages for personal injury against the Ministry of Defence. The Ministry in turn relied on section 10 of the CPA 1947 which exempted the Crown from liability in tort for injuries to members of the armed forces resulting from events prior to 1987. Under the section, the immunity is operative if the Secretary of State issues a certificate stating that the injury in question was due to something suffered by the claimant during service, and would be treated as attributable to service for the purposes of pension entitlement. The judge at first instance held that section 10 of the CPA 1947 was incompatible with the right to fair trial under article 6(1) of the ECHR. The Court of Appeal allowed the Ministry's appeal and the House of Lords also found in favour of the Ministry. The House of Lords held that the term 'civil rights' in article 6 of the ECHR applied only to civil rights which could be recognised under domestic law and to procedural restrictions on the right of access to court. The Law Lords found that the limitation imposed by section 10 was a substantive bar and since it was not procedural in nature, the claimant had no civil rights to which

⁵⁸ *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) 131 (Lord Hoffmann); See Chapter 3, 'Judicial Conceptions of the Rule of Law'.

article 6 were applicable. In his judgment Lord Hoffmann framed the fundamentals of article 6 as the protection of the rule of law and the separation of powers:

A right to the independence and impartiality of the judicial branch of government would not be worth much if the executive branch could stop you from getting to the court in the first place. The executive would in effect be deciding the case against you. That would contravene the rule of law and the principle of the separation of powers.

These principles require not only that you should be able to get to the court room door. The rule of law and separation of powers would be equally at risk if the executive government was entitled, as a matter of arbitrary discretion, to instruct the court to dismiss your action.⁵⁹

Lord Hoffmann preferred to interpret article 6 as an attempt to secure and protect these fundamentals and measure restrictions on access to courts against these implied principles rather than to use the tool of a distinction between procedural and substantive bars to courts. In his view, ‘what matters is whether the effect is to give the executive a power to make decisions about people’s rights which under the rule of law should be made by the judicial branch of government.’⁶⁰ Thus, he arrived at the same conclusion as the other Law Lords but arrived at this conclusion through an alternative route, in which he emphasised a purposive approach which relied on the rule of law and separation of powers. His approach emphasised substance, rather than form, and would have the effect of allowing more flexibility to courts interpreting provisions similar to those at issue in *Matthews*. The institutional role played by the implied principles thus operates on two levels in this type of case. On the first level, the principles help to perform the work of defending individuals’ access to the courts and the courts’ sphere of adjudication. On the second level, the flexibility allowed by the principles, the interpretation of which was in

⁵⁹ [2003] UKHL 4, [2003] 1 All ER 689 (HL) [28]-[29] (Lord Hoffmann).

⁶⁰ *ibid* [29] (Lord Hoffmann).

the hands of the judges, allowed for greater judicial control over the results of the application of the statutory text to the facts of individual cases.

Lord Hoffmann's approach to the interpretation of the section was adopted by the Privy Council in interpreting the corresponding section of the Constitution of St Vincent and the Grenadines 1979, which was based on article 6 of the ECHR. The Vincentian case *Toussaint (Randolph) v Attorney-General of St Vincent and Grenadines* concerned the admissibility of parliamentary proceedings in civil proceedings.⁶¹ The government of the islands issued a declaration indicating a cabinet decision to compulsorily purchase the appellant's land. It was published in the government gazette that the land was to be acquired for a public purpose. However, the appellant was of the view that the real reasons for the acquisition were political, and in a claim against the government for constitutional relief for alleged discriminatory and/or illegitimate expropriation of property, he sought to rely upon a statement allegedly made by the Prime Minister during a budget debate as proof of a political purpose. The Attorney-General applied to strike out the claim, arguing, inter alia, that the statement of the Prime Minister which the appellant sought to adduce in evidence was privileged pursuant to s 46 of the Constitution of St Vincent and the Grenadines 1979, sections 3, 4, and 16 of the House of Assembly (Privileges, Immunities and Powers) Act 1966 (St Vincent and the Grenadines) ('Privileges Act') and article 9 of the Bill of Rights 1689. The Privy Council found that the section 4 of the Privileges Act and section 46 of the Constitution invoked by the Attorney-General were only relevant where proceedings were brought against a Member

⁶¹ [2007] UKPC 48, (2007) 70 WIR 167 (JCPC, St. Vincent and the Grenadines).

of the House in respect of words or conduct in the House but not relevant in this case where the claim was against the government for constitutional relief. The Board held that since the appellant only relied upon the Prime Minister's statement in the House to explain the motivation for the government's action outside the House, this was a use of the statement which was permissible under article 9 of the Bill of Rights. However, section 16 of the Privileges Act 1966 did, on its face, prevent the appellant from adducing that evidence. Section 16 of the Privileges Act 1966 provided that no evidence relating to matters including debates or proceedings in the House were admissible in any proceedings before a court unless the court was satisfied that permission had been given by the Speaker of the House for such evidence to be given. In this case, the Speaker had refused such permission. The Privy Council held that there had been a violation of the appellant's right of access to court under sections 8(8) and 16 of the Constitution, which guaranteed, respectively, that civil rights and obligations should be determined by an independent and impartial tribunal and that any person alleging violation of his rights under the Constitution should have access to the High Court for determination of the claim and redress. The appellant had relied on the reasoning in *Matthews*, in particular, Lord Hoffmann's judgment, in support of the contention that section 16 of the Privileges Act 1966 conferred upon the Speaker of a legislature 'an apparently unconstrained power over the pursuit of a claim'.⁶² The Board accepted the submissions advanced on behalf of the appellant, ordering that section 16 of the Privileges Act 1966 must be read with the modifications necessary to enable evidence of the Prime Minister's statement to be admissible in the appellant's claim against the executive. In determining the requirements

⁶² *ibid* [27].

of the constitutional right of access to courts, the Privy Council was influenced by the impact of section 16 of the Privileges Act 1966 on the separation of powers. Delivering the opinion of the Board, Lord Mance observed that:

the exclusion relied upon by the Attorney General ... depends on the unexplained and unchallengeable exercise of a discretion by the Speaker of the House of Assembly. Such an exclusion is in the Board's view inherently problematic in the context of a claim for judicial review of executive action. It involves a potentially very significant inroad into the doctrine of separation of powers. Nothing in the nature of, or need to protect, parliamentary activity requires an officer of the legislature to have so unconstrained a power over the use before the courts, to explain and review executive action, of statements made in Parliament.⁶³

The use of the implied constitutional principle in the access to court cases provides a degree of flexibility to the judges while allowing them to anchor their interpretation of the statute in tradition and the fundamentals of the constitution.

The application of the implied principles in *Matthews* and *Toussaint* as well as in the ouster clause cases shows that reliance on implied constitutional principles as an interpretive technique in access to court cases does not always lead to identical results, and in particular, does not always result in widening access for the claimant in the relevant case. For instance, reflecting on the *Cart* case, while the Divisional Court, the Court of Appeal, and the Supreme Court in *Cart* employed the same category of application of the rule of law, that is, the rule of law as a requirement of supervisory jurisdiction by an independent judicial source, the resulting interpretation of the Tribunals Act 2007 by the two appellate bodies diverged.⁶⁴ The Court of Appeal sanctioned review of the Upper Tribunal where there was outright excess of jurisdiction or fundamental

⁶³ *ibid* [31] (Lord Mance).

⁶⁴ See discussion in Mark Elliott and Robert Thomas, 'Tribunal justice and proportionate dispute resolution' [2012] CLJ 297.

denial of justice but not where the tribunal made an error of law within jurisdiction. The Supreme Court, on the other hand, preferred an alternative formulation which allowed judicial review of the Upper Tribunal using the same criteria upon which applications for permission to make a second-tier appeal to the Court of Appeal were determined. The Supreme Court thus ‘made it clear that it envisaged judicial review in circumstances broader than those for which the lower courts’ decisions in *Cart* would have allowed.’⁶⁵ Nonetheless, what the reasoning in the cases does indicate, firstly, is an emerging similarity of interpretive technique and methodology and, secondly, a framework for defence of access to courts, regardless of the result in the particular case. We see similar patterns in the judgments that invoke the rule of law to limit other restrictions on access to courts.

Conclusion

The interpretive uses of the implied constitutional principles arise whether at the time of the case the jurisdiction in question has a relevant written constitution or bill of rights or neither. This interpretive technique is the product of a mixture of historical, institutional, rhetorical, and linguistic reasons. This chapter sought to demonstrate the legitimacy reinforcing role that implied constitutional principles appear to serve in fundamental rights cases. It was argued that implied principles are used in construing legislation in hard cases, and in so doing, they are employed as distancing devices, to buttress the legitimacy of the court’s decision-making. This interpretive technique was appealing in the context of the substance of the issues addressed by the courts (hard fundamental rights cases) and in the context of the institutional questions (relating to the

⁶⁵ *ibid* 307-08.

court's institutional process and its role in relation to the other branches of government). Paradoxically, if we see the references to the separation of powers and rule of law as attempts to legitimize the court's decision-making, such references to implied constitutional principles actually sometimes spark criticisms of illegitimacy. These criticisms are addressed in Chapter Eight on 'The Legitimacy of the Use of Implied Constitutional Principles in Fundamental Rights Adjudication'.

CHAPTER SIX - IMPLIED PRINCIPLES AS GROUNDS FOR INVALIDATING LEGISLATION

Introduction

This Chapter examines the phenomenon whereby judges either use the implied constitutional principles of the rule of law and the separation of powers to invalidate legislative provisions, or assert that these principles may be used as a ground for invalidation of legislation. Both these practices are significant as they go beyond the use of implied constitutional principles as an aid in the interpretation of a constitutional or statutory bill of rights text. When an implied principle is used as an interpretive aid, the interpreted text itself remains the ground on which legislation is invalidated. However, where an implied principle is the ground of invalidation, the court's decision that legislation is, or may be, invalid is not based on substantive sections of the text, but is based instead on a principle that is not expressed in substantive provisions of the text.

Part I of this Chapter proposes that there are three circumstances that give rise to the use of implied constitutional principles as a ground for invalidating legislation or an assertion of the power to do so. The first circumstance occurs where there is a gap in the Bill of Rights with respect to the fundamental right or interest that appears to be engaged

in the case before the court. That is, where the case before the court arguably engages a particular individual right but the Bill of Rights does not expressly guarantee this right. The second circumstance occurs where there is a gap in the constitutional text as it relates to the power of the court to invalidate legislation. The third circumstance occurs where the legislation at issue challenges the power of the court or removes the court's power of review of governmental action that affects individual rights. This third category differs from the second in that the challenge to the court's power comes not from the Bill of Rights itself but from subsequent legislation.

Dissecting and analysing the case law in those three categories exposes the common threads that run through these cases. This leads to the argument in Part II of the Chapter that two trends are evident in the case law that arises in this area in the jurisdictions considered. First, where courts have invalidated legislation based on one of the implied constitutional principles or otherwise asserted the power to do so, they have relied on an application of the implied principle that protects jurisdictional boundaries. Thus, in these invalidation cases, the judges either based the decision on the separation of powers principle or on an application of the rule of law principle as a requirement of the separation of organs of the state. Second, courts are most protective of the borders of the judicial sphere; accordingly the implied principle is sometimes used as a proxy or synonym for separation and protection of the judicial branch from other branches of government. Part II will also discuss the idea that invalidation on a jurisdictional basis allows for judicial review on structural grounds, such as an argument that a decision should be made by the judicial branch, rather than substantive grounds, such as an argument that a decision has violated a right not to be subjected to inhuman and

degrading punishment. In that sense, it allows the court to purport to review and potentially strike down legislation on grounds that do not involve evaluation of policy or values. Accordingly, invalidation on jurisdictional grounds may appear less interventionist and may reinforce the utility of the principle as a device that distances the court from value judgments. It will also be shown in Part II that this technique is more presentational than actual and that the attempt to present structural grounds as devoid of value judgments is unconvincing.

I – The Practice of Invoking Implied Principles as Grounds for Invalidating Legislation

i. A gap in the Bill of Rights or constitutional text with respect to the individual interest that is engaged in the case before the court

This first category of cases is a product of jurisdictions in which there is a Bill of Rights or Constitution that confers on the court jurisdiction to review legislation but where the rights protections lack comprehensiveness. The decision of the Privy Council in *Hinds v R* is one of the key cases that arise within this category.¹ In that case the Privy Council invalidated sections 8 and 10 of the Gun Court Act 1974, Jamaica, on the ground that they violated the constitutional principle of the separation of powers by vesting sentencing powers in the Governor General of Jamaica and a Review Board comprised mainly of non-judicial appointees. It appears that one reason that the Privy Council used the separation of powers as the ground for invalidating parts of the Gun Court Act 1974 was the judges' assumption that no provision in the Bill of Rights text clearly applied to

¹ *Hinds v R* [1977] AC 195 (JCPC, Jamaica).

the sentencing power at issue. Accordingly, the Privy Council assumed that there was a gap in the rights protected under the Bill of Rights in the Jamaican Constitution. It is arguable that it was not firmly established at the time of *Hinds*, in 1977, that either the right not to be deprived of liberty except in execution of the order of a court of law in section 15 of the Jamaican Constitution, or the right to trial by an impartial and independent tribunal in section 20 of the Constitution (both included in Chapter III of the Constitution), was applicable to the facts before the Privy Council in *Hinds*.

At the time of *Hinds*, section 15 provided that no person should be deprived of liberty except in the execution of the order of a court of law but, again, the Privy Council in *Hinds* did not identify this right as being applicable to the facts of the case. The right not to be deprived of liberty except, *inter alia*, in execution of the sentence of a court was not even cited in *Hinds*.

Also at the time of *Hinds*, section 20 included a right to trial by an independent and impartial tribunal but there are indications in the law report of the case that the Board did not regard this section as dispositive of the case before it. With respect to section 20 (1), the Privy Council referred to the right to be tried by an independent and impartial tribunal, but the Board described that provision in terms which seemed to limit its application to the determination of whether the defendant ought to be convicted of a crime;² there was no mention of the application of that provision to the sentencing stage of a trial.

² *ibid* 223, 225-26.

This omission was, perhaps, not surprising given the approach that was taken to the scope of section 20 in extra-judicial legal commentary at that time. Lloyd Barnett did not refer to sentencing as an aspect of the right to fair trial in his discussion of the rights to fair trial in his text *The Constitutional Law of Jamaica*, which, like the *Hinds* decision, was published in 1977.³ Margaret Demerieux also made no mention of sentencing in her chapter ‘Constitutional Protections for the Criminally Accused’, which discusses the right to trial by independent and impartial tribunal.⁴ Demerieux’s text, *Fundamental Rights in Commonwealth Caribbean Constitutions*, published in 1992, was one of the few leading authorities on Commonwealth Caribbean constitutional law and her treatment of the subject, together with that by Lloyd Barnett, suggests that during the time of *Hinds* (and for a significant period of time after that), case law and academic thinking on Caribbean constitutional law had not yet confirmed that the vesting of sentencing powers in an officer of the executive violated the right to trial by an independent and impartial tribunal.

In light of these omissions from the *Hinds* judgment, it is likely that the judgment was based on the separation of powers because it was not clear to the Privy Council that any provisions in the constitutional text actually applied to the issue of the sentencing powers of the court. Based on the report of the case in the Appeal Cases, counsel for the defendants did not invoke section 20 of the Constitution to support the argument that the

³ Lloyd G. Barnett, *The Constitutional Law of Jamaica* (OUP 1977) Chapter 14.

⁴ Margaret Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (Faculty of Law Library, University of the West Indies 1992).

conferral of sentencing powers on members of the executive was unconstitutional.⁵ Instead, counsel cited structural provisions, such as s 97 of the Constitution, which provided, in subsection (1) that ‘[t]here shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by the Constitution or any other law’, and in subsection (4), that [t]he Supreme Court shall be a superior court of record and, save as otherwise provided by Parliament, shall have all the powers of such a court.’ On this foundation, counsel argued that Parliament could by ordinary legislation increase the powers of the Supreme Court, but could not use ordinary legislation to erode the jurisdiction of the Supreme Court. It was also asserted in the course of argument that ‘[t]he structure of the Constitution shows that it was based on the principle of the separation of powers and that it was intended to preserve basic institutions and principles in existence before the Constitution came into force.’⁶

The application of the right to trial by an independent and impartial tribunal to the sentencing stage has now been more conclusively established. In particular, case law on Art 6 of the ECHR, has established that the right includes an entitlement to have one’s sentence determined by an independent and impartial tribunal. This interpretation is represented in the judgment of the House of Lords in *Anderson v Secretary of State for the Home Department*, in which the Law Lords stated that:

as the imposition of sentence was part of a trial for the purposes of ensuring a fair hearing by an independent and impartial tribunal guaranteed by Article 6 [ECHR]

⁵ Section 20 was only invoked to argue that sections of the Gun Court Act 1974 providing for in camera proceedings were unconstitutional. This argument, which was unsuccessful, was that the ‘in camera’ provisions of the Gun Court Act 1974 contravened the provision in s 20(3) that court proceedings be held in public. See *Hinds* (n 1) 223-24.

⁶ *Hinds* (n 1) 200.

and the fixing of the tariff was required to be set by such a tribunal, and the Secretary of State was neither independent of the executive nor a tribunal, he should play no part in fixing the appellant's tariff, and to that extent the appeal succeeded.⁷

The *Anderson* judgment is significant for our understanding of the right to fair trial in Jamaican constitutional law for two reasons. First, the Bill of Rights in the Jamaican Constitution was modelled on the ECHR catalogue of rights. Second, the judges of the House of Lords (now the Supreme Court of the UK) also sit on panels of the Privy Council that decide cases on appeal from the Court of Appeal of Jamaica. Indeed, in subsequent case law from Jamaica and the wider Commonwealth Caribbean, the approach in *Anderson* has been adopted and it has become clear that the right to be tried by an independent and impartial tribunal as outlined in section 20 includes the right to have both conviction and sentencing determined by such as tribunal,⁸ but these developments post-date *Hinds*.

ii. A gap in the power conferred on the court by the Bill of Rights of other constitutional text

The second circumstance occurs when the Bill of Rights or constitutional text does not expressly confer on the court a power to invalidate legislation, or confers a

⁷ *R (Anderson) v SSHD* [2002] UKHL 46; [2003] 1 AC 837 (HL) 838.

⁸ *DPP of Jamaica v Mollison* [2003] UKPC 6, [2003] 2 AC 411 (JCPC, Jamaica) [11]; *Reyes v The Queen* [2002] 2 AC 235 (JCPC, Belize) [44].

general power to invalidate legislation but the textual provisions do not expressly extend that power of invalidation to the particular legislation in question.

This gap in judicial power is a feature of several Commonwealth Caribbean constitutions, including the Constitution of Jamaica 1962. Section 2 of the Jamaican Constitution provides that, subject to the terms of the Constitution, ‘if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.’ Section 25 of the Bill of Rights in Chapter III of the Jamaican Constitution entitles individuals to apply to the Supreme Court of Jamaica for redress for contravention of their rights and empowers the Supreme Court of Jamaica to make such orders as it considers appropriate for the purpose of enforcing the guarantees listed in the Chapter.

The Jamaican Constitution was amended in 2011 by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, which replaced Chapter III with a new catalogue of rights. Before the amendments to the Constitution in 2011, the Bill of Rights provisions sat alongside a clause that limited the power of the courts to enforce the rights provisions in Chapter III by purporting to prevent the Court from invalidating legislation that pre-dated the Constitution itself. Section 26(8) of the Constitution provided that:

Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.⁹

⁹ The ‘appointed day’ is the day when the Constitution entered into force.

Chapter III as amended retains the power of the Court to make orders for the enforcement of the rights provisions contained in the Chapter,¹⁰ but it modifies the general savings law clause. Henceforth, the Court may hold legislation pre-dating the 2011 Charter of Rights to be inconsistent with the provisions of the Bill of Rights, except with regard to legislation on sexual offences, obscene publications, and offences relating to the life of the unborn.¹¹

The Privy Council considered the original general savings clause restrictions on the power of the court in *DPP v Mollison*,¹² which was decided in 2003, thus before the amendment of the Constitution. The respondent in the case was a prisoner who had been convicted of a murder which was committed when he was sixteen years old. He was sentenced to detention during the Governor General's pleasure, in accordance with section 29 of the Juveniles Act 1951 (Jamaica). He appealed against his sentence, arguing: (i) that the sentence infringed his right, guaranteed by section 15(1)(b) of the Constitution of Jamaica, 1962, not to be deprived of liberty except in accordance with the sentence of a court; (ii) that the sentence violated his right to a fair hearing within a reasonable time by an independent and impartial tribunal, as guaranteed by section 20(1) of the Constitution, and (iii) that the sentence infringed the fundamental constitutional principle of the separation of powers because the length of the sentence was to be determined by a member of the executive rather than a member of the judiciary. It was conceded that the sentence did infringe the rights expressed in sections 15(1)(b) and

¹⁰ Section 13(19), Constitution of Jamaica 1962.

¹¹ Section 13(12), Constitution of Jamaica 1962.

¹² *Mollison* (n 8).

20(1) of the Constitution. However, because the Juveniles Act 1951 was a pre-1962 statute, the general savings law clause prevented the court from holding that the Act was inconsistent with the Constitution. Accordingly, the only argument that could lead to a finding that the sentence was invalid was the argument that the sentence infringed the implied constitutional principle of the separation of powers. Lord Bingham, delivering the judgment of the Privy Council, held that the statutory provision violated the separation of powers by vesting a sentencing power in the hands of the executive. In his words:

Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as "a characteristic feature of democracies": *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 890-891, para 50. In the opinion of the Board, [the respondent] has made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive.

In arriving at this holding, Lord Bingham said, in relation to *Hinds*, that:

the sentencing provisions under challenge in the *Hinds* case were held to be unconstitutional not because of their repugnancy to any of the rights guaranteed by sections in Chapter III of the Constitution but because of their incompatibility with a principle on which the Constitution itself was held to be founded.¹³

What the Privy Council developed in *Mollison* was a clever technique for circumventing a textual gap in the court's power to invalidate legislation that infringes fundamental rights. As shown above, the respondent in *Mollison* did have constitutionally guaranteed rights to a fair hearing by an independent and impartial tribunal and to not be deprived of liberty except in accordance with the sentence of a court. However, the court

¹³ *ibid* [13].

was barred from holding that the law that violated these rights was inconsistent with the Constitution and therefore null and void. Therefore, the implied principle of the separation of powers provided a means by which the Court could fill the gap in its powers.

A lacuna in the jurisdiction of the court to invalidate legislation that is alleged to violate constitutional rights has led the recently constituted Caribbean Court of Justice (CCJ) to follow in the steps of the Judicial Committee by finding creative grounds for protecting the fundamental rights guaranteed in the Constitutions subject to the court's jurisdiction. The CCJ flexed its muscles, in a somewhat similar way that the Judicial Committee did, in *AG for Barbados v Joseph and Boyce*,¹⁴ although in this case the implied principle drawn on by the Court was the rule of law, rather than the separation of powers.

The appellants in *Joseph and Boyce* had been sentenced to death upon conviction for the crime of murder. After their appeals against sentence to the Court of Appeal and to the Judicial Committee were dismissed, they petitioned the Inter-American Commission on Human Rights (IACHR) for declarations that Barbados had violated their rights to, *inter alia*, life, humane treatment, and fair trial, under the American Convention on Human Rights. On the application of the IACHR, the Inter-American Court of Human Rights subsequently issued provisional measures requiring Barbados to preserve the respondents' lives pending the outcome of the IACHR proceedings. In a further application to the Court of Appeal, the respondents were successful, the Court holding that the respondents were entitled to have their executions suspended pending the

¹⁴ *AG v Joseph and Boyce* (2006) 69 WIR 104 (Caribbean Court of Justice (CCJ), Barbados).

outcome of the IACHR proceedings and to have the outcome of the IACHR proceedings considered in clemency proceedings in Barbados. The Attorney General appealed to the CCJ, which had by the time of the appeal replaced the Judicial Committee as the final appellate court for Barbados. The CCJ dismissed the Attorney General's appeal, holding that the respondents had a legitimate expectation that the State would not execute them without permitting a reasonable time within which their proceedings before the IACHR could be completed.

It is, however, the Court's holding that it had jurisdiction to provide redress to uphold the 'protection of the law' that is most pertinent to this discussion. The Court held that it had jurisdiction to determine whether the respondents' right to protection of the law was infringed and to provide redress if such a violation was found, although in this case it was held that the right to protection of the law was not violated.

The issue arose as a result of section 11 of the Constitution of Barbados 1966, which the CCJ characterizes as the preamble to the Bill of Rights Chapter in the Constitution.¹⁵ Section 11 expresses the right to protection of the law in the following terms:

11. Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -

...

(c) *the protection of the law;*

...

the following provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of

¹⁵ *ibid* [58] (de la Bastide P and Saunders J).

that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.¹⁶

Sections 12-23 then detail the specific rights which correspond to the rights referred to in section 11, and section 24 confers on the court the jurisdiction to provide redress for violation of sections 12-23. There is no section, however, that unambiguously corresponds with ‘the protection of the law’ in section 11, but section 18 most appears to correspond with the protection of law. This is indicated by its marginal note which reads ‘Protection of the law’, and its subject matter, which seeks ‘to ensure that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly.’¹⁷

In the view of the CCJ, the terms of section 18 could not, however, be intended to capture the *full* extent of the ‘protection of the law’. In support of this position, the court referred to the Privy Council’s judgment in *Thomas v Baptiste*, in which Lord Millett stated that due process of the law, which has the same meaning as the protection of the law, ‘invokes the concept of law itself and the universally accepted standards of justice observed by civilised *nations which observe the rule of law*’.¹⁸ Accordingly, it was argued that the court’s power to provide redress for violations of the protection of the law could not be limited to section 18. De la Bastide and Saunders JJ of the CCJ summed up the court’s conclusion in this way:

¹⁶ Emphasis added.

¹⁷ *Joseph and Boyce* (n 14) [60].

¹⁸ *Thomas v Baptiste* [2000] 2 AC 1 (JCPC, Trinidad and Tobago) 22 (emphasis added).

We are of the view that Lord Millett's observations on the meaning of the word 'law' in the context of the phrase 'due process of law' are equally applicable to the phrase 'protection of the law'. Procedural fairness is an elementary principle permeating both concepts and therefore, pursuant to s 11, a condemned man has a constitutional right to procedural fairness as part of his right to protection of the law. Correspondingly, *the courts have an inherent jurisdiction, and a duty, to grant an appropriate remedy for any breach of that right.*¹⁹

Since section 24 of the Barbadian Constitution did not grant the court jurisdiction to provide redress for breaches of section 11, the court provided an alternate basis for its claim to find violations of the right to protection of the law. So the court asserted an 'inherent jurisdiction' to grant relief for breaches of this right, but did not elucidate the basis for this jurisdiction.

It is suggested that one possible ground on which the judges based their jurisdiction was the 'rule of law'. This inference can be made due to the court's references to the rule of law in explaining the meaning of the right to due process. Justice Wit was more explicit in his judgment, where, after referring to the affirmation that 'that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law' in the preamble to the Barbadian Constitution, he continued:

It is clear that this concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive 'due process of law' and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect. The right to protection of the law requires therefore not only law of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power; but it also requires the availability of effective remedies. These requirements are inherent in the Barbados Constitution. Section 24 which expressly guarantees the right to an effective remedy is, therefore, merely a reflection of that fundamental right to the protection of the law. Hence, the existence of that section, cannot, without more, be construed in a manner so as

¹⁹ *Joseph and Boyce* (n 14) [64] (emphasis added).

to limit that right or to frustrate the granting of an effective remedy for a breach of the Constitution.²⁰

This idea that the rule of law is a source of the court's jurisdiction to review legislation is also consistent with statements by members of the House of Lords in the *Jackson* case²¹ that the court has a duty to safeguard the rule of law. *Jackson* is discussed in more detail in the following section of this chapter. However, for the moment, it suffices to point to dicta in the judgments of Lady Hale and Lord Steyn, which assert the potential for the courts to invalidate legislation on rule of law grounds. Lady Hale warned that:

The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.²²

Lord Steyn expressed this possibility of judicial rejection of legislation in the following way:

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.²³

²⁰ *ibid* [20].

²¹ *R (Jackson) v AG* [2005] UKHL 56, [2006] 1 AC 262.

²² *ibid* [159].

²³ *ibid* [102].

What is particularly interesting about this argument is that it expands upon the idea that the rule of law simply legitimises judicial review of *executive* organs, and raises the prospect of judicial review of legislation. The rule of law justification for judicial review of administrative action is championed by supporters of common law constitutionalism as a substitute for the traditional argument that the *ultra vires* doctrine justifies judicial review.²⁴ In an article published in 2002 Lord Steyn framed the argument in the following terms:

As a department of state the judiciary is charged with the constitutional duty to control abuse of power by the state, its officials and emanations. In a democracy the rule of law itself legitimises judicial review. I now accept that the traditional justification in England of judicial review is no longer supportable. By overwhelming weight of reasoned argument the *ultra vires* theory has been shown to be a dispensable fiction.²⁵

This is significant, because, as Lord Steyn noted in that piece, '[t]he theoretical underpinning of the principles of judicial review is important because it may affect their reach.'²⁶ This seems to be borne out by his dictum in *Jackson* and it mirrors the comments made by Justice Wit in *Joseph and Boyce*, which show that perhaps the rule of law justification may be expanded so that it not only justifies review of executive action, but also justifies review of legislation in some circumstances.

Despite this significant common thread that runs through *Joseph and Boyce* and *Jackson*, it is useful to note an important distinction between the lines of reasoning in the

²⁴ Justin Leslie, 'Vindicating Common Law Constitutionalism' (2010) 30 *Legal Studies* 301, 307; Lord Steyn, 'Democracy through law' (2002) 6 *EHRLR* 723, 723, 725; TRS Allan, 'The Constitutional Foundations of Judicial Review' (2002) 61 *CLJ* 87, 88. See discussion of common law constitutionalism in Chapter 2.

²⁵ Lord Steyn (n 24).

²⁶ *ibid.*

two cases. The distinction arises as a result of the doctrine of parliamentary supremacy which is applicable in the United Kingdom, but not in the Commonwealth Caribbean. The judges in *Joseph and Boyce* did not acknowledge any need to justify their assertion that the protection of the law or the rule of law could be a basis for invalidating legislation, beyond asserting that this principle is located within the ‘unstated assumptions’ of the Constitution. On the other hand, Lord Steyn in *Jackson* was at pains to restrict the normative power of the rule of law as against legislation by limiting its application to ‘exceptional circumstances’ and to account for its conflict with parliamentary supremacy by suggesting that in such circumstances the court would ‘qualify’ parliamentary supremacy by establishing a different hypothesis of constitutionalism.²⁷ In this respect therefore, while both *Jackson* and *Joseph and Boyce* suggest that the rule of law argument used in common law constitutionalism could be applicable to judicial review of legislation, *Joseph and Boyce* is bolder in asserting a broader, more robust role for the rule of law. In fact, it appears that the common law constitutionalist argument coupled with a Constitution that explicitly empowers the court to invalidate legislation (even if the scope of this power is limited) helps to produce assertions of a more robust normative role for the rule of law, leading the court to expand the scope of review of legislation.

Lord Steyn’s dictum in *Jackson* was criticized by Trevor Allan who expressed dissatisfaction with the theoretical reasoning outlined in this dictum. For Allan, Lord Steyn’s judgment in *Jackson* is based on the existence of a conflict between a commitment to parliamentary supremacy and a commitment to constitutional legal

²⁷ *Jackson* (n 21) [102].

principle, including the principle of the rule of law.²⁸ Allan contends that this conflict could be resolved if the judges would accept that the rule of law imposes limits on parliamentary supremacy. Allan therefore contends that Lord Steyn's suggestion that in 'exceptional circumstances' judges might have to 'qualify' a doctrine of parliamentary supremacy 'established on a different hypothesis of constitutionalism', is unnecessary as all such limitations on legislative supremacy as may be necessary to comply with the rule of law are already implicit in Britain's unwritten constitution.²⁹ Allan also protests that Lord Steyn's dictum in *Jackson* amounts to a threat of judicial revolt in exceptional circumstances, which runs the risk of 'portraying the courts, implausibly, as free political agents in a political process disguised as constitutional adjudication.'³⁰ For Allan, this quandary would be solved by accepting the force of an already existing normative rule of law against Acts of Parliament. Whether one subscribes to Lord Steyn's or Professor Allan's position, it does demonstrate that the enduring presence of parliamentary supremacy in the UK adds a further element to the conversation on the normative force of the rule of law that accounts for some of the subtle differences in approach between courts in the UK and courts of the Commonwealth Caribbean.

The continued role of parliamentary supremacy also accounts for some of the features of the use of the doctrine of separation of powers in the High Court of Australia.³¹ As

²⁸ TRS Allan, 'Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism' (2011) 9 ICON 155, 155-56.

²⁹ *ibid* 156.

³⁰ *ibid* 160.

³¹ See, eg, Julie Taylor, 'Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy' (2004) 32 Fed L Rev 57.

noted in Chapter 2, while the Commonwealth Constitution of Australia imposes some limits on the legislative powers of the Federal Parliament of Australia,³² the judicial review of legislation under the Commonwealth Constitution is only possible due to implication of that power by judges. More specifically, the text of the Constitution does not give the judiciary the power to review the Acts of Parliament for rights-consistency. Thus, the principle of parliamentary supremacy remains operative in Australia. In this jurisdiction, which has not (unlike the UK) introduced a Bill of Rights according courts some power to scrutinise legislation for rights-consistency, the courts have found creative ways to strike down legislation that is alleged to infringe individual rights.

One way in which this has been accomplished is through the implied doctrine of the separation of powers. The separation of powers has been identified as a principle enshrined in the Constitution of the Commonwealth of Australia 1900, as inferred or implied from the Constitution's structural provisions. As stated in Chapter 4, this was established in a series of landmark cases in Australian constitutional law, including *New South Wales v Commonwealth of Australia* (the *Wheat case*),³³ *R v Kirby, ex p Boilermakers' Society of Australia*,³⁴ and, more recently, *Polyukhovich v Commonwealth of Australia*,³⁵ and *Kable v DPP (NSW)*.³⁶ In a number of these cases, it was stated that the separation of powers can be used not only as an interpretative guide, but also as an

³² *ibid* 60.

³³ (1915) 20 CLR 54 (HC, Australia) 88-93 (Isaacs J).

³⁴ (1956) 94 CLR 254 (HC, Australia) 267-88.

³⁵ (1991) 172 CLR 501 (HC, Australia) 502, 532-40 (Mason CJ).

³⁶ (1996) 189 CLR 51 (HC, Australia).

independent ground of normative limitations on legislation. The court in *Polyukhovich* held that the separation of powers would invalidate a law that punished specified persons without trial, on the ground that such a law was a usurpation of judicial power.³⁷ It has been noted that it is difficult to identify a clear ratio from the *Kable* case,³⁸ but it has been observed that the case expanded the impact of the separation of judicial power in the Federal Constitution by using it as a source of limitations on State parliaments in their interaction with state courts vested with federal jurisdiction.³⁹ From that basic principle the statute in *Kable* was invalidated, a plurality of the judges holding that the division of functions envisioned by the Act was incompatible with the independence, impartiality, and integrity of the Supreme Court of New South Wales as a court in which federal jurisdiction has been vested.⁴⁰

The idea in *Kable* has been developed and was recently affirmed in *South Australia v Totani*⁴¹ in which the court invalidated a statutory provision on the ground that it undermined the institutional independence and impartiality of the courts of South Australia. The statute challenged before the court was the Serious and Organised Crime (Control) Act 2008 (South Australia), section 14(1) of which provided that ‘[t]he Court must, on application by the Commissioner, make a control order against a person (the ‘defendant’) if the Court is satisfied that the defendant is a member of a declared

³⁷ *Polyukhovich* (n 35) 502.

³⁸ Mirko Bagaric, ‘Editorial: The revived Kable doctrine as a constitutional protector of rights?’ (2011) 35 Crim L J 197, 197.

³⁹ *ibid.*

⁴⁰ *Kable* (n 36).

⁴¹ *South Australia v Totani* (2010) 242 CLR 1 (HC, Australia).

organisation.’ If, on application by the Commissioner of Police under s 8 of that Act, the Attorney-General is satisfied that members of an organisation associate to commit serious crime that threatens public safety, he may make a declaration in respect of that organisation. Section 3 defined ‘organisation’ and ‘member’ very broadly. Breach of a control order was a criminal offence punishable by a maximum of five years imprisonment.

The majority of the High Court held that section 14(1) was invalid as it sought to enlist a court in the implementation of executive policy by an adjudicative process in which the court was acting at the behest of the Attorney General to an unacceptable degree.⁴² Part of the ratio for this important decision was that the state cannot deprive state courts of the characteristics of institutional independence and impartiality, the minimum characteristics of courts, because Chapter III of the Constitution assumes the rule of law, an assumption predicated in part on the State courts’ retention of the defining characteristics of courts.⁴³ The court’s decision, therefore, directly relied on that area of the rule of law that overlaps with the separation of powers -- the requirement of an independent and impartial judiciary.⁴⁴

iii. Non-Bill of Rights legislation challenges or threatens to reduce the power of the court

⁴² *ibid* 82, 149, 236, 428, 436, 481.

⁴³ *ibid* 58-66 (French CJ), 232-33 (Hayne J).

⁴⁴ See Chapter 4 above.

The phenomenon of invoking unwritten principles as a ground for invalidating legislation has also manifested itself in the United Kingdom, in a legal context dominated by parliamentary supremacy (although as we have seen, this is under challenge). A key aspect of the doctrine of parliamentary supremacy in the UK is that no law passed by Parliament may be set aside by the courts. There have been statutes that have caused debate about the definition of the parliamentary supremacy, such as the European Communities Act 1972 (UK) (ECA) and the Human Rights Act 1998 (UK) (HRA). However, neither of these statutes explicitly empowered the courts to invalidate parliamentary legislation. Yet, in obiter dicta in *Jackson*, we have seen that it was accepted by two judges in the House of Lords that there is a residual power at common law for judges to ‘reject’ legislation.⁴⁵

The two judges - Lord Steyn and Lady Hale – argued that this residual power could be utilized where there is an attempt to remove the power of the courts to review governmental actions that affect individual rights. The judgments suggest two potential approaches to such legislative attempts. The first of these is where review can be justified on the principle of legality and the second is ‘exceptional circumstances review’ as outlined by Lord Steyn. Indeed, Lady Hale envisioned the use of these two approaches to legislation that threatens to remove the power of the courts to review challenges to individual liberty in her judgment in *Jackson*. She warned that ‘[t]he courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by

⁴⁵ *Jackson* (n 21) [102] (Lord Steyn); [159] (Lady Hale).

removing governmental action affecting the rights of the individual from all judicial scrutiny.⁴⁶

The principle of legality is an interpretative tool, which ‘means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.’⁴⁷ As such, the principle of legality may arguably extend only to interpretative choices and not to invalidation of parliamentary legislation. In *AXA General Insurance Ltd v The Scottish Ministers*, Lord Reed articulated this presumption of legality as a potential ground for invalidating legislation of a subordinate legislature (the Scottish Parliament), but not the Westminster Parliament. However, it may be argued that Lord Reed’s reasoning in *AXA* opens the door for further development in the utilization of this principle and it remains to be seen whether the courts would assert a power to invalidate legislation of a sovereign legislature on this basis. Second, the power of invalidation may also be based explicitly on the rule of law, without an interpretative restriction. This would be the basis of ‘exceptional circumstances review’ as articulated by Lord Steyn. These ‘exceptional circumstances’ include occasions where a statute seeks to remove the power of the court to adjudicate issues related to individual liberties. As stated above, in *Jackson*, Lord Steyn argued that in ‘exceptional circumstances’ involving an attempt by the legislature ‘to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts

⁴⁶ *Jackson* (n 21) [159] (Lady Hale).

⁴⁷ *AXA General Insurance Ltd v The Scottish Ministers* [2011] UKSC 46, [2011] 3 WLR 871 (UKSC) [152] (Lord Reed); *R v Secretary of State for the Home Department, ex parte Pierson* [1997] UKHL 37, [1998] AC 539, 591 (Lord Steyn); *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131 (Lord Hoffmann).

in standing between the executive and citizens', the courts may have to reject those legislative attempts.

The legislature's usage, or proposed usage, of privative clauses or ouster clauses appears to have been a driving force behind the assertion by the court of a power to reject legislation which is wholly inconsistent with constitutional principle. Between 2004 and 2005 there were many denunciations of privative clauses from within the legislature and from various branches of the legal profession. These denunciations were largely in response to the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2004 (UK). As discussed in Chapter 5, the draft Bill that was introduced in Parliament contained a clause purporting to oust completely the jurisdiction of the court over decisions of the Asylum and Immigration Tribunal, even in the face of allegations of breach of natural justice.⁴⁸ A notable response from former Lord Chancellor Lord Mackay of Clashfern was that the ouster clause represented a 'serious affront to the rule of law', and he cited in support of his view the fact that based on the clause, the court would be 'prevented from intervening, even where there is a clear breach of natural justice on the part of the tribunal'.⁴⁹ Also noteworthy was Lord Chief Justice Woolf's argument, writing extra-judicially, that the enactment of the clause 'would have been ...inconsistent with the spirit of mutual respect between the different arms of government'.⁵⁰ Roger Smith, solicitor and Director of JUSTICE, likened a tribunal created under such rules to the Star Chamber and described the ouster clause as being not only 'offensive to all who value good

⁴⁸ Asylum and Immigration (Treatment of Claimants, etc.) Bill 2004 (UK)

⁴⁹ HL Debs, 15 March 2004, vol. 659 col. 67.

⁵⁰ Lord Woolf, 'The rule of law and a change in the constitution' (2004) 63 CLJ 317, 329.

governance’, but also, ‘objectionable under the principles both of common law and human rights’.⁵¹ So, as Mark Elliott notes, when Lord Steyn referred in the *Jackson* case to the possibility of Parliament abolishing judicial review of ‘flagrant abuse of power’, he ‘delicately omitted to say’ that the Government of the day had sought to do just that in the Asylum and Immigration Bill.⁵² Accordingly, these previous government threats to the jurisdiction of the court where fundamental rights or interests were engaged are a crucial part of the context in which the power of the court to invalidate legislation for breach of implied constitutional principles was asserted in the United Kingdom.

Jackson- which addresses instances in which non-Bill of Rights legislation may threaten the power of the court- is quite relevant to our discussion of the impact of implied constitutional principles on fundamental rights adjudication, despite not being a case in which there was an allegation of violation of a fundamental right. The relevance of *Jackson* lies in the fact that there were significant statements on the jurisdiction of judges in fundamental rights cases in the judgments of Lady Hale and Lord Steyn. Lady Hale, as stated above, spoke to the supervisory jurisdiction of the court in cases concerning ‘governmental action affecting the rights of the individual’ and Lord Steyn’s robust defence of judicial review and the ‘ordinary role of the courts’ must be thought to include judicial review in cases in which there are allegations of state interference with fundamental rights.

⁵¹ Roger Smith, ‘Rights And Wrongs: Asylum Star Chamber’ (2004) LS Gaz, 15 Jan, 16, 17.

⁵² Mark Elliott, ‘The Sovereignty of Parliament, the Hunting Ban, and the Parliament Acts’ (2006) 65 CLJ 1, 3.

Some of the dicta in *Jackson* were recently reasserted by the UK Supreme Court in *AXA General Insurance v Lord Advocate*.⁵³ *AXA* was a fundamental rights case in the sense established in Chapter 1 of the thesis. The case arose out of the enactment of the Damages (Asbestos-related Conditions) (Scotland) Act 2009. Sections 1 and 2 of the Act provided that asymptomatic pleural plaques constitute an injury capable giving rise to harm under the law of tort, despite that these plaques do not increase an individual's susceptibility to other asbestos-related diseases or shorten life expectancy. Section 4 of the Act provided that sections 1 and 2 were to have retrospective effect. The appellants were insurers who alleged, inter alia, that their right to peaceful enjoyment of their possessions under article 1 of the First Protocol to the ECHR, were violated by the Act. Under section 29(2)(d) of the Scotland Act 1998 legislation incompatible with any right protected by the ECHR was outside the legislative competence of the Scottish Parliament, and under section 33(1) the court was empowered to determine whether Acts of the Scottish Parliament were within its legislative competence. One issue that arose in the course of the case was whether in addition to the limits on legislative competence specified in the Scotland Act 1998, the Scottish Parliament was also subject to the supervisory jurisdiction of courts on common law grounds.

In a judgment delivered by Lord Hope, in whose judgment the remaining judges concurred, the justices identified two scenarios that are central to our discussion in this Chapter. First, Lord Hope referred to the dicta in *Jackson* in which Lord Steyn said, *obiter*, that in exceptional circumstances the Supreme Court might have to consider whether judicial review of flagrant abuse of power or the ordinary role of the courts is a

⁵³ *AXA General Insurance v Lord Advocate* (n 47).

constitutional fundamental that even a *sovereign Parliament* could not abolish.⁵⁴ Lord Hope correctly regarded this as a question of the relationship between the rule of law and parliamentary sovereignty and stated that it was an open question how a conflict between those two principles ought to be reconciled.⁵⁵ This, although *obiter*, leaves open the possibility that the courts could seek to enforce the rule of law by ‘rejecting’ legislation passed by the Westminster Parliament. The second scenario envisioned by Lord Hope was part of the court’s holding in the *AXA* case that Acts of the Scottish Parliament (which is not a sovereign Parliament) would be subject to judicial review and subject to refusal of recognition by the courts if legislation of the Scottish Parliament was passed seeking to ‘abolish judicial review or to diminish the role of the courts in protecting the interests of the individual.’⁵⁶ Lord Hope justified this power of rejection by invoking the rule of law as the ground on which this purported jurisdiction of the court rests. In his words ‘[t]he rule of law requires that judges must retain the power to insist that legislation of that extreme kind is not law which the courts would recognise.’⁵⁷

The first scenario explored by Lord Hope was already foreshadowed in *Jackson* and certainly has implications for the use of unwritten constitutional principles in judicial review in UK courts. It is arguable that the second scenario discussed by Lord Hope may also have implications for such review in jurisdictions where there is constitutional, rather than legislative, supremacy. A question raised by the judgment in *AXA* is whether

⁵⁴ *ibid* [50].

⁵⁵ *ibid* [51].

⁵⁶ *ibid*.

⁵⁷ *ibid*.

the holding that the court could and should refuse recognition to legislation of the Scottish Parliament that sought to abolish judicial review, could have implications for other jurisdictions in which the legislature is not sovereign. It is important to note that one reason the Supreme Court held conclusively that superior courts would be entitled to review the legislation of the Scottish Parliament on grounds that it rejected fundamental rule of law principles, was that the Scottish Parliament is not a sovereign Parliament. So a factor in the court's willingness to clearly assert this power to invalidate legislation on rule of law grounds is the question whether the legislature is sovereign. This suggests that in jurisdictions where there is constitutional rather than legislative supremacy, there could be a corresponding willingness and justification for asserting a power to invalidate legislation on grounds of violation of rule of law principles.

The implications of the *AXA* judgment for jurisdictions with constitutional supremacy are not entirely clear. There is a relevant similarity between devolved legislatures and legislatures in jurisdictions with constitutional supremacy, such as the Commonwealth Caribbean states, in that their legislatures are not sovereign. However, an equally relevant *distinction* is that the Scottish Parliament has delegated powers⁵⁸ while parliaments in the latter jurisdictions, while not sovereign, are in no sense delegated bodies. Accordingly, while the judgment on this point in *AXA* provides useful lessons on the court's view of its powers of review under common law, some of the reasoning of their Lordships might not be directly applicable to legislatures in jurisdictions such as those of the Commonwealth Caribbean.

⁵⁸

ibid [46].

With this caveat in mind, the *AXA* judgment may yet be instructive in jurisdictions without parliamentary supremacy because of the Supreme Court's holding that the constitutional principle of the rule of law can found the basis of the court's rejection of 'extreme' legislation that seeks to abolish judicial review or diminish the role of the courts as protector of the citizen. It is significant that the court came to this conclusion despite the presence of statutory grounds, embodied in the Scotland Act 1998, which has been described as a constitutional statute, which empower the court to invalidate legislation of the Scottish Parliament. This suggests a potentially significant role for constitutional principles, such as the rule of law, as complementary grounds for invalidation of legislation if the terms of the Constitution do not suffice.

As two Law Lords in *Jackson* and the Court in *AXA* have stated, this is only likely to occur in 'exceptional circumstances'. In countries with written Bills of Rights which confer jurisdiction on the courts to invalidate legislation, the circumstances in which the terms of the Bill of Rights would not suffice may be exceptional, yet they are not impossible. It is important to note that most of the Bills of Rights in the Commonwealth Caribbean constitutions are based on the ECHR and therefore bear a close resemblance to Schedule 1 of HRA. Also, the Caribbean constitutions allow for the amendment of the Constitution, including the Bill of Rights; some of the constitutions even allow for the enactment of Special Acts that derogate from the Constitution.⁵⁹ This may open the door for privative clauses that amend the Constitution and severely restrict the court's power of review for violations of fundamental rights. Accordingly, while the circumstances

⁵⁹ Derogation by 'Special Acts' is permitted if passed in accordance with special majority requirements prescribed in the Constitution. See, eg, section 13, Constitution of Trinidad and Tobago 1976.

would be exceptional, it is not inconceivable that if those circumstances were to occur, a court in a jurisdiction with constitutional supremacy might be without a constitutional textual ground on which to base its review of or refusal to recognize such a statute, and would be forced to resort to unwritten constitutional principles.

II – Trends and Fault Lines

The second part of this Chapter argues that two trends are evident in cases where judges assert the power to invalidate legislation on the ground of an implied principle. First, the cases in which the judges hold or state in obiter dicta that the implied principles are grounds on which legislation may be invalidated involve applications of the implied principles in defence of jurisdictional spheres. Thus, the separation of powers is often used, and, when the rule of law is used, it is that area of the rule of law which intersects with the separation of powers doctrine.⁶⁰ Second, there are more instances of the courts using the principles in this way to delineate and protect the sphere of the judiciary than that of the other two branches of government.

i. Invalidation in order to Protect Jurisdictional Boundaries

An examination of the cases discussed above reveals that judges more readily lay claim to a power to invalidate legislation on the ground of an application of one of the implied principle in defence of the boundaries between the institutions of state. In the cases examined in the course of this thesis, invalidation was either based on the separation of powers, or an application of the rule of law as a requirement of judicial independence, access to courts, or a combination thereof. Therefore, if the rule of law is

⁶⁰ See Chapter 4, ‘The Application of the Separation of Powers’.

suggested as a ground on which courts can invalidate legislation, it is that category of the rule of law which overlaps with the separation of powers principle. This claim does not mean that judges *generally* appeal to the separation of powers principle in more cases than they do to the rule of law principle. The claim made here is that in the cases in these jurisdictions in which judges assert a power to invalidate legislation based on an implied constitutional principle of the separation of powers or rule of law, there are more instances in which the application of the principle is one that protects jurisdictional spheres. For ease of reference, in the remainder of this section, these grounds will be referred to collectively as jurisdictional grounds.

This trend is arguably based on the following factors. First, while there is significant dispute about the true content of both the separation of powers and the rule of law, there appears to be significantly more debate regarding the content of the rule of law as well as more scepticism about its usefulness as a legal principle. The content of each of these principles was canvassed more fully in the preceding chapters. This accounts for part of the trend, but more is needed to explain the higher incidence of use of jurisdictional grounds (whether expressed as aspects of separation of powers or the rule of law) as bases for invalidation, especially since these jurisdictional grounds are sometimes expressed as part of the rule of law principle.

This leads to the second factor, that is, the greater appeal of jurisdictional applications of the principles as direct grounds of invalidation of legislation may be partly due to the fact that the jurisdictional grounds allow for judicial review to be presented as proceeding along structural rather than substantive or rights-based grounds. Rights-based grounds recognize and protect individual interests or community values

which the state is not permitted to infringe, while structural review relies on rules regarding the operation of the institutions of the state and the apportionment of powers among them. Jurisdictional grounds in general and the separation of powers in particular, are therefore structural in this sense. The rule of law has been included within the category of structural grounds by Adrienne Stone,⁶¹ but this is mistaken. Only those meanings of the rule of law that are limited to the functioning of governmental institutions should be classified as structural, excluding from this category the aspects of the rule of law that explicitly invoke substantive values.⁶² This would accord with my definition of structural review as review that is based on the rules regarding the operation of the institutions of government. Thus, the separation of powers would qualify as structural and some (but not all) applications of the rule of law would be considered structural.

Structural review generally attracts less stringent criticism than rights-based review.⁶³ While structural review is sometimes the subject of debate, the disagreement usually involves the manner of exercise of this review but does not generally involve arguments that the courts be denied this power of structural review *in toto*. It may be proposed that structural review is less susceptible to strident criticism as it is not open to arguments that it reflects judges' values on contentious moral or political questions. Accordingly, if a judge can base her decision on the constitutionality of the death penalty

⁶¹ Adrienne Stone, 'Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28 OJLS 1, 3-4, 12-13.

⁶² See alternate definitions of 'structural judicial review' in Stone (n 61); James Allan, 'Not In for a Pound—In for a Penny? Must a Majoritarian Democrat Treat All Constitutional Judicial Review as Equally Egregious?' (2010) 21 KLJ 233, 242-43.

⁶³ Stone (n 61) 3; Allan, 'Not In for a Pound—In for a Penny' (n 62) 243.

on the division of powers between the judiciary and the executive, the judge may avoid the charge that her ruling is a mask for her own moral views of the death penalty. Of course, it is open to doubt whether structural judgments can truly be said to avoid value judgments. For instance, in the context of separation of powers, decisions regarding which branch of government should be accorded particular functions may involve evaluative judgments regarding the function in question, the potential difference of results depending on which body exercises the function and the relative attributes of each body. Structural review in the context of the separation of powers may also reflect the judge's evaluative judgment regarding competing conceptions of the separation of powers.⁶⁴ In writing on the democratic legitimacy of structural judicial review, Adrienne Stone put the argument this way:

courts must make choices when interpreting the structural elements of a constitution and those choices are driven, at least in part, by judges' own assessments of the merits of competing conceptions of those structures.⁶⁵

Therefore, while structural review, like rights-based review, may *actually* involve evaluative judgments, it does appear that there is a perception that it does not. For instance, in Canada and Australia, it is argued in political and scholarly debates that judges should not have the power to engage in rights-based review but this sort of objection is not raised to structural judicial review.⁶⁶

⁶⁴ For instance a judge may adopt a material, as opposed to formal, conception of the separation of powers. For the distinction between material and formal conceptions of the separation of powers, see Chapter Four.

⁶⁵ Stone (n 61) 17.

⁶⁶ *ibid* 5-6.

Accordingly, there is some dissonance between perception and reality, but it is the perception that is relevant for the purposes of this chapter. For our purposes, it is necessary to consider that this perception of the merits of structural as opposed to rights-based review may partly account for the fact that there is a greater incidence of judges relying on jurisdictional grounds as bases for invalidating legislation. What perhaps supplements the impact of this perception is that when judges rely on jurisdictional grounds, they tend to rely on traditionally established propositions about the relative functions and powers of the relevant branches of government. This idea is explored in the next section on the divisions protected by the courts.

ii. Divisions Protected by the Courts

Within the trend whereby judges identify jurisdictional applications of the implied principles as grounds on which legislation may be invalidated, another trend is identifiable. This is the trend whereby judges protect the sphere of the judiciary to a greater extent than they protect the spheres of the legislature or of the executive.⁶⁷ This is evident in the majority of the cases in this study, from *Hinds* in the Commonwealth Caribbean to *Jackson* in the UK.

An exception to this general rule is the case of *Astaphan v Comptroller of Customs of Dominica*.⁶⁸ The question before the court was whether the Dominican Customs (Control and Management) Act 1985, s 27(4), was constitutional. Section 27 of

⁶⁷ This trend is unsurprising as it may be as an expected result under a model of public choice theory or institutional theory. See William Mitchell and Randy Simmons, 'Public Choice and the Judiciary: Introductory Notes' [1990] BYUL 729; Jack Knight and Lee Epstein, 'On the Struggle for Judicial Supremacy' (1996) 30 Law & Society Review 87.

⁶⁸ (1996) 54 WIR 153 (Eastern Caribbean CA, Dominica).

the Act provided that if an importer signs a declaration that, due to lack of documentation or information, he is unable to make a correct and complete entry of goods, he will be allowed to take delivery of the goods on payment of a specified sum. Under section 27(4) the specified sum was comprised of the customs duty estimated by a customs officer, in addition to ‘such further sum as the [customs] officer may require, that further sum being not less than one-half of the estimated duty’. The appellants, who were required to pay the specified sum, unsuccessfully challenged the constitutionality of the section before the High Court of Dominica. They appealed against the judgment of the lower court, arguing before the Court of Appeal of the Eastern Caribbean States that the ‘further sum’ referred to in section 27(4) was either a tax or duty [which were regarded as the same], or a penalty, and that in either case, it was unconstitutional. The appellants contended that if the further sum was regarded as a tax or duty, it was inconsistent with the basic constitutional principle of the separation of powers. If it was regarded as a penalty, it also violated the principle of the separation of powers and/or violated section 6 of the Constitution of the Commonwealth of Dominica 1978, which prohibits compulsory acquisition of property except under the conditions permitted in the Constitution.

These arguments were accepted by the Court of Appeal of the Eastern Caribbean States. The Court held, first, that if the ‘further sum’ is a tax it violates the separation of powers as between the legislature and the executive. The Court reasoned that the power to impose taxes and duties is an inherently legislative power and that if the further sum was a tax or duty, the legislature had delegated its legislative power to the executive without prescribing a maximum sum or otherwise circumscribing the power and without

prescribing guidelines or a policy for the imposition of the further sum.⁶⁹ The court further held that the compulsory acquisition of the further sum constituted a violation of the right not to be deprived of property and did not fall within the constitutional exception of acquisition of property by way of penalty for breach of the law because the Customs Act did not provide that the inability to make perfect entry of goods due to want of documentation or information constituted an offence. Yet, the court sought to further bolster the judgment by holding that, even assuming that the further sum was a penalty, it violated the separation of powers by purporting to vest the discretion to fix the appropriate penalty in the hands of the executive, rather than the judiciary.

As the Caribbean attorney, Stephen Fraser, has written, it was thought prior to this decision that the separation of powers only had partial application in the Caribbean context, in that the courts would only enforce the separation of the judiciary from the legislative and executive branches, but would not demarcate or enforce divisions between the executive and the legislature.⁷⁰ Indeed, *Astaphan* is the only the case that I have found in any of the jurisdictions in this study in which a court has invalidated legislation on the ground that the legislation violated the separation of powers by purporting to transfer legislative powers to the executive. How then do we account for the decision in *Astaphan*? First, the particular finding on the ground of separation of powers was shielded by other grounds. In fact, the entire reasoning and decision in the case could be characterized as an attempt to construct a ‘bullet-proof judgment’. In this sense, the

⁶⁹ ibid 158-59.

⁷⁰ Stephen Fraser, ‘Constitutional Protection of Fundamental Rights in Guyana’ (25 November 2000), <<http://www.guyanlaw.net/index.php/8-news-events/41-constitutional-protection-of-fundamental-rights-in-guyana>> accessed 12 December 2012.

judgment was constructed upon so many foundations that it could be defended even if the separation of powers finding is assailed, which therefore creates a type of shield for the court's decision. Second, an explanation for the exception of the *Astaphan* decision is that the court was emboldened by the Privy Council decision in *Hinds*. Third, the court was arguably also emboldened by the powers accorded to the court under the Constitution. In particular, the court may have been emboldened by the fact that the constitutions of the Commonwealth Caribbean, including that of Dominica, prescribe judicially enforced limits on the legislature. *Astaphan* suggests that in Commonwealth Caribbean jurisdictions, courts may be prepared to invalidate legislation on the ground of violation of the separation of powers as between the legislature and executive, at least where fundamental rights appear to be engaged.

Why is there a higher incidence of judges using jurisdictional bases as grounds on which to invalidate legislation where the legislation affects judicial independence but not where it affects the division between the legislature and the executive? First, judges may feel more comfortable policing the boundaries of their own province of power because they can justifiably claim to be the appropriate guardians of their own sphere of activity. This relative sense of comfort may be enhanced by the notion that the judiciary is the 'least dangerous' branch of government.⁷¹

In this sense, an attempt by the courts to protect the powers of the judiciary may be viewed as less risky than attempts to protect the power of the other branches. Indeed, attempts to guard against reduction of the judiciary's power may seem all the more

⁷¹ See Alexander Hamilton, *The Federalist Papers* (Michael A. Genovese ed, Palgrave Macmillan 2009) 236.

justifiable if the judiciary is viewed as weaker than the other branches and more vulnerable to the force or power of the other branches.

Second, in the Westminster system of the UK or modified Westminster system of the Commonwealth Caribbean, Canada, and Australia, the line between the executive and the legislature is less defined, whereas the division between the judiciary on the one hand, and the executive and the legislature on the other, is much more concrete. This was the prevailing view in twentieth century commentary on the separation of powers in the Westminster system.⁷² This view was also evident in cases in the early twentieth century, such as the Australian High Court decision in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*⁷³ in which the court rejected the argument that legislation which delegated power to the Governor General to make regulations which could override Acts of Parliament violated the separation of powers between the legislature and the executive. In his judgment, Evatt J emphasised the close relationship between the executive and legislature which exists in the Westminster system. It continues to dominate today, as is evident in Roger Masterman's 'The Separation of Powers in the Contemporary Constitution'⁷⁴ and this view has been endorsed in judicial statements. Indeed, while there have long existed disputes in the academic literature

⁷² Gordon Hewart, *The New Despotism* (Ernest Benn 1929) 37-45; Trevor C. Hartley and J. A. G. Griffith, *Government and Law: An Introduction to the Working of the Constitution in Britain* (2nd edn, Weidenfeld and Nicolson 1981) 175.

⁷³ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (HC, Australia); Leslie Zines, *The High Court and the constitution* (5th edn, The Federation Press 2008) 198-207.

⁷⁴ Roger Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge UP 2011) 4; On the acceptance of the independence of the judiciary in Australian constitutional law, see Zines (n 73) 208-18.

regarding the existence of separation of powers as a feature of the British constitution, there has been much greater acceptance of the notion of an independent judiciary.⁷⁵ This notion has become so firmly established that it may perhaps be seen as not only an accepted facet of the separation of powers and of the rule of law, but also a characteristic that is regarded as fundamental to the very understanding of the separation of powers, the rule of law, and the Westminster constitution. As Masterman indicates, this idea has been based on and supported by statute, common law and convention. The statutes that have contributed to the reinforcement and acceptance of judicial independence as a fundamental feature of the constitution include the Magna Carta 1215, the Act of Settlement 1701, the House of Commons Disqualification Act 1975 (UK), the Senior Courts Act 1981 (UK), the HRA 1998, and the CRA 2005. At common law, these statutes have been supported by the development of rules of procedural fairness, such as the rule against bias and the rule requiring that decisions that result in a deprivation of rights or interests must be made after a fair hearing.⁷⁶

The notion that effective separation between the judicial branch and the other two branches of government is a fundamental aspect of the constitution has also received judicial endorsement. As Lord Bingham put it in *Mollison*:

Whatever overlap there may under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so.⁷⁷

⁷⁵ Masterman (n 74) 26-30.

⁷⁶ *Ridge v Baldwin* [1964] AC 40; *R v Bow Street Magistrates ex p Pinochet (No. 2)* [1999] 1 All ER 577; noted Timothy H. Jones, 'Case Comment: Judicial Bias and Disqualification in the Pinochet case' [1999] PL 391.

⁷⁷ *Mollison* (n 8) [13].

Lord Steyn also argued, citing *Mollison*, that while the separation of powers between the executive and legislature is ‘comparatively weak’, the separation of powers between the executive and legislature on the one hand, and the judiciary on the other, is strong.⁷⁸ In addition, Masterman notes the convention that on appointment as a member of the judiciary, judges should withdraw from membership of political parties.⁷⁹ This convention helps to dissociate judges from political affairs and therefore contributes to the independence of the judiciary.

The third explanation for the judicial protection trend is that in the cases in which judges use jurisdictional grounds as bases for invalidating legislation that appears to encroach on judicial power, it seems that there are at least two elements involved: that individual interests are affected, and that the court’s power of review in relation to government action that affects those interests is limited to some extent by a statutory text. In these circumstances, the court may see itself as the last bastion of fundamental rights protection and may resist efforts to remove this last layer of protection for individuals. Perhaps where the question only arises as a question of the division between legislative and executive power, there are other layers of protection that may yet be explored so judicial intervention would not be perceived as urgent.

Conclusion

The development of judicial acceptance that implied constitutional principles are grounds for invalidating legislation is emblematic of the tension between the elected and judicial

⁷⁸ Lord Steyn, ‘Democracy, the Rule of Law and the role of Judges’ [2006] EHRLR 243, 248.

⁷⁹ Masterman (n 74) 28.

branches of government. This tension is pronounced whenever legislatures seek to limit the jurisdiction of the courts to restrain governmental interference with fundamental rights. What is particularly interesting about this struggle is that because the legislature defines and redefines the *textual* bases of judicial enforcement of fundamental rights, whenever the legislature exercises its control over the text in order to narrow the judiciary's sphere of influence in rights protection, the courts may resort to looking outside the text in order to ground their protective actions. This Chapter sought to explore the various circumstances in which courts rely on implied constitutional principles to strike down legislation and to understand the patterns that emerge when courts take such action.

CHAPTER SEVEN – IMPLIED PRINCIPLES AS GATEWAYS TO COMPARATIVE LAW

Introduction

Our discussion now takes us to the intersection of the institutional and the methodological. This chapter taps into an important thread that runs through the practice of reasoning by implied constitutional principles. Such reasoning often situates the institutions of the state, the substance of the law, and the reasoning of the judges within a transnational or even global context. The implied principles are used in a way that expressly connects the court's reasoning to foreign institutions and states, by creating a form of connection to foreign judicial decisions. There is a significant degree of commonality of language and discourse that feeds and is fed into by the comparative methodology employed by judges, a commonality around the language of constitutionalism, the rule of law, the separation of powers, and fundamental rights. The relationship between reasoning by implied constitutional principles and reasoning by comparative analysis can flow in two directions. In other words, implied constitutional principles can fuel and justify comparativism in adjudication, while the use of foreign judgments by courts can also result in references to implied constitutional principles.

The chapter will begin by briefly setting the scene, noting the trend of judicial comparativism in constitutional law and human rights. Specifically, I will propose reasons why judges cite foreign judgments and show that the appeal of comparative law

intersects with the appeal of implied constitutional principles, specifically in fundamental rights adjudication. In this analysis, I will highlight the importance of legitimation of institutions, of institutional processes, and of the state *qua* state. The second part of this chapter discusses the ways in which the implied principles function as gateways to foreign judgments. The court may state that the principle is a feature of the local legal system by virtue of inheritance from another jurisdiction. Accordingly, in Canada and the Caribbean, the legitimacy of invoking the rule of law and separation of powers is traced to the inheritance of the British legal tradition.¹ The courts also refer to foreign law in discussing and justifying the content given to these principles.² I highlight specific themes that arise in the analysis of this practice. First, the use of implied constitutional principles in conjunction with comparative legal analysis is evocative of a connection between transition and continuity. Second, it appears that the judges are concerned to preserve and reinforce institutional legitimacy. Part 3 of the chapter discusses the extent to which the case law shows the courts developing common approaches to common problems and the impact of the exchange of ideas and methodology across the jurisdictions considered in this thesis.

Having chosen countries that were once part of the colonial structure of Great Britain, the invocation of implied principles by a judge in one of the newly independent states as a pathway to adopting the reasoning of judges in the United Kingdom is also, in some respects, an acknowledgment of, and a beckoning towards, a historical framework.

¹ *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 (Manitoba Language Rights Reference or Reference re Manitoba Language Rights)* [1985] 1 SCR 721 [63].

² *Thomas v Baptiste* [2000] 2 AC 1 (JCPC, Trinidad and Tobago) 21-22.

It raises questions of the situation of the institution within the new state and questions of the degree of autochthony and intellectual independence manifested by the judicial and other legal institutions.

Throughout the discussion in this chapter, I will also address the extent to which reference to domestic instruments leads to the development of ‘nationalized’ conceptions of the implied principles, and consider how this interacts with the references to foreign law. This analysis will expose a tension between transnationalism and nationalization which is a key feature of both comparativism and the constitutional principles of the rule of law and the separation of powers.

I Comparativism in Constitutional Law and Human Rights

The trend of judicial comparativism in constitutional and human rights cases has been affected by concurrent events in constitutional states.³ The first significant occurrence is the existence of constitutions, whether written or unwritten, which feature a number of modern elements. Second, there is the impact of the recognition of fundamental rights and freedoms. The emerging rights discourse across constitutional jurisdictions, often alongside rights instruments, has also fuelled comparativism. Third, these jurisdictions

³ On comparativism in Australian constitutional law, see Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ [2009] U Melb Law Research Series 15. On comparativism in Canadian constitutional law, see Gianluca Gentili, ‘Canada: protecting rights in a “worldwide rights culture”, an empirical study of the use of foreign precedents by the Supreme Court of Canada (1982-2010)’ in Tania Groppi and Marie-Claire Ponthoreau (eds), *Use of foreign precedents by constitutional judges* (Hart 2013). On comparativism in UK constitutional law, see Esin Örücü, ‘Comparative Law in British Courts’, in Ulrich Drobnig & Sjef van Erp (eds.), *The Use of Comparative Law by Courts* (Kluwer Law International 1999); Tom Bingham, *Widening Horizons: The Influence Of Comparative Law And International Law On Domestic Law* (Cambridge UP 2010) 5. On comparativism in Commonwealth Caribbean constitutional law, see Albert Fiadjoe, ‘Judicial Attitudes to Commonwealth Caribbean Constitutions’ (1991) 20 *Anglo-Am.L.Rev* 121.

have developed institutional mechanisms, often including courts, to settle disputes regarding the extent of fundamental rights and to contribute to the realization of such rights.⁴ These developments foster, and in some cases spring from, a transnational dialogue on constitutionalism and rights protection. They feed comparative work among scholars, legislators, advocates and judicial actors.⁵

The level of generality of principles makes them particularly attractive in comparative judicial exchanges. The universalistic nature of constitutional principles such as the rule of law and separation of powers at a high level of abstraction means that their invocation does not, *ipso facto*, threaten the commitment to the particular values and conditions of the state in question. If one then digs deeper into the content of such principles to find the particular applications ascribed to them in foreign jurisdictions, the court can use this knowledge in a variety of ways, depending on the perspectives of the judges in the case, the textual arrangements of the constitution, and the social and political circumstances of the society. This may include a decision by the court to reject a particular application of the principle in another jurisdiction.

There is a significant point of overlap between the appeal of reasoning by principles and the appeal of comparative methodology. This is the supposed reputational impact of these two analytical tools. The reputational impact operates on two levels. First, they are indicative of the legitimacy of the state. They send a signal to internal and external forces that the state has embraced the tradition of democratic constitutionalism.

⁴ Wen-Chen Chang and Jiunn-Rong Yeh, 'Internationalization of Constitutional Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 1168-69.

⁵ Vicki C. Jackson, 'Comparative Constitutional Law: Methodologies' in Rosenfeld and Sajó (n 4).

This can either be, as in the case of South Africa, a message that the state has rejected an undemocratic past,⁶ or, as in the case of many Commonwealth Caribbean states, a message that the new state will retain the democratic traditions of the former ruling state. Interestingly, what emerges is that the interpretative techniques may be perceived as having a reputational impact on the perception of the legitimacy of the state, which can be used to reinforce an image of transformation or an image of continuity, or some combination of both.⁷ On the intra-state level, reputational impact is meant to accrue to the institutional legitimacy of the court. Referring to the ‘legitimacy generating’ effects of comparative judicial reasoning, it has been remarked that ‘judicial borrowing helps courts to deliver decisions that appear objective and impartial, which is particularly valuable to newly establish [sic] constitution courts. Engagement with foreign peers can also boost the external prestige of courts even when it leads to the rejection of foreign approaches.’⁸ McCrudden has also convincingly argued that courts employ citation of foreign judgments as a ‘distancing device’ to enable the courts’ audience to view human rights judgments as legal, as opposed to policy or political judgments.⁹

⁶ Heinz Klug, ‘South Africa’s Experience in Constitution-Building’ University of Wisconsin Law School, Legal Studies Research Paper Series Paper No. 1157, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808168>, accessed January 22, 2013.

⁷ See further examples and discussion in Part II of this Chapter.

⁸ Vlad Perju, ‘Constitutional Transplants, Borrowing, and Migrations’ in Rosenfeld and Sajó (n 4) 1318.

⁹ Christopher McCrudden, ‘Human Rights and Judicial Use of Comparative Law’, in Esin Örüçü (ed.) *Judicial Comparativism in Human Rights* (Martinus Nijhoff Publishers 2004) 1.

II - Inheritance from Former Colonial Power

The implied constitutional principles appear to provide a base from which the substantive and structural borrowing that occurred during constitution-making processes in the new nation-states can be maintained. Indeed, Trevor Allan contends that Western liberal democracies are founded on the rule of law, and consequently, share unwritten constitutional principles. For Allan, these states ‘should ... be understood to share a common law constitution’.¹⁰ It is a similar sentiment of commitment to common constitutional principles, including the rule of law and the separation of powers, which may be used as a gateway to transnational judicial reasoning.

The implied constitutional principles of the rule of law and separation of powers are sometimes expressly linked to the legal system and legal tradition inherited from Britain. In this way, the colonial history and the legal tradition of a foreign jurisdiction are used to justify the invocation of an implied constitutional principle. This also has the effect that foreign law- including foreign judgments- is referred to in judicial analysis.

In Canada the recognition of the rule of law as an ‘unwritten postulate’ of the Constitution has been based in part on its status within the UK constitution and the reference to ‘the constitution ... of the United Kingdom’ in the preamble to the Canadian Constitution Act 1867. Accordingly, in *Reference re Manitoba Language Rights*, it was explained that:

The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, *The Law of the Constitution* (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble

¹⁰ TRS Allan, *Constitutional Justice: A liberal Theory of the Rule of Law* (OUP 2001) 4-5.

to the *Constitution Act, 1982*, and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words “with a Constitution similar in principle to that of the United Kingdom”.¹¹

This reasoning did not directly refer to English case law, but, of course, it opens the door for references to case law from the UK in expounding on the principles of the Canadian Constitution. The *Manitoba Language Rights* case is quite useful in our analysis. Section 133 of the Constitution Act 1867 and section 23 of the Manitoba Act 1870 required that all the Records and Journals of the Houses of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, and the Acts of the Parliament of Canada and of the Legislatures of Quebec and Manitoba, be printed and published in both English and French. The Manitoba Act 1870 is entrenched as part of the Constitution of Canada by virtue of section 52(2)(b) of the Constitution Act 1982. In 1890, An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba 1890 (Man.) (Official Language Act) was enacted by the Manitoba Legislature. The Act provided that the records and journals of the House of Assembly for the Province of Manitoba and the Acts of the Legislature of the Province of Manitoba need only be printed and published in the English language. Subsequently, Manitoba ceased publication of French versions of its records, journals and legislation. On a reference to the Supreme Court of Canada, the court was asked to determine, *inter alia*, whether the language requirements of section 133 of the Constitution Act 1867 and section 23 of the Manitoba Act 1870 were mandatory, and if so, whether Manitoba legislation that was not printed and published in both English and French were invalid by reason of section 23 of the Manitoba Act 1870. The court answered both questions in the affirmative, but on the second question, it clarified that ‘the invalid current

¹¹ *Reference re Manitoba Language Rights* (n 1) [63].

Acts of the Legislature will be deemed temporarily valid for the minimum period necessary for their translation, re-enactment, printing and publication.¹²

i. Transition and Continuity

The use of implied constitutional principles as a conduit between Britain and the new state evokes a connection between transition and continuity. For instance, in the *Secession Reference*, the rule of law, along with other constitutional principles, was invoked in a discussion of the historical context of the Constitution and the influence of that history on the principles that form part of the current Constitution:

Despite its federal structure, the new Dominion was to have ‘a Constitution similar in Principle to that of the United Kingdom’ (*Constitution Act, 1867*, preamble). Allowing for the obvious differences between the governance of Canada and the United Kingdom, it was nevertheless thought important to thus emphasize the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.¹³

In that passage, we see a claim to the adoption of a tradition of constitutionalism and the rule of law at the founding of the new state. There is a sense that this continuity of democratic traditions adds legitimacy to the institutions of the newly independent state. Thus there are at least two elements of the appeal to continuity. The first is the assertion of the continuity of the substance of the law in the sense of the adoption of constitutional principles. The second is the continuity of state institutions.

The continuity of positive laws was at the heart of the decision of the Supreme Court of Canada in *Reference re Manitoba Language Rights*. This was reflected in the

¹² *ibid* [157].

¹³ [1998] 2 SCR 217 (SC, Canada) [44].

court's assertion of the survival of the constitutional principle of the rule of law. The continuing presence of the rule of law as a 'fundamental postulate' of the constitution meant that the court had a ground on which to base its decision to declare the temporary validity of the Manitoba legislation. As the court put it, 'the rule of law requires the creation and maintenance of an actual order of positive laws to govern society.'¹⁴ The maintenance of the positive legal order was perceived by the court as essential to 'avoiding a legal vacuum in Manitoba and ensuring the continuity of the rule of law.'¹⁵ The nature of the continuity which was discussed in this aspect of the judgment was quite elemental. Based on the court's reasoning, the rule of law ensured the preservation of the legal and social order in society. Hence, the court held that a 'declaration that the laws of Manitoba are invalid and of no legal force or effect would deprive Manitoba of its legal order and cause a transgression of the rule of law.'¹⁶ This led to the court's conclusion that 'otherwise invalid acts may be recognized as temporarily valid in order to preserve normative order and the rule of law.'¹⁷ The elemental nature of the concern of securing normative order through the rule of law ensures that this issue is viewed as having a global reach and not restricted to national matters. Since the preservation of a legal order would be essential to the survival of any state, this internationalizes the issue faced by the court in the *Manitoba* case and helps to justify the incorporation of foreign judicial decisions into the court's reasoning.

¹⁴ *Reference re Manitoba Language Rights* (n 1) [60].

¹⁵ *ibid* [67].

¹⁶ *ibid* [68].

¹⁷ *ibid* [103].

The case also presented the rule of law as a connection to a global network of constitutional states in general, going beyond the connection to the former colonial ruler. Thus, the court characterized the rule of law as an ‘unwritten but inherent principle’ which ‘must provide the foundation of any constitution.’¹⁸ This argument was consistent with the Supreme Court’s reference to judgments from Cyprus and Pakistan, both former colonies of Britain. In Cyprus and Pakistan, there was a crisis regarding the enactment of unconstitutional statutes and the court had to decide whether those statutes could be recognized as valid under the law. In both Cyprus and Pakistan, the doctrine of state necessity was used to sanction acts that would otherwise have been held to be unconstitutional and invalid. In Cyprus, in *Attorney General of the Republic v Mustafa Ibrahim*,¹⁹ the Court of Appeal of Cyprus relied on the doctrine of state necessity to hold valid a law passed in contravention of the express provisions of the Constitution of the Republic of Cyprus 1960. The Federal Court of Pakistan in *Special Reference No. 1 of 1955* upheld an action taken by the Governor General of Pakistan to fill a legal vacuum created by the Federal Court’s earlier invalidation of many statutes and regulations. In an earlier case, the Federal Court had held that forty-four amendments to the Indian Independence Act 1947 (which functioned as the original Constitution for India and Pakistan) were void, having been passed without royal assent. As a result of this decision, many pieces of legislation passed pursuant to the amendments were also nullities. The Governor General subsequently issued a proclamation giving himself the power retrospectively to validate and enforce all laws necessary to preserve the State and the

¹⁸ *ibid* [105].

¹⁹ [1964] Cyprus Law Reports 195.

government until a new Constituent Convention could decide upon the validity of those laws. In *Special Reference No. 1 of 1955* the Federal Court of Pakistan found that the Governor General acted out of necessity ‘in order to avert an impending disaster and to prevent the State and society from dissolution.’²⁰ This mirrors the concerns that confronted the court in the *Manitoba Language Rights* case. For the Canadian Supreme Court, the doctrine of necessity employed by the courts in Cyprus and Pakistan had its foundation in the rule of law. In the words of the Canadian Supreme Court, ‘[t]he cases on the necessity doctrine ... point to the same conclusion: the courts will recognize unconstitutional enactments as valid where a failure to do so would lead to legal chaos and thus violate the constitutional requirement of the rule of law.’²¹ The rule of law basis and the elemental concern for the maintenance of legal order in society are features that support an appeal to foreign law and, conversely, the references to foreign law allow the court to incorporate unwritten principles and doctrines into its judgment.

In the *Secession Reference* the Supreme Court of Canada constructed a case for continuity by laying claim to the gradual evolution of the Constitution. Support for the Court’s characterization of the Constitution was based in part on the process through which independence was achieved in Canada. The court laid a claim to gradual evolution on the basis of the process of independence. Accordingly, it was noted that ‘Canada’s evolution from colony to fully independent state was gradual... Canada’s independence from Britain was achieved through legal and political evolution with an adherence to the

²⁰ *Special Ref. 1 of 1955*, P.L.R. 1956 W.P. 598 (Fed. Ct., Pakistan), cited in *Reference re Manitoba Language Rights* (n 1) [101].

²¹ *Reference re Manitoba Language Rights* (n 1) [104].

rule of law and stability.’²² After tracing Canada’s journey to independence, the Court stated its conclusion that ‘[w]e think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability.’ As in the *Manitoba Language Rights Reference*, the preoccupation with the rule of law as an engine of continuity and stability within the state was instrumental to the court’s reasoning in the case. The Court concluded that Quebec did not have a right to unilaterally secede from Canada, and further, that all parties (including Quebec) should negotiate ‘in a manner consistent with constitutional principles and values’.²³ In recognizing the complex issues to which secession would give rise, the Court stated that these issues ‘would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty’. Accordingly, the Court concluded that ‘[t]he Constitution vouchsafes order and stability, and accordingly secession of a province “under the Constitution” could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.’²⁴ Hence, the continuity and stability that characterized the independence process, and which is reflected in the adoption of the rule of law as a principle of the Canadian Constitution, requires that

²² *Secession Reference* (n 13) [46].

²³ *ibid* [95].

²⁴ *ibid* [149].

stability must also be maintained by the negotiation and potential secession process for Quebec.

ii. Continuing Institutional Legitimacy

Another significant theme that emerges in cases where there is a confluence of reasoning by implied constitutional principle and reasoning by comparative legal analysis is the theme of continuing institutional legitimacy. The *Manitoba Language Rights* case emphasised the need for institutional legitimacy. In explaining why it was necessary to deem that the Acts of the Legislature of Manitoba have temporary validity, one of the concerns highlighted by the court was that of the legitimacy of the institutions of the province. In holding that the rule of law demanded the declaration of temporary validity, the court summarized the potential impact on the institutions of government in the province of Manitoba if the Acts of the province were invalidated with immediate effect:

The situation of the various institutions of provincial government would be as follows: the courts, administrative tribunals, public officials, municipal corporations, school boards, professional governing bodies, and all other bodies created by law, to the extent that they derive their existence from or purport to exercise powers conferred by Manitoba laws enacted since 1890 in English only, would be acting without legal authority.²⁵

For this institutional reason, along with the potential impact on the substantive law of the rights and obligations arising under unilingual Acts passed after 1890, the court concluded that ‘declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law’.²⁶ In this construct, the rule of law operates to secure the legal authority of the institutions of the

²⁵ *ibid* [56].

²⁶ *ibid* [59].

state. Hence, the court invoked the rule of law not merely to preserve the authority of the positive laws, but also to ensure the maintenance of institutional authority. The rule of law is perceived as a conduit operating within the dimensions of space and time. It connects the current institutions to the past and, hence, to their past legitimacy and authority, and it connects the institutions within Manitoba, Canada, to the institutions of England. As such, the court contended that ‘the rule of law is a fundamental postulate of our constitutional structure... [t]he rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest.’²⁷

The *Hinds* case, which was a seminal case in Caribbean constitutional law- the first case in which a court invalidated a statute from an independent Commonwealth Caribbean jurisdiction for inconsistency with the Constitution²⁸ - also explicitly laid claim to continuity and characterized the Constitution as ‘evolutionary’. The same theme of transition through continuity was present in Lord Diplock’s judgment and he took the view that one result of the continuity was the survival of the separation of powers and the preservation of the institutional apparatus that existed prior to independence. In his words:

The new constitutions, particularly in the case of unitary states, were evolutionary not revolutionary. They provided for continuity of government through successor institutions, legislative, executive and judicial, of which the members were to be selected in a different way, but each institution was to exercise powers which,

²⁷ *ibid* [63].

²⁸ A.R. Carnegie, ‘*Floreat* the Westminster Model?’ A Commonwealth Caribbean Perspective’ (1996) 6 Carib.L.R. 1, 1.

although enlarged, remained of a similar character to those that had been exercised by the corresponding institution that it had replaced.²⁹

Similarly to the *Manitoba Language Rights* case, this passage evinces a concern for the preservation of institutional integrity. As this thesis shows, the invocation of the rule of law and the separation of powers is often connected with the desire to display institutional legitimacy. The cases reveal that the use of implied constitutional principles in connection with comparative law is meant to reinforce the legitimacy of the state institutions.

The element of institutional legitimacy was brought to the fore in the *Provincial Judges Reference*. As we have seen in Chapter 5, the Supreme Court of Canada in the *Provincial Judges Reference* ruled that the reduction of salaries of judges in the provinces of Prince Edward Island, Manitoba, and Alberta was unconstitutional. In the Opinion, the preambular ‘reference to “a Constitution similar in Principle to that of the United Kingdom”’ was referred to as recognition of the constitutional principle at issue, in that case the principle of judicial independence.³⁰ Moreover, the institutional similarity and continuity between England and Canada was asserted, the argument being made that ‘the preamble indicates that the legal and institutional structure of constitutional democracy in Canada should be similar to that of the legal regime out of which the Canadian Constitution emerged.’ In the view of the Court, this necessitated recognition of constitutional democracy and the protection of those mechanisms that ‘give those

²⁹ *Hinds v R* [1977] AC 195 (JCPC, Jamaica) 212.

³⁰ *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 (SC, Canada) [105].

institutions definition, direction and legitimacy.’³¹ By that reasoning, the implied principle of judicial independence required limitations on the use of legislative power to undermine the independence of the courts.

The Court’s assessment of the Constitution as evolutionary was invoked to justify an expansion of the protection of judicial independence from superior court judges to all judges in the state. The argument of Lamer CJ, delivering the opinion of the majority, proceeded as follows:

The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. As we said in *Valente, supra*, at p. 693, that Act was the ‘historical inspiration’ for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

The court then concluded that the judicial branch constituted an institution that is part of the ‘basic structure of [the] Constitution’, with the result that there is an ‘implied limitation [on legislative power] that the independence of those courts cannot be undermined’.³²

The continuity of the English model of constitutionalism in the new states and the impact of this continuity on the institutional apparatus of the states also had an impact on significant judgments regarding the separation of powers in the Commonwealth Caribbean and Australia. In *Hinds* Lord Diplock explained that once the condition has

³¹ *ibid* [103], in reference to the protection of political institutions through the protection of free speech.

³² *ibid* [108].

been satisfied that the Constitution in question is ‘a Constitution on the Westminster model’, it ‘is implicit ... that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office’.³³ The *Hinds* assessment of the separation of powers in the Westminster constitutional system ought to be compared with the characterization of that constitutional model in *R v Kirby, ex p Boilermakers’ Society of Australia*, a decision of the High Court of Australia.³⁴ Both courts referred to the adoption of ‘British’ ideas on the ‘division’ or ‘separation’ of powers, the Court in *Kirby* stating that the division in the Australian constitution ‘is a division of powers whose character is determined according to traditional British conceptions’.³⁵ *Kirby*, which was decided in 1956, described the separation of powers as a ‘broad division of power’. For the Court, understanding this division ‘according to traditional British conceptions’ meant that ‘difficulties as between executive and legislative power are not to be expected.’³⁶ In the view of the Court, the ‘British conceptions’ had the consequence that ‘it is in connection with judicial power that questions are apt to occur.’³⁷ When we fast-forward nineteen years to the *Hinds* decision, we see a bolder and more expansive statement of the contours of the separation of powers. For Lord Diplock, delivering the judgment of the Privy Council in *Hinds*, ‘it is well established as a rule of construction applicable to constitutional instruments under

³³ *Hinds* (n 29) 213.

³⁴ (1956) 94 CLR 254 (HC, Australia) 276-77.

³⁵ *ibid* 276.

³⁶ *ibid*.

³⁷ *ibid*.

which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.³⁸

Therefore, both courts invoked English tradition to justify their understanding of the separation of powers, yet their characterizations of the implications of the separation of powers principle are not entirely consistent with each other. What are the explanations for this? The first possible explanation is that one of the two assessments was incorrect. On this point, it is useful to note that *Hinds* has been criticised by some academics in the UK and the Caribbean, the argument being made that the separation of powers was not truly a feature of the English constitution.³⁹ The second is that neither assessment was incorrect, as each represented an accurate application of the separation of powers in the English constitution to the Constitution of the respective state. Again, the criticism of *Hinds* is relevant. Caribbean academic Carnegie argued that the statement in *Hinds* that the Westminster model had been transplanted to the Commonwealth Caribbean was dubious. Carnegie challenged the transplantation argument, noting the differences in separation of powers and the organization of institutions under the constitutions of the Caribbean as compared with these features in the English constitution. For instance, Carnegie pointed to the Constitution's grant of power to the courts to review and invalidate legislation. The third possible explanation is that neither assessment was incorrect as each represented the understanding of the separation of powers in the English

³⁸ *Hinds* (n 29) 212.

³⁹ O. Hood Phillips, 'A Constitutional Myth: Separation of Powers' 93 LQR 11 (1977); Carnegie (n 28).

constitution at the time of the respective judicial decision. If the third explanation is convincing, that would entail that the separation of powers principle in the English constitution underwent some transformation between *Kirby* in 1956 and *Hinds* in 1975. The difference between *Hinds* and *Kirby* and the variety of possible explanations for that difference are used here to demonstrate that the reference to foreign law does not necessarily add clarity to the court's decision-making. In fact, it may raise more questions than it answers.

This leads to a larger point that the adjudicative borrowing that takes place around constitutional principles does highlight areas of convergence as well as divergence in comparative constitutionalism. This is largely revealed by the cleavage between the citation of the connection between principles and foreign law and the articulation of the content of those principles in the borrowing state.

iii. Comparison at Different Stages of Constitutional Development

It is important to take account of the fact that the transnational borrowing and the use of principles (and the connection of the two techniques) which occur in the adjudication of constitutional law and fundamental rights are not limited to judicial action or always initiated by the judiciary. Political actors and other legal actors also engage in this exercise, and their comparative engagement may influence the court to follow suit. The process of constitutional design and drafting itself often involves comparative work.⁴⁰ In the Commonwealth Caribbean, there were two branches of borrowing that

⁴⁰ Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Va.L.Rev. 771; Klug (n 6); Anne Smith, 'Internationalisation and Constitutional Borrowing In Drafting Bills Of Rights' (2011) 60 ICLQ 867.

influenced the design of the Constitutions that were enacted. On one level, the states adopted much of the structure of Westminster government. This fact was reflected in *Hinds*, where Lord Diplock stated that ‘there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or in an Order in Council, a common pattern and style of draftsmanship which may conveniently be described as “the Westminster model.”’⁴¹ A belief in the influence of comparative law and constitutional principle adopted from a foreign jurisdiction was expressed by Lord Diplock in the following terms: ‘[a]ll of [the Westminster constitutions] were negotiated and drafted by persons nurtured in the tradition of that branch of the branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive, and judicial power as it had been developed in the unwritten constitution of the United Kingdom.’⁴²

Constitutional principles and comparative analysis share the characteristic of bringing an external outlook and influence into the constitutional debates of a jurisdiction and this external influence on the state’s constitutional debates may occur at the constitutional design stage as well as the constitutional adjudication stage. It is useful to consider whether this external influence occurs in a similar manner at both stages. An intriguing question which arises is how the use of comparative law in conjunction with implied constitutional principles during the construction of constitutions translates into the comparative analysis that occurs in judicial interpretation of constitutions. At the interpretative stage, there are three scenarios that may emerge. First, there may be an

⁴¹ *Hinds* (n 29) 212.

⁴² *ibid.*

abandonment of comparative analysis. This has not occurred in any of the jurisdictions considered here. Second, comparative discussion may occur and involve the same or similar jurisdictions to those used in the drafting stage. The cases discussed above show evidence of this. In the new states there are repeated references to UK law. In Trinidad and Tobago and Australia there are references to the principles inherited from England but influenced by developments in North America. This is consistent with the fact that the Constitution of Canada influenced the drafting of the Constitution of Trinidad and Tobago and the Constitution of the United States of America influenced the drafting of Commonwealth Constitution of Australia.⁴³ Third, comparative discussion may occur but involving significantly different jurisdictions and issues from those used during the drafting stage. The occurrence of the third scenario may suggest that the judicial reasoning used comparison for different purposes than those which influenced the drafting process. With respect to this scenario, in some jurisdictions, there has been a narrowing of the jurisdictions considered between the design stage and the adjudicative stage. For instance, in Australia, the design of the Constitution and organization of the institutions of state were largely influenced by the English constitution, as well as the constitutional framework of Canada, the USA, Germany and Switzerland.⁴⁴ Yet, in its adjudication, specifically its reasoning by constitutional principles, Germany and Switzerland are not referenced. This may reflect the influence of the ‘similar cases model’ of comparative methodology, which in this circumstance, narrows the comparator

⁴³ Margaret Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (Faculty of Law Library, University of the West Indies 1992); Clark, A. Inglis (Andrew Inglis), *Studies in Australian Constitutional Law* (Charles F. Maxwell (G. Partridge & Co. 1901)1; Cheryl Saunders, ‘The Constitution of Australia: Contextual Analysis’ (Hart Publishing 2011) 15.

⁴⁴ Saunders (n 43).

jurisdictions to those which possess the same legal system as the jurisdiction in question. The same patterns may occur in the use of principles in the constitutional construction stage as compared with the interpretive stage.

On another level, the courts' reference to comparative law is sometimes encouraged by the attorneys in the case. This is evidenced in the *Hinds* case by Lord Diplock's judgment, where he noted that '[t]heir Lordships have been quite properly referred to a number of previous authorities'. These previous authorities included cases from foreign jurisdictions, with a focus on cases from independent states that were former British colonies.⁴⁵ References were made in the attorneys' submissions to judicial decisions emanating from Australia, Canada, the Republic of Ireland and Ceylon [now Sri Lanka] on the relative powers of the legislature and the jurisdiction of the courts. Subsequently, some of the cases invoked by the attorneys were then incorporated into the judgment delivered by the Judicial Committee. It is important to take note of this because the process through which foreign decisions have been used contributes to our analysis of reasons why judges use foreign law. The sequence in *Hinds* makes it clear that one of the reasons for the use of comparative reasoning in judicial decisions is that lawyers rely on these judgments in their submissions to the judges. The reliance on foreign judgments and comparative analysis is prevalent among lawyers and (human rights activists) in common law jurisdictions. Accordingly, there is a network of legal professionals, wider than the judicial class, that incorporate comparative analysis into their arguments.⁴⁶ This,

⁴⁵ *Hinds* (n 29) 200-01, 204-08.

⁴⁶ McCrudden, 'Human Rights and Judicial Use of Comparative Law' (n 9) 19-20. See also Aharon Barak, 'Response to The Judge as Comparatist: Comparison in Public Law' (2005-2006) 80 Tul. L. Rev. 196.

predictably, has an impact on the analysis of the judges to whom these arguments are made; thus it may be seen to influence judges to also engage in comparative analysis.

III - Principled Borrowing and a Colonial Legacy

Invocation of implied constitutional principles in the former British colonies of the Commonwealth Caribbean, Canada, and Australia provide particularly fertile ground for the observance of the trends of transnational legal analysis and judicial globalization.⁴⁷ These new jurisdictions feature constitutions and/or bills of rights. It is important to note that, while inheritance of some legal traditions from England may justify and perhaps almost make it inevitable that judges in the new states would refer to UK judgments, it was not automatic that the new states should cross-reference each other. Perhaps it was largely the institutional and adjudicative link of the Privy Council that provided (and in some states, continues to provide) the medium through which this borrowing takes place. As Öricü has noted, there has developed ‘an intra-family comparativism in human rights cases, the Privy Council having acted as the anchoring point.’⁴⁸ The comparative methodology and intra-Commonwealth judicial borrowing was justified by Lord Diplock in the early days of adjudication of Commonwealth Caribbean written constitutions. Delivering the opinion of the Judicial Committee of the Privy Council in *Hinds v The Queen*, in 1977, Lord Diplock stated:

⁴⁷ On transnational human rights reasoning, see Christopher McCrudden, ‘A Common Law of Human Rights: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499. On judicial globalization, see Anne-Marie Slaughter, ‘Judicial Globalization’ (1999-2000) 40 Va.J.Int’l L. 1103.

⁴⁸ Esin Öricü, ‘Whither Comparativism in Human Rights Cases’ in Öricü (n 9) 232.

Their Lordships have been *quite properly* referred to a number of previous authorities dealing with the exercise of judicial power under other written constitutions, established either by Act of the Imperial Parliament or by Order in Council made by Her Majesty in right of the Imperial Crown, whereby internal sovereignty or full independence has been granted to what were formerly colonial or protected territories of the Crown.⁴⁹

The appeal of foreign judgments in new democracies has been characterized as arising in part from a ‘strong pedagogical impulse’.⁵⁰ Perhaps more importantly, there is an attempt to tie the institutions in the new democracy with older democratic states. Slaughter describes it in these terms: ‘The court of a fledgling democracy, for instance, might look to the opinions of courts in older and more established democracies as a way of binding its country to this existing community of states.’⁵¹ In former colonies, there are internal and external elements to this ‘pedagogical impulse’. Internally, it has been argued that there is a psychologically soothing effect of adopting or maintaining links with the structure, the language, and the law of the former ruling state. Ralph Carnegie has argued in the context of the Commonwealth Caribbean, that the manifestation of a desire to maintain such links, lies in part:

in the continuing influence of the historical attitudes even in the era of political independence. Poyers’ view of the patterning of early nineteenth century Barbados government on the English system perhaps reflected a desire for self-assurance by colonial settlers which produced the fiction that the colonial systems was Westminster adapted only in relative detail. That psychological comfort still has a part to play in constitutional design is no doubt too obvious for any warning to be needed against denying its value...⁵²

⁴⁹ *Hinds* (n 29) 211 (emphasis added).

⁵⁰ McCrudden ‘Human Rights and Judicial Use of Comparative Law’ (n 9) 10.

⁵¹ Anne-Marie Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 *Univ Richmond LR* 99, 134.

⁵² Carnegie (n 28) 11.

Understanding the dynamics at play in the invocation of principles as a conduit to foreign legal material requires some reflection on power disparity in the migration of constitutional and fundamental rights law judgments. Chang and Yeh in their study of the ‘Internationalization of Constitutional Law’ point to such a power disparity in judicial comparativism in constitutional law. They use the examples of the US Supreme Court and the German Federal Constitutional Court, which are often cited by foreign courts within their respective geographical regions and legal families, but which seldom refer to foreign cases in their own judgments.⁵³ The examination of the case law which was discussed in Part II reveals more examples of borrowing by the former colonies than by the former imperial power. This suggests that there is a remnant of colonial power at play here, as well as a legal historical basis that encourages the investigation of historical English precedents as explanatory aids. A further dissection reveals that among the courts in the Commonwealth, there is more judicial discursive power possessed by the larger, more developed and majority white states than accrues to the smaller, less developed, majority black states.⁵⁴ The reasons for the power disparity among the Commonwealth states may include the locus (both physical and intellectual) of legal training for judges, the fact that the new states have developed on the ideas of British constitutionalism so there may be more pedagogical value in referring to British judgments, institutional

⁵³ Chang and Yeh (n 4) 1176

⁵⁴ In Trinidad and Tobago as well as Guyana the majority ethnic group is of Indian descent, with the population of Afro-descendants the second largest group: < http://www.indexmundi.com/trinidad_and_tobago/demographics_profile.html> (accessed 19 October 2013), < http://www.indexmundi.com/guyana/ethnic_groups.html> (accessed 19 October 2013).

affiliation with educational facilities in the more developed states,⁵⁵ the perception that some jurisdictions are more ‘developed’ and therefore have greater reputational currency, functional resource-based considerations that encourage states to consult the judicial record of jurisdictions that have already addressed difficult issues in hard cases, and the greater availability of judicial decisions from more developed states.

The implications of this power disparity are potentially significant in the legal and cultural life of the state. The first set of implications is functional. If the migration of constitutional ideas and case law is mostly going in one direction, this casts doubt on the metaphor and existence of true transnational judicial *dialogue*. If one assumes that comparativism and the internationalization of constitutional law is useful, unbalanced migration also adversely affects the benefits of judicial comparativism as it diminishes the perspectives that inform judicial decision-making. This discussion of the implications of an imbalance in borrowing is not meant to discount the divergence that occurs in the process of comparative analyses undertaken in borrowing states; references to the use of implied principles in foreign law do not always result in adoption of the particular applications of the principle in that foreign law. Foreign law has been distinguished on the basis of textual differences in the constitutional framework and local circumstances, which include the social, religious, and political culture. Further, the principles, while the historical roots of constitutional principles are identified as English, there is judicial acknowledgement that they continue to evolve in the constitutional context of the new jurisdiction.⁵⁶ Secondly, there are cultural implications to the imbalance of borrowing

⁵⁵ See references to the influence of intellectual tradition in *Hinds* (n 29) 212.

⁵⁶ *Remuneration Reference* (n 30) 106.

power. It reinforces a narrative, steeped in a colonial legacy, that the newly independent states, particularly those of the Caribbean are still grasping for legitimacy, to be ‘made into men’.⁵⁷ This affects both the legal and political culture by colouring institutional behaviour. For the courts, as stated above, this does not necessarily result in fealty to English or Canadian or Australian doctrine. This is because references to constitutional principles and foreign law may still operate at such a level of abstraction that courts may converge on the *principles* but encourage divergence based on local cultural *values* or based on the value judgments of the judge(s) in the case.⁵⁸

IV - Developing Common Approaches to Common Problems

It has been argued in defence of comparative judicial analysis that it may be useful for countries to harmonize their approaches to similar problems. A particular method of approaching a legal problem may prove so fruitful that it makes sense to regard it as a permanent resource.⁵⁹ There are features which are discernible on examination of the development of the content of principles by foreign law which show some evidence that the countries under examination are developing common methodological approaches to common problems. Of course, the dominant

⁵⁷ Tracy Robinson, 'Gender, Nation and the Common Law Constitution' (2008) 28 OJLS 735, 746.

⁵⁸ On the interplay of convergence and divergence, see Julian Go, 'A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000' (2003) 18 International Sociology 71; Cheryl Saunders 'The Use and Misuse of Comparative Constitutional Law (The George P. Smith Lecture in International Law)' (2006) 13 Indiana Journal of Global Legal Studies 37, 52-57.

⁵⁹ Jeremy Waldron, '*Partly Laws Common to All Mankind*': *Foreign Law in American Courts* (Yale UP 2012) 61.

methodological approach in our analysis is the combination of citing implied principles and foreign law.

One example of an area in which there are common problems to which common approaches have been developing is that foreign law is heavily cited in applying implied constitutional principles as guides to the organization of state institutions. The *Wheat* case is an early example. In *New South Wales v Commonwealth (Wheat case)* the High Court of Australia held that although section 101 of the Constitution provided for an Inter-State Commission and permitted the Commonwealth Parliament to confer powers upon the Commission as Parliament deems necessary to administer inter-state trade, the Constitution does not permit Parliament to confer the powers of a court on the Inter-State Commission.⁶⁰ The ‘fundamental principle of the separation of powers’ was employed to assist in resolving the debate regarding the interpretation of section 101.⁶¹ The Court cited English and US law in clarifying the distinction between the executive and the judiciary and in establishing when adjudicative functions were judicial as opposed to administrative.⁶² This was also evident in cases such as *Victorian Stevedoring*.⁶³ The case concerned the constitutional validity of section 3 of the Transport Workers Act 1928-1929 (Cth) which conferred on the Governor General the power to make regulations regarding the employment of transport workers and the licensing of persons engaged as

⁶⁰ The case was decided after the enactment of the Constitution of the Commonwealth of Australia 1900 but before the Statute of Westminster 1931, which may be regarded as the point at which Australian independence begins.

⁶¹ *New South Wales v Commonwealth of Australia* (1915) 20 CLR 54 (HC, Australia) 88 (Isaacs J).

⁶² *ibid* 89-92.

⁶³ *Victorian Stevedoring and General Contracting Co. Pty Ltd v Dignan* (1931) 46 CLR 73 (HC, Australia).

transport workers. Under the section, the Governor General was empowered to make regulations prohibiting the employment of unlicensed persons. The appellants were convicted of an offence against the regulations. They challenged their convictions, arguing *inter alia*, that it was unconstitutional for the legislature to delegate its legislative powers to a member of the executive as this was ‘inconsistent with the distribution made by the Constitution of legislative, executive and judicial powers’.⁶⁴ It was held that legislative power may be delegated to the executive and that there was a valid delegation in this case. In the course of its Opinion, the High Court examined whether the separation of powers principle prohibited the delegation of the legislative power under consideration in the case and engaged in a lengthy discourse regarding the separation of institutions of state in other common law jurisdictions. In this discussion the complexities of arriving at the practical application of a constitutional principle was illustrated through references not only to the English division of power but also to federal common law systems in the USA and Canada.⁶⁵ This bears a distinct connection to the constitutional design stage of the Constitution of the Commonwealth of Australia 1900, as the UK, USA, and Canada were jurisdictions the constitutional framework of which were relied upon in drafting the Australian Constitution.⁶⁶

Second, foreign law is also heavily cited in reference to applications of the constitutional principles in support of due process requirements, including the requirement of access to courts. This application would form part of the legalistic

⁶⁴ *ibid* 90.

⁶⁵ *ibid* 89-98.

⁶⁶ Inglis (n 43).

conception of the rule of law.⁶⁷ The case *Church of Scientology v Woodward*⁶⁸ provides an illustration of the way in which the procedural applications of the rule of law might be used to beckon to judicial discourse in other jurisdictions. The Church of Scientology and one of its members sought a declaration that they were not security risks under the Australian Security Intelligence Organization Act 1979 (Cth) and that the Director-General of the Australian Security Intelligence Organization (ASIO) acted outwith its powers under the 1979 Act in obtaining information about them, communicating that information to others, and characterising them as security risks. One issue in the case was whether the Act had implicitly excluded judicial review for ultra vires (though allowing for review for corruption or mala fides). The majority of the Court rejected the Solicitor General's submission that judicial review of the ASIO was excluded by the Act.⁶⁹ In the *Church of Scientology* case the application of the rule of law as a requirement of access to courts was utilized by the High Court of Australia. This point led the court to refer to English authorities on the importance of allowing citizens access to courts to make complaints against the executive.⁷⁰ Notably, we have seen a recurrence throughout this thesis of access to courts as a common application of the implied constitutional principles throughout the jurisdictions examined. Consequently, this application of the principles unsurprisingly provides ground for comparative judicial reasoning.

⁶⁷ See Chapter 3 above.

⁶⁸ (1980 - 1982) 154 CLR 25 (HC, Australia).

⁶⁹ *ibid* (55).

⁷⁰ *ibid* 70-71.

We also see the connection of due process requirements to the rule of law and the use of the rule of law principle to invoke foreign law in *Thomas v Baptiste*, a decision of the Privy Council on an appeal from Trinidad and Tobago.⁷¹ The applicants, who had been convicted of murder and sentenced to death, made a motion for redress under the Constitution, arguing that their execution before the final result of their pending petitions before the Inter-American Commission on Human Rights would violate their constitutional right not to be deprived of life except by due process of law. The majority in the Privy Council held that ‘the right not to be deprived thereof except by due process of law’ under section 4(a) of the Constitution of Trinidad and Tobago 1976 prevented the state from executing the applicants before the determination of their petitions in the Inter-American system because due process of law ‘includes the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action.’⁷² In delivering the judgment of the majority, Lord Millett described the concept of due process of law as inclusive of respect for the rule of law and connected this principle to global tradition, saying:

In their Lordships' view ‘due process of law’ is a compendious expression in which the word ‘law’ does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law...⁷³

⁷¹ *Thomas v Baptiste* (n 2).

⁷² *ibid* 22.

⁷³ *ibid*.

The judges also traced the history of the due process clause to the Magna Carta and to the Fifth Amendment to the Constitution of the USA. For the majority in *Thomas*, the due process clause represents the separation of powers principle by ‘exclud[ing] legislative as well as executive interference with the judicial process’ and also embodies the rule of law principle, ‘thus giv[ing] constitutional protection to the concept of procedural fairness.’⁷⁴ Finally, it is important to note the majority’s statement that the right not to have the outcome of the legal proceedings superseded by executive action is a right ‘accorded by the common law’ and affirmed in the due process clause. These points in the judgment are revealing; there is a clear, explicit, and repeated attempt to connect the constitutional principles invoked by the court in protection of due process to global standards (at least, those observed by ‘civilised nations’), notably global standards that may not be limited to a particular text. This was important in light of the fact that the case concerned the extent to which domestic courts and the executive in Trinidad and Tobago were required to observe the American Convention on Human Rights and the processes of the Inter-American system. By invoking principles recognized globally, there is an incorporation of foreign and international doctrine, ostensibly without adopting a particular foreign or international text. In addition, the reference to the common law right to procedural fairness locates the case within the common law tradition. This meant the majority’s holding was not just a matter of respecting global standards, but a somewhat more specific matter of respecting common law standards, and one which the legal profession in a fellow common law country would find more persuasive.

⁷⁴

ibid.

The Privy Council's references to standards observed by 'civilised nations' are noteworthy in the colonial and post-colonial context. There is influential literature on colonial and post-colonial discourse which posits that the term 'civilised' is an expression of adoption of, and assimilation into, a European culture as well as an expression of the superiority of European culture.⁷⁵ As Césaire put it, the colonial construct of civilisation was one in which 'the civilized world was Europe'.⁷⁶ Speaking as a Judicial Committee that stretches from the colonial to post-colonial period, and which has its geographical locus in England, the Privy Council's language in this respect is unfortunately reminiscent of a hierarchical relationship between the (former) imperial power and the (former) colonial state. This representation of hierarchy arguably influences the borrowing between the respective judicial institutions in the states concerned, and perhaps contributes the borrowing imbalance discussed above.

V - Cyclical Borrowing

As stated above, there is a greater tendency for judges in the former colonies (particularly the Commonwealth Caribbean) to cite UK judgments than the other way around and the cases discussed in Part II of this Chapter show the high incidence of references to the UK law in the courts of the former colonies. Despite this general imbalance, there is evidence of a feedback loop that sees the judgments of the newer states which invoke implied constitutional principles being referenced in UK judgments. This is evident in UK judgments on the separation of powers. There are three main

⁷⁵ See, eg, Ania Loomba, *Colonialism/Postcolonialism* (Routledge 2005) 255.

⁷⁶ Aimé Césaire, *Discourse on Colonialism* (Monthly Review Press 1978) 28.

reasons for this cyclical pattern. First, there are perceptions of similarities in the structure of state as all these jurisdictions have (to varying extents)⁷⁷ a parliamentary style of government. Second, they are cases in which the Privy Council remains the final appellate tribunal so a Privy Council judgment would impact the UK House of Lords (now the Supreme Court) because they are decided by (largely) the same pool of judges. Third, in light of our discussion in the previous section of this chapter, there are areas in which there is a common problem with common approaches being developed.

The cyclical pattern can have an impact on the accuracy of the analysis of the content principles in adjudication. First, there may be an opportunity for reflection and correction of errors, in a sense allowing for the correction of the court's analysis. The second possibility is that the pattern simply results in the repetition and dissemination of errors. What is interesting and may be worthy of further research is the extent to which the adoption and repetition of a flawed understanding of the application of a principle may then change the reality to fit the flawed model. These ideas can be explained by way of example from the *Hinds* case. As we have seen, Lord Diplock's statements on the separation of powers in the Westminster system have been subject to criticism. Yet, parts of his comments have been repeated and adopted in important cases in the Caribbean by the Privy Council, and in the UK by the Supreme Court. Whatever the accuracy of Lord Diplock's comments in *Hinds* at the time they were made, it is arguable that they have affected the judicial understanding and exposition of the separation of powers doctrine subsequently. Could the argument be made that Lord Diplock's assessment of the

⁷⁷ A notable caveat is that Trinidad and Tobago, for example, now has elements of a presidential structure.

strength of the separation of powers principle in Westminster style constitutionalism has contributed over time to the strengthening of that principle in the UK and the Caribbean?

Hinds, *Anderson*, *Mollison* and *Astaphan* provide evidence to help us dissect the cyclical pattern and the issues it raises. Lord Diplock's statements on the separation of powers have influenced the House of Lords, as seen in its judgment in *Anderson* in which attorneys on both sides cited *Hinds* in their submissions and *Hinds* was cited in the judgment of Lord Steyn, who argued:

The relationship between the legislature and the executive is close. On the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government. The House of Lords and the Privy Council have so stated: *Attorney General for Australia v The Queen* [1957] AC 288, 315; *Liyanage v The Queen* [1967] 1 AC 259, 291; *Hinds v The Queen* [1977] AC 195; *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157b.⁷⁸

The first notable feature of this quotation is the invocation of foreign law in supporting Lord Steyn's description of the application of the separation of powers. Secondly, most of the sources cited by Lord Steyn are Privy Council judgments emanating from former colonies. Third, it was the less controversial aspect of Lord Diplock's assessment, that focussing on the separation of the judiciary from the other branches, which was expressly adopted in this case.

The *Mollison* case shows the full cycle of the use of implied constitutional principles to invoke foreign law. The courts in *Hinds*, *Anderson*, and *Mollison* were all faced with similar questions of the constitutionality or the rights consistency of the exercise of sentencing powers by a member of the executive. As we have seen, the *Hinds*

⁷⁸ *Regina (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 [39].

panel relied on the separation of powers principle found in ‘Westminster style’ constitutions to find that the legislature cannot transfer sentencing powers from the judiciary. This judgment was referred to by the House of Lords in *Anderson* in that court’s use of the separation of powers principle as an aid in the interpretation of Article 6 (1) of the ECHR. Both the *Hinds* judgment and the *Anderson* judgment were influential in the landmark decision in *Mollison*, which reveals a continued conversation among the judges in these jurisdictions on the separation of powers principle and its impact on the right to liberty. The impact of reasoning by principle and comparative reasoning was quite significant in *Mollison* as the court’s decision effectively bypassed express provisions of the Constitution in question. We recall, in *Mollison*, that the Privy Council held that a sentence of detention during the Governor General’s pleasure was inconsistent with the implied principle of the separation of powers. In so doing, the Privy Council evaded the savings law clause under the Constitution, which prevented the court from invalidating a statute for inconsistency with the provisions of the fundamental rights chapter of the Constitution. In delivering the judgment of the Board, Lord Bingham referred to Lord Steyn’s statement in *Anderson* that the separation of the exercise of judicial power from the other two branches, ‘based on the rule of law’, was ‘a characteristic feature of democracies’. Lord Steyn in turn, had referred to Lord Diplock’s judgment in *Hinds* in arriving at the decision in *Anderson*. We see a progression whereby the implied constitutional principle was used along with the constitutional provisions in *Hinds* and again in *Anderson*, and in *Mollison*, the implied principle arguably displaced the text in the Constitution.

What emerges is that the reasoning by principles and the use of principles to incorporate foreign law reflects an attempt to develop solutions to similar problems. This factor, in combination with the similarity of personnel between the uppermost echelon of the judicial branch in the UK and the Caribbean (and formerly, Australia⁷⁹), contributes to the cyclical borrowing pattern. It is, on the one hand, a cyclical pattern, but on the other hand, not an entirely reciprocal pattern, because in one sense, the judges of the House of Lords/UK Supreme Court are referring to the words of members of their own bench, albeit that the law being adjudicated is foreign.

Lord Diplock's description of the separation of powers principle in *Hinds* also influenced the judgment in *Astaphan*. The facts of *Astaphan* are discussed in detail in Chapter 6. The Eastern Caribbean Court of Appeal held that to the extent that a sum imposed by the customs authorities on the appellant was a tax, 'the delegation of the legislative powers to the executive without the prescription of a maximum sum, or the powers being otherwise circumscribed, or guidelines being issued as to their exercise, constitutes an abdication of the powers of the legislature which is inconsistent with the doctrine of the separation of powers under the Constitution of Dominica.'⁸⁰ In arriving at this conclusion, the court endorsed in totality Lord Diplock's assessment that the separation of powers was an implicit principle in Westminster model constitutions. Unlike *Anderson*, *Astaphan* showed a wider application of this principle, extending beyond the more broadly accepted separation of the judiciary from the other branches, to

⁷⁹ See *Attorney General for Australia v The Queen* [1957] AC 288 (JCPC, Australia), cited in *Anderson* (n 78) [39].

⁸⁰ *Astaphan & Co (1970) Ltd v Comptroller of Customs of Dominica* (1996) 54 WIR 153 (Eastern Caribbean CA, Dominica) 153.

an understanding that there is also a meaningful separation between the executive and legislative branches. Accordingly, to the extent that Lord Diplock was mistaken or painted with too broad a brush in *Hinds*, this error was repeated, with concrete consequences in *Astaphan*. Alternatively, the *Hinds* assessment may have been applicable to Westminster-style Constitutions, even if not to the Westminster system itself as practised in the UK. Perhaps this partly explains the difference between *Astaphan* and *Anderson*, in which Lord Steyn said of the UK constitution, that ‘[o]ur constitution has, however, never embraced a rigid doctrine of separation of powers.’⁸¹

Conclusion

Jeremy Waldron has articulated a thesis defending comparative judicial analysis where the citation of foreign law takes account of the consensus developed in the *ius gentium*, that is, where foreign law ‘represents a legal consensus among the nations of the world’.⁸² However, there must be more nuance in our assessment of the practice of using constitutional principles as a bridge to foreign law. There is an argument to be made that Waldron’s thesis applies insofar as the implied constitutional principles are part of a consensus among nations that have adopted a form of democratic constitutionalism. However, as shown in this Chapter, comparative analysis develops heavily within legal systems so that the jurisdictions cited by the courts referred to in this thesis are almost exclusively common law legal systems; there are certain jurisdictions that are cited more often than others; and with the exception of the areas in which we see cyclical borrowing, there is not an equal, reciprocal borrowing pattern.

⁸¹ *Anderson* (n 78) [39] (emphasis added).

⁸² Waldron (n 59).

What we have examined in this chapter is not merely the borrowing or migration of doctrines or principles; it is also the migration of a particular methodology. This methodology is one level, the invocation of implied constitutional principles, and on further examination, a methodology of invoking implied constitutional principles which are then connected to foreign law or to international standards. The main functions of this connected use of comparative analysis and the invocation of implied constitutional principles are to forge a connection between the present and the past, and between the domestic and the global. The cases show that there is a process of ‘transnationalisation’ taking place at a high level of abstraction but that the details of the applications of the implied constitutional principles in each state are heavily influenced by the domestic constitution or rights text, the particular governmental structure adopted in the state, and the judges own views and assessments.

Issues arise as to the normative desirability of the practice of employing implied principles as gateways to comparative legal analysis. These issues are discussed in Chapter 9, which addresses the legitimacy of the use of implied constitutional principles in fundamental rights adjudication.

CHAPTER EIGHT- THE LEGITIMACY OF THE USE OF THE IMPLIED CONSTITUTIONAL PRINCIPLES IN FUNDAMENTAL RIGHTS ADJUDICATION

Introduction

Based on the discussion in previous chapters of this thesis, we can identify four broad factors that are likely to influence the normative question of whether judges should use implied constitutional principles in adjudication. These factors identify the main philosophical, institutional, and textual narratives that should influence an appraisal of the legitimacy of reasoning by implied principles in fundamental rights cases in a constitutional democracy.

The first factor is the process and source of implication of the constitutional principle, such as, for instance, the implication from the preamble. The second factor is the specific use for which the implied constitutional principle is employed, that is, whether it is used as an interpretative aid, as a gateway to foreign law, or as a ground for invalidating legislation. The discussion of the second factor is connected to the issue of the institutional legitimacy of the courts in reasoning by implied constitutional principles. Included in this analysis is the question whether one or all of the uses of implied principles leads to the supplanting of bills of rights by the implied constitutional principles.

The third factor is the level of determinacy of the constitutional principle in question. This factor takes account of the charges of vagueness or indeterminacy of the content of the principles examined. It will be shown that the level of determinacy is the least important of the four factors, because, as is discussed below, the charge of indeterminacy can also be laid at the feet of rules expressed in the Constitution or Bill of Rights. Moreover, determinacy is not the ultimate objective of prescribing constitutional and fundamental rights norms.

The fourth and final factor to be considered is the question of the degree of similarity between reasoning by implied principles and adoption of a doctrine that allows for the defeat of ‘unconstitutional constitutional amendments’.

This Chapter is not designed to be an exhaustive discourse on the normative issues that arise in relation to the techniques examined in the thesis. There is neither space for such an expansive discussion, nor does it fit within the overall objectives of the thesis. What this Chapter does seek to accomplish is to connect the themes addressed in the preceding chapters, and the functions played by implied principles as explored in detail in the foregoing chapters, to the question of legitimacy. The Chapter therefore suggests a path forward for systematic normative analysis of the implied principle techniques. In so doing, I seek to provide useful categories for organizing the normative critique and creating critical distinctions which clarify that the normative question may yield a multiplicity of answers, depending on the four factors discussed below. The chapter can thus be considered as a prolegomenon to normative analysis.

I - Process of Implication of the Implied Constitutional Principle

The discourse on the legitimacy of such implied constitutional principles must take into account the process of implication of these principles. The methods employed for deriving constitutional principles were outlined in Chapter 2. We recall that there are five main methods of implication. These are: (1) the description of terms in the text as synonyms for the implied principle in question (the equivalence method); (2) the description of terms in the text, such as the right to equality, as applications of the principle in question (the application method); (3) implication of the principles from the structure of the text (the structuralist method); (4) implication from reference to the principles in parts of the Constitution which are not expressly justiciable, such as the preamble (the preambular method); (5) adoption from the unwritten British constitution from which the constitutions in question derive much of their inspiration (the historical method).¹

The judicial decisions examined throughout the thesis are products of a process of interpretation of a Constitution, bill of rights, and/or other legislation. Against this background, the method of implication may be perceived as more or less legitimate based on its conformity with the accepted purpose and nature of judicial interpretation of statutes. Aileen Kavanagh has observed that it is accepted that the purpose of statutory interpretation is to determine the meaning of the text.² Yet, as she argues, to determine

¹ These methods of implication relate to four sources, as outlined in Chapter 2, substantive provisions in the Constitutions or rights text, preambles, the structure of the Constitution, and the 'unwritten English constitution'.

² Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' 24 OJLS 259, 262.

the meaning of a statutory text is not limited to finding the literal meaning of the words used. There are terms which are ‘linguistically irresolvable’, for which a literal meaning is not helpful in determining the issue before the court.³ To determine the meaning of such terms, it is necessary for judges to engage in substantive evaluation.⁴ Lord Hoffmann, sitting in the Privy Council in *Matadeen v Pointu* expressed a similar sentiment in referring to the interpretation of a Constitution, where he stated that while judges are not free from ‘the task of interpreting the statutory language’,

[t]he background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution ... may expressly state moral and political principles to which judges are required to give effect in accordance with their own conscientiously held views of what such principles entail.⁵

For instance, the literal meaning of the term ‘discrimination’ would not have resolved the issue in *Ghaidan* regarding whether the exclusion of same-sex couples from the scheme for succession to rent-controlled tenancies was inconsistent with the Article 14 right to non-discrimination. Nor would a literal construction of the words used in the Tribunals Act 2007 in the *Cart* case have led to a determination of the extent of judicial supervision over the Upper Tribunal allowed or required by the law.

Accordingly, the starting point is that the objective of interpretation is to declare the meaning of the text. By this metric, it would be convincing to argue that the implication of a principle through the equivalence method and the application method are fairly consistent with the objective of determining the meaning of a statutory term or the

³ *ibid.*

⁴ *ibid.*

⁵ *Matadeen v Pointu* [1998] 3 WLR 18 (JCPC, Mauritius) 25.

text as a whole. It could also be argued that implication from unstated assumptions of the Constitution lies at the other end of the spectrum, as it has less of an explicit connection to the text. This metric has as its premise the idea that to determine the meaning of a statute is to determine the meaning of the text of the statute. This is not identical to a claim that the meaning of the text can only be gleaned from the text itself and not from techniques involving external material, but it assumes that the text is the focal point of the techniques used and the reasons given, and that the ultimate purpose remains to determine the meaning of that text. It is more difficult to maintain that implying principles from unstated assumptions of the constitutional or rights document satisfies this metric because the activity of ‘assumption’ may have a focal point based in the philosophy of the judge in question, or based on the judge’s assumptions of the Constitution, the state and the institution which she represents. The text may indeed be lost in the process of assumption. In fact, the very notion of an ‘unstated assumption’ suggests a disconnection with the text, in the way that an implication from the structure of the constitutional instrument, for instance, does not. Therefore, the argument from the purpose of interpretation presents more challenges for the unstated assumptions method of implication.

The importance of a ‘textual anchor’ was reflected in Justice Major’s judgment in *Imperial Tobacco*. As outlined in Chapter 3, the case arose from a claim that the Tobacco Damages and Health Care Costs Recovery Act 2000 which authorised the province of British Columbia to recover expenditure from tobacco manufacturers for sums spent by the government on healthcare for tobacco-related illnesses was unconstitutional and invalid. In rejecting the appellants’ argument that the retroactivity of the legislation was

invalid for violation of the rule of law, Justice Major maintained that such an application of the rule of law would undermine the principles of constitutionalism and democracy, principles which ‘very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms).’⁶ Vincent Kazmierski perceives an ‘apparent contradiction’ between the rejection of independent force for implied principles such as the rule of law and the suggestion that legislation must conform to the requirements ‘that flow by necessary implication’ from the terms of the text.⁷ However, it appears that this criticism misses the crux of Justice Major’s position. Justice Major was really hinting at a fine point regarding the process of implication of the relevant principle. A similar approach had been advanced by Robin Elliott and Patrick Monahan, who argued that courts ought to be more receptive to using implied principles where the application of the principle is a ‘necessary implication’ from the text and structure of the Constitution.⁸ Justice Major’s distinction between the respective methods of implication for judicial independence and the rule of law suggests that he perceives a difference between the text of the substantive provisions (‘the express terms of the Constitution’) and the words of the preamble. This is evident from the fact that while the rule of law is referred to in the preamble to the Charter, he described

⁶ *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 [66]; Vincent Kazmierski, ‘Draconian But Not Despotic: The ‘Unwritten Limits of Parliamentary Sovereignty in Canada’ (2010) 41 *Ottawa Law Review* 245, 274.

⁷ Kazmierski (n 6) 274.

⁸ Robin Elliott, ‘References, Structural Argumentation and the Organizing Principles of Canada’s Constitution’ (2001) 80 *Can. Bar Rev.* 67, 83-84; Patrick J. Monahan, ‘The Public Policy Role of the Supreme Court in the *Secession Reference*’ (1999) 11 *NJCL* 65, 76-77; Kazmierski (n 6) fn 101.

judicial independence, unlike the rule of law, as arising from necessary implication from the terms of the Charter. Of course, the acceptance of the view that the preamble does not form part of the express substantive provisions of the Constitution does not lead to the conclusion that the preambular method cannot be justified as a legitimate method of implication. This is where we return to Kavanagh's argument that interpretation is often about 'substantive evaluation' and Lord Hoffman's statement that constitutional interpretation must take into account that the Constitution represents an attempt to lay down, 'at a particular moment in history' a 'scheme of government in accordance with certain moral and political values'. As we saw in Chapter 2, preambles may play an explanatory role in informing readers of the history and objectives of the enactment of the Constitution and of the purposes of the Constitution.⁹ Judicial implication of principles via the preamble may therefore represent a genuine attempt to discover the characteristics of that 'particular moment' in history and the moral and political values underlying the governmental scheme established by the Constitution.

Another useful message from Lord Hoffman's statement in *Matadeen* is the special character of Constitutions. Thus, even in cases where the method of implication may diverge from traditional understandings of the nature and methods of statutory interpretation, if the construction in question is that of a Constitution, the divergence can be justified on the basis of the special nature of the statute in question. A Constitution is 'sui generis', as stated by Lord Wilberforce in another Privy Council decision in *Minister of Home Affairs v Fisher*, and requires 'principles of interpretation of its own, suitable to

⁹ Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 ICON 714, 722. See also Eric Voegelin, *Published Essays, 1934-1939, vol 9 of The Collected Works of Eric Voegelin* (University of Missouri Press 2001) 32.

its character'.¹⁰ As such, courts and commentators repeatedly note that constitutional interpretation possesses a special character. This special character partly derives from the fact that constitutions must 'endure over time'. Raz emphasises the feature of endurance and continuity of a constitution:

it is, and is meant to be, of long duration: It is meant to serve as a stable framework for the political and legal institutions of the country, to be adjusted and amended from time to time, but basically to preserve stability and continuity in the legal and political structure, and the basic principles that guide its institutions.¹¹

The necessity of endurance justifies techniques that ensure the constitution's continued relevance and authority, including, for instance, techniques that enable judges to call upon constitutional principles to fill gaps in the text.

The objective of endurance helps to indicate that history and tradition are key elements in an appraisal of the legitimacy of a jurisprudence of implied constitutional principles. In fact, a historical outlook is part of the very nature of legal interpretation in general. Raz has described the process of interpretation as possessing a 'Janus-like' quality, 'that it faces both backward, aiming to elucidate the law as it is, and forward, aiming to develop and improve it'.¹² The backward-looking aspect takes into account, first, the historical context of the law of the state, and secondly, the desirability of stability and continuity as part of a constitution's source of authority. The historical context of the law proceeds along two tracks. The first may be loosely termed 'external' as it relates to the overall political and legal context in which the law was developed,

¹⁰ *Minister of Home Affairs v Fisher* [1980] AC 319 (JCPC, Bermuda) 329 (Lord Wilberforce).

¹¹ Joseph Raz, *Between Authority and Interpretation: on the Theory of Law and Practical Reason* (OUP 2009) 324.

¹² *ibid* 354.

while the second track is internal as it relates to precedent and previous interpretations of the text in question or similar texts. This internal track is unsurprising, given the central place of precedent in common law systems.

On the importance of the historical context of the law, Mark Walters has contended that the theory of *lex non scripta* as fundamental law must, if it is to represent more than the mere application of political-moral sentiment, fit within the legal system's traditions, doctrines, and assumptions about what is 'law' and what is not.¹³ Case law does reveal traditional acceptance by judges of the use of common law principles in the interpretation and application of statutes and it can be forcefully argued that the set of common law principles would include a subset of constitutional principles. The archetypal example of the application of common law principles to statutory interpretation is *Dr. Bonham's Case*, in which Coke uttered the famous words:

And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.¹⁴

The meaning of Coke's judgment in *Dr. Bonham's Case* is contested; the two dominant interpretations proffered being, first, that Coke meant to indicate the power of the judges to *declare a statute void* for incompatibility with a higher order law, and second, that Coke merely articulated a power of *interpretation*.¹⁵ It has been said of

¹³ Mark Walters, 'The Common Law Constitution in Canada: The Return of Lex Non Scripta as Fundamental Law' (2001) 51 U. Toronto L.J. 91, 136.

¹⁴ *Dr Bonham's Case* (1610) 8 Co. Rep. 107a, 118a.

¹⁵ Ian Williams, 'Dr Bonham's Case and "Void" Statutes' (2006) 27(2) Journal of Legal History 111. Commentators who have argued that the Coke advanced a position that statute could be invalidated by judges include Chijioke Dike [1976] Public Law 283, 284-87; Allen Dillar Boyer,

Coke's statements on the relationship between the common law and statute, that 'scholarship may help us narrow the range and his possible meanings, but his language is so rich and ambiguous, and his writing so unsystematic, that he cannot be pinned down exactly.'¹⁶ It is not my intention in this thesis to join that debate. However, if one accepts, for the sake of argument, the 'voidness account' of Coke's passage, it presents an exceptional occurrence of a statute 'against common right and reason', in which the courts will take the exceptional step of finding that Act of Parliament void. If we accept the 'interpretation account' of the passage, there is also an articulation of the notion that exceptional situations may lead the court to apply a strong power of interpretation to ensure that the statute conforms more closely to common law principles. Whatever is the correct interpretation of Coke's statement, the Glorious Revolution of 1688 established that Parliament was the supreme law-making authority and subsequently, legislation has been generally viewed as a source of law superior to the common law.¹⁷ Accordingly, I will not belabour the point about *Dr. Bonham's case*. What it does indicate is evidence that might support the use of implied principles from the perspective of the backward-looking aspect of interpretation.

"Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins Of Judicial Review' (1997-1998) 39 B.C.L. Rev. 43; Laurence Peronne, 'The Fundamental and Natural Law 'Repugnant Review' Origins of Judicial Review: A Synergy of early English Corporate Law with Notions of Fundamental and Natural Law' (2008) 23 BYU Journal of Public Law 61. The opposing view is advanced in Samuel Thorne, 'Dr Bonham's case' (1938) LQR 543; R.H. Helmholz, 'Bonham's case, judicial review and the law of nature' [2009] Journal of Legal Analysis 325.

¹⁶ J.W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (2000) 160, cited in David Jenkins, 'From Unwritten to Written: Transformation in The British Common-Law Constitution' (2003) 36 Vand. J. Transnat'l L. 863, 887 and fn 179.

¹⁷ Ian Loveland, *Constitutional law, Administrative Law, and Human Rights: A Critical Introduction* (6th edn, OUP 2012) 24-29.

The desire to secure continuity and stability, identified by Raz as a reason for the backward-looking aspect of interpretation, has also received judicial acknowledgement. The Canadian Supreme Court in the *Secession Reference* observed that judicial interpretation involves ‘methods that ... ensure continuity, stability and legal order.’¹⁸ In fact, the courts’ application of implied constitutional principles in interpretation does evince an attempt to maintain stability and continuity within the constitutional order of the state. The judges’ anchoring of their interpretive techniques and interpretive reasoning in the history of the state and the desirability of continuity was a defining feature of *Manitoba* and *Hinds*, for instance. In *Hinds*, Lord Diplock characterized continuity as an element of the intent of the framers of the Constitution.¹⁹ As such, the desire for continuity which permeates the use of implied principles was presented as the result of the framers’ intent, another common interpretive technique used in constitutional law. These methods of reasoning represent the historical aspect of the nature of interpretation, which Raz identifies as part of the core of the nature of interpretation.

II - The Type of Use Involved

In a sceptical article on the use of implied constitutional principles by the Canadian Supreme Court, Jean Leclair acknowledged that the legitimacy of that use depends on the function of the principles in the court’s reasoning.²⁰ However, the work of methodically classifying these functions and constructing a normative analysis that

¹⁸ *Reference re Secession of Quebec* [1998] 2 SCR 217 (SC, Canada) [33].

¹⁹ *Hinds v R* [1977] AC 195 (JCPC, Jamaica) 212.

²⁰ Jean Leclair, ‘Canada’s Unfathomable Unwritten Constitutional Principles’ (2002) 27 Queen’s LJ 389, 431.

reflects the different functions has not been undertaken, until now. Further, the analysis of each function is, in turn, affected by the institutional and textual context of the constitutional law of the jurisdiction. The current section of this chapter begins this necessary analysis by indicating the key considerations that factor into the normative analysis of the legitimacy of the respective functions played by implied constitutional principles in fundamental rights adjudication in the contexts of the jurisdictions examined in the thesis.

i. Implied Principles as Interpretative Aid

The use of implied constitutional principles as interpretative aids is more easily defensible as a legitimate exercise of the court's constitutional jurisdiction in a state without a constitution or bill of rights. Accordingly, in the UK where there is no written constitution and was no bill of rights, prior to the HRA 1998, a particularly strong argument can be made that it was the job of the common law to produce the principles necessary for the protection of individual rights. This is because there is evidence in academic commentary and case law that the protection of rights was part of the activity of the common law. The articulation of this role of the common law was a cornerstone of Dicey's conceptualisation of the rule of law. In fact, the capacity of the common law to protect individual rights was manifested in *Entick v Carrington*, in which the common law tort of trespass and the rule that there must be legal authority for the powers asserted and exercised by the executive were employed to protect the individual's property from invasion and confiscation by the state.²¹

²¹ *Entick v Carrington* (1765) 19 Str 1029, (1558-1774) All ER 41.

There is an intriguing question regarding the extent to which judges ought to have recourse to implied constitutional principles to resolve rights issues in the UK subsequent to the implementation of the HRA 1998 on 2 October 2000. A useful factor to consider in resolving this question is the evidence that UK judges have largely accepted that the common law continues to be operative as a source of rights protection in the post-HRA era. First, this position was foreshadowed in cases establishing what the judges referred to as ‘constitutional rights’ (before and subsequent to the HRA). For instance, in *Leech*, Steyn LJ (as he then was) held that ‘the principle of our law that every citizen has a right of unimpeded access to the court... must rank as a constitutional right’.²² The use of the term ‘constitutional’ is evidence of something fundamental and of a higher order than ordinary law. Second, as we saw in Chapters Three and Five, the principle of legality has emerged as a formidable venue for the application of constitutional principles to the interpretation of legislation and this principle has seen continued application beyond the HRA 1998.²³ Beyond the HRA 1998, the courts continue to acknowledge the importance of common law principles of rights protection. Hence, the House of Lords held in *A v SSHD (No 2)* that:

The principles of the common law ... compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.²⁴

²² *R v SSHD, ex p Leech (No. 2)* [1994] QB 198 (CA) 210.

²³ *R v SSHD, ex p Simms* [2000] 2 AC 115 (HL) 132; *R v SSHD, ex parte Pierson* [1997] UKHL 37, [1998] AC 539 (HL) 577-78.

²⁴ [2005] UKHL 71, [2006] 2 AC 221 (HL).

Finally, evidence of the continued acceptance of the role of the common law beyond the HRA 1998 in this field can be found in *Rabone v Pennine Care NHS Foundation Trust*. In *Rabone* the issue arose whether UK courts have an obligation or a discretion to develop Convention rights applied through the HRA 1998 beyond the definition provided by decisions of the European Court of Human Rights.²⁵ Lord Brown concluded that UK courts could develop the common law to protect rights, despite the absence of a consistent line of case law from the Strasbourg Court, but that in so doing, the UK courts must clarify that they are developing the common law and not providing a definition of Convention rights.²⁶ This admonition rests upon the premise that the common law continues to be a source of rights concurrent with the HRA 1998.

The criticism of the use of interpretative function gains more credence where there is a written/codified constitution as is the case in the Commonwealth Caribbean and Canada where, in both cases, there is a written constitution with a bill of rights, and in Australia where there is a written constitution (without a bill of rights). In states with a written/codified constitution, the criticism gains more credence due to two factors. The first is the legal effect of the Constitution; the Constitution is the written instrument which represents the higher order law of the state. These constitutions either expressly establish themselves as supreme in the hierarchy of legal sources in the state or have been interpreted as such by the courts. The second factor is the source of the special normative force of this written instrument, that is, the view that the Constitution represents the expression of the constituent power of the state. The constituent power has been

²⁵ [2012] UKSC 2, [2012] 2 AC 72 (UKSC).

²⁶ *ibid* [113].

described as ‘the power that represents the regime’s foundational enactment’ and thus helps to account for the special status of a written constitution at the foundation of a state.²⁷ The notion of constituent power is thus relevant in the discussion of the implementation of the Constitutions of the former British colonies examined in this thesis.

These characteristics of the written constitution are factors that must be considered in normative critiques of the use of implied constitutional principles. It seems, however, that the central point in the normative discourse surrounding the legitimacy of the use of implied principles in states with a written constitution is the legitimacy of particular interpretative techniques. Accordingly, the reflections on the nature of interpretation in general and of constitutional interpretation specifically, which were outlined in Part 1 of this Chapter, are equally applicable to the current discussion. Therefore, in line with the discussion in Part 1, it is legitimate for judges to appeal to non-textual aids in interpretation as the Constitution comprises much more than the text. Even in jurisdictions with a codified constitution, it has been repeatedly observed that the written Constitution does not, indeed cannot, contain all rules and principles which are constitutional in the sense of operating as a restraint on the exercise of state power.²⁸ Accordingly, the Canadian Supreme Court observed that while the texts have a ‘primary place’ in determining the law of the Constitution, ‘they are not exhaustive’.²⁹ Second, in

²⁷ Gary J. Jacobsohn, *Constitutional Identity* (Harvard UP 2010) 38.

²⁸ This is the sense of the terms ‘constitutional’ and ‘constitutionalism’ that were established in Chapter Two of the thesis.

²⁹ *Secession Reference* (n 18) [32].

using implied constitutional principles in interpretation the courts are acting consistently with precedent and tradition within the common law system.

Those are the factors relevant to the written constitutions but where does the HRA 1998 lie within this analysis? It is submitted that the HRA 1998 constitutes a Bill of Rights due to its substantive provisions and their legal effect.³⁰ It is further submitted that the HRA 1998 is a ‘constitutional statute’. There are customarily two routes for claiming that the HRA 1998 is a constitutional statute: a procedural route and a substantive route. On the procedural side, the argument is that the HRA 1998 is a constitutional statute because it is not susceptible to implied repeal in the way that ordinary statutes are. The basis of this argument is that the doctrine of implied repeal applies to ordinary statutes, so that if there is a conflict between an earlier statute and a later one, the latter statute impliedly repeals the earlier statute to the extent of the inconsistency. Section 3 of the HRA 1998 requires courts to interpret all statutes (whether preceding or postdating the entry into force of the HRA 1998) ‘so far as it is possible to do so’ to achieve consistency with the ECHR rights scheduled to the HRA 1998. By virtue of section 3, legislation enacted subsequent to October 2, 2000 is limited by the HRA to the extent of any inconsistency, rather than the HRA being qualified by the latter statute.³¹ ‘Proceduralists’ therefore maintain that, by virtue of section 3 of the HRA 1998, the doctrine of implied repeal is inapplicable to the HRA 1998, and consequently it is not an ordinary statute.

³⁰ Francesca Klug, ‘The Human Rights Act- a “Third Way” or “Third Wave” Bill of Rights’ [2001] EHRLR 361; Aileen Kavanagh, ‘Constitutional Review under the UK Human Rights’ (Cambridge UP 2009) 307.

³¹ See challenge to the position that the HRA 1998 cannot be impliedly repealed in Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009) 52-54; Tom Hickman, *Public Law after the Human Rights Act* (Oxford 2010) 46-47.

The substantive approach maintains that the HRA 1998 does not attain ‘constitutional’ status by virtue of a ‘special resistance to repeal’ but by virtue of the fact that it ‘purports to protect fundamental rights and freedoms’ and does so ‘by establishing such rights and freedoms as general norms, that apply to all legislation and all conduct of public authorities.’³² It appears that the definition of constitutional statutes provided by Laws LJ in *Thoburn* is consistent with Hickman’s preferred approach, as the learned judge classified as ‘constitutional’ those statutes that enlarge or diminish fundamental constitutional rights.³³ In the view of Laws LJ, ‘[t]he special status of constitutional statutes follows the special status of constitutional rights’.³⁴ Moreover, the procedural argument can hardly stand on its own and is really based on the substantive changes and substantive import of the statute; it is the substantive effect of the Act that largely contributes (in conjunction with the terms of section 3 itself) to the procedural impact. Whichever sense of the term ‘constitutional statute’ is used as a means of characterizing the HRA 1998, it is clear that it does not function as a ‘constitution’ in the way that the bills of rights that form parts of written or codified constitutions do. Despite that the HRA 1998 would be regarded as a constitutional statute under Laws LJ’s characterization of such statutes in *Thoburn*, it is not treated in the way a constitution is treated. As Alison Young notes, unlike entrenched constitutions, the HRA 1998 can be expressly repealed by ordinary legislation.³⁵

³² Hickman (n 31) 48.

³³ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151 [60]-[63].

³⁴ *ibid* [62].

³⁵ Young, *Parliamentary Sovereignty and the HRA* (n 31), Chapter 2.

ii. Implied Principles as Gateways to Comparative Judicial Analysis

With respect to the use of implied constitutional principles as gateways to comparative judicial analysis, the main arguments criticising the legitimacy of this practice largely mirror those raised in the debate on comparativism in judicial constitutional and rights interpretation more generally. The main arguments can be categorised into three groups: the textual objection, the argument from democracy, and the nationalist or localist critique.³⁶ The textual objection maintains that judges must observe fidelity to the text of the Constitution and to the extent that they refer to foreign law, they are illegitimately relying on a non-textual source. This objection is connected to the second critique, the argument from democracy, which objects to judicial comparativism on the ground that the foreign laws have not been democratically approved by the state in question and that neither local judges nor foreign judges issuing foreign judgments are democratically accountable to the relevant state. The nationalist critique maintains, as Cheryl Saunders explains, that the Constitution is a ‘quintessentially national instrument’ which responds to ‘national perceptions, national needs, and national values.’³⁷ The localist approach to constitutional interpretation therefore maintains that the interpretation and application of the Constitution must reflect the constitutional, legal, and political culture of the state as reflected in the founding document. In short, it states that interpretation of the Constitution must respect the national identity of the state as expressed in the Constitution. Thus, it is part of a drive to

³⁶ These are legitimacy-based objections to judicial comparativism; there also exist methodology-based objections to the practice. See Cheryl Saunders, ‘The Use and Misuse of Comparative Constitutional Law’ (2006) 13 *Indiana Journal of Global Legal Studies* 37; Robert Reed, ‘Foreign precedents and judicial reasoning: the American debate and British practice’ (2008) 124 *LQR* 253.

³⁷ Saunders, ‘Use and Misuse’ (n 36) 50.

restrict epistemological openness in adjudication in order to respect the specific national identity of the state which the court serves.

A useful starting point for assessing the force of these objections in the context of the use of implied principles as a bridge to foreign law is an observation made by Jeffrey Goldsworthy in his analysis of the migration of constitutional ideas. Goldsworthy rightly noted that '[c]onstitutions rarely if ever prescribe a particular interpretive or analytical methodology.'³⁸ This provides ample space to judges to develop techniques that supply the methodology that has not been prescribed in the text of the constitution. This argument goes some distance towards answering textual objections to both comparative methodology and the use of devices such as implied principles to incorporate foreign law in judicial reasoning. Further, even where there are express rules of interpretation applicable to the constitution, 'the law of interpretation ... cannot contain all that can and need be said in an account of legal or constitutional interpretation.'³⁹ Thus, there is still methodological space available to judges.

Moreover, in response to the nationalist complaint against using principles to incorporate foreign law, it must be noted that in the judicial use of implied constitutional principles, there is always a connection to foreign law and foreign or global doctrines. This is because, conceptually, the implied constitutional principles are part of a model of

³⁸ Jeffrey Goldsworthy, 'Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence' in Sujit Choudhry, *The Migration of Constitutional Ideas* (2006 Cambridge UP) 127, 137-40.

³⁹ Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 356.

constitutionalism⁴⁰ and, empirically, the principles are often borrowed or developed from experiences and law in other countries, as is sometimes reflected in the preambles to the constitutions and bills of rights. It is these considerations which lie at the base of Gary Jacobsohn's response to localist objectors, which is that where 'courts attempt to interpret and apply 'the principles of democracy' ... they are likely to benefit from, or at least not to be undermined by, consideration of how others have addressed these aspirations in the various structural and interpretive choices that define their unique constitutional identities.'⁴¹

It is this argument which is at the crux of the response to originalist and localist objections to the use of the implied constitutional principles. The common law states examined in this thesis would all lay claim to observance of, and 'constitutional commitment' to the rule of law and separation of powers. Despite that their precise application may vary according to local circumstances, the observance and recognition of these principles are not exclusive to any one state, and indeed, as argued in Chapter 2, they are foundational to the very edifice of democratic constitutionalism.

This takes us to a critical note that must be acknowledged in the debate on the legitimacy of the use of implied principles in tandem with comparative judicial analysis. In considering attacks on the legitimacy of comparative judicial methodology, it is important to distinguish between comparativism at different stages of the life of the constitution. As with the use of implied principles, comparative methodology may occur

⁴⁰ Goldsworthy, 'Questioning the Migration of Constitutional Ideas' (n 38) 116.

⁴¹ Gary Jacobsohn, 'Constitutional Values and Principles' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 790.

at the legislative stage as well as at the interpretative stage. This is reflected in the use of foreign law by legislative drafters and the legislature on the one hand, and the citation of foreign law by judges, on the other. The invocation of comparative material by legislators is viewed by some critics, such as Justice Antonin Scalia, as possessing a greater claim to legitimacy than the invocation of comparative law by members of the bench.⁴² Thus, to the extent that the complaints against the comparative function involve claims related to the argument from democracy and institutional legitimacy, a reasonable response to this critique is that it can be legitimate for courts to embrace methodology that has been embraced by the legislature. This is particularly so if, as shown in Chapter 7, the courts refer to laws from countries similar to those used in the drafting process.

iii. Implied Principles as Grounds for Invalidating Legislation

Where the use of implied principles goes further than the interpretive or comparative functions, and extends to use of the implied principles as grounds for directly invalidating legislation, the considerations for determining legitimacy differ. In this context, it can be argued that challenges to legitimacy arise acutely for all the jurisdictions examined, with some challenges applying to all the jurisdictions. However, the significance of particular challenges depends on the institutional and textual arrangements in each respective jurisdiction.

For all jurisdictions, the argument from democracy looms large as a challenge to the use of implied principles as independent grounds for invalidating legislation. The argument from democracy posits that the use of principles as independent grounds for

⁴² Vlad Perju, 'Constitutional Transplants, Borrowing, and Migrations' in Rosenfeld and Sajó (n 41) 1317.

invalidation undermines respect for the will of the people as expressed through their elected representatives in the legislature. The democracy-based objection contains two components. In the first, the complaint is that arguments against pieces of legislation should be settled through the democratic mechanism of voting, rather than the judicial process. Of course, this objection could just as easily be raised (and is often raised) in complaints against judicial review of legislation in general. Accordingly, there is a second component of the democracy-based objection, which is that if legislation is to be defeated through the judicial process, this defeat must be suffered through the weapon of the text of the Constitution or Bill of Rights, rather than through an implied principle exterior to the particular sections of the constitutional or rights instrument. This component of the democracy argument views the text of the Constitution as an expression of the democratic will. Justice Major expressed the argument from democracy in the following terms in the *Imperial Tobacco* case:

...the appellants' arguments ...fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box.⁴³

A supplementary argument from democratic legitimacy is the argument based on the particular constitutive role of the constitution. The constitutive character of a constitution has been raised in debates regarding the legitimacy of comparativism in constitutional interpretation. Adrienne Stone explained the constitutive argument in the following terms:

Constitutions have a symbolic power that arises from their constitutive role. Precisely because they provide a framework for government, they are also seen as

⁴³ *Imperial Tobacco* (n 6) [66].

a repository of important values. Put at its highest, this view has it that constitutions are expressive of national identity.⁴⁴

A meaningful discussion of the force of the democratic-constitutive critique would have to explore the following threads of argument. The first thread is temporal; it raises the question whether the constitutive role of the Constitution operates as a ‘Big Bang’, expressed at the point of enactment of the document and therefore resistant to change overtime. In this sense, the conversation must involve a discussion of the concept of the ‘constituent power’. The constituent power, as stated above, has been described as ‘the power that represents the regime’s foundational enactment’.⁴⁵ The concept of the constituent power as a ‘profound manifestation of democratic power’ may be invoked to mount an acutely strong objection to the application of limitations on legislative power which are not expressed in the text of the founding document. However, there is debate about the implications of the idea of ‘constituent power’. Therefore, the notion of the constituent power may be marshalled by advocates of reasoning by implied constitutional principles by wielding the argument that as the constituent power was expressed at the founding, the principles derived from that constituent document should prevail over subsequent enactments which are not the product of the constituent assembly. At the base of this conflict over the constituent power is the question of how to define the exercise of constituent power and the composition of the constituent assembly. These debates become particularly significant in the discourse on ‘unconstitutional’ constitutional amendments, which is addressed in Part IV of this Chapter.

⁴⁴ Adrienne Stone, ‘Comparativism in Constitutional Interpretation’ [2009] U Melb LRS 15.

⁴⁵ Jacobsohn, *Constitutional Identity* (n 27) 38.

The second thread of argument related to the democratic-constitutive critique is textual and seeks to explore the connection between the written constitution and unwritten constitutionalism. The basic argument that arises here in response to the democratic/constitutive objection is that the written Constitution was enacted against a background of implied principles that form the common law constitution. Thus, Mark Walters has suggested that there are two ways of conceptualising the relationship between written and ‘unwritten constitutionalism’⁴⁶ that emerges following the enactment of the Constitution. The first is to perceive a formal distinction between the written constitution and unwritten constitutional norms. He sees this conceptualisation as useful in common law jurisdictions with no written constitution or with a written constitution that is not comprehensive, because, for example, it does not include a Bill of Rights. Where a written constitution exists in the jurisdiction and this constitution is comprehensive, the second conceptualisation becomes relevant. On this second view, the written constitution is an abstract expression of unwritten norms. What this means, however, is that, in Walters’ words, ‘this constitution can no more break loose from the unwritten constitution of legality than an island can separate from the seabed that lies beneath the waters that surround it.’⁴⁷ Unfortunately, Walters’ analysis did not distinguish between distinct functions of implied principles, but it is useful in discussing the critique of the invalidation function because it highlights the inexorability of a symbiosis between written and unwritten constitutional norms. If these sets of norms are intertwined and ‘the value of made-law is interdependent upon implicit law’, this goes

⁴⁶ See Chapter 2.

⁴⁷ Mark Walters, ‘Written Constitutions and Unwritten Constitutionalism’ in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge UP 2008) 273.

some distance towards making the argument that in using implied principles, even as grounds of invalidation, courts are giving effect to the implicit norms that are intimately connected to the written instrument.

The third thread of reasoning to be explored in the discussion of the democracy objection centres on arguments related to the relative institutional legitimacy of the organs of the state. As noted in Chapter 6, where the court concludes that implied constitutional principles can serve as independent grounds for invalidating legislation, the application of the principle in question is usually one related to the separation of the institutional powers of the state. Further, this conclusion is almost exclusively used in defence of the court's jurisdictional sphere and institutional power. This generates a 'conflict of interest' perception which can undermine the legitimacy of the court's use of the implied principle. From a theoretical perspective, this trend in the judgments using implied principles can be seen to fall neatly within the framework of rational choice theory or institutional theory. The judges' reasoning could be accounted for as representations of personal self-interest or the interests of the institution of the judiciary. Leclair perceives great danger for the very legitimacy of the court in the use of the implied principles in defence of the judicial sphere. She argued, with respect to Canada, that 'in some cases, while the unwritten principle of judicial independence was praised, others, such as the principle of democracy or the rule of law, were clearly neglected' and that '[d]ecisions in which legislation was impugned on the basis of the unwritten principle of judicial independence have all had to do with judicial remuneration, and were all

initiated by judges.⁴⁸ Leclair maintains that the initiation of such actions by judges is ‘more than problematic’ because ‘[t]he credibility of the judiciary requires that judges not initiate recourse to law’.⁴⁹ However, this criticism seems, with respect, overblown. There must be, and indeed have been, in various jurisdictions, occasions that judges have recourse to the law. Apart from the *Remuneration Reference*, judges have also had recourse to the law in Trinidad and Tobago, where a judge made a claim challenging his removal from office⁵⁰ and the United States of America, where judges have challenged the constitutionality of reductions of their salaries.⁵¹

Further, a purely rational choice model that explains the trend as solely a matter of judicial self-interest might be overly simplistic. We should also account for the judges’ belief in the suitability and necessity of the institutional processes of the court to do justice to the individual. Such a belief in the institutional virtues of the court was expressed by judges in the *Remuneration Reference*, *Jackson*, and *White v DPP*.⁵²

A final aspect of the debate on the legitimacy of the use of implied principles as grounds of invalidation is the impact of parliamentary supremacy. The potency of the challenge posed by the argument from parliamentary supremacy operates on a sliding

⁴⁸ Leclair (n 20) 432.

⁴⁹ *ibid.*

⁵⁰ *Rees v Crane* [1994] 2 AC 173 (JCPC, Trinidad and Tobago).

⁵¹ *Williams v United States* 53 S.Ct. 751, 289 U.S. 553 (1933); *O'Donoghue v United States* 53 S.Ct. 740, 289 U.S. 516 (1933); MK ‘Constitutional Law-Court of Claims-Legislative Courts-Reducing Judge's Salary’ (1934) 9 *Indiana LJ* 318.

⁵² *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3 (SC, Canada) (*Provincial Judges Reference* or *Remuneration Reference*) (Lamer CJ) [124-25]; *R (Jackson) v AG* [2005] UKHL 56, [2006] 1 AC 262 [102] (Lord Steyn), [107] (Lord Hope), [159] (Lady Hale); *White v DPP* (2007) 81 ALJR 1259 (HC, Australia) [189]-[198] (Kirby J, dissenting).

scale in relation to the extent of the power conferred upon the court to invalidate legislation. For the UK, there is a particularly strong challenge to legitimacy arising from the orthodox view that the doctrine of parliamentary sovereignty is the controlling principle in the UK constitution. Here, the problems are, first, the fact that the substantive limitation on legislative power has not been prescribed or permitted by Act of Parliament, and, second, from the institutional point of view, courts do not possess the power to invalidate legislation. In Australia, parliamentary supremacy is also a recognized principle of the Commonwealth Constitution. However, in Australia, the fact that the Constitution, as interpreted by the courts, permits the invalidation of legislation makes the critique less compelling than in the institutional context of the UK. What provides significant room for argument in Australia is that the Constitution does not include a bill of rights and does not expressly confer jurisdiction on the courts to invalidate legislation for violation of rights. Therefore, the use of the implied principles to incorporate rights protections and thereby invalidate legislation is in tension with the wide berth provided to Parliament by the Constitution.

In the other states, the supremacy of Parliament as it is understood in the UK or Australia is not the dominant issue, as the courts are accorded the power to invalidate legislation on the ground of rights violations. In the Commonwealth Caribbean the Constitutions are expressly declared in the Constitution to be the supreme law.⁵³ In Canada, there is neither complete parliamentary supremacy nor constitutional supremacy.

⁵³ See, eg, section 1, Constitution of Barbados 1966, which states that the Constitution 'is the supreme law'. Section 2 of the Constitution of Jamaica 1962 does not expressly state that the Constitution is the 'supreme law' but is to the same effect, providing that 'if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.'

As discussed in Chapter 2, in Canada there is an interplay between the clauses asserting constitutional supremacy and providing for enforcement of the Charter of Rights on the one hand, and the notwithstanding clause on the other. The discussion in Chapter 2 identified two characterizations of Canada's constitutional structure: the dialogue model and the 'new Commonwealth' model.⁵⁴ The dialogue model seeks to identify the distinctiveness of the Canadian system of constitutional review from the US system of 'strong' constitutional review. The 'new constitutionalism' model is broader in focus and seeks to identify the distinctions between 'strong-form systems' operating in the US and in countries that form part of the post-World War II paradigm of constitutional review and a new intermediate model which provides a mechanism 'whereby the legislature can take the final decision away from the courts.'⁵⁵ What is common to both models is that they both emphasise meaningful legislative involvement in the contouring and protection of rights.

From these types of descriptive analysis of the involvement of the Canadian judicial and legislative branches in the articulation and protection of rights, there has developed a normative discourse requiring the rejection of 'judicial supremacy' in Canadian constitutional law. This normative requirement is represented in Leclair's critique of the Supreme Court's decisions incorporating implied constitutional principles. For Leclair, the court's decision-making in constitutional cases must evince 'respect for

⁵⁴ Peter Hogg and Alison Bushell, 'The Charter Dialogue between Courts and Legislatures' (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge UP 2013) 2.

⁵⁵ Gardbaum (n 54) 111-21.

the dialogical dimension of law-making'.⁵⁶ A significant part of Leclair's concern that using implied principles erodes the dialogic interplay arises from the observation that, because implied principles are not part of the 'particular sections' of the Charter, they are not subject to the notwithstanding clause.⁵⁷ There is therefore, concern that the use of implied principles as independent grounds fails to maintain the ethos of 'joint responsibility of rights'.⁵⁸

iv. Implied Principles as Substitutes for Bills of Rights?

Leclair, while ultimately acknowledging that the legitimacy of using implied principles depends on the purpose they serve and the use courts make of them, expressed concern that '[c]ourts have latitude in the interpretation of a constitution, but they must not appeal to unwritten constitutional principles with the intent of rewriting it.'⁵⁹ Accordingly, an aspect of the analysis of the legitimacy of reasoning by implied constitutional principles in adjudicating rights issues is to consider whether this reasoning technique acts to supplant the constitutional rights specified in the text of the constitution or rights instrument. This section of the Chapter addresses the main points of debate that arise from the concern that reasoning by unwritten principles may have the effect of slowly rewriting the Constitution and/or the Bill of Rights.

There are two main aspects of the courts' use of rule of law and separation of powers that may prove threatening to the supremacy of the *text* of the Constitution,

⁵⁶ Leclair (n 20) 428.

⁵⁷ *ibid.*

⁵⁸ The term 'joint responsibility for rights' was borrowed from Gardbaum (n 54) 7.

⁵⁹ Leclair (n 20) 431.

and/or the Bill of Rights. First, there is the possibility that the implied principles may be used to supply substantive limits against the legislature despite the absence of a bill of rights in the jurisdiction.⁶⁰ In Australia, this is arguably the dynamic that is developing through the use of the rule of law and separation of powers principles in rights cases. Through this route, despite the absence of a bill of rights in the Constitution, judges have created judicially enforceable rights with an unwritten source. Accordingly, commentators on Australian constitutional law have observed that the Australian High Court has implied a bill of rights into the Constitution through the implied constitutional principles of the rule of law and the separation of powers.⁶¹ Fiona Wheeler has detailed the High Court's protection of due process rights through the implication of a separation of powers doctrine (particularly a separation of judicial power).⁶² For instance, in one of the leading cases on this issue in Australia, *Leeth v Commonwealth of Australia*, it was stated that one consequence of respect for the separation of judicial power from others is that judicial power must be exercised consistently with rules of natural justice.⁶³ While natural justice requirements would be protected in administrative law, decisions such as *Leeth* had the effect of entrenching these requirements by elevating them to inclusion in the Constitution itself.⁶⁴

⁶⁰ Walters, 'Lex Non Scripta' (n 13) 91.

⁶¹ George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press 1994); Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205.

⁶² Wheeler, 'Due Process, Judicial Power' (n 61).

⁶³ (1992) 174 CLR 455 (HC, Australia) 470, 487.

⁶⁴ Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Mon LR* 248.

The second potential impact of reasoning by implied principles that is relevant in this section is that implied constitutional principles may apply regardless of (contradictory) written provisions in the Constitution. In the UK, one potential implication of the use of implied constitutional principles could be that the courts would exercise a power that is wider in scope and greater in potency than that granted by the HRA 1998. The roots of this potential development can be seen from the perspective of Trevor Allan's theory on the fundamental pillars of British constitutionalism and the evolution of the British constitution. Allan maintains that it is essential for courts to accord due normative force to the rule of law along with parliamentary supremacy. This would involve courts acknowledging that they are bound by the rule of law to reject legislative breaches of the rule of law. For Allan, it is not necessary for a bill of rights to do this work of restraining legislative interference with rights, because the rule of law as part of the British constitution supplies the normative and institutional space for that restraint on legislative power.⁶⁵ This line of argument provides a theoretical foundation and justification for the potential impact of reasoning by implied constitutional principles.

The application of the implied principles in a manner that seemingly contradicts the Constitution or Bill of Rights could produce both conservative and activist effects. The activist effect in the sense used here refers to the application of the implied principles in support of invalidation of a legislative or executive act. An example of the activist impact is presented by the decision in *Mollison*, in which the Privy Council invalidated legislation on the ground of the implied principle of the separation of powers in order to

⁶⁵ TRS Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' [1985] Cambridge LJ 111.

evade the savings law clause, which saves pre-independence laws from declarations of inconsistency with the provisions of the Bill of Rights.⁶⁶ The conservative effect occurs where the principles provide a basis on which a court declines to invalidate a governmental act or a basis on which the Court otherwise exercises restraint in its review of governmental acts. The use of the rule of law in *Reference re Manitoba Language Rights* provides a useful precedent for this conservative effect. The statutes challenged before the court had not been passed in accordance with the manner and form requirements prescribed in section 23 of the Manitoba Act 1870, which forms part of the Constitution of Canada. As the Supreme Court held, the failure to comply with these mandatory requirements meant that the statutes were ‘invalid and of no force or effect’.⁶⁷ Nonetheless, the Court held that the ‘constitutional guarantee of the rule of law’ rendered it ‘necessary to deem temporarily valid and effective the unilingual Acts of the Legislature of Manitoba which would be currently in force, were it not for their constitutional defect, for the period of time during which it would be impossible for the Manitoba Legislature to fulfil its constitutional duty.’⁶⁸ The novelty and constitutional significance of this decision was signalled by Jean LeClair who observed that ‘[p]reviously, such principles were never held capable of counteracting the explicit provisions of the Constitution.’⁶⁹ Nevertheless, it will be apparent to the reader that the application of the rule of law in the *Manitoba* case, though

⁶⁶ *DPP of Jamaica v Mollison* (2003) 64 WIR 140 (JCPC, Jamaica).

⁶⁷ *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 (Manitoba Language Rights Reference or Reference re Manitoba Language Rights)* [1985] 1 SCR 721 (SC, Canada) [54].

⁶⁸ *ibid* [84].

⁶⁹ Leclair (n 20) 391.

of substantial normative force, temporarily salvaged the validity of legislation. Thus, a complete appraisal of the decision must account for the fact that the use of the implied principles was conservative in the sense used in this section, and moreover, was applied as a temporary remedial measure.

Where the Canadian Supreme Court has been invited to invalidate legislation using the principles as independent grounds, the Court has been more reticent. *Babcock v Attorney General Canada* provides a useful example.⁷⁰ The case arose out of a claim by lawyers at the Vancouver branch of the federal Department of Justice against the federal government for breach of fiduciary duty and breach of contract following the Department of Justice's decision to increase the pay of lawyers in the Toronto branch but not in the other offices in Canada. In the course of the case the government objected to the disclosure of fifty-one documents on the ground that they contained 'information constituting confidences of the Queen's Privy Council for Canada' under section 39 of the Canada Evidence Act 1985. The Vancouver lawyers argued, inter alia, that section 39 was unconstitutional for violation of the implied principles of the rule of law, the independence of the judiciary, and the separation of powers. The Supreme Court of Canada rejected the argument that section 39 violated these implied constitutional principles. In arriving at its decision, the Court rejected the submission that it is within the power of the judges to invoke the rule of law and the separation of powers to control legislative power which is not restricted by the terms of the Charter. For McLachlin CJ,

⁷⁰ [2002] 3 SCR 3 (SC, Canada).

[i]t is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.⁷¹

The Court's reluctance to apply implied constitutional principles in preference to the terms of the Constitution and bill of rights was mirrored in the more recent case of *Imperial Tobacco*. As explained in Chapter 2, in this case the Canadian Supreme Court rejected the appellants' submissions that the rule of law could be applied to enforce substantive limitations on legislation and as a ground on which to invalidate legislation. Major J stated that 'the appellants' conception of the unwritten constitutional principle of the rule of law would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers.'⁷²

Overall then, there is some evidence of implied principles emerging as substitutes for Bills of Rights where such principles supply rights protections in the absence of a Bill of Rights for the jurisdiction in question and where the principles apply contrary to contradictory provisions in the relevant text. However, it is also critical to take account of the different results that can be produced when principles are applied in ways that seemingly contradict the constitutional or rights text.

v. Exceptional Cases

A final question to consider before leaving the topic of the type of use involved is the question of whether we should treat exceptional cases differently in our assessment of the legitimacy of the use of implied constitutional principles. As noted in previous chapters, the concept of 'exceptional circumstances' has been referred to by Lord Steyn

⁷¹ *ibid* [57] (McLachlin CJ).

⁷² *Imperial Tobacco* (n 6) [65].

in the *Jackson* case, and adopted by Lord Hope in *AXA*, but its lineage is much older. In fact, exceptional cases have long formed part of the discourse in constitutional law. The nature of the exception can refer to the facts that arise in the case before the court, as well as the powers exercised by the court to resolve the dispute in the case.

There are two sets of cases in which the character of exceptionality is claimed. The first category contains cases where the constitution does not permit judicial invalidation of legislation (a jurisdiction whose constitution includes the principle of parliamentary supremacy) yet judges lay a claim to common law or judicial control of statute in exceptional cases. In this category, we may place *Dr Bonham's case* and the *obiter dicta* in the *Jackson* case. This category involves two propositions. The first proposition is that there is a source of law, that, in at least 'exceptional circumstances', may be superior to parliamentary legislation. The second proposition is that the courts have a residual power to enforce that higher law as against legislation. In the second category are the necessity cases, which usually arise from questions regarding the validity of legislation passed and institutions constituted in a manner and form that contradict the formal requirements of the Constitution. Within this category we can place cases arising out of the aftermath of a revolution. The quintessential examples of this category occurred in cases in post-revolution cases in Pakistan and Cyprus, which were cited by the Canadian Supreme Court in the *Manitoba Language Rights* case. However, a notable example arose subsequent to the revolution in the Caribbean jurisdiction of Grenada, which was addressed in *Mitchell v DPP of Grenada*.⁷³ This category also includes cases arising from the rescue of unconstitutional statutes passed in ordinary social and political

⁷³ [1986] LRC (Const) 35 (CA, Grenada).

circumstances (unlike the revolution cases) but which failed to comply with constitutional manner and form requirements, as in the *Manitoba* case.

The parallels between the revolution cases (some of which use the doctrine of necessity) and the *Manitoba* case (which relied on the rule of law) reveal that the implied constitutional principles can lead to the same results as other unwritten doctrines which have been applied in constitutional law and in other fields of law in common law jurisdictions. The discussion of these cases is also meant to demonstrate the complexities of the circumstances which are sometimes presented to judges, to emphasise that even in the hardest of hard cases the judge has a duty to decide the case, and that in exceptional cases, there is a strong argument to be made for judges basing their decisions on non-textual material in order to arrive at a sensible decision.

As we recall, in *Manitoba*, the Supreme Court of Canada found that unilingual laws in Manitoba were unconstitutional insofar as they failed to comply with the requirements for bilingual publication. The Court nonetheless declared that the laws should be observed as temporarily valid in order to avoid a legal vacuum in the province. The need to preserve law and order was at the basis of this decision and this need has influenced judges in other jurisdictions to rely on non-textual sources and arrive at a result similar to that reached by the Supreme Court in the *Manitoba* case. Such was the case in *Mitchell v DPP*, the facts of which it is useful to set out in some detail.

The circumstances of the *Mitchell* case arose in the aftermath of a revolution in Grenada, a usually peaceful ‘small island in the Eastern Caribbean’.⁷⁴ A coup d'état was staged in March 1979 by the New Jewel Movement, the opposition party to the then

⁷⁴ *ibid* (Haynes P) 41.

ruling Grenada United Labour Party. The ‘bloodless revolution’ led to the establishment of the People’s Revolutionary Government (PRG) in 1979, led by Maurice Bishop, who assumed the position of Prime Minister of Grenada. The PRG suspended the Constitution of Grenada 1973 and promulgated a set of People’s Laws; the existing local courts were abolished as were appeals to the Privy Council. A new Supreme Court consisting of a High Court and a Court of Appeal was created by People’s Laws Nos. 4 and 14. The PRG was overthrown in October 1983, when Maurice Bishop and some of his Ministers were murdered. Following the murders, a Revolutionary Military Council assumed power, which lasted for approximately one week, whereupon their reign was terminated when the island was invaded by forces from the USA, along with forces from some Caribbean states. The Governor General of the country then issued a proclamation declaring a state of emergency, declaring that he would exercise executive authority until a government was elected pursuant to the Constitution. The declaration also stated that ‘existing laws’ (including People’s Laws Nos. 4, 14, and 84, which established the new judicial system) would continue in force. Constitutional government returned when the Constitution of Grenada Order 1984 was published, which provided that the Constitution of 1973 was in force with the exception of some specified provisions, and a new Parliament was elected in December of 1984. The first Act passed by this new parliament in 1985 confirmed the validity of the laws passed during the PRG rule when the Constitution had been suspended.

The appellants in the case were charged with the murder of Maurice Bishop and other ministers of the PRG and were awaiting trial in the High Court. The indictment against them was filed in September 1984, before the resumption of government under

the Constitution. They applied to the High Court challenging the High Court's competence to hear the charge, on the ground that the Court was established by the People's Revolutionary Government by People's Laws No. 4 and No. 14 and that since that government was invalid, those laws were invalid and hence the High Court itself as it was then constituted was invalid. Nedd CJ, sitting on the bench of the High Court, dismissed the application, holding that while the PRG was not the *de jure* government, the laws passed by it validly established the Supreme Court.⁷⁵ The appellants then appealed to the Court of Appeal of Grenada. The issues raised on appeal included whether the PRG was the *de facto* government of Grenada, whether the PRG achieved *de jure* status before it was overthrown, whether People's Laws Nos. 4 and 14 were valid, and whether the court has jurisdiction to hear the appeal before it.

The majority of the Court held that there was insufficient evidence before it to decide whether the PRG had achieved *de jure* status. However, the Court held that People's Laws Nos. 4 and 14 were validated under the law of necessity, and therefore the Supreme Court (including the Court of Appeal itself) was validly constituted.⁷⁶ Haynes, P. indicated that one of the maxims from which the doctrine of necessity is derived is that stated by Bacon: 'that the preservation of the state is the supreme law (*salus populi suprema lex*)'.⁷⁷ Based on this understanding, the President of the Court of Appeal listed five conditions for the operation of the doctrine of necessity, the first among these being

⁷⁵ The Chief Justice's decision was given ten days after the Constitution of Grenada Order 1984, which reinstated the Constitution of 1973.

⁷⁶ *ibid* 73-74, 88-94, 120.

⁷⁷ *ibid* 76.

that an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, for immediate action to be taken to protect or preserve some vital function of the State. Professor Simeon McIntosh criticized the Court's application of the doctrine of necessity to the case on the basis that the circumstances before the court did not constitute an 'emergency' in the meaning required by the necessity doctrine because the doctrine only applies to unconstitutional acts of a constitutional state.⁷⁸ He also based his criticism on the argument that 'it is only a court that is itself already validly constituted that would have jurisdiction' in the case.⁷⁹ McIntosh's latter criticism- regarding the validity of the court – certainly indicates a logical flaw in the decision. However, a court before which this issue is raised must decide; that is a critical distinction between judicial practice and legal theory.

Despite its potential for substantial effect on the legal, political, and social structures of the state, the doctrine of necessity has generally been recognized as one of ancient vintage and, in fact, was relied upon by an English court as early as 1672.⁸⁰ Indeed, Glanville Williams identified twelve maxims justifying the doctrine of necessity⁸¹ and he justified its place in the law, noting that:

'The law' is not a body of systematised rules enacted as a whole and fixed for all time. Judges have always exercised the power of developing the law, and this is now recognized to be a proper part of their function. 'The law', in a word,

⁷⁸ Simeon McIntosh, *Kelsen in the "Grenada court": Essays on Revolutionary Legality* (Ian Randle 2008) 28.

⁷⁹ *ibid* 37.

⁸⁰ *Manby v Scott* (1672) 1 Lev. 4; Mark Stavsky, 'The Doctrine of State Necessity in Pakistan' (1983) 16 *Cornell Int. L.J.* 341, 342.

⁸¹ Glanville Williams, 'Defence of Necessity' (1953) 6 *Current Legal Problems* 216.

includes the doctrine of necessity; the defence of necessity is an implied exception to particular rules of law.⁸²

With respect to the Grenadian CA's judgment in *Mitchell*, though McIntosh criticised the court's ruling, his critique was based on his view that the Court 'misconstrued the doctrine'⁸³ and not on the ground that the doctrine itself was an illegitimate tool of judicial decision-making. Importantly, it has been noted by Professor Mark Stavsky, commenting on the use of the doctrine of necessity in Pakistan, that 'if narrowly and carefully applied, the doctrine constitutes an affirmation of the rule of law'.⁸⁴ The Supreme Court of Canada stated in the *Manitoba* case that 'the doctrine of necessity is not used in these cases to support some law which is above the Constitution; it is, instead, used to ensure the unwritten but inherent principle of rule of law which must provide the foundation of any constitution.'⁸⁵ Thus, this brief discussion on the use of the doctrine of necessity in constitutional law cases was intended to show that similar effects can be achieved through the use of constitutional principles such as the rule of law and the use of common law doctrines such as that of necessity, and that necessity can be viewed as affiliated with the rule of law itself.

The 'exception' category combines aspects of the legitimizing function of implied principles while possessing attributes that answer many of the charges against the use of implied principles. On the legitimizing side, the use of the principles in the exceptional cases do appear to be attempts to identify and glean the *core* elements of the state and the

⁸² *ibid* 224.

⁸³ McIntosh (n 78) 28.

⁸⁴ Stavsky (n 80) 344.

⁸⁵ *ibid*; *Manitoba Language Rights Reference* (n 67) [105].

constitution by ‘dig[ging] down to the level of constitutional theory’⁸⁶ to find and apply the *core* of foundational principles of the constitution. So, for instance, if in the exceptionalities case, the implied constitutional principle is used to ensure the maintenance of laws in a jurisdiction, this is a core application of the rule of law, universally accepted, that the rule of law requires that there must be laws. This was the application of the rule of law in the *Manitoba* case. Hence, while there may be controversy surrounding the court’s resolution of the facts of the case, it is unlikely that there would be debate surrounding the particular application of the implied constitutional principle, that is, that the rule of law demands that there must be laws. In the framework of legitimization, the exceptions category not only uses principles that have been accepted throughout constitutional democracies, it also taps into the elemental human, institutional, and state inclinations towards stability and continuity. Those elements of continuity and stability are so basic and obvious in exception cases (particularly in the latter two categories) that they would generate broad-scale support across jurisdictions. We see this cross-jurisdictional consensus in cases from jurisdictions as diverse as Pakistan, Canada,⁸⁷ and Grenada. This elemental need has long been recognized through the constitutional provision for the exercise of executive and legislative powers during times of emergency and in justifications for extraordinary state action taken in exceptional situations. Thus, John Ferejohn and Pascale Pasquino maintain that emergency powers ‘have long been thought to be a vital and, perhaps, even an essential

⁸⁶ *Pierson* (n 23) 584.

⁸⁷ See discussion in the *Manitoba* case (n 67): [84]-[107].

component of a liberal constitutional- that is, a rights-protecting- government.’⁸⁸ For Ferejohn and Pascale, the aim of this power is ‘fundamentally *conservative*’- it is to resolve the threat to the system ‘in such a way that the legal/constitutional system is restored to its previous state.’⁸⁹ The necessity of providing for exceptional or emergency situations is well-acknowledged, even if there are disagreements on the tools to be used to respond to such situations.⁹⁰

The exceptional cases evade many of the complaints made by sceptics of the implied principle techniques. For instance, in the jurisdictions in which parliamentary supremacy remains an influential doctrine, a restriction of the use of implied principles to exceptional circumstances accords more respect to parliamentary supremacy by excluding overturn of legislation in ‘ordinary’ circumstances. If we take this argument further, it is not simply that the exceptional cases category reduces the number of instances of use of implied principles to invalidate legislation. The category may also rest on deeper normative claims regarding the justification for parliamentary supremacy. Paul Craig has argued persuasively that parliamentary supremacy must be underpinned by normative arguments justifying that principle.⁹¹ As part of Craig’s rejection of the ultra vires justification of judicial review, he maintains that the formalist approach adopted by ultra vires theorists and modern defenders of parliamentary supremacy is flawed as it

⁸⁸ John Ferejohn and Pascale Pasquino, ‘The Law of the Exception: A Typology of Emergency Powers’ (2004) 2 *ICON* 210.

⁸⁹ *ibid* 210.

⁹⁰ For a recent proposal on the best responses to emergency situations, see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge UP 2006).

⁹¹ Paul Craig, ‘Public law, Political Theory and Legal Theory’ [2000] *Public Law* 211.

fails to advance a normative claim in support of parliamentary supremacy. He presents evidence demonstrating that while the orthodox defence of parliamentary supremacy tends to rely heavily on Blackstone and Dicey, they fail to account for the context in which those writers developed their theories and the underlying normative claims that supported their account of parliamentary supremacy. Craig uses historical examples to maintain his claim that despite the orthodox view, the traditional approach used by Dicey and Blackstone, as well as by venerated judges such as Coke was to support their account of the legal hierarchy with normative claims.⁹²

Vincent Kazmierski uses the premise of Craig's rejection of formalism in the context of the debate over substantive limitations on legislative power by implied constitutional principles. Kazmierski argues that if the court accepts a normative claim in favour of parliamentary supremacy (for instance, that parliamentary supremacy upholds parliamentary democracy), this normative argument can simultaneously provide the tools for the court to reject the use of implied principles in ordinary cases while permitting the use of such principles in 'exceptional circumstances' to defeat legislation that would undermine the normative justification for parliamentary supremacy. This argument has been advanced by Kazmierski in relation to the Supreme Court of Canada's application of the implied constitutional principles. Kazmierski maintains that the Canadian Supreme Court attaches substantial weight to parliamentary supremacy and that though the Court has explored the use of implied principles in constitutional cases, it has relied on the principle of parliamentary supremacy to reject arguments that other implied constitutional

⁹² *ibid* 212-22.

principles should be used to invalidate legislation.⁹³ He argues that the Court identifies the source of parliamentary supremacy as the ‘representative function of democracy’. On that basis, if the legislation before the court erodes representative democracy (which is the normative context that gives force to parliamentary supremacy), the Court is entitled to reject such legislation on the ground of the other implied constitutional principles.

Despite that permitting the use of implied principles in the exception category avoids many of the strong complaints of implied principle sceptics, there are conceptual questions that must be answered. First among these is the question of what must be considered exceptional: the factual context or the legal issue arising. This question may be answered by explaining that the label ‘exceptional’ must be a reference to the factual context and it is this factual context that gives rise to exceptional legal issues. This is the pattern established in the cases which fall into this category. Second, what is the result of the characterization of circumstances as exceptional? Does this characterization affect the interpretive style of the court or does it transform the (hierarchy of) the sources of law in the state? The claim can be made that in the *Manitoba* case, there was an impact on the interpretive style of the court whereas in *Jackson*, there was a suggestion that in exceptional circumstances, the very hierarchy of sources in the state is altered. Thus, in *Manitoba*, the Canadian Supreme Court relied on precedent identifying the importance of the rule of law in the constitutional scheme of Canada and found that in that case, the rule of law demanded that the laws which were unconstitutional for violation of the constitutional text must be *temporarily* maintained in order to uphold the rule of law. The Supreme Court reasoned on the basis that the rule of law has always been a fundamental

⁹³ Kazmierski (n 6) 251.

principle of the Canadian Constitution and that the court must seek to observe the principles and rules of the Constitution by acknowledging the unconstitutionality of the unilingual legislation while according them temporary validity in order to avoid a legal vacuum in Manitoba. By contrast, Lord Steyn in *Jackson* envisioned a different legal impact insofar as he suggested that in exceptional circumstances the courts might have to qualify the doctrine of parliamentary supremacy ‘established on a different hypothesis of constitutionalism.’⁹⁴ Notably, Trevor Allan has criticised the notion of amending the fundamentals of constitutional law in the state in the event of exceptional circumstances, arguing that it is tantamount to threatening a ‘judicial revolt’.⁹⁵

A final consideration that affects our analysis of ‘exceptional’ cases must be noted before we leave this topic. At the beginning of this section, we observed that there are two types of ‘exceptional’ cases: one in which judicial control of statutes is claimed in a jurisdiction that observes parliamentary supremacy and the second in which it is claimed that statutes which were not validly enacted in accordance with the formal requirements of the Constitution should be accorded validity by the court. It must be observed that a key distinction between these two forms of exceptionalities is that while in the second form, the court plays a secondary role in ascribing validity to legislation under an understanding that it is ‘necessary’ to do so, under the first form, the court plays a primary role in ascribing validity to judicial control and, consequently, judicial invalidation, of legislation. It is noteworthy in this discussion that most of the literature

⁹⁴ *Jackson* (n 52) [102].

⁹⁵ TRS Allan, ‘Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism’ (2011) 9 *ICON* 155, 156.

defending special legal treatment of exceptional cases in constitutional law speaks to exceptional acts of the legislature and executive and the necessity of recognising the validity of such acts, rather than the court invalidating legislation in exceptional circumstances. The distinction made here between these two classes of exceptional cases would, undoubtedly, affect an assessment of the legitimacy of the use of the exceptionalities category.

III - Determinacy of the Constitutional Principle

Jean Leclair argues that there is much uncertainty regarding the meaning of an implied principle, because there is an indeterminacy which exists in implied principles that is greater than that which exists with respect to written norms. Leclair's view is that while written norms may also be vague, the words do provide some guidance which does not exist for unwritten norms.⁹⁶ Therefore, the fear expressed is that reasoning by implied principles potentially opens the door for judges to import values into the Constitution and supply their own meaning to such values.

There seem to be two main components of the vagueness complaint, the first being that the principle is vaguer because it is not expressed in the text. The textual objections are addressed in the previous parts of the chapter, but it bears repeating here that the 'unwritten' quality does not, on its own, automatically result in less determinacy than written norms. The charge of indeterminacy may also appropriately be laid at the feet of written provisions in constitutional and bill of rights texts. Indeterminacy occurs where the legal rule or principle in question provides no single solution or single right

⁹⁶ Leclair (n 20) 431; Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1978) 109.

answer to the question of how the court should decide the dispute at hand.⁹⁷ This definition reflects the characterization of indeterminacy by many legal theorists.⁹⁸ As Aileen Kavanagh writes in the context of the indeterminacy of the terms in the Human Rights Act 1998:

[t]he task of the interpreting judge is to redress this, i.e. to make clear something which is not clear on the face of the legislation. ... This view seems to be supported by Lord Bingham of Cornhill when he stated in *Brown v Stott* that 'the language of the Convention is so general that some implication of terms is necessary, and the case law of the European Court shows that the court has been willing to imply terms into the Convention when it has judged necessary or plainly right to do so'. It follows that the meaning of legislative provisions is not contained within the text of those provisions, waiting to be 'discovered' by the interpreting judge. The justifying reasons, which constitute the interpretation, will necessarily be drawn (in part) from evaluations not contained within the legislation.⁹⁹

The Privy Council has also spoken to the generality of constitutional rights provisions, noting that:

the terms in which these provisions of the Constitution are expressed necessarily co-opt future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems.¹⁰⁰

Indeed, there is an inevitable degree of indeterminacy in many constitutional (rights and non-rights) provisions, so that judges have to supply substantive evaluative content even where they purport to rely on norms expressed in the text.¹⁰¹ The near

⁹⁷ Kavanagh, 'Elusive Divide' (n 2) 264.

⁹⁸ *ibid*; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 70-72, 181-2; Timothy Endicott, 'Linguistic Indeterminacy' (1996) 16 OJLS 667, 669.

⁹⁹ Kavanagh, 'Elusive Divide' (n 2) 264.

¹⁰⁰ *Boyce v R* [2004] UPKC 32, [2005] 1 AC 400 (JCPC, Barbados) [28] (Lord Hoffmann).

¹⁰¹ James B. Kelly and Michael Murphy, 'Confronting Judicial Supremacy: A Defence of Judicial Activism' (2001) 16 Can. J.L. & Soc. 3, 10-12; Adrienne Stone, 'Judicial Review Without Rights:

ubiquity of indeterminacy in constitutional and rights interpretation suggests that, if we assume acceptance of the legitimacy of constitutional and rights interpretation by courts, the standard by which to judge the epistemological choice to use implied constitutional principles ought not to be a standard of determinacy. Thus, as argued by James Kelly and Michael Murphy, the ‘standard of certainty is the error’,¹⁰² and the inquiry must be more nuanced.

The second component of the vagueness objection is that principles are inherently vaguer than rules. Accordingly, the argument from determinacy has been made in resistance to the use of implied principles in constitutional adjudication but has also been made generally to the use of principles as legal norms. Thus, for instance, Raz objects that ‘[p]rinciples, because they prescribe highly unspecific acts, tend to be vaguer and less certain than rules.’¹⁰³ We can acknowledge that the rule of law and the separation of powers do manifest a higher level of abstraction than *some* textual provisions and *some* rules. As has been noted in earlier chapters, it is partly their abstract quality that accounts for their appeal to judges (and, indeed, to other legal actors). However, as with the comparison between textual and non-textual norms, so between rules and principles, there is a level of generality and vagueness in both.¹⁰⁴

Some Problems for the Democratic Legitimacy of Structural Judicial Review’ (2008) 28 OJLS 1, 8-15.

¹⁰² Kelly and Murphy (n 101) 11.

¹⁰³ Joseph Raz, ‘Legal Principles and the Limits of Law’ (1972) 81 Yale L.J. 823, 841.

¹⁰⁴ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 58; Humberto Avila, *Theory of Legal Principles (Law and Philosophy Library)* (Springer 2007) 638-39.

These two components of the argument from determinacy should be disaggregated and each treated on its own merits. In addition, analysts of the legitimacy of implied principle techniques must query whether determinacy ought properly to be regarded as a sensible goal and appropriate standard for measuring the normative desirability of particular norms and interpretive techniques in fundamental rights cases. Again, it is suggested that the standard of certainty is a false standard and that the main focus of the inquiry as to legitimacy lies in the institutional roles played and to be played by the courts and other organs of the state.

IV - The Road to Defeat of Constitutional Amendments?

The implications of the use of implied principles should also be considered alongside the notion of ‘unconstitutional constitutional amendments’ which has been explored in jurisdictions from Latin America, India, and Africa.¹⁰⁵ The question has been posed whether constitutional amendments may be invalidated by implied constitutional principles. For instance, Mark Walters has raised the possibility of implied principles operating as a substantive restraint on constitutional amendments, suggesting that ‘certain constitutional amendments, such as those abolishing fundamental rights, might be precluded by the unwritten constitution.’¹⁰⁶ Arif Bulkan has more recently discussed the potential for such developments in the constitutional law of the Commonwealth Caribbean.¹⁰⁷

¹⁰⁵ Jacobsohn (n 27) 34-83.

¹⁰⁶ Walters, ‘Lex Non Scripta’ (n 13) 140.

¹⁰⁷ Arif Bulkan, ‘The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the “Perfect Nation”’ (2013) 2 Can J Hum Rts 79.

One model for the judicial rejection of constitutional amendments is the basic structure doctrine which was developed in India and has recently been applied in the Commonwealth Caribbean.¹⁰⁸ The basic structure doctrine holds that the Constitution has basic features which cannot be destroyed by the legislature. The doctrine stipulates that ordinary legislation and constitutional amendments must be measured against the essential features of the constitution. Therefore, under that doctrine, the express limits on legislative power in the Constitution are not exhaustive of the constitutional restraints on legislators; there are also implied limits on legislative power which must be complied with in order to achieve constitutional validity. Further, the limits on the power to amend the Constitution are not purely manner and form restrictions; there are also substantive limits on the legislature's amending power. The basic structure doctrine emerged as a result of a series of cases before the Supreme Court of India between 1951 and 1973 in which litigants mounted challenges to constitutional amendments related to land reform.¹⁰⁹ The development of the basic structure doctrine in *Kesavananda Bharati v State of Kerala* arose out of a series of land reform laws championed by the Government of India. When the constitutional validity of that legislation was challenged in the courts, the government amended the Constitution, including amending the protection of the right to property by excluding its application to laws relating to land reform. Two of the critical amendments were the 24th and 29th Amendments. The 24th Amendment sought to ensure that fundamental constitutional rights could be amended without restraint and

¹⁰⁸ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 (SC, India); *Bowen v AG BZ* 2009 SC 2 (13 February 2009) (SC, Belize).

¹⁰⁹ Sudhir Krishnaswamy, *Democracy And Constitutionalism In India: A Study Of The Basic Structure Doctrine* (OUP 2009) 1-2.

provided that the Constitution granted no judicial power to review constitutional amendments. The 29th Amendment sought to insert the land reform legislation into the Ninth Schedule to the Constitution, which meant that the legislation would be immune from being adjudged void by virtue of inconsistency with the fundamental rights provisions in the Constitution.¹¹⁰

The basic structure doctrine has been adopted in the Commonwealth Caribbean by a judge at first instance in the Supreme Court of Belize, but has so far not been approved by an appellate court. The Government of Belize attempted to amend the Constitution of Belize 1981 by providing, in clause 2 of a Bill entitled ‘Belize Constitution (Sixth Amendment) Act 2008’, that the right to property in the Constitution does not apply to petroleum, minerals, and accompanying substances. After the Bill had passed both Houses of Parliament, but before it received Royal Assent, this provision in the Bill was challenged by two landowners in Belize. The landowners sought a declaration that clause 2 ‘is an unconstitutional attempt to amend the Belize Constitution and is likely to contravene the constitutional rights of the applicant generally and including those enshrined in sections 1,3,6,17,20, and 95 of the Belize Constitution’¹¹¹ and that the clause is in violation of the rule of law and the separation of powers. In the

¹¹⁰ See Vivendra Kumar, ‘Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance’ (2007) 49 *Journal of the Indian Law Institute* 365.

¹¹¹ Section 1 of the Constitution of Belize 1981 provides that Belize shall be a democratic state; section 3 guarantees to the right to protection from arbitrary deprivation of property; section 6 enshrines the right to equal protection of the law; section 17 protects the right to property and forbids the compulsory acquisition of such without compensation; section 20 of the Constitution stipulates that any person who alleges that any of his constitutional rights is being or is likely to be infringed is entitled to apply to the Supreme Court for redress and section 95 stipulates that the Supreme Court shall have unlimited jurisdiction to hear and determine civil and criminal proceedings and such jurisdiction as the Constitution or any other law confers upon it.

case, *Bowen v AG*, the Supreme Court of Belize¹¹² held that the challenged clause would be inconsistent with the structure of the Constitution ‘regarding the principle of the separation of powers and its undoubted concomitant, the rule of law’.¹¹³ Conteh CJ concluded that the clause was fatal due to its interference with individual access to courts and its inconsistency with the fundamental constitutional principles. In so finding, he held that the clause would be unconstitutional despite the fact that it had been passed with the requisite super- majority specified in the Constitution for amendment of the constitutional rights provisions.

Despite the boldness of the decision, the breadth of its implications is limited by two factors. First, the decision was one of the lower court and the appellate courts did not take up the issue, finding alternate means of resolving the case.¹¹⁴ The Court of Appeal referred to the fact that, subsequent to the Supreme Court decision, the Parliament amended the impugned clause in the Bill, to provide that:

‘nothing in this subsection shall affect the right of the owner of any private land beneath which any petroleum deposits are located to receive royalty from the Government, as provided in the Petroleum Act and the regulations made there under, existing at the commencement of the Belize Constitution (Sixth Amendment) Act’.

The Court of Appeal found that, as the Bill which was in issue before the lower court no longer existed, the issue raised on appeal regarding the correctness of the Supreme Court’s rulings had become moot.¹¹⁵ Second, in the lower court, Conteh CJ did

¹¹² The Supreme Court of Belize is a court of first instance in constitutional claims.

¹¹³ *Bowen* (n 108)

¹¹⁴ *Attorney General v Bowen* BZ 2010 CA 1 (March 19, 2010) (CA, Belize).

¹¹⁵ *ibid* [21].

not undertake a sufficiently rigorous conceptual analysis that addressed the complex underlying theories, the textual and institutional foundations and implications of the decision, or the connection between the implied principles and the basic structure doctrine.

In examining the potential for the adoption of a form of basic structure doctrine as a consequence of the use of implied constitutional principles, it is crucial to take note of the fact that this doctrine has not been adopted in all jurisdictions that use implied constitutional principles. As Gary Jacobsohn explains, the Supreme Court of Ireland rejected the idea that the judiciary had the capacity to restrain the legislature's amendment power by implied substantive limits. In *State (Ryan and Others) v Lennon* the majority of the Irish Supreme Court found that the judiciary could not legitimately identify and distinguish the articles in the Constitution of the Irish Free State 1922 which were of fundamental importance and those which were not.¹¹⁶ Further, in the *Secession Reference*, the Supreme Court of Canada considered and commented unfavourably upon the potential for invalidating constitutional amendments on the ground of inconsistency with implied constitutional principles:

The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention.... The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.¹¹⁷

¹¹⁶ *The State (Ryan and Others) v Lennon* [1935] IR 170 (SC, Republic of Ireland) 180 (Meredith J).

¹¹⁷ *Secession Reference* (n 18) [84]; Warren Newman, 'The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation' (2005) 16 NJCL 175, 295-96.

The history of the use of implied principles in the jurisdictions examined shows that the doctrine of reasoning by implied principles has not yet developed an analytical narrative that confronts constitutional amendments. Could the doctrine do so? It is possible, but would depend on (1) the theoretical and textual justification for the use of implied principles, including whether the principles are viewed as representing a higher order law, and (2) the source of the principles and the process of implication.

The argument that the implied principles may supply a basis for rejection of constitutional amendments would be strongest if implied principles are viewed as an expression of ‘higher order’ law, on which the text of the Constitution itself is based. As noted above, Mark Walters has written extensively on the perception of implied constitutional principles as an expression of higher law but this concept is not concretely developed in the case law so there would need to be more concrete articulation of this higher law analysis in the courts. Regarding the source and the process of implication, if the source of the implied principles is the text of the Constitution, this may lead to the conclusion that if legislation is validly passed according to the procedure for amendment specified in the Constitution, the constitutional validity of that reform cannot be challenged on the basis of implied principles. If the source is seen as a broader notion of the structure of the Constitution, the argument could be made that the concept of the ‘structure’ can sustain a wider interpretation and potentially provide greater scope for argument that implied principles could operate as a restraint on the legislative power of amendment. Yet, it is not clear that the concept of structure of the Constitution as applied in cases using the structural method of implication could supply substantive limits to the

amending power. For instance, in cases such as *Hinds* and the *Provincial Judges Reference* structural implication was applied as a reference to the manner in which the Constitution arranged its several chapters and to describe the structure of the institutions of government. So there are limits to the extent to which the structural basis of implication could supply grounds for substantive limits on the amending power in those jurisdictions. In summary, then, the current analysis in the case law does not provide enough support for a conclusion that reasoning by implied principles leads inexorably to judicial support for doctrines that would permit the judicial defeat of constitutional amendments. In fact, the highest court in one of the jurisdictions examined has expressed reluctance to adopt this suggestion.

Conclusion

This chapter reveals a combination of challenges to the legitimacy of the use of implied constitutional principles, some of which fall within what Vincent Kazmierski would classify as a ‘British approach’ to the legitimacy question, an approach that ‘recognizes the legitimacy of unwritten principles but favours the principle of parliamentary sovereignty above other principles’. Others fall within what Kazmierski would classify as an ‘American approach’ which focuses on ‘the potential dangers to the legitimacy of judicial review which are raised by judges departing from the constitutional text to identify and apply constitutional principles as limits on legislation’.¹¹⁸ Therefore, the challenges arise mainly from a combination of institutional and textual considerations.

¹¹⁸

Kazmierski (n 6) 245.

Overall, in the assessment of the legitimacy of the use of implied constitutional principles, primacy should be accorded to the issues relating to the process of implication and the function played by the implied principles, along with the institutional contexts in which both of these factors emerge. Accordingly, a systematic examination of the normative question must include a consideration of the impact of these factors along a spectrum of functions, ranging from the interpretative function to the invalidating function. It is in this way that the thesis contributes to the existing literature on the legitimacy of the use of implied constitutional principles in human rights cases; it reveals that we must acknowledge that this 'use' is not monolithic but manifests in a variety of ways which must be accounted for in any normative analysis. This Chapter was not an exhaustive treatment of these issues, but lays the groundwork for a more accurate discourse on the legitimacy of courts' use of implied constitutional principles.

CHAPTER NINE - CONCLUSION

The overarching objective of this thesis is to take a step back from the discourse on the legitimacy and desirability of judicial reliance on implied constitutional principles in fundamental rights adjudication. It is to engage with the prior question of why judges appeal to such principles and the functions played by such principles in the doctrinal, institutional, and legal historical framework of the common law jurisdictions.

I - Decisional Flexibility

The operation of the rule of law and the separation of powers as constitutional principles allow for the blending of the substantive, the institutional, and the methodological. Within the substantive sphere, this thesis highlighted the flexibility of the applications of the implied principles. This flexibility was on display in the analysis of the applications of the implied constitutional principles in Chapter 3, ‘Judicial Conceptions of the Rule of Law’, and Chapter 4, ‘The Application of the Separation of Powers’. It is partly what has been described as the ‘principled ambiguity’¹ of constitutional principles that make them so appealing in the process of building the constitution of a state, both at the design stage and the adjudication stage. Part of the decisional flexibility afforded by the principles is that their content and the results of their application can evolve significantly overtime. Thus, as we noted, the rule of law has been applied to promote equality in ways that would not have been contemplated when Dicey penned his famous treatise.

¹ Heinz Klug, ‘South Africa’s Experience in Constitution-Building’ available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808168> accessed 23 June 2013, 31.

Another aspect of the application of the principles that highlights and utilizes the generality of their content is purposive interpretation. Thus, Chapter 4 sets out how the separation of powers principle serves as a tool in the purposive interpretation of Constitutions and Bills of Rights in the common law jurisdictions. This process provides decisional flexibility to the judges in the current case and opens the door to flexible interpretations and case specific interpretations, in subsequent cases. Thus, the variability of the content and application of the implied constitutional principles was proposed as one factor contributing to judicial engagement with these principles in adjudicating fundamental rights claims.

The analysis of the content of the rule of law and separation of powers principles as applied by courts also reveals interlocking spheres of application of the two principles. The separation and independence of the judiciary from other branches of the state, as well as the corresponding ability of the judiciary to adjudicate as an independent and impartial tribunal, operates as both an application of the rule of law and the separation of powers.

II - Distancing Devices and Institutional Defence

The implied constitutional principles appear to play a critical function in operating as devices that purport to distance judges from the appearance of personal and political judgments. By appealing to principles that are foundational to the constitution, there is an attempt to buttress the legitimacy of decisions in fundamental rights cases. This argument was advanced in Chapter 5, 'Implied Principles as Interpretative Aids'. It was maintained that in cases where judges invoke the implied principles in their

judgments but yet do not use the principles as independent grounds for their decisions, the principles nonetheless play an important role as distancing devices.

Chapter 5 also advanced the idea that the substantive and institutional dimensions are connected by a linguistic theme which highlights the power of the language of the rule of law and separation of powers. The force of these widely accepted principles, which are viewed not only as an aspect of constitutional democracy, but also as foundational to constitutionalism itself, is manifest. The rhetorical force and normative force of these principles are not mutually exclusive. There is significant rhetorical power behind the invocations of the implied principles. However, this fact does not exclude the possibility that the principles also have normative force. Further, the use of the principles as legal norms is evident in the judgments in which judges derive more specific norms and rules from the more general principles. Thus, Jowell has convincingly argued that the rule of law operates not merely as rhetoric, but also as a legal principle.

It is within the overlapping content of the rule of law and separation of powers principles that we see much of the activity of employing the implied constitutional principles. It is also within this overlapping sphere that we see the strongest normative force of the implied constitutional principles. The case material suggests several explanations for this fact. First, it may be that the overlapping area represents the field of these principles that has gained most acceptance from constitutional actors, including judges and legal commentators. This acceptance argument was made in Chapter 3 ‘Judicial Conceptions of the Rule of Law’, Chapter 4 ‘The Separation of Powers’, and Chapter 6 ‘Implied Principles as Grounds for Invalidating Legislation’.

Chapter 6 highlighted cases in which it was held or stated in *obiter dicta* that the implied principles may serve as independent grounds for invalidating legislation. That Chapter noted that in those cases, the application of the implied principle was one that protected jurisdictional grounds, which falls within the overlapping sphere of the rule of law and separation of powers. It was in this Chapter that a second explanation was discussed, that is, that jurisdictional grounds allow for the presentation of the court's decision as one based on structural argumentation rather than evaluative value-based argumentation. This is closely allied with the idea of principles acting as distancing devices in hard fundamental rights cases. A basis for argumentation may be appealing as a distancing device if that ground is perceived as structural, and divorced from moral and political value judgments. As explained in Chapter 6, the presentation of such jurisdictional arguments as grounds excluding value judgments is ultimately unconvincing as such grounds may include evaluations of the role of institutions in rights protection, of competing conceptions of the separation of powers or the rule of law, as well as results-oriented assessments of what decision is likely to be made depending on the branch of government which exercises the decision-making power. A third explanation is that this overlapping application of the principles is a particularly forceful weapon that can be and often is, deployed in defence of a jurisdictional sphere of power, specifically, the court's sphere.

The institutional element of the practice of using implied principles is also a significant theme in the analysis of the use of the implied principles as gateways to comparative judicial reasoning. Thus, the analysis in Chapter 7 highlights the function of implied principles and comparative adjudication as a means of legitimating institutions

and institutional processes. The importance of methodological trends is thrown into sharp relief, showing that while results may be divergent, there is a strong similarity of methodology across the jurisdictions.

Some of the most significant and thought-provoking developments in the methodology of marshalling implied constitutional principles in human rights adjudication can be characterized as actions of institutional self-defence. In this framework, courts use the rule of law and separation of powers as defence mechanisms against limitations or encroachments on the judicial jurisdiction by other organs of the state. The question is whether the courts achieve a Pyrrhic victory in such cases. Do they succeed at protecting their powers of review while sacrificing some of their institutional legitimacy in the eyes of other institutional actors in the state? The institutional legitimacy of the court may be undermined by perceptions that the judges are motivated by institutional self-interest and not by legal reasoning and legal argumentation. It may also be undermined by criticisms that the tools used to preserve that power- in this study, the implication of principles- are imposed on the Constitution by unelected and unaccountable judges in order to preserve or expand their power. Consequently, the lack of democratic accountability as a restraint on judicial power is, it may be argued, exacerbated by the use in judicial decision-making of principles which have not been formally enacted as part of the constitution. These arguments were canvassed in Chapter 8, where it was suggested that these institutional democratic considerations were generally more serious challenges to the legitimacy of courts' invocation of implied constitutional principles than were complaints of the vagueness or indeterminacy of the principles.

III - Invitations

Current scholarly literature, as well as this thesis, focuses the spotlight on *judicial* reasoning by implied principles. However, the judges' activity in using the implied principle techniques only tells one part of the story. There are accompanying narratives surrounding the activity by legislatures and governments in invoking such principles in drafting, as evidenced by the fact that the principles sometimes feature in preambles to constitutions and bill of rights. A second accompanying narrative surrounds the fact that lawyers in rights cases sometimes invite judges to engage in reasoning by implied principles. Thus, it was shown that the principles are often invoked by counsel in making submissions before the courts. Accordingly, there are 'grand entrance halls' to the judicial use of implied constitutional principles on a general level in the form of legislative deliberation and drafting, and on a specific level in the parties' submissions before the court.

IV - Continuity and Transition

To study the role of implied constitutional principles in fundamental rights adjudication is also to observe the role of continuity in the development of constitutions and rights protection. There are elements of continuity in modes of reasoning that have been adopted from the common law for application to the interpretation of constitutions and bills of rights. We see that claim being made by UK judges, with Lord Hoffmann in *Simms* noting the continuity and strengthening of the principle of legality under the HRA

1998.² We see also evidence of common law modes of reasoning in the evolutionary impulses of judges in former colonial states and in their continued and sustained appeal to implied norms in interpreting their written constitutions.

V - Autochthony

This brings us to another consideration that emerges from the observation of the relationship between ‘principled reasoning’ and Bills of Rights. Reliance on implied constitutional principles may be perceived as having a differential impact on the autochthony of constitutional development in the jurisdictions examined. In the former colonial states, the argument may quite sensibly be made that continued invocation of principles in the face of a domestic Bill of Rights or Constitution- developed upon or subsequent to independence- undermines the autochthonous nature of the Constitution or Bill of Rights. For the UK, the dynamic is quite different. In the UK, reasoning by principles that do not derive their normative force from statutory enactment is quite natural and indigenous. This is where Dicey’s description of the centrality of the common law as a source of rights protection in the English constitution is useful. That mode of rights protection is traditional and may be seen as a continuation of English (if not British) modes of reasoning in protection of fundamental rights. On the contrary, the HRA 1998 is not widely perceived as autochthonous, as is observed in the report by the Commission on a Bill of Rights.³ Therefore, in the UK, the implied principles would have a larger claim to autochthonous belonging than does the Bill of Rights.

² *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 132 (HL).

³ The Commission on a Bill of Rights, ‘A UK Bill of Rights? The Choice Before Us’ (December 2012) < <http://www.justice.gov.uk/about/cbr> > accessed 02 November 2013.

VI - Concluding Thoughts

Part of the motivation that influenced the course of this thesis was the need to evaluate what judges actually say about the content and application of the implied constitutional principles. In so doing, the discussion in the chapters above takes stock of the institutional, historical, and doctrinal contexts in which the courts operate. These contexts influence the ways in which judges employ the principles and they ultimately influence any comprehensive analysis of the legitimacy of the use of these principles. Reasoning by implied constitutional principles remains a significant force in rights adjudication, though the functions they play vary, depending on the case before the court, the text in question, and the structural arrangements of the jurisdiction. They provide a route for courts to fill gaps in the bill of rights or the constitution and thus allow for more comprehensive rights protection. They also function as gateways to connect the court, the text, and the state to a transnational web of rights language and rights protection. Further, on a fundamental level, in the sense that the principles form part of the foundation of constitutionalism, there is an immediate transnational connection. They form part of a dialogue that occurs not only between institutions in the same state, but also among institutions across national lines. However, the commonality of language masks divergences that occur across national lines and through the decades as the meanings and applications of the principles evolve.

There are questions that remain to be answered and lines of argument that remain to be pursued, particularly in relation to the legitimacy of the various uses of the implied constitutional principles. However, this thesis sought to contribute to the debate about the continued utilization of the implied constitutional principles by providing a thematic

account of the functions of these principles. In structuring the analysis of the judicial practice in this way, we get a clearer idea of their intrinsic appeal and of the work that they do in fundamental rights adjudication. This form of analysis also helps us to develop our understanding of the courts' role in constitutional development and rights protection in common law jurisdictions.

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