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**JUDICIAL REVIEW OF LEGISLATION IN THE UK:
FUNDAMENTAL COMMON LAW PRINCIPLES AS
“CONSTITUTIONAL PRINCIPLES” LIMITING THE
SOVEREIGNTY OF PARLIAMENT?**

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Abstract

The aim of this paper is to explore the role of judicial review of legislation in the UK from a legal constitutionalist's point of view. After having introduced the reader to the origins of judicial review of legislation in general and the two theoretical models of constitutionalism, the UK's system of constitutionalism will be analysed in particular. In this context, the process of "juridification" and "judicialisation" will be discussed in order to show that the British doctrine of Parliamentary sovereignty - famously articulated by Dicey in 1885 - is currently under attack.

The main focus of this research paper is on the theory of common law constitutionalism (CLC theory), according to which the common law is seen as constituting a higher order of law, a moral ideal and a superior form of public reason, and therefore the ultimate controlling factor of Parliament's actions. On the basis of the academic theory, the judicial reception of this theory will be analysed with particular attention to the House of Lords' decision in Jackson in 2005.

It will be argued that the system of the common law constitutionalism in the UK is not very different from the system of legal constitutionalism: Firstly, fundamental principles embedded in the common law like the rule of law are similar to constitutional principles of codified supreme constitutions, providing for benchmarks of judicial review of legislation. Secondly, the requirement of exceptional circumstances for invalidating legislation in the CLC system corresponds to the idea of (strong) judicial self-restraint in legal constitutionalist systems.

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I Introduction

The UK courts cannot review Parliament's laws because there is nothing against which they can review them. Reviewing the exercise of parliamentary sovereignty in the UK would be as pointless an exercise ... as comparing two copies of the same edition of the morning newspaper with each other to check whether what they report on page one actually happened.¹

The UK is one of the few states in the modern world where the constitution is not codified in one single written document. For legally trained people from states that operate under a codified supreme constitution, the UK's constitutional arrangements seem to lack an object: a document called "the constitution", on the basis of which constitutional courts can review legislation of Parliament.

Furthermore, finding the doctrine of Parliamentary sovereignty to be the most basic postulate in British constitutional law, non-UK jurists immediately raise the question if judicial review of legislation – if legitimate at all - is not pointless within this constitutional framework as it seems to be impossible to allow judges to strike down legislation thereunder. However, more and more UK legal professionals invoke that judicial review of legislation including the power to strike it down must be admissible even within the British constitutional framework.

Consequently, the aim of this paper is to explore the role of judicial review of legislation in the UK from a legal constitutionalist's point of view: Having introduced the reader to the origins of judicial review of legislation in general and the two theoretical models of political and legal constitutionalism (II), I will analyse the UK's system of constitutionalism in particular (III). In this context, the process of "juridification" and "judicialisation" will be discussed in detail in order to show that the British doctrine of Parliamentary sovereignty - famously articulated by Dicey in 1885 - is currently under attack.

The main focus of this research paper is on the theory of common law constitutionalism (CLC theory), according to which the common law is seen as constituting a higher order of law, a moral ideal and a superior form of public reason, and therefore the ultimate controlling factor of Parliament's actions. On the basis of academic theory, part IV of this paper will analyse the judicial reception of this theory, paying particular attention to the House of Lords' decision in *Jackson v the Attorney General*² in 2005. In this case, some judges indicated in obiter that there might be some fundamental principles embedded in the common law that constrain the supremacy of Parliament and allow for judicial review of legislation including the power to strike it down in exceptional circumstances.

¹ Anthony Clarke and John Sorabji "The Rule of Law and Our Changing Constitution" in Mads Andenas and Duncan Fairgrieve (ed) *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, Oxford, New York, 2009) 39 at 54.

² *Jackson v Attorney-General* [2005] UKHL 56, [2006] 1 AC 262 at [102] [*Jackson*].

The final questions to be examined in part IV will be the following: Is there is a power to strike down legislation of Parliament stemming from fundamental common law principles in the uncoded British constitution that can be equated with constitutional principles embodied in codified constitutions? Is the system of the exceptional exercise of judicial review of legislation according to the CLC theory similar to the principle of judicial self-restraint in the concept of legal constitutionalism?

II Judicial Review of Legislation

A Origins of Judicial Review

1 Dr Bonham's Case (1610)

The idea of having a judicial power to review legislation within the constitutional system of a state can be traced back to 1610. In *Dr Bonham's Case*³, Lord Coke stated:⁴

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.

Whereas some argue that this dictum symbolises the foundation of judicial review of legislation,⁵ others maintain that Lord Coke did not intend to advocate a doctrine of judicial review.⁶ With reference to the historical context and Coke's other case reports it must be noted that there is a somewhat controversial meaning of the terms "control", "void", "repugnant" and "common right and reason".⁷ It has been argued that these terms were widely phrased and therefore need to be read in the context of the dictum, which hereafter "visualise[d] no statute void because of a conflict between it and common law, natural law, or higher law, but simply a refusal to follow a statute absurd on its face".⁸ Critics say furthermore, that it is unclear if Coke in his dictum referred to "Parliament" as a legislative or judicial body in this context.⁹ Together, these factors cast some doubt on whether this dictum advocates the doctrine of judicial review of legislation or whether it merely expresses a

³ *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 107a, 77 ER 638 (Comm Pleas) [*Dr. Bonham's Case*].

⁴ At 118a.

⁵ See e.g. Douglas Edlin *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (University of Michigan Press, USA, 2008) at 7; 55. Raoul Berger "Doctor Bonham's Case: Statutory Construction or Constitutional Theory?" (1969) 117 U Pa L Rev 521; Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) at 488 et seq.; 518.

⁶ See e.g. Theodore Plucknett "Bonham's Case and Judicial Review" (1926) 40 Harv L Rev 30; Samuel Thorne "Dr. Bonham's Case" (1938) 54 LQR 543.

⁷ See e.g. Thorne, above n 6, at 548 et seqq.

⁸ At 548.

⁹ Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, Oxford, New York, 1999) at 40; 45; 61 et seq.; 114 et seqq.

technique of statutory interpretation, demanding for harmonisation of statutes with the common law.

2 *Marbury v Madison* (1803)

Regardless of its interpretation, Coke's statement made in *Dr Bonham's Case* did not lead to a growth of judicial review of legislation in the UK in the following centuries, as it did not receive systematic judicial sanction.¹⁰ However, the idea of judicial review of legislation had been born and was transferred to British colonies and new states, where Coke's books were highly influential, e.g. British America^{11, 12}

In the US, the Supreme Court clearly stated in the landmark case *Marbury v Madison*¹³ in 1803 that it is for the judges to review legislation of Parliament.¹⁴ According to the US Supreme Court judges can strike down legislation in the case where it is unconstitutional. Marshall CJ held that this judicial power was inherent in the US Constitution itself, which demanded for judges to help to enforce the supreme character of the constitution.¹⁵

It must be noted that the US Supreme Court referred to the idea of judicial review of legislation in *Marbury v Madison* in the context of a system which has a written constitution, wherefore justification for judicial review could be found in the written supreme constitution itself rather than in "common right and reason":¹⁶

The particular phraseology of the constitution of the United States confirms and strengthens the principle, *supposed to be essential to all written constitutions*, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

Before this case, during legal and public campaigns in British America, *Dr Bonham's Case* was often used as a justification for nullifying primary legislation.¹⁷ In *Marbury v Madison*, however, Coke was not explicitly mentioned on the crucial point of striking down legislation. Therefore, it is difficult to determine in how far the ruling of the US Supreme Court was based on Coke's obiter: On the one hand, it can be argued that the judges made deliberate

¹⁰ By 1772, William Blackstone's clearly expressed contrary view gained widespread acceptance, meaning that common law courts had no authority to set aside legislation, see Philip Hamburger *Law and Judicial Duty* (Harvard University Press, Cambridge, Massachusetts, London, 2008) at 278.

¹¹ United States of America since Declaration of Independence in 1776.

¹² See Hamburger, above n 10, at 274 et seqq. or George Fletcher and Steve Sheppard *American Law in a Global Context: The Basics* (Oxford University Press, New York, 2005) at 133.

¹³ *William Marbury v James Madison* 5 US (1 Cranch) 137 (1803) [*Marbury v Madison*].

¹⁴ See 178 et seqq.

¹⁵ *Ibid.*

¹⁶ *Marbury v Madison*, above n 13, at 180 (emphasis added).

¹⁷ E.g. used by James Otis in his argumentation against the statutory authority of "writs of assistances" in the *Writs of Assistance Case* in 1761 as well as more generally in his argumentation against unconstitutional statutes in his pamphlet *The Rights of the British Colonies Asserted and Proved* in 1764, see Hamburger, above n 10, at 275.

references to Coke by using the terms “repugnant” and “void”.¹⁸ On the other hand, both, the aforementioned ambiguity of these terms used by Coke and a subsequent American Supreme Court case in 1883, *Hurtado v California*¹⁹, according to which Coke’s obiter in *Dr Bonham’s case* was explicitly referred to as not having affected “the omnipotence of Parliament over the common law”,²⁰ cast doubts on the question if the US Supreme Court really had Coke’s obiter in mind when reaching its conclusion in *Marbury v Madison*.²¹ Whatever view might be correct, it cannot be denied that with the reasoning in *Marbury v Madison*, the Americans established the doctrine of judicial review in their constitutional tradition – leaving it open to interpretation if there might have been a “higher” idea of “common right and reason” behind their findings or not.

3 Development of Judicial Review

As a means of both protecting individuals’ rights and policing the federal distribution of powers, the idea of judicial review has gained widespread acceptance not only in the US but also in other countries all over the world.²² Nowadays, judicial review of legislation is a feature in most democratic common law and civil law constitutional systems, varying from a weak judicial review, where legislation can only be interpreted alongside the legislative intention, to a strong judicial review in countries where Acts of Parliament can even be struck down.²³ In Europe, the creation of constitutional courts was mainly inspired by the American *Marbury v Madison* decision. Being created in the post-second World War era, most of these constitutional courts nowadays have greater powers than the American role model as they are even allowed to abstractly review legislation of Parliament.²⁴

Generally speaking, whereas the roots of judicial review of legislation might be said to lie in the common law regarding Coke’s statement in *Dr Bonham’s Case*, the American case of *Marbury v Madison* provides a good example that judicial review of legislation is easily

¹⁸ Noah Feldman "The Voidness of Repugnant Statutes: Another Look at the Meaning of Marbury" (2004) 148 Proceedings of the American Philosophical Society 27 at 29 et seqq. For the general influence of Coke’s views on American constitutional law see Edward Corwin “The ‘Higher Law’ Background of American Constitutional Law” (1929) 42 Harv L Rev 365 at 371: “From his [Coke’s] work many of them early found their way into American judicial decisions, sometimes as interpretative of the written constitution, sometimes as supplementary of it”.

¹⁹ See e.g. *Hurtado v People of California* 110 US 516 (1883) [*Hurtado v California*].

²⁰ Ibid, at 531.

²¹ So e.g. Gary McDowell "Coke, Corwin and the Constitution: The 'Higher Law Background' Reconsidered" 55 The Review of Politics 393, who argues that Coke’s reasoning was not influential for the understanding of the establishment of judicial review in America.

²² In Europe, the idea of judicial review of legislation became popular during the 20th century, with Austria as the first country to introduce that idea, see Tim Koopmans *Courts and Political Institutions: A Comparative View* (Cambridge University Press, Cambridge, 2003) at 41 et seq.

²³ Compare for a strong judicial review e.g. India (as a common law country) and Germany (as a civil law country).

²⁴ Fletcher and Sheppard, above n 12, at 146. See e.g. Basic Law 1949 (Germany), art 93 (1): “The Federal Constitutional Court shall rule: ... 2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law, or the compatibility of Land law with other federal law, on application of the Federal Government, of a Land government, or of one fourth of the Members of the Bundestag”.

justified in a system with a codified (supreme) constitution, where the constituent power has explicitly conferred this power to the judiciary.²⁵

B Legitimacy of Judicial Review

1 Legal Constitutionalism vs. Political Constitutionalism

The legitimacy of judicial review is linked to the idea of constitutionalism²⁶ and therefore varies within the two constitutional conceptions²⁷ that determine how government's power shall be constrained: legal constitutionalism and political constitutionalism.²⁸

Legal constitutionalists demand for legal limits on the government's actions and legally enshrined rights for individuals that should be enforced through the judiciary. Therefore, legal constitutionalism can be equated with constitutional or judicial supremacy.²⁹ The legitimacy of judicial review is inherent in this concept, leaving it for the courts to uphold the constitutional values enshrined in the supreme constitution.³⁰

By contrast, political constitutionalists demand for political limits on the government's actions and rights and liberties for individuals. In political constitutionalism, these rights and liberties can be legalized by statutes or in the common law "as long as they are politically changeable and controllable through ordinary, politically accountable decision-making of the legislature".³¹ Thus, the legitimacy of judicial review is not based on a supreme constitution but simply on the idea of checks and balances within the ordinary political system.³² Demanding for democratic mechanisms to have the last say, this model incorporates a huge scepticism towards judicial review.³³ With regard to judicial review of the legislative process,

²⁵ See also Alexander Hamilton "The Federalist, 78" in Lawrance Goldman (ed) *Alexander Hamilton, James Madison, and John Jay: The Federalist Papers* (Oxford University Press, Oxford and New York, 2008) 379 at 382, who argues for a three-way relationship between the people, the constitution and the legislative body, which leaves it to the court to ensure that the people's will declared in the constitution will not be undermined by the legislative body.

²⁶ See Clarke, above n 1, at 44.

²⁷ See Stephen Gardbaum "What is the New Commonwealth Model and What is New About It?" in Stephen Gardbaum (ed) *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, New York 2013) 21 at 21 et seqq.

²⁸ See generally on the importance of judicial review of legislation in constitutional democracies Martin Loughlin "Judicial Independence and Judicial Review in Constitutional Democracies: A Note on Hamilton and Tocqueville" in Christopher Forsyth, Mark Elliot, Swati Jhaveri, Michael Ramsden and Anne Scully-Hill (ed) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford New York, 2010) 9.

²⁹ Gardbaum, above n 27, at 22.

³⁰ See e.g. Basic Law 1949 (Germany), art 93 and art 100 about the jurisdiction of the Federal Constitutional Court in cases where constitutional rights might have been affected by one of the three branches of government. These constitutional rights are not changeable by normal political means, see e.g. Basic Law 1949 (Germany), art 79 about the amendment of the Basic Law.

³¹ Gardbaum, above n 27, at 23.

³² At 22.

³³ See e.g. Richard Bellamy *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, New York, 2007) at 145; 260.

courts generally have no or very limited power to review legislation of Parliament, not going further than interpreting and applying the law.³⁴

2 *Critiquing Both Models*

Both models incorporate conceptual strengths and weaknesses:

The most important strength of the model of legal constitutionalism lies in the fact that this system seems to be able to temper majority rule by rights-based judicial control³⁵ having judges that are impartial and independent from popular support, but bound by the constitutional document. The biggest conceptual advantage of political constitutionalism, however, is that it is highly democratic, leaving it to the elected MPs instead of a few judges to have the last say concerning the government of the people.

By contrast, according to critics, the main weakness of the model of legal constitutionalism is that is antidemocratic in that just a few judges have the final say concerning the validity of legislation and that the legitimacy of the judges does not directly stem from the popular will expressed through elections.³⁶ Furthermore, the boundaries between merely judicial constitutional control on the one hand and judge-made law on the other hand are floating.³⁷ Therefore, this concept is prone to result in a system where the courts become an alternate legislator while pretending that they just exercise their function as guardians of the constitution.³⁸

The model of political constitutionalism, on the other hand, entails a different problem: its biggest advantage of being flexible is simultaneously its biggest disadvantage. The omnipotence of the political majoritarian view is always at risk of encountering or even suppressing the civil liberties of the citizens.³⁹ In this system, the courts' limited role of just being able to interpret Parliament's will cannot provide for sufficient mechanisms to come to someone's defence against Parliament.⁴⁰ Therefore, the biggest conceptual weakness of the

³⁴ For a general critique of judicial review of legislation by political constitutionalists, see Paul Craig "Political Constitutionalism and Judicial Review" in Christopher Forsyth, Mark Elliot, Swati Jhaveri, Michael Ramsden and Anne Scully-Hill (ed) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford New York, 2010) 19 at 19 et seqq.

³⁵ See Craig "Political Constitutionalism and Judicial Review" in Christopher Forsyth, Mark Elliot, Swati Jhaveri, Michael Ramsden and Anne Scully-Hill (ed) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, New York, 2010) at 23.

³⁶ Jeremy Waldron "The Core of the Case Against Judicial Review" (2006) 115 Yale LJ 1346 at 1346. See also Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press, New Haven and London, 1986) at 16 et seqq., who describes this problem of the courts as a "counter-majoritarian difficulty".

³⁷ See for this problematic development of juridification (of political issues) by the (German) constitutional court Markus Ogorek "Die Lehre von der sog. Parlamentsouveränität in rechtsvergleichender Perspektive" [2006] JA 151 at 155 (translation: "The Doctrine of the So-Called Parliamentary Sovereignty From a Legal Comparative Perspective").

³⁸ See Jonathan Morgan "Law's British Empire" (2002) 22 OJLS 729 at 744 at seq.

³⁹ Ogorek, above n 37, at 155.

⁴⁰ Ibid.

model of political constitutionalism seems to be the lack of mechanisms for the individual's best.⁴¹

There might be several ways of improving these two models legitimising judicial review of legislation:

Firstly, concerning the model of political constitutionalism, it is obvious that the court's role as a "guardian of the constitution" must be implemented in a way conformable to this model, allowing for judicial review of legislation in cases where the individual's rights are at risk. A possible form would be to allow judges to invoke abstract principles of morality or natural law as political means standing above the majority will of Parliament and being justified by the constituent power itself, the people.⁴² In the absence of a supra-legislative constitution, the courts' allegiance should be to the people and their moral values.⁴³

Secondly, concerning the model of legal constitutionalism, a form of "judicial self-restraint", according to which the constitutional court itself limits its powers concerning new laws or policies and only acts in line with the principle of subsidiarity in order to uphold the authority of the legislature, namely the democratic will, might be a way to overcome the inherent conceptual problem but also to ensure that the individual's rights will not be misused by the majority will.⁴⁴

To conclude, whereas the model of political constitutionalism can hardly justify a bigger role for the judiciary than statutory interpretation without invoking "higher" law or principles of morality, the model of legal constitutionalism has no dogmatic problem with the justification of judicial review of legislation in a wide sense, including the power to strike it down. In the latter model, the danger rather lies with the power conferred to some judges misusing their power and threatening democracy.

III The UK's Model of Constitutionalism and the Power of Judicial Review of Legislation

Unlike most of the countries in the world, the UK has a constitution that is said to be uncodified.⁴⁵ Instead of being embodied in one single constitutional document, the British constitution has multiple sources, being both legal, like statutes and the common law, and non-legal in the form of constitutional conventions.⁴⁶

⁴¹ Contrast Waldron, above n 36, at 1346, who believes that judicial review can on no account provide better rights protection than via democratic legislatures.

⁴² Compare idea of CLC theory discussed under III.B.2.

⁴³ See Joel Colón-Ríos "The Counter-Majoritarian Difficulty and the Road not Taken: Democratizing Amendment Rules" (2012) 25 Can J L & Jurisprudence 53 at 73 et seqq., who further develops this idea by saying that the citizens should even be allowed to react to controversial judicial decisions.

⁴⁴ See e.g. model in Germany. On this point in detail, see analysis under IV.B.2.

⁴⁵ Sometimes also referred to as unwritten even though that term might be incorrect if one bears in mind that there exist written documents forming part of the constitution. Apart from the UK, only New Zealand and Israel have this special form of constitutional framework.

⁴⁶ Adam Tomkins *Public Law* (Oxford University Press, Oxford, New York, 2003) at 9 et seq.

Traditionally, the UK has favoured the model of political constitutionalism⁴⁷ that is linked to the doctrine of Parliamentary sovereignty. Being developed under the “Glorious Revolution” in 1688,⁴⁸ the doctrine of Parliamentary sovereignty has found its famous authoritative description by Dicey, who explained its nature as follows:⁴⁹

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined [i.e. as the “Queen in Parliament”] has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

This statement expresses Dicey’s orthodox view on this doctrine, consisting of a positive and a negative limb: positively, that Parliament – consisting of the House of Commons, the House of Lords and the Monarch - may make any law whatsoever and negatively, that no body can set aside Acts of Parliament as Parliament is seen as constituting the supreme legislative authority or power in the British constitution.⁵⁰

The positive limb allows Parliament to repeal statutes even implicitly, as Parliament cannot bind itself or its successors on this orthodox reading.⁵¹ Accordingly, entrenchment of any legislation hereafter is impossible. Even longstanding Acts of Parliament, like the Magna Carta,⁵² could be repealed anytime. The important statement of this doctrine for the purpose of this paper, however, lies in its negative limb, the allocation of competences: As no body has the right to override or set aside primary legislation, the courts have no right to exercise judicial review of legislation in a wide sense.⁵³ Besides, the positive limb of Dicey’s doctrine may be related to judicial review of legislation, since hereafter courts cannot even use a principle protected in an earlier statute to invalidate an inconsistent statute passed afterwards.

It must be noted that Dicey found a second cardinal rule at the heart of the British constitution – the rule of law.⁵⁴ Generally speaking, the rule of law, although being “notoriously vague and contested”, basically implies that not only the governed people but

⁴⁷ See John Griffith “The Political Constitution” (1979) 42 MLR 1.

⁴⁸ The “Glorious Revolution” is commonly seen as an event having shifted the substantial power from the sovereign to Parliament by sweeping aside any limitation on the power of Parliament, see e.g. Joseph, above n 5, at 498.

⁴⁹ Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (1885) (10 ed, Macmillan & Co, London, 1959) at 39 et seq.

⁵⁰ Dicey’s categories have been rephrased by Eleftheriadis in terms of “power” for the positive limb and “immunity” for the negative limb, see Pavlos Eleftheriadis “Parliamentary Sovereignty and the Constitution” (2009) 22 Can J L & Jurisprudence 267 at 268.

⁵¹ See *Ellen Street Estates v Minister of Health* [1934] 1 KB 590 (CA) at 597: “The Legislature cannot ... bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal.”

⁵² Magna Carta 1297 (UK).

⁵³ See Ian Loveland *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (6 ed, Oxford University Press, Oxford, 2012) at 23.

⁵⁴ Tomkins, above n 46, at 21.

also the government itself should be ruled by the law and subject to the law.⁵⁵ It is evident that the rule of law understood as a legal principle conflicts with the doctrine of Parliamentary supremacy.⁵⁶ Dicey dissolved this conflict by conceptualising the rule of law in a narrow sense, i.e. more in a way of a political ideal than a legal principle, therefore subordinate to the doctrine of Parliamentary supremacy, thus not advocating for legal constitutionalism.⁵⁷

Consequently, according to the orthodox view in line with Dicey, judicial review of legislation is extremely limited⁵⁸ and only exercised in terms of statutory interpretation according to the will of Parliament.⁵⁹ In the Diceyan theory, there is no place for a “higher law” above the will of Parliament such as natural law or divine law that could be invoked by the courts in order to find a statute ‘unconstitutional’.⁶⁰ As Lord Simon expressed it in *Pickin* in 1974, the UK courts have traditionally held the view that they have “no power to declare enacted law to be invalid”.⁶¹ On this reading, Parliamentary sovereignty is an absolute principle to which the rule of law is subordinate. Therefore, no body – not even the judiciary – is under any circumstances capable of setting aside an Act of Parliament.

B Developing Modern View: Limits on Parliament’s Power

By contrast, a modern view has developed whereby there are legal constraints on Parliament to be enforced by the courts. According to this view, the hierarchy between the conflicting principles of Parliamentary sovereignty and the rule of law is not as clear as traditionally accepted by Dicey and his orthodox followers. Seeing the rule of law as “the bedrock of liberal democratic constitutionalism”⁶², advocates of the modern view rather see the principle of parliamentary sovereignty as a somewhat relative principle that is challenged by legal constraints set both by Parliament itself and by fundamental values embedded in the common law (“common law constitutionalism”).⁶³

1 Parliament’s “Self-Restrictions”

The self-restrictions of Parliament itself can be classified into two groups: legal theory and legal practise.

⁵⁵ Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, New York, 2010) at 61 et seqq.

⁵⁶ See e.g. Francis Jacobs *The Sovereignty of Law: The European Way* (Cambridge University Press, Cambridge 2007) at 8, who even argues that the rule of law is incompatible with the principle of Parliamentary sovereignty. Contrast Goldsworthy, above n 55, at 57.

⁵⁷ Tomkins, above n 46, at 21.

⁵⁸ The strongest opponents of rights-based judicial review of legislation in the UK are Waldron and Bellamy, see Jeremy Waldron “The Core of the Case against Judicial Review” (2006) 115 Yale LJ 1346 and Bellamy, above n 23.

⁵⁹ See *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL), a case which established the principle of statutory interpretation by reference to Parliamentary material if legislation is ambiguous.

⁶⁰ Loveland, above n 53, at 23.

⁶¹ *British Railways Board and Others v Pickin* [1974] AC 765 (HL) at [15] [*Pickin*].

⁶² Trevor Allan *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, Oxford, 2013) at 1.

⁶³ For an overview, see Tom Mullen “Reflections on *Jackson v Attorney General*: Questioning Sovereignty” (2007) 27 LS 1 at 8 et seqq.

(a) Legal theory: The manner and form argument

With reference to legal theory, some scholars challenge the positive limb of Dicey's doctrine, arguing on the basis of Ivor Jennings that Parliament itself is in a way able to bind itself procedurally in a "self-embracing" way, by having the possibility of legislating special manner and form requirements for certain specified types of future legislations ("manner and form argument").⁶⁴ Therefore, in their view, although Parliament may not be able to place restrictions on future contents of legislation,⁶⁵ it may well introduce procedural requirements that are binding on future Parliaments like an alteration of an Act only by referendum or by a certain majority of both Houses (and royal assent). Future Parliaments would accordingly not be able to amend legislation by the ordinary procedure but only by a special procedure. Precedents can be found in cases concerning colonial legislatures only.⁶⁶ Thus, the manner and form doctrine lacks widespread acceptance: By saying that precedents have only concerned non-sovereign colonial legislatures, critics argue that these precedents could not be seen as persuasively underlining the practical implication of the manner and form theory with regard to the sovereign British Parliament.⁶⁷

Not only have some critics rejected that theory as inapplicable to the UK but also the British government.⁶⁸ But what about the Parliament Acts 1911 and 1949? It is well accepted that these Acts set certain conditions for Parliament concerning the method in which (future) legislation can be enacted without the consent of the House of Lords.⁶⁹ Establishing procedural requirements for the House of Commons to "overrule" the House of Lords, these Acts are widely accepted and have been abided by ever since their enactment, a factor which implies that these Acts may well be considered as procedural entrenchments, putting the manner and form theory into practice and challenging the orthodox position of Parliament.⁷⁰ Therefore, in a way, unofficially, the manner and form argument is applied in British constitutional law in spite of the government's official denial of the application of that theory.

⁶⁴ See e.g. John Mitchell *Constitutional Law* (2nd ed, Green, Edinburgh, 1968) at 74 et seq.; great overview over manner and form theory given by Geoffrey Marshall *Constitutional Theory* (Clarendon Press, Oxford, 1971) at ch 3.

⁶⁵ Nevertheless, some theorists even advocate for such a radical position by saying that a substantive entrenchment may be justified on the basis of unchangeable higher human values, see overview given by Loveland above n 53, at 34 et seq. This view is not very popular in the UK since it implies that a nation would be "stuck with particular values forever", see Loveland, above n 53, at 35.

⁶⁶ See e.g. *Attorney-General for New South Wales v Trethowan* [1932] AC 526 (PC) for New South Wales, *Harris v Dönges (Minister of the Interior)* [1952] 1 TLR 1245 for South Africa and *Bribery Commissioner v Ranasinghe* [1965] AC 172 (PC) for British Ceylon, cases in which legislation was declared invalid on the ground that it had not been compliant with procedural requirements set by Parliament.

⁶⁷ See e.g. Ronald Ekins "Acts of Parliament and the Parliament Acts" (2007) 123 LQR 91 at 101.

⁶⁸ See e.g. Government's White Paper for the Human Rights Act 1998 "Rights Brought Home: The Human Rights Bill" [1997] CM 3782 at [2.16].

⁶⁹ See e.g. reasoning in the *Jackson* case on these Acts, above n 2.

⁷⁰ So e.g. Han-Ru Zhou "Revisiting the 'Manner and Form' Theory of Parliamentary Sovereignty" (2013) 129 LQR 610 at 637. Note that the procedure established by these Acts does not apply to parliament as ordinarily constituted, but only to the House of Commons.

(b) Legal practice: Accession to the EU and “1998 legislation”

With reference to the UK’s legal practice over the years, its accession to the EU and the “1998 legislation” are two major events that are said to be limiting the sovereignty of Parliament.⁷¹

Firstly, it has been argued that the UK’s accession to the European Union rendered possible by the European Communities Act 1972⁷² has placed limitations to its Parliamentary sovereignty.⁷³ Section 2 (1) and (4) of this Act are of particular importance: According to section 2 (1) ECA all EU obligations arising by or under the EU treaties “are without further enactment to be given legal effect”. Section 2 (4) refers back to section 2 (1) and states that “any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section”.

This wording leaves some room to interpretation as to whether EU law is supreme or equal to domestic law as the provisions do not explicitly prohibit the UK Parliament to enact conflicting legislation. Initially, the UK courts held that EU law and UK domestic law were of equal status and that it was up to Parliament to decide to which of them courts should give effect.⁷⁴ The House of Lords finally acknowledged in its famous *Factortame (No 2)*⁷⁵ decision in 1991 that priority must be given to EU law over domestic law. The House of Lords clearly stated that the UK accepted with its membership to the European Union that the EU law is supreme over UK national law where the EU has competence.⁷⁶ The Act of Parliament in question, the Merchant Shipping Act 1988, was therefore disapplied in that case after the European Court of Justice (ECJ) had ruled that the House of Lords would have no other chance than to set aside this Act, as the UK was obliged to do so by the loyal duty of member states to the EU laid down in article 5 of the EEC Treaty^{77, 78}.

However, apart from this general consensus, there is still a huge debate if Parliament retains the power to legislate contrary to its obligations arising out of its membership in the EU.⁷⁹ In this context, it is noteworthy that in addition to its famous *Factortame* decision, the House of Lords has declared other Acts of Parliament incompatible with EU law.⁸⁰ Legislation contrary to EU law is therefore somewhat ineffective as it can be said to have no practical

⁷¹ Note that these two developments should not be seen exclusively. In fact, there is other important legislation that can be seen as challenging the Diceyan view, like the Supreme Court Act 2005 (UK).

⁷² European Communities Act 1972 (UK) [ECA].

⁷³ See e.g. William Wade “Sovereignty – Evolution or Revolution?” (1996) 112 LQR 568 at 574 et seq.

⁷⁴ See e.g. *HP Bulmer & Anor v Bollinger & Ors* [1974] Ch 401 (CA).

⁷⁵ *R v Secretary of State for Transport, ex p Factortame Ltd and Others (No 2)* [1991] 1 AC 603 (HL) [*Factortame No 2*].

⁷⁶ At 4, per Lord Bridge.

⁷⁷ Since 2009 laid down in article 4 (3) of Treaty on European Union (TEU).

⁷⁸ Case C-213/89 *The Queen v Secretary of State for Transport, ex p Factortame* [1990] ECR I-2433.

⁷⁹ Overview given by Loveland, above n 53, at 402 et seqq.

⁸⁰ See e.g. *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1 (HL).

application in the UK. Thus, Parliament's freedom to legislate whatsoever must be considered as being limited by EU law.

Another question in this context is if UK courts are able to disapply a statute aiming at withdrawing the UK from the EU. On this point, the *Thoburn* case⁸¹ is of particular importance, in which Laws LJ stated in obiter that in contrast to "ordinary" statutes the ECA has to be seen as a higher "constitutional" statute which cannot be repealed by implication.⁸² This line of argumentation in the *Thoburn* case can be seen as a form of arguing for substantial entrenchment of the legislation of the ECA and might be questioned with regard to the British constitutional system. The essence of this case for the purpose of this paper, however, is that it indicates that an express repeal of the ECA seems to be possible in order to withdraw the UK from the EU.

In my view, it is not necessary to decide if the view expressed in *Thoburn* withstands scrutiny or not. Obligations for the courts to judicially review domestic legislation with EU law – including attempts at withdrawing the UK implicitly or explicitly from the EU – simply arise out of the British accession to the EU itself and its international treaty obligations incorporated into domestic law by the ECA.⁸³ The creation of a new legal order⁸⁴ has to be accepted by all the member states of the EU – even the eurosceptics. The only possibility for the UK of enacting legislation contrary to EU law would be to formally opt out of the EU according to the procedure laid down in the Lisbon treaty.⁸⁵ Regardless of this clear legal background of international law, this point remains controversial in the UK. Thus, the academic debate continues as to whether the accession of the UK to the EU has actually limited the Diceyan idea of legislative supremacy or not.

Secondly, some proponents of the modern view argue that Parliament⁸⁶ has placed some restrictions on its own power by incorporating the European Convention on Human Rights into domestic law by the Human Rights Act 1998⁸⁷ and by passing devolution legislation in 1998 (1998 legislation):⁸⁸ First, under the HRA, legislation "must be read and given effect in a way which is compatible with the Convention rights"⁸⁹, which means that UK courts are granted the power to render declarations of incompatibility in cases where legislation is not

⁸¹ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] QB 151.

⁸² At 62 et seq.

⁸³ Note that in the jurisprudence of the ECJ the primacy of European Union law over the domestic law of member states is seen as given by the autonomous European Communities legal system itself rather than by the various national legal systems, see e.g. Case 6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 585 [*Costa v E.N.E.L.*] and Case 26-62 *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

⁸⁴ See *Costa v E.N.E.L.*, above n 83, at 593 et seq.

⁸⁵ See Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/1, art 50.

⁸⁶ Under the political agenda of New Labour and the government of Tony Blair.

⁸⁷ Arguing that it created a new legal order similar to the European Union law; see e.g. reasoning of Lord Steyn in *Jackson* case, above n 2, at [102].

⁸⁸ See e.g. Gavin Little "Scotland and Parliamentary Sovereignty" (2004) 24 LS 540; for an overview over these two developments in the UK promoting the modern view, see Ogorek, above n 37, at 151 et seqq.

⁸⁹ Human Rights Act 1998 (UK), s 3 (1).

convention-compliant.⁹⁰ Second, in 1998, under the influence of the Blair government, the Westminster Parliament granted some of its powers to three subnational authorities, namely Scotland, Wales and Northern Ireland. The three parliaments in Scotland, Wales and Northern Ireland,⁹¹ which resulted from the devolutionary process, can make or unmake laws for their territories in certain devolved areas,⁹² a factor which has been seen as limiting the sovereignty of the UK Parliament.

However, even though the UK Parliament granted some of its powers to different bodies, the aforementioned line taken by some theorists is not convincing - in contrast to the real limitation imposed by the accession to the EU mentioned before - as these grantings cannot really challenge Parliamentary sovereignty since the ultimate power in these two cases still lies with the UK Parliament: First, section 3 (2) of the Human Rights Act 1998 clearly states that the UK Parliament is not bound by the Convention.⁹³ Second, similarly, the UK Parliament cannot only continue to make laws for Scotland, Wales and Northern Ireland but it also retains the power to abolish the devolutionary parliaments any time.⁹⁴ In addition, it must be noted that the UK Parliament embodied sections in the devolutionary acts concerning the respective countries which enable the UK Supreme Court to fully judicially review legislation made by the devolutionary bodies - the power of striking down legislation included.⁹⁵

Nevertheless, some of these theoretical powers of the UK Parliament might be said to be politically unenforceable: with regard to the European Convention on Human Rights (ECHR), as the *Belmarsh* decision has shown in 2005,⁹⁶ the (external) political pressure on the UK - if found to have violated the ECHR - by the European Court of Human Rights necessarily leads to the acceptance of the UK Parliament, making it alter domestic law incompatible with Convention rights;⁹⁷ with regard to the devolutionary Parliaments, it is the

⁹⁰ See Human Rights Act 1998 (UK), s 4.

⁹¹ Namely the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly.

⁹² Establishment of parliaments via the following acts: Scotland Act 1998 (UK), Government of Wales Act 1998 (UK), and Northern Ireland Act 1998 (UK). See generally Dawn Oliver "The United Kingdom Constitution in Transition: From where to where?" in Mads Andenas and Duncan Fairgrieve (ed) *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, Oxford, New York, 2009) 147 at 160 et seq., who argues that the devolution process might have increased the wish for independence in these states. Note in this context that a referendum is intended in Scotland for its independence before the end of 2014, see The Scottish Government "Agreement between the UK government and the Scottish government on a referendum on independence for Scotland" (15 Oct 2012) <www.scotland.gov.uk>.

⁹³ Human Rights Act 1998 (UK), s 3 (2)(b): "This section does not affect the validity, continuing operation or enforcement of any incompatible primary legislation."

⁹⁴ Ogorek, above n 37, at 154.

⁹⁵ See e.g. Scotland Act 1998 (UK), s 29.

⁹⁶ See *A (FC) and Others (FC) v The Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [*Belmarsh*] in which the House of Lords held that an indefinite detention of non-national terrorist suspects under part IV of the Anti-Terrorism, Crime and Security Act 2001 (UK) was incompatible with the European Convention on Human Rights as being discriminatory and disproportionate. As a result, Parliament repealed this part of the Act in 2005, see Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, New York, 2011) at 280.

⁹⁷ See Dominic McGoldrick "The Human Rights Act 1998 in Theory and Practice" (2001) 50 ICLQ 901 at 946.

(internal) political pressure nowadays which makes an abolition of these devolutionary Parliaments highly unlikely.⁹⁸

2 *Restrictions Imposed by the Common Law: The CLC Theory*

Apart from the aforementioned self-restrictions, a theory in between political and legal constitutionalism⁹⁹ has been developed in recent years, known as “common law constitutionalism”.¹⁰⁰ Common law constitutionalists claim that there are fundamental values embedded in the common law, like the rule of law, human rights or democracy that pose restrictions on the sovereignty of Parliament.¹⁰¹ According to their theory, as “democratic decision-making cannot be legitimate if it violates certain fundamental rights”, the courts “ought to have the final authority to identify and interpret these [fundamental] rights”.¹⁰²

Scholars favouring the CLC theory¹⁰³ have developed various justifications for their view. The major arguments in favour of common law constitutionalism can be summed up as follows:¹⁰⁴

- Fundamental values evolved over time from the long-lasting common law decision-making
- Common law is a species of moral reasoning
- Common law adjudication is the exemplar of public reason

These arguments can be classified into two categories, the first one being a descriptive one from history and both the latter ones being normative arguments.

(a) The descriptive argument of history

Common law constitutionalists often refer to historical material, particularly the judgments of Sir Edward Coke in the 17th century or the development of the *ultra vires* reasoning in order to argue that fundamental values have evolved over time from the long-lasting common law decision-making, which has aimed at counteracting the (legislative) abuse of power.¹⁰⁵

⁹⁸ Concerning the Scottish Parliament see Little, above n 88, at 541.

⁹⁹ Gardbaum, above n 27, at 25 et seqq.

¹⁰⁰ Note that this theory is not limited to the UK, see e.g. David Strauss “Common Law Constitutional Interpretation” (1996) 63 U Chi L Rev 877 for the US.

¹⁰¹ See e.g. Trevor Allan *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, Oxford, 1993). Also referred to as “strong common law constitutionalism” as opposed to “weak common law constitutionalism”, according to which the common law cannot invalidate legislation but only control its interpretation, see overview given by Jeffrey Goldsworthy “Unwritten Constitutional Principles” in Grant Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, New York, 2008) 277 at 289 et seqq.

¹⁰² See Tamas Gyorfi “Between Common Law Constitutionalism and Procedural Democracy” (2013) 33 OJLS 317 at 318. Note that he himself is of the opinion that the desirability of substantial limits does not automatically allow for judicial review of legislation, see at 333.

¹⁰³ See particularly e.g. Trevor Allan “Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority” (2004) 63 CLJ 685; John Laws “Law and Democracy” [1995] PL 72 at 87; Lord Woolf of Barnes “Droit Public – English Style” [1995] PL 57 at 67 et seqq.

¹⁰⁴ Taken from Thomas Poole “Back to the Future? The Theory of Common Law Constitutionalism” (2003) 23 OJLS 435 at 439 et seqq.

¹⁰⁵ See overview given by Poole, above n 104, at 444 et seq.

Trevor Allan, one of the strongest advocates of the CLC theory, makes reference to Coke's famous obiter dictum in *Dr Bonham's Case* in 1609, which is mentioned above.¹⁰⁶ Others refer to judgments made by Coke in *Bagg's Case*¹⁰⁷ in 1615 as well as in *Rooke's Case*¹⁰⁸ in 1598, in which the courts made limiting public power a concern.

In *Rooke's Case* Lord Coke stated:¹⁰⁹

Notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law.

John Laws comes to the conclusion that this statement of Coke may well illustrate the ongoing concerns of the courts to limit public (executive) power in the name of reason and law long before *Wednesbury*¹¹⁰ and thus imply that there is a "moral basis upon which the common law ... necessarily operates".¹¹¹

In *Bagg's Case*, which dealt with the disfranchisement of the chief burgess James Bagg on grounds of showing disrespect towards the Major and Commonalty, the court issued a remedy (writ of certiorari) merely on common law grounds. In this context, Lord Coke said the following:¹¹²

This Court of King's Bench belongs ... authority, not only to correct errors in judicial proceedings, but other errors and misdemeanours extra-judicial, tending to the breach of the peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any manner of misgovernment; so that no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law.

Dawn Oliver argues that this case may serve as an early example of the application of common law values by the courts to counteract abuse of power in the way of upholding common law rights and providing remedies to avoid injustice that might lead to civil disorder.¹¹³ In her view, "the true basis of the jurisdiction in judicial review ... is the common law's ancient function in putting injustices right".¹¹⁴

Hereafter, all the advocates of the CLC theory historically demonstrate that the "17th century ancient constitutionalism" -although modified- strongly parallels the "present-day common

¹⁰⁶ Allan, above n 101, at 267 et seqq.

¹⁰⁷ *James Bagg's Case* (1615) 11 Co Rep 93b, 77 ER 1271 (KB) [*Bagg's Case*].

¹⁰⁸ *Rooke's Case* (1598) 5 Co Rep 99b, 77 ER 209 (Comm Pleas).

¹⁰⁹ At 100a.

¹¹⁰ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).

¹¹¹ John Laws "Wednesbury" in Christopher Forsyth and Ivan Hare (ed) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 185 at 190 et seq.

¹¹² *Bagg's Case*, above n 107, at 98a.

¹¹³ Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999) at 52.

¹¹⁴ At 44.

law constitutionalism”.¹¹⁵ The underlying historical reasoning seems to be that because of its uncoded character the British constitution has always been a matter of the common law.

It must be noted that the references to Coke are not persuasive enough to underline the CLC theory since - due to the controversial meaning of certain terms (as has been mentioned before) - Coke’s view on the relationship between the courts and the legislature is not clear. Nonetheless, references to passages like the dictum in *Dr Bonham’s Case* or the judgments in the other cases can very well serve as historical examples of seeing the common law as the origin of justice, having developed fundamental principles over time in order to protect the governed people against public authorities.

One of the strongest opponents to the CLC theory, Goldsworthy, argues historically against the underlying reasoning that it was in fact the doctrine of Parliamentary sovereignty that had always been seen as “above” the common law within the last centuries. Although acknowledging that especially in the 17th century there was the claim that the common law should be considered as the ultimate political source, Goldsworthy notes that it must not be overlooked that there were also other considerable claims that the ultimate political source was the King or rather the “community represented in Parliament”.¹¹⁶ These arguments put forward by Goldsworthy might be legitimate but are not convincing enough to undermine the CLC theory. They just let us come to the conclusion that the descriptive argument of historical evidence of common law constitutionalism is weak and cannot be the ultimate argument for the justification of the CLC theory as there have always been other claims in history as well.

(b) Normative arguments

Therefore, it is important to evaluate the two normative arguments brought forward by the CLC theorists:

First of all, philosophical essentialists argue in favour of common law constitutionalism, by saying that - while aiming at achieving a “good constitution” - the common law is a species of moral reasoning needed for the protection of the individual’s rights.¹¹⁷ Their premise is that “moral fittingness” is the “ultimate criterion for the legitimate exercise of political power”.¹¹⁸ Unlike ordinary political institutions like the democratic legislature, courts are seen as necessarily moral institutions, which have “no programme, no mandate, no popular vote”¹¹⁹ and are therefore translating Kant’s imperative for the individual’s best against powerful institutions into legal principle.¹²⁰

The assumption taken by essentialists that courts are necessarily moral institutions superior to Parliament is challenged by critics who claim that Parliament could equally proclaim this

¹¹⁵ Poole, above n 104, at 447.

¹¹⁶ Goldsworthy, above n 55, at 34 and 46.

¹¹⁷ See e.g. John Laws “The Constitution: Morals and Rights” [1996] PL 622 at 623.

¹¹⁸ See Poole, above n 104, at 448.

¹¹⁹ Laws, above n 111, at 200 et seq.

¹²⁰ Laws, above n 111, at 192.

moral authority itself.¹²¹ In my view, even though the assumption that courts are *necessarily* moral institutions is proven wrong by examples in (recent) history¹²², they can be said to be *more likely* moral institutions than legislative bodies since they are neither dependent on the popular vote nor on the requirement to vote in accordance with party policy and supposed to be impartial.

Secondly, the legal philosopher Trevor Allan takes up the aforementioned idea¹²³ and develops it as follows: He classifies the common law as a body of “public reason” and argues that it is the rule of law behind the court rulings that leads to litigant-driven and inherently rational adjudication.¹²⁴ This line taken by Allan resembles Ronald Dworkin’s idea of “moral readings” of written supreme constitutions.¹²⁵ Similar to Dworkin¹²⁶ Allan argues that neither the texts of (written supreme) constitutions nor ordinary primary legislative texts can be read only in their originalist meaning. On the contrary, these relevant texts must be interpreted in context: “The true meaning of any textual provision is ultimately a matter of its correct application (or disapplication) in the infinite variety of circumstances arising from time to time.”¹²⁷ Accordingly, public reason in Allan’s theory is ideally performed by “ordinary courts, deciding cases at common law”.¹²⁸ Judgments are seen as a chance of “debate over political morality that nourishes, and draws on, the common law”.¹²⁹ This idea, in turn, is similar to Rawls’ idea of the function of constitutional courts performing public reason.¹³⁰

Allan justifies restrictions imposed by the common law on the sovereignty of Parliament by saying that “the common law is prior to legislative supremacy, which it defines and regulates”.¹³¹ This latter view has been criticised as being a false premise.¹³² Whereas it is uncontested that the source of Parliament’s authority cannot be derived from any statute as there is none claiming that and as this body cannot confer its powers upon itself,¹³³ it is highly controversial if the assumption that its source must be the common law is correct. Again, it is Goldsworthy arguing against it historically and philosophically. As shown above, his historical argument that there were other claims in the past of the UK is not convincing enough to undermine Allan’s view. However, his philosophical argument is more compelling and is therefore worth evaluating in detail:

¹²¹ Goldsworthy, above n 55, at 53.

¹²² See e.g. judgments of German courts under Nazi regime.

¹²³ See Poole, above n 104, at 442 and 449.

¹²⁴ Trevor Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, New York, 2003) at 286 ff. See for this reasoning also Lon Fuller “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353, whose work formed the basis of Allan’s theory.

¹²⁵ Poole, above n 104, at 444.

¹²⁶ Compare Ronald Dworkin “The Forum of Principle” (1981) 56 NYU L Rev 469.

¹²⁷ Trevor Allan “Text, Context, and Constitution: The Common Law as Public Reason” in Douglas Edlin (ed) *Common Law Theory* (Cambridge University Press, New York, 2007) 185 at 203.

¹²⁸ Allan, above n 124, at 290.

¹²⁹ Ibid.

¹³⁰ Compare John Rawls *Political Liberalism* (Columbia University Press, New York, 1993) at 231 et seqq.

¹³¹ Allan, above n 124, at 271.

¹³² See e.g. Goldsworthy, above n 55, at 46 et seqq.

¹³³ At 46 and 51.

Goldsworthy rightly observes that before challenging the CLC theory a preliminary question must be what constitutes the common law. He identifies four different conceptions of the nature of the common law, of which the following two are the relevant ones: firstly, the legal positivist approach, according to which the common law is purely understood as judge-made law and secondly, the Dworkinian approach, whereby the common law is “a coherent body of norms, resting on fundamental principles of political morality, which the judiciary has authority to identify and expound”¹³⁴.¹³⁵

With regard to the legal positivist approach, Goldsworthy explains that the common law understood in positivist terms cannot justify the claim that the common law is above Parliament.¹³⁶ Arguing in line with the positivist Herbert Hart, Goldsworthy emphasises that the principle of Parliamentary sovereignty has not been created by the judiciary but has been accepted, as a rule of recognition, by all the three branches of government.¹³⁷ Therefore, an alteration of this principle could only take place if all the branches accepted other criteria as law, thus creating a new rule of recognition.¹³⁸ This argument comprising all three branches is convincing since in positivist terms there is no ultimate power conferred only to the judiciary. With no reference to higher law the power of the judges cannot stand above the democratic will of the governed people represented in Parliament, a principle established by the rule of recognition. However, if one bears in mind the risks the positivist theory implies, not asking for legal principles to be just or reasonable, but just accepting them as political factors, Goldsworthy’s positivist approach can hardly be accepted from a liberal democratic constitutionalist’s point of view. Liberal democracy demands for the protection of individuals’ rights, especially minorities’ rights by means of a system of checks and balances between the three branches of government. Consequently, the rule of law and other fundamental just and reasonable values must accordingly be safeguarded – even from majority’s decisions.¹³⁹

With regard to the Dworkinian approach, Goldsworthy explains that the common law conceived in Dworkinian terms is not capable of justifying common law constitutionalism by saying that it is neither consonant with “official practices and understandings”¹⁴⁰ nor consistent with “the nature of fundamental unwritten constitutional rules”.¹⁴¹ It must be noted that this argumentation comes from Goldsworthy’s positivist point of view. According to Dworkin, law must be conceived as integrity, consisting of positivist rights and duties as well as of deeper principles of “justice, fairness and procedural due process that provide the best constructive interpretation of that community’s legal practice”.¹⁴² Since according to Dworkin every legal system is based on abstract principles of political morality, this idea can

¹³⁴ At 50.

¹³⁵ At 49 et seq.

¹³⁶ At 50.

¹³⁷ At 54.

¹³⁸ At 55.

¹³⁹ See Jeffrey Jowell “Parliamentary Sovereignty under the New Constitutional Hypothesis” [2006] PL 562 at 575.

¹⁴⁰ At 52.

¹⁴¹ At 55.

¹⁴² Ronald Dworkin *Law’s Empire* (Fontana Press, London, 1986) at 225.

be considered to be underlying the UK's constitutional order.¹⁴³ Therefore, the common law conceived in Dworkinian terms as used by Allan¹⁴⁴ and others is well apt to justify the CLC theory. Even Goldsworthy concedes that the principle of Parliamentary sovereignty is – at least *inter alia* - a fundamental principle of the common law.¹⁴⁵

(c) Overall reasoning

Considering all the arguments, one can sum up that the overall reasoning of the CLC theorists allowing for judicial review of legislation while constraining the sovereignty of Parliament withstands scrutiny. The overall reasoning of this theory is well described by Thomas Poole:

Common Law, in this [i.e. the CLC theorist's] account, is necessarily moral, the exemplar of public reason, and has a continuous and evolutionary history. Legislation, by contrast, is amoral, imperfect as a mode of public reason, and both transient and potentially capricious.¹⁴⁶

C *Result: Parliamentary Sovereignty under Attack*

The aforementioned examples of the modern view show that Parliamentary sovereignty has been under attack during the previous decades. Consequently, the orthodox view of Dicey seems incompatible with certain practical developments in the UK, like the legal consequences of its accession to the EU, as well as with certain theoretical developments in the UK, like the promotion of the common law constitutionalism.¹⁴⁷

Academics – especially from legal constitutionalists' countries - refer to these developments having taken place over the last 40 years in the UK as a process of “juridification” and “judicialisation” that has challenged the traditional model of Parliamentary sovereignty.¹⁴⁸ The model of political constitutionalism in the UK has been called into question and a demand for an increased role of judicial review of legislation in the UK has been developed.¹⁴⁹

Whereas the restrictions caused by Parliament itself can only temporarily challenge but not infinitely limit the sovereignty of Parliament since the possibility of withdrawing from the limitations ultimately lies with the legislative branch,¹⁵⁰ the restrictions imposed by the common law according to the CLC theory constitute real limitations on the principle of Parliamentary sovereignty as the common law – seen as a somewhat supreme source - cannot be controlled by Parliament.

¹⁴³ Ibid.

¹⁴⁴ See e.g. Trevor Allan, above n 62, at 166 et seq.

¹⁴⁵ Goldsworthy, above n 55, at 56.

¹⁴⁶ Poole, above n 104, at 450.

¹⁴⁷ Distinction between practical and theoretical side of development taken from Gardbaum, above n 27, at 23.

¹⁴⁸ See e.g. Gernot Sydow “Der geplante Supreme Court für das Vereinigte Königreich im Spiegel der britischen Verfassungsreformen” [2004] ZaöRV 65 at 67 et seq. (translation: “The British Government's Plans for a UK Supreme Court and the British Constitutional Reforms”).

¹⁴⁹ Gardbaum, above n 27, at 23; see generally Tomkins, above n 46, at 23 et seq., who enumerates three reasons for the “collapse of the Diceyan constitutional order” since the 1970s.

¹⁵⁰ The membership in the EU might be seen differently, see above under III.B.1.b.

IV Analysis of the CLC Practice in the UK

A Juridical Reception of the CLC Theory

In the following, it will be examined how far the CLC theory has gained practical reception by the judiciary.

Before the *Jackson* case in 2005, the (former) House of Lords had only hinted at this theory from time to time by generally saying that there might be fundamental rights constraining Parliament.¹⁵¹ However, judges also held in these particular cases that these fundamental rights could be invaded by the clearest expression of legislative intention.¹⁵²

1 Jackson Case (2005): The Power of Judicial Review

The obiter dicta in *Jackson*¹⁵³ in 2005 lifted the judicial reception of the CLC theory onto another level, going beyond the previous rulings by endorsing the position that courts may have the authority to strike down legislation where found to be incompatible with fundamental common law rights.¹⁵⁴

(a) Principal facts of the case

The *Jackson* case dealt with the question whether the Hunting Act 2004, which made it an offence to hunt wild mammals with dogs¹⁵⁵, was a valid Act of Parliament.¹⁵⁶ The constitutional significance of that case was the fact that the Hunting Act was forced through without the consent of the House of Lords using the procedure under the Parliament Act 1949.¹⁵⁷

As briefly explained before, the Parliament Act 1949 stipulates that the House of Lords cannot veto but only delay legislation of the House of Commons for up to one year. According to the 1949 Act, in cases where the bill in question has been passed in the House of Commons in two successive parliamentary sessions it can become an Act of Parliament even without the consent of the House of Lords when Royal Assent is given.¹⁵⁸ The 1949 Act itself was passed using the procedure of the Parliament Act 1911 which, for the first time, had reduced the power of the House of Lords to delaying legislation by abolishing its veto right and only allowing for a maximum delay of two years in cases where the House of Commons has passed the bill in three successive sessions.¹⁵⁹

¹⁵¹ Woolf, above n 103; Laws, above n 103.

¹⁵² See e.g. *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198 (CA) [*Leech*]; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) [*Simms*]; *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26, [2001] 2 AC 532 [*Daly*].

¹⁵³ *Jackson*, above n 2.

¹⁵⁴ Mullen, above n 63, at 13.

¹⁵⁵ Hunting Act 2004 (UK), s 1.

¹⁵⁶ *Jackson*, above n 2, at [1].

¹⁵⁷ See [1].

¹⁵⁸ Parliament Act 1949 (UK), s 1.

¹⁵⁹ Parliament Act 1911 (UK), s 2.

Mr Jackson¹⁶⁰ claimed that the Parliament Act 1911¹⁶¹ could not lawfully be used to amend itself but that an amendment of this Act needed the formal consent of the House of Lords.¹⁶² Accordingly, the appellants challenged the validity of both the Parliament Act 1949 and the Hunting Act 2004.¹⁶³

After the Divisional Court and the Court of Appeal had rejected this claim,¹⁶⁴ the House of Lords decided in *Jackson* in 2005 unanimously that the enactment of the Parliament Act 1949 had been validly passed under the procedure laid down in the Parliament Act 1911 and that consequently the Hunting Act 2004 likewise was a valid Act of Parliament.¹⁶⁵

(b) Obiter dicta concerning the CLC theory

The remarkability of the *Jackson* case lies apart from the central issue of the ruling: the obiter dicta in that decision concerning the CLC theory and arguing for the power of judicial review of legislation in the UK.¹⁶⁶ Some judges in the Court of Appeal had indicated before that there might be situations in which it would be legitimate for courts to disapply Parliamentary legislation on constitutional grounds.¹⁶⁷

Lord Steyn, Lord Hope and Baroness Hale were the three judges of the House of Lords who in more or less clear terms referred to the CLC theory and generally expressed a modern view on the role of the judiciary in the UK and the sovereignty of Parliament doctrine. By making direct and indirect references to legal theory (manner and form argument) and legal practice of Parliament's self-restrictions like the aforementioned constitutional developments in the UK due to European obligations and domestic processes, they all stated that the doctrine of parliamentary sovereignty had changed since Dicey. Furthermore, they all agreed that there are limits on the sovereignty of Parliament to be found in the common law, imposed by the rule of law or respectively by various fundamental principles embedded in the common law, thus taking up the idea of the CLC theory. Consequently, they all inferred a power of the judiciary to review legislation of Parliament including the possibility of striking it down. Their views on the legitimacy and extent of judicial review of legislation, however, varied.

¹⁶⁰ A member of the Countryside Alliance, an organisation in Britain promoting "country sports activities" like hunting or shooting.

¹⁶¹ Precisely the bypassing procedure laid down in section 2 (1) of the Parliament Act 1911, see *Jackson*, above n 2, at [1 and 7].

¹⁶² See *Jackson*, above n 2, at [1 and 7].

¹⁶³ At [2].

¹⁶⁴ See *R (on the application of Jackson & Ors) v Her Majesty's Attorney General* [2005] EWHC 94 and *R (on the application of Jackson & Ors) v HM Attorney General* [2005] EWCA Civ 126, [2005] QB 579.

¹⁶⁵ See *Jackson*, above n 2. Note that with regard to the reasoning that the Parliamentary Acts 1911 and 1949 establish a form of procedural requirement for enacting legislation, most of the judges agreed (implicitly or explicitly) on the validity of the manner and form theory. On this point see Zhou, above n 70, at 622 et seqq.

¹⁶⁶ Five out of nine judges of the panel of the House of Lords considered that point more or less clearly, namely Lord Bingham, Lord Steyn, Lord Hope, Baroness Hale and Lord Carshwell.

¹⁶⁷ Drawing a distinction between "modest" and "fundamental" constitutional amendments, see *R (on the application of Jackson & Ors) v HM Attorney General*, above n 164, at [98-100].

(i) Lord Steyn

Lord Steyn made the following statement:¹⁶⁸

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 common law. The judges created this principle.

Having expressed that the supremacy of Parliament is a construct of the common law made by the judges themselves, he went on to state that the House of Lords may reconsider the position that courts have no power to strike down legislation.¹⁶⁹

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 a *constitutional fundamental* which even a sovereign Parliament acting at the behest of a complaisant House of Commons *cannot* abolish.

Lord Steyn therefore saw fundamental principles embedded in the common law as the ultimate controlling factors of the constitution, upon which judicial review of legislation including the power to strike it down might be justified. Although he did not explicitly refer to English legal theory, Lord Steyn's line of reasoning seems to refer to Allan, according to whom the common law is prior to legislative supremacy. Therefore, despite being somewhat vague, Lord Steyn's argumentation in itself seems to refer to the idea of deeper principles, described as "constitutional fundamentals" stemming from the common law, which is behind positivist laws. He emphasises that the judges' power to set aside Acts of Parliaments should only be exercised in exceptional circumstances.

(ii) Lord Hope

Lord Hope,¹⁷⁰ expressed his view as follows:¹⁷¹

Parliamentary sovereignty is no longer, if it ever was, absolute. ... Step by step, gradually but surely, the English principle of absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.

In his statement, Lord Hope affirmed the modern view expressed by Lord Steyn on the principle of Parliamentary sovereignty and the legitimacy of judicial review of legislation. His argumentation is equally based on the premise of the common law having created the principle of Parliamentary sovereignty.¹⁷² Instead of invoking fundamental constitutionals like Lord Steyn, Lord Hope argued that it was specifically "the rule of law enforced by the

¹⁶⁸ *Jackson*, above n 2, at [102].

¹⁶⁹ *Ibid* (emphases added).

¹⁷⁰ Scottish Law Lord.

¹⁷¹ At [104].

¹⁷² See [126]: "The principle of parliamentary sovereignty...has been created by the common law".

courts” which was the ultimate controlling factor on which the UK constitution was based.¹⁷³ By invoking the rule of law as *the* fundamental principle of the constitution, his Lordship implicitly abandoned the Diceyan view on this principle of being subordinate to the supremacy of Parliament. His Lordship concluded that “the courts have a part to play in defining the limits of Parliament’s legislative sovereignty”.¹⁷⁴

Lord Hope’s obiter dictum is highly valuable in that he was the only one explicitly referring to English legal theory in his argumentation. He stated that “there [was] a strong case for saying that the rule of recognition ... is itself worth calling ‘law’ and for applying it accordingly”.¹⁷⁵ It seems that he favoured the positivist approach of Hart, which is commonly used to argue for the orthodox view on Parliamentary supremacy as the most fundamental law in the British constitution.¹⁷⁶ However, in the following, he critically evaluates this positivist approach of Hart’s concept of law, by saying that “it must never be forgotten that this rule, which is underpinned by what others have referred to as political reality, depends upon the legislature maintaining the trust of the electorate”.¹⁷⁷ Thus, Lord Hope’s statement on the power of judicial review is said to implicitly favour the Dworkinian approach of “law as integrity” which has been used by scholars like Allan to argue for a modern view on the principle of sovereignty by promoting the CLC theory.¹⁷⁸ However, it is not clear if his Lordship consistently based his argumentation on the premise of the common law in Dworkinian terms or in positivist terms. The Dworkinian proponent Allan himself criticises that Lord Hope is “reluctant to pursue the logic of his insight”.¹⁷⁹

Besides, it is worth mentioning that unlike CLC theorists, Lord Hope presents Coke as a defender of the orthodox view on Parliamentary sovereignty in line with Blackstone and Dicey and not as an early supporter of the idea that the court can limit the power of Parliament. Therefore, it seems that Lord Hope does not with the historical argument concerning Coke’s influence or the ancient 17th constitutionalism but only with the normative arguments brought up by CLC theorists.

(iii) Baroness Hale

Baroness Hale stated the following:¹⁸⁰

The concept of Parliamentary sovereignty which has been fundamental to the constitution of England and Wales since the 17th century ... means that Parliament can do anything. The courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (*and might even reject*) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.

¹⁷³ At [107].

¹⁷⁴ Ibid.

¹⁷⁵ At [126].

¹⁷⁶ Mullen, above n 63, at 16 et seq.

¹⁷⁷ *Jackson*, above n 2, at [126].

¹⁷⁸ See Mullen, above n 63, at 20 et seq.

¹⁷⁹ Allan, above n 62, at 144.

¹⁸⁰ At [159] (emphasis added).

Thus, her Ladyship concurred with Lord Hope by referring to the rule of law as the ultimate controlling factor of Parliamentary Acts. Baroness Hope puts special emphasis on the protection of the individual's rights. By saying that courts might even reject attempts to subvert the rule of law, her Ladyship explained what the CLC theory's consequence would be: granting judges the power to strike down legislation when necessary. However, it seems that - unlike the other two judges- she puts her statement into perspective, by saying that generally, the constraints upon Parliament are "political and diplomatic rather than constitutional."¹⁸¹

(iv) Overall significance of the obiter dicta

To conclude, the line taken by the "modernists" Lord Steyn, Lord Hope and Baroness Hale can be said to generally pick up on the idea of the CLC theory: Whereas the normative arguments underpinned more or less clearly their line of argumentation, the descriptive historical argument was only partly invoked by Lord Steyn and Lord Hope, stating that parliamentary sovereignty was the creation of the common law but not making particular reference to the 17th century ancient constitutionalism.

In a way, the obiter dicta in the *Jackson* case by Lord Steyn, Lord Hope and Baroness Hale highlight the long-lasting conflict in the UK's constitutional law between Parliamentary sovereignty and the rule of law and conclude that the principle of Parliamentary sovereignty is relative and that the ultimate power within the constitutional system lies with the rule of law respectively fundamental principles embedded in the common law to be determined by the courts.

However, it cannot be ignored that in *Jackson* Lord Bingham and Lord Carshwell referred to the doctrine of Parliamentary sovereignty in an orthodox Diceyan view.¹⁸² Lord Carshwell clearly rejected the modern view expressed by Lord Steyn, Lord Hope and Baroness Hale, stating that he and his Lordships do not "wish to expand the role of the judiciary at the expense of any other organ of the State".¹⁸³ Lord Bingham, who referred to the principle of Parliamentary sovereignty as "the bedrock of the British constitution"¹⁸⁴, however, admitted in his judgment that judicial review with regard to the Parliament Acts was justified for the benefit of protecting the appellant's rights - by referring to the rule of law.¹⁸⁵ Therefore, even the traditionalist Lord Bingham invoked the rule of law as a justification for judicially reviewing Acts of Parliament "under the guise of statutory interpretation" since the points raised by the appellants otherwise could not have been resolved at all.¹⁸⁶

¹⁸¹ Ibid.

¹⁸² See [9] and [168].

¹⁸³ At [168]. This same somewhat reluctant view on the role of courts towards judicial review of Parliamentary Acts was also expressed by Lords Nicholls. Instead of invoking the principle of Parliamentary sovereignty he referred to the case of *Pickin*, which was a "reflection to art 9 of the Bill of Rights 1689: '...proceedings in Parliament ought not to be impeached or questioned in any court'", see [49].

¹⁸⁴ At [9].

¹⁸⁵ At [27].

¹⁸⁶ Jowell, above n 139, at 577.

To sum it up, the *Jackson* case “marks a significant staging post” in the development of the UK constitution¹⁸⁷ in that judges their official role have referred to the CLC theory as a justification for judicial review of legislation in the UK.

2 *After Jackson: Reception in Subsequent Cases?*

The CLC theory and the reasoning of *Jackson* were again referred to in *AXA v Lord Advocate*¹⁸⁸ in 2011, a case which - inter alia - dealt with the question if the judiciary had the power to repudiate an Act of the Scottish Parliament on common law grounds.

The factual background of this case was the 2007 decision of the House of Lords, *Rothwell v Chemical and Insulating Company & Ors*,¹⁸⁹ which stated that no damages in tort could be claimed for a health condition called pleural plaques which result from exposure to asbestos. Aiming at reversing that decision for Scotland, the Scottish Parliament enacted the Damages (Asbestos-related Conditions) (Scotland) Act 2009¹⁹⁰, according to which a person suffering from pleural plaques caused by an exposure to asbestos would have the right to get compensation. Against this backdrop, AXA and other insurance companies, whose business it is to indemnify employers for any of their liabilities arising out of negligent actions, challenged the validity of the Damages Act by invoking not only Convention rights¹⁹¹ but also common law rights.¹⁹² The UK Supreme Court dismissed the claim of AXA and upheld the validity of the Damages Act.

Against this factual background, the legal issue arose whether the Damages Act of the devolved Scottish Parliament could be judicially reviewed on common law grounds of unreasonableness, irrationality or arbitrariness with regard to the legislative authority conferred on the Scottish Parliament by the Scotland Act 1998.¹⁹³ In this context, the views expressed by Lord Hope and Lord Reed are of particular importance with regard to the reception of the CLC theory:

Apart from the devolutionary context, Lord Hope generally stated that the orthodox view on the supremacy of the UK Parliament was currently under attack. His Lordship referred to Lord Steyn as the strongest supporter of a modern view on the doctrine of parliamentary sovereignty, advocating for a stronger role of the judiciary.¹⁹⁴ Even though he did not explicitly subscribe himself to Lord Steyn, he implicitly favoured his view by referring to the *Jackson* case and by repeating his own former statement in *Jackson* that the “rule of law enforced by the courts is the ultimate controlling factor on which our [e.g. the British]

¹⁸⁷ Mark Elliot “Case and Comment: The Sovereignty of Parliament, the Hunting Ban, and the Parliament Acts” (2006) 65 CLJ 1 at 4.

¹⁸⁸ *AXA General Insurance v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 [*AXA v Lord Advocate*].

¹⁸⁹ *Rothwell v Chemical and Insulating Company & Ors* [2007] UKHL 39, [2008] AC 281.

¹⁹⁰ Damages (Asbestos-related Conditions) (Scotland) Act 2009.

¹⁹¹ If an Act is incompatible with the ECHR it is automatically outside the legislative competence of the devolved Parliament according to the Scotland Act 1998 (UK), s 29 (2)(d).

¹⁹² *Axa v Lord Advocate*, above n 180, at [1]-[2] and [17].

¹⁹³ See claim of appellants at [17]. The particular question which arose here was if the courts possessed the power to intervene not only on grounds specified in the section 29 (2) of the Scotland Act 1998 but also on other grounds, namely common law grounds.

¹⁹⁴ At [50].

constitution is based".¹⁹⁵ Therefore, six years after *Jackson*, Lord Hope affirmed the judicial reception of the CLC theory, according to which fundamental values like the rule of law embedded in the common law pose limitations on the doctrine of Parliamentary sovereignty.

At the same time, Lord Hope made clear that the obiter dicta expressed by Lord Steyn, Baroness Hale and himself in *Jackson* had to be interpreted in a way that the judges' power to strike down legislation was admissible in exceptional circumstances only.¹⁹⁶ Judicial review on common law grounds of unreasonableness, which were invoked by the appellants with regard to the Scottish case in question, on the other hand, could be seen as the other extreme of the exercise of judicial review of legislation.¹⁹⁷

Lord Reed referred to the CLC theory in *AXA v Lord Advocate* by saying that there are fundamental rights embedded in the common law and the rule of law, enabling judicial review of legislation.¹⁹⁸ However, it must be noted that he referred to this idea of the CLC theory with regard to the devolutionary non-sovereign Scottish Parliament only and not with regard to the sovereign Westminster Parliament.

In short, even though the aforementioned views were expressed in a devolutionary context, where judicial review of legislation is possible on statutory grounds like the Scotland Act 1998, the statements of Lord Hope and Lord Reed, who generally agreed on the possibility of having judicial review on common law grounds as well, can be seen as revitalising the CLC theory. Lord Hope's statements, in which he particularly referred to the UK Parliament, underline the on-going concern of some judges of the highest court in the UK to implement the idea of the CLC theory. It must be noted that the emphasis in *AXA v Lord Advocate* was that the CLC theory, according to which judges are justified to set aside an Act of the UK Parliament, could be applied in exceptional circumstances only.¹⁹⁹ However, as Lord Hope's view concerning the CLC theory was only expressed in obiter, it cannot be said that there is a full reception of the CLC theory in the jurisprudence. Therefore, it might be "simplistic to assume that judgments like Lord Hope's in *AXA* foreshadow an era of judicial supremacism entailing legal curtailment of legislative authority".²⁰⁰ Nonetheless, there is a tendency to a more frequent invocation of fundamental principles embedded in the common law, especially the rule of law, in terms of justifying judicial review of legislation in the UK.²⁰¹

¹⁹⁵ At [51].

¹⁹⁶ At [43].

¹⁹⁷ Ibid.

¹⁹⁸ See [149]-[153]

¹⁹⁹ See [43].

²⁰⁰ Elliot, above n 187, at 11.

²⁰¹ Note that the same applies to New Zealand, where the CLC theory has been promoted over the last decades especially by Sir Robin Cooke, see e.g. his statement in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398: "Some common law rights presumably lie so deep that even Parliament could not override them".

B CLC Practice from a Legal Constitutionalist's Point of View

1 Comparison with Constitutional Principles of Codified Supreme Constitutions

A question that arises with regard to the reception of the CLC theory is whether the UK is gradually developing “constitutional principles” similar to those of states favouring legal constitutionalism.

As mentioned before, the idea of CLC advocates the invocation of fundamental principles embedded in the common law as a form of higher law justifying judicial review of legislation including the possibility of invalidating legislation. The rule of law is one of these fundamentals, advocated for by Lord Hope several times. Other principles like human rights or the principle of democracy have been identified as fundamental principles as well in the UK.²⁰²

Consequently, it can be argued that a shift is taking place in the UK from a political constitution to a principled constitution.²⁰³ But are these principles similar to “constitutional principles” of written supreme constitutions? In order to answer this question, I will exemplarily refer to the constitutional principles laid down in the German Basic Law. The core constitutional principles can be found in art 20 of the German Basic Law, two of them being the principle of democracy and the principle of the rule of law (“Rechtsstaat”).²⁰⁴ The rule of law is the principle which is mainly referred to in CLC practice and which constitutes “the bedrock of liberal democratic constitutionalism”.²⁰⁵ Thus, the meaning of this particular principle will be examined in the context of German constitutional law in the following.

Art 20 (3) of the German Basic Law stipulates that the rule of law (“Rechtsstaat”) is one of the core constitutional principles of the German constitution. This principle means that “the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice”.²⁰⁶ Art 20 (3) reflects the idea of a supreme constitution binding all the three branches, an idea which is also explicitly expressed in art 1 (3) of the German Basic Law,²⁰⁷ which provides as follows: “The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.”

Against this background, the rule of law principle invoked in CLC practice must be evaluated: In contrast to the orthodox Diceyan view, the rule of law is referred to by CLC practitioners as a higher value, being not only above the law of the UK Parliament but also above all the three branches of government since it is a moral principle. Insofar, the rule of

²⁰² See e.g. *Leech, Simms and Daly*, above n 152; see also *Thoburn*, above n 81, at [62]. Great overview of judicial recognition of constitutional rights in the UK in Jeffrey Jowell “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] PL 671 at 674 et seqq.

²⁰³ See e.g. Oliver, above n 92, at 147 et seqq.

²⁰⁴ See Basic Law 1949 (Germany), art 20 (2) for the principle of democracy and art 20 (3) for the principle of the rule of law.

²⁰⁵ Trevor Allan, above n 62, at 1.

²⁰⁶ Basic Law 1949 (Germany), art 20 (3).

²⁰⁷ Roman Herzog, Rupert Scholz, Matthias Herdegen and Hans Klein (eds) *Maunz/Dürig: Grundgesetz-Kommentar* (online looseleaf ed, C.H.Beck, Munich 2013), art. 20 (3) at [2] (translation: *German Basic Law Commentary*).

law as higher law according to CLC theorists and practitioners can be said to reflect the idea of the rule of law established by codified supreme constitutions like the German one, which ultimately derives its legal principles from moral authorities.²⁰⁸

Similar considerations can be made in terms of other fundamental values embedded in the common law like the principle of democracy and human rights. They all can be said to have equivalents in codified supreme constitutions.²⁰⁹ As core values in liberal democratic communities,²¹⁰ these principles represent the universality of human dignity, freedom, equality and justice.²¹¹

Therefore, with regard to the reception of the CLC theory, one can argue that the UK is gradually developing “constitutional principles” stemming from the common law which are similar to those stemming from codified supreme constitutions and allowing for judicial review of legislation including the possibility of invalidating legislation.

2 *Comparison with the Principle of Judicial Self-Restraint in Legal Constitutionalism*

A second comparative question is if the CLC system is similar to legal constitutionalist systems with judicial self-restraint. According to the CLC theory, the judges’ power to strike down Acts of Parliament is allowed on the grounds of fundamental principles embedded in the common law in exceptional circumstances only. It has to be examined if the condition of “exceptional circumstances” can be equated with the principle of judicial self-restraint in legal constitutionalist systems.

The principle of judicial self-restraint is not inherent in legal constitutionalism. However, in order to respect the role of the legislature as the law- and policy-making-power, the principle of judicial self-restraint is more and more promoted in these countries, contrasting with the phenomenon of “judicial activism”. Constitutional judges in several legal constitutionalist countries have committed themselves to a form of judicial self-restraint, varying from a weak one to a strong one: whereas the US’s judicial approach can be described as a weak form of judicial restraint, the courts generally taking a very activist approach,²¹² Nordic European countries pursue this concept in a very strong form, their judges having rarely declared primary legislation invalid.²¹³ Germany’s approach can be seen as comparatively moderate: On the one hand, it has judges who are legally authorised by the constitution to strike down legislation and who therefore represent great authorities, whose judgments have “profound

²⁰⁸ See for higher (natural or divine) law with regard to the German Basic law Herzog, above n 207, preamble, at [17]-[18]. See more generally Isabelle Ley “Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich” [2009] ZaöRV 317 at 340 et seqq. (translation: “Kant versus Locke: European and International Constitutionalism in Comparison”).

²⁰⁹ See Laws, above n 103, at 81 et seqq.

²¹⁰ See *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 (HL) at 575; see also Jowell, above n 139, at 575.

²¹¹ See e.g. Basic Law 1949 (Germany), art 79 (3), the so-called eternity clause, which aims at protecting the fundamental constitutional principles of the German Basic Law laid down in articles 1 and 20.

²¹² Richard Posner “The Rise and Fall of Judicial Self-Restraint” (2012) 100 CLR 519 at 519.

See for the changing attitudes of US within the last decades Koopmans, above n 22, at 51 et seqq.

²¹³ Andreas Follesdal and Marlene Wind “Nordic Reluctance Towards Judicial Review Under Siege” (2009) 27 Nordisk Tidsskrift for Menneskerettigheter 131 at 139.

influence on legal and political developments in the country”.²¹⁴ On the other hand, the judges acknowledge at the same time that enough latitude must be left to the legislative branch for free policy-moulding.²¹⁵

The general concept of judicial self-restraint was well expounded by Justice Frankfurter in a dissenting opinion in *Trop v Dulles* in 1958, an American case that dealt with the question of whether new legislation was compatible with the US constitution.²¹⁶

This legislation is the result of an exercise by Congress of the legislative power vested in it by the Constitution, and of the exercise by the President of his constitutional power in approving a bill and thereby making it ‘a law’. To sustain it is to respect the actions of the two branches of our Government directly responsible to the will of the people and empowered under the Constitution to determine the wisdom of legislation. The awesome power of this Court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court’s constitutional function, must be exercised with the utmost restraint.

This reference shows that the general idea of judicial self-restraint is that the judges show deference to the legislative branch and make sure that their role does not go further than applying the law of the democratic legislative body instead of making laws themselves.²¹⁷ In this context, it is noteworthy that one of the early judicial (self-) restraint advocates, the American law professor James Bradley Thayer, famously stated in 1893 that a legislative statute should be struck down only if its unconstitutionality arose from a mistake of the legislature which was - “beyond a reasonable doubt”- ²¹⁸ “so clear that it [was] not open to rational question”.²¹⁹

This line taken by Thayer, which can be said to be best implemented by the Nordic European legal constitutionalist countries nowadays, is similar to the judicial reluctance expressed by the judges in *Jackson* and *Axa v Lord Advocate* with regard to the UK: the CLC theorists’ approach of requiring “exceptional circumstances” concerning the invalidation of primary legislation embodies the same idea of judicial self-restraint as the one advocated by legal constitutionalist judges in countries with a strong form of judicial self-restraint. Therefore, as a matter of practice, the CLC approach seems to be similar to a legal constitutionalist system in countries with a strong judicial self-restraint.

²¹⁴ Koopmans, above n 22, at 69.

²¹⁵ See e.g. BVerfGE 36, 1 [1973] NJW 1539, where the principle of “judicial self-restraint” was invoked by the constitutional court in an important judgment concerning the political question of treaty-making power of the Federal Republic of Germany with the German Democratic Republic in 1973. Note that the English technical term of “judicial self-restraint” was even used by the German court.

²¹⁶ *Trop v Dulles, Secretary of State* 356 US 86 (1957) at 128 [*Trop v Dulles*].

²¹⁷ See Posner, above n 212, at 520 et seq.

²¹⁸ See Posner, above n 212, at 523.

²¹⁹ James Thayer “The Origin and Scope of the American Doctrine of Constitutional Law” (1893) 7 Harv L Rev 129 at 144.

V Conclusion

In contrast to the introductory quotation, according to which there is no basis for judicially review legislation in the UK, the previous analysis has led to the conclusion that similar to constitutional courts in countries pursuing legal constitutionalism, the UK Supreme Court can legitimately review the UK Parliament's statutes including the possibility of striking them down in exceptional cases, as there are fundamental common law principles against which the courts can review the laws. I myself subscribe to the view of the English lecturer and barrister Pavlos Eleftheriadis who states: "All legally organised parliaments have limited powers. The Westminster Parliament has constitutionally limited powers, very much like its German and American counterparts."²²⁰

From a comparative point of view, the system of the common law constitutionalism in the UK is not very different from the system of legal constitutionalism: Firstly, fundamental principles embedded in the common law like the rule of law are similar to constitutional principles of codified supreme constitutions, providing for benchmarks of judicial review of legislation. Secondly, the requirement of exceptional circumstances for invalidating legislation in the CLC system corresponds to the idea of (strong) judicial self-restraint in legal constitutionalist systems.

The results found are unexpected against the background of the UK's model of political constitutionalism. Traditionally, in line with Dicey, this model did not provide for judicial review of legislation since the sovereignty of Parliament was regarded as being absolute, thus considered to be the utmost principle of the British constitution. However, this model has been modified by the CLC theory, which has challenged the orthodox view on the principle of parliamentary sovereignty and has provided for a greater role of the judiciary in terms of reviewing legislation.

The promotion of the CLC theory has to be seen in the context of self-imposed restrictions by the UK Parliament, like the enactment of the ECA 1972 or the incorporation of the ECHR into domestic law through the HRA 1998, which generally contributed to a modern view on the principle of parliamentary sovereignty, therefore demanding for judges' power to review legislation of the UK Parliament in certain areas. The original reluctance of courts to review legislation of Parliament has changed within the last decades due to these developments. The courts' power to declare legislation incompatible with EU law or the Convention or rather even invalidate legislation of devolutionary Acts of Scotland, Wales and Northern Ireland may have led to a different approach of the courts with regard to their competences. In the wake of these newly gained powers, the idea of fully reviewing primary legislation of the UK has gained wider acceptance and consequently led to the judicial reception of the CLC theory: The obiter dicta of Lord Steyn, Lord Hope and Baroness Hale in *Jackson* concerning this theory can be seen as "a significant staging post" in the development of the UK constitution²²¹ in that they officially highlight the idea of having the common law (or fundamental principles thereof) as the ultimate controlling factor and justification for judicial

²²⁰ Eleftheriadis, above n 50, at 267.

²²¹ Elliot, above n 187, at 4.

review of legislation in the UK. More recent cases like *AXA v Lord Advocate* foreshadow that the courts in exceptional circumstances may well invalidate an Act of the UK Parliament in cases where the rule of law or another fundamental common law principle are at stake.

This development may be seen as a lesson learnt from history, meaning that this idea of limiting Parliament's power is an increasing desire of the British resulting from the people's experiencing "the great tyrannies of the 20th century [that] had already demonstrated the dangers of unconfined power, regardless of whether it was sanctioned by popular consent".²²² The CLC theory, which is based on abstract principles of political morality as the ultimate controlling factor of the constitution may well fit into the UK's uncoded constitutional system and provide for safeguards against the abuse of Parliament's power. To conclude, a strong form of judicial review of legislation in the UK hereafter is not only possible but can also be legitimately exercised as the flexibility of the UK's constitution allows for judges striking down legislation when necessary.²²³

²²² Jowell, above n 139, at 578.

²²³ Compare Edmund Thomas "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) 31 VUWLR 5 at 8 for same line of argumentation concerning New Zealand. Contrast Oliver, above n 92, at 152, who thinks that the practice of judicial disapplication of Acts of the UK Parliament would not work in the British unwritten constitution and the British constitutional culture.

BIBLIOGRAPHY

PRIMARY SOURCES

A Cases

1 European Union

Case 6/64 *Flaminio Costa v E.N.E.L* [1964] ECR 585.

Case 26-62 *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1.

Case C-213/89 *The Queen v Secretary of State for Transport, ex p Factortame* [1990] ECR I-2433.

2 Germany

BVerfGE 36, 1 [1973] NJW 1539.

3 New Zealand

Taylor v New Zealand Poultry Board [1984] 1 NZLR 394 (CA).

4 South Africa

Harris v Dönges (Minister of the Interior) [1952] 1 TLR 1245.

5 United Kingdom

A (FC) and Others (FC) v The Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68.

Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223 (CA).

Attorney-General for New South Wales v Trethowan [1932] AC 526 (PC).

AXA General Insurance v Lord Advocate [2011] UKSC 46, [2012] 1 AC 868.

Bribery Commissioner v Ranasinghe [1965] AC 172 (PC).

British Railways Board and Others v Pickin [1974] AC 765 (HL).

Ellen Street Estates v Minister of Health [1934] 1 KB 590 (CA).

Jackson v Attorney-General [2005] UKHL 56, [2006] 1 AC 262.

James Bagg's Case (1615) 11 Co Rep 93b, 77 ER 1271 (KB).

HP Bulmer & Anor v Bollinger & Ors [1974] Ch 401 (CA).

Pepper (Inspector of Taxes) v Hart [1993] AC 593 (HL).

R (on the application of Jackson & Ors) v Her Majesty's Attorney General [2005] EWHC 94.

R (on the application of Jackson & Ors) v HM Attorney General [2005] EWCA Civ 126, [2005] QB 579.

R v Secretary of State for Employment, ex p Equal Opportunities Commission [1995] 1 AC 1 (HL).

R v Secretary of State for the Home Department, ex p Daly [2001] UKHL 26, [2001] 2 AC 532.

R v Secretary of State for the Home Department, ex p Leech [1994] QB 198 (CA).

R v Secretary of State for the Home Department, ex p Pierson [1998] AC 539 (HL).

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

R v Secretary of State for Transport, ex p Factortame Ltd and Others (No 2) [1991] 1 AC 603 (HL).

Rooke's Case (1598) 5 Co Rep 99b, 77 ER 209 (Comm Pleas).

Rothwell v Chemical and Insulating Company & Ors [2007] UKHL 39, [2008] AC 281.

Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), [2003] QB 151.

Thomas Bonham v College of Physicians (1610) 8 Co Rep 107a, 77 ER 638 (Comm Pleas).

5 *United States of America*

Hurtado v People of California 110 US 516 (1883).

Trop v Dulles, Secretary of State 356 US 86 (1957).

William Marbury v James Madison 5 US (1 Cranch) 137 (1803).

B Legislation

1 Germany

Basic Law 1949.

2 UK

Damages (Asbestos-related Conditions) (Scotland) Act 2009.

European Communities Act 1972.

Government of Wales Act 1998.

Human Rights Act 1998.

Hunting Act 2004.

Magna Carta 1297.

Northern Ireland Act 1998 .

Parliament Act 1911.

Parliament Act 1949.

Scotland Act 1998.

C Treaties

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C 306/1.

SECONDARY SOURCES

A Texts

Trevor Allan *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, Oxford, 1993).

Trevor Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, New York, 2003).

Trevor Allan *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, Oxford, 2013).

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

Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press, New Haven and London, 1986).

Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (1885) (10 ed, Macmillan & Co, London, 1959).

Ronald Dworkin *Law's Empire* (Fontana Press, London, 1986).

Douglas Edlin *Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review* (University of Michigan Press, USA, 2008).

George Fletcher and Steve Sheppard *American Law in a Global Context: The Basics* (Oxford University Press, New York, 2005).

Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, Cambridge, New York, 2010).

Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, Oxford, New York, 1999).

Francis Jacobs *The Sovereignty of Law: The European Way* (Cambridge University Press, Cambridge 2007).

Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007).

Philip Hamburger *Law and Judicial Duty* (Harvard University Press, Cambridge, Massachusetts, London, 2008).

Roman Herzog, Rupert Scholz, Matthias Herdegen and Hans Klein (eds) *Maunz/Dürig: Grundgesetz-Kommentar* (online looseleaf ed, C.H.Beck, Munich 2013).

Tim Koopmans *Courts and Political Institutions: A Comparative View* (Cambridge University Press, Cambridge, 2003).

Ian Loveland *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (6 ed, Oxford University Press, Oxford, 2012).

Geoffrey Marshall *Constitutional Theory* (Clarendon Press, Oxford, 1971).

John Mitchell *Constitutional Law* (2nd ed, Green, Edinburgh, 1968).

Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999).

John Rawls *Political Liberalism* (Columbia University Press, New York, 1993).

Kent Roach *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, New York, 2011).

Adam Tomkins *Public Law* (Oxford University Press, Oxford, New York, 2003).

B *Essays in Books*

Trevor Allan “Text, Context, and Constitution: The Common Law as Public Reason” in Douglas Edlin (ed) *Common Law Theory* (Cambridge University Press, New York, 2007) 185.

Anthony Clarke and John Sorabji “The Rule of Law and Our Changing Constitution” in Mads Andenas and Duncan Fairgrieve (ed) *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, Oxford, New York, 2009) 39.

Paul Craig “Political Constitutionalism and Judicial Review” in Christopher Forsyth, Mark Elliot, Swati Jhaveri, Michael Ramsden and Anne Scully-Hill (ed) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford New York, 2010) 19.

Stephen Gardbaum “What is the New Commonwealth Model and What is New About It?” in Stephen Gardbaum (ed) *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, Cambridge, New York 2013) 21.

Jeffrey Goldsworthy “Unwritten Constitutional Principles” in Grant Huscroft (ed) *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, New York, 2008) 277.

Alexander Hamilton “The Federalist, 78” in Lawrance Goldman (ed) *Alexander Hamilton, James Madison, and John Jay: The Federalist Papers* (Oxford University Press, Oxford, New York, 2008) 379.

John Laws “Wednesbury” in Christopher Forsyth and Ivan Hare (ed) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, Oxford, 1998) 185.

Martin Loughlin “Judicial Independence and Judicial Review in Constitutional Democracies: A Note on Hamilton and Tocqueville” in Christopher Forsyth, Mark Elliot, Swati Jhaveri, Michael Ramsden and Anne Scully-Hill (ed) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, Oxford, New York, 2010) 9.

Dawn Oliver “The United Kingdom Constitution in Transition: From where to where?” in Mads Andenas and Duncan Fairgrieve (ed) *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, Oxford, New York, 2009) 147.

C Journal Articles

Trevor Allan “Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority” (2004) 63 CLJ 685.

Raoul Berger “Doctor Bonham’s Case: Statutory Construction or Constitutional Theory?” (1969) 117 U Pa L Rev 521.

Joel Colón-Ríos “The Counter-Majoritarian Difficulty and the Road not Taken: Democratizing Amendment Rules” (2012) 25 Can J L & Jurisprudence 53.

Edward Corwin “The ‘Higher Law’ Background of American Constitutional Law” (1929) 42 Harv L Rev 365.

Ronald Dworkin “The Forum of Principle” (1981) 56 N Y U L Rev 469.

Ronald Ekins “Acts of Parliament and the Parliament Acts” (2007) 123 LQR 91.

Pavlos Eleftheriadis “Parliamentary Sovereignty and the Constitution” (2009) 22 Can J L & Jurisprudence 267.

Mark Elliot “Case and Comment: The Sovereignty of Parliament, the Hunting Ban, and the Parliament Acts” (2006) 65 CLJ 1.

Noah Feldman “The Voidness of Repugnant Statutes: Another Look at the Meaning of Marbury” (2004) 148 Proceedings of the American Philosophical Society 27.

Andreas Follesdal and Marlene Wind “Nordic Reluctance Towards Judicial Review Under Siege” (2009) 27 Nordisk Tidsskrift for Menneskerettigheter 131.

Lon Fuller “The Forms and Limits of Adjudication” (1978) 92 Harv L Rev 353.

John Griffith “The Political Constitution” (1979) 42 MLR 1.

Tamas Gyorfi “Between Common Law Constitutionalism and Procedural Democracy” (2013) 33 OJLS 317.

Jeffrey Jowell “Beyond the Rule of Law: Towards Constitutional Judicial Review” [2000] PL 671.

Jeffrey Jowell “Parliamentary Sovereignty under the New Constitutional Hypothesis” [2006] PL 562 at 576.

John Laws “Law and Democracy” [1995] PL 72.

John Laws “The Constitution: Morals and Rights” [1996] PL 622.

Isabelle Ley “Kant *versus* Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich” [2009] ZaöRV 317.

Gavin Little “Scotland and Parliamentary Sovereignty” (2004) 24 LS 540.

Gary McDowell (1993) "Coke, Corwin and the Constitution: The 'Higher Law Background' Reconsidered" 55 The Review of Politics 393.

Dominic McGoldrick “The Human Rights Act 1998 in Theory and Practice” (2001) 50 ICLQ 901.

Jonathan Morgan “Law’s British Empire“ (2002) 22 OJLS 729.

Tom Mullen “Reflections on Jackson v Attorney General: Questioning Sovereignty“ (2007) 27 LS 1.

Markus Ogorek “Die Lehre von der sog Parlamentssouveränität in rechtsvergleichender Perspektive” [2006] JA 151.

Thomas Poole “Back to the Future? The Theory of Common Law Constitutionalism“ (2003) 23 OJLS 435.

Richard Posner “The Rise and Fall of Judicial Self-Restraint” (2012) 100 CLR519.

Theodore Plucknett “Bonham’s Case and Judicial Review” (1926) 40 Harv L Rev 30.

David Strauss “Common Law Constitutional Interpretation“ (1996) 63 U Chi L Rev 877.

Gernot Sydow “Der geplante Supreme Court für das Vereinigte Königreich im Spiegel der britischen Verfassungsreformen” [2004] ZaöRV 65.

James Thayer “The Origin and Scope of the American Doctrine of Constitutional Law” (1893) 7 Harv L Rev 129.

Edmund Thomas “The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium” (2000) 31 VUWLR 5.

Samuel Thorne “Dr. Bonham’s Case” (1938) 54 LQR 543.

William Wade “Sovereignty – Evolution or Revolution?” (1996) 112 LQR 568.

Jeremy Waldron “The Core of the Case against Judicial Review“ (2006) 115 Yale LJ 1346.

Lord Woolf of Barnes “Droit Public – English Style” [1995] PL 57.

Han-Ru Zhou “Revisiting the ‘Manner and Form’ Theory of Parliamentary Sovereignty” (2013) 129 LQR 610.