

# Constitutional Principle and the Rule of Law<sup>1</sup>

## Lord Rodger Memorial Lecture

29 October 2020

### Preface

I had the privilege and pleasure of meeting Alan Rodger on many occasions throughout our legal careers. He was Clerk of Faculty when I passed advocate in 1977. As Clerk he was always willing to provide guidance to the new members of the bar. Our careers were to cross on several occasions after this. He was the Home Depute when I became an Advocate depute in 1986. Once more, when we were working at the old Royal High School in Regent Road, he was frequently on hand to assist the ADs when knotty problems arose in marking cases for prosecution; as they often did. I was always struck by the integrity of his decision making. Alan soon went on to become Solicitor General and then Lord Advocate before joining the Court of Session bench in 1995. We were to meet up on different sides of the bar in one of Alan's only proofs, or maybe his only proof<sup>2</sup> in the Outer House. This was a defective equipment case which the pursuer couldn't lose, but contrived to do so. The matter was remedied in the Inner House. When I appeared as counsel before Alan after he became Lord President, I confess to being somewhat unsuccessful. Of three reported cases I lost two of them<sup>3</sup> and the one which I did win<sup>4</sup> was reversed in the House of Lords.

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<sup>1</sup> I am grateful to my law clerk, Neil Deacon, for preparing the first draft of this address.

<sup>2</sup> *Edwards v Butlins* 1998 SLT 500 (Inner House), in which I was not involved, and 1996 SLT 1354 (incidental procedure).

<sup>3</sup> *Maclean v Caledonian MacBrayne* 2000 SC 74 and *Macari v Celtic* 1999 SC 628.

<sup>4</sup> *Cantwell v Criminal Injuries Compensation Board* 2000 SC 407.

By that time, Alan had supported my own elevation to the bench in 2000. We sat together, with Alan in the chair as Lord Justice General, in one of the earliest referrals by the nascent Scottish Criminal Cases Review Commission, reviewing the jury directions of Lord Justice Clerk Thomson in 1948<sup>5</sup>. One of Alan's skills was his understanding of criminal law. His analysis of the modern law of corroboration<sup>6</sup> in particular has stood the test of time. Alan was to depart for London to make his mark in the House of Lords and then the United Kingdom Supreme Court. We were still to meet up at the many legal functions which we used to attend but are so sadly missed in these COVID ridden times. It was always a pleasure to be in his company with his dry wit and sociability to the fore. He is sadly missed.

It is therefore a great honour to have been invited to deliver this year's Lord Rodger Memorial Lecture; one of the truly prestigious occasions in the legal calendar. Sometimes, it may be tempting to use this occasion to put forward some personal views on the way things are and the way they ought, in the mind of the speaker, to be. It would have been interesting to discuss the current pandemic, which has prompted a major re-think of the way both the criminal and civil justice systems work. This could have involved an examination of what has been achieved and what has not, what has worked and what has not and how the different component parts of the legal profession have reacted to proposed changes; some radical and others simply embracing technology in a manner which we have never done before. These are practical matters; they are my problems. It is then more interesting to talk about wider potential societal issues which may affect all of us at least in a broad

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<sup>5</sup> *Boncza-Tomaszewski v HM Advocate* 2000 JC 586.

<sup>6</sup> *Fox v HM Advocate* 1998 JC 94.

sense. This is why the chosen subject is the particularly topical one of constitutional principle and the rule of law. It is interesting not only in the United Kingdom context, where the Government has set up a panel under Lord Faulks to look at judicial review but also in the American dimension, as the Trump-Biden contest reaches its denouement next week.

## Introduction

In the preface to the first edition of *Constitutional Law*,<sup>7</sup> Professor Mitchell lamented that the circumstances then prevailing were equivalent to those which tempted the American professor, Thomas Reed Powell, to change the title of his law course from “Constitutional Law” to “Current Affairs”. Mitchell was writing in 1964, shortly after the passing of the Peerage Act 1963, when the reform of local government in Scotland was in prospect, *Burmah Oil*<sup>8</sup> had caused a bit of a stir on the subject of the royal prerogative and the conventions applicable to the selection of the Prime Minister were under review. It was difficult to produce a coherent textbook when new contemporaneous events and changing judicial dicta necessitated constant revision of thought. It is not surprising that, even in a field of law which ought to be, like the constitution itself, relatively stable, a second edition appeared within 5 years.

The same problem of rapidly changing events afflicts today’s legal commentators on the UK constitution. The problem in Mitchell’s time was not so much the American one, in which the US Constitution and Supreme Court tend to play key supporting roles in the high

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<sup>7</sup> JDB Mitchell, *Constitutional Law* (1<sup>st</sup> ed; 1964).

<sup>8</sup> 1964 SC (HL) 117.

drama of political discourse. Powell's period was the early-to-mid 20<sup>th</sup> century. The most serious matters were Roosevelt's decision not to follow George Washington's precedent by seeking a third, and eventually a fourth, term as President, and his attempts<sup>9</sup> to increase the number of Justices in the US Supreme Court in order to reverse rulings against his New Deal legislation.<sup>10</sup> Once again the US Supreme Court is not just a political concern, but an election issue. The possibility of court-packing has resurfaced.<sup>11</sup> The respective merits of "originalism" and "the living Constitution" have come to the fore.

The expression of views on, and especially criticisms of, judicial activism in the United Kingdom is undoubtedly increasing. This is unusual in this jurisdiction. The law and the courts have traditionally tended to play the role of the silent extra. They were viewed as an incidental or occasional element in the political dimension. They probably interested only a few academics. The *obiter dicta*<sup>12</sup> of Lord President Cooper, that the constitutional principle of parliamentary sovereignty is not part of Scots law, looms larger in public consciousness today than it did in the 1950s. The same could be said for the debate over whether parliamentary sovereignty or the rule of law better reflects the principle of democracy<sup>13</sup>. The development of the law and the courts, as a more prominent part of public debate, may represent something of an Americanisation of the British constitutional scene. There are many reasons for this, but they do not all make sense.

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<sup>9</sup> Cf Judicial Procedures Reform Bill of 1937.

<sup>10</sup> Eg. [Louisville Joint Stock Land Bank v Radford 295 US 555 \(1935\)](#).

<sup>11</sup> ['Joe Biden walks tightrope on 'packing' of US Supreme Court'](#), *Financial Times*, 14 October 2020.

<sup>12</sup> *MacCormick v Lord Advocate* 1953 SC 396, at 411.

<sup>13</sup> *Moohan v Lord Advocate* 2015 SC (UKSC) 1, Lord Hodge at para 35.

Superficially, concern about the extent and desirability of judicial activism on each side of the Atlantic may be seen to parallel each other. In reality, there are important structural differences which must be recognised before any sensible discussion about the extent of the judiciary's constitutional role in this country may take place, and in particular before taking a view on the institutional legitimacy of certain judicial decisions. Contrasting the American system exposes some of the myths about our own system. This is not simply to distinguish codified and uncodified constitutional systems, although this is a primary underlying factor.

The US Supreme Court is mandated to decide two kinds of case. First, there are cases about the substantive rights contained in the Constitution. The appropriate shorthand is "merits review". These cases involve the Court treading on areas which judges in this jurisdiction would view primarily as matters for political resolution. They involve the reconciliation of, or an election between, divergent moral or economic interests, and the assessment of the public good. For example, although some debt relief aspects of FDR's New Deal were ruled unlawful on the basis that it was unconstitutional for private property to be taken without justification,<sup>14</sup> matters of macro-economic social policy are regarded by our courts as something for parliamentary determination, even where EU or Convention non-discrimination provisions are engaged.<sup>15</sup> The second kind of case is where the US Supreme Court exercises its function as the final arbiter in the balance of power between the

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<sup>14</sup> [Louisville Joint Stock Land Bank v Radford 295 US 555 \(1935\)](#), p 602.

<sup>15</sup> *Nyamayaro v Advocate General* 2019 SC 537, para [81], citing *R (JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, para 93; *Delve v Secretary of State for Work and Pensions* [2020] 1 CMLR 35, para 74 (upheld: [\[2020\] EWCA Civ 1199](#), paras 42 and 93).

three branches of the state; what decisions are for the legislature, what are for the executive and what for the courts.

The legitimacy of the US Supreme Court's decision-making in both areas derives from the Constitution; both are essentially about the interpretation of that document, and sometimes about the legitimacy of taking into account circumstances which have arisen since it was drafted. In the UK, constitutional principle means that the courts require to approach these two types of decision, merits review on the one hand and questions about the allocation and extent of constitutional power on the other, radically differently.

### **Constitutional Basis of Merits Review**

In this jurisdiction, most of the merits review cases are not regarded as matters for determination by the courts. The exceptions are those which involve an infringement of the minimum basic legal rights which are regarded, at least by the courts, as essential to the rule of law. They include protection from violence and arbitrary interferences with life, liberty and property. They are said by some to be so widely accepted as to be beyond political debate;<sup>16</sup> such that they are safeguarded as much by public opinion as the law. They are reminiscent of theories of natural law. Even these rights may not prevail in every situation in which they are engaged<sup>17</sup>.

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<sup>16</sup> Sumption, *The Reith Lectures 2019: Law and the Decline of Politics III – Human Rights and Wrongs*, BBC Radio 4.

<sup>17</sup> *Elgizouli v Secretary of State for the Home Department* [2020] 2 WLR 857

Beyond these core human rights and the protections offered by the common law, courts in this jurisdiction will not generally consider it their place, without parliamentary authorisation, to determine the existence and extent of rights about which reasonable people may disagree. They will not adjudicate on the merits of public policy. The threshold for the court's intervention, under the common law governing the supervisory jurisdiction of the Court of Session, is a high one. It remains<sup>18</sup> that expressed in Lord President Emslie's *dicta* in *Wordie Property v Secretary of State for Scotland*.<sup>19</sup> The key principle, of historic origin,<sup>20</sup> is that no body, public or private, is permitted to do something which it does not have the lawful power to do. A decision will be regarded as susceptible to successful challenge if it: involves a failure to take into account a relevant consideration or the taking into account of an irrelevant one; is based upon a material error of law going to the root of the question for determination; had no proper basis in fact, where that was required; or was so unreasonable that no reasonable decision-maker could have made the decision. This test may initially give the impression that the decision-maker's task contains many pitfalls, but what the court is essentially concerned with discovering is whether the decision-maker has made a "manifest error".<sup>21</sup> That is a high bar. It means that, if some public decision-making power is exercised on the basis of an error of law, rendering it an arbitrary one, it will be amenable to reduction. That ought not to be too controversial.

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<sup>18</sup> *DO v Secretary of State for the Home Department* [2020] CSIH 35, para [20]; *Nyamayaro v Secretary of State for the Home Department* 2019 SC 537, para [81]; *Sheridan v Scottish Criminal Cases Review Commission* 2019 SLT 586, para [72].

<sup>19</sup> 1984 SLT 345, at 347-348.

<sup>20</sup> *Guthrie v Miller* (1827) 5 S 711, LJC Boyle at 713.

<sup>21</sup> *Royal Society for the Protection of Birds v Scottish Ministers* 2017 SC 552, para [203].

When the courts are asked to exercise a power of merits review below that threshold, it is vital that any discussion about institutional legitimacy recognises that the power must be based on one which has been conferred on the courts expressly by Parliament and not one arbitrarily created by them. The courts exercise these powers on the instruction of Parliament. Conceptually, the need for an error of law remains; it is just that Parliament has lowered the bar at which that may be established. The obvious examples of this are, first, the requirements of the Human Rights Act 1998 which, along with the Scotland Act of the same year, incorporated the European Convention. Secondly, and until now, there are the proportionality assessments required by the competitive freedoms of the European Union single market, which are, in the final analysis, carried out by the courts pursuant to the European Communities Act 1972. It was Parliament which required the courts to scrutinise governmental acts in light of EU law and the Convention. Parliament imported a more radical and expansive form of judicial decision-making from what were two relatively novel evolving supranational bodies of law. There was a certain inevitability that this would give rise to questions of legitimacy.

From the conceptual perspective, the cumulative body of EU law and the Articles of the Convention are relatively young codes of law. In order to be effective in a modern and changing world, they require to mature rapidly, while having regard to the varied provisions of many individual legal systems. From the substantive perspective, this jurisprudence, or rather the international treaties on which they are based, can place into the judicial realm matters which traditionally, and legitimately, would otherwise be regarded as being for political resolution. An early, and at the time controversial, example in the

Convention context was the banning of corporal punishment in Scottish schools<sup>22</sup>. In the EU context, macro-economic policy did become, to some extent, a matter for the courts as a result of *inter alia* competition law and the regulation of state aid. Arguments, which to a degree mirror those of the competing “originalists” and “living constitutionalists” in the US Supreme Court, can be made in relation to the European Court of Human Rights’ notion of the “living instrument” theory as applied to the Convention. That does not detract from the central proposition that the obligation on the courts in this jurisdiction to recognise and enforce EU law and human rights’ jurisprudence derives from express statutory, that is UK Parliamentary, sanction.

The restricted nature of a merits review, even when EU law or Convention jurisprudence is invoked, has been made very clear in a series of cases involving different levels of decision making. At the level of the UK Parliament, the challenge<sup>23</sup>, which had failed in England, to the Government’s parsimonious reduction of the level of benefits available to single parent asylum seekers was rejected because no error of law was demonstrated. It was primarily a matter for the minister to determine the amounts which would meet “essential living needs” in terms of the relevant regulations. The sums selected could not be successfully impugned in the absence of some obvious, readily identifiable error.

Scottish Parliamentary Acts were unsuccessfully challenged in several instances. First, in relation to the prohibition of cigarette machines<sup>24</sup>, in order to reduce the supply of

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<sup>22</sup> *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293.

<sup>23</sup> *Nyamayaro v Secretary of State for the Home Department* 2019 SC 537

<sup>24</sup> *Sinclair Collis v Lord Advocate* 2013 SC 221

tobacco to children, the court determined that, in EU law terms, the question was whether the legislature had material available to it which objectively justified the measure taken in terms of the protection of health. The court would not explore the accuracy of that material when compared to other available evidence unless the legislature's decision had been "manifestly without reasonable foundation"<sup>25</sup>. Secondly, the same result followed in relation to the human rights challenge to the named person legislation<sup>26</sup>. As the court said, quoting *dicta* from the UK Supreme Court<sup>27</sup>, the courts must not be used to "substitute judicial opinions for legislative ones as to the place at which to draw the line" when imposing measures which might be seen as intruding on fundamental rights. Thirdly, a challenge again failed in the minimum alcohol pricing case<sup>28</sup>. Once more it was emphasised that, where a measure which was ostensibly designed to protect health, it was for the legislature to determine the level of protection. The measure had to be proportionate, but the court's task was to determine objectively simply whether it was reasonable to conclude, on the material available, that the means chosen were appropriate to achieve the stated objective<sup>29</sup>. The level of scrutiny was neither "high" nor "low" but it had to be marked by "a certain degree of restraint"<sup>30</sup> by the courts recognising the distinction between a political decision for Government and a question of the legality of the measure for the courts.

My own emphasis on legality has been criticised as discouraging individuals from challenging decisions on merits grounds, especially on environmental concerns in the

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<sup>25</sup> See para [64].

<sup>26</sup> *Christian Institute v Scottish Ministers* 2016 SC 47 (the challenge succeeded before the UK Supreme Court on data protection grounds (2017 SC (UKSC) 29).

<sup>27</sup> *Bank Mellat v HM Treasury* (No 2) [2014] AC 700 at para 75.

<sup>28</sup> *Scotch Whisky Association v Lord Advocate* 2017 SC 465 (affirmed 2018 SC (UKSC) 94).

<sup>29</sup> At para [168].

<sup>30</sup> *ibid* at para [188] quoting the Advocate General.

planning sphere. Outwith the area of fundamental rights or EU law, I *would* advise parties to think carefully before lodging judicial review petitions if the grounds are not capable of expression within the conventional test in *Wordie Property*<sup>31</sup>. Efforts to make the position clear were taken in relation to the challenge<sup>32</sup> to the construction of the large windfarms, which are now being constructed in the Firth of Forth and off the East coast generally, on the basis of damage to birdlife. This concerned an attempt to review the “appropriate assessment” which Governments are required to undertake in relation to projects which are likely to have a significant impact on special bird protection areas. The court held<sup>33</sup> that the EU law test of “manifest error of assessment” was not materially different from the test in *Wordie Property*<sup>34</sup>. The error had to be capable of detection by the court and not after anxious scrutiny by an expert. Where there were different expert views, the court was not permitted to substitute its own view for that of the person who was responsible for the decision in the absence of manifest error or unreasonableness.

Will matters change if and when the Scottish Parliament incorporates additional international conventions into Scots law? Late last year, the First Minister’s Advisory Group on Human Rights Leadership recommended<sup>35</sup> primary legislation which would set out a new framework for giving effect to a wide range of rights-based treaties in Scots law.<sup>36</sup> The idea involves, first, transposing the basic rights of the existing European Convention into a Scottish Act. In addition, the Act would incorporate the aspirational terms of various UN

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<sup>31</sup> (*supra*).

<sup>32</sup> *Royal Society for the Protection of Birds v Scottish Ministers* 2017 SC 552.

<sup>33</sup> at para [203].

<sup>34</sup> see also *Pentland Ferries v Scottish Ministers* [2019] CSIH 41 at para [118]

<sup>35</sup> First Minister’s Advisory Group on Human Rights Leadership, “*Recommendations for a new human rights framework to improve people’s lives*”, 10 December 2018.

<sup>36</sup> *ibid*, Annex B.

Conventions. It would bring into existence in statutory form certain economic, social and cultural rights, including the right to an adequate standard of living. This in turn would involve subsidiary rights to adequate housing, food, physical and mental health, education, social security and even a right to take part in cultural life. Another part of the Act would incorporate environmental rights; essentially a right to a healthy environment, including an ability to access information, to participate in the planning process and to access justice, as it is phrased, rather than the courts. There would be rights relating to persons with disabilities or members of specific communities or classes.

The Convention and EU law are, quite legitimately, used to challenge governmental or parliamentary measures. Introducing a grid of new statutory rights of the general type envisaged is likely to encourage persons or groups litigating about whether the Government has adequately complied with the rights which have been either created, or put on a statutory footing, in the new Act. Exactly how the courts will manage this type of litigation remains to be seen. There is certainly some guidance from the existing EU and Convention jurisprudence, but it may involve the court having to formulate new tests on when, if ever, it can declare that the Government has failed to comply with a particular right, and what the financial consequences might be. The enforceability of the rights will be the key issue.<sup>37</sup> The outcome may result in a significant divergence in the scope of judicial review in the different reserved and devolved contexts.

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<sup>37</sup> see Lord Thomas: *Thinking policy through before legislating – aspirational legislation*, Lord Renton Lecture, 21 November 2019.

## The Balance of Constitutional Power

In the second kind of case, the court is concerned with the balance of constitutional power among the three branches of the state. The court's *locus* is rooted in the constitutional principle of the rule of law. The scope of judicial review is wider if the proposition is that one branch of the state is trying to seize power in a manner which is incompatible with the constitutional roles of the other branches. The UK Supreme Court in the prorogation case said that:

“It is [the courts’] particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits.”<sup>38</sup>

When I was first studying constitutional law in 1971, I do not recall “the Rule of Law” being to the fore in the lectures or the tutorials. The sovereignty of the UK Parliament certainly was. Dicey<sup>39</sup> had to be read and understood, yet not only did he place an emphasis on the sovereignty of Parliament, he popularised, although he did not invent, the phrase “the Rule of Law”<sup>40</sup>. What he meant by it was that no-one can be punished, or have his or her rights interfered with, whether in the criminal or the civil sphere, except for a breach of the law, properly established in the ordinary legal manner before the ordinary courts. The principle encapsulates the concept of equality before the law and the need to avoid exemptions which, under other systems, are given to the favoured few.

The Rule of Law conjures up feelings about the manner in which society is regulated or regulates itself. It has been described dramatically as the difference between “autocracy

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<sup>38</sup> *Cherry and Others v Advocate General for Scotland* 2020 SC (UKSC) 1, para 39.

<sup>39</sup> *Introduction to the Study of the Constitution* (10<sup>th</sup> ed)

<sup>40</sup> *ibid*, introduction by Prof Wade at xcvi.

tempered by assassination” and “democracy tempered by culture”<sup>41</sup>. It requires a culture of respect for the idea that the final say on matters of law must be determined by an independent judiciary, regardless of the strength of feeling against it. That in turn means that there must be recognised courts, and access to them. The legitimacy of the Rule of Law depends upon public confidence in the judiciary. The judges who are appointed must have the strength to make decisions which may be made the subject of intense public, or at least press, and political scrutiny. Parties must have confidence in the judges to carry out independent assessments of their respective cases. The public must be able to respect the judges as being capable, in terms of their intellectual functioning, learning and experience, of making decisions which involve the sound, and practical, application of the law to the facts and to produce intelligible, succinct reasoning to justify them. This is all part of the operation of the Rule of Law.

The last decade has seen a more strenuous approach by the UK Supreme Court to legislation which appears to restrict access to justice (ie the courts). In England, *R (Evans) v Attorney General*,<sup>42</sup> emphasised the basic principle that any provision which permitted a Government minister to reverse a judicial decision would require to be “crystal clear” in its intention, in line with the principle of legality.<sup>43</sup> *R (Privacy International) v Investigatory Powers Tribunal*<sup>44</sup> dealt with a provision whereby determinations of the Investigatory Powers Tribunal could not be questioned in any court”.<sup>45</sup> By a narrow majority, the UK Supreme Court held that a “determination” which could not be questioned could only refer to one

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<sup>41</sup> John Stuart Mackenzie: *An Introduction to Social Philosophy* (1895).

<sup>42</sup> [2015] AC 1787.

<sup>43</sup> *R (Evans) v Attorney General* [2015] AC 1787, para 58.

<sup>44</sup> [2019] 2 WLR 1219.

<sup>45</sup> Regulation of Investigatory Powers Act 2000, s 67(8) (Exercise of the Tribunal's jurisdiction).

which was legally valid. The justices differed significantly on whether, as a matter of principle, Parliament could exclude judicial review.<sup>46</sup> These decisions are derived from *Anisminic*<sup>47</sup>, which in turn relied on the early 19<sup>th</sup> century Scottish case of *Brown v Heritors of Kilberry*<sup>48</sup>. It concerned the terms of a statute which provided that complaints about a schoolmaster were to be determined by the Presbytery, whose judgment “shall be final, without appeal to, or review by any Court, civil or ecclesiastical”. The Lord President (Hope) explained<sup>49</sup> that this merely prohibited a challenge on the merits and not the review of a decision which proceeded upon a procedural irregularity.

A related problem arose recently in connection with the enforceability of Employment Tribunal judgments<sup>50</sup>. With the increase in the levels of awards in that forum, it appeared that some employers were taking steps to thwart the effective enforcement of awards. Following the UNISON case,<sup>51</sup> which was concerned not with the formal exclusion of a judicial remedy, but the rendering of access to it so difficult that statutory rights would be nugatory,<sup>52</sup> I took the view that this was a denial of access to justice. I was, however, a dissenting voice, although it will be interesting to see if the case goes further.

These various cases may represent a progression towards an acceptance that it is the rule of law, as opposed to parliamentary sovereignty, which is the “ultimate controlling

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<sup>46</sup> see Elliott and Young, ‘*Privacy International* in the Supreme Court: jurisdiction, the rule of law and parliamentary sovereignty’, 2019 CLJ 78(3), 490 at 494-5.

<sup>47</sup> [1969] 2 AC 147, at 199-200.

<sup>48</sup> (1825) 4 Shaw 174 (affd *Campbell v Brown* (1829) 3 W & S 441).

<sup>49</sup> At 178.

<sup>50</sup> *Anwar v Secretary of State for Business etc* 2020 SC 95.

<sup>51</sup> *R (UNISON) v Lord Chancellor (Nos 1 and 2)* [2017] 3 WLR 409.

<sup>52</sup> *ibid* para 104.

factor”<sup>53</sup> in the constitution. The cases do not always flow in that direction. The acceptance,<sup>54</sup> albeit subject to an irreducible minimum of a fair trial,<sup>55</sup> of closed material procedures is an example of the UK Supreme Court accommodating a certain degree of derogation from the general concept. A less dramatic example is the flexibility shown in developing the second appeals test which restrains the right of judicial review in respect of tribunal decisions which have been refused leave to appeal.<sup>56</sup>

The broader context includes the high-profile cases associated with the timing and manner of the UK’s departure from the EU. Contrary to some popular belief, these supported the primacy of Parliament in the constitution. It was Parliament’s place which the courts protected. The courts were preserving the balance of power in the constitution.

Professor Mitchell said that:

“It is often difficult to determine what is political theory and what is constitutional law, since in many respects the legal position is undefined.”<sup>57</sup>

At the theoretical level one question is: why is it that the courts have the ultimate right to set the legal limits on the power of each branch of the state, including its own? Why should it not be the legislature or the executive? In the US, *Marbury v Madison* established that the power was indeed implied. Chief Justice Marshall relied on the very fact of the US Constitution being written down. Crucial to the thinking was the idea of an independent and impartial judiciary as being the best-placed to adjudicate on the Constitution. It was

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<sup>53</sup> *R (Jackson) v Attorney General* [2006] 1 AC 262, para 107.

<sup>54</sup> *Bank Mellat v HM Treasury (No 2)* [2014] AC 700.

<sup>55</sup> *Al Rawi v Security Service* [2012] 1 AC 531, para 30.

<sup>56</sup> *Eba v Advocate General for Scotland* [2012] 1 AC 710, para 48.

<sup>57</sup> JDB Mitchell, *Constitutional Law* (2<sup>nd</sup> ed; 1968), Introduction, p 5.

“emphatically the province and duty of the Judicial Department to say what the law is.”<sup>58</sup> Alexander Hamilton justified this power on the basis that the judiciary enjoyed the power of neither the sword nor the purse. They had no force nor will, only judgment.<sup>59</sup> As such, they were the least dangerous of the three organs of the state to be the ultimate constitutional arbiter. This observation is not peculiar to the US or even codified constitutional systems. In this jurisdiction, the courts’ power is in practical terms only to sign interlocutors and state its opinion of what the law requires. If it were left to either Parliament or government, the setting and preservation of constitutional boundaries would be reduced to a contest of force, not law. The rule of law would break down.

## **Conclusion**

Before the constitution became an everyday part of political discourse, the most interesting question to those who have studied it was what is, and what should be, the supreme constitutional principle: parliamentary sovereignty or the rule of law? Those arguing for the rule of law could be seen as deviating from principle and providing dangerous leeway for a judge’s own views to manifest themselves. Giving effect to legislative intent accorded with principle. There was less danger of judicial activism. The courts may have been moving in the rule of law direction when legislation has been regarded as undermining the effective protection of legal and constitutional rights.

Ironically, what seems to have given rise to the most fevered accusations of judicial activism are the recent cases associated with the role of Parliament in determining the

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<sup>58</sup> *Marbury v Madison* 5 US (1 Cranch) 137 (1803), at 177.

<sup>59</sup> *The Federalist* No 78, 28 May 1788.

timing and manner of the UK's departure from the EU. It is ironic because these decisions simply build upon conventional Diceyan constitutional principle by applying it to new circumstances. The constitutional law observer of 10 years ago would view the courts' approach to the various Brexit cases as essentially a traditional one, which was in keeping with the principle of parliamentary sovereignty.

It has been said that the constitution has been radically altered whereby:

"It is no longer true to say that in our constitution a matter could be unconstitutional but not illegal. Constitutionality has become justiciable and subject to the law."<sup>60</sup>

This may or may not be true, but it is certainly incomplete. Hamilton recognised that the power of judicial review which he advocated would also depend upon the executive for its efficacy. The functioning of any democratic constitutional system requires more than judicial pronouncements on constitutional matters. For a constitution to function properly, it requires a culture of respect for the idea that the final say on matters of law fall to be determined by an independent judiciary, whose ultimate judgment will be implemented, regardless of the strength of feeling against it. This necessitates conferring on the rule of law a status which is elevated above political priorities. Only in that manner can the rule of law as a constitutional principle be maintained.

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<sup>60</sup> Birkenshaw: *Brexit's Challenge to the UK's Unwritten Constitution* 2020 European Public Law 26 at 30.