Legitimacy, Rights and Judicial Review:

A Critical Analysis of the Rights-Based Theory of Public Law

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LIST OF CONTENTS

ABSTRACT

This thesis examines the conceptual underpinnings of public law. It examines in particular a theory of public law that features prominently within contemporary scholarship. In the thesis, this theory is called the rights-based theory of public law because that term best captures certain of the vital features of the approach: its moral philosophical underpinnings, the paramount status it accords fundamental values, and the concomitant notion that judicial review must be oriented towards the protection of such values.

The rights-based theory of public law is explicated in Part I. In chapters 1-3, the work of three of its leading proponents – T.R.S. Allan, Sir John Laws, and Dawn Oliver – is analysed. Chapter 4 draws together the common strands of this body of thought and articulates a model of the rights-based approach.

Part II of the thesis comprises a critical examination of the rights-based theory. Chapter 5 investigates and criticises the rights theorists' 'argument from history': that is, the claim that good precedents are to be found in British traditions of legal and constitutional thought which support the key features of the theory. The investigation concentrates on the use of early seventeenth-century legal practice and concludes that the rights-based argument is not compelling either as history, or as law. Chapter 6 examines the rights theory's claim that judge-made law comprises a superior body of 'higher-order' law. An intensive analysis of a recent case – *ex p Simms* – is used to show that judicial review necessarily falls short of this ideal. Chapter 7 concentrates on the 'value-driven' approach to decision-making in judicial review that is entailed by the rights theory. Drawing on analyses of four recent cases, it is suggested that this conception of decision-making is not viable.

Part III of the thesis (chapters 8 and 9) advances an outline of an alternative approach to public law, based on the notion of legitimacy, which aims to avoid the problems identified with the rights-based theory.

DECLARATION

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

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Grau, teurer Freund, ist alle Theorie,
und grün des Lebens goldner Baum.

(Goethe)

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Thomas Poole completed his undergraduate studies at University College London in 1997. He obtained the degree of Master of Studies in Legal Research from St John's College, Oxford in the following year. Between 1998-2000, he was a doctoral student at the University of Manchester. Poole became a lecturer in law at the University of Nottingham in September 2000. His main research interest is judicial review and constitutional theory. He teaches public law, legal theory, human rights and comparative civil liberties.

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Introduction

This thesis examines the conceptual underpinnings of public law. As such, it is a work of public law theory. Public law theory may be defined as a species of political theory: it tries to find answers to a number of related questions that touch upon the relationship between the courts and government, or, more broadly, between law and politics.[1]

For the most part, the thesis comprises an analysis and critique of a theory of public law that figures prominently within contemporary scholarship. I call this the rights-based theory of public law because the term best captures certain of the vital features of the approach: its moral philosophical underpinnings, the paramount status it accords fundamental values, and the concomitant notion that judicial review must be oriented towards enforcing such fundamental values.[2] Having explicated this theory, its shortcomings are examined. In the final Part of the thesis, an alternative theory of public law is advanced. This 'legitimacy model' of public law attempts to avoid the problems identified with the rights theory and may, when elaborated properly, represent a more rigorous and conceptually sound account of the subject.

[1] On the relationship between political theory and constitutional theory, see, e.g., N.W. Barber, 'Prelude to the Separation of Powers' (2001) 60 CLJ 59, p. 62.

This thesis intends to contribute to the contemporary debate in three main ways. First, it represents a thorough analysis of what Dyzenhaus terms 'Blackstonian liberal antipositivism'[3] and what Loughlin calls the 'liberal variant of normativism' in its contemporary form.[4] The rights theory is probably currently the dominant account of public law within academic circles. It is certainly the most frequently articulated and consistently defended theory presently available.[5] To articulate the main strands of rights-based public law thought and to clarify its intellectual underpinnings in this way is a valuable exercise.

The thesis goes beyond the level of pure analysis by developing a series of criticisms. These criticisms seek to draw out the limitations of the rights-based approach. The intellectual exchange might produce a better understanding of the subject. Cogent criticisms designed to tease out the weaknesses of the rights theory ought to produce a more acute and sophisticated debate over the theoretical and conceptual underpinnings of public law.

Third, the articulation of the skeleton of an alternative theory that avoids the flaws identified with the rights-based approach is designed to draw on these limitations to make an original contribution. It is suggested that the legitimacy theory, outlined in the final chapters of the thesis, may have greater explanatory potential than its

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[2] See ch. 4, below, p. 116-120.
[3] D. Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in M. Taggart (ed.), *The Province of Administrative Law* (1997), p. 280.
[4] M. Loughlin, *Public Law and Political Theory* (1992), pp. 84-101 & 206-229. See, further, Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (2000).
[5] See ch. 4, below.

rivals. It accords with the way in which judges seem to understand their constitutional political role. It defines a positive and appropriate role for the court whilst recognising the particular limitations of judicial decision-making in the sphere of constitutional politics. And it provides an account of public law that fits our (justifiable) assumptions about the political function of the courts.

1. The Thesis and the Debate over Ultra Vires

This substance of this thesis relates to an ongoing debate within public law circles over the continuing relevance of the ultra vires principle. A preliminary comment is required, then, in order both to situate the present discussion within the context of that wider debate and to explore the potential ramifications of the position adopted here.

The ultra vires debate, in essence, turns on the continued relevance of the ultra vires doctrine as the foundational principle of judicial review.[6] Sir John Laws and Dawn Oliver are leading ultra vires sceptics. (Oliver, indeed, was the first to raise the standard against the ultra vires principle in a groundbreaking 1987 *Public Law* article.[7]) They reject the ultra vires principle as an outmoded and unnecessary 'fig-leaf'[8] and advance instead what they call a 'common law' model of judicial review. According to the influential rights-based public lawyer, Paul Craig, this model recognises in a way that its rival supposedly does not that 'the principles of judicial

[6] On the ultra vires debate see, e.g., C.F. Forsyth (ed.), *Judicial Review and the Constitution* (2000); N.W. Barber, 'The Academic Mythologians' (2001) 21 OJLS 369; A. Halpin, 'The Theoretical Controversy Concerning Judicial Review' (2001) 63 MLR 500.
[7] D. Oliver, 'Is the Ultra Vires Doctrine the Basis of Judicial Review?' (1987) PL 543.

review are in reality developed by the courts' and that the courts 'impose the controls which constitute judicial review which they believe are normatively justified on the grounds of justice, the rule of law, etc.'[9]

The ultra vires sceptics join issue with Christopher Forsyth and Mark Elliott. Forsyth and Elliott argue that the common law theory acts as a 'trailer for a constitutional theory of judicial supremacism' in that it sets no limits on the power of the courts.[10]

> The most fundamental reason why the judiciary should cleave to the doctrine of ultra vires is that otherwise the judges have no good answer to the officious but pertinent question: who are you to interfere in the exercise of a discretion, clearly within the requirements of the statute, and entrusted to a democratically accountable decision-maker by a democratically elected parliament?[11]

Recognising some of the more telling criticisms of the traditional ultra vires model of judicial review, Forsyth and Elliott posit instead a 'modified ultra vires doctrine' according to which an assumption is made, 'backed both by judicial precedent and common sense, that when Parliament grants power to a decision-maker it intends that ... common law principles [of modern administrative law] should be applied.'[12]

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[8] Sir J. Laws, 'Law and Democracy' (1995) PL 72, p. 79.
[9] P. Craig, 'Competing Models of Judicial Review' (1999) PL 428 at 429. See also, e.g., P. Craig and N. Bamforth, 'Constitutional Analysis, Constitutional Principle and Judicial Review' (2001) PL 763; J. Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' (1999) PL 448.
[10] M. Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) CLJ 129. See also Elliott, *The Constitutional Foundations of Judicial Review* (2001).
[11] C. Forsyth, 'Heat and Light: A Plea for Reconciliation' in Forsyth, *Judicial Review and the Constitution*, note 6, above, p. 399.
[12] Forsyth, 'Heat and Light: A Plea for Reconciliation' note 11, above, p. 404.

The authors recognise, however, that it is 'undeniable that this proposition involves a degree of artificiality.'[13]

Philip Joseph has said that an 'extraordinary amount of ink has been spilled' over a debate which has become to seem 'excessively introspective and distracting'.[14] One of the benefits of the analysis developed within this thesis is that it has the potential to turn the debate over ultra vires, always rather sterile and increasingly claustrophobic of late, into something of a side-show. Trevor Allan writes that the debate has 'obscured the most important questions about the nature and legitimacy of the judges' constitutional role'.[15] There is a certainly a sense in which the ultra vires debate has served as a proxy to the more important debate over the constitutional role of the courts - and perhaps, more generally, over the political role of law[16] – in the context of a changing political landscape. We could isolate, in this regard, the reconfiguration of the public sector and the birth of new public management techniques in public administration,[17] the incorporation of the European Convention on Human Rights via the Human Rights Act 1998,[18] the internationalisation of human rights discourse,[19] and the impact of the

[13] M. Elliott, 'The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review' (1999) 115 LQR 119, p. 136.
[14] P. Joseph, 'The Demise of Ultra Vires – Judicial Review in the New Zealand Courts' (2001) PL 354, p. 356.
[15] T.R.S. Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' (2002) 61 CLJ 87, p. 123. See also M. Taggart, 'Ultra Vires as Distraction' in Forsyth, *Judicial Review and the Constitution*, note 6, above.
[16] See, e.g., M. Loughlin, *Sword and Scales* (2000).
[17] See, e.g., C. Harlow and R. Rawlings, *Law and Administration* (2nd ed., 1997), ch. 5; M.R. Freedland, 'Government by Contract and Public Law' (1994) PL 86; C. Scott, 'Accountability and the Regulatory State' (2000) 27 JLS 38.
[18] On which see ch. 9, below.
[19] C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499.

constitutionalisation of the European Union[20] as particularly relevant factors that have a bearing on our understanding of the function of public law.

While it is true to say that the theorists grouped together here as rights-based theorists tend to take one side in the ongoing debate over the ultra vires principle,[21] I maintain that the connections between them are in fact more extensive and far-reaching. The affinities between them extend beyond their understanding of the doctrinal underpinnings of judicial review. The repositioning of the common law theorists as espousing a much broader theory of constitutional justice, I suggest, has the potential to lead to a more thoroughgoing and focused debate on the role and legitimacy of judicial review in the modern state. This, in turn, may allow for a direct and serious engagement, less introverted perhaps than before, with the political changes that affect public law.

2. Preliminary Matters

Before providing a more comprehensive summary of some of the main strands of argument advanced in the thesis, there are a number of preliminary matters that need to be explained.

[20] J.H.H. Weiler, *The Constitution of Europe* (1999); N. Walker, 'Beyond the Unitary Conception of the United Kingdom Constitution?' (2000) PL 384. It is worth noting, of course, that the courts both within their public law jurisdiction and elsewhere apply principles of EU law.
[21] One possible exception is Trevor Allan, whose position is more complicated, as we have seen.

(a) Method

The thesis tests several strands of public law thought by constructing, criticising, and comparing a series of models. The method of constructing models or ideal-types[22] to represent perspectives offers a number of advantages. It is well suited to the needs of theory because it allows the theorist to generalise about and explicate complex structures or systems of ideas. Moreover, by enabling the theorist to bring the characteristic features of an approach to the fore, it facilitates the process, essential to intellectual discourse, of criticism and comparison.

While, in general, the modelling method seems apt for a work of public law theory, the strength of an application of the method in the individual case depends on the explanatory power of the particular model or models actually deployed. Apart from the development of the 'legitimacy model' in the last chapters of the work, the model of the rights-based approach to public law is the primary exercise in modelling contained within the thesis.[23] The aim in devising the rights-based model was not (and could not be) to capture every nuance and facet of every rights-based writer's thought. Rather, the model is designed to accommodate what on examination appear to be the essential aspects of an important strand of thought within contemporary public law scholarship.

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[22] On the notion of ideal-type see A. Kronman, *Max Weber* (1983), pp. 7-14 & 67. On the use of the modelling method in legal scholarship see, e.g., R. Cotterrell, *The Sociology of Law: an Introduction* (1992), Introduction & ch. 1; Cotterrell, 'Judicial Review and Legal Theory' in G. Richardson and H. Genn (eds.), *Administrative Law and Government Action* (1994); R.M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (1976), pp. 8-23; J. Bell, *Policy Arguments in Judicial Decisions*

The essential elements of the rights-based approach identified in the thesis derive from an examination of the work of three pivotal rights theorists: T.R.S. Allan,[24] Sir John Laws,[25] and Dawn Oliver.[26] The focused nature of the analytical enquiry reflects the aims of the thesis. In favouring quality over quantity, the thesis rejects a 'shopping-list' approach. An investigation into the conceptual underpinnings and argumentative structure of a school of thought requires detailed examination of the strongest writing which that school has to offer rather than a comprehensive, but shallow, summary of all writers who might be regarded as working within that school.

Without doubt, this approach has its limitations. The thesis makes connections between the arguments advanced by Allan, Laws, and Oliver, and at times the argument broadens out to include others who adopt a rights-based perspective.[27] But, however successfully this is done, the existence of a distinctive approach to public law along the lines suggested would by no means have been *proved*. Three theorists, after all, do not make a school of thought. The account of rights-based thought offered here and its significance to contemporary public law scholarship are matters not amenable to scientific proof, but should be assessed according to how proficiently significant strands within a vibrant and polyphonic debate are captured.

(1983), ch. 1; D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986), pp. 64-85.

[23] An 'ultra vires' model of public law is also deployed in chs. 8 & 9, below.

[24] See ch. 1, below.

[25] See ch. 2, below.

[26] See ch. 3, below.

(b) Scope

The arguments developed in the thesis trespass into fields alien to traditional constitutional and administrative law scholarship.[28] At various stages, the argument touches upon matters of political theory[29] and constitutional history,[30] and, to a lesser extent, historiography[31] and moral philosophy.[32] There is nothing untoward in this, since academic public law can justifiably be regarded as a species of applied political theory. But the diversity of the argument raises legitimate questions about the scope of the project. In order to answer such questions, a series of restrictions have been imposed which aim to provide suitable parameters to the enquiry.

1. The philosophical element of the discussion has been curtailed. There has been little attempt in the thesis to make a *systematic* exploration of this philosophical substructure. This is because a sophisticated discussion of the nature of rights would necessitate a separate thesis. However, I argue in this thesis that the rights theory adopts or presupposes a particular conception of rights that draws on Kantian ideas relating to the autonomy of the individual and the image of rights

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[27] See ch. 4, below, pp. 107-117.
[28] On traditional approaches to academic public law scholarship see, e.g., D.J. Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257; Galligan, *Discretionary Powers*, above, note 5, pp. 86-88; C. Harlow, 'A Special Relationship? American Influences on Judicial Review in England', in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (1995); J. Morrison and S. Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (1995), ch. 1; M. Hunt, *Using Human Rights Law in English Courts* (1998), pp. 140-143, 151-160 & 207-211.
[29] See, in particular, chs. 8 & 9, below.
[30] See ch. 5, below.
[31] See ch. 5, below.

as trumps popularised by Ronald Dworkin.[33] And, in the last Part of the thesis, I suggest that the legitimacy model I propose conceptualises rights and rights discourse in a different way.

2. The thesis contains no general analysis of the nature of rights. It was thought that a jurisprudential[34] or philosophical[35] debate about the nature of rights was not necessary to realise the objective of this thesis, which is to explicate and assess significant patterns of thought in contemporary public law. Some attempt has been made in the final Part of the thesis to accommodate rights discourse within the proposed model of public law as legitimacy. But this exercise would

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[32] See, e.g., chs. 8 & 9, below.

[33] R. Dworkin, *Taking Rights Seriously* (1977), esp. chs. 2 & 4.

[34] See, e.g., M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights: Philosophical Enquiries* (1998); M. Koskenniemi, 'The Effect of Rights on Political Culture' in P. Alston (ed.), *The EU and Human Rights* (1999); D. Kennedy, *A Critique of Adjudication: fin de siècle* (1997), chs. 12 & 13; A. Halpin, *Rights And Law Analysis And Theory* (1997); H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983), chs. 8 & 9; R. Dworkin, *Taking Rights Seriously* (1977), esp. chs. 4 & 6; J. Finnis, *Natural Law and Natural Rights* (1980); J. Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13 OJLS 13; Waldron, *Law and Disagreement* (1999), Chs. 10-13; J. Raz, 'Legal Rights' (1984) 4 OJLS 1; C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499; D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed., 2001), ch. 1; N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era* (2001), Ch. 1; R.M. Unger, *What Should Legal Analysis Become?* (1996), pp.16-33 & 63-78; P. Graham, 'The Will Theory of Rights: A Defence' (1996) 15 L & Phil 257; D. Lyons, 'Rights, Claimants, and Beneficiaries' (1969) 6 Am Phil Qu 173.

[35] See, e.g., C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000); J. Habermas, *Between Facts and Norms* (1992), ch. 3; Habermas, 'Remarks on Legitimation Through Human Rights' in Habermas, *The Postnational Constellation: Political Essays* (2001); R. Rorty, 'Human Rights, Rationality, and Sentimentality' in Rorty, *Truth and Progress: Philosophical Papers Vol. 3* (1998); H. Steiner, *An Essay on Rights* (1994); J. Raz, *The Morality of Freedom* (1986), chs. 7-10; Raz, 'Rights and Individual Well-Being' in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994); M. Loughlin, 'Rights, Democracy and Law' in T. Campbell, K. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (2001); M. Perry, *The Idea of Human Rights: Four Inquiries* (1998); M. Freeden, *Rights* (1991); A. Gewirth, *The Community of Rights* (1996); Gewirth, *Reason and Morality* (1978); D. Lyons, 'Utility and Rights' in J. Waldron (ed.), *Theories of Rights* (1984); M. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000), chs. 1 & 2; J. Waldron, 'Rights in Conflict' (1989) 99 Ethics 503; R.E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (1998), chs. 1, 4, 13 & 14. For historical antecedents to the contemporary debate, see T. Paine, *Rights Of Man* [1791] (T. Benn, ed., 1993); J. Bentham, '*Anarchical Fallacies* and *Supply without Burthen*'; [1796] E. Burke, 'Reflections on the Revolution in France' [1790] and K. Marx, 'On the Jewish Question' [1843] in J. Waldron (ed.), *Nonsense Upon Stilts* (1987).

require further elaboration in the course of developing that model in future work.

3. A decision was made not to address the (novel) implications of the rights theory for the relationship between public law and private law. This feature of the rights theory has received a degree of academic attention.[36] It has also been the subject of some of my previous work.[37] But the issue of the 'public law/private law divide'[38] is sufficiently complex and sufficiently important to be reserved for independent treatment in future work.

4. Given the nature of the enquiry, it may at first sight appear odd that the Human Rights Act[39] does not feature more prominently at an earlier stage in the inquiry.

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[36] D. Oliver, *Common Values and the Public-Private Divide* (1999); Oliver, 'Judicial Review and the Shorthandwriters' (1993) PL 214; Oliver, 'The Underlying Values of Public and Private Law' in M. Taggart (ed.), *The Province of Administrative Law* (1997); Sir J. Laws, 'Public Law and Employment Law: Abuse of Power?' (1996) PL 455.

[37] T. Poole, 'Judicial Review and Public Employment: Decision-Making on the Public-Private Divide' (2000) 29 ILJ 61; 'Review of Dawn Oliver, *Common Values and the Public-Private Divide*' (2000) 63 MLR 629.

[38] On the public/private divide see, e.g., J.W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (1996); N. Bamforth, 'The Public Law-Private Law Distinction: A Comparative and Philosophical Approach' in P. Leyland and T. Woods (eds.), *Administrative Law Facing the Future: Old Constraints and New Horizons* (1997); C. Harlow, '"Public" and "Private" Law: Definition Without Distinction' (1980) 43 MLR 241; P. Cane, 'Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept' in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence, 3rd Series* (1987); J. Beatson, '"Public" and "Private" in English Administrative Law' (1987) 103 LQR 34; M. Freedland, 'Government by Contract and Public Law' (1994) PL 86; P. Davies and M. Freedland, 'The Impact of Public Law on Labour Law, 1972-1997' (1997) 26 ILJ 311; S. Fredman and G. Morris, 'Public or Private? State Employees and Judicial Review' (1991) 107 LQR 298; Fredman and Morris, 'The Costs of Exclusivity: Public and Private Re-examined' (1994) PL 69; I. Harden, *The Contracting State* (1992); D. Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 U Penn LR 1349; N. Fraser, *Justice Interruptus* (1997), ch. 3; H. Woolf, 'Droit Public – English Style' (1995) PL 57; S. Arrowsmith, 'Judicial Review and the Contractual Powers of Public Authorities' (1990) 106 LQR 277; D. Pannick, 'Who is Subject to Judicial Review and in Respect of What?' (1992) PL 1; B.V. Harris, 'The "Third Source" of Authority for Government Action' (1992) 109 LQR 626.

[39] On the Act see, e.g., J. Cooper and A. Marshall-Williams (eds.), *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (2000); J. Wadham and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (2000); K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 MLR 79; A. Lester, 'Human Rights and the British Constitution' in J. Jowell and

Surely, it could be suggested, it makes no sense to discuss an avowedly *rights-based* theory separately from a major constitutional innovation that has the notion of rights at its heart. But my approach can be justified. As this thesis demonstrates, the rights theory was a staple feature of the constitutional debate long before the Act was introduced. The theory would continue to have its advocates and attract its adherents whether or not the Human Rights Act had been passed. To understand the rights-based theory properly, then, necessitates an inquiry into the arguments that underlie and constitute the theory.

The Human Rights Act is by no means omitted entirely from the thesis. I discuss the Act in chapter 10 of the thesis, in the context of the exposition of the legitimacy model. I argue in that chapter that the Act in no way presupposes a perspective on public law that fits with the model proposed by rights-based theorists. I argue, to the contrary, that the structure of the Act makes more sense if we view it in terms of the legitimacy model. I also suggest that the early case-law relating to the Human Rights Act supports this interpretation.[40]

(c) 'Public Law'

What is meant by the term 'public law' has yet to be specified. Public law is a term that embraces a wide variety of meanings. Three common uses of the term may be outlined:

D. Oliver (eds.), *The Changing Constitution* (4th ed., 2000). For significant judicial decisions relating to the Human Rights Act see *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328; *R v A* (No. 2) [2001] 1 All ER 1.

[40] See ch. 10, below.

(a) 'Public law' can be used, as in the Civilian tradition,[41] to mean any law that is not private law. Used in this broad sense, the term is capable of accommodating not just constitutional and administrative law, but also subjects such as criminal law and tax law.

(b) 'Public law' is commonly used in a less extensive sense to embrace only the disciplines of constitutional and administrative law (and to hint at their interconnectedness). This term is used in this sense by a number of textbook writers[42] and in the title of the journal, *Public Law*.

(c) 'Public law' is also used in the scholarly literature to connote a particular normative order[43] or distinct field of intellectual enquiry. Thus, writers talk about the imposition by the courts of 'public law norms', and contrast 'public law' values with other (e.g., 'private law', or free-market) norms.[44]

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[41] See, e.g., L.N. Brown and J.S. Bell, *French Administrative Law* (5th ed., 1998), pp. 4-6 & ch. 1; Allison, *A Continental Distinction in the Common Law*, above, note 21, ch. 6; R. Errera, 'Dicey and French Administrative Law' (1985) PL 695; P. Stein, *Roman Law in European History* (1999), p. 21; O.F. Robinson, T.D. Fergus and W.M. Gordon, *European Legal History* (3rd ed., 2000), pp. 60, 83, & 259; R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (1995).

[42] See e.g., A.P. Le Sueur and M. Sunkin, *Public Law* (1997); J.F. McEldowney, *Public Law* (2nd ed., 1998).

[43] On normative orders see, e.g., N. MacCormick, 'Institutions, Arrangements, and Practical Information' (1988) 1 Ratio Juris 73; Habermas, *Between Facts and Norms*, above, note 18; N. Luhmann, 'Law as a Social System' (1989) Northwestern Univ LR 136; G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1993) Law & Soc Rev 239.

[44] The term 'public law' is used in this sense in the following works: M. Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in M. Taggart (ed.), *The Province of Administrative Law* (1997); A. Page, 'Toolboxes and Blueprints: Controlling the Control of the Executive and the New Administrative Law' in T. Daintith (ed.), *Constitutional Implications of Executive Self-Regulation: The New Administrative Law* (1997); C. Harlow, 'Back to Basics: Reinventing Administrative Law' (1997) PL 245; Davies and Freedland, 'The Impact of Public Law on Labour Law, 1972-1997', above, note 21.

In this thesis, the term 'public law' is used in the third of these senses. The normative use of the term seems more attuned to the task of theorising about public law. Theory in this context involves generalising about aspects of the practice of an institutional normative order[45] and the third definition of public law postulates an idea of a general intellectual and normative framework well suited to this task.

While this usage of the term 'public law' makes sense given the aims of the thesis, it does nonetheless have the potential to confuse the relationship between public law and judicial review. Rights theorists also use the term public law in the third sense identified here. But, in their analysis, the notion of public law is often conflated or elided with the distinct practice of judicial review. This is because the rights-based theory of public law is, first and foremost, a theory of the practice of judicial review; and the elision of public law and judicial review may be seen, then, as part of a wider strategy to place the common law court at the apex of the constitutional hierarchy. Since this thesis is concerned primarily with understanding and criticising rights-based public law thought, it is unavoidable that this usage of the term 'public law' is mirrored in the analysis and criticism contained within the first two Parts of the thesis.

The legitimacy model, outlined in Part 3, does not share with the rights theory the understanding of judicial review as a morally and constitutionally superior site of political/legal decision-making. And while, like the rights theory, it is for the most part a theory of judicial review, the legitimacy model does understand judicial

[45] See N. MacCormick, 'The Legal Framework: Institutional Normative Order' in MacCormick, *Questioning Sovereignty* (1999).

review to be but one element within a wider framework of constitutional and administrative justice. Both theories, then, situate judicial review (in different ways) in the context of a broader scheme of public law or constitutionalist thought. An attempt will be made in the concluding Part of the thesis to distinguish between judicial review as a particular site or mode of public law activity and public law as a more general normative idea.

But why should a thesis concerned with the conceptual underpinnings of public law - or a theoretical account of public law for that matter – concentrate its attention on judicial review? After all, judicial review is but one aspect of a broad and diverse spectrum of institutions and processes concerned with public law related matters. Certainly, were we to adopt a functionalist account of the subject, it is at least arguable that judicial review would not figure so prominently. Stanley de Smith famously described judicial review as 'sporadic and peripheral'.[46] Of course, he said this before the exponential growth in the numbers of judicial review actions, a phenomenon charted by Le Sueur, Bridges, Meszaros and Sunkin.[47] Despite this growth, the number of judicial review claims is dwarfed by the number of claims brought before administrative tribunals[48] and the number of complaints made to

[46] S. de Smith, *Judicial Review of Administrative Action* (4th ed., 1980), p. 3.
[47] L. Bridges, G. Meszaros and M. Sunkin, *Judicial Review in Perspective* (2nd ed., 1995); M. Sunkin, 'What is Happening to Applications to Judicial Review?' (1987) 50 MLR 432; A. Le Sueur and M. Sunkin, 'Applications for Judicial Review: The Requirement of Leave' (1992) PL 102.
[48] 'In 1996, the Council on Tribunals was responsible for supervising almost 80 different categories of tribunal and over 2,000 tribunals altogether. Annually, these tribunals hear over 300,000 cases (or over 1,250,000 if those cases are included which are withdrawn, settled or dealt with almost as a formality). The total number of cases disposed of has long been many times the comparable total of civil cases in the High Court and county courts (already a multiple of six, when the Royal Commission on Legal Services reported in 1979).' Harlow and Rawlings, *Law and Administration*, note 15, above, p. 456. See also, e.g., M. Sayers, 'The Importance and Variety of Tribunals' (1994) 1 Tribunals 2; H. Genn, 'Tribunal Review of Administrative Decision-Making' in G. Richardson and H. Genn (eds.), *Administrative Law and Government Action* (1994).

ombudsmen and various complaints bodies and authorities.[49] Harlow and Rawlings argue that, at least from the quantitative angle, de Smith's comment continues to have merit.[50] In similar vein, Ross Cranston has expressed concern that 'the attention lawyers lavish on judicial review diverts their gaze from more fundamental, if less glamorous, mechanisms to redress citizens' grievances and call government to account.'[51]

This is not necessarily conclusive of the matter, however. It is certainly possible for a phenomenon to be qualitatively important while remaining quantitatively insignificant. The current authors of de Smith's original textbook counsel caution before assuming from the statistics that judicial review does not exert significant influence over political and administration behaviour. They argue, first, that the number of applications for judicial review has grown annually, is still growing and is unlikely to diminish. Second, they argue that empirical studies suggest that there is a heightened awareness of the potential impact of judicial review among officials and politicians which may help to produce a different decision-making culture.[52]

It is difficult to draw a definite conclusion on the true measure of the influence of judicial review on administrative behaviour mainly because of the paucity of empirical research in the area.[53] The studies that do exist tend to indicate that the impact of judicial review is patchy and highly dependent on context. In the prelude

[49] See, e.g., Harlow and Rawlings, *Law and Administration*, note 17, above, chs. 12 & 13; G. Drewry and C. Harlow, 'A "Cutting Edge"? The Parliamentary Commissioner and MPs' (1990) 53 MLR 745.
[50] Harlow and Rawlings, *Law and Administration*, note 17, above, p. 530.
[51] R. Cranston, 'Reviewing Judicial Review' in Richardson and Genn, *Administrative Law and Government Action*, note 45, above, p. 80.
[52] Lord Woolf, J. Jowell and A. Le Sueur, *Principles of Judicial Review* (1999), p. 21.

to an article detailing the findings of their study of judicial review and the Social Fund, Sunkin and Pick remind us 'that causal links between doctrine and action cannot be assumed and that a vibrant jurisprudence does not necessarily produce compliant administrative behaviour.'[54] The authors observe that, when the Social Fund was in its infancy, judicial review was very influential. Judicial review's role at this stage was paradoxical since 'it threatens to invalidate action and at the same time provides a source of best legal decision-making practice.'[55] Early judicial review cases of Social Fund decisions thus served a broader legitimating role: they 'helped to clarify the framework and structure of the system as well as the task of the inspectors, and their approach to that task ... [and] also reinforced the claim that the SFIs were independent experts.'[56]

The authors note, however, that after the organisation had gained a measure of legitimacy, its principal goal shifted to a concern to ensure efficient service delivery. In that context, the influence of judicial review declined. By the mid-1990s, the incidence of cases challenging SFI decisions 'fell to no more than a trickle'. (This lull in itself highlights the sporadic nature of judicial review and the 'inherent limitation in judicial review's ability to provide guidance and clarity' to administrative organisations.[57]) This change did not mean that 'juridical norms are now unimportant, only that they now serve the overriding goals associated with

[53] See Woolf, Jowell, and Le Sueur, *Principles of Judicial Review*, note 52, above, p. 25.
[54] M. Sunkin and K. Pick, 'The Changing Impact of Judicial Review: The Independent Review Service of the Social Fund' (2001) PL 736, p. 737. See also G. Richardson and M. Sunkin, 'Judicial Review: Questions of Impact' (1996) PL 79; G. Dalley and R. Berthoud, *Challenging Discretion* (1992).
[55] Sunkin and Pick, note 54, above, p. 745.
[56] Sunkin and Pick, note 54, above, p. 746.
[57] Sunkin and Pick, note 54, above, p. 751.

efficient service delivery.'[58] This shows, the authors suggest, how 'the organisation learned to live with the prospect of judicial review and, as it were, to place the prospect of litigation in perspective.'[59]

In a recent article detailing an investigation of the influence of judicial review on the decision-making practices on homelessness of local government administrators in three areas, Simon Halliday concludes that judicial review did not - and probably could not - control the bureaucratic cultures under study and that 'unlawful decision-making was rife within each authority'.[60] The author also suggests that the precise nature of impact judicial review might have on bureaucratic behaviour will always be difficult to predict. This is because administrative decision-making is, he says, 'a complex social process where apparently straightforward decisions emerge from a host of forces and influences, where seemingly "clear" legal rules are infused with discretion and compete with other social and organisational norms.'[61] These findings echo those of a study by Richardson and Machin into the impact of judicial review on Mental Health Review Tribunals in which the authors concluded that, despite the adjudicative nature of the proceedings and the presence of lawyers, 'the influence of judicial review on the decision-making of MHRTS is patchy at best, even with regard to procedural fairness'.[62]

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[58] Sunkin and Pick, note 54, above, p. 752.
[59] Sunkin and Pick, note 54, above, p. 760.
[60] S. Halliday, 'The Influence of Judicial Review on Bureaucratic Decision-Making' (2000) PL 110, p. 122.
[61] Halliday, note 60, above, p. 113. See also, e.g., R. Baldwin, *Rules and Government* (1995); N. Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in K. Hawkins (ed.), *The Uses of Discretion* (1992).
[62] G. Richardson and D. Machin, 'Judicial Review and Tribunal Decision-Making' (2000) PL 494, p. 514.

It is important not to forget the findings of these studies when constructing and assessing accounts of the function of judicial review. However, in some contexts at least, judicial review may be said to have a symbolic or political value that transcends its (relative) quantitative insignificance and its lack of direct impact on (certain) administrative environments. There are at least two contexts in which judicial review may be said to punch above its weight. First, judicial review of the decisions of administrative tribunals undoubtedly has had a cascading effect – for good and ill - in relation both to the decisions of those tribunals and (we can safely presume) over the decision-making contexts over which those tribunals preside. This phenomenon of legalisation or juridification has been noted and discussed by commentators, for instance, in the context of social security[63] and in relation to local government.[64]

Second, there is no doubt that some cases of judicial review attract a great deal of political and media attention.[65] The attention stems from the highly contested nature of the issue underlying the case, combined with the relatively high profile nature of court-based decision-making and the fact that courts, when exercising their supervisory jurisdiction, have the power to strike down governmental decisions and actions. If anything, this public dimension of the activities of the administrative

[63] See, e.g., R. Sainsbury, 'Administrative Justice: Discretion and Procedure in Social Security Decision-Making' in Hawkins, *The Uses of Discretion*, note 61, above; Harlow and Rawlings, *Law and Administration*, note 17, above, ch. 14.

[64] See, e.g., M. Loughlin, *Legality and Locality: The Role of Central-Local Government Relations* (1996), esp. ch. 9.

[65] See, e.g., *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement* [1995] 1 WLR 386; *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275; *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257; *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1.

court seems to be increasing[66] and is likely to increase further in the wake of the introduction of the Human Rights Act. The existence and importance of this public dimension to the court's supervisory jurisdiction is evidenced by the use of the mechanism of judicial review by various campaigning groups as a means of obtaining outcomes favourable to the interests of a group and/or publicity for a particular cause.[67] In a recent article which addresses the phenomenon of group litigation, Carol Harlow suggests that a 'novel public interest action is in the making, with the help of which campaigning groups are gaining entry to the legal process.'[68] But campaigning groups would have no interest in brining judicial review actions, given the associated costs and delays, if the benefits of success were not significant.[69]

To conclude this discussion, then, while it is certainly true that judicial review – despite recent dramatic increases in the case-load of the administrative court – remains statistically insignificant in relation to the total number of complaints brought against public bodies by way of various complaints mechanisms and tribunals, this does not necessarily entail that judicial review is not an important institution worthy of study. For one thing, it is possible that judicial review has a significant influence over the behaviour of (some) administrative bureaucracies.

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[66] See, e.g., A. Le Sueur, 'The Judicial Review Debate: From Partnership to Friction' (1996) 31 Government and Opposition 8.

[67] See, e.g., *R v Inspectorate of Pollution, ex p Greenpeace Ltd (No. 2)* [1994] 4 All ER 239; *R v Secretary of State for the Environment, ex p Friends of the Earth Ltd* (1995) 7 Admin LR 26; *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 WLR 722; *R v Secretary of State for Social Security, ex p Child Poverty Action Group* [1990] 2 QB 540; *R v Lord Chancellor, ex p Child Poverty Action Group* [1999] 1 WLR 347.

[68] C. Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1, pp. 7-8.

[69] See, further, C. Harlow and R. Rawlings, *Pressure Through Law* (1992); R. Rawlings, 'Courts and Interests' in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (1995).

(Although those who have conducted empirical work tend to argue that that influence is complicated and hard both to map and to predict.) For another, the high profile nature of a growing number of judicial review cases means that judicial review may be said to have a constitutional and political importance that far surpasses its quantitative significance.

3. The Rights-Based Theory of Public Law

With these preliminary issues aside, we can concentrate again on matters of substance. A sketch of the rights-based model of public law will be provided in this section. No attempt will be made at this stage to justify the model: it will be supported and defended in Part 1.[70] For reasons of expositional clarity, the outlines of the model are arranged here as a group of propositions arranged under a series of headings.

- **Moral theory:** *Kantian essentialism*[71]

  The roots of the rights-based approach to public law lie in moral philosophy. Rights theorists start by ascribing to the individual a set of essential needs. These essential needs may be grouped under the umbrella of individual autonomy (or human dignity).

[70] See in particular ch. 4, below.

[71] Kantian essentialism is discussed below, pp. 144-147. On Kant see, e.g., I. Kant, *Groundwork of the Metaphysics of Morals* [1785] (ed. M. Gregor, 1997); J.B. Schneewind, 'Autonomy, obligation, and virtue: An overview of Kant's political philosophy' in P. Guyer (ed.), *The Cambridge Companion to Kant* (1992).

- **Political Theory:** *rights as 'trumps'*

Rights theorists maintain that it is possible to deduce a set of fundamental values from these essential needs. These fundamental values are to be regarded as politically overriding because they preserve the cardinal value of individual autonomy. These fundamental values can usefully be translated into the politico-legal language of rights.[72] This translation brings out the overriding status of these fundamental values: rights are 'trumps'[73] and, as such, are suitable vehicles for protecting individual autonomy from inimical decisions and actions.

- **Constitutional Theory:** *dualist*

Rights theorists understand constitutions to be a means of constraining government action so that fundamental values are protected.[74] The courts have a decisive role in this set-up, since their primary concern is to protect fundamental values and rights from abuse by the powerful, particularly the state.[75] Courts can thus be said to apply a species of moral law. In the 'good constitution'[76] – the constitution that best protects autonomy - this morally

[72] See, e.g., R.A. Primus, *The American Language of Rights* (1999); D.A.J. Richards, *Foundations of American Constituitonalism* (1989), chs. 1-3; M. Loughlin, *Sword and Scales* (2000), chs. 13-15; D. Patterson, *Law and Truth* (1996), ch. 7.

[73] See Dworkin, *Taking Rights Seriously*, above, note 16, Introduction p. *xv*. See also, S. Guest, *Ronald Dworkin* (1992), pp. 62, 235 & 282.

[74] See, e.g., F.A. Hayek, *The Constitution of Liberty* (1960); G. Calabresi, *A Common Law for the Age of Statutes* (1982). S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (1995), p. 7, calls this *negative constitutionalism*: 'the doctrine that constitutions are primarily preventive or inhibitory devices, meant to check or repress tyranny and other abuses of power.' See also, J. Waldron, *The Dignity of Legislation* (1999), esp. ch. 2; R. Hardin, *Liberalism, Constitutionalism, and Democracy* (1999), esp. ch. 3; J. Elster, *Ulysees Unbound* (2000).

[75] Although not just the state: rights theorists like Oliver and Laws argue that the values are common to all areas of law and legal decision-making. See above, note 19.

[76] The origins of this intellectual approach stem from Classical Greek thought. See ch. 2, below.

superior judicial law must be regarded as a higher order of law because no other institution is *necessarily* connected with the moral law.[77]

- **Public law:** *'value-driven'*

Since the aim of judicial review of governmental decision-making is to apply a higher-order of moral law, decision-making in public law cases is necessarily value-driven: that is, it must be oriented towards the protection of fundamental values and basic rights. Judicial decision-making in public law can best be seen, then, as a species of practical, moral reasoning.[78]

The argument in this thesis mainly concerns the last two categories: rights-based constitutional theory and the legal structure it supports. (This is also where the argument in support of the rights theory is drawn most strongly.) In relation to these categories, the thesis identifies the following three recurring strands of argument and subjects them to intensive analysis and criticism.

(a) The common law is a superior form of reason – *summa ratio*, in Edward Coke's phrase.[79] Since the common law courts apply a higher set of laws

[77] See chs. 2 & 4, below. For the notion of the *dualist constitution*, see B. Ackerman, *We The People – Vol. 1 Foundations* (1991), ch. 1. See also, B. Ackerman, 'Constitutional Politics/Constitutional Law' (1989) Yale LJ 99; J. Rawls, *Political Liberalism* (1996), pp. 233-235.

[78] See chs. 4 & 7, below.

[79] Sir E. Coke, *First Institute of the Laws of England* (ed. J.H. Thomas, 1836), 1. See also J.U. Lewis, 'Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory' (1968) 84 LQR 330; H.J. Berman, 'The Origins of Historical Jurisprudence: Coke, Selden, Hale' (1994) 103 Yale LJ 1651, pp. 1673-1694. See, further, ch. 6, below.

they can for that reason justifiably be considered as comprising the highest forum of public reason.[80]

(b) Judicial decision-making in public law cases is value-driven: the level of judicial scrutiny depends on the importance of the right(s) at stake.[81] (So, for instance, the more important the right at stake, the more the court will question the plausibility of the decision-maker's arguments in support of its decision.)

(c) The rights-based approach to public law is historically supported. Our constitutional history and traditions of constitutional thought indicate that the rights theory is the contemporary representative of the 'true' approach to constitutional politics.[82]

4. Structure of the Thesis

The thesis is divided into three Parts. Part I constructs and defends the model of rights-based public law outlined above. The first three chapters analyse the work of Allan, Laws, and Oliver. Chapter 4 draws together the various strands contained within these analyses in order to identify the main arguments that connect and

[80] On the notion of public reason see Rawls, *Political Liberalism*, above, note 77, Lecture VI; D. Ivison, 'The Secret History of Public Reason: Hobbes to Rawls' (1997) 18 Hist of Pol Thought 125;L. Hunt, 'Principle and Prejudice: Burke, Kant and Habermas on the Conditions of Practical Reason' (2002) 23 Hist of Pol Thought 117.
[81] See ch. 4, pp. 106-107 & ch. 7, below.
[82] See ch. 5, below.

support theories of public law that fall within the rights-based approach to public law.

Part II criticises the model of rights-based public law identified in Part I. There are three main lines of critique. Chapter 5 criticises the historical dimension of the rights-based approach, in particular the argument that central elements of the rights-based model have precedents in early seventeenth-century legal practice. Chapter 6 takes issue with the idea of public law as a superior form of public reason. Chapter 7 challenges the idea that decision-making in public law is value-driven.

Part III (chapters 8-10) advances an outline of an alternative approach to public law based on the notion of legitimacy that aims to avoid the problems identified with the rights-based theory.

Part I

The Rights-Based Theory of Public Law: Analysis

Chapter 1

T.R.S. Allan: The Rule of Law, The Common Law, and Liberal Constitutionalism

Introduction

This chapter analyses the work of the distinguished Cambridge-based academic T.R.S. Allan. Allan is worthy of detailed study because he is, in many ways, the central figure in contemporary rights-based public law. His work is important by virtue of the quality of its argument, which has been developed and sustained over a long period: the 1985 *Cambridge Law Journal* article on legislative supremacy[1] contains a theory similar in all key respects to that advanced in the recent book, *Constitutional Justice*.[2]

Allan provides probably the most sophisticated British version of the rights-based theory of public law. His theory centres upon a rejuvenated notion of the rule of law, imbued with liberal substance and grounded in the common law, against which governmental action is to be scrutinised by the courts in the name of fundamental values and rights.

This chapter aims to provide a systematic account of Allan's theory. For the most part, the chapter will simply articulate, and where necessary clarify, the central

[1] T.R.S. Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 CLJ 111.

strands of Allan's argument. This is particularly true of the aspects of his work that deal with the core constitutional and public law aspects of the theory. In peripheral areas where the theory is less precisely drawn, particularly in relation to its philosophical underpinnings, an element of reconstruction will be necessary.

The analysis begins by exposing the philosophical and social theoretic underpinnings of Allan's theory (section 1). Section 2 examines the essentially 'dualist' account that stands at the heart of Allan's constitutional theory. The chapter then investigates the central dimensions of Allan's theory of constitutional politics: the rule of law (section 3) and the common law (section 4). Finally, in section 5, Allan's account of public law and public law decision-making is examined.

1. Of Politics in General

Allan's theory rests on the idea of a law-centred sphere of constitutional politics (examined in sections 2-4, below). But in order to achieve a thorough analysis of Allan's work, this section investigates the philosophical underpinnings of the theory.

The philosophical underpinnings of Allan's theory of public law are not precisely drawn. It is possible, however, to locate a number of key recurring themes in his work: first, the central position of fundamental values and rights; second, the idea of society as a community that shares fundamental values; third, a republican

[2] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001).

conception (or ideal) of deliberative politics and the concomitant notion of public reason. These three themes are examined in turn in this section.

(a) Philosophy - Fundamental Values and Natural Rights

Allan's theory of public law rests on the idea of fundamental values: it is for the sake of such values that judicial review of governmental decisions is justified. At times, Allan refers directly to the natural rights presuppositions of his thought:[3] he talks, for instance, of 'natural law, in the guise of reasoning from fundamental rights'.[4] At other times, the natural rights heritage of Allan's thought is implicit. In this passage from *Constitutional Justice*, for instance, Allan draws on the work of Lon Fuller[5] to make the following point:

> If the law aspires to an order of governance that all can freely accept, as a necessary framework for the co-operation of autonomous and morally conscientious

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[3] On natural rights theory see, e.g., R. Tuck, *Natural Rights Theories: Their Origin and Development* (1979); M. Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (2000), pp. 161-165 & 199-202; M. Freeden, *Rights* (1991), ch. 3; C. Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (2000), chs. 3-9; J. Finnis, *Natural Law and Natural Rights* (1980), esp. pp. 198-199; M. MacDonald, 'Natural Rights' in J. Waldron (ed.), *Theories of Rights* (1984); M.J. Perry, *The Idea of Human Rights: Four Inquiries* (1998); H.L.A. Hart, 'Utilitarianism and Natural Rights' in Hart, *Essays in Jurisprudence and Philosophy* (1983).

[4] T.R.S. Allan, 'Constitutional Rights and Common Law' (1991) 11 OJLS 453, p. 473. See also, e.g., Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993), pp. 28-33.

[5] See, e.g., L.L. Fuller, *The Morality of Law* (2nd ed., 1969); Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv LR 353; Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 Harv LR 630. On Fuller see, e.g., N. Duxbury, *Patterns of American Jurisprudence* (1995), pp. 223-232; J.W.F. Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 CLJ 367; Allison, *A Continental Distinction in the Common Law* (1996), pp. 192-206; R.S. Summers, 'Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law' (1978) 92 Harv LR 433; K. Winston, 'Is/Ought Redux: the Pragmatist Context of Lon Fuller's Conception of Law' (1988) 8 OJLS 329; A. Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv LR 1281; N. Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in K. Hawkins (ed.), *The Uses of Discretion* (1992), pp. 368-380; J. Jowell, 'The Legal Control of Administrative Discretion' (1973) PL 178, pp. 213-218; R. Alexy, 'A Defence of Radbruch's Formula'

> citizens, there are certain basic freedoms and other institutional arrangements whose constitutional status must be placed beyond serious challenge.[6]

The reasoning underlying the argument in this passage is essentialist.[7] The starting place, Allan assumes, is the autonomous and moral individual who exists, as it were, out of time and place. Allan assumes that a set of fundamental needs can be divined if we think about what the individual requires to be able to function autonomously and morally. Conclusions drawn from this process of reasoning act as bases for generating core political and constitutional ideas.

What fundamental values does Allan identify using this essentialist method? Allan says that 'the concepts of human dignity and autonomy' underlie his theory.[8] Another recurring idea is the notion of equality. The 'governing ideal of equality', Allan maintains, both 'explains and justifies the basic constitutional division of powers' and 'imposes constraints on the content of general laws.'[9] These recurring ideas - autonomy, dignity, and equality – are harnessed in the notion of equal citizenship, an umbrella idea that binds the theoretical aspects of Allan's model together and provides the platform for his constitutional theory.

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in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (1999); D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996), pp. 243-246.

[6] *Constitutional Justice*, note 2, above, p. 7.

[7] The essentialist approach analysed here is Kantian in origin. See the discussion in ch. 4, below, pp. 103-104. See also the account of Sir John Laws' parallel search for the 'good constitution' in ch. 2, below, pp. 48-51.

[8] T.R.S. Allan, 'Fairness, Equality, Rationality: Constitutional Theory and Judicial Review' in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (1998), p. 30. See also Allan's discussion of individual autonomy in *Law, Liberty, and Justice*, note 4, above, pp. 109-118 and in *Constitutional Justice*, note 2, above, pp. 62-27 & 301-315.

[9] T.R.S. Allan, 'Equality and Moral Independence: Private Morality and Public Law' in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (1995), p. 52. See also the discussion of equality in 'Fairness, Equality, Rationality', note 8, above, pp. 24-29.

> Government must be held to a broadly consistent account of the common good it purports to espouse: it cannot discriminate unfairly between citizens by selective application of general principles it claims to honour. The equal dignity of citizens, with its implications for fair treatment and respect for individual autonomy, is the basic premise of liberal constitutionalism, and accordingly the ultimate meaning of the rule of law.[10]

In line with the natural rights premises of the underlying philosophy, fundamental values give rise to fundamental rights.

> The protection of fundamental rights is an important aspect of government in accordance with a substantive conception of the rule of law; but such rights are themselves a reflection of underlying ideas of human dignity and equality.[11]

(b) Society - A Community of Values

While at no point does Allan make explicit his conception of society, he does give sufficient indications, particular in his recent work, for us to be able to construct an account of the sort of society his constitutional model is designed to fit.[12]

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[10] *Constitutional Justice*, note 2, above, p. 2. See also *Constitutional Justice*, ch. 8.
[11] 'Fairness, Equality, Rationality', note 8, above, p. 34.
[12] On the theory of society in general see, e.g., C. Geertz, *The Interpretation of Cultures* (1973); Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (2000); R. Dahrendorf, *Essays in the Theory of Society* (1968); T. Parsons, *The Structure of Social Action* (1968); J-F Lyotard, *The Postmodern Condition: A Report on Knowledge* (1979), pp. 11-17. On the use of social theory in relation to political and constitutional thought see, e.g., R. Hardin, *Liberalism, Constitutionalism and Democracy* (1999); M. Oakeshott, *Rationalism in Politics and Other Essays* (1991); J. Waldron, *Law and Disagreement* (1999), pp. 149-150; M. Loughlin, *Public Law and Political Theory* (1992), Ch. 6. On the use of social theory in relation to legal thought see, e.g., R.M. Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (1978); S. Veitch, *Moral Conflict and Legal Reasoning* (1999);

- For Allan, a society is a community in which three qualities are combined. First, society is a *moral* entity. Allan's (ideal[13]) society is one that adopts the classic liberal values of autonomy, dignity and equality as its bedrock values. Law and politics, on this account, are 'grounded in a public morality - one in which all citizens can join in upholding as a fair basis of co-operation, permitting a wide range of different conceptions of the good life.'[14] A society, according to Allan, is *a community which shares a set of fundamental, common values*.

- Allan's society is also *organic*. A community shares experiences and the values it regards as fundamental are born out of reflection on such experiences. Allan talks, for instance, of the 'accumulated wisdom' and the 'spontaneous order' of society.[15] A society, following Allan's account, is *a community of people whose shared values are produced over time by reflection on shared experience*.

- The third quality Allan attributes to society is the notion that the common law has a central role in expressing the fundamental values. As we shall see in more detail below, for Allan, the common law 'constitutes society' and plays a

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R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (1995); Cotterrell, *The Sociology of Law: an Introduction* (1992); N. Duxbury, 'Signalling and Social Norms' (2001) 21 OJLS 719.

[13] Allan is not clear here. Does he mean that all societies are *ultimately* liberal, in the sense that any society, if left to its own devices for long enough, will ultimately produce a set of fundamental values that approximate Allan's classic liberal catalogue? Or, is he developing an ideal model towards which societies ought to strive? Each account has its problems. The first - descriptive - reading appears either complacent (and devoid of empirical support) or simply untrue. The second - normative - reading would require greater elucidation and justification than Allan currently provides.

[14] 'Equality and Moral Independence', note 9, above, p. 55.

[15] T.R.S. Allan, 'Common Law Constitutionalism and Freedom of Speech' in J. Beatson and Y. Cripps (eds.), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (2000), p. 21. See also e.g., *Constitutional Justice*, note 2, above, pp. 15-16 & 33-34.

foundational role.[16] A society, then, is *a community whose common values, produced over time by reflection on shared experience, are reflected and collated in the principles of the common law.*[17]

(c) Politics - Republicanism, Deliberative Democracy and Public Reason

In recent work, Allan has argued that his theory of public law 'makes sense only in the context of a broadly republican conception of politics'.[18] Allan understands republicanism as a theory of politics that centres on the notion of deliberative democracy in which 'all strive to articulate and further a conception of the common good'.[19] He calls this an 'economy of moral disagreement.'[20]

> We should, then, view democracy as a means for the collective pursuit of justice, enabling conflicts of interest to be resolved primarily on grounds of right rather than power or influence. Democratic deliberation should appeal to moral principles that facilitate agreement among people who seek the common good, instead of

[16] On the constitutive or foundational role of the common law see section 4, below.
[17] Allan's conception of society is in all central respects - the idea of a moral community, the idea of 'spontaneous social order', and the central, constitutive role of the common law - Hayekian. On the influence of Hayek on Allan's thought see pp. 32-35, below.
[18] *Constitutional Justice*, note 2, above, p. 283.
[19] 'Common Law Constitutionalism', note 15, above, p. 27. On republican theories of politics see, e.g., P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975); Pocock, *Politics, Language, and Time: Essays on Political Thought and History* (1971); Pocock, 'Virtue and Commerce in the Eighteenth Century' (1972) 3 J of Interdisciplinary Hist 119; D.T. Rodgers, 'Republicanism: the Career of a Concept' (1992) J of Am Hist 11; P. Springborg, 'Republicanism, Freedom from Domination, and the Cambridge Contextual Historians' (2001) 49 Pol Studs 851; C. Taylor, 'Liberal Politics in the Public Sphere' in Taylor, *Philosophical Arguments* (1995); M. Francis, 'Review Article: Histories of Australian Republicanism' (2001) 22 Hist of Pol Thought 251. On the influence of republican ideas on public law see, e.g., J. Habermas, *Between Facts and Norms* (1996), pp. 267-279; C.R. Sunstein, *The Partial Constitution* (1993); F.I. Michelman, 'Foreword: Traces of Self-Government' (1986) 100 Harv LR 4; M.J. Horwitz, 'Republicanism and Liberalism in American Constitutional Thought' (1987) 29 William and Mary LR 57; M. Loughlin,

> narrow self-interest, in order that the results can be accepted by everyone as amounting to a reasonable accommodation that treats all citizens as equally entitled to concern and respect.[21]

The related idea of *public reason* has recently become a significant idea in this dimension of Allan's recent work. The root idea comes from John Rawls,[22] who defined public reason in this way:

> The point of the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse, and each is, in good faith, prepared to defend that conception so understood.[23]

Allan thinks that Rawls' account of public reason is unduly restrictive. He rejects Rawls' exclusion of 'certain kinds of [rational] religious beliefs', for instance, and argues that 'recourse to controversial moral and metaphysical convictions is more often necessary, and more generally legitimate, than Rawls seems willing to concede.'[24] Allan's version of the ideal aims to permit 'a more thorough-going, less circumscribed, moral debate than Rawls would allow.'

'Rights, Democracy and Law' in T. Campbell, K. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (2001).

[20] 'Common Law Constitutionalism', note 15, above, p. 27.

[21] 'Common Law Constitutionalism', note 15, above, pp. 23-24.

[22] J. Rawls, *Political Liberalism* (1996), chs. 4 & 6.

[23] *Political Liberalism*, note 22, above, p. 226. Quoted by Allan in *Constitutional Justice*, note 2, above, p. 284.

[24] *Constitutional Justice*, note 2, above, p. 286.

> In seeking to challenge or justify legal restrictions or government policies, both citizens and officials should appeal, so far as possible, to shared principles and values in an effort to reach consensus; but it is not necessary for debate to cease as soon as there is a clash of moral commitments. No one should be criticized for confronting his fellow citizens with arguments that he thinks pertinent to any moral or political issue, however difficult or divisive, provided only that he claims no special knowledge or authority that precludes rational inspection and challenge.[25]

(d) Conclusions to Section 1

There are a number of important implications of the philosophy and social and political theory that underpins Allan's work.

(1) If society is understood as an organic, moral community, sharing basic values accrued as the result of generations of moral debate, politics is naturally conceived as a species of moral engagement. Political argument becomes a matter of moral dialogue between those who share fundamental values about the way in which those values ought to be applied in particular cases of dispute.

(2) Within this moral republic, political argument is all-embracing. Political argument is the way in which a community, conceived as a single moral entity, decides which course to adopt for the future.[26]

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[25] *Constitutional Justice*, note 2, above, p. 287.

[26] The idea of society as an organic, moral community is captured in the work of Michael Oakeshott: see his 'Rationalism in Politics' and 'The Tower of Babel' in *Rationalism in Politics*, note 12, above; *On Human Conduct* (1975). See also M. Loughlin, *Public Law and Political Theory*, note 12, above, pp. 64-83. For criticism of the organicist model of society in the German context see J Habermas,

(3) Law, on this account, is to be conceived as a (very important) dimension of this moral/political engagement: 'Questions of existing law ... are always also questions of political morality'.[27] To argue about law, then, is to engage in a moral enterprise: that is, it requires reflection about what certain shared, fundamental values require us to do in particular cases of uncertainty or dispute.

2. The Dualist Constitution

At the level of general social and political theory, we have seen that Allan develops a one-dimensional conception of a society that shares basic (liberal) values and whose politics are a species of moral reasoning. This neat structure is disrupted at the level of constitutional theory, however, as Allan develops what can best be described as a 'dualist constitution'.[28] Allan draws a distinction between 'ordinary' and 'constitutional' politics. Ordinary politics is the normal democratic process, with its characteristic institutions, organisations and events: elections, parliaments, governments, political parties and general political debate. By contrast, constitutional politics comprises a sphere of politics, centred on the common law courts, whose *raison d'être* is to protect the fundamental values of society by curbing the excesses of the ordinary political process.

'What is a People?' in Habermas, *The Postnational Constellation: Political Essays* (2001). See also, e.g., J. Morefield, 'Hegelian Organicism, British New Liberalism and the Return of the Family State' (2002) 23 Hist of Pol Thought 141.

[27] 'Common Law Constitutionalism', note 15, above, p. 29. On the interrelation between law and politics see also, e.g., Allan, 'The Politics of the British Constitution: a response to Professor Ewing's paper' (2000) PL 374; Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 LQR 443; Allan, 'Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case' (1986) 45 CLJ 305, p. 320.

Allan's understanding of constitutional politics is explored in sections 3 and 4. This section examines the dualist constitution, concentrating on the distinction between the two forms of politics Allan identifies.

In Allan's earlier work, the distinction between ordinary and constitutional politics was clearly drawn. While constitutional politics was necessarily connected with the fundamental values of society and so necessarily entailed a form of moral reasoning, ordinary politics, when subjected to a 'bleak analysis',[29] was a tainted process incapable of securing fundamental rights.

> Important freedoms are at the mercy of a temporary majority of the House of Commons, generally manipulated by the executive government which cannot even claim the support of a clear majority of the electorate.[30]

This bifurcated account of politics, in which the constitutional politics of the courts is regarded as necessarily good and the ordinary legislative process is to be regarded with suspicion, owes much to Hayek's constitutional theory. Arguing against the unitary and hierarchical presuppositions of Hobbesian legal positivism,[31] Hayek

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[28] The phrase comes from B. Ackerman, *We The People – Vol. 1, Foundations* (1991), ch. 1.
[29] 'Legislative Supremacy', note 1, above, p. 116.
[30] 'Legislative Supremacy', note 1, above, p. 116.
[31] T Hobbes, *Leviathan* [1651] (ed., C.B. Macpherson, 1968); Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England* [1681] (ed., J. Cropsey, 1971). On Hobbes, see, e.g., D.E.C. Yale, 'Hobbes and Hale on Law and the Sovereign' (1972) 31 CLJ 129; Q. Skinner, 'The Ideological Context of Hobbes's Political Thought' (1966) 9 Hist J 286; S. Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (1995), Ch. 3; Hardin, *Liberalism, Constitutionalism, and Democracy*, note 12, above, esp. Chs. 1-3; C.D. Tarlton, 'The Despotical Doctrine of Hobbes, Part I: The Liberalization of *Leviathan*' (2001) 22 Hist of Pol Thought 587; Tarlton, 'The Despotical Doctrine of Hobbes, Part II: Aspects of the Textual Substructure of Tyranny in *Leviathan*' (2002) 32 Hist of Pol Thought 61; J. Gray, *Enlightenment's Wake: Politics and Culture*

drew a sharp distinction between common law and legislation. Common law was '*the law*, the lawyer's law' (*nomos*). Legislation, by contrast, was law posited by authority (*thesis*).

Hayek believed that 'judge-made law will of necessity possess certain attributes which the decrees of the legislator need not possess'.[32] Common law, like the economy in Adam Smith's 'invisible hand' formulation,[33] and like society itself, is the product of unplanned evolution, a propitious combination of rational discovery and spontaneous growth.[34] As John Gray puts it, law, on Hayek's account, 'is part of the natural history of mankind; it emerges directly from men's dealing with each other, it is coeval with society and so antedates the emergence of the state.'[35]

Understood in this way, the common law is the guarantor of liberty. Its incremental method, at once evolutionary and rational, makes it perfectly adapted to respond to a multiplicity of societal demands and desires. The common law provides, by virtue of its continuity and longevity, a stable platform for the activities of the citizens.[36] Legislation, on the other hand, is to be regarded as both a modern aberrance and a threat to liberty. It lacks the virtuous qualities inherent to common law and is

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at the Close of the Modern Age (1995), ch. 6. On Hobbes and legal positivism see, e.g., N.E. Simmonds, 'Protestant Jurisprudence and Modern Doctrinal Scholarship' (2001) 60 CLJ 271; Douzinas, note 3, above, ch. 4.

[32] F.A. Hayek, *Law, Legislation and Liberty, Vol. 1: Rules and Order* (1973), p. 94.

[33] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776]. See also, B. de Mandeville, *The Fable of the Bees: Or, Private Vices, Publick Benefits* [1714] (ed. P. Harth, 1970); R. Porter, *Enlightenment: Britain and the Creation of the Modern World* (2000), pp. 388-396; A. MacIntyre, *Whose Justice? Which Rationality?* (1988), chs. XII & XIII.

[34] Hayek used the Greek word *cosmos* to denote this spontaneous order: see *Law, Legislation and Liberty*, note 32, above, p. 37.

[35] J. Gray, *Hayek on Liberty* (3rd ed., 1998), p. 71.

[36] Gray, note 35, above, p. 71. Note, however, that Hayek's theory 'does not contain at a foundational level any commitment to inviolable human rights'. Unlike the libertarian philosopher Nozick, for

vulnerable to the whims of those who happen to wield power at a particular point in time.[37]

While earlier formulations of Allan's account of politics seemed to mirror Hayek's scheme in almost all of its particulars, his present position is not quite as clear. The modification might be due to an awareness that a sceptical account of legislative practice sits uncomfortably alongside a normative, even idealist, account of the political practice of the courts.[38] There are indications in recent work that Allan is beginning to propound a normative account of ordinary politics that would better suit the general normative thrust of the theory and its ideas of a republican, deliberative politics.[39]

> Members of Parliament must be understood as having as their principal obligation the duty to fight for justice and a coherent conception of the public good, as opposed to being merely, or largely, the servants of their constituents' or their parties' interests, more narrowly interpreted.[40]

Whether or not this tentative re-positioning eventually results in something more tangible, a central aspect of Allan's constitutional theory as it currently stands is that the constitutional politics of the courts ought to be considered the moral superior of

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instance, Hayek 'relies on a theory of procedural justice instead of an assertion of fundamental rights': see Gray, *ibid.*, p. 74; R. Nozick, *Anarchy, State and Utopia* (1974).

[37] On Hayek's thought see, e.g., M. Loughlin, *Public Law and Political Theory*, note 12, above, pp. 84-104; A. Ogus, 'Law and Spontaneous Order: Hayek's Contribution to Legal Theory' (1989) 16 J of L & Soc 393; A. Giddens, *Beyond Left and Right: The Future of Radical Politics* (1994), ch. 1.

[38] This point is explored in detail in ch. 6, below.

[39] Although a Hayekian approach seems to be maintained in *Constitutional Justice*, note 2, above, pp. 34-35.

[40] 'Common Law Constitutionalism', note 15, above, p. 24.

the process of ordinary, legislative politics. In place of John Griffith's idea of the 'political constitution',[41] then, Allan develops a law-centred or juridified conception in which the notion of 'constitutional politics' dominates.[42]

3. Constitutional Politics: The Rule of Law

The rule of law and the common law are intimately connected in Allan's conception of constitutional politics; together, they form the core of Allan's theory. However, for ease of explication, they will be analysed separately. This section analyses Allan's conception of the rule of law and the following section examines his understanding of the common law.

The rule of law provides the dominant intellectual motif of Allan's theory of constitutional politics.[43] (Note that his most recent book is sub-titled *A Liberal Theory of the Rule of Law*.) Allan uses the rule of law as the main basis for establishing a definitively legal basis for constitutional practice: he maintains that his analysis serves to clarify the 'legal foundations of British constitutionalism'.[44]

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[41] J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1.
[42] See further, e.g., M. Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (1996), ch. 9.
[43] On the rule of law in general see, e.g., J. Jowell, 'The Rule of Law Today' in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (4th ed., 2000); Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, note 5, above; M. Oakeshott, 'The Rule of Law' in Oakeshott, *On History and Other Essays* (1983).
[44] The sub-title of Allan's first book, *Law, Liberty, and Justice*, note 4, above.

Allan's analysis begins with Dicey, still the *locus classicus* for British public lawyers, for whom the rule of law was one of two chief pillars of the constitution.[45] He expands Dicey's conception by infusing the doctrine with liberal substance. (Allan argues, in fact, that it is more accurate to understand Dicey as a nascent liberal constitutionalist thinker.[46]) The rule of law, Allan maintains, 'clearly means more than formal legality, in the jejune sense in which government actions must be properly authorized.'[47]

For Allan, the rule of law is a distinctly liberal principle: it is based, he says, 'on the central importance of the individual'[48] and expresses a 'commitment to certain foundational values'[49] of 'individual freedom and responsibility.'[50] He defends a version of the principle that embodies 'a conception of constitutional equality that may be compared to that embraced by Dicey and Hayek, but which does not share their hostility to administrative discretion or governmental interference in economic affairs.'[51] In this respect, he parts company with writers like Raz for whom the doctrine is a principle of formal legality compatible (potentially at least) with any form of political ordering.[52]

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[45] See A.V. Dicey, *Introduction to the Study of The Law of the Constitution* [1885] (ed. E.C.S. Wade, 1959). On Dicey see, e.g., P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990), ch. 2; C. Harlow and R. Rawlings, *Law and Administration* (2nd ed., 1997), pp. 37-47; M. Elliott, *The Constitutional Foundations of Judicial Review* (2001), pp. 44-49; D. Sugarman, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science' (1983) 46 MLR 102; P. McAuslan, 'Dicey and his influence on public law' (1985) PL 721; F. Lawson, 'Dicey Revisited' (1959) 7 Pol Stud 109; R. Errera, 'Dicey and French Administrative Law' (1985) PL 695.

[46] T.R.S. Allan, 'Dworkin and Dicey: The Rule of Law as Integrity' (1988) 8 OJLS 266. See also *Constitutional Justice*, note 2, above, pp. 13-21. Craig, note 45, above, makes a similar argument.

[47] 'Equality and Moral Independence', note 9, above, p. 51.

[48] 'Legislative Sovereignty', note 1, above, p. 134.

[49] *Constitutional Justice*, note 2, above, p. 4.

[50] 'Legislative Sovereignty', note 1, above, p. 134.

[51] *Constitutional Justice*, note 2, above, p. 21.

[52] J. Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195; 'The Politics of the Rule of Law' in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994).

Allan insists that the rule of law is capable of acting as a constitutional or 'juristic principle'[53]: that is, as a *direct* guide to argument and decision-making in the courts. 'As a constitutional principle, [the rule of law] carries the force of law: it operates to direct the reasoning and functions of the courts'.[54]

> The rule of law entails a requirement of equal citizenship, obliging government to justify the distinctions between persons on which it relies; and that obligation is not merely one of political wisdom or expediency, dependent for its efficacy on the vigilance of politicians or the force of public opinion, but has legal force[55]

On this point, Allan regards his conception of the principle as an improvement on the related version propounded by Hayek.[56] Allan argues that Hayek's version is overtly political and, for that reason, incapable of acting juridically. By contrast, his own version 'does not ... embody any particular theory of equal justice' but simply enforces 'a request that government should adhere faithfully and consistently to some coherent conception of justice, however controversial.'[57]

As a matter of constitutional practice, Allan thinks that his conception of the rule of law entails the following:

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[53] 'Legislative Sovereignty', note 1, above, p. 114.
[54] 'Legislative Sovereignty', note 1, above, p. 114.
[55] *Constitutional Justice*, note 2, above, p. 21.
[56] *Law, Legislation and Liberty*, note 32, above, Ch.5. See also Gray, note 35, above, pp. 61-78.
[57] T.R.S. Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 LQR 221, p. 231.

> The rule of law, as a juristic principle, thus embodies the *liberal and individualistic bias* of the common law in favour of the citizen. It transcends the principle of legality by authorising, and demanding, *an attitude of individualism and scepticism on the part of the judges* in the face of claims of governmental power.[58]

A more recent version of this test says that the rule of law requires 'governmental action to be rationally justified *in terms of some conception of the common good*', requiring only faithful and consistent adherence to '*some coherent conception of justice, however controversial.*'[59]

These two versions of the rule of law principle illustrate Allan's attempt to steer a course between what he regards as the failings of rival conceptions of the rule of law. Hayek's version is flawed because it rests upon a narrow, sectarian liberalism, whereas the account Raz offers is disappointingly thin. Allan's version aspires to be both substantive ('liberal and individualistic') and ecumenical between different conceptions of the good ('some conception of justice, however controversial').

It is at least arguable that Allan fails in this attempt. It is possible to think of many conceptions of the common good which, given their starting premises, are perfectly coherent and rational, but do not treat individuals equally and are anything but liberal and individualist. In this vein, we could imagine autocratic conceptions of the state built on the idea of the visionary leader of a people,[60] fundamentalist religious

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[58] 'Legislative Sovereignty', note 1, above, p. 119. (Emphasis added.)
[59] 'Rule of Law as the Rule of Reason', note 57, above, p. 231.
[60] E.g., certain Middle Eastern states – like Iraq – in the present and recent past; the USSR under Stalin, Maoist China and Hitler's German Reich earlier in the twentieth century: see, e.g., K.D. Bracher, *The German Dictatorship* (1973); I. Deutscher, *Stalin* (1963).

states,[61] or polities based on entrenched caste systems.[62] If the rule of law is to be used as a constitutional principle capable of directing judicial decision-making, we must assume that it is capable of ruling out this type of non-liberal system. But, if so, the ecumenical claims Allan makes for his principle are undercut.

We can make best sense of Allan's rule of law if we remove some of the more sweeping ecumenical claims Allan makes on its behalf. This would bring the theory back in line with the natural rights philosophy that underpins it.[63] On this reading, Allan's version of the rule of law may be said to allow any governmental action rationally justifiable in terms of some coherent conception of the common good, so long as it does not infringe the fundamental (liberal) values that underpin society. The weakest version possible of the rule of law, then, given the philosophical roots and general thrust of the theory is this: 'government action is to be justified in terms of some *liberal and individualist conception* of the common good.'

4. The Common Law

The common law is the other central strand within Allan's theory of constitutional politics. The rule of law and the common law are entwined in that the *raison d'être* of both is the protection of fundamental values and rights. Whereas the rule of law

[61] E.g., contemporary Islamic states, like Afghanistan under the Taliban regime and, perhaps, Iran: see, e.g., R. Afshari, *Human Rights in Iran: The Abuse of Cultural Relativism* (2001). Past examples might include Cromwellian England: see, e.g., C. Russell, *The Crisis of Parliaments: English History 1509-1660* (1971), pp. 361-375; C. Hill, *The Century of Revolution 1603-1714* (2nd ed., 1980), pp. 94-165; D.L. Smith, 'The Impact on Government' in J. Morrill (ed.), *The Impact of the English Civil War* (1991).

[62] As used to be the case in the States of the Indian Subcontinent: see, e.g., J. Keay, *India, A History* (2000); M. Hutt, *Nepal in the Nineties: Versions of the Past, Visions of the Future* (2001).

is the dominant intellectual motif in Allan's theory, the common law can be seen as the primary vehicle through which the ends of the theory are to be achieved.

Echoing Edward Coke,[64] Allan takes the common law to be first and foremost 'a body of reason'.[65] The common law courts are the forums within which the public reason that characterises moral argument within Allan's republican conception of politics and society is most consistently to be found. The common law is the medium through which reasoned and principled solutions to social problems are most frequently sought. The positivist account of common law as a body of rules is explicitly rejected, as is the positivist constitutional model based on the idea of law as command of a sovereign.[66] Allan advances instead an account of the common law as 'an evolving body of legal principle'.[67] In Dworkinian fashion,[68] these principles give rise to rights: 'the unimpeded application and development of established rights [represents] the full flowering, so to speak, of existing principles embedded in the common law.'[69]

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[63] See p. 24, above.
[64] Sir Edward Coke (d. 1634), author of the *Institutes*, Solicitor General in 1592, Speaker of the Commons in 1593, attorney general in 1594, Chief Justice of the Common Pleas in 1606: see, e.g., J.P. Kenyon, *The Stuart Constitution 1603-1688: Documents and Commentary* (1966), ch. 3. See further ch. 5, below. Coke is referred to a number of times in Allan's work: see, e.g., 'Rule of Law as the Rule of Reason', note 57, above, p. 242; 'Legislative Supremacy', note 1, above, pp. 132-133; *Constitutional Justice*, note 2, above, p. 34 & 204-208; *Law, Liberty, and Justice*, note 4, above, pp. 267-269.
[65] 'Common Law Constitutionalism', note 15, above, p. 25.
[66] On positivist constitutionalism see, e.g., D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1997), pp. 58-70; Dyzenhaus, 'Positivism's Stagnant Research Programme' (2000) 20 OJLS 703; J. Goldsworthy, *The Sovereignty of Parliament* (1999), Chs. 8 & 10.
[67] 'Fairness, Equality, Rationality', note 8, above, p. 25.
[68] Allan explicitly adopts a Dworkinian method: see 'Dworkin and Dicey', note 46, above. See also, e.g., R. Dworkin, *Taking Rights Seriously* (1977); Dworkin, *Law's Empire* (1986).
[69] 'Constitutional Rights and Common Law', note 4, above, p. 478.

Allan also identifies what he calls the common law's 'foundational role'.[70] The common law, Allan maintains, 'forms the chief source of legal values that together "constitute" the polity'.[71] We have seen that Allan's theory presupposes a moral community that shares certain fundamental values that develop over time as a result of the moral deliberation of that community.[72] Allan regards the common law as the main repository of this accrued wisdom. The common law, he says, is 'ultimately the common morality'[73] which 'reflects the spontaneous order of society'[74] and 'embodies ... the experience and more enduring values of the community'.[75]

> The common law articulates the content of the common good, according to the society's shared values and traditions. The judges are its authoritative exponents because their role is to express the collective understanding[76]

Drawing on Fuller's account of common law adjudication to reinforce the point,[77]Allan argues that the process of decision-making at common law is *inherently* moral. The 'central role accorded the litigant's participation by adjudication, in its traditional common law form, gives the proceedings an intrinsic moral value akin to that of democracy itself.'[78] In fact, by virtue of its innate moral essence, Allan

[70] 'Common Law Constitutionalism', note 15, above, p. 22.
[71] 'Common Law Constitutionalism', note 15, above, p. 21.
[72] See pp. 26-28, above.
[73] 'Common Law Constitutionalism', note 15, above, p. 26.
[74] 'Common Law Constitutionalism', note 15, above, p. 21.
[75] 'Rule of Law as the Rule of Reason', note 57, above, p. 240.
[76] 'Rule of Law as the Rule of Reason', note 57, above, p. 239.
[77] See p. 24, footnote 5, above.
[78] 'Common Law Constitutionalism', note 15, above, p. 30.

suggests that, in many respects, 'the common law is superior to the legislative process as a means of resolving questions of justice.'[79]

To make sense of this claim, we must return to the social and political theoretic aspects of Allan's theory. Allan's premise is that political argument in a society is a species of moral engagement. On this account, the best forum for political decision-making is the one most capable of ensuring a high quality of moral/political debate. The moral and rational qualities Allan identifies as inherent in the process of common law adjudication, then, make the common law court the best forum for many types of political discussion.

Allan's conception of the common law as a body of principle and reason which has a foundational or constitutive role in society by virtue of the accrued fundamental values secreted within it, and which offers the best forum for public reason, is summarised in this passage:

> [T]he common law must serve as a constitutional framework and expression of the community's most important values. It therefore enjoys a superiority to legislation in the sense that a statute must be interpreted consistently with deep-rooted common law principles even when the consequence is some diminution in its efficacy. When an Act of Parliament contradicts "common right and reason", as Coke C.J. expressed it, it must be appropriately "controlled".'[80]

[79] 'Common Law Constitutionalism', note 15, above, p. 22.
[80] 'Rule of Law as the Rule of Reason', note 57, above, pp. 241-242.

5. Public Law

In Allan's theory, constitutional politics is structured around a liberal version of the rule of law principle and the idea that the common law is the primary site for a society's moral deliberation. On this account, public law is to be regarded as a species of 'legal and moral reasoning from general principle'.[81] Moral reasoning, in Allan's scheme, means deliberation about what society's fundamental moral and political values require in particular cases of dispute. To conceive public law argument as a species of moral reasoning implies 'the abandonment of formal rationality and unqualified deference to official value judgments in favour of an appraisal attuned to the moral imperatives discerned.'[82]

The duty of public lawyers, according to this account, is to construct 'a coherent scheme of legal principle which can justify decisions defining the scope of rights and provide a legitimate counterweight, in appropriate contexts, to the outcome of ordinary politics and the exercise of political power.'[83] A public law jurisprudence, constructed in this way, gives rise to a scheme of public law rights: 'The modern law of judicial review may plausibly be interpreted as a scheme for protecting the rights of citizens in public law.'[84]

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[81] 'Constitutional Rights and Common Law', note 4, above, p. 471.
[82] 'Fairness, Equality, Rationality', note 8, above, p. 29.
[83] 'Equality and Moral Independence', note 9, above, p. 76.
[84] 'Dworkin and Dicey', note 46, above, p. 273.

The sort of conception of public law as moral deliberation Allan proposes means a scheme of value-led judicial review.[85] This means, specifically, a change in the focus of judicial inquiry. In traditional English judicial review, courts inquired primarily into the powers of the challenged decision-maker and the decision-making process. In the scheme of judicial review proposed by Allan, the inquiry must concentrate on the seriousness of the fundamental right(s) and value(s) at stake and the seriousness of the infringement.

> The appropriateness of judicial restraint, in any particular case, will be simply a function of the seriousness and apparent cogency of a complainant's objections to administrative action: the more serious, in terms of accepted constitutional rights and legal values, and the more persuasive the complaint of injustice, as presented to the court, the more demanding the court must be of the relevant agency, reluctant to accept anything less than convincing explanation of its decisions on plainly lawful and legitimate grounds.[86]

6. Conclusion

This theory of public law advanced by Allan has been analysed. In section 1, the philosophical and social and political theory underlying Allan's model of public law were examined. It was argued that an essentialist philosophical approach underlies Allan's account. The values Allan identifies as essential or fundamental are dignity, autonomy, and equality. It was also argued that Allan's model rests on an idea of

[85] The notion of value-driven judicial review is developed and criticised in ch. 7, below.
[86] *Constitutional Justice*, note 2, above, p. 10.

society as a community that shares certain fundamental values which are the result of generations of moral deliberation. The political theory underlying Allan's account is republican, based on the idea of deliberative democracy and public reason.

In section 2, Allan's 'dualist' account of the constitution was examined. It was suggested that Allan's constitutional theory rests on a sharp distinction between ordinary politics and constitutional politics. Ordinary politics is the ordinary democratic process, centred on the legislature; constitutional politics is the sphere of politics centred on the common law courts. Allan's conception of ordinary politics was also investigated. In his early work, Allan offered a 'bleak analysis' of the legislative process as tainted and amoral. While his recent work contains some indications of a less intensely sceptical edge, it was argued that the distinction retains the Hayekian connotation that legislation is to be treated with scepticism, while common law is essentially good.

The analysis of Allan's conception of constitutional politics began in section 3, in which his version of the rule of law principle was examined. Allan tries to turn Dicey's principle into a distinctly liberal principle. In so doing, his aim is to steer a path between Raz's account of a principle of formal legality and Hayek's overtly political conception. The success of this attempt was questioned. Allan's principle aims to be both individualist liberal and ecumenical between different conceptions of the good. A modification of Allan's conception, in line with the general thrust of the theory, was offered as a way of rectifying this weakness.

In section 4, Allan's conception of the common law was examined. Allan conceives of the common law first and foremost as a body of reason and principle. He has also identified what he sees as the constitutive or foundational role of the common law. The common law, he maintains, reflects and embodies society's fundamental values. The common law courts also provide, for Allan, the best forum of public reason.

In section 5, the implications of this constitutional theory for public law were investigated. Allan sees public law as a species of moral reasoning. Judicial review ought to be value-driven, oriented towards fundamental values and rights. It was suggested that this would involve a change in focus from the traditional examination of powers and processes to an examination of the seriousness of infringements to public law rights.

Chapter 2

Sir John Laws: The Good Constitution and the Courts

Introduction

Sir John Laws is a distinguished Court of Appeal judge. During the course of the last decade, he has written a number of articles on aspects of public law. The compass of the argument contained in these articles is broad, ranging from moral philosophy and constitutional theory to concentrated analyses of doctrines and principles of judicial review.

This chapter seeks to construct a coherent theory from Laws' work. There is no doubt that this body of work is of sufficient academic rigour to merit serious study. Laws advances a bold and highly individual account of his subject. Nonetheless, inconsistencies are present in Laws' arguments to a degree not present in the work of Allan. These inconsistencies must be ironed out so that the strongest account of Laws' theoretical position can be found.

The chapter begins in section 1 with an account of what Laws' calls the search for the good constitution. Section 2 traces the implications of Laws' version of the good constitution for constitutional theory. Laws' notion of a 'higher order' of judge-made law and the crucial distinction he deploys between 'positive' and 'negative'

rights are analysed in section 3. Finally, section 4 investigates the consequences of Laws' constitutional theory for public law.

1. The Good Constitution

Sir John Laws' approach is resolutely philosophical. Following Aristotelian precedents,[1] Laws defines his task as a search for 'the good constitution'.[2] He starts by articulating what the good constitution is not. It is not, Laws says, characterised by great results: while Augustan Rome was undoubtedly a great civilisation, it does not exemplify the good constitution. The goodness of a constitution does not equate with material well-being; nor is it synonymous with democracy, which can be capable of 'suppressing minorities and perpetrating injustices'.[3]

To begin with an analysis of politics or power, Laws maintains, would be to put the cart before the horse. Since constitutions exist for the benefit of man, the primary task must be to identify man's essential needs or requirements. 'The law of a modern state – not least its constitutional law – has to nourish and protect its citizens' essential characteristics'.[4] The search for the good constitution, then, is nothing less than an exercise in moral philosophy: it involves thinking about how people in society ought to live.

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[1] Aristotle, *The Politics* (trans. T.A. Sinclair, 1981), Book III; Plato, *The Republic* (trans. D. Lee, 1953). See also, e.g., R. Polin, *Plato and Aristotle on Constitutionalism* (1998); F. Peonidis, 'The Relation between the *Nichomachean Ethics* and the *Politics* Revisited' (2001) 22 Hist of Pol Thought 1.

[2] Sir J. Laws, 'The Constitution: Morals and Rights' (1996) PL 622, p. 623.

[3] 'Constitution: Morals and Rights', note 2, above, p. 623.

What does essentialist moral philosophy tell us about the nature of man? Laws articulates one basic, very general idea about the human constitution: individual autonomy. He refers to 'man's essential moral nature', and his 'nature as an autonomous being'.[5] Autonomy stands as the central feature of Laws' theory: it is the ordering principle and *leitmotif* of his constitutional and political thought. Everything else in the theory – rights, democracy, judicial review – radiates from it. 'The true starting-point in the quest for the good constitution consists in ... the autonomy of every individual, in his sovereignty.'[6]

Laws defines autonomy in the following way:

> [Autonomy] is reflected, but not defined, in modern liberal thinking which excoriates discrimination. It is the ideal which drives all post-war international human rights texts. It is expressed in the well-known Kantian perception that the individual is an end in himself, never a means.[7]

Autonomy, on this reading, is the essence of what it means to be human. Why is this so? 'I think it arises from three factors: [man's] power of reason, his possession of free will, and the fact that he lives in society with others of his kind.'[8] This position is not further elaborated; Laws does not articulate fully what he means by autonomy nor does he systematically defend the paramount status he accords that idea at any stage in his analysis. He attempts to excuse this omission on the ground

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[4] 'Constitution: Morals and Rights', note 2, above, p. 623.
[5] 'Constitution: Morals and Rights', note 2, above, p. 623.
[6] 'Constitution: Morals and Rights', note 2, above, p. 623.
[7] 'Constitution: Morals and Rights', note 2, above, p. 623.
[8] 'Constitution: Morals and Rights', note 2, above, p. 624.

that there is no need to provide a rigorous philosophical exegesis of the notion of autonomy since his main concern is to advance a theory of public law. (Although it could be argued to the contrary that a more developed account of autonomy seems essential given the importance attached to that notion in Laws' theory.[9])

Laws does, however, allude to a core of Kantian ideas that underpin his theory. He refers to a version of Kant's categorical imperative on a number of occasions.[10] These references serve two main purposes. First, Kant's name, in this context, stands for a philosophical position in which the primacy of the individual is central. Second, references to Kant denote a particular understanding of freedom. Kantian individuals are rational, moral beings; Kantian freedom is individual moral freedom.[11]

To summarise the findings of this section of the chapter, Laws defines his task in Aristotelian terms as a search for the good constitution. The good constitution is to

[9] On autonomy see, e.g., J. Raz, *The Morality of Freedom* (1986), chs. 14 & 15; J. Habermas, *Between Facts and Norms* (1992), ch. 3; S. Fish, *The Trouble with Principle* (1999), pp. 50-51; H. Arendt, *The Human Condition* (1958); J. Searle, *Mind, Language and Society: Philosophy in the Real World* (1999).

[10] 'Constitution: Morals and Rights, note 2, above, p. 623. See also Sir John Laws, 'Wednesbury' in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (1998), 185, p. 190; Laws, 'Public Law and Employment Law: Abuse of Power' (1997) PL 455, p. 465.

[11] I. Kant, *Groundwork of the Metaphysics of Morals* [1785] (ed. M. Gregor, 1997); Kant, 'On the Common Saying 'This may be true in theory, but it does not apply in practice'' [1793] in H. Reiss (ed.), *Kant: Political Writings* (2nd ed., 1991). On Kant see, e.g., J.B. Schneewind, 'Autonomy, obligation, and virtue: An overview of Kant's political philosophy' in P. Guyer (ed.), *The Cambridge Companion to Kant* (1992); J. Murphy, *Kant: The Philosophy of Rights* (1970); H. Williams, *Kant's Political Philosophy* (1983); J. Finnis, 'Legal Enforcement of 'Duties to Oneself': Kant v Neo-Kantians' (1987) 87 Col LR 433; D. Richards, 'Kantian Ethics and the Harm Principle: A Reply to John Finnis' (1987) 87 Col LR 457; E.J. Weinrib, 'Law as a Kantian Idea of Reason' (1987) 87 Col LR 472; C. Douzinas, *The End of Human Rights: Critical Legal Thought at the End of the Century* (2000), ch. 8; G. Buchdahl, *Kant and the Dynamics of Reason* (1992).

be discovered by reflection on the essence of man. Laws relies on the Kantian insight that a core of moral autonomy is the essence of what it is to be human.

2. Three Consequences of Autonomy: Democracy, Rights, and Law

(a) Autonomy and Politics

Having established a philosophical platform, the next stage of Laws' argument is to articulate the implications of the good constitution. Laws maintains that a number of constitutional requirements are generated if we translate the Kantian ideal into 'real-world' conditions. Autonomy requires, first, that politics within the good constitution are democratic. 'A people's aspiration to democracy and the imperative of individual freedoms go hand in hand.'[12] Democracy is the best form of politics, on this account, because it is the politics that best respects individual autonomy: by according citizens an equal voice in the law-making process, it presupposes that people are of equal worth. Laws is at pains to emphasise the *derivative* nature of democracy, noting that the ideals of the good constitution, he says, 'are logically prior to democracy.'[13]

[12] Sir J. Laws, 'Law and Democracy' (1995) PL 72, p. 85.
[13] 'Constitution: Morals and Rights', note 2, above, p. 613. See also Laws, 'Judicial Remedies and the Constitution' (1994) 57 MLR 213, p. 223.

(b) Autonomy and Rights

A second consequence of translating the good constitution into real-world conditions is the requirement that a matrix of rights should be developed in order to protect individual autonomy from wrongful interference. Autonomy, Laws says, 'gives rise to rights'.[14] The connection is explained in the following way. In a perfect society – a garden of Eden – rights would be unnecessary since no-one would ever interfere unduly with anyone else. But, in the real world, rights stand as a necessary 'antibiotic against [a society's] moral ill-health'.[15] Rights, in Laws' scheme, form a necessary bridge between morality in the abstract and social practice. They give morality its hard, practical edge in an imperfect world in which people sometimes forget their moral duty to respect the autonomy of others: 'a right falls to be asserted when and because someone else – or it may be the state – trespasses on one's autonomy'.[16]

Laws argues that the paramount moral status of autonomy means that rights cannot be regarded as fundamental. Autonomy 'cannot be unpacked or defined purely in terms of rights'.[17] Rights are, rather, 'a *consequence* of man's shared morality'.[18] Like democracy, they have what Laws calls a 'secondary nature'.[19] He then goes on

[14] 'Constitution: Morals and Rights', note 2, above, p. 624. See also 'Law and Democracy', note 12, above, p. 81.
[15] 'Constitution: Morals and Rights', note 2, above, p. 626. See also 'Public Law and Employment Law', note 10, above, p. 457.
[16] 'Constitution: Morals and Rights', note 2, above, p. 627.
[17] 'Constitution: Morals and Rights', note 2, above, p. 625.
[18] 'Constitution: Morals and Rights', note 2, above, p. 623. (Emphasis added.)
[19] Sir John Laws, 'The Limitations of Human Rights' (1998) PL 254, p. 259.

to reject a rights-based society and the idea that 'the very nature of morality is ... a function of rights.'[20] On the contrary, he says:

> A society whose values are defined by reference to individual rights is by that very fact already impoverished. Its culture says nothing about individual duty – nothing about *virtue*. We speak of respect for other people's rights. But, crudely at least, this comes more and more to mean only that we should accept that what someone wants to do, he should be allowed to do.[21]

It might be suggested that this argument is difficult to square with the root philosophical premises of Laws' theory. Individual autonomy is the only notion articulated within Laws' moral philosophy. Although that notion is left undefined and unelaborated, the way Laws uses it seems to imply, (a) that an individual has the innate capacity to chose what is good for himself or herself, and (b) that (the preservation of) this capacity is essential to the individual's flourishing.

A logical consequence of this position is a moral injunction not to interfere with the individual's innate capacity to choose his or her own way of flourishing: precisely that 'we should accept that what someone wants to do, he should be allowed to do it'. (As long as what the individual wishes to do does not interfere with another's autonomy.) Given that Laws himself translates the moral injunction demanded by autonomy into the language of rights (albeit reluctantly), and that he provides no concepts other than autonomy at the philosophical level, his position at this point

[20] 'Limitations of Human Rights', note 19, above, p. 255.
[21] 'Limitations of Human Rights', note 19, above, p. 255. (Emphasis of original.)

seems contradictory. The conclusion of this digression is that we should ignore or at least relegate some of the more forthright attacks Laws makes on the idea of a rights-based society since such a society seems to be precisely what his autonomy-based constitutional theory seems to entail.

(c) Autonomy, Law, and the Courts

There is a third consequence of Laws' good constitution for constitutional practice. Just as translating the notion of autonomy into real-world conditions generates a demand for rights, it also gives rise to the need for law: 'The law is bound to speak the language of rights. The need for rights is an aspect of the need for law.'[22] Since the purpose of rights is to provide a defence against activity inimical to individual autonomy, a viable system for the protection of such rights requires an institution capable of enforcing them against the powerful, especially the government.

Laws maintains that law and the courts are ideal agents for assuming this role. Democratic political institutions cannot alone be trusted to respect autonomy since it is their function to decide upon and implement policies which further particular ends, a process whose results may well be antithetical to individual autonomy.

> Logically, it is a matter of great fortune, and not of necessity, that Parliament does good things. This is a function of the very fact, and the heavy burden, of its absolute power. Its power being absolute, it is of necessity morally neutral, for it is

> a condition of any morality that the actor in question recognises limits on what he may do.[23]

Laws reinforces his point with a look at the parliamentary process in the United Kingdom.[24] The 'real power of Parliament', Laws observes, 'rests in the House of Commons, which, for most of the time, is manned by a majority which will support the governing party – the Executive – on major issues.'[25] As a result, Laws argues, Parliament is 'too weak to vindicate to the just satisfaction of the citizen its historic power to control the Executive in the name of the people.'[26] The rather bleak conclusion drawn from this analysis is that 'the Executive enjoys great autocratic power' in contemporary Britain.[27]

The common law, however, stands in stark contrast. 'The starting-point is to recognize that whereas reasonableness is a *defining* function of the common law, it is no more than an *adventitious* function of legislation.'[28] Although the courts also wield considerable power, they are unique in that they 'have no programme, no mandate, no popular vote',[29] and are, as such, in a position to prioritise autonomy in their decision-making. In fact, not only are the courts capable of giving precedence to autonomy, they have a *duty* to do so. The absence of any electoral support means that the court must establish a moral foundation from which to justify its power. Its decisions are only justifiable as long as they are *good* decisions. Decisions are good,

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[22] 'Constitution: Morals and Rights', note 2, above, p. 626.
[23] 'Public Law and Employment Law', note 10, above, p. 455.
[24] Compare Allan's 'bleak analysis' of legislative (or ordinary) politics: ch. 1, above, p. 45.
[25] 'Law and Democracy', note 12, above, p. 91.
[26] 'Judicial Remedies and the Constitution', note 13, above, p. 223.
[27] 'Law and Democracy', note 12, above, p. 92.
[28] 'Wednesbury', note 10, above, p. 199. (Emphasis of original.)

Laws assumes, if they further the ends of autonomy. Courts, then, are necessarily moral institutions: they have 'no choice but to translate Kant's imperative into legal principle',[30] because their ability to make decisions at all rests on their doing so.

> [The courts'] duty is to defend for the present, and articulate into the future, those principles of a free society which are logically prior to the policies of elected government.[31]

The purpose of (common) law, then, is to protect individual autonomy in the context of an imperfect world. 'The law of a modern state – not least its constitutional law – has to nourish and promote its citizens' essential characteristics'.[32] Like Allan, Laws defends a substantive conception of the rule of law. To operate a formalist legal version of the principle would be to allow the courts to derogate from their duty to protect autonomy. It is not sufficient in all cases for the court merely to ensure that the commands of the legislature are faithfully respected since the parliamentary process, as we have seen, is at best 'morally neutral' as it can be co-opted by an autocratic Executive.

While the defence of individual autonomy against state interference represents a crucial dimension of the courts' operations, Laws is clear that the duty to protect freedom extends beyond the task of scrutinising governmental activity. Law is concerned with *all* abuses of power: 'The blood of the common law is the just

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[29] 'Wednesbury', note 10, above, p. 201.
[30] 'Wednesbury', note 10, above, p. 192.
[31] 'Wednesbury', note 10, above, p. 201.

distribution of power within relationships between man and man, between citizen and the state.'[33] However, in light of the aims of this thesis,[34] the examination of the implications of Laws' theory need not extend beyond the confines of public law.

3. Higher-Order Law: the Distinction between Positive and Negative Rights

Like Allan, Laws advances a dualist account of the constitution in order to explain the relationship between the courts and the legislature.[35] The first order of law comprises rules, typically in the form of statutes, which emanate from a democratically elected Parliament. Since these rules, on Laws' account, are the manifestations of political power, designed to further the welfare of particular interest groups, law-making within this first order is to be regarded as morally neutral at best.

The second order of law is composed of principles developed incrementally by the courts. These principles are designed to protect the individual and are enforced by striking down governmental (and other) decisions and actions that threaten his or her autonomy.

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[32] 'Constitution: Morals and Rights', note 2, above, p. 623. See also Lord Justice Laws, 'From Homer to Socrates – The Rule of Law in Greek Literature' (The Howard Memoral Lecture, given at the Law Faculty, Oxford, 16 May 2002: http://www.lcd.gov.uk/judicial/speeches/ljlaws160502.htm).
[33] 'Public Law and Employment Law', note 10, above, p. 455.
[34] See Introduction, above, p. 14.

This second order of law, Laws maintains, equates with the moral law. Its *necessary* connection with the cardinal principle of autonomy means that it can justifiably be regarded as a 'higher-order of law to which even Parliament is subject'.[36] ('Higher', in this context, means both morally and constitutionally superior.) Even democrats, Laws argues, are obliged 'on pain of contradiction' to accept this because, in the final analysis, the same overriding value of individual autonomy also underpins and justifies democracy. 'Basic rights', he says, have 'logical priority over democratic institutions'.[37]

On Laws' account, the dualist perspective leads to the conclusion that, in terms of constitutional hierarchy, it is the constitution and not the legislature that is sovereign.[38] Since the judges are perforce the ultimate interpreters of a higher order of moral/constitutional law, it is they who have the final say on whether or not some decision or act is constitutional. And, because judge-made law is both morally and constitutionally superior to legislation, it means that the precise 'nature of the relationship between courts, government, and Parliament ... is, in the end, a creature of the Judges and of no other body.'[39]As a result, Laws concludes, 'the

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[35] See ch. 1, above, p. 44.
[36] 'Law and Democracy', note 12, above, pp. 84-89.
[37] 'Judicial Remedies and the Constitution', note 13, above, p. 226.
[38] 'Law and Democracy', note 12, above, p. 92. The supremacy of judge-made constitutional law is a first principle of constitutional law in the United States: see e.g., *Marbury* v *Madison* 2 L Ed. 60 (1803); J. Madison, A. Hamilton and J. Jay, *The Federalist* [1788] (ed. W. R. Brock, 1992), No. 78; H.J. Abraham and B.A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (7th ed., 1998), B. Schwartz, *A History of the Supreme Court* (1993), ch. 2; R. Dworkin, 'Introduction: The Moral Reading and the Majoritarian Premise' in Dworkin, *Freedom's Law* (1996); D.A.J. Richards, *Foundations of American Constitutionalism* (1989); L.H. LaRue, 'Neither Force nor Will' in W.N. Eskridge and S. Levinson (eds.), *Constitutional Stupidities, Constitutional Tragedies* (1998).
[39] Sir J. Laws, 'Illegality: The problem of jurisdiction' in M. Supperstone and J. Goudie, *Judicial Review* (1992), 51, p. 65.

superior courts in England ... have, in the final analysis, the power they say they have.'[40]

This conception of the relationship between ordinary and constitutional politics is expressed analytically by Laws in terms of a distinction between negative and positive rights. Negative rights, the staple of constitutional politics, derive directly from autonomy. Their function is to provide means of checking activity inimical to fundamental values. They defend particular aspects of an individual's autonomy, setting a 'minimum standard for the relationship between ruler and ruled.'[41] Developed incrementally by the courts, negative (or constitutional[42]) rights reflect the deep-rooted moral/political values of the community. The court, and not the legislature, is supreme when it comes to deciding questions involving negative rights, as they are products of judge-made higher law.

> Man's moral nature ... requires the institution in the state of basic principles which will ... tend to be expressed in the language of rights. ... Such principles are not matters of policy. They are logically prior to the institution of democratic government. The constitutional role of the courts is to act as their guardians.[43]

[40] 'Illegality', note 39, above, p. 51.
[41] 'Constitution: Morals and Rights', note 2, above, p. 629.
[42] See e.g., Sir J. Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1993) PL 59.
[43] 'Constitution: Morals and Rights', note 2, above, p. 629. See also 'Public Law and Employment Law', note 10, above, p. 457: 'Negative rights, accordingly, are constitutional rights and lie primarily in the keeping of the courts.'

Positive rights, on the other hand, are rights 'to enjoy the maximum, or at least a reasonable, chance of self-fulfilment'.[44] They are rights to certain benefits, the result of democratic choices made about 'education, health, defence, and many other goals' in relation to which 'honourable people' may 'honestly and (save at extremes) reasonably differ'.[45] Whereas negative rights set a minimum standard, positive rights form 'the class of rights which involves various and competing ideals of self-fulfilment - the morality of aspiration'.[46] These rights do not form part of the higher order of constitutional law because they do not 'flow from an actual or threatened assault on the individual's autonomy.'[47] Accordingly, positive rights originate in the legislature and are products of the ordinary political process: 'the stuff of political debate'.[48] And, in relation to these rights, 'Parliament is necessarily and rightly supreme.'[49]

Laws recognises that, in practice, negative and positive rights will come into conflict. But he insists that this poses no real threat to his analysis. Laws offers two ways of resolving such conflict. First, if there is a 'moral consensus' about the matter in dispute, it is up to the courts to decide whether the positive right under challenge is too invasive of the negative right in question. If, on the other hand, there is no consensus, it will 'generally be for Parliament to set the appropriate rule'. Alternatively, Laws suggests that, in any case, a 'grasp of the true moral basis

[44] 'Constitution: Morals and Rights', note 2, above, p. 628.
[45] 'Public Law and Employment Law', note 10, above, p. 457.
[46] 'Public Law and Employment Law', note 10, above, p. 457. See L.L. Fuller, *The Morality of Law* (1965).
[47] 'Constitution: Morals and Rights', note 2, above, p. 628.
[48] 'Constitution: Morals and Rights', note 2, above, p. 629.
[49] 'Constitution: Morals and Rights', note 2, above, p. 629.

of negative rights will itself determine the necessary reach in most cases'.[50] This analysis will be examined in detail in chapter 4.

4. Public Law

Laws' constitutional theory charges the courts with the task of defending negative rights, through the application of principles of higher-order law, against any action which threatens them. Public law - that part of the court's business which examines governmental decisions - is particularly important in this regard: since the agencies of the state have considerable power, they have considerable opportunity to abuse it.

The obligation on judges to preserve individual autonomy in the face of those who wield governmental power is the central feature of Laws' theory of public law. The 'starting point for an appreciation of the judicial review jurisdiction', Laws maintains, is the proposition that 'the court's general authority is to decide for itself when and upon what grounds it will review.'[51] He rejects the suggestion that the *ultra vires* principle can either explain or act as a conceptual basis for the law of judicial review.[52] Judicial review principles, Laws says,

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[50] 'Constitution: Morals and Rights', note 2, above, p. 633.
[51] 'Illegality', note 39, above, p. 68.
[52] See, e.g., H.W.R. Wade and C. Forsyth, *Adminsitrative Law* (2000), Ch. 1; C.F. Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122; M. Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting' (1999) 58 CLJ 129; Elliott, *The Constitutional Foundations of Judicial Review* (2001); A. Halpin, 'The Theoretical Controversy Concerning Judicial Review' (2001) 64 MLR 500; N.W. Barber, 'The Academic Mythologians' (2001) 21 OJLS 369. An *ultra vires* model of public law is deployed in chs. 8 & 9, below.

> are, categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins. We do not need the fig-leaf any more.[53]

Laws suggests an alternative foundational principle for public law that is more attuned to the imperatives identified by his constitutional theory. In line with the overarching duty of courts to 'protect the individual from the effects of arbitrary power', the principle advanced by Laws is that 'the common law will not permit abuse of power.'[54] Laws claims that this principle is capable of forming the basis for both judicial review and 'all those private law doctrines where public policy has been held to restrain one man's hold over another.'[55] Laws calls this the *principle of reasonableness* and suggests that, being the juridical product of ideas of freedom and justice contained in Kant's categorical imperative, it is 'necessary to clothe our public law with any moral force'.[56]

Laws argues that the principles of public law can be regarded as 'apolitical'.[57] Courts, he says, are under an obligation

> to protect values which no democratic politician could honestly contest: values which, therefore, can best be described as apolitical, since they stand altogether above the rancorous but vital dissensions of party politicians.[58]

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[53] 'Law and Democracy', note 12, above, p. 79.
[54] 'Public Law and Employment Law', note 10, above, p. 464.
[55] 'Public Law and Employment Law', note 10, above, p. 464.
[56] 'Wednesbury', note 10, above, pp. 190-194.
[57] 'Constitution: Morals and Rights', note 2, above, p. 628.

Laws is not being naïve here. He is not unaware of the inescapably political nature of many public law cases: 'you cannot construct a litany of the subject matter of judicial review without being struck by the fact that time and again it engages questions upon whose merits politicians (and others) are in rancorous disagreement.'[59] Laws acknowledges that, in one sense, public law principles are political since they are not morally neutral but are prescriptions 'about how powerful people ought to behave.'[60] He points out, however, that when we call public law principles 'political' we mean something different from when we talk about democratic debate being 'political'. Public law principles are juridical representations of political ideals - they 'constitute ethical ideals as to the virtuous conduct of the state's affairs'[61] - and, although political in a *broad* sense, they stand outside and above the course of ordinary political debate, being axioms on which that debate rests.

But what does this understanding of public law as a form of higher law designed to enforce autonomy-protecting rights against governmental action – judicial review as 'apolitical politics' - entail at the level of legal doctrine? Laws suggests that his theory generates the following general test:

[58] 'Law and Democracy', note 12, above, p. 93.
[59] 'Law and Democracy', note 12, above, p. 74.
[60] 'Law and Democracy', note 12, above, p. 79.
[61] 'Law and Democracy', note 12, above, p. 80.

> [T]he greater the intrusion proposed by a body possessing public power over the citizen into an area where his fundamental rights are at stake, the greater must be the justification which the public authority must demonstrate.[62]

The test dictates that the concerns of ordinary politics must give way to the demands of the higher law, and the public law principles that law entails, when rights protective of autonomy are at stake. Laws says that there ought 'certainly [to be] no judicial self-restraint on the ground only that the subject-matter is politically controversial.'[63] This rejection of deference is a natural consequence of Laws' dualist theory of the constitution which emphasises the derivative or ancillary status of democratic politics and which equates public law with the moral law.

Laws' theory also has implications for specific areas of judicial review. He has argued, for instance, that courts ought generally to require decision-makers to give reasons for adverse decisions: 'a *reasonable* decision must also be a *reasoned* decision.'[64] He has also said that the proportionality test[65] ought to be recognised as a distinct concept and formally added to the court's arsenal of principles of review:

> [I]f we are to entertain a form of review in which fundamental rights are to enjoy the court's distinct protection, the very exercise consists in an insistence that the decision-maker is not free to order his priorities as he chooses ...; an insistence that

[62] 'Is the High Court?', note 42, above, p. 69.
[63] 'Law and Democracy', note 12, above, p. 76.
[64] Sir J. Laws, 'A Duty to Give Reasons', Keynote Speech at the 2 Hare Courts/IBC Seminar, 25 September 1992, p.2.
[65] On proportionality see, e.g., *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696; R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (2000), chs. 4 & 5; J. Jowell and A. Lester, 'Proportionality: Neither Novel Nor Dangerous' in J. Jowell and D. Oliver

> he accord the first priority to the right in question unless he can show substantial, objective, public justification for overriding it. Proportionality is surely the means of doing this.[66]

The theory of public law outlined by Laws has significant implications for the *Wednesbury* principle[67] and the review of the substantive merits of governmental decisions. He argues that, although the wording of *Wednesbury* might imply a monolithic application of the test of unreasonableness, the courts 'have to a considerable extent in recent years adopted variable standards of review.'[68] (In support of this claim, he cites the dicta of Lord Bridge in *Bugdaycay*[69] and *Brind*,[70] the analysis of Sir Thomas Bingham MR in *ex p Smith*,[71] and the *Nottinghamshire County Council*[72] and *Hammersmith LBC*[73] cases.[74]) Laws supports the variable application of *Wednesbury*, arguing that a more flexible approach reflects the doctrine's status as a key aspect of the principle of reasonableness which, on his account, is the doctrinal core of public law. The variable nature of the application of the *Wednesbury* doctrine is simply a function of the sensitivity of the principle of reasonableness to the moral consequences of decision-making: 'the context in which

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(eds.), *New Directions in Judicial Review* (1989); S. Boyron, 'Proportionality in English Administrative Law: A Faulty Translation?' (1992) 12 OJLS 237.

[66] 'Is the High Court?', note 42, above, pp. 73-74. See also Sir J. Laws, 'English and Community Law: Uniformity of Principle' (1994) The European Advocate 433.

[67] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

[68] 'Wednesbury', note 10, above, p. 187.

[69] *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514, p. 531.

[70] *Ex p Brind*, note 72, above, p. 748-749.

[71] *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257, p. 262.

[72] *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240.

[73] *R v Secretary of State for the Environment, ex p Hammersmith London Borough Council* [1991] 1 AC 521.

[74] On variable standards of the *Wednesbury* principle, see further J. Jowell and A. Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' (1987) PL 369; M. Hunt, *Using Human Rights Law in English Courts* (1997); M. Fordham and T. de la Mere, 'Anxious Scrutiny, the Principle of Legality and the Human Rights Act' (2000) 5 JR 40.

public power is exercised may bite more, or less, upon essential individual liberties or rights.'[75]

5. Conclusion

Laws' theory began with the search for the good constitution. Laws argued that the good constitution is to be identified through reflection on the essential qualities of man. Accordingly, Laws grounds his theory on Kant's notion of individual moral autonomy.

Laws derived a constitutional theory by translating these abstract, philosophical ideals to fit the imperfect conditions of the real world. Rights (of the negative, autonomy-protecting sort) and (common) law, Laws said, spring directly from a consideration of what autonomy requires for protection in the real world. (Although Laws emphasises that autonomy cannot be reduced to rights: rights exist in a fallen world, and are as such but pale shadows of a perfect moral ideal.) A democratic system of politics is also necessary (but not sufficient) to protect autonomy in real-world conditions. Laws insists that democracy has only a secondary or derivative status: that is, it is not good in and for itself, but because it is the best known political system for ensuring respect for autonomy.

Laws encapsulates his constitutional theory analytically in terms of a distinction between positive and negative rights. Positive rights, which are, generally, rights to

[75] 'Wednesbury', note 10, above, p. 192.

benefits, such as welfare entitlements, are the products of democratic politics. In relation to these rights, the legislature is sovereign. Negative (or constitutional) rights, being more direct manifestations of autonomy, are the products of a higher-order of law-making, centred on the courts. These rights are the constitutional responsibility of the courts: the courts, and not Parliament, have the final say in relation to these rights.

This constitutional theory gives rise to a particular conception of public law. Courts, on Laws' account, are under a moral and constitutional duty to protect autonomy from inimical governmental activity. This is recognised by the foundational principle for public law (and some areas of private law) advanced by Laws that 'the common law will not permit abuse of power'. Laws calls this principle a principle of reasonableness. It is a juridical translation of ideas of freedom and justice that reflect Kant's categorical imperative. Despite being political ideals, public law principles are apolitical in the sense that they are not open to democratic debate. Rather, they are the principles on which that very debate rests.

More concretely, Laws argues that the test to be applied in cases of judicial review ought to be that the greater intrusion to the individual's fundamental rights, the greater the justification required for the challenged decision or action. Courts thus operate a form of 'benign bias' in their public law jurisprudence.[76] In applying this test, judicial restraint or deference is rejected. Judges are applying a higher-order,

[76] 'Public Law and Employment Law', note 10, above, p. 465.

moral law over areas of legal decision-making which are both morally and constitutionally inferior.

More concretely still, Law argues that courts generally ought to require decision-makers to give reasons for their decisions. He also argues that courts should recognise and apply the proportionality principle as a distinct principle of review. The *Wednesbury* principle is reconceived as an important aspect of the governing principle of reasonableness. The differential approach to *Wednesbury* as identified in the courts' jurisprudence is, for Laws, an illustration of the way in which common law reasonableness varies according to the moral context of disputes.

Chapter 3

Dawn Oliver: Common Values, Communitarian Citizenship, and the Common Law

Introduction

This chapter examines the work of Dawn Oliver. Oliver is a significant and influential figure within contemporary public law scholarship. Her work has tended to focus in on the effect of changes in public management on public law[1] and the issue of the public law/private law divide.[2] By reflecting on these matters, Oliver has produced an original and thought-provoking theory of public law. While her theory does connect in significant ways to the theories of public law advanced by Allan and Laws analysed in chapters 1 and 2, it does differ from them in certain important respects. The precise nature of these similarities and differences will be examined in the following chapter.

One significant difference needs to be addressed at this point. Oliver's theory centres on the idea of values rather than rights. Given this, the question arises as to whether Oliver's theory fits within the analytical frame of the thesis.[3] It is suggested, however, that the similarities between Oliver's account and the theories

[1] See, e.g., D.Oliver and G. Drewry, *Public Service Reforms: Issues of Accountability and Public Law* (1996); Oliver, 'Judicial Review and the Shorthandwriters' (1993) PL 214.
[2] See, e.g., D. Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act' (2000) PL 476.

advanced by Allan and Laws – in particular, a similar 'idealist' conception of the common law and a set of very similar prescriptions for public law - are such that differences can legitimately be treated as familial disputes amongst disciples of the same school.

Another preliminary point must be made here. Much of Oliver's theory concentrates upon the question of the public/private divide. As indicated in the Introduction, discussion is restricted in this thesis to public law and avoids the public/private divide question.[4] Leaving such an important dimension of Oliver's theory out of consideration means that the analysis provided in this chapter cannot be regarded as a complete examination of Oliver's work. It should be seen instead as a complete examination of the elements of public law theory contained in Oliver's work that are pertinent to the aims of the thesis.

The structure of the chapter is as follows. Section 1 examines the theoretical premises of Oliver's theory of public law. It investigates in particular the author's analysis of four different conceptions of citizenship and the constitution. Section 2 comprises an examination of the five common values that form the core of Oliver's theory of public law. Section 3 delves deeper into the nature of these common values, examining, first, the relationship between values and rights, and, second, Oliver's analysis of conflicts between values. Section 4 assesses the implications of Oliver's common values theory for public law.

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[3] See Introduction, above.
[4] See Introduction, above, p. 14.

1. Theories of Public Law and Citizenship

In her recent book, *Common Values and the Public-Private Divide*,[5] Oliver outlines four competing theories of the constitution.[6] She maintains that all these theories are reflected in our public law jurisprudence. The first theory, which Oliver calls *positivist authoritarianism*, is a non-democratic theory of diminishing relevance. In former times, this strand of thought 'found expression in the very considerable common law prerogatives at the disposal of the monarch.'[7] Positivist authoritarianism is still reflected in the remaining royal prerogatives,[8] and is also to 'be found operating in the present system where the courts refuse to impose duties of, for instance, fairness and rationality, on decision making on grounds that to intervene would be to undermine the authority of the decision maker.'[9]

The second strand of constitutional thought identified by Oliver, *liberal majoritarianism*, 'generally entails, on the one hand ... that Parliament's consent is required for legislation, and on the other hand, that any legislation passed by Parliament must be given effect by the courts.'[10] Oliver connects this strand to the *ultra vires* doctrine.[11] In the courts, liberal-majoritarianism is applied when 'the

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[5] D. Oliver, *Common Values and the Public-Private Divide* (London: 1999). See also T. Poole, 'Review of Dawn Oliver, *Common Values and the Public-Private Divide*' (2000) 63 MLR 629

[6] See also D. Oliver, 'The Underlying Values of Public and Private Law' in M. Taggart (ed.), *The Province of Administrative Law* (1998); Oliver, 'What is Happening to the Relations between the Citizen and the State?' in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (3rd ed., 1994).

[7] *Common Values*, note 5, above, p. 2.

[8] *Common Values*, note 5, above, p. 3.

[9] *Common Values*, note 5, above, p. 3.

[10] *Common Values*, note 5, above, p. 4.

[11] See, e.g., D. Oliver, 'Is the Ultra Vires Doctrine the Basis of Judicial Review?' (1987) PL 543; H.W.R. Wade and C. Forsyth, *Administrative Law* (8th ed., 2000), Ch. 1; C.F. Forsyth, 'Of Fig Leaves

doctrine of legislative intent is taken both to justify actions or decisions taken under statutory authority, and to justify the courts imposing duties of, broadly, procedural fairness and rationality in the exercise of statutory discretions'.[12] On the other hand, liberal majoritarian theory 'is said to make it illegitimate for the courts to impose any kind of restraint on those exercising statutory powers such as ministers and local authorities, even by requiring that they conform to the requirements of procedural propriety or reasonableness in their decision making.'[13]

Considerate altruism is the third strand of constitutional thought identified by Oliver. According to this theory,

> public bodies have no rights or interests of their own and must exercise their powers altruistically, and for the general good. They are also under responsibilities - duties of consideration - towards individuals affected by their decisions. These are not only responsibilities to hear them and take their interests into account before exercising a discretion, but also duties to act considerately towards them, to place their interests in the balance, not to act 'unreasonably' or arbitrarily or capriciously.[14]

The fourth strand of constitutional thought outlined by Oliver is *participative communitarianism*. This theory holds that 'individuals - and groups - affected by

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and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 122; M. Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting' (1999) 58 CLJ 129.

[12] *Common Values*, note 5, above, p. 5.

[13] *Common Values*, note 5, above, p. 5.

[14] *Common Values*, note 5, above, p. 5.

public decisions ought to have the opportunity to participate in those decisions'.[15] It is reflected in public law when the courts lay down 'duties of procedural propriety - consultation, hearings, the giving of reasons' and the liberalisation of standing rules 'to provide a court forum for the ventilation of issues.'[16] The participative communitarian theory on participation rests on three grounds.[17] First, it is a function of the instrumental 'importance of securing "good" decisions'. Second, it embodies 'a form of "developmental democracy" which facilitates community activity, commitment and involvement' and 'involves the idea that the various communities in society ought to be able to influence and participate in government'. And, third, it is 'dignitarian' since 'respect for the dignity of individuals requires that they be heard when decisions that affect them are in contemplation'.[18]

Oliver extends the analysis by arguing that each of these theories of public law and the constitution entails a particular theory of citizenship. Since it 'places little importance on the individual and the effects of state action upon individual interests', the positivist authoritarian theory 'treats individuals as subjects rather

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[15] *Common Values*, note 5, above, p. 5.

[16] *Common Values*, note 5, above, p. 6. On the liberalisation of standing rules see, e.g., C. Harlow and R. Rawlings, *Law and Administration* (2nd ed., 1997), pp. 540-552; Harlow and Rawlings, *Pressure Through Law* (1992); P. Cane, 'Standing Up for the Public' (1995) PL 376; Sir K. Schiemann, 'Locus Standi' (1990) PL 342. For a discussion of public interest judicial review actions in the United States see, e.g., R. Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harv LR 1667; A. Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv LR 1281; C.F. Edley, *Administrative Law: Rethinking Judicial Control of Bureaucracy* (1990).

[17] For a general discussion see, e.g., D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986); Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (1996); S. Schønberg, *Legitimate Expectations in Administrative Law* (2000), ch. 1; T. Scanlon, 'Due Process' in J.R. Pennock and J.W. Chapman, *Due Process* (1977); G. Maher, 'Natural Justice as Fairness' in N. MacCormick and P. Birks (eds.), *The Legal Mind: Essays for Tony Honoré* (1986); H. Genn, 'Tribunals and Informal Justice' (1993) 56 MLR 393.

[18] *Common Values*, note 5, above, p. 6. For a similar argument see, e.g., R. Dworkin, 'Principle, Policy, and Procedure' in C. Tapper (ed.), *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* (1981).

than citizens.'[19] Liberal-majoritarian theory 'does provide some protection for civil and political rights as against the state', but does not 'envisage a participative role for the citizen outside the right to vote and stand for election'. It entails, then, a classic liberal form of citizenship that emphasises the importance of keeping 'a clear sphere of "private" activity with which the state cannot interfere save through statutory authority'.[20]

Considerate altruism 'emphasises the position of the citizen as the considered beneficiary of state action.' By 'considered', Oliver means that the theory of considerate altruism requires public decision-makers to 'weigh in the balance the interests not only of particular individuals who may be affected by their actions, but also of the collectivities or groups of individuals who might also be so affected.'[21] Considerate altruism does not treat individuals as subjects, objects, or means to ends. The theory, Oliver says, thus reflects 'Kant's principle that individuals are to treated as ends and not means'[22] and 'Marshall's idea of social rights as forming part of citizenship'.[23]

Participative communitarianism, since it envisages the participation of individuals and groups in public decision-making, 'involves a model of citizenship of a "civic republican" kind, which emphasises involvement in politics as being of central importance'. It differs from the classic liberal concerns of the liberal-majoritarian

[19] *Common Values*, note 5, above, p. 7.
[20] *Common Values*, note 5, above, p. 7.
[21] *Common Values*, note 5, above, p. 7.
[22] On Kant see ch. 2, above, p. 63.
[23] *Common Values*, note 5, above, pp. 7-8. See also T.H. Marshall, *Citizenship and Social Class* (1950).

model, then, in that it 'focuses on the social involvement or integration of individuals and institutions of civil society in public life, rather than establishing a fence between public and private life.'[24]

Oliver concludes her theoretical argument with the claim that, while all four theories have influenced and continue to influence legal decision-making, the positivist authoritarian and liberal-majoritatian theories are gradually being displaced in favour of the considerate altruism and participative communitarianism models. Her basic thesis is that legal developments, 'in both case-law and statutes',[25] indicate that 'the courts are developing participative-communitarianism and responsible altruism models which recognise and weigh in the balance the interests of individuals when decisions are being made that affect them.'[26] There has been, she says, 'a major shift from the position in the early nineteenth century, for instance, where precedence was commonly given to upholding authority and the interests of good administration - a positivist authoritarian approach'.[27]

While it is possible to find evidence of this shift in both public and private law, Oliver argues that it is particularly noticeable in the field of judicial review.

> In particular judicial review has moved away from principles of positivist authoritarianism towards more participative and altruistic approaches. ... [T]he courts impose duties of consideration on public decision makers, which protect

[24] *Common Values*, note 5, above, p. 8. On republicanism see ch. 1, above, p. 28, note 19.
[25] 'Underlying Values', note 6, above, p. 217.
[26] *Common Values*, note 5, above, p. 110.
[27] *Common Values*, note 5, above, p. 70.

> individuals in their personal autonomy and in their status and involvement in civil society - their citizenship. The standards of fairness and rationality imposed in judicial review reflect a combination of participative-communitarian and considerate-altruism theories of democracy.[28]

Oliver claims that this juridical development is part of a more general move in law and political practice towards an understanding of citizenship along communitarian lines.[29] The conception of communitarianism Oliver favours involves 'an image of a morally cohesive association of politically autonomous people' and suggests 'a horizontal relationship of natural, spontaneous, or freely chosen association between individuals and between social groups on the basis of values held in common.'[30] Elsewhere in her work, Oliver has called this model 'the concept of participating citizenship', and has extolled wider 'participation (if it wishes) of the populus generally' in a process she calls "public culture".[31]

2. Five Common Values

The central feature of Oliver's theory is the identification of a set of 'common values' which pervade the law and legal decision-making. These values connect with the background theories of citizenship and the constitution examined in the previous

[28] *Common Values*, note 5, above, p. 121.
[29] *Common Values*, note 5, above, pp. 270-272.
[30] *Common Values*, note 5, above, p. 270.
[31] 'Underlying Values', note 6, above, p. 241.

section. While warning that they 'cannot always be disentangled from one another',[32] Oliver identifies five common values:

> [M]y general argument ... [is] that important common key values - dignity, autonomy, respect, status and security - are being developed at a high level of abstraction in public and private law. Together these support what I shall refer to as paramount values of democracy, citizenship and participation.[33]

Oliver says that the first value, *autonomy*, 'means, strictly, living under one's own laws, or self-government.'[34] Since autonomy is often discussed in the context of imbalances of power, 'control of the ways in which individuals may be subjected to power or coercion by others ... is a relevant consideration in the protection of autonomy'.[35] The meaning of autonomy, Oliver maintains, is not to be confined to the freedom to operate in the market, but also refers to 'relational autonomy'; that is, freedom within social relationships like marriage and the family.[36] In the legal context, issues of autonomy 'are generally to do with the immediate freedom of action of a party ... and whether or how another party is entitled to restrict that freedom'.[37]

Dignity, a complementary value, derives from the Latin *dignus* and means 'worthy, implying honour and reputableness'.[38] The connection between dignity and the

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[32] 'Underlying Values', note 6, above, p. 226.
[33] 'Underlying Values', note 6, above, p. 218.
[34] *Common Values*, note 5, above, p. 60.
[35] *Common Values*, note 5, above, p. 61.
[36] *Common Values*, note 5, above, p. 61.
[37] *Common Values*, note 5, above, p. 61.
[38] *Common Values*, note 5, above, p. 62. See also 'Underlying Values', note 6, above, p. 225.

notions of respect and self-respect 'is expressed in Kant's practical imperative: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."'[39]

Another related value, *respect*, means the regard in which a person is held by others. In the legal context, respect entails 'equal treatment and non-discrimination - both examples of considerate altruism on the part of those in positions of power.'[40] Oliver observes that, although the law cannot 'compel others to "respect" a person in their own minds, subjectively', it can itself treat individuals with respect and can 'compel others to do the same, especially state bodies.'[41] The values of respect and dignity, Oliver maintains, combine to produce equality and the idea of equal citizenship.[42]

A fourth value, *status*, is defined by Oliver (following Max Weber[43]) to connote 'a form of *social* recognition usually enjoyed by individuals by virtue of their membership of a group.'[44] Membership - not necessarily in the contractual or legal sense - 'of churches, or of ethnic or professional or sporting groups, or of workforces, or political parties, or families and dynasties' can give rise to status: 'the membership affects the way other members of the group view the member, and

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[39] *Common Values*, note 5, above, p. 62. See I. Kant, *Groundwork of the Metaphysics of Morals* [1785] (ed. M. Gregor, 1997).
[40] *Common Values*, note 5, above, p. 62.
[41] *Common Values*, note 5, above, p. 62.
[42] *Common Values*, note 5, above, p. 63.
[43] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (ed. G. Roth and C. Wintrich, 1968). See also, A.T. Kronman, *Max Weber* (1983).
[44] *Common Values*, note 5, above, p. 66. (Emphasis of original.)

how outsiders view the members.'[45] Status, 'essentially a communitarian value', is protected by the courts in a number of different ways: though the tort of defamation, by means of the obligation of trust and confidence in the employment relationship, and in judicial review.[46]

The final value identified by Oliver, *security*, means 'an ability to rely on or trust those with whom one deals - including public bodies - and the condition of being protected from or not exposed to danger or risk.'[47] The desire to provide security for weaker parties in relationships is furthered by law in the fields of landlord and tenant, employment and marriage. Security, like status, promotes 'not only individualistic interests but also social or civil interests' and is, as such, 'a democratic value reflecting participative communitarianism and considerate altruism.'[48]

Oliver's basic thesis, then, is that five values can be identified which pervade both public and private law. These values are identified as autonomy, dignity, respect, status and security. Oliver claims that they are the driving force behind legal decision-making, both in relation to statutory and (especially) judge-made law: 'our common values', she says, 'are weighty considerations in the balance'.[49] The five values she identifies interrelate, being connected by their shared relationship with the theories of citizenship Oliver favours. The values are best seen as more concrete

[45] *Common Values*, note 5, above, p. 66.
[46] *Common Values*, note 5, above, p. 66. See, e.g., *R v Gaming Board of Great Britain, ex p Benaim and Khaida* [1970] 2 QB 417.
[47] *Common Values*, note 5, above, p. 67.
[48] *Common Values*, note 5, above, p. 69.
[49] *Common Values*, note 5, above, p. 70.

applications of the theories of considerate altruism and participative communitarianism which Oliver thinks are beginning to dominate other rival conceptions of citizenship in both law and political practice.

3. The Nature of the Five Common Values

This section investigates Oliver's common values in more detail. This is necessary because the common values represent the core element in her theory of public law. Two questions will be addressed. First, what is the relationship between the values Oliver identifies and rights? Second, how does Oliver's scheme account for conflicts that arise between the common values and other values?

(a) The Common Values and Rights

Oliver defines a value as that 'which is worthy of esteem for its own sake; that which has intrinsic worth',[50] and sees the five common values as the culmination of an attempt 'to identify the ultimate and most pervasive underlying values in public - and private - law'.[51] Common values, Oliver says, 'are close to the "background rights" Dworkin refers to, "rights that provide a justification for political decisions by society in the abstract".'[52]

[50] *Common Values*, note 5, above, p. 57.
[51] *Common Values*, note 5, above, p. 57.
[52] *Common Values*, note 5, above, p. 57. See also R. Dworkin, *Taking Rights Seriously* (1977), p. 93.

Oliver insists that the common values cannot be regarded as rights: 'values ... are not themselves rights, though rights are reflections of values.'[53] The common values are far more pervasive than rights. They exist on a higher plane of abstraction and, being less absolute, allow more room for competing values, policies and principles. 'Values have to contend with other considerations in the law and legal policy, and this is one of the reasons why they are not rights.'[54] In similar vein, Oliver says that her values are not the equivalent of Dworkinian principles.[55] Like rights, principles 'are *applications* of what I mean by values, but at a lower level on the ladder of abstraction than the levels I am aiming at.'[56]

Oliver's analysis of the common values illustrates how her theory of public law is underpinned by an essentialist philosophy.[57] Responding to Habermas' observation that '[p]rinciples or higher-level norms ... have a deontological sense, whereas values are teleological',[58] Oliver says that, while some values can be teleological, her common values, being 'fundamental to the human condition', are deontological.

> Values, then, are part of the climate, the 'background' in which judges operate. Perhaps Neil McCormick's 'background moral view of how life in an organised society ought to be for individuals' is the nearest to my concept of underlying values.[59]

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[53] *Common Values*, note 5, above, p. 57.
[54] *Common Values*, note 5, above, p. 59.
[55] See Dworkin, *Taking Rights Seriously*, note 52, above, chs. 2 & 4.
[56] 'Underlying Values', note 6, above, p. 224. (Emphasis of original.)
[57] On the essentialist philosophical method, see ch. 4, below, pp. 103-104.
[58] J. Habermas, *Between Facts and Norms* (1996), p. 255.

Oliver's common values, then, are not rights. They exist on a higher level of abstraction and give rise to rights. The basic, generative role that common values play in Oliver's scheme mirrors Allan's use of autonomy, dignity, and equality and Laws' use of autonomy in his theory.[60]

(b) Common Values in Conflict

Oliver insists that the five common values she identifies are 'the ultimate and most pervasive underlying values' to be found in public and private law. She recognises, however, that her catalogue of values is not exhaustive: 'I acknowledge that the values I have identified are not the only ones underlying the system'.[61] In this section, Oliver's account for the relationship between her common values and other values is examined.

Let us explore first the scenario in which one common value conflicts with another common value. Oliver accepts that the 'five common values explored here will often be in conflict with each other in a particular case.' In defamation cases, for instance, 'the freedom of speech - autonomy - of one individual may be limited by the interests of another in their status, dignity and respect.'[62] Because the common values share similar underlying concerns - they are underpinned by the same theories of citizenship, considerate altruism and participative communitarianism -

[59] *Common Values*, note 5, above, p. 59. See also N. MacCormick, 'Jurisprudence and the Constitution' (1983) CLP 13, p. 22.
[60] See ch. 1, above, pp. 24-26 and ch. 2, above, pp. 47-50.
[61] 'Underlying Values', note 6, above, p. 217.

this type of conflict is not especially difficult to accommodate. In cases where common values conflict, the courts may have recourse to the background theories common to those values in order to ascertain the best way of reconciling them. Oliver suggests that this will usually entail giving 'particular weight to the interests of individuals over corporate bodies ... and to seek to redress imbalances of power between parties in favour of the vulnerable party.'[63]

But what happens if a common value conflicts with a value which is not on Oliver's list? Oliver accepts that this is a possibility: her values, she says, will 'often come into conflict with other values.' These competing values include the 'perceived need for those in authority to be treated with respect, the interests of good administration, of the market and of national security.'[64]

Oliver provides no sustained analysis of these competing values, nor does she articulate a coherent strategy for dealing with conflicts between common values and competing values. She tends instead to dismiss the importance of any competing values. There is a brief discussion of such values - which Oliver calls defendants' interests[65] - towards the end of *Common Values*. Her first argument is to dismiss the possibility that public bodies themselves might be able to rely on common values: 'where the defendant is a public or governmental body, it will not be regarded as

[62] *Common Values*, note 5, above, p. 70.
[63] *Common Values*, note 5, above, p. 70.
[64] *Common Values*, note 5, above, p. 70.
[65] *Common Values*, note 5, above, p. 250.

entitled to place its own interests in the balance as against the interests of private bodies: public bodies do not have interests.'[66]

A second argument denigrates the defendants' value of deference to authority. Oliver refers to an unholy trinity of cases - *Attorney-General v Sunday Times*,[67] *Nottinghamshire County Council*[68] and *Liversidge v Anderson*[69] - whose bad outcomes were a product, she maintains, of an excess of judicial deference. In order to avoid this sort of error in future, Oliver proposes that the courts should 'give less weight to considerations of a need to defer to authority or to accept claims of national security'.[70] The more robust approach of *Bagg's Case* (1615) is preferred. In that case, Sir Edward Coke dismissed a claim that the court ought to defer to political authority: 'no wrong or injury', he said, 'either public or private, can be done but that it shall be [here] reformed or punished by due course of law'.[71]

By contrast to this brusque dismissal of defendants' interests, Oliver emphasises the overriding importance of the common values she articulates. These common values are referred to as 'key'[72] and 'paramount';[73] they generate, collectively, Oliver says, a framework of '*higher order* duties of good administration, high principles or institutional morality.'[74]

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[66] *Common Values*, note 5, above, p. 251. See also, 'Underlying Values', note 6, above, p. 227.
[67] *Attorney-General v Times Newspapers Ltd* [1974] AC 273. See also the European Court of Human Rights decision in the case: *Sunday Times v United Kingdom* [1979] 2 EHRR 245.
[68] *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240.
[69] [1942] AC 206.
[70] *Common Values*, note 5, above, pp. 253-254.
[71] (1615) 11 Co. Rep. 93b. 'Common Values', note 5, below, pp. 44-47 & 253-254. On Coke, see ch. 5, below, pp. 133-137.
[72] *Common Values*, note 5, above, p. 60.
[73] Underlying Values', note 6, above, p. 240.
[74] 'Underlying Values', note 6, above, pp. 230-231. (Emphasis added.)

> [T]he five underlying key values ... contribute to, even to a large extent constitute, important *paramount* values, namely democracy, participation and citizenship.[75]

The clear implication of Oliver's analysis of the 'key' common values as a higher order of paramount law, combined with the denigration or dismissal of the importance of defendants' interest, is that when common values conflict with countervailing values they ought generally to triumph.

4. Implications for Public Law

Oliver's thesis that there are five 'key' common values which pervade the law and drive legal decision-making has important implications for public law. These implications are analysed in this section.

One implication of Oliver's theory concerns the nature of what are traditionally understood as public law principles. Since the key values are pervasive in the law, the duties of considerate decision-making to which they give rise, expressed in the context of judicial review in terms of the three heads of review – legality, procedural propriety or fairness, and reasonableness – are not really principles of public law at all. They are, rather, '*general* principles of considerate decision-

[75] Underlying Values', note 6, above, p. 240. (Emphasis of original.)

making'[76] which apply to both public and private bodies in any situation where (a) 'the vital interests of individuals are at stake, notably their interests in their autonomy, dignity, respect, status or security' and (b) the 'decision-maker is in a position of power'.[77]

A consequence of this position is that there can be no substantive division between public law and private law.[78] Another, related, implication is that the *ultra vires* doctrine cannot be seen as the foundational principle of judicial review: 'the *ultra vires* rule ... is not the basis of [the judicial review] jurisdiction'.[79] The courts, Oliver says, in exercising their supervisory powers, 'are concerned both with the *vires* of public authorities in the strict or narrow sense ... and with abuse of power.'[80]

Having the concern to prevent abuse of power as a foundational principle entails that, 'if a public body wields power which affects the public interest or the rights or vital interests of individuals or organisations', it ought 'to be subject to judicial supervision as to how that power is exercised.'[81] It further implies that the intensity of scrutiny in cases of judicial review 'depends on the effect of the proposed decision on an individual'.[82] This position is captured in a more specific test that makes explicit the connection between the abuse of power principle and the five common values:

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[76] D. Oliver, 'Review of (Non-Statutory) Discretions' in C. Forsyth (ed.), *Judicial Review and the Constitution* (2000), p. 321.
[77] 'Review', note 76, above, pp. 321-322.
[78] *Common Values*, note 5, above, Ch. 11.
[79] 'Is the Ultra Vires Rule?', note 11, above, p. 567.
[80] 'Is the Ultra Vires Rule?', note 11, above, p. 567.

> Where there is an imbalance of power in relationships, and especially where the more powerful party can act in ways that reduce the dignity, autonomy, respect, security and status of the less powerful party, then the law ... [should] impose higher order duties on the superior.[83]

This theory of public law entails a particular ideal of the role of the courts. In Oliver's account, public law comprises (part of) a higher-order framework of principles and rights. These principles and rights are the product of legal decision-making driven in the main by the five key values identified by the theory. These values connect with the background theories of citizenship favoured by the author – considerate altruism and participative communitarianism – and enshrine values regarded as fundamental to an individual's flourishing. The values thus 'contribute to, even to a large extent constitute' a republican ideal of active citizenship and deliberative democracy. Given the - at least partly - legal nature of the common values, Oliver concludes that the courts ought to act as a surrogate forum for political discussion:

> My own sense is that the courts are taking on a role as a forum for political debate and settlement of disputes with a political dimension – a Grand Inquest of the Nation forum – in response to the increasingly obvious inability and unwillingness of the House of Commons to do so.[84]

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[81] 'Judicial Review and the Shorthandwriters', note 1, above.
[82] 'Review', note 76, above, p. 323.
[83] 'Underlying Values', note 6, above, p. 233.

5. Conclusion

This chapter has examined the theory of public law advanced by Dawn Oliver. Section 1 analysed Oliver's argument that considerate altruism and participative communitarian theories of citizenship and the constitution were gradually displacing positivist authoritarian and liberal majoritarian theories in law and legal decision-making. Section 2 analysed the five common values of autonomy, dignity, respect, status and security that form the core of Oliver's theory. In section 3, the nature of those common values was elucidated by investigating Oliver's understanding of the relationship between the common values and rights and of the common values in conflict with other, competing values. Section 4 examined the implications of the common values thesis for public law. Significant implications of the theory were the abandonment of *ultra vires* in favour of the rubric of abuse of power, and the idea of the court as a surrogate political forum.

[84] 'Underlying Values', note 6, above, p. 241.

Chapter 4

The Rights-Based Theory of Public Law

Introduction

The work of T.R.S. Allan, Sir John Laws, and Dawn Oliver, three central figures within rights-based public law, was examined in previous chapters. The relatively narrow focus of the analysis was justified on the ground that a rigorous investigation of the strongest writing available was required given that the thesis comprises an investigation into the conceptual underpinnings of public law.[1]

The present chapter concludes the analytical section of the thesis. It articulates, in section 1, the points at which the theories developed by Allan, Laws and Oliver intersect. A model of this approach to public law is constructed in section 2 on the basis of this analysis. In section 3, this approach is connected to ideas advanced by other public law scholars. The chapter concludes by indicating the main lines of criticism to be advanced in the second Part of the thesis.

1. Connections between Allan, Laws and Oliver

(a) T.R.S. Allan

The account of Allan's theory of public law began with an analysis of the underlying political and social philosophy. It was suggested that the theory is grounded in an essentialist philosophical method.[2] Allan identifies dignity, autonomy and equality as essential attributes of the human social condition and understands society to be a moral community that shares certain fundamental values produced by generations of moral and political deliberation. From this theoretical basis, the author develops a republican conception of politics centred on the notions of deliberative democracy and public reason.[3]

The constitutional theory advanced by Allan was then examined. Its central feature was a sharp, Hayekian distinction between ordinary and constitutional politics. 'Ordinary politics' centres on the legislature and is regarded by Allan as insufficient in itself to secure the type of politics his theory envisages. 'Constitutional politics', on the other hand, centres on the rule of law and occurs primarily within the common law courts. Allan takes the rule of law to be the primary device for protecting shared moral (liberal) values in a community. He understands the common law to be a site of reason which is essentially good because it necessarily enforces rule of law values. On this account, the common law reflects and embodies

[1] See Introduction, above, p. 9.
[2] See further pp. 144-147, below.
[3] See ch. 1, above, section 2.

society's fundamental values and so performs a constitutive or foundational role. The common law courts, Allan believes, are as close as we can get to the perfect forum of public reason.[4]

The analysis of Allan's theory closed with an exploration into its implications for public law. On Allan's account, public law is a species of moral reasoning: decision-making in judicial review is properly value-driven, being oriented towards society's fundamental values as reflected by the principles of common law and the rule of law. In reviewing governmental acts, courts should ask whether the proposed infringement of fundamental values and individual rights is justified. The extent of the justification required will depend on the importance of the right at stake and the degree of the intrusion.[5]

(b) Sir John Laws

Chapter 2 examined the theory of public law advanced by Sir John Laws. Laws casts his theory in terms of a search for the good constitution. The search must begin, he says, by reflecting on the essential attributes and needs of mankind. Laws suggests that the essence of man lies in the capacity to make his own moral choices autonomously. This Kantian conception of individual autonomy produces a cardinal moral and political imperative: each individual is to be treated as an end in himself or herself, never only as a means.[6]

[4] See ch. 1, above, p. 55
[5] See ch. 1, above, p. 57

Laws derives his constitutional theory from these philosophical ruminations. The need to enforce the cardinal moral imperative in real-world conditions gives rise to rights and democratic politics. It is the duty of the courts to enforce rights, Laws says, and the responsibility of the legislature to make democratic decisions. This division of functions is recognised analytically by a distinction between positive and negative rights. Positive rights are rights to benefits, such as welfare rights, in relation to which the legislature is sovereign. Negative or constitutional rights are more direct manifestations of the cardinal moral imperative; they are products of a higher-order of law-making in relation to which the courts are supreme.[7]

On this account, courts have a special obligation to protect individual autonomy by enforcing the cardinal moral imperative against inimical action, particularly governmental action. This duty is reflected in the general principle proposed by Laws: 'the courts will not permit abuse of power'. This general principle translates into a more specific test for courts to apply in cases of judicial review: the greater the intrusion into the individual's fundamental rights, the greater the justification required for the challenged decision or action.[8]

(c) Allan and Laws Compared

There are definite and substantial points of contact between the theories advanced by Allan and Laws. At the level of abstract political theory, both writers share the same intellectual method: key political and moral propositions are derived from a

[6] See ch. 2, above, pp. 61-63
[7] See ch. 2, above, pp. 67-71

reflection on the essential nature of man. The conclusions they draw from this process are also very similar: man, they say, is essentially an autonomous rational and moral creature. Both writers also believe – albeit reluctantly in Laws' case[9] - that the propositions derived from their philosophical inquiry can best be expressed juridically in the language of rights.

At the level of constitutional theory, both Allan and Laws articulate a dualist conception of the constitution which rests upon a clear division between ordinary and constitutional politics. In both accounts, the common law constitutes a species of moral law in that it is said *necessarily* to reflect and incorporate society's fundamental values and rights. For both Allan and Laws, the common law forms a higher order of law which can be said to constitute a form of 'apolitical politics'. Both writers treat ordinary politics with scepticism, although Allan is not consistent on this point.[10] They regard legislative practices as morally - and therefore constitutionally - inferior to that form of politics practised within common law courts. Common to both these accounts of the constitution is the assumption that responsibility for protecting fundamental moral and political imperatives rests primarily with the courts.

The two authors' understanding of public law is also similar. Both assume that the basic, general purpose of the court is to protect the individual from interference by

[8] See ch. 2, above, p. 80.
[9] See the discussion in ch. 2, above, pp. 65-67.
[10] See the discussion in ch. 1, above.

the state.[11] This assumption is reflected in the authors' rejection of the *ultra vires* principle as a basis for judicial review. Both writers advocate instead the general principle that courts ought to prevent abuses of power. From this general rubric, Allan and Laws generate very similar specific tests which they think ought to be applied in cases of review: the intensity of review in individual cases is a function of the importance of rights and the significance of the interference.

The close parallels that exist between the philosophical, constitutional and legal aspects of the two theories do not go unnoticed by the authors themselves. For instance, Allan endorses Laws' account of the relationship between Parliament and the courts and his distinction between positive and negative rights in his book *Constitutional Justice*:

> Nor can judgments about the demands of the rule of law in the particular case be evaded by invoking the authority of a 'sovereign' Parliament: as Laws's discussion makes clear, the rule of law is ultimately premised instead on the 'sovereign autonomy' of the individual citizen.[12]

(d) Dawn Oliver

Dawn Oliver's theory of public law was examined in chapter 3. The analysis began with an account of Oliver's thesis that considerate altruism and participative communitarian theories of citizenship are displacing positivist authoritarian and

[11] Harlow and Rawlings would call this a 'red light' analysis of the function of public law: see C. Harlow and R. Rawlings, *Law and Administration* (2nd ed., 1997), ch. 3.

liberal majoritarian theories as the main basis for legal decision-making.[13] Oliver identifies five values lying at the heart of the two theories of citizenship she favours: autonomy, dignity, respect, status and security. She argues that these common values are deontological, being fundamental to the human condition, and they precede rights as they exist on a higher level of abstraction.[14] Common values are also 'key' or 'paramount' values in that they collectively generate higher-order duties of good administration and will generally triumph when it comes to conflicts with other values.[15]

The thesis that five key common values connected to now-dominant theories of citizenship pervade legal decision-making has significant repercussions for public law. For one thing, it entails that what have been regarded traditionally as principles of public law are really manifestations of general higher-order duties of good decision-making in a particular context. These general duties, following Oliver's scheme, ought to be applied whenever (a) the vital interests of the individual are at stake and (b) the decision-maker is in a position of power.[16]

This analysis leads Oliver to reject the *ultra vires* principle as a basis for judicial review. She posits instead a principle that the court's supervisory powers ought to be used in order to prevent abuses of power. This test requires, specifically, that the intensity of judicial review ought to vary according to the significance of the impact of the challenged decision upon the fundamental interests (captured in the five

[12] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), pp. 280-281.
[13] See ch. 3, above, pp. 84-89.
[14] See ch. 3, above, pp. 90-94.
[15] See ch. 3, above, pp. 95-98.

common values) of the affected individual. Oliver believes that, in enforcing the five key values and the theories of citizenship to which they relate through their supervisory jurisdiction, the courts are required to act as a surrogate political institution, a 'Grand Inquest of the Nation forum'.[17]

(e) Similarities between Oliver, Allan, and Laws

Oliver herself identifies connections between her ideas and those advanced by Allan and Laws. She refers, for instance, to Allan's analysis of autonomy and dignity[18] and draws upon Allan's idea of equal citizenship in support of her version of communitarian citizenship.[19] She also reinforces her account of the role of the courts by drawing on Allan's argument that 'the common law embodies ... a set of constitutional values transcending the ordinary more transient, and particular, rules enacted by the legislature'.[20] Similarly, Laws' argument that public bodies 'do not have interests of their own ... [but] must justify their actions in terms of the public interest' provides support for Oliver's thesis at a crucial point.[21]

These references hint at deeper associations. Like Allan and Laws, Oliver makes her theory rest upon a set of values understood to be fundamental. They provide a basis for generating propositions about the constitutional function of the courts.

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[16] See ch. 3, above, p. 100.
[17] See ch. 3, above, p. 100.
[18] D. Oliver, *Common Values and the Public-Private Divide* (1999), pp. 61-62.
[19] *Common Values*, note 18, above, p. 63.
[20] *Common Values*, note 18, above, pp. 270-271.
[21] D. Oliver, 'The Underlying Values of Public and Private Law' in M. Taggart (ed.), *The Province of Administrative Law* (1997), pp. 228-229. See *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513, 524 (per Laws J). (The case is discussed in ch. 7, below.)

Another common aspect of the theories advanced by Allan, Laws, and Oliver is their use of constitutional history. All three theorists argue that their conception of public law, and in particular their account of the value-driven nature of review, is supported by historical practice. Early seventeenth-century cases, in particular those involving Edward Coke, are pivotal to this argument. Oliver uses Coke's judgment in *Bagg's Case*[22] as an early example of the application of generic common law values to counteract abuses of power. She says that the decision illustrates 'how illegality and unfairness are ancient grounds for intervention by the court in the exercise of a supervisory jurisdiction [which has] nothing to do with legislative intent or the ultra vires rule.'[23]

In a similar vein, Allan argues that the famous dictum from *Bonham's Case* - that the common law will control an Act of Parliament if it is against common right and reason[24] - shows that the power to prevent governmental action at odds with deep-rooted constitutional principle is of long-standing pedigree. 'Modern assertions of unlimited sovereignty', he says, 'rest on a misunderstanding of constitutional history'.[25] Coke's dictum indicates that seventeenth-century lawyers 'well understood the ability of judicial interpretation to tame the potential excesses and abuses of legislative power.'[26]

Laws also makes use of seventeenth-century cases in order to support his thesis that judge-made law constitutes a higher-order of law-making. He quotes Coke in

[22] (1615) 11 Co. Rep. 93b.
[23] *Common Values*, note 18, above, p. 47.
[24] (1609) 8 Co. Rep. 107, at p.118a.
[25] T.R.S. Allan, *Law, Liberty, and Justice* (1993), p. 269.

Rooke's Case: 'discretions ... ought to be limited and bound with the rule of reason and law'.[27] He then argues that *Rooke* stands as a precedent for 'a long line of cases, stretching centuries before *Wednesbury*, which vouchsafe the principle of reasonableness as providing the legal limit to the use of public discretionary power.'[28]

All three theories are also similar in respect of their implications for public law. All reject the notion that *ultra vires* can still justifiably be regarded as the foundational principle of public law. Each offers instead a conception of judicial review structured around the notion of abuse of power and advocates a similar value-driven account of public law decision-making. (By 'value-driven', I mean decision-making structured by and oriented towards certain fundamental values.[29]) This conception ties in with the image, common to all three theories, of public law as apolitical politics: a higher-order legal discourse which is necessarily connected with a society's fundamental (liberal) values.

Given the extent of the similarities between the theories advanced by Allan, Laws, and Oliver, it is not surprising that they offer very similar versions of the more specific test that ought to be applied in cases of judicial review.

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[26] *Constitutional Justice*, note 12, above, pp. 204-205.
[27] (1598) 5 Co. Rep. 99b. See also C. Hill, *Intellectual Origins of the English Revolution* (1965), pp. 241-243.
[28] Sir J. Laws, 'Wednesbury' in C. Forsyth and I. Hare (ed.), *The Golden Metwand and the Crooked Cord: Essays on Public Law for Sir William Wade* (1998), p. 190.
[29] For a more thorough definition of value-driven review see ch. 7, below.

- Allan - The modern law of judicial review may plausibly be interpreted as a scheme for protecting the rights of citizens in public law. In cases of judicial review, the appropriateness of judicial restraint will be simply a function of the seriousness and apparent cogency of a complainant's objections to administrative action: the more serious in terms of accepted constitutional rights and legal values, the more demanding the court must be of the relevant agency.[30]

- Laws – The common law will not permit abuse of power. In cases of judicial review, the greater the intrusion proposed by a body possessing public power over the citizen in an area where his fundamental rights are at stake, the greater must be the justification which the public authority must demonstrate.[31]

- Oliver – If a public body wields power which affects the public interest or the rights or vital interests of individuals or organisation, it ought to be subject to judicial supervision as to how that power is exercised. The intensity of judicial scrutiny in such cases ought to depend on the effect of the proposed decision on the affected individual(s) or organisation(s).[32]

A caveat can be entered at this point. Despite the extent of the connection between the theories developed by Allan, Laws, and Oliver, differences remain. The precise account of the fundamental values, for instance, varies between accounts: while

[30] See ch. 1, below, p. 57.

Laws thinks that the Kantian notion of autonomy alone will suffice, Allan adds the (related) ideas of dignity and equality, and Oliver articulates five values of autonomy, dignity, respect, status and security. There are differences at the legal level too: Allan insists that complainants in public law cases must ground their claim on existing public law rights, while Oliver's scheme appears to allow any claim that can be formulated as a threat to one or more of the key values. The three theories are, then, recognisably individual accounts of the subject. Yet, notwithstanding differences of emphasis, the parallels between them are such that it is legitimate to say that they are variations of the same general approach to public law.

2. Essential Propositions of Rights-Based Public Law

The previous section identified a number of similarities between the theories advanced by Allan, Laws and Oliver. This section puts those similarities into a more systematic order by modelling the approach to public law advanced by these writers. The modelling process is intended to bring to the fore the essential characteristics of the subject approach. It is not designed to capture every nuance of each writer's account.[33]

In this thesis, the approach developed by Allan, Laws, Oliver and others is called the *rights-based theory of public law*. The choice of title requires justification. In some respects, it appears to be a misnomer as the writers in question sometimes tend

[31] See ch. 2, below, p. 77.
[32] See ch. 3, below, pp. 100.
[33] For a full defence of the modelling process, see Introduction, below.

to demote rights to a subordinate role. Laws argues, for instance, that rights are only imperfect reflections of the cardinal moral value of autonomy designed to fit an imperfect world. Oliver argues that the common values she identifies are not to be regarded as rights: they are more abstract than rights and so give rise to rights, not *vice versa*.

In spite of these partial efforts to downgrade rights, the choice of title is justifiable. Rights remain an important feature within all of the examined theories and, perhaps more importantly, the language of rights captures certain key aspects of the approach to public law under examination. It reflects, first of all, the vital strand of moral philosophy around which this approach is structured. On this account, philosophising about the essence of man gives rise to a set of fundamental values out of which spring legal and political rights. Second, the language of rights also picks up on the Dworkinian imagery of rights as trumps.[34] This idea dominates the constitutional thought of the writers within this school: constitutional politics practised in common law courts produces rights capable of trumping countervailing decisions arising from the ordinary political process. Third, the terminology connects with the value-driven understanding of judicial review characteristic to this style of thought. Rights theorists envisage a style of judicial review according to which decisions are made directly on the basis of considerations of fundamental values, values which in practice are realised in the form of rights.

[34] R. Dworkin, *Taking Rights Seriously* (1977), ch. 2.

With this preliminary issue aside, it is possible to concentrate on articulating a model of the rights-based approach to public law. For reasons of expositional clarity, the model is arranged as a series of propositions grouped under appropriate headings.

- **Moral Theory**

The starting-point of the rights theory is a philosophical enquiry into the essence of man. According to the contemporary Aristotelian, Martha Nussbaum, the idea behind this approach is twofold: 'first, that certain functions are particularly central in human life, in the sense that their presence or absence is typically understood to be a mark of the presence or absence of human life; and second ... that there is something that it is to do these functions in a truly human way, not a merely animal way.'[35]

Using this philosophical method, rights theorists ascribe to the individual a set of essential needs. The common element to rights-based accounts is the notion of the morally and rationally autonomous individual derived from Kant. Kantian autonomy involves two components. The first is that 'no authority external to ourselves is needed to constitute or inform us of the demands of morality.' The

[35] M.C. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000), pp. 71-72. See also Nussbaum,'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism' (1992) 20 Pol Theory 202: 'to find out what our nature is seems to be one and the same things as to find out what we deeply believe to be most important and indispensable' in a human life. See further, M. Perry, *The Idea of Human Rights: Four Inquiries* (1998), p. 68; R. Polin, *Plato and Aristotle on Constitutionalism* (1998); A.D. Nuttall, *Why Does Tragedy Give Pleasure?* (1996), ch. 1; R. Rorty,

second is that, through self-government, we can effectively control ourselves since 'no external source of motivation is needed for our self-legislation to be effective in controlling behaviour.'[36] The notion of autonomy implies, then, that people are capable of being fully self-governing in moral matters.

The ascription to the individual of a set of essential needs structured around the notion of autonomy leads to the articulation of an overriding moral imperative.[37] This imperative is a close echo of Kant's practical imperative: *So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means*.[38] This moral imperative is in many ways the determining feature of rights-based thought. Once articulated, it acts as a critical principle against which institutions and practices are to be measured.

- **Political Theory**

Rights theorists deduce a set of values which they regard as necessary to give practical expression to this overriding moral imperative. The values most commonly articulated are autonomy and its cognates dignity, equality, and

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'Human Rights, Rationality, and Sentimentality in Rorty, *Truth and Progress: Philosophical Papers, Vol. 3* (1998).

[36] J.B. Schneewind, 'Autonomy, obligation, and virtue: An overview of Kant's moral philosophy' in P. Guyer (ed.), *The Cambridge Companion to Kant* (Cambridge: CUP, 1992), pp. 309-310. On Kantian autonomy see also, C. Douzinas, *The End of Human Rights* pp. 184-201; J. Murphy, *Kant: The Philosophy of Rights* (1970).

[37] On the Enlightenment background of Kant's thought see, e.g., N. Hampson, *The Enlightenment* (1968); T. Adorno and M. Horkheimer, *Dialectic of Enlightenment* (1944); P. Gay, *The Enlightenment: An Interpretation* (1966); J. Carroll, *Humanism: The Wreck of Western Culture* (1993), chs. 6-8; J. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (2001); R. Porter, *Enlightenment: Britain and the Creation of the Modern World* (2000); J. Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (1995), ch. 10.

respect. These values, being seen as necessary for the preservation of the essence of man, are regarded as morally and politically fundamental.

In practical political and legal discourse, these values are translated into the language of rights. The translation helps to bring out the transcendent nature of these autonomy-related values. Rights are trumps, as Dworkin said,[39] and are, as such, suitable vehicles for protecting individual autonomy from inimical decisions and actions.

Rights theorists also argue that the cardinal value of individual autonomy demands that decision-making in a society ought to take place according to ideals of deliberative democracy and public reason. Political argument and decision-making in a society ought to concentrate on how best to apply shared fundamental values to novel or difficult cases. The need to respect autonomy also dictates that at least those affected by a decision ought to have the opportunity to take part in prior discussions.

- **Constitutional Theory**

In describing the way in which constitutions ought to function, rights theorists articulate a dualist framework. They assume that it is primarily the responsibility of the courts to protect fundamental values. The courts operate a form of constitutional politics which generates a species of higher-order law.

[38] I Kant, *Groundwork of the Metaphysic of Morals* [1785], 4:429 (ed. M. Gregor, 1997), p. 38.
[39] See note 34, above.

Constitutional politics exists for the protection of individual autonomy against countervailing governmental activity. Judge-made law is to be considered superior, both morally and constitutionally, because it is necessarily connected with the cardinal moral principle relating to the protection of autonomy. Since it applies a higher set of laws, the common law can justifiably be regarded as a superior form of reason, or *summa ratio* in Coke's phrase.[40] The adjudicative procedure of the common law courts epitomises a process of public reason connected to ideals of deliberative, democratic decision-making. Rights theorists postulate, then, the idea of a *common law constitution*: that is, a constitutional order structured around and grounded in the system of judge-made law.[41]

Ordinary politics, according to the rights-based account, is to be regarded with suspicion. The legislative process, designed as it is to respond to the demands of the electorate, is interest-driven rather than value-led. The legislature is thus a morally neutral institution which cannot be trusted to produce decisions that respect individual autonomy. Accordingly, governmental decisions must be open to challenge on the ground that they fail to accord with basic standards of political morality, as enshrined in the principles of the common law.

[40] Sir E. Coke, *First Institute of the Laws of England* (ed. J.H. Thomas, 1836), 1.
[41] See, e.g., Allan, *Law, Liberty, Justice*, note 25, above, ch. 1; Laws, 'Wednesbury', note 28, above; Sir S. Sedley, 'Human Rights: A Twenty-First Century Agenda' (1995) PL 386; F.A. Hayek, *Law, Legislation and Liberty, Vol. 1: Rules and Order* (1973), ch. 5.

- **Public Law**

According to the rights theory, public law exists to protect individual autonomy from wrongful interference by the agents of the state. Courts apply basic standards of political morality, as enshrined in principles of common law, to contested governmental decisions. The intensity of judicial scrutiny in public law cases is simply a factor of the importance of the right(s) at stake and the level of interference produced by the challenged decision: the more important the right at stake, and the greater the intrusion, the more the courts will require by way of justification.

For rights theorists, then, decision-making in public law is necessarily value-driven. Value-driven public law implies a style of judicial review in which legitimate argument is *directly* oriented towards the protection of fundamental values and basic rights. Public law decision-making, on this account, is a species of practical, moral reasoning.

Rights theorists argue that this value-driven account of judicial review is historically supported. The most viable reading of constitutional history, they suggest, reveals that the account they advance represents the best understanding of the nature and purpose of public law.

3. The Rights-Based Theory and Legitimacy

It could be objected that the model outlined in the previous section, although it captures the essential elements or main ingredients of rights-based public law thought, fails to express the totality or diversity of what is inevitably - given both the nature of the theory and the quality of the thinkers who express it - a complex and multifaceted body of ideas.

There are two responses to this objection. The first response attaches to the aim of the thesis and the method by means of which that aim is to be achieved. As an examination into the conceptual underpinnings of public law, the thesis aims to analyse and critically assess what is probably the leading contemporary strand of public law thought in the UK. This aim necessitates a particular argumentative method, recognised as the standard means of conducting theoretical scholarship within the humanities. According to this method, the inquirer constructs a model of a body of thought by means of a careful examination of the relevant texts.[42] The aim of this exercise is to provide a basis from which potentially complex ideas can be understood and examined. It aids with the process of understanding and assessing a complex body of thought if we can strip it down to its essential elements. It is hard to work out the implications of Marx's thought, for instance, unless we can first isolate its core. Without this exegetical process, there is no way in which we can examine and criticise Marx with due scholarly precision.

[42] This raises the problem of selection. In the case of the present inquiry, however, there is no real selection problem. The theorists in question are relatively few in number and their work is readily identifiable. What is more difficult is to trace the precise nature of their influence on more doctrinally-focused work, something which this thesis avoids doing. But see section 5, below.

No scholar (or human being, for that matter) is always consistent. But it is essential if we are to assess the merits or the potential of a scholar's work – that is, if we are to take it seriously – to have a coherent account of his or her thought. A necessary part of this process is the stripping away of material considered ephemeral to the main body of the scholar's thought. This process, of course, may sometimes prove problematic and must itself be open to critical scrutiny. But a modelling exercise is not reprehensible simply because it omits certain aspects of a scholar's thought. In general, a model will be satisfactory if it provides an accurate interpretation of the main lines of the scholar's thoughts which is faithful to those thoughts as expressed in the text.[43] I maintain that I have respected these strictures in relation to the modelling of rights-based thought conducted here and offer the detailed analysis of the work of the three scholars in the first three chapters of the thesis as evidence of this.[44]

The second response to the objection relates to particulars. The analysis developed so far in the thesis has sought to map out the contours of a school of thought that I have called the rights-based theory of public law. The aim has been to highlight the precise nature of the conceptual ties that can be said to transform a series of perspectives and analyses into a connected and integrated body of work. At the heart of the theory lies the idea that the common law is both the foundation-stone and

[43] This in itself is a contested idea. Some scholars, indeed, would completely reject fidelity to the text even as a theoretical possibility: see, e.g., S. Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (1989); Fish, *The Trouble with Principle* (1999).

[44] Indeed, it is worth noting that the rights theorists themselves make frequent use of the modelling method: see, e.g., their characterisation of the ultra vires approach to judicial review; Dawn Oliver's rival theories of constitutionalism and citizenship; T.R.S. Allan's interpretation of the work of Dicey,

lodestar of the political community: that is, it both constitutes the political community and contains the fundamental principles that ought to guide its political and legal decision-making. This claim, in itself highly distinctive, is underpinned by three characteristic arguments. The common law constitutes a higher order of law, rights theorists argue, because it necessarily connects with basic moral principles in a way that is not true of statute law. In addition, they say, the common law represents a superior site of public reason on account of the necessarily rational and individual-respecting nature of its decision-making processes. And the common law is also unique in that it embodies a body of principles which, on account of their evolutionary nature, necessarily connect with society's deep-rooted moral/political values.

In the following chapters, I will go on to argue that this theory – or at least the reading of it offered here - can be criticised because it neglects or downgrades certain elements inherent to and ineradicable from the enterprise of judicial review. (And that theory is, above all, a theory of judicial review.[45]) But, at this stage, it is important to distinguish between the inner thought of the writers under examination and the outward expression of that thought in published writings. It is no part of the argument advanced here that the theorists themselves are unaware of certain aspects of the judicial review process. Clearly that cannot be the case, given the eminence and experience of the writers in question. What I do maintain, however, is that the theoretical account of the discipline they have constructed takes inadequate account of issues which in the following chapters are often grouped under the umbrella

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Dworkin, Fuller, Hayek and others; Sir John Laws' (extremely vapid) account of Kant's moral philosophy.

term(s) constitutional and administrative propriety. This is due, I suggest, to the overwhelming effect of prioritising supposedly fundamental values and rights and ascribing both moral and constitutional superiority within the political community to the court.

This last argument is pivotal to the thesis and needs to be defended. (It is, of course, implicit in and follows from the analysis contained within the first three chapters of the thesis.) I shall argue in the remainder of this section, then, that while rights theorists may recognise the significance of matters of constitutional and administrative propriety as important constituent parts of judicial review, they nonetheless fail to integrate such matters into their overall theoretical account. In order to do make this argument, two aspects of the judicial review process will be examined: first, the related notions of justiciabilty, jurisdiction and institutional balance; second, the problem of polycentricity.

(a) Rights-Based Thought and Constitutional Propriety

The interpretation of rights-based thought offered in this thesis must be able to accommodate – in some sense or other - the writings of rights theorists on the notions of justiciability, jurisdiction and the idea of 'institutional balance'. What rights theorists say on these matters has a direct bearing on the cogency of the model advanced in this chapter and on the criticisms of that model advanced in the following chapters.

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[45] See Introduction, above.

'"Jurisdiction"', Diplock LJ said in *Anisminic Ltd v Foreign Compensation Commission*, 'is an expression which is used in a variety of senses and takes its colour from its context'.[46] In an article on the subject, Ivan Hare notes that the law relating to jurisdiction involves a high degree of doctrinal complexity which has yet to be resolved.[47] This point is echoed by the textbook writers. *De Smith, Woolf and Jowell* says that the concept of jurisdictional error, while connected with the historical origins of judicial review of administrative action, has become 'one of the most elusive in administrative law, largely because it calls for analytical distinctions which have, as judicial review has developed, become difficult if not impossible to sustain.'[48]

Although in general terms, jurisdiction means the extent or range of a body's decision-making power,[49] the term, Hare says, is used in a number of different senses.[50] The first 'is the idea that jurisdiction concerns an objective limit on the

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[46] [1968] 2 QB 862, p. 889. Cf *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129, at 136 in which Lord Cooke referred to the 'vague and probably undefinable concept of "jurisdiction"'. For the concept of jurisdiction in the context of the law of habeas corpus, see, e.g., *Re S-C (Mental Patient)* [1996] QB 599 and *R v Oldham Justices, ex p Cawley* [1996] 2 WLR 681. On the use of the terminology of jurisdiction in the USA, see, e.g., P. Craig, 'Jurisdiction, Judicial Control and Agency Autonomy' in I. Loveland, *A Special Relationship? American Influences on Public Law in the UK* (1995).

[47] I. Hare, 'The Separation of Powers and Judicial Review for Error of Law' in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord* (1998), p. 113. See also, e.g., P. Craig, *Administrative Law* (4th ed., 1999), ch. 15; Lord Woolf, J. Jowell and A. Le Sueur, *Principles of Judicial Review* (1999), ch. 4.

[48] Woolf, Jowell and Le Sueur, note 47, above, p. 89. On the origins of judicial review, see, e.g., L.J. Jaffe and E.G. Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 LQR 345.

[49] See, e.g., *R v West Yorkshire Coroner, ex p Smith* [1982] 3 WLR 920.

[50] The leading modern cases on jurisdiction are *R v Hull University Visitor, ex p Page* [1993] AC 682 (review of University Visitor's decision that termination of lecturer was permissible on the terms of the lecturer's contract of employment); *R v Monopoly and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 (challenge to decision of Secretary of State for Transport and Industry to refer a merger of two bus companies to the MMC); *Re Racal Communications Ltd* [1981] AC 374 (the High Court is not itself subject to judicial review). See also the *Anisminic* case, note 45, above.

decision-maker's power'.[51] The second is that, 'in some way, jurisdictional issues are preliminary to the real substance of the determination.' In other words, they are 'regarded as threshold questions which the decision-maker must answer (correctly) before proceeding to exercise its discretion on the merits of the claim before it.'[52] A third sense in which the term jurisdiction is used 'is that relating to the liability in damages for the decisions of certain judicial actors.'[53] Interestingly, Hare also note another dimension to the concept of jurisdiction which connects with the reflective nature of judicial review as understood by the legitimacy model, developed in the final Part of this thesis.

> The difficulties of defining the protean concept of jurisdiction are exacerbated by the fact that, in judicial review proceedings, what is crucially in issue is also the limits of the High Court's jurisdiction, as it is only if the inferior body has (in the broad sense) exceeded its jurisdiction that the High Court has the authority to intervene.[54]

Hare goes on to argue that the best justification for the notion of jurisdiction derives from the separation of powers doctrine: 'it is possible to justify judicial review for error of law over other parts of the judicial branch on the basis of separation of

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[51] Hare, note 47, above, p. 115. See, e.g., *R v Customs & Excise Commissioners, ex p Canterbury Crown Court* (2002) LTL 14/11/2002 (Crown Court judge had no jurisdiction to make an order or to give directions purporting to dictate or control proceedings in the magistrates' court nominated to give effect to a request for assistance made by Dutch authorities).

[52] Hare, note 47, above, p. 115. See also, e.g., *R v Bolton* (1841) 1 QB 66; *R v Broadcasting Complaints Commission, ex p British Broadcasting Corporation* (1994) 6 Admin LR 714; *R v Wandsworth County Court, ex p Makandu Sivasubramaniam* (2001) LTL 28/11/2002 (decisions of circuit judges, granting or refusing permission to appeal, were not susceptible to judicial review unless the challenge was based on jurisdictional error in a narrow sense).

[53] Hare, note 47, above, p. 116.

[54] Hare, note 47, above, p. 117. Recent cases raising questions of jurisdiction of this sort include: *J L Melbourne v Ministry of Defence* (EAT) LTL 14/1/2002 (unreported); *R v Inner London Crown Court,*

powers.'[55] This understanding of jurisdiction helps to clarify the connections between that concept and the related notion of institutional balance. The term institutional balance clearly reflects the underlying constitutional principle of separation of powers. That doctrine 'involves dividing governmental activity into legislative, executive and judicial functions. The fundamental tenet of the theory is that the concentration of more than one form of governmental power in the hands of one person or body is likely to lead to tyranny.'[56]

The notion of justiciability also relates to questions of institutional balance and the doctrine of separation of powers. Justiciability refers to those actions and decisions that 'are not amenable to the judicial process'.[57] Both justiciability and jurisdiction, then, are threshold doctrines which relate (at least in part) to the issue of whether a case is suitable or amenable to the supervisory jurisdiction of the court. Galligan says that the idea of justiciability developed from early judicial attitudes which were 'influenced by the idea that matters of discretion were in some way unsuited to the adjudicative process and thus to judicial review.'[58] The idea was crucial in *Liversidge v Anderson*, for instance, in which a number of judges distinguished between matters suitable for resolution by adjudicative processes and those that are

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ex p S (DC) LTL 4/7/2002 (unreported); *M Dannatt v Customs & Excise Commissioners* (VADT) LTL 50/5/2002 (unreported).

[55] Hare, note 47, above, p. 133. On the separation of powers doctrine see, e.g., *Duport Steel v Sirs* [1980] 1 WLR 142, per Lord Diplock at 157; E. Barendt, 'Separation of Powers and Constitutional Government' (1995) PL 599; N.W. Barber, 'Prelude to the Separation of Powers' (2001) 60 CLJ 59; Lord Steyn, 'The Weakest and Least Dangerous Branch of Government' (1997) PL 84.

[56] Hare, note 47, above, pp. 128-9. For classic accounts of separation of powers, see, e.g., Montesquieu, *The Spirit of Laws* (ed. D.W. Carrithers, 1977); J. Madison, A. Hamilton and J. Jay, *The Federalist* (ed. W.R. Brock, 1992).

[57] Per Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, at 418. See also, e.g., *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, per Lord Upjohn at 1060; *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 All ER 244, per Lord Browne-Wilkinson at 252.

[58] D.J. Galligan, *Discretionary Powers* (1986), p. 240.

discretionary.[59] In that case, matters of discretion vested in government officials were non-justiciable because they related to issues of 'statecraft and national policy' and the government was entitled to act upon secret information, the disclosure of which would be contrary to the national interest.[60]

There are two main ways in which the notion of non-justiciability has been used by the courts.[61] The first is where it can be used to indicate that for certain kinds of policy reasons there should be no review, as in *Liversidge*. 'The reasons for that classification are likely to be mixed, but part at least of the rationale is that the courts do not wish to intervene in the decision because, for constitutional reasons, it is best left to some other body.'[62] In the second sense, non-justiciability refers to the fact that a particular issue is unsuited to resolution by adjudication. The remainder of this section will refer to justiciability in the first – constitutional – sense. The other sense of the term is addressed in the following section when we turn to address the relationship between rights-based thought and administrative propriety (and specifically the problem of polycentricity).

I will consider the work of rights-based theorists in this area. Sir John Laws' position in relation to jurisdiction is perhaps the most direct elaboration of the implications of adopting an approach to public law based on the idea of the common law court as upholder of rights essential to human flourishing. In an article entitled 'Illegality: the problem of jurisdiction', Laws began:

[59] [1942] AC 206, pp. 221, 248, 261-7 & 279.
[60] Note 59, above, pp.261-7 (per Lord Wright). See also Galligan, note 58, above, pp. 240-1.
[61] See, e.g., Woolf, Jowell and Le Sueur, note 47, above, pp.168-175 & 291-4.

> 'Jurisdiction', like 'reasonableness', is a protean word. Its easiest application is the case where a body has express but limited powers conferred on it by another body: so if it acts outside those powers, it exceeds its jurisdiction. But the superior courts in England are not constituted on any such basis: they have, in the last analysis, the power they say they have.[63]

Laws used this analysis as a platform from which to propose reform not just of the concept of jurisdiction but also of the entire conceptual foundations of judicial review. In relation to the latter, Laws argued that, since the court itself develops principles of judicial review 'which it perceives are required to control those bodies which, in its judgment, should in modern conditions be subjected to the power of supervision',[64] it follows that the relationship between courts, government, and Parliament 'is, in the end, a creature of the Judges and of no other body.'[65] Accordingly, the traditionalist idea that ultra vires must underpin decision-making in judicial review cases is a 'fig-leaf' that we no longer need.[66] Laws posited instead an authentic common law foundation to the subject. 'The court's general authority is to decide for itself when and upon what grounds it will review. This must be the starting point for an appreciation of the judicial review jurisdiction.'[67] In relation to the former, Laws argued the doctrinal discourse surrounding jurisdiction and the

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[62] Galligan, note 58, above, p. 241. See also *Attorney-General v Gouriet* [1978] AC 435; the *CCSU* case, note 57, above.
[63] Sir J. Laws, 'Illegality: the problem of jurisdiction' in M. Supperstone and J. Goudie (eds.), *Judicial Review* (1992), p. 51.
[64] Above, note 63, p. 51.
[65] Above, note 63, p. 65.
[66] Above, note 63, p. 67.
[67] Above, note 63, p. 68.

Anisminic case is rendered redundant by the general conceptual shift he had proposed.[68]

There are no obvious limits to the position detailed in this early article on jurisdiction, or even any obvious consideration of the need to find such limits. If it is true that the courts have 'the power they say they have' and 'there exists no higher order of law for them',[69] there seems to be very little more to say on the matter. Laws does, however, make an attempt at defining the limitations of judicial review. But he does so in relation to his analysis of rights. These putative limitations will be examined in the section on rights-based thought and rights, below.[70]

The essence of Laws' argument on justiciability and institutional balance is mirrored in the corresponding sections of Dawn Oliver's book, *Common Values and the Public-Private Divide*.[71] In line with the book's basic argument, Oliver's main aim is to draw parallels between the issue of justiciability in public law and situations in private law which call for the examination by the court of expert or specialised information or skills (e.g., commercial judgments). The author, however, also notes that 'those cases in which judicial review is not available on grounds of justiciability ... represent perpetuations of a positivist authoritarian approach to power.'[72] (*R v*

[68] Above, note 63, p. 67.
[69] Above, note 63, p. 69.
[70] Laws, in his guise as judge, seems more aware of the need to find legitimate limits to the judicial role than Laws the theorist. (Or perhaps Laws the judge is better at finding such limits than Laws the theorist.) In the recent case *International Transport Roth GMBH v Secretary of State for the Home Department* [2002] EWCA CIV 158, Laws LJ also develops an extensive analysis of the limitations of the judicial role in protecting rights under the Human Rights Act regime. The case is discussed in detail in ch. 7, below. For analytical purposes, it is important when discussing Laws to distinguish between the practical activity of judging cases and the somewhat more reflective activity of theorising. For the most part, the thesis respects this distinction.
[71] *Common Values*, note 18, pp. 251-3.
[72] *Common Values*, note 18, p. 252.

Higher Education Funding Council for England, ex p Institute of Dental Surgery is cited as one such case.[73]) Given her earlier expression of disapproval of the positivist authoritarian theory, the author has little problem in decisively rejecting the idea of non-justiciable decisions.

> But the range of non-justiciable decisions is shrinking. Non-justiciability is not a popular ground for refusing judicial control. With the introduction of the Human Rights Act 1998 the weight problem when the interests of individuals have to be balanced against public interests – a large factor in justiciability – will be eased, though not solved.[74]

Trevor Allan's position on justiciability and institutional balance is rather more complicated. His recent book *Constitutional Justice* contains a chapter entitled 'Justiciability and Jurisdiction: Political Questions and the Scope of Judicial Review'.[75] The primary purpose of that chapter is to counter the claim that 'certain matters are inherently unsuited to adjudication, either because judicial determination would usurp the proper democratic process, or because judicial qualifications or adversarial legal procedures are inadequate or inappropriate to the task.'[76] Such an approach would, of course, have the potential to undercut the position defended by rights theorists that the common law court provides (or is capable of providing) a constitutionally superior forum for adjudicating moral/political disputes.

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[73] [1994] 1 WLR 242.
[74] *Common Values*, note 18, p. 253.
[75] See also T.R.S. Allan, *Law, Liberty, and Justice* (1993), ch. 9.
[76] *Constitutional Justice*, note 12, above, p. 161.

Allan begins his rejection of the claim for a freestanding political questions doctrine by recognising that a distinction between legal and 'political' questions does indeed form the basis of judicial review of legislative, executive and administrative action under the rule of law. This division, he says, is simply a reflection of the separation of powers doctrine.[77] However, he continues by arguing that, in the ordinary exercise of the court's constitutional powers, there is no place for an independent doctrine of 'political questions' that would restrict judicial review and allow political branches to be the final judges of the validity of their own actions or decisions.[78]

> The appropriate place for 'judicial restraint' is in the *interpretation* of constitutional rights, recognizing the crucial role of the political process in determining the needs of the common good: judicial respect for the complexities of governance and the values of democratic choice and accountability should be an integral part of the ordinary process of review.[79]

Later in the same chapter of his book, Allan elaborates what he means by judicial restraint. 'We should interpret the call for judicial restraint', he says, 'as a reinforcement of the familiar distinction between public policy and legal principle.'[80] The main way in which the principle/policy distinction is respected in Allan's account is the claim that rights in judicial review has a 'largely procedural character'.

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[77] *Constitutional Justice*, note 12, above, pp. 161-2.
[78] *Constitutional Justice*, note 12, above, p. 162.
[79] *Constitutional Justice*, note 12, above, p. 163.
[80] *Constitutional Justice*, note 12, above, p. 189.

> Individual rights in public law are rights to offer arguments to public agencies and to have those arguments, where relevant and cogent, fully and fairly taken into account. Since there is usually no right to any particular outcome, but only a right to fair treatment in the light of the reasonable requirements of public policy, as settled by the relevant authority, the court's judgment of the merits of an administrative decision is of a strictly limited kind.[81]

The point of ascribing public law rights a procedural character is clearly to differentiate politics and law in the context of administrative law and practice. Nonetheless, for a number of reasons, Allan's analysis at this point is somewhat surprising. First, it differs from the position advanced by both Oliver and Laws. (And also from other rights-based thinkers who prioritise the idea of substantive judicial review.[82]) Second, it is hard to square with other central elements within his own account. The two guiding ideas of his theory are the notion of the rule of law laden with substantive values and the idea that the common law necessarily operates according to those basic moral values that attach to the rule of law.[83] The proceduralist turn at this stage of the theory is at odds with both of these central ideas. A substantive rule of law operated by a constitutionally supreme court applying the fundamental values of a society must surely demand more than a 'largely proceduralist' ideal of judicial review. To argue that the substantive moral values that constitute the rule of law become, in practice, 'rights to offer arguments

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[81] *Constitutional Justice*, note 12, above, p. 191.
[82] And also from other rights theorists who emphasise the importance of substantive judicial review. See, e.g., J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) PL 671; J. Jowell and A. Lester, 'Beyond Wednesbury: Substantive Principles of Administrative Law' (1987) PL 369; Lord Lester, 'Developing Constitutional Principles of Public Law' (2001) PL 684.
[83] See chapter 1, above.

to public agencies' is to downgrade the very concepts that supposedly form the heart of the scheme of constitutional justice that Allan proposes.

In relation to matters relating to justiciability and institutional balance, then, rights-based thinkers – with the partial exception of Allan – appear to be decisive in their rejection of the idea that certain kinds of decisions, by virtue of their content, ought to be regarded as non-justiciable. This analysis makes sense given the essence of the argument they advance: that, at least in respect of its public law jurisdiction, the common law court operates a higher order of moral law against which all governmental decisions ought to be assessed. As I will continue to argue in Part II, in putting forward this argument, rights theorists downplay the dimension of what I have called constitutional propriety or legitimacy. Allan's solution is somewhat different. Although, like Laws and Oliver, he rejects the idea that there should be a freestanding doctrine of jurisdiction based on the idea of 'political questions', he qualifies this by turning the public law rights that flow from the fundamental values into rights to 'due process'.[84] But this solution, I have argued, is not only inconsistent with the position most rights theorists adopt on the matter, but it also fails to square with the main thrust of his own theory.

(b) Rights-Based Thought and Administrative Propriety

The previous section examined issues of constitutional propriety - in particular, the issues of jurisdiction, justiciability, and institutional balance - within the theoretical accounts offered by rights-based scholars. In this section, the extent to which rights theorists accommodate matters of administrative propriety is explored by means of an examination of the way in which the notion of polycentricity is dealt with by those theorists.

According to Harlow and Rawlings, polycentric issues 'involve a complex network of *interacting* interests and considerations.'[85] The notion of polycentricity was introduced into the discussion of adjudication by Lon Fuller. Fuller himself derived the concept from Polanyi who used it to justify restricting central direction of the economy.[86] Fuller defined polycentric problems as 'situation[s] of interacting points of influence', which normally 'involve many affected parties and a somewhat fluid state of affairs'.[87] Fuller stressed the complex repercussions of intervention in such situations:

> We may visualize this kind of situation by thinking of a spider's web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a

[84] On due process, see, e.g., J.R. Pennock and J.W. Chapman (eds.), *Due Process* (1977); J.L. Mashaw, *Due Process in the Administrative State* (1985); G. Maher, 'Natural Justice as Fairness' in N. MacCormick and P. Birks (eds.), *The Legal Mind* (1986).
[85] C. Harlow and R. Rawlings, *Law and Administration* (2nd ed., 1997), p. 598. (Emphasis of original.)
[86] M. Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (1951). For polycentrism in the context of regulatory theory see, e.g., I. Ayres and J. Braithwaite, *Responsive Regulation* (1992), p. 78; R. Baldwin and M. Cave, *Understanding Regulation* (1999), p. 302.

> whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker to snap. This is a 'polycentric' situation because it is 'many centred' – each crossing of strands is a distinct center for distributing tensions.[88]

A classic recent example of a polycentric issue arising in the context of judicial review is *R v Cambridge Health Authority, ex p B*.[89] That case involved a challenge to a decision to refuse medical treatment to a terminally ill girl on the grounds of the very low chance of success and the fact that medical resources were limited within the decision-making context in question. (The case is analysed in detail in chapter 7.) John Allison has spelt out the implications of the problem of polycentricity for the judicial review of administrative action.

> To avoid exceeding the limits of its own competence, a court confronted with a significantly polycentric dispute must refrain from two kinds of activism. First, the court must not change the law where an appreciation of repercussions is required for sensible legal development. Secondly, in so far as the court has a choice under existing law, it must avoid choosing a legal solution that necessitates an appreciation of complex repercussions.[90]

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[87] L. Fuller, 'The Forms and Limits of Adjudication' (1979) 92 Harv LR 353, p. 395 & 397. For a sophisticated account of Fuller's thought, see J.W.F. Allison, *A Continental Distinction in the Common Law* (1996), pp. 192-204.

[88] Fuller, note 87, above, p. 395. This position has connections with the analysis of contemporary systems theory: see, e.g., N. Luhmann, 'Law as a Social System' (1989) Northwestern Univ LR 136; G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) Law & Soc Rev 239; G. Vershraegen, 'Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory' (2002) 29 JLS 258.

[89] [1995] 2 All ER 129.

[90] J. Allison, 'The Procedural Reason for Judicial Restraint' (1994) PL 452, p. 455. See also, e.g., Allison, note 87, above; R. Cranston, 'Reviewing Judicial Review' in G. Richardson and H. Genn,

To what extent, then, is the problem of polycentricity incorporated within the theoretical framework developed by rights-based theorists? There is very little in the published work of Sir John Laws that pertains to this issue. He seems far more concerned to chart the general constitutional relationship between court and Parliament, or court and the executive. There is certainly no systematic attempt to accommodate issues of administrative propriety - and no mention of the problem of polycentricity - in the articles that form the key components of Laws' theoretical oeuvre.[91]

The work of Trevor Allan, by contrast, shows that the author is fully cognisant of both the issue of administrative propriety in general and with Fuller's analysis of polycentricity in particular.[92] Allan's discussion of polycentricity arises in the context of his analysis of justiciability and jurisdiction, discussed in the previous section. Allan reinterprets Fuller's (and Allison's) call for judicial restraint as the proper response to polycentricity as 'a reinforcement of the familiar distinction between public policy and legal principle.'[93] Adjudication is properly concerned with issues that can be reduced to questions of individual right; other issues 'that

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Administrative Law and Government Action (1994), p. 64; C. Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1; R. Baldwin, *Rules and Government* (1995), p. 29.

[91] Bearing in mind the analytical strictures mentioned in note 70 above, there is little evidence in the cases either that Laws in his judicial role has much time for the niceties of Fuller's argument from administrative complexity. In his first instance decision in *ex p B* (mentioned above and discussed in detail in chapter 7), Laws J dismissed a similar argument made on behalf of the Health Authority. They were, he said, to 'do more than toll the bell of tight resources' before convincing him that B's right to life was to be overridden: [1995] 1 FLR 1055, at p. 1065. In addition, ideas of administrative complexity and polycentricity were absent from the four 'principles of deference' developed in the recent *International Transport* case: above, note 70, paras 80-87. (Although, in fairness to Laws, in that case the situation did call for an assessment of the relationship between court, Parliament and the executive rather than an assessment of the reviewing court's position vis-à-vis administrators.)

[92] This is certainly true of Jeffrey Jowell, another influential public lawyer whose work contains strong rights-based elements: see, e.g., his 'The Legal Control of Administrative Discretion' (1973) PL 179.

normally entail complex judgments concerning the public interest' are matters of policy which 'cannot be resolved by invoking constitutional principles as a basis for purely legal analysis.'[94] Allan goes on to argue that, if an issue can be phrased in terms of legal principle, the notion of judicial restraint becomes redundant. Within the sphere of legal principle, he says, 'the court must adhere to the dictates of reason, as it perceives them: a policy of 'restraint', if that meant deciding contrary to what appeared to be a balance of argument against the public authority, would imply abdication of the judicial function.'[95]

But the mere fact that Allan is aware of the problem of polycentricity is not sufficient to threaten the model of rights-based public law thought developed in this thesis. This would only be the case were his thoughts on the matter found to be both internally coherent and fully integrated with the central aspects of his theory.[96] There are two arguments that might be made at this point. The first relates to the internal coherence of Allan's analysis at this point. It is arguable that Allan does not do enough to sustain the distinction he erects between issues of policy and matters of principle. We saw in the previous paragraph that the distinction rests on the difference between: (a) 'issues that can be reduced to questions of individual rights' – which are, for that reason, matters of principle amenable to judicial resolution - and (b) issues that 'entail complex judgments concerning the public interest' which 'indirectly affect[] many persons in numerous interconnected ways' – which are

[93] *Constitutional Justice*, note 12, above, p. 189.
[94] *Constitutional Justice*, note 12, above, p. 189.
[95] *Constitutional Justice*, note 12, above, p. 190.
[96] Even then, it could be argued that Allan's position is aberrant within rights-based public law scholarship and the integrity of the model developed in this chapter could be preserved.

matters of policy which are unsuitable for judicial resolution on the basis of legal analysis.[97]

This distinction seems plausible enough in the abstract. But, on reflection, it is not at all clear whether the distinction is as watertight as Allan appears to imagine. To find out why, we can return to the case of *ex p B*, mentioned above and discussed fully later. That case has been understood as a classic modern example of a situation beset by polycentricity by, amongst others, Harlow and Rawlings.[98] But, as Allan himself recognises,[99] that case involved both the need to make extremely complex and expert 'judgments concerning the public interest' (the best allocation of scarce medical resources) and was at the same time (partly) reducible to 'a question of individual rights' (whether the infringement of B's right to life was justifiable in the circumstances). And, as we shall see below, the judges involved in the case analysed the case using both the language of rights and the language of administrative propriety and polycentricity.

After examining a number of cases in chapter 7, I will suggest that this sort of mixture is by no means unusual within the context of judicial review. This fact makes it difficult to sustain a dichotomy between principle and policy and to use it in the way that Allan suggests. Allan tries to use the distinction as a basis from which to distinguish between those situations in which deference is due to the original decision-maker (matters of policy) and those situations in which deference

[97] See also T.R.S. Allan, 'Parliament, Ministers, Courts and Prerogative: Criminal Injuries Compensation and the Dormant Statute' (1995) 54 CLJ 481.
[98] *Law and Administration*, note 85, pp. 599-602.
[99] *Constitutional Justice*, note 12, above, pp. 190-1.

is, generally, inappropriate (matters of principle). But, if what the court faces when reviewing decision is typically a mixture of both policy and principle (to use Allan's terms) which cannot be classified simply in terms of either, then there is no basis for the sort of distinctions envisaged by Allan's theory.

The second problem mirrors the assessment of the place of constitutional propriety in Allan's theory advanced in the previous section. Allan's theory is structured around the idea of a substantive, liberal rule of law standing at the heart of a scheme of constitutional justice. The common law court stand as ultimate guardian within this scheme since the common law is the only sure site of moral/political deliberation in the polity. Allan's argument that, in relation to matters of principle, there is in general no place for judicial deference fits comfortably within this theoretical framework. His argument that deference is due in respect of all those issues of concern the public interest or those that have the potential to affect many people does not fit comfortably. It is one of the conditions of public administration that decisions are complex, concern the public interest, and have the potential to affect many people. To encourage deference in relation to these matters would be to relegate (Allan's ideal of) the rule of law from its central position because it would leave vast areas of administrative practice untouched (or only lightly touched) by the network of public law rights and principles developed by the common law court.

Like Allan, Dawn Oliver is undoubtedly aware of the problem of polycentricity in the context of judicial review raised by Fuller and others. In a short section of her book *Common Values and the Public-Private Divide*, Oliver suggests that the

intensity of review will vary according to a number of factors. One reason for reduced intensity, Oliver argues, 'might be that the decision maker has expertise which the courts lack and which , in effect makes the issue less justiciable than in cases where no particular expertise is required on the part of the decision maker.'[100] Elsewhere, Oliver argues that, in public law, 'we are accustomed to the idea that certain decisions are not justiciable, often, though by no means invariably, because they are "polycentric".'[101]

But, as in the previous discussion of similar comments made by Trevor Allan, the fact that the theorist alludes to these matters is not sufficient to controvert the model of rights-based thought developed in this thesis. We must find out, additionally, whether Oliver has successfully integrated such comments into her overall theory. The essence of Oliver's normative theory is that five key values that are connected to two influential models of citizenship ought to applied by the courts in all situations in which there is an imbalance of power between the parties to the dispute. There is no essential difference, in Oliver's account, between public and private law. As regards public law, since the citizen is always in a position of relative powerlessness in the face of governmental action, the courts ought to enforce the key values against the public body in question.

One consequence of this position is that the courts should be most reluctant, generally speaking, to be deferential towards governmental decision-makers. Such a response would be demanded by the theory of positivist authoritarian model of

[100] *Common Values*, note 18, above, pp. 108-9.
[101] *Common Values*, note 18, above, p. 251.

judicial review that Oliver rejects as outmoded and unjustifiable. Deference of this sort would be wholly at odds with the models of citizenship she supports – considerate altruism and participative communitarianism.[102] Oliver makes this point on a number of occasions. Questions about deference and 'the public interest in upholding the authority of those in positions of public power', she says at one point in *Common Values*, 'raise issues about the place of positivist authoritarianism in judicial review.'[103] In relation to these questions, Oliver argues that 'judicial review has moved away from principles of positivist authoritarian towards more participative and altruistic approaches.'[104] Later in the book, she notes with approval that 'the trend in recent years has been to give less weight to considerations of the need to defer to authority or to accept claims of national security as precluding judicial review'.[105]

This interpretation of trends in the case law makes sense given Oliver's basic theoretical perspective. Judicial deference to those who wield power (including public bodies) is associated with a positivist authoritarian model of government and citizenship which is normatively unjustifiable given Oliver's understanding of the human nature.[106] Judicial assertiveness in the face of such wielders of power is associated (necessarily so, according to Oliver's account) with the five key values and the theories of citizenship that constitute the normative core of the theory. According to Oliver, positivist authoritarianism is receding in contemporary British

[102] *Common Values*, note 18, above, pp. 7-8.
[103] *Common Values*, note 18, above, p. 111.
[104] *Common Values*, note 18, above, p. 121.
[105] *Common Values*, note 18, above, p. 254.
[106] See, e.g., Oliver's discussion of the deontological rationale for civil and political rights: *Common Values*, note 18, above, pp. 228-9. See also chapter 3, above.

politics as theories of considerate altruism and (in particular) participative communitarianism begin to predominate.

This theoretical framework clearly has its attractions. But there is no place within it for complex account of the relationship between of the sort demanded by a considered reflection on Fuller's analysis of polycentric decision-making and its implications for judicial review. This is so because, on Oliver's account, notions of deference are in binary opposition to the normative theory of public law that she favours. This line of argument is developed and generalised in the following chapters of the thesis.

I have argued in this section that, to the extent that issues relating to administrative propriety are present in right-based work, they are not properly integrated into the general theoretical framework rights theorists develop. That framework is based on the prioritisation of a scheme of fundamental rights, deriving from essential values, which is to be enforced through the application of a higher-order law in the common law courts. Issues of administrative propriety are largely absent from Laws' theoretical writings. Allan's reinterpretation of judicial deference to administrative expertise in terms of the distinction between principle and policy is ultimately unconvincing because it lacks internal consistency and is unable to fit within the main contours of his account. Oliver's occasional advocacy of context-sensitive judicial review is difficult to square with the repeated hostility to judicial deference which derives from her general theoretical platform.

4. Rights-Based Thought and the Nature and Limits of Rights

The challenge posed at the beginning of the previous section to our model of rights-based public law thought seems to have proved unfounded. This does not mean, however, that the task of explicating the rights-based theory is over. On the contrary, there are two significant issues which need to be addressed before the model is complete. In this section, then, I turn to address two pertinent issues: first, the rights theorists' understanding of the nature of fundamental common law rights; second, Sir John Laws' attempt to put limits on a rights-driven public law jurisprudence - an issue raised above, but not yet dealt with.

(a) The Nature of Fundamental Common Law Rights

None of the theorists under examination in this thesis provides a thorough philosophical account of the nature of the type of rights that form the core of their theory of public law. Nonetheless, we can deduce from their work certain assumptions about the nature and function of rights in their theories.

The rights theory begins with an exploration into the 'essence' of human nature.[107] The function of modern constitutional law, we are told, is to nourish and protect the essential characteristics of the citizens.[108] In this regard, rights-based theory can be seen as a species of 'ethical liberalism'. According to Robert Baldwin, ethical

[107] On deducing rights from essentialist philosophy in general, see, e.g., A. Halpin, *Rights and Law Analysis and Theory* (1997), pp. 106-7.

liberals, 'as exemplified by John Rawls, Ronald Dworkin, and Bruce Ackerman, seek to derive liberal conclusions about social justice from premisses concerning human nature.'[109] In a similar vein, Shiffrin argues that ethical liberalism 'invokes neutrality (or variants of it) as a principle from which large and powerful political conclusions are to be drawn. Lurking behind this neutrality is a conception of what human beings ought to be like and how they ought to think.'[110]

The precise outcome of this exploration into essentialist philosophy varies from theorist to theorist. However, the accounts they provide have a number of distinctive common features. First, each of the accounts appears to rest upon Kantian foundations. Laws is the most straightforward in this respect, arguing without elaboration that his constitutional theory rests on a Kantian understanding of the notion of autonomy.[111] In discussing the five key values that form the heart of her account – autonomy, dignity, respect, status and security - Dawn Oliver draws directly upon Kant's categorical imperative.[112] Allan prefers to derive the core values in his theory – autonomy, dignity, equality - from Kantians of a more recent vintage: in particular, Hayek, Fuller, and Dworkin.[113]

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[108] Sir J. Laws, 'The Constitution: Morals and Rights' (1996) PL 622, p. 623. See also T.R.S. Allan, 'Constitutional Rights and Common Law' (1991) 11 OJLS 453, p. 473. A state-bound model of constitutional law seems to be implicit in this account.
[109] *Rules and Government*, note 90, above, p. 50.
[110] S. Shiffrin, 'Liberalism, Radicalism and Legal Scholarship' (1983) 30 UCLA LR 1103, p. 1107.
[111] Above, note 108, p. 623.
[112] *Common Values*, note 18, above, pp. 60-3. Although it is not clear whether all five values are Kantian in origin or inclination.
[113] On the revival of Kantian thought post-World War II, see, e.g., R.A. Primus, *The American Language of Rights* (1999), pp. 182-197. See also N. Duxbury, *Patterns of American Jurisprudence* (1995), ch. 4.

Second, although their position is in no sense fleshed out, the rights theorists examined in this thesis have a shared understanding of the character and function of rights. [114] They all adopt a Dworkinian understanding of rights. According to Dworkin, a right is a metaphorical trump card, held by an individual, which can prevent the government or society at large from doing a certain thing, even if doing that thing would be in society's general interest.[115] Dworkin's account has a number of characteristics – aside, that is, from its intellectual force - that make it highly attractive to the rights theorists examined here. For one thing, Dworkin's political theory, like the rights-based theories of public law it serves to support, is avowedly liberal and individualistic.[116] It serves as a basis from which to generate the civil and political rights[117] essential to a classic form of liberalism. For another, Dworkin's theory of law as integrity also lends itself to those who maintian that the court acts (or is capable of acting) as the central institution in the political community for enforcing the individual's rights, through the application of legal principle, against countervailing governmental action. The following passage from *Law's Empire*, for instance, closely parallels the rights-based theorists' understanding of the purpose of (public) law and their dualist conception of constitutional politics.

> Governments have goals: they aim to make the nations they govern prosperous or powerful or religious or eminent; they also aim to remain in power. ... Law insists

[114] On the relationship between rights and Kantian thought see, e.g., N.E. Simmonds, 'Rights at the Cutting Edge' in M. Kramer, N.E. Simmonds and H. Steiner, *A Debate Over Rights* (1998), pp. 119-127; H. Steiner, *An Essay on Rights* (1994), pp. 208-228.
[115] See R. Dworkin, *Taking Rights Seriously* (1977), pp. 90-94 & 105-30; 'Rights as Trumps' in J. Waldron (ed.), *Theories of Rights* (1984). See also S. Guest, *Ronald Dworkin* (1992), 235 & 282; Primus, note 113, above, pp. 11-16.
[116] See, e.g., R. Dworkin, *Freedom's Law* (1996), pp. 36-38.
[117] But not, perhaps, social rights: see K. Ewing, 'Social Rights and Constitutional Law' (1999) PL 104. Alan Gewirth, however, makes a strong case for the proposition that it is perfectly possible to justify welfare and economic rights from a Kantian foundation: see *The Community of Rights* (1996), ch. 4.

> that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[118]

Two further issues concerning rights remain to be addressed. The first concerns the rights theorists' understanding of the relationship between the fundamental common law rights that form the core of their conception of public law and the rights adumbrated in the European Convention on Human Rights.[119] This has become a pressing issue in the wake of the introduction of the Human Rights Act[120] (discussed in some detail in the last chapter of the thesis). It has not received much attention, however, from rights-based theorists. This is due in the main, I would suggest, to the fact that the rights theory of public law predates and is in no sense connected to the introduction of the Human Rights Act.[121] The rights theory was advanced and had its adherents long before the Human Rights Act was passed; and it would still be advanced had the Act not have been passed. (A point which I make in the Introduction to this thesis.)

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[118] R. Dworkin, *Law's Empire* (1986), p. 93. For a recent criticism of the court-centred approach to constitutionalism see M. Tushnet, *Taking the Constitution Away from the Courts* (2000).

[119] See, e.g., *Derbyshire Country Council v Times Newspapers Ltd* [1992] QB 770; *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400; *R v Mid Glamorgan Family Health Services, ex p Martin* [1995] 1 WLR 110.

[120] See, e.g., *Director of Public Prosecutions v Jones* [1999] 2 AC 240 (it was appropriate to have regard to the Convention where the common law was uncertain and developing, in resolving the uncertainty and deciding how the law should develop); *Briggs v Baptiste* [2000] 2 AC 40 (Privy Council emphasised at p. 54 'the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation').

[121] Another reason might be that the incorporation of European Convention rights via the HRA is, in fact, difficult to incorporate in a theory one of whose major justificatory strands is historical and country-specific: i.e., that the common law in this country is peculiarly adapted to the needs of the citizens and has developed a set of principles which corresponds and reflects the deep-rooted values of the people.

There are, however, comments in recent work which might indicate what conception rights theorists might have of the relationship between these two types of rights. Dawn Oliver sees a very close nexus between common law values and rights, or at least those values and rights resulting from the progressive trend she perceives away from principles grounded in positivist authoritarianism to those connected with participative communitarianism and considerate altruism. Drawing on examples relating to the operation of European Convention articles 3 (freedom from torture and inhuman or degrading treatment), 8 (right to privacy), and article 2 of the First Protocol (right to education), Oliver argues that 'the values of dignity, autonomy, respect, status and security are strongly present in most of the articles' of the Convention.'[122]

Trevor Allan's position on this matter seems to be very similar. The Convention rights introduced into English law via the Human Rights Act add to an already existing body of case law which served to express and protect similar values and rights. Incoming rights will be assimilated into the larger body of common law principles. In the wake of the Act, he writes in a recent article,

> the substantive standards of legality that comprise the rule of law may be taken to include respect for the European Convention rights that now form part of our domestic law. These rights are founded on constitutional values that inform both common law and the judicial interpretation of statute, facilitating the consistent

[122] *Common Values*, note 18, above, pp. 233-6.

application of an integrated body of law, expressing a consistent conception of justice.[123]

Statements to similar effect occur in *Constitutional Justice*, where Allan writes that, in so far as 'the general law protects those civil and political rights fundamental to citizenship, such as freedom of speech and association, it deserves the scrupulous protection of the judiciary, jealous of infringements that serve only temporary political ends.'[124] This position is also consistent with Allan's analysis of cases like *R v Ministry of Defence, ex p Smith*[125] in which challenges to governmental decisions involved Convention articles but were decided before the introduction of the Human Rights Act. Criticising the approach of the English courts in the *Smith* case, Allan argues that even without the incorporation of the Convention 'it would be wrong to conclude that English law was incapable of providing appropriate protection' to the article 8 right in question. 'The judges failed to show the courage of their own convictions – that the executive had been unable to provide compelling justification for serious breaches of (common law) constitutional rights.'[126]

This analysis of the relationship between common law and Convention rights in terms of a comfortable reception of the latter into an existing body of legal principle is replicated in the discussion of the right of access to the courts. In *R v Secretary of*

[123] T.R.S. Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' (2002) 61 CLJ 87, p. 120. It is difficult to see how this analysis fits with Allan's account of existing public law rights as 'largely procedural'.
[124] *Constitutional Justice*, note 12, above, p. 45. (See also at p. 228: 'the Human Rights Act, and therewith the Convention rights, has been entrenched by a rule of interpretation. Although it is only a weak form of entrenchment ... its effectiveness depends largely on the strength of judicial adherence to the rights and liberties concerned.')
[125] [1995] 4 All ER 427. The case was also litigated before the Strasbourg court: *Smith and Grady v United Kingdom* (2000) 29 EHRR 493.
[126] *Constitutional Justice*, note 12, p. 179.

State for the Home Department, ex p Leech (No. 2)[127], the Court of Appeal upheld a prisoner's objection to a practice whereby the prison authorities routinely intercepted correspondence with his legal adviser, in breach of the ordinary rule of legal professional privilege. The right of (unimpeded) access to a solicitor was said to be implicit in and a constituent of the 'constitutional right' of access to the court. This approach was followed in *R v Lord Chancellor, ex p Witham*,[128] in which Laws J held that excessive court fees deprived a citizen of his or her constitutional right of access to the court.[129] In discussing the first of these cases, for instance, Allan attempts to dovetail the common law and Convention positions on the matter by pointing to similar conclusions reached by the European Court of Human Rights applying its article 8 jurisprudence.[130]

In respect of the relationship between common law and European Convention rights, then, rights theorists assume a great degree of consonance between the rights that they detect in 'home grown' common law and those articulated in the Convention. Rights theorists expect those Convention rights to be subsumed within a pre-existing body of public law principles. They assume that they are cut from the same theoretical cloth. This general outlook finds some support in judicial comments about the nature of the relationship between the two bodies of rights in certain post-

[127] [1993] 3 WLR 1125; [1994] QB 198.
[128] [1998] QB 575. In *Witham*, an impecunious person was seeking to bring defamation proceedings, for which legal aid was unavailable.
[129] See Woolf, Jowell and Le Sueur, note 47, above, p. 496. See also *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (discussed in chapter 7); Raymond v Honey [1983] 1 AC 1 where Lord Wiberforce described access to a court as a 'basic right' (at p. 13). But see also *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597 (CA held that *Witham* did not apply where the applicant, unable to petition for bankruptcy because of the £250 deposit required under the Insolvency Fees Order 1986 for the Official Solicitor's fees, sought judicial review of the Order as restricting her right of access to justice).
[130] *Constitutional Justice*, note 12, above, pp. 45-6. Allan cites as an illustration *Campbell v United Kingdom* (1992) 15 EHRR 137.

Human Rights Act cases. In *Ashworth Security Hospital v MGN Ltd*, Lord Phillips MR said that English courts 'have frequently stated that in the field of freedom of speech there is no difference in principle between English law and Article 10 of ECHR'.[131] Similarly, Lord Bingham said in *R (Daly) v Secretary of State for the Home Department* that the right to legal professional privilege is 'a basic right recognised both at common law and under the European Convention'.[132] Laws LJ in his judgment in *R v Secretary of State for the Home Department, ex p Mahmood* sums up this sentiment succinctly:

> The more intrusive mode of supervision ... which is apt by our domestic law to the review of decisions affecting fundamental freedoms will, in my judgment, in broad terms and in most instances suffice also at least as the beginning of a proper touchstone for review when the Convention is directly in play. ... There will be occasions when the court's duty is to be more muscular than has been its habit; but at every turn its decisions will form part of a continuum with what the common law has already said.[133]

In addition, rights theorists seem to recognise no great need to distinguish between different sorts of Convention articles – e.g., the unqualified prevention of torture and inhuman or degrading treatment (article 3) and the qualified right to respect for private and family life (article 8).[134] This would seem to indicate that rights theorists

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[131] [2001] 1 WLR 515, para 71. (Citing *Attorney-General v Guardian Newspapers Ltd* (No. 2) [1990] 1 AC 109; *Derbyshire County Council v Times Newspapers* [1993] AC 534; *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328.)
[132] [2001] 2 AC 532, at p. 538.
[133] [2001] 1 WLR 840, para. 30.
[134] See, e.g., Oliver, *Common Values*, note 18, above, pp. 233-5.

perceive little difficulty in incorporating both sorts of articles into their theoretical framework.

The second remaining issue concerning rights in rights-based thought is whether rights theorists draw a distinction between common law rights and those that derive from statute.[135] In general, rights theorists tend to conceptualise the relationship between statutory and common law norms in terms of a metaphor of reception: statutory norms are like islands in a surrounding ocean of pre-existing common law.[136] This issue is pertinent in light of an interesting recent judgment of Sir John Laws.[137] *Thoburn v Sunderland City Council*[138] concerned a challenge to the municipal legislation giving effect to the policy of the EU to introduce in the Member States compulsory systems of metric weights and measures. The appellants had been convicted for offences under the Weights and Measures Act 1985[139] for failing to comply with the instructions of inspectors to sell produce in metric rather than imperial measures. They sought to challenge those convictions by arguing that the regulations in question. It was submitted on behalf of the appellants that a Henry VIII power[140] to amend primary legislation, such as that contained in European Communities Act 1972 s.2(2) read with s.2(4), could only lawfully be exercised in

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[135] On the relationship between statute and common law in general, see, e.g., G. Calabresi, *A Common Law for the Age of Statutes* (1980).
[136] See, e.g., Sir S. Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 LQR 270.
[137] But see my earlier caveat on the use of judgments in cases in relation to the analysis of the rights-based theory: note 70, above.
[138] [2002] WWHC 195.
[139] As contained within the Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994.
[140] See, e.g., C. Turpin, *British Government and the Constitution* (4th ed., 1999), pp. 381-2: 'One kind of enabling provision, known as a 'Henry VIII clause', allows ministers to repeal or amend Acts of Parliament. The Donoughmore Committee recommended in 1932 that this kind of clause should be adopted only rarely, when it could be justified 'up to the hilt', and used for strictly limited purposes (Cmnd 4060/1932, p 61). The Hansard Society Commission on the Legislative Process showed a like

relation to Acts already on the statute book at the time when the Henry VIII power is enacted.[141]

Laws LJ rejected this argument from the doctrine of implied repeal[142] on the basis that there was no inconsistency between the weights and measures provisions and ECA s.2(2). Laws LJ then dealt with the submission of the respondents, who had argued that by the ECA, Parliament had entrenched EC law in the domestic law of the United Kingdom subject only to the possibility of withdrawal from the EU by express repeal of the ECA.[143] This submission failed, Laws LJ said, because it forgot the rule that Parliament cannot bind its successors. 'Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA.' In consequence, the ECA does not allow any institution of the EU to 'touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom' since Parliament 'has not the authority to authorise any such thing.'[144]

The traditional understanding of Parliament's legislative supremacy has not been changed – and cannot be changed – by Parliament itself. Nonetheless, Laws LJ continued, there has been some modification to the doctrine, but this 'has been done by the common law, wholly consistent with constitutional principle.'[145] Drawing on the jurisprudence of 'constitutional rights' developed in *Leech*, *Witham* and

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antipathy towards Henry VIII clauses (*Making the Law* (1992), p 67) but they still make a frequent appearance in modern statutues.'

[141] Above, note 138, para. 41.

[142] On which see, e.g., *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590. See also S. de Smith and R. Brazier, *Constitutional and Administrative Law* (8th ed., 1998), p. 78.

[143] Above, note 138, para, 56.

[144] Above, note 138, para. 59.

[145] Above, note 138, para. 59.

elsewhere,[146] Laws LJ said that there 'are now classes or types of legislative provision which cannot be repealed by mere implication.'[147] On the basis of this jurisprudence, it was possible to draw a distinction between 'ordinary' and 'constitutional' statutes.[148] A constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.[149] According to Laws LJ, while ordinary statutes may be impliedly repealed, constitutional statutes may not.

> A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and State, by unambiguous words on the face of the later statute.[150]

Laws LJ maintained that, when applied to the present dispute, this analysis gave full weight both 'to the proper supremacy of Community law and to the proper supremacy of the United Kingdom Parliament.' Supremacy of Community law referred to the supremacy of substantive principles and rules of Community law and was protected by the fact that the ECA, as a constitutional statute, could not be impliedly repealed. Supremacy of the UK Parliament meant the supremacy of the legal foundation within which those substantive legal provisions enjoy their primacy.

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[146] See above, notes 128 & 129. For another recent application of this principle, see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.
[147] Above, note 138, para. 60.
[148] Note the parallels between this distinction and a similar division between ordinary and constitutional politics pervasive in rights-based theory.
[149] Above, note 138, para. 62.
[150] Above, note 138, para. 63.

This supremacy was protected, first, by the fact that the doctrine of implied repeal derived 'purely from the law of England: the common law recognises a category of constitutional statutes' and, second, in the recognition that the 'fundamental legal basis of the United Kingdom's relationship with the EU rests with the domestic, not the European, legal powers.'[151]

(b) Laws on the Limits of Rights

I said earlier that Sir John Laws seems to make no room for limitations on the judicial role in his discussion of the law relating to jurisdiction and the limits of the courts' supervisory jurisdiction. The source of the limitations on the scope and reach of judicial review which Laws attempts to articulate derive, aptly enough for an avowedly rights-based theory, from differences in the nature of rights themselves.[152]

It will be recalled from the analysis contained in chapter 2 that Laws constructs a dualist account of the constitution by drawing a distinction between ordinary and constitutional politics. Within this account, he attempts to conceptualise the relationship between the legislature and court – and, therefore, the division between politics and law – in terms of a distinction between positive and negative rights. Negative rights, he says, derive directly from the moral law and so serve to protect individual autonomy by providing a check on inimical governmental activity. Developed by the courts, these constitutional rights set 'a minimum standard for the

[151] Above, note 138, paras. 69-70.
[152] See, e.g., Sir J. Laws, 'The Limitations of Human Rights' (1998) PL 254.

relationship between ruler and ruled.'[153] And the judgments of the courts are supreme when it comes to these rights since they are the products of common law. Positive rights, by contrast, are rights to certain aspirational benefits that result from democratic choices made about 'education, health, defence, and many other goals' in relation to which citizens may reasonably differ.[154] These rights are not constitutional rights, since they do not protective of individual autonomy, and do not form part of the higher order of law operated by the courts. In relation to these rights, then, the legislature and not the court is supreme.[155]

Laws recognises that, in practice, negative and positive rights will come into conflict. But he insists that this does not pose a real threat to his analysis. Laws offers two ways of resolving such conflict. First, if there is a 'moral consensus' about the matter in dispute, it is up to the courts to decide whether the positive right under challenge is too invasive of the negative right in question. If, on the other hand, there is no consensus, it will 'generally be for Parliament to set the appropriate rule'. Alternatively, Laws suggests that, in any case, a 'grasp of the true moral basis of negative rights will itself determine the necessary reach in most cases'.[156]

It is arguable that neither of these putative methods of resolution is convincing. In relation to the first argument, it might be said that the fact that the two parties have decided to bring a dispute to court indicates a lack of moral consensus. It is also

[153] 'Constitution: Morals and Rights', note 108, above, p. 629.
[154] Sir J. Laws, 'Public Law and Employment Law: Abuse of Power' (1997) PL 455, p. 457.
[155] 'Constitution: Morals and Rights', note 108, above, p. 629.
[156] 'Constitution: Morals and Rights', note 108, above, p. 633.

hard to see how the court is to determine the existence or otherwise of consensus, other than by inspired guesswork, given its limited fact-finding capabilities.[157] Nor is it clear how we are meant to reach a consensus about the existence of consensus, since Laws does not specify which of the two relevant constitutional actors, the court of Parliament, has the final say as to whether consensus does in fact pertain.

The second argument amounts to saying that reflection - by judges, presumably - about what autonomy requires in situations where positive and negative rights conflict will often produce the right result. But the theory Laws outlines provides no basis for drawing this conclusion. The theory tells us the following things: that individual autonomy is paramount, that it is the duty of the court to uphold autonomy, and that any infringement of autonomy must be open to challenge in courts 'bias[ed] in favour of individual freedom'. But the theory is silent as to how this inquiry is to be conducted. The analysis of positive and negative rights offers no support in this regard. If we agree that all political and legal dispute turns on the need to settle questions about whose interest should prevail in the relevant circumstances, it can be argued that *any* political or legal decision infringes some individual's autonomy in some way. A broad moral rule requiring that 'every individual be treated as an end, and not a means only' cannot be of much practical assistance, since it tells us nothing about how we might ascertain the *relative or case-specific* weight of (what Laws calls) negative rights, just that the interests such rights protect are regarded in the abstract as important or valuable.

[157] On the fact-finding capabilities of the reviewing court see, e.g., H. Collins, 'Democracy and Adjudication' in N. MacCormick and P. Birks (eds.), *The Legal Mind: Essays for Tony Honoré* (1986);

The point can be illustrated with one of Laws' own examples. Laws thinks that state provision of education is an archetypal area of political choice. In relation to decisions about education, according to Laws, the legislature is supreme and the court must adopt a 'hands-off' role. But, on reflection, we might ask whether this example is as clear as Laws takes it to be. For one thing, it can be argued that education is the 'flip side' of certain (negative) rights that the courts, on Laws' account, are duty-bound to protect.[158] Rights to freedom of thought, expression, and of the press (undoubtedly negative rights for Laws[159]) are meaningless in the absence of a literate, educated and informed public.[160] Alternatively, it is possible to argue that decisions about state provision of education may impinge on negative rights in a more direct sense. State education is publicly funded education for which funds must be taken from tax which citizens are obliged to pay. A decision to instigate a public education programme, or to improve on a pre-existing programme, impacts upon negative rights: it requires the involuntary deprivation of individual property and it removes a portion of the financial means whereby an individual might realise his or her autonomy-driven desires.[161]

C. Harlow and R. Rawlings, *Pressure Through Law* (1992).

[158] See, e.g., D. Hogdson, *The Human Right to Education* (1998).

[159] See Sir J. Laws, 'Meikeljohn, the First Amendment, and Free Speech in English Law' in I. Loveland (ed.), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (1998).

[160] On freedom of expression see, e.g., D.A.J. Richards, *Free Speech and the Politics of Identity* (1999); R. Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice* (1997), ch. 4; R. Dworkin, 'Why Must Speech Be Free?' in *Freedom's Law*, note 38, above; S Fish, 'The Dance of Theory' in *The Trouble with Principle*, note 9, above; J. Raz, 'Free Expression and Personal Identification' in Raz, *Ethics in the Public Domain* (1994); C. McCrudden, 'The Impact on Freedom of Speech' in B. Markesinis (ed.), *The Impact of the Human Rights Bill on English Law* (1998). For classic defences of freedom of thought and expression see, e.g., J. Milton, *Areopagitica* [1644] in Milton, *Complete English Poems, Of Education, Areopagitica* (ed. G. Campbell, 1980); J. Mill, *On Liberty* [1859] (ed. G. Himmelfarb, 1974), ch. 2.

[161] The argument here is not that courts have a warped sense of ethics. There may be very good reasons why courts refuse to review - or review less intensively - decisions like those that relate to education.

Laws' theory of jurisdiction appears to make no room for a principled consideration of the limitations of the judicial role. I have argued in this section that Laws' attempt to construct such limitations on the basis of a distinction between positive and negative rights – the former being an aspect of legislative sovereignty and the latter the province of the court – on examination is not sufficiently rigorous enough to affect the integrity of our earlier analysis of his theory of public law.

5. Other Rights-Based Scholars

It has been assumed so far in the analysis that the work of Allan, Laws and Oliver is representative of a wider body of thought and that this body of thought has exercised a considerable influence upon public law scholarship in recent years. In this section, these assumptions will be supported by connecting elements of the model of the rights-based approach developed in this chapter to the work of other significant public law writers. This section does not claim that the work of each of the writers discussed corresponds in all particulars to the rights-based model. It is sufficient to show that elements of the rights-based approach are present in or have exercised an influence over the work of these individuals.[162]

The Oxford-based legal academic Paul Craig is another influential scholar much of whose work can be said to correspond to the rights-based approach analysed in this

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My point is that these reasons have nothing directly to do with autonomy or morality, and so cannot fit within Laws' theory. See further chs. 8 & 9, below.

[162] On the nature and dynamics of influence in the legal context see, e.g., N. Duxbury, *Jurists and Judges* (2001), ch. 2.

thesis. In the opening chapter of his textbook on administrative law, for instance, Craig suggests that there has been a conceptual shift away from understanding judicial review in terms of the *ultra vires* principle and Diceyan notions of democracy[163] towards a rights-based model that is not premised on the idea that the courts simply apply Parliament's will.

> An approach which is becoming more prevalent as of late is to argue for a rights based conception of public law, which is openly and unashamedly concerned with the imposition of certain standards of legality and which is designed to prevent the abuse of power both by public bodies *stricto sensu*, and by a range of other quasi-public or private bodies which possess a certain degree of power.[164]

Elsewhere in his work, Craig has pursued a number of themes in a way that fits the characterisation of the rights-based approach provided in this thesis. Like Laws[165] and Oliver,[166] for instance, Craig has consistently argued that the *ultra vires* principle[167] is no longer capable of providing a suitable foundational principle for public law. That principle, he has said, 'is indeterminate, unrealistic, beset by internal tension, and ... cannot explain all instances where the judiciary has applied public law principles.'[168] In line with the stance taken by other rights-based thinkers, Craig suggests that *ultra vires* should be replaced with a 'common law model of

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[163] For Craig's analysis of Diceyan democracy see P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990), ch. 2.
[164] P.P. Craig, *Administrative Law* (4th ed., 1999), p. 20.
[165] See in particular Sir J. Laws, 'Illegality: The Problem of Jurisdiction' in M. Supperstone and J. Goudie (eds.), *Judicial Review* (2nd ed., 1997).
[166] See in particular D. Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' (1987) PL 543 and *Common Values*, note 18, above, chs. 4 & 11.
[167] For Craig's analysis of *ultra vires* see P.P. Craig, 'Dicey: Unitary, Self-Correcting Democracy and Public Law' (1990) 106 LQR 105.
[168] P. Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) CLJ 63, p. 63.

illegality'. This model, he says, recognises that 'the principles of judicial review are in reality developed by the courts' and prescribes that the courts should 'impose the controls which constitute judicial review which they believe are normatively justified on the grounds of the justice, rule of law, etc.'[169]

Craig's 'common law model' of judicial review equates very closely with elements of the rights-based model outlined in this chapter. It assumes that the basic purpose of judicial review is to protect individual autonomy from undue interference by state (and other[170]) agencies. It posits the idea of the common law as an institutional normative order which comprises essential standards of justice that connect with a substantive ideal of the rule of law.[171] And it assumes that these moral/legal standards and values form a body of higher-order principles against which governmental decisions must be scrutinised. In each of these ways, Craig's model faithfully reflects the idea of the common law constitution central to rights-based thought.

In addition to his work in relation to the *ultra vires* debate, Craig has provided perhaps the most sophisticated version of what this thesis has called the rights-based argument from history.[172] In a series of articles, Craig has argued that the orthodox view of constitutional and administrative law, inherited from Dicey and Wade, 'does

[169] P. Craig, 'Competing Models of Judicial Review' (1999) PL 428, p. 429.
[170] For the relevance of 'public law' norms outside the context of public law see P. Craig, 'Constitutions, Property and Regulation' (1991) PL 538 and 'Corporatisation, Privatisation and Public Law' (1991) 2 Pub LR 77.
[171] See also P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) PL 467.
[172] This argument is criticised in ch. 5, below.

not represent the reality of our public law heritage.'[173] In particular, he draws on elements of early seventeenth-century judicial decision-making and constitutional thought in order to undermine the claims of the orthodox theory 'that review had to be legitimated through legislative intent'.[174] This aspect of Craig's work is analysed in more detail in the next chapter.

Key features of the rights-based approach to public law are also reflected in the work of Jeffrey Jowell and Anthony Lester. In a series of articles in the late 1980's, Jowell and Lester made the case for rationalising and increasing the reach of those principles of administrative law that relate to the review of the substantive merits of governmental decisions. In order to combat 'abuse of public power', they argued that the courts must be able to apply 'substantive principles of administrative law derived from standards of administrative propriety and the basic rights and liberties of the individual and of citizenship.'[175]

More recently, Jowell has identified a trend in judicial review which matches the prescriptions suggested by his earlier work:

> Without the aid of the Human Rights Act we have therefore seen that our courts have begun to shift the boundaries of administrative law into the constitutional realm by explicitly endorsing a higher order of rights inherent in our constitutional democracy. These rights emanate not from any implied Parliamentary intent but

[173] P. Craig, 'Public Law, Political Theory and Legal Theory' (2000) PL 211, p. 211.
[174] 'Public Law, Political Theory', note 173, above, p. 234.
[175] J. Jowell and A. Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' (1987) PL 368, p. 371. See also Jowell and Lester, 'Proportionality: neither novel nor dangerous' in J. Jowell and D. Oliver (eds.), *New Directions in Judicial Review* (1989).

> from the framework of modern democracy within which Parliament legislates. They are "not a consequence of the democratic process but logically prior to it".[176]

Motifs familiar to rights-based thought dominate this account. In the last sentence, Jowell draws directly on Laws' idea of the primacy of rights over ordinary democratic processes. He seems also to accept the rights theorists' analysis of judge-made law as a higher order of law-making. Jowell also joins forces with Oliver and Craig by suggesting that the *ultra vires* principle is inadequate as a foundational principle for modern administrative law. In another recent article, he advances a modified form of the common law justification of judicial review articulated by Craig and others.

> In our scheme the courts, once qualified by means of competence to enter review, have played their search-lights upon an order higher than any statute in order to identify their ultimate reason for intervention. ... The theory of implied intent cannot accommodate this approach, which reaches beyond the realm of the statute whose intent is in issue.[177]

Lester's basic thesis is similar – there is a movement identifiable in the cases towards the adoption in English law of a rights-based approach - although on occasion he seems more willing than most rights-based writers to admit that the

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[176] J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) PL 671, p. 675. (Citing Sir J. Laws, 'Law and Democracy' (1995) PL 72.) See also Jowell, 'Restraining the State: Politics, Principle and Judicial Review' in M.R. Freeman (ed.), *Law and Opinion at the End of the Twentieth Century* (1997); 'Courts and Administration in Britain: Standards, Principles and Rights' (1988) Israel LR 409; 'The Rule of Law Today' in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (4th ed., 2000).

[177] J. Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' (1999) PL 448, p. 457.

common law courts have often failed to protect basic rights in the past.[178] His account is distinctive because of the central position it accords the jurisprudence of the European Court on Human Rights:[179]

> The landmark judgments of the European Court of Human Rights against the UK had a profound impact upon senior British judges. The Strasbourg jurisprudence has made them more sensitive to the fault-line in the British legal system that has resulted in repeated failures to give sufficient legal protection to individual rights.[180]

For Lester, the Human Rights Act 1998 is the final and definitive confirmation of the adoption in the UK of an approach modelled on the European Convention system: the Act, he says, 'weaves Convention rights into the warp and woof of the common law and statute law.'[181]

David Feldman is another writer elements of whose work reflect the influence of rights-based thinking.[182] In recent work, Feldman has begun to pay attention to the

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[178] Lord Lester of Herne Hill, 'Equality and United Kingdom Law: Past, Present and Future' (2001) PL 77, pp. 85-87. On the failings of the common law courts in the recent past see, e.g., K.D. Ewing and C.A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (1990); Ewing and Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945* (2000); S. Jenkins, *Accountable to None: The Tory Nationalization of Britain* (1995), ch. 10; F. Mount, *The British Constitution Now* (1992), pp. 205-213.

[179] On which see e.g., M. Janis, R. Kay and A. Bradley, *European Human Rights Law: Text and Materials* (2nd ed., 2000); A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (2001).

[180] Lord Lester of Herne Hill, 'Human Rights and the British Constitution' in Jowell and Oliver, *The Changing Constitution*, note 56, above, p. 96. See also Lester, 'The Art of the Possible: Interpreting Statutes under the Human Rights Act' (1998) EHRLR 655; Lester, 'Fundamental Rights: The UK Isolated?' (1984) PL 46; Lester, 'UK Acceptance of the Strasbourg: What Went on in Whitehall in 1965' (1998) PL 237.

[181] 'Human Rights and the British Constitution', note 60, above, p. 107. See also Lester, 'English Judges as Law Makers' (1993) PL 269; Lester, *Democracy and Individual Rights*, Fabian Tract No. 390 (1968).

[182] See e.g., D. Feldman, 'The Human Rights Act 1998 and constitutional principles' (1999) 19 Legal Studies 165; Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed., 2001); Feldman, 'Content Neutrality' in I. Loveland (ed.), Importing the First Amendment: Freedom of

philosophical underpinnings of public law. His approach to this matter reflects - although it is by no means identical to - some of the central elements of the rights-based approach. Beginning with a nuanced analysis of the notion of the dignity, Feldman argues that 'dignity, or as it is sometimes called "human dignity", is central to a valuable human life.'[183] Like other theorists who employ an essentialist method, Feldman's conception of the dignity of the individual owes much to Kant: 'The right to make one's own decisions about many aspects of one's fate, and to contribute to decisions made by others which affect one's life, can be seen as a major contribution to an individual's dignity, linking the notion to a Kantian perspective on morality.'[184] The value of dignity, according to Feldman, connects with other values that lie at the heart of the rights-based account: 'the notion of dignity can bolster individual freedom by making it desirable to enhance autonomy and moral integrity'.[185]

Like Oliver's analysis of her five key common values or Laws' account of the cardinal value of autonomy, Feldman argues that the idea of dignity, although not itself a right, can, if properly understood, generate a set of core rights. While 'it can generally make little or no sense to talk of a right to dignity', he says, the law can 'provide a circumscribing circle of rights which, in some of their effects, help to preserve the field for a dignified life.'[186] He argues further that 'English law will

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Speech and Expression in Britain, Europe and the USA (1998); Feldman, 'Public Law Values in the House of Lords' (1990) 107 LQR 246; Feldman, 'Judicial Review: A Way of Controlling Government?' (1988) 66 Pub Admin 21.

[183] D. Feldman, 'Human Dignity as a Legal Value – Part I' (1999) PL 682, p. 682.

[184] 'Human Dignity – Part I', note 183, above, p. 685.

[185] 'Human Dignity – Part I', note 183, above, p. 685.

[186] 'Human Dignity – Part I', note 183, above, p. 687.

increasingly have to have regard to [the notion of dignity] as our legal system adjusts to the demands of the Human Rights Act 1998.'[187]

Although Feldman's account shares common themes with the work of rights-based theorists analysed in this thesis, it differs from those accounts in that he does not see the value of dignity, when applied by the courts, to be an unreservedly good thing. On the contrary, dignity is a 'highly complex concept', he says, incapable of acting as a certain guide. This uncertainty derives primarily from a 'lack of agreement about what makes human life good, both for individuals and for societies.'[188] In addition, when judges make decisions in the name of the protection of dignity they are often acting paternalistically: 'dignity has been used in some jurisdictions in ways which both advance social rights and permit paternalistic restrictions on individual autonomy.'[189]

Sir Stephen Sedley, now a Court of Appeal judge, has made significant contributions to the debate on the future of public law in this country.[190] Sedley begins his analysis by trying to distance himself from the essentialist approach adopted by most rights theorists. Taking issue with Sir John Laws in particular, Sedley argues that human rights 'are by nature political ... they enshrine values which are universal neither in time nor in place.'[191] Since ideas are local in time and place, Sedley says that 'as times change our premises and assumptions about the

[187] D. Feldman, 'Human Dignity as a Legal Value – Part II' (2000) PL 61, p. 76.
[188] 'Human Dignity – Part II', note 187, above, pp. 75-76.
[189] 'Human Dignity – Part I', note 183, above, p. 699.
[190] See e.g., The Rt. Hon. Lord Justice Sedley, *Freedom, Law and Justice* (1999). See also the review of this book by A. Lester: (2000) 116 LQR 318.
[191] Sir S. Sedley, 'Human Rights: a Twenty-First Century Agenda' (1995) PL 386, p. 386.

content of fundamental rights will change' and that 'what is made of currently accepted rights in each country and each generation by its courts and adjudicators is itself a function of time and place.'[192] In similar vein, Sedley says that he also has difficulty with the rather 'theological' notion of a 'higher-order law as the basis of human rights adjudication.'[193]

Despite his disavowal of essentialist philosophy and the dualist constitution, Sedley ultimately accepts most of the main elements of the rights theorists' account. 'The only choice', Sedley says, is 'to continue to move in the direction of a rights culture compatible with constitutional adjudication in a democracy.'[194] This approach entails a thoroughgoing system of 'constitutional adjudication' in which the courts, applying the 'notion that the prime function of human rights and indeed the rule of law is to protect the weak against the strong', provide a 'rights adjudication under a fundamental law'.[195]

So, although he approaches the matter from an avowedly non-essentialist perspective, Sedley's conception of the function and future of public law is in its essentials identical to the analysis offered by the rights theorists.[196] He argues for the existence of a common law constitution,[197] grounded in the notion of rights, in

[192] 'Human Rights: a Twenty-First Century Agenda', note 192, above, p. 387.
[193] 'Human Rights: a Twenty-First Century Agenda', note 192, above, p. 389.
[194] 'Human Rights: a Twenty-First Century Agenda', note 192, above, p. 395.
[195] 'Human Rights: a Twenty-First Century Agenda', note 192, above, pp. 398-399. But see also the judgment of Sedley J in *R v Somerset County Council, ex p Dixon* (1997) Crown Office Digest 323, at p. 331.
[196] For criticism of Sedley's theory see, e.g., J.A.G. Griffith, 'The Common Law and the Political Constitution' (2001) 117 LQR 42. (See also Sedley's reply: 'The Common Law and the Political Constitution: A Reply' (2001) 117 LQR 68.)
[197] See Sir S. Sedley, 'The Sound of Silence: Constitutional Law Without a Constitution' (1994) 110 LQR 270.

which the courts are to employ a system of higher order law in order to protect the weak from abuses of power.[198] He also agrees with the rights theorists' rejection of the idea that the *ultra vires* principle can act as a foundational idea for judicial review: 'the modern reach of public law is expressed in the concept of the abuse of power rather than in a formalistic delineation of its limits.'[199]

Murray Hunt is another practising lawyer who has made an important contribution to the articulation of a rights-based theory of public law. In his influential book, *Using Human Rights in English Courts*, Hunt argued that developments in international human rights law have gradually undermined the traditional account of the United Kingdom's constitutional arrangements.

> The emergence of a constitutionalism on both a global and a regional scale, which transcends national boundaries, has inevitably had its influence on a national legal system which, for reasons largely of historical accident, had remained rooted in the pre-modern sovereignty paradigm.[200]

Hunt's basic idea is that the last few decades have witnessed the development in English law of what he calls a 'common law human rights jurisdiction'. This jurisdiction is marked by 'a judicial willingness to develop the common law in a way

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[198] See also Lord Nolan and Sir S. Sedley, *The Making and Remaking of the British Constitution* (1997); S. Sedley, 'Governments, Constitutions, and Judges' in G. Richardson and H. Genn (eds.), *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (1994); Sedley, 'The First Amendment: a Case for Import Controls?' in I. Loveland (ed.), *Importing the First Amendment: Freedom of Speech and Expression in Britain, Europe and the USA* (1998).
[199] S. Sedley, 'Public Law and Contractual Employment' (1994) 23 ILJ 201, p. 205; Sedley, 'Law and State Power: A Time for Reconstruction' (1990) J of L & Soc 234.
[200] M. Hunt, *Using Human Rights Law in English Courts* (1998), p. 297.

which provides recognition for and greater protection of fundamental rights'.[201] (Hunt notes in particular the contribution of Laws and Sedley in this regard.[202]) Although for a long time the courts, relying on notions derived from *ultra vires*-based orthodoxy, resisted the influence of international human rights law in their public law decision-making, that position is no longer tenable. In future, to avoid the sort of 'atavistic lapses' that beset judicial decision-making in the past, judges ought to 'recognise a full interpretive obligation ... to construe domestic law in such a way as to achieve consistency with the UK's obligations under international human rights treaties.'[203]

Looking at the work of Craig, Feldman, Jowell, Lester, Sedley, and Hunt, this section has shown that the influence of rights-based ideas is widespread in contemporary public law scholarship. While each of these writers offers an individual and distinctive account of aspects of public law, we have seen that elements characteristic of the rights-based approach, modelled earlier in this chapter, are prevalent in their work.

6. Next Steps

Part I of the thesis has examined the rights-based strain of thought within contemporary public law. To that end, the work of three rights theorists – T.R.S. Allan, Sir John Laws, and Dawn Oliver – was analysed in chapters 1-3. In this

[201] *Using Human Rights Law*, note 200, above, p. 205.
[202] *Using Human Rights Law*, note 200, above, pp. 164-174.
[203] *Using Human Rights Law*, note 200, above, p. 298.

chapter, the common strands of their work were brought together and a model of the rights-based theory was articulated. In Part II, aspects of that model of public law will be subjected to critical scrutiny. The remainder of the chapter outlines the structure of this critical aspect of the thesis.

In line with the aims of this thesis, as outlined in the Introduction,[204] the critical analysis within Part 2 does not deal directly with the moral and political theory which underlies rights-based public law. It should not be inferred from this that the validity of the rights-based approach in relation to these matters is accepted. It is simply that to address them would take the thesis far beyond its established field of inquiry. The critical analysis concentrates, instead, on the public law elements of the rights-based approach. Three important and characteristic strands of argument prevalent within rights-based public law will be addressed in Part II. These strands are listed here.

Chapter 5 looks at the argument from constitutional history. Rights theorists invoke aspects of constitutional history and traditions of political thought in order to support their conception of public law. They argue, in essence, that not only is the theory they advance philosophically justified, it also true as a matter of local, constitutional history. This is an important ancillary strand of the argument in favour of the rights-based approach and to examine it is to further our understanding of the rights-based approach. The analysis in chapter 5 concentrates upon the argument from history as it relates to early seventeenth-century constitutional practice. This period, in any

[204] See Introduction, below.

case, provides much of the evidence for the rights theorists' argument. It is suggested that the argument from history is deficient both as history and as law.

Chapter 6 examines the dualist constitutional framework that is a feature of the rights theory. It looks in particular at the claim that the common law is the embodiment of superior reason and the site of a higher-order of law - the highest forum of public reason - but also at the corollary claim that other political institutions, particularly the legislature, are inferior. Drawing upon a detailed analysis of judicial review cases, it is argued that the claim that judicial review represents a *superior* form of political discourse and public reason cannot be maintained.

Chapter 7 investigates the argument that judicial review is essentially value-driven. Drawing again upon the case analysis contained within chapter 6, it is suggested that this model of public law decision-making is deficient in that it neglects a crucial dimension of the enquiry in cases of judicial review.

Part II

The Rights-Based Theory of Public Law: Critique

Chapter 5

The Rights-Based 'Argument from History'

Introduction

The rights-based theory of public law was analysed in Part 1. In Part 2, that theory will be subject to a series of critical investigations, using the model developed in chapter 4 as a basis. This chapter examines the argument from history deployed by rights theorists.

Rights theorists argue that there are good precedents to be found in constitutional history which support the central features of their conception of public law. They argue that precursors to their notion of the common law constitution, and in particular the idea that the courts exist primarily to protect individual autonomy from interference by the state, can be found in if we look back to older traditions of English constitutional thought.[1]

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[1] See, generally, on the notion of tradition, J.G.A. Pocock, 'Time, Institutions and Action: an Essay on Traditions and Their Understanding' in Pocock, *Politics, Language, Time* (1972); C. Geertz, 'Local Knowledge: Fact and Law in Comparative Perspective' in Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1983); Geertz, 'Ideology as a Cultural System' in Geertz, *The Interpretation of Cultures* (1993); E. Hobsbawm, 'Introduction: Inventing Traditions' in E. Hobsbawm and T. Ranger (eds.), *The Invention of Tradition* (1983); A. MacIntyre, *Whose Justice? Which Rationality?* (1988); MacIntyre, *Three Rival Versions of Moral Enquiry* (1990); K. Popper, 'Towards a Rational Theory of Tradition' in Popper, *Conjectures and Refutations* (3rd ed., 1969); M. Oakeshott, 'Political Education' in Oakeshott, *Rationalism in Politics and other essays* (1991); H-G. Gadamer, *Reason in the Age of Science* (1981). On tradition and law see, e.g., J.P. Dawson, *The Oracles of the Law* (1968), ch. 1; H. Patrick Glenn, *Legal Traditions of the World* (2000), chs. 1 & 2; M. Krygier, 'Law as Tradition' (1986) 5 Law and Phil 237; Krygier, 'The Traditionality of Statutes' (1988) 1 Ratio Juris 20; B. Simpson, 'The Common Law and Legal Theory' in W. Twining (ed.), *Legal Theory and Common Law* (1986); G.J. Postema, *Bentham and the Common Law Tradition* (2986), ch. 1; S.F.C. Milsom 'Law and Fact in Legal Development' (1967) 17 U of Toronto LJ 1; M.T. Clanchy, 'Remembering the Past and the Good Old Law' (1970) 55 Hist 165; M. Lobban, *The Common Law and English Jurisprudence 1760-1850* (1991); D. Lieberman, *The Province of Legislation Determined:*

The present chapter examines this argument. The investigation concentrates on the part of the argument that relates to early seventeenth-century constitutional practice. This period is chosen for two reasons: first, because it helps to give the analysis a sharper focus, and, second, because of its vital importance for the rights theorists' argument.

The chapter is structured in the following way. In section 1, the argument from history is analysed. Section 2 addresses a methodological difficulty of investigating an argument that lies on the cusp of the disciplines of history and law. Section 3 examines the historical credibility of that argument. Finally, section 4 examines the argument for its cogency as a matter of law.

1. Analysis of the Argument from Seventeenth-Century History

In chapter 4, an outline of the argument from history as it appeared in the work of Allan, Laws and Oliver was provided.[2] Allan refers to Coke's famous dictum in *Bonham's Case*[3] to illustrate the pedigree of the judicial power to prevent governmental action at odds with deep-rooted constitutional principle. Seventeenth-century lawyers, he argues, 'well understood the ability of judicial interpretation to tame the potential excesses and abuses of legislative power.'[4]

Legal Theory in Eighteenth-Century Britain (1989); K.N. Llewellyn, *The Common Law Tradition* (1960); M.J. Horwitz, *The Transformation of American Law* (1977), ch. 1.

[2] See ch. 4, above, pp. 98-99 & 107.

[3] (1609) 8 Co. Rep. 107, p. 118a.

[4] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), p. 205. See also Allan, *Law, Liberty, and Justice* (1993), pp. 267-269.

Laws cites Coke's decision in *Rooke's Case*[5] to show how the courts have always sought to limit public power in the name of reason and law. *Rooke*, he says, stands as part of 'a long line of cases, stretching centuries before *Wednesbury*, which vouchsafe the principle of reasonableness as providing the legal limit to the use of discretionary power.'[6]

Oliver takes Coke's judgment in *Bagg's Case*[7] as an early example of the application of generic common law values to counteract abuse of power, whether public or private.[8] The case illustrates, she says, the way in which the courts have always 'considered themselves entitled to impose duties of duties of consideration for individuals'.[9] Their 'concern, as it emerges from Bagg's case ... was with upholding rights, and avoiding in particular the kind of injustice that might lead to civil disorder by providing remedies.'[10]

Paul Craig has advanced a more thorough version of this argument.[11] In the article 'Public Law, Political Theory and Legal Theory',[12] Craig makes three points relevant to this discussion. He argues, first, that 'in historical terms the courts did not conceive of review in terms of legislative intent, but reasoned in the manner

[5] (1598) 5 Co. Rep. 99b.
[6] Sir J. Laws, 'Wednesbury' in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law for Sir William Wade* (1998), p. 190.
[7] (1615) 11 Co. Rep. 93b.
[8] D. Oliver, *Common Values and the Public-Private Divide* (1999), pp. 45-47.
[9] *Common Values*, note 8, above, p. 205.
[10] *Common Values*, note 8, above, p. 205.
[11] For a discussion of Craig's connection with rights-based theory see ch. 4, above, pp. 108-110.
[12] P. Craig, 'Public Law, Political Theory and Legal Theory' (2000) PL 211.

argued for by advocates of the common law model.'[13] Like Oliver, he sees *Bagg's Case* as seminal in this respect. Second, Craig suggests that 'this approach to judicial review was natural' since the 'common law was seen [by Coke and contemporary common lawyers] as the embodiment of reason which could be modified so as to meet the challenged of a new age'.[14] Third, the absence of a 'rigid dichotomy between public and private law' further undermines the 'idea, represented as traditional orthodoxy, that review had to be legitimated through legislative intent'.[15]

Craig concludes his analysis with the argument that the modern, positivist conception of judicial review, dominated by the *ultra vires* principle, is anomalous when viewed in the context of older traditions of English constitutional thought.

> When viewed in the light of our constitutional history and jurisprudence it is clear that the rationalisation of judicial review based on the *ultra vires* model and legislative intent does not capture the traditional understanding of judicial review. ... Far from being the traditional model, in the normally accepted meaning of that phrase, it constitutes a modern vision of judicial review which does not sit well with our past.[16]

The versions of the argument from history advanced by Allan, Laws, Oliver and Craig share a number of common themes. All four writers regard seventeenth-century judicial practice favourably, seeing within it a standard worthy of

[13] 'Public Law, Political Theory', note 12, above, p. 231.
[14] 'Public Law, Political Theory', note 12, above, p. 233.
[15] 'Public Law, Political Theory', note 12, above, p. 234.

emulation. The reason for this is also common to them all. Seventeenth-century judicial practice ought to be regarded as good practice, they suggest, because it was marked by the direct application of generic common law values and standards to counteract abuses of power.

The cases drawn upon – *Bonham*, *Rooke* and *Bagg* – are taken as illustrations of this practice. Quotations from these cases are always from Edward Coke. Coke thus appears as a totemic figure within rights-based writing, his judgments taken to exemplify a robust style of judicial review based on a value-laden common law. The fiercely independent and justice-oriented nature of the early seventeenth-century judiciary is confirmed for rights theorists by Coke's famous confrontation with King James I.[17]

> Providing and reflecting an independent order of justice, rather than serving particular interests or governmental ends, its enforcement by the courts forms a barrier to the exercise of power (as Coke CJ showed in his resistance to the attempted encroachments of James I).[18]

There is a normative dimension to this argument. Rights theorists maintain that their account of early seventeenth-century judicial practice is mirrored in its essentials by

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[16] 'Public Law, Political Theory', note 12, above, pp. 235-236.
[17] On this confrontation see, e.g., C. Hill, *Intellectual Origins of the English Revolution* (1965), ch. 5; C. Russell, *The Crisis of Parliaments: English History 1509-1660* (1971), ch. 5; J.P. Kenyon, *The Stuart Constitution 1603-1688: Documents and Commentary* (1966), ch. 3; J.H. Baker, 'The Common Lawyers and the Chancery: 1616' in Baker, *The Legal Profession and the Common Law* (1986); F.D. MacKinnon, 'Sir Edward Coke' (1935) 51 LQR 289; F.W. Maitland, *The Constitutional History of England* (ed. H.A.L. Fisher, 1908), pp. 268-275.
[18] Allan, *Constitutional Justice*, note 4, above, p. 34. See also Allan, 'Common Law Constitutionalism and Freedom of Speech' in J. Beatson and Y. Cripps (eds.), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (2000), p. 21.

the conception of public law they advocate for the present. Allan, Laws and Oliver have all developed arguments along these lines, but Craig's version is the most sophisticated. Craig argues that the conception of public law defined by rights theorists is in line with the a true, Cokean tradition of constitutional jurisprudence and that other conceptions ought to be considered aberrant.

2. A Methodological Problem

The examination of the rights-based argument from history throws up a particular methodological difficulty. The argument is part history, part law. On what basis should an examination of the argument be undertaken? Should we take it to be history, or law? As a preliminary to the examination of the argument from history, it is necessary to articulate the differences between these two perspectives. We must determine what the study of history entails and the ways in which it differs from the discipline of law.

(a) What is History?

The question 'what is history?' has produced a number of compelling responses. Michael Oakeshott, historian as well as philosopher, understood history to be a 'categorically distinct mode of enquiry', identifiable by its '*exclusive* concern with the past'.[19] The historian's task, on Oakeshott's account, is to construct a more complete picture of the past from the fragments of it that survive in the present. In

similar vein, Geoffrey Elton has argued that historical study 'involves, above all, the deliberate abandonment of the present'. Given that the 'task of history is to understand the past, and if the past is to be understood it must be given full respect in its own right', it follows that it 'is a cardinal error to reverse this process and study the past for the light it throws on the present.'[20] Likewise, Andrew Marwick has argued that the discipline of history may be identified by its particular - critical and rational – method of analysing and interpreting sources. In this way, the writing of history can be said to differ from myth-making. History, then, is 'an interpretation of the past, one in which a serious effort has been made to filter out myth and fable.'[21]

These accounts of the nature of historical study are connected by the idea that history must be concerned exclusively with furthering our understanding of the past. (What later happens with the products of historical research – their *polemical* use - is a separate matter.) This is not to deny that in practice the historian brings to the sources his or her own presumptions and predilections, as well as those of the society in which he lives. E.H. Carr would have said that this is unavoidably the case.[22] It does mean, however, that in studying and writing about the past, the practice of history imposes a certain discipline the effect of which is that the historian must be careful not to study teleologically. It is alien to the historical method for the enquirer to delve into the past purposively: that is, in order directly

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[19] M. Oakeshott, *On History and other essays* (1983), p. 45. (Emphasis added.) See also Oakeshott, 'The activity of being an historian' in *Rationalism in Politics*, note 1, above.
[20] G.R. Elton, *The Practice of History* (1967), p. 66. See also R.G. Collingwood, *The Idea of History* (ed. J. van der Dussen, 1994).
[21] A. Marwick, *The Nature of History* (3rd ed., 1989), p. 3.
[22] E.H. Carr, *What is History?* (2nd ed., 1987).

to provide him with fodder for contemporary (non-historical) arguments.[23] He or she must study the past in order to discover more about the past – for its own sake, as it were.[24]

In a critique of Whig historical writing, Blaas warns of the twin dangers of 'present-mindedness' and 'finalness': that is, an approach to the past based exclusively on present concepts and strongly directed towards the present, the present being 'complacently regarded as some sort of climax; and excess of teleology which result[s] in a stress on the linearity of history.'[25] Quentin Skinner makes a related point in a seminal article discussing the pitfalls of historical writing:

> In all such cases, where a given writer may appear to intimate some "doctrine" in something that he says, we are left confronting the same essential and essentially begged question: if all the writers are claimed to have *meant* to articulate the doctrine with which they are being credited, why is it that they so signally failed to do so, so that the historian is left reconstructing their implied intentions from guesses and vague hints? The only plausible answer is of course fatal to the claim itself: that the author did not (or even could not) have meant after all to enunciate such a doctrine.[26]

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[23] This is not to suggest that such a method of arguing is necessarily *wrong*, just that it is not history. (Marwick would call it myth.) See further section 5, below.

[24] This does not mean that a motivating factor behind this sort of enquiry might not be a concern to understand the way we are now, in the present, or why we are what we are now. The belief underpinning the study of history is that we cannot successfully accomplish this sort of enquiry without distancing ourselves as much as possible from present concerns in order to try to understand the past in its own terms (as much as *that* is possible).

[25] P.B.M. Blaas, *Continuity and Anachronism: Parliamentary and Constitutional Development in Whig Historiography and in the Anti-Whig Reaction Between 1890-1930* (1978), pp. 10-15.

[26] Q. Skinner, 'Meaning and Understanding in the History of Ideas' (1969) History and Theory 3, p. 10. See also N. Davies, *The Isles: A History* (1999), p. 211, who makes a similar point when he underlines 'how reluctant historians must be to jump the historical gun, how careful not to use later names for

(b) Law and History

In what ways, then, are law and history different? In a classic account, Maitland argued that, while both lawyers and historians might want to study the history of the common law, they will do so in different ways that reflect the different purposes they have in mind. Maitland expressed these differences in terms of two separate logics, 'the logic of authority, and the logic of evidence'. Whereas the historian who looks at the history of the common law wants a 'knowledge of medieval law as it was in the middle ages', the lawyer who looks at the same material seeks 'a knowledge of medieval law as interpreted by modern courts to suit modern facts.' Given this, 'what the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better.'[27]

Elton has identified another site of difference between law and history. Legal study of historical material tends to be 'isolated', he says, in the sense that lawyers who look to historical evidence in order to mine them for their usefulness for present legal debate - for their precedent value - are not likely to be 'interested in using them historically and [so] never look[] around at other forms of intellectual enterprise'. By contrast, Elton says that 'the closed exploration of a single system cannot produce history' since 'history necessarily involves comparison':

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earlier things. For names reflect consciousness. They are only applied when people become aware of phenomena which they previously did not recognize'.

[27] F.W. Maitland, 'Why the History of English Law is Not Written' in *Collected Papers, Vol. 1* (ed. H.A.L. Fisher, 1911), 480, pp. 490-491. This was Maitland's inaugural lecture as Downing Professor

> much history always was and continues to be hampered by such isolation, and one of the chief virtues of historical studies lies in the breakdown of unconscious assumptions when they come up against alternative circumstances and convictions.[28]

The lawyer, then, when studying historical material, acts prospectively and purposively: he seeks to draw on historical materials for their instrumental value for present legal disputes. Content to mine a source for its precedent value, he has no need to look beyond it and can use it in isolation from its historical context. The historian, on the other hand, works in a retrospective and non-purposive way. He looks at historical materials for what they disclose about themselves and for what they tell us about the period from which they come. In order to do this, the historian must always be engaged in the business of comparison and so cannot afford to study historical evidence in isolation.

How does this analysis of the practice of history and the relationship between history and law relate to the examination of the rights-based argument from history? In this section, it has been suggested that law and history are very different forms of study marked by distinct modes of analysis and argument. The rights-based argument from history could either be an historical or a legal argument. The only way of assessing its merit, then, is to examine it in two separate ways: first, in terms of its quality as a matter of history; second, in terms of its cogency as a matter of law.

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of the Laws of England, delivered on 13 October 1888. See also, J.H. Baker, 'Why the History of English Law has not been Finished' (2000) 59 CLJ 62, pp. 63-64.

3. The Argument from History as History

Rights theorists argue that the early seventeenth-century was a golden age of constitutional practice marked by the application of general common law values to prevent abuses of power. They maintain that this method should be regarded as the 'true' strand of English[29] public law thought and as a standard for present and future constitutional practice.

In this section, the assumption is that the rights theorists intend their argument from history to be an historical argument. The argument is examined, then, *in terms of its cogency as a matter of history*. According to the analysis of law and history developed in the previous section, a key difference between the two forms of study lies in the way in which historical evidence is treated. Legal argument follows the logic of authority. It is teleological, being driven by present concerns. A good legal argument combines citations from sources considered to be authoritative (most commonly, judicial dicta and legislation) in a logically compelling way. Generally speaking, the more recent the evidence and the more authoritative the cited figure is understood to be, the more cogent a legal argument is considered to be.

Historical argument, on the other hand, applies the logic of evidence. A good historical argument cannot be purposive since it involves 'the deliberate

[28] G R Elton, *F.W. Maitland* (1985), pp. 20-21.
[29] Rights theorists make no distinction between England and Britain, or English and British constitutional and political traditions.

abandonment of the present'. By contrast to the lawyer's practice of citing dicta from isolated historical sources, the historian's aim is to provide the account which makes the most plausible connections between an array of relevant source material.

The way in which rights theorists handle the historical evidence can be set against this analytical framework. Rights theorists draw upon a case or series of cases from the early seventeenth century: Allan refers to *Bonham*, Laws cites from *Rooke*, while Oliver and Craig use *Bagg's Case*. The writer selects from the case a passage or passages. These passages invariably involve Edward Coke. The writer assumes that the quoted passage is representative of its time and stands as a good precedent for the claims made by the rights theory. Supporting evidence, either legal or extra-legal, is generally absent. Allan, for instance, refers to just two seventeenth-century sources (*Bonham* and Coke's *Institutes*[30]) and two histories of the period[31] when articulating his version of the argument from history in *Constitutional Justice*.[32] He makes no attempt to situate the famous passage from *Bonham's* Case in its contemporary constitutional context. Laws makes no reference to the work of historians of the period, citing nothing other than *Rooke's* Case itself. Oliver does give a detailed account of the facts that gave rise to *Bagg's* Case, but fails to connect the case to contemporary developments and does not refer to the work of any historian.

[30] Sir E. Coke, *Institutes of the Laws of England, Part IV* [1644]
[31] Namely G. Burgess, *Absolute Monarchy and the Stuart Constitution* (1996) and J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999).
[32] *Constitutional Justice*, note 4, above, pp. 204-208.

There are two observations to be made about the use of historical sources in the argument from history. First, rights theorists use sources in isolation: they concentrate almost exclusively on reported cases, making no systematic attempt to engage with other contemporary sources, whether legal or extra-legal, nor to situate the cases they use within contemporary social and political contexts. Baker says that it is a 'basic truth' that 'history cannot be written in any reliable way until the best evidence has been harvested'.[33] Rights theorists make no attempt to find the best evidence.

Second, rights theorists use sources in a teleological or purposive way. They use historical sources in the way in which a lawyer uses evidence before a court. Seventeenth-century cases are mined for their precedent value in a current legal debate. The force of the argument is presumed to come from connecting the words of figures assumed to be authoritative (in this case, Coke) with the thrust of the legal argument being made.

In the argument from history, then, rights theorists use historical sources in a legal way: isolating judicial dicta from seventeenth-century cases to support propositions relevant to a current legal argument. This isolated and purposive nature of the argument from history implies that the argument is structured according to the logic of authority rather than the logic of evidence. If the aim is to produce a plausible historical argument, then, it appears that the rights theorists have failed: the

[33] Baker, note 27, above, p. 64.

evidential method they deploy is designed for the context of legal, not historical, argument.

The Example of Coke

The weakness of the argument from history as an historical argument can be illustrated by looking at the way in which rights theorists treat Edward Coke. Rights theorists regard Coke as the central figure within seventeenth-century constitutional practice. (Indeed, he is the only person who appears in their account of the period.) He is, for them, the golden figure of their golden age: the model philosopher-judge, whose judgments exemplify a robust style of judicial review based on a value-laden common law.

Historians would not recognise this assessment of Coke. They tend to be dismissive about the merits of Coke's constitutional philosophy. Coke wrote 'bogus history', Finley thought,[34] and Douglas said that 'Coke was no historian, but he was ever ready to seek the origin of the Common Law in Saxon antiquity.'[35] Maitland, who saw Coke as an 'imperious dogmatist', said that there was 'no fable, no forgery, that he would not endorse; and a good many medieval legends and medieval lies passed into currency with his name upon their backs'.[36]

[34] M.I. Finley, 'The Ancestral Constitution' in Finley, *The Use and Abuse of History* (1975), 34, p. 41.
[35] D.C. Douglas, *English Scholars 1660-1730* (2nd ed., 1951), p. 53.
[36] F.W. Maitland, 'The Laws of the Anglo-Saxons' in Maitland, *Collected Papers* (ed. H.A.L. Fisher, 1931), 447, p. 453.

In similar vein, Christopher Hill calls Coke the prime 'myth-maker' of Stuart England and denies that his political writings represent a coherent body of thought. Coke's writings were, rather, 'mystical and personal': 'Rarely can so many questions have been begged in so few words.'[37] This interpretation is supported by Kenyon's account of Coke in his *Stuart Constitution*. Kenyon sees Coke as the common law's foremost populist and apologist: 'Coke's greatest service to the Common Law was the publicity he secured for it. ... He stiffened his colleagues, and he encouraged in any way he knew that almost superstitious reverence for the law which was prevalent in the 1620's.'[38]

In his biography of Coke, Stephen White says that it is a mistake to 'exaggerate the clarity, coherence, and consistency of [Coke's] constitutional views'. On the contrary, Coke's views changed during his career and were 'shaped by the precise political context in which they were made.' Legal writers assume too readily, White alleges, 'that Coke was far more interested in implementing his own general interpretation of the constitution than in achieving specific, practical results.'[39]

Nowhere is this truer than when it comes to interpreting two key moments: Coke's famous dispute with James I and the equally famous dictum in *Bonham's* Case.[40] Rights theorists see in Coke's conflict with the King a symbol of the fierce political independence and integrity of the common law.[41] Historians are more sanguine.

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[37] Hill, *Intellectual Origins*, note 17, above, p. 252. Maitland, *Constitutional History*, note 17, above, p. 300: it is 'always difficult to pin Coke to a theory'.
[38] Kenyon, *Stuart Constitution*, note 17, above, p. 92.
[39] S.D. White, *Sir Edward Coke and the grievances of the commonwealth* (1979), 15. See also, e.g., *J.W. Tubbs, The Common Law Mind: Medieval and Early Modern Conceptions* (2000), ch. 7.
[40] See note 17, above.
[41] See note 18, above.

Quentin Skinner, for instance, maintains that Coke's position in this affair was 'very much that of a party politician'.[42] In relation to the *Bonham* dictum, few legal historians would accept that Coke was articulating in that case a doctrine of judicial review based on the idea of the common law as fundamental law.[43] In a recent account, Jeffrey Goldsworthy argues that, 'even if in *Dr Bonham's* case Coke did advocate something like a power of judicial review, he later changed his mind.'[44] Thorne is equally clear that Coke did not entertain the 'theory of higher law, binding upon Parliament and making Acts that contravene it void.'[45] Gray says Coke 'at most flirted' with the idea.[46] Gough agrees, arguing that Coke 'was not propounding a theory of unconstitutional legislation, but only one of strict statutory interpretation.'[47]

Historians also warn against assuming too readily that Coke was representative of his time. While Coke was certainly a central figure in Pocock's classic work on seventeenth-century ancient constitutionalism,[48] Conrad Russell reminds us that 'Sir Edward Coke was not synonymous with English law'.[49] Burgess argues that it is a mistake to see Coke as typical of his time. He was, in many respects, he says, an

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[42] Skinner, 'Meaning and Understanding', note 26, above, pp. 8-9.

[43] On *Bonham's* Case see, e.g., T.F.T. Plucknett, 'Bonham's Case and Judicial Review' (1926) 40 Harv LR, 30; E.S. Corwin, 'The "Higher Law" Background of American Constitutional Law' (1928) 42 Harv LR 367; J.U. Lewis, 'Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory' (1968) 84 LQR 330.

[44] Goldsworthy, *Sovereignty of Parliament*, note 31, above, p. 12. See also J.W. Gough, *Fundamental Law in English Constitutional History* (1955), p. 41. Gough refers to Sir John Davies, *Le Premier report des cases et matters en ley* [1628]. The interpretation has a great deal to do with the fact that Parliament was not really seen at the time as a legislature in the modern sense of the term, but more as some sort of supreme court: see also W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1987); J.H. Baker, 'The Changing Concept of a Court' in *The Legal Profession and the Common Law*, note 17, above.

[45] S.E. Thorne, 'Dr Bonham's Case' (1938) 54 LQR 543, p. 551. See also, L.J. Jaffe and E.G. Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 LQR 345; MacKinnon, note 17, above.

[46] C. Gray, 'Reason, Authority, and Imagination: the Jurisprudence of Sir Edward Coke' in P. Zagorin (ed.), *Culture and Politics from Puritanism to Enlightenment* (1980), 25, p. 41.

'eccentric' common lawyer: John Selden was a more representative figure.[50] Tuck agrees, claiming that Coke's comparatively rigid conception of common law as immemorial and unchanging custom was not shared by many of his contemporaries.[51] This position finds support from Kenyon, who notes that Coke's confrontation with James I cost him the support of legal colleagues during the 1620's.[52] Martyn Thompson draws a similar conclusion:

> Coke's concept of fundamental law was less typical of seventeenth-century England than it has been taken to be. More similar, European concepts continued to coexist and interact with it.[53]

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[47] Gough, *Fundamental Law*, note 44, above, p. 40.

[48] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (2nd ed. 1987), ch. 2. Pocock says that his book is 'study of a constitutionalist myth and its overthrow': *ibid.*, p. 264. Note that talk of fundamental laws and ancient constitutions was not confined to England: see M.P. Thompson, 'The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution' (1986) 91 Am HR 1103, p. 1111. On ancient constitutionalism see G. Burgess, *The Politics of the Ancient Constitution* (1992); R.W.K. Hinton, 'English Constitutional doctrines from the Fifteenth Century to the Seventeenth' (1960) 75 Eng HR 480, pp. 421-425; J. Guy, 'The "Imperial Crown" and the Liberty of the Subject: The English Constitution from Magna Carta to the Bill of Rights' in B.J. Kunze and D.D. Brautigam (eds.), *Court, Country and Culture: Essays on Early Modern British History in Honor of Perez Zagorin* (1992), 65, pp. 75-87; Pocock, 'Burke and the Ancient Constitutional' in Pocock, *Politics, Language, Time*, note 1, above; D.R. Kelley, 'History, English Law and the Renaissance' (1974) 65 Past & Present 24, pp. 32-35; C. Brooks and K. Sharpe, 'History, English Law and the Renaissance' (1976) 72 Past & Present 133; J. Greenberg, 'The Confessor's Laws and the Radical Face of the Ancient Constitution' (1989) 104 Eng HR 611; Greenberg, 'Our Grand Maxim of State, "The King Can Do No Wrong"' (1991) 12 Hist of Pol Thought 209; J. Cairns, 'Blackstone, the Ancient Constitution and the Feudal Law' (1985) 28 Hist J 711.

[49] C. Russell, *The Causes of the English Civil War* (1990), p. 149. See also Russell, *Crisis of Parliaments*, note 17, above.

[50] Burgess, note 48, above, pp. 57-58 & 63-68. See also, H.J. Berman, 'The Origins of Historical Jurisprudence: Coke, Selden, Hale' (1994) 103 Yale LJ 1651, pp. 1694-1701; F. Pollock (ed.), *Table Talk of John Selden* (1927), 69, p. 137.

[51] R. Tuck, *Natural Rights Theories: Their Origin and Development* (1979) 88, pp. 132-139. The 'contemporaries' here include William Hakewill and Thomas Egerton, Lord Ellesmere; John Selden and followers.

[52] Kenyon, *Stuart Constitution*, note 17, above, sees *Peacham's* Case (1614) as the turning point. In that case, Coke insisted, in the face of established custom and precedent, that the king had no right to consult judges individually before they tried a case. See also, Baker, 'The Common Lawyers and the Chancery: 1616', note 17, above, pp. 206-18; R.G. Usher, 'James I and Sir Edward Coke' (1903) 18 Eng Hist Rev 664.

[53] Thompson, note 48, above, p. 1119.

It would be wrong to ignore the fact that 'for two centuries after his death, [Coke's] writings exerted a profound influence on English and American law.'[54] But this survey has revealed a number of points at which historians' accounts diverge from the interpretation of Coke put forward by the rights theorists. (1) Historians are far more critical of Coke's constitutional thought than rights theorists tend to be, seeing him as a practical lawyer and active politician more than a constitutional theorist. (2) Historians disagree with the rights theorists about the meaning of cases involving Coke, especially *Bonham*. (3) Most historians do not see Coke as a representative seventeenth-century common lawyer; rights theorists assume that he is.

The problems with the rights-based interpretation stem from the methodological flaws identified earlier in this section. Using sources purposively and in isolation from their context leads rights theorists into the basic mistake of reflecting backwards 'later doctrines... upon Coke's statement, giving it a content it did not in fact have.'[55] In relation to Coke, rights theorists fall into the trap identified by Skinner:[56] they say that Coke 'appears to intimate some "doctrine" in something that he says', but since Coke is 'claimed to have *meant* to articulate the doctrine with which [he is] being credited, why is it that [he] so signally failed to so'?

[54] White, note 39, above, p. 3. *Ibid.*, p. 11: 'Down through the early nineteenth century his *Reports* and *Institutes* were frequently reprinted, along with several other minor works, and they were avidly studied and reverentially cited by generations of English and American judges and lawyers. During the same period, writers on politics and government from Lilburne and Hobbes to Jefferson looked to Coke's writings as sources either of wisdom or of views worthy of serious criticism.' See also Baker, 'Coke's Note-Books and the Sources of his Reports' in *The Legal Profession*, note 17, above, 177, p. 203: 'It is difficult to resist the comparison of Coke with his eminent contemporaries Bacon and Shakespeare: what they were to philosophy and literature, Coke was to the common law.'

[55] Thorne, note 45, above, p. 545; Gray, note 46, above, p. 41. But compare, for instance, D.E.C. 'Hobbes and Hale on Law, Legislation and the Sovereign' (1972) CLJ 121, pp. 124-126; Berman, note 50, above, pp. 1673-1693.

[56] See p. 128, above.

4. The Argument from History as Law

In section 3, the assumption was that the rights-based argument from history was in fact an historical argument. The fact that an argument fails as history does not necessarily make it a bad argument for all purposes, just bad history. In this section, a different assumption will be made: namely, that the argument from history is really a legal argument, designed to defend a particular legal position.

In the previous section, it was suggested that rights theorists tend to use historical sources in the way a lawyer would in court: they cite words drawn from previous cases as authority for some legal proposition being advanced. In Maitland's terminology, they use the logic of authority to ground their argument.

The basic structure of the logic of authority is this: the fact that the courts (or other relevant authority) have decided in a particular way in the past provides a good, but not sufficient, reason why courts should decide in a similar way now and in the future. But this only holds true if the circumstances to which the earlier decision pertains are substantially the same as the surrounding circumstances of the decision in question today. Otherwise, were circumstances to be wholly or substantially different, there would be no good reason to follow the earlier decision. The nature of legal argument to which the logic of authority relates presupposes, then, that

nothing fundamental or highly significant relating to the matter at hand has changed since the authoritative case was decided.[57]

Applying this analysis to the argument from history, we can say that since they draw upon the logic of authority when using seventeenth-century cases for their precedent value, rights theorists assume that nothing relevant has changed in a fundamental and significant way since that time. Even if we accept the rights theorists' interpretation of early seventeenth-century constitutional practice, objections to the argument from history would remain. Seventeenth-century lawyers worked, argued and thought in an environment which contemporary constitutional theorists would find wholly alien.

For one thing, the ethos and structure of government was very different. Government in the sixteenth and early seventeenth centuries was still in large measure structured around the King's court. Van Caenegem says that England under the Tudors and Stuarts was, in many ways, structured along classic absolutist lines. Although Parliament was becoming 'less of a court of law ... and more a vigorous legislative body, wielding (always, in collaboration with the crown) a sovereign and omnicompetent authority', at the same time, he says, its 'political position vis-à-vis royal power became weaker than in medieval times.'[58] Distinct echoes of feudalism remained within this structure of governance:

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[57] See further, e.g., R. Tur, 'Time and Law' (2002) 22 OJLS 463.

[58] R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (1995), p. 92. See also G.L. Harriss, 'Medieval Government and Statecraft' (1963) 25 Past & Present 8; J.W. McKenna, 'The myth of parliamentary sovereignty in late-medieval England' (1979) 372 Eng HR 481; E.T. Lampson, 'Some New Light on the Growth of Parliamentary Sovereignty: Wimbish versus Taillebois' (1941) 35 Am Pol Sc Rev 952; F. Pollock, 'Sovereignty in English Law' (1894) 8 Harv LR 243.

> The king, or queen, resembled the "distant" intelligence or God of the universe, bestowing himself and his power on his subjects as from a divine height. The king's role was less that of master among servants than of superior being among inferiors.[59]

Unsurprisingly, the political thought of the period reflected aspects of this structure of government:

> Political theory in the early seventeenth century was simple, patriarchal and authoritative, virtually untouched in terms of practical politics by continental writers like Bodin. From Adam descended the heads of families, from heads of families, chiefs of tribes, and from chiefs of tribes, kings. To this extent the patriarchal theories of Sir Robert Filmer were a commonplace. The opposing theory, of elective kingship and government by the people, was familiar, too, but sturdily rejected.[60]

While early seventeenth-century government and the ethos in which it operated differed markedly from the situation which pertains today, the same is true of law and the legal profession. 'In the early seventeenth century the judges of the courts of

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[59] P. Oppenheimer, *The Birth of the Modern Mind: Self, Consciousness, and the Invention of the Sonnet* (1989), p. 7.

[60] Kenyon, *Stuart Constitution*, note 17, above, p. 7. See J. Bodin, *Six livres de la république* (1576); S. Holmes, 'Hobbes's Irrational Man' and 'The Constitution of Sovereignty in Jean Bodin' in Holmes, *Passions and Constraints: On the Theory of Liberal Democracy* (1995); W.M. Lamont, 'The Puritan Revolution: a historiograhical essay' and H. Nenner, 'The later Stuart age' in J.G.A. Pocock (ed.), *The Varieties of British Political Thought 1500-1800* (1993); D. Wootton (ed.), *Divine Right and Democracy: An Anthology of Political Writing in Stuart England* (1986). On the political context surrounding the English Civil War see e.g., C. Hill, *The Century of Revolution 1603-1714* (2nd ed., 1980), chs. 2-6; Hill, *Liberty Against the Law: Some Seventeenth-Century Controversies* (1996); C. Russell, *The Causes of the English Civil War* (1990); G. Burgess, 'The Impact on Political Thought:

Common Law, King's Bench, Common Pleas and Exchequer were the king's judges, appointed by him and dismissable at will.'[61] The common lawyers of the time, according to Hill, formed an 'homogeneous social group' with 'similar ideas of what was right and proper'.[62] It was natural, perhaps, for this tight-knit group of judges and senior lawyers, themselves members of the élite, to assume that the law which they articulated spoke for the people. Moreover, in the context of a traditionalist, early-modern society run by an oligarchy with a strong autocratic element, talk of a tight corpus of shared values, traditions and customs, and a belief in the motivating force of such traditions and customs, made sense.

This situation no longer pertains in any meaningful way. There is a plausible argument for regarding the seventeenth century as a watershed - the period dividing medieval and modern, the era in which the world was turned upside down.[63] Jonathan Israel says that,

> During the later Middle Ages and the early modern age down to around 1650, western civilization was based on a largely shared core of faith, tradition, and authority. By contrast, after 1650, everything, no matter how fundamental or deeply rooted, was questioned in the light of philosophical reason and frequently

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Rhetorics for Troubled Times' in J. Morrill (ed.), *The Impact of the English Civil War* (1991); G.E. Aylmer, *Rebellion or Revolution? England from Civil War to Restoration* (1986).

[61] Kenyon, *Stuart Constitution*, note 17, above, p. 90. Coke was himself dismissed from his judicial and conciliar offices in 1616: see Baker, 'The Common Lawyers', note 17, above; White, note 39, above, p. 7.

[62] Hill, *Intellectual Origins*, note 17, above, p. 256.

[63] C. Hill, *The World Turned Upside Down* (1991). See also N.E. Simmonds, 'Protestant Jurisprudence and Modern Doctrinal Scholarship' (2001) 60 CLJ 271, p. 275.

challenged or replaced by startlingly different concepts generated by the New Philosophy and what may still usefully be termed the Scientific Revolution.[64]

Two developments are especially pertinent in the context of the present discussion. First, the advent in the nineteenth and twentieth centuries of a democratic mode of government, in the form of a constitutional monarchy and parliamentary democracy, has destroyed the medieval and early-modern system of consiliar government.[65] Second, contemporary lawyers and political theorists have no choice but to deal with a world where a tight corpus of shared values does not exist.[66]

Given the extent of the changes in government, social organisation, and political thought, the unguarded, isolated use of antique cases as authority for legal propositions is a fraught enterprise. For one thing, a word or phrase will often mean something different today from what it did in the seventeenth century because of changes in the surrounding social and intellectual *milieu*. Christopher Hill informs us that seventeenth-century talk of the common law being the law of free men, for instance, would not have meant what it means today, since 'freedom', to the seventeenth-century lawyer or politician, denoted property ownership.

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[64] J. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (2001), pp. 3-4. See also, S. Shapin, *The Scientific Revolution* (1998).

[65] See e.g., van Caenegem, note 57, above, chs. 7-9. See also C. Welch, *De Tocqueville* (2001); L. Janara, 'Commercial Capitalism and the Democratic Psyche: The Threat to Tocquevillian Citizenshup' (2001) 22 Hist of Pol Thought 317; O. Chadwick, *The Secularization of the European Mind in the 19th Century* (1975).

[66] See J. Waldron, *Law and Disagreement* (1999); S. Veitch, *Moral Conflict and Legal Reasoning* (1999); J. Raz, 'Facing Diversity: The Case of Epistemic Abstinence' in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994); C. Sunstein, *Legal Reasoning and Political Conflict* (1996); I. Marion Young, *Inclusion and Democracy* (2000); I. Berlin, *The Proper Study of Mankind* (1997); J. Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (1995).

> Words are deceptive because their meanings change. When members of Parliament spoke in defence of "liberty and property" they meant something more like "privilege and property" than is conveyed by the modern sense of the word liberty.[67]

The same might be said of the word 'reason', a crucial word to Coke and his fellow common lawyers.[68] Oppenheimer says that while the early-modern period was 'above all rational', reason at that time was generally 'perceived as a manifestation of God's mind and of divine love. ... All medieval art, music, architecture, science, and literature were based on it. Reason, as announced by the orderliness of the heavens and Church philosophy, reigned supreme.'[69]

The invocation by rights theorists of seventeenth-century talk of a transcendent set of 'common law values' is misguided. What might have been seen by seventeenth-century judges like Coke as quintessential common-law values – values relating to religion and dissent,[70] treason and the State,[71] punishment,[72] the torture of suspects, just systems of governance,[73] the importance of tradition and the past,[74] even the use of Law-French - would be anathema to modern rights theorists.

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[67] Hill, *Intellectual Origins*, note 17, above, p. 38.
[68] On the Cokean idea of common law as perfect reason (*summa ratio*) see ch. 6, below.
[69] Oppenheimer, *Birth of the Modern*, note 58, above, pp. 4 & 8. See also the discussion of the changes in the meaning of the republican notion of virtue in J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975), pp. 526-552.
[70] See e.g., R. Williams, *The Bloudy Tenent of Persecution, for Cause of Conscience, Discussed, in a Conference between Truth and Peace* [1644] in Wootton, *Divine Right and Democracy*, note 59, above, pp. 238-247; J. Milton, *Areopagitica* [1644] in Milton, *Complete English Poems, Of Education, Areopagitica* (ed. G. Campbell, 4th ed., 1990).
[71] See e.g., G.P. Bodet, 'Sir Edward Coke's Third Institute: A Primer for Treason Defendants' (1970) 20 U of Toronto LJ 469.
[72] D. Wootton, 'Introduction' to *Divine Right and Democracy*, note 59, above, pp. 24-25.
[73] See e.g., T. Hobbes, *Leviathan* [1651]; C.D. Tarlton, 'The Despotical Doctrine of Hobbes, Part I: The Liberalization of *Leviathan*' (2001) 22 Hist of Pol Thought 587; Tarlton, 'The Despotical Doctrine of Hobbes, Part II: Aspects of the Textual Substructure of Tyranny in *Leviathan*' (2002) 23 Hist of Pol

The fundamental differences that exist between the era of Coke and the present undermine the normative potential of the argument from history. The logic of authority assumes that nothing fundamental has changed between the time of the authority relied upon and the present. This is not the case in relation to the rights theorists' argument from history. The world occupied by Coke and his contemporaries was fundamentally different from that occupied by rights theorists today. The advent of democratic parliamentary politics has made it difficult to assume that judge-made law represents the law of the people. Likewise, the pluralism of the modern world makes the rhetoric of shared values unsustainable, at least in the thoroughgoing manner typical of the arguments of seventeenth-century common lawyers.

5. Conclusion

This chapter examined the argument from history. The analysis concentrated on early seventeenth-century constitutional theory and legal practice, both because that period is pivotal to the rights theorists' argument and also because it would provide a good focus to the inquiry.

Thought 61; J.G.A. Pocock and G.J. Schochet, 'Interregnum and Restoration' in Pocock, *Varieties of Political Thought*, note 59, above.

[74] For a vivid example of which see the extract from Sir E. Coke, *Le Tierce Part des Reportes* [1602] in Wooton, *Divine Right and Democracy*, note 59, above, pp. 143-145.

The rights-based argument was analysed in section 1, where particular attention was paid to the sophisticated version of the argument developed by Craig. Because the argument from history is an amalgam of history and law, the differences between the study of history and the study of law were identified in section 2. Drawing on Maitland and Elton in particular, it was argued that legal argument is characterised by its isolated and purposive nature and is governed by what Maitland called the logic of authority. Historical argument, by contrast, is retrospective and non-purposive in nature and governed by the logic of evidence.

The rights-based argument from history was assessed first, in section 3, for its cogency as a matter of history. The sparse and isolated use of historical material and the essentially purposive nature of the enquiry indicated that the argument from history was not underpinned by a method that professional historians would regard as adequate. This analysis was reinforced by an examination of the way in which the rights theorists' interpretation of the writings and career of Sir Edward Coke varies substantially from the accounts of historians working in the period.

The cogency of the argument from history as a legal argument was examined next in section 4. The logic of authority on which legal argument rests depends, it was said, on there being no substantial or fundamental difference between relevant surrounding circumstances of the authoritative case and those pertaining at the time at which the case is relied upon as a precedent. In relation to the argument from history, since there are fundamental differences between seventeenth-century government, law, political practice and social configuration compared with present

conditions, cases from the earlier period have only limited worth as precedents. The unsupported and unguarded use of dicta from such cases, in the manner of the rights theory, ought to be regarded with suspicion.

6. Coda - The Argument from History as Myth?

If the argument from history advanced by rights theorists is neither good history nor persuasive law, then what precisely is it? In his account of the nature of history, Marwick draws a category distinction between history and myth. While both are, broadly speaking, interpretations of the past, what sets the discipline of history apart is its critical and rational method of analysing and interpreting sources.

> The characteristic of myth is that while containing some element, often highly attenuated, of faithfulness to what actually happened in the past, it is also highly distorted or exaggerated, almost invariably with a view to glorifying or asserting the special powers of one particular individual, or family, or community, or nation, or religious faith, or to blackening the character of some perceived enemy. Myths exploit the past in order to serve some current national, political or religious purpose.[75]

History, then, at least on Marwick's account, is an interpretation of the past in which a serious effort has been made to filter out myth and fable.[76] The rights-based argument from history makes no attempt to filter out myth and fable. On the

[75] Marwick, *Nature of History*, note 21, above, p. 13.
[76] Marwick, *Nature of History*, note 21, above, pp. 1-3.

contrary, by erecting the idea of the early seventeenth century as a prelapsarian age, a golden era of constitutionalism, in which the figure of Coke the philosopher-judge stands as a totem, rights theorists seem to be indulging in ideological myth-making.[77]

This point can be reinforced. Finley examined the use of the rhetorical trope of ancient constitutionalism in fifth-century Athens, seventeenth-century England and revolutionary America. He found the following common features in all three versions. (1) 'It was assumed, rather than justified, that the argument from antiquity is a valid one in a debate about current politics. ... They [ancient constitutionalists] knew what they wished to find in the past, they sought it, and they found it.' (2) 'The distant past was concretized and personalized, exactly as it had been in the myths and legends of archaic societies. The sanctioning ancestor was normally *an* ancestor, Solon or Edward the Confessor or Thomas Jefferson, or whoever, not just the past in general or even a specified period in the past.' (3) 'Viewed objectively, ... the debates were over genuine issues, over constitutional or other questions in which there were definable differences in interests and goals'. (4) '[T]he appeal to, and argument from, the ancestral past habitually crosses lines, whether of class, educational level or political disposition. ... It is, in short, ideology in its classic form.'[78]

The rights-based argument from history contains many of the elements identified by Finley. Like former ancient constitutionalists, rights theorists assume rather than

[77] On myth see, e.g., A. Bailey, *The Caves of the Sun: The Origin of Mythology* (1997).
[78] Finley, 'Ancestral Constitution', note 34, above, pp. 44-45.

argue for the relevance of an argument from antiquity in the context of a contemporary political debate. In addition, the analysis in this chapter appears to show that rights theorists, in their purposive trawl through English constitutional history, 'knew what they wished to find in the past, they sought it, and they found it.' The way in which the rights theorists' historical content is personified in the form of Coke - in a way that is unrecognisable to historians - shows that the rights theory shares another characteristic with previous ancient constituitonalist myths.

Chapter 6

The Common Law as Superior Reason?

Introduction

This chapter examines a central strand of rights-based public law thought. Rights theorists maintain that judge-made law is a superior form of law, both morally and constitutionally, because of its necessary connection with moral principles. The common law is thus said to embody a superior form of reason since its task is to interpret and apply a higher set of laws. Moreover, the adjudicative procedures applied within common law courts are said by some rights theorists to epitomise a process of public reason connected to ideals of deliberative, democratic decision-making.[1]

This understanding of the common law as higher-order law connects with an understanding of the constitution in which ordinary, legislative politics and the constitutional politics of the courts are sharply divided. This articulation of this dualist constitution involves the assertion of both a positive and negative claim. The negative claim is that all forms of politics that occur within institutions other than the courts ought to be approached with scepticism. The positive (and corollary) claim is that of all social and political institutions the common law court alone is necessarily connected with the moral law.

The viability of each of these claims is tested in this chapter. In section 1, the rights-based account of the dualist constitution is further analysed. Section 2 examines the negative component of the rights-based argument in support of the dualist constitution. Section 3 investigates the positive claim by means of a case study of the process of argument and decision-making in judicial review.

1. The Dualist Constitution

In Part I of the thesis, it was suggested that the rights-based approach to public law rests on a distinction between ordinary and constitutional politics. On this account, ordinary politics is democratic politics, centred on the business of governing, in relation to which the legislature is supreme. Since ordinary politics is necessarily concerned with furthering the interests of particular sectional groups by the agglomeration and selective use of power, rights theorists regard it as morally neutral at best.

Constitutional politics, on the other hand, is structured around the institution of the courts. It is said to constitute a moral order of law because it exists to ensure that moral and political imperatives relating to the protection of individual autonomy are respected. As far as this order of law is concerned, the courts and not the legislature reign supreme. This means, presumably, that the courts have the final say in relation to any matter deemed to fall within the sphere of constitutional politics.[2]

[1] See ch. 4, above.

The distinction between ordinary and constitutional politics is a defining characteristic of rights-based thought. Rights theorists argue that constitutional politics must be seen as a superior form of law since it is necessarily moral whereas ordinary politics is not. 'Higher' in this context means superior not just in the moral sense but in the legal and constitutional sense too.[3] The ascription of constitutional superiority to the constitutional political decisions of the common law courts entails that the courts must be justified in overriding governmental – even legislative – decisions on appropriate occasions.[4]

2. 'Good' politics, 'bad' politics?

In this section, the negative claim which underpins the distinction between ordinary and constitutional politics - that ordinary politics, especially the legislative process, ought to be treated with scepticism - is examined. The reasoning underlying this claim is unpacked, and then challenged, in this section.

It can be suggested that the distinction between ordinary and constitutional politics rests on a particular method. Rights theorists adopt a normative stance when they examine judicial politics and the workings of the common law courts. Normative theory can be defined, in Waldron's phrase, as the attempt to 'articulate a

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[2] See ch. 4, above.
[3] The logic underlying the rights-based approach is this: since the need to protect autonomy is identified as the overriding principle, it follows that any approach which is morally superior ought to be considered constitutionally superior too. See ch. 4, above.
[4] See e.g., T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), pp. 216-225.

reasonable ideal' of the practice in question.[5] Rights theorists are aware of the normative presuppositions of their work. Allan, for instance, in the Preface to *Law, Liberty, and Justice* admits that the 'book unashamedly attempts a defence of the "liberal variant of normativism".'[6]

Rights theory approaches the task of analysing democratic or legislative politics in a different way. For one thing, rights-based accounts of the legislative process tend to be rather thin, containing little by way of systematic or sustained examination of the democratic process. Moreover, when scrutiny of the ordinary political process does occur, it tends to take the form of what Allan calls a 'bleak analysis'.[7] In Allan's own account, this way of analysing ordinary politics manifests itself with the observation that, in contemporary Britain,

> [i]mportant freedoms are at the mercy of a temporary majority of the House of Commons, generally manipulated by the executive government which cannot even claim the support of a clear majority of the electorate.[8]

Laws' analysis of the current parliamentary process follows a similar course. He argues that 'whereas reasonableness is a defining function of the common law, it is no more than an adventitious function of legislation.'[9] The purpose of democratic political institutions, Laws says, is to implement policies that further the needs of

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[5] J. Waldron, *Law and Disagreement* (1999), p. 33.
[6] T.R.S. Allan, *Law, Liberty, and Justice* (1993), p. *vii*. (Referring to M. Loughlin, *Public Law and Political Theory* (1992), chs. 5, 8 & 9.)
[7] Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 CLJ 111, p. 116.
[8] 'Legislative Supremacy', note 7, above, p. 116.

particular interest groups. He argues that, in Britain today, 'the Executive enjoys great autocratic power'.[10] Parliament's power being absolute, 'it is of necessity morally neutral'.[11]

A negative assessment of the process of ordinary legislative politics also underlies Oliver's account.[12] In defending the idea of the court as a surrogate political institution – a 'Grand Inquest of the Nation forum' – Oliver argues that the House of Commons is increasingly unable and unwilling to engage in the sort of political debate required by her theory.[13]

It is at least arguable that the rights-based account of legislative politics is influenced by public or rational choice theory. Dunleavy and O'Leary define public choice theory as the invasion of modes of analysis drawn from neo-classical economics into the arena of political science.[14] According to McAuslan, an analytical perspective influenced by rational choice theory involves the writer being 'at the very least, sceptical about the benefits of government and public administration.'[15] Writers who adopt this perspective, he says, tend to be 'devoted to demonstrating ... how lacking in any public benefit are existing political and administrative processes.'[16]

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[9] Sir John Laws, 'Wednesbury' in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (1998), p. 199. (Emphasis of original.)
[10] Sir John Laws, 'Law and Democracy' (1995) PL 59, p. 92.
[11] Sir John Laws, 'Public Law and Employment Law: Abuse of Power' (1997) PL 455, p. 455.
[12] See ch. 4, above.
[13] See ch. 3, above.
[14] P. Dunleavy and B. O'Leary, *Theories of the State: The Politics of Liberal Democracy* (1987), ch. 3.
[15] P. McAuslan, 'Public Law and Public Choice' (1988) 51 MLR 683, p. 689. For the significance of public choice theory in the context of 'new public management' see, e.g., C. Scott, 'Accountability in the Regulatory State' (2000) 27 J of Law & Soc 38; C. Hood, 'Public Service Managerialism: Onwards and Upwards, or 'Trobriand Cricket' Again?' (2001) Pol Qu 300; N. Deakin and K. Walsh, 'The Enabling State: The Role of Markets and Contracts' (1996) 74 Pub Admin 33; P. Barberis, 'The New Public Management and a New Accountability' (1998) 76 Pub Admin 451.
[16] McAuslan, note 15, above, p. 687.

Whether or not rights theorists are aware of it, there is certainly a similarity between the 'bleak analysis' they offer and the sceptical accounts of the legislative process advanced by rational choice-influenced political scientists. Given this, the rights theorists' argument in favour of the dualist constitution can be said to juxtapose a normative or 'reasonable ideal' account of judicial politics against a sceptical account of the legislative process influenced by rational choice theory. This method is incongruous. There is no good reason why one central aspect of rights-based thought should be analysed normatively when a related aspect of the study is viewed sceptically.

Rights theorists might defend their position by arguing that, as good liberals, their working premise is rightly that exercises of political power ought to be regarded jealously and with distrust. This argument fails: since courts also wield political power, intellectual consistency demands that the presumption must also be applied to the analysis of judicial politics. The result of this would be a sceptical, rational choice-influenced account of the workings of both the legislature *and* the court. But that is not what the rights theory provides.

Alternatively, rights theorists could argue that their aim is to provide a normative theory of constitutional politics. Once again, however, intellectual consistency would demand that the normative mode of enquiry ought to be extended to embrace

the study of legislative politics, there being no legitimate basis for confining their normative inquiry to the politics of the courts.[17]

There are a number of sceptical accounts of both legislative and judicial politics in the literature.[18] It is also possible to imagine a normative theory which embraces both forms of politics. Jeremy Waldron begins his recent book *Law and Disagreement* by alluding to Unger's observation that 'discomfort with democracy' is one of the 'dirty little secrets of contemporary jurisprudence'.[19] In an attempt to rectify this deficiency, Waldron says that his book aims to provide a glimpse of 'a genuinely democratic jurisprudence: a philosophy of law that pays something more than lip-service to the ideal of self-government.'[20] Given that normative theory necessarily contains something aspirational, Waldron's theory posits the assumption that 'citizens and representatives often do vote on the basis of good faith and relatively impartial opinions about justice, rights, and the common good.'[21] By contrast with the rights theory analysed in this thesis, the virtue of legislatures, on Waldron's account, stems from the fact that they 'incorporate disagreement into their proceedings, and they make their decisions in the midst of it.'[22]

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[17] For a similar argument, see Waldron, *Law and Disagreement*, note 5, above, pp. 8-17 & ch. 13.
[18] See e.g., A.P. Le Sueur, 'The Judicial Review Debate: From Partnership to Friction' (1996) 31 Government and Opposition 8; K.D. Ewing and C.A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (1990); Ewing and Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (2000); J.A.G. Griffith, *The Politics of the Judiciary* (5th ed., 1997).
[19] See R.M. Unger, *What Should Legal Analysis Become?* (1996), pp. 69-74.
[20] *Law and Disagreement*, note 5, above, pp. 8-9.
[21] *Law and Disagreement*, note 5, above, p. 14.
[22] *Law and Disagreement*, note 5, above, p. 24. See also *ibid.*, p. 40: 'Modern legislatures do not just respond to disagreement; they internalize it. For us, it matters that legislation should emerge from a process that is *deliberative*.'

> Every feature of the majority-decision method that seems arbitrary can be defended as *reasonable in the circumstances of politics*, and indeed as expressive of perhaps the most robust conception of respect for persons that we are entitled to work with in those circumstances.[23]

Waldron shows that it is possible to construct a thoroughgoing normative theory which embraces both legislative and judicial politics. Other writers have shown that it is possible to provide a thoroughgoing sceptical account. Rights theorists do neither, opting instead for an uneasy combination of perspectives. They are normativists when it comes to assessing the politics of the common law courts and sceptics whenever they discuss the democratic politics that occurs within the legislature. This bifurcated method of arguing is unconvincing because it eschews the demands of intellectual consistency.

3. The Common Law as Superior Reason?

The previous section examined the negative claim underpinning the dualist constitution, namely, that legislative practice is a morally inferior brand of politics. This section investigates the positive – and primary – claim rights theorists make in support of the superiority of judicial politics: the claim that the common law is essentially good.

[23] *Law and Disagreement*, note 5, above, pp. 116-117. (Emphasis of original.)

Rights theorists consider judge-made law to be morally superior to legislation. The common law, they say, is unique in being essentially a site of practical reason that is necessarily connected to the cardinal moral principles which enforce and protect individual autonomy. Since it applies the moral law, common law reason can justifiably be regarded as a superior form of reason that produces a 'higher order' of law.

On this account, common law adjudication has a special role in realising ideals of deliberative democracy and republicanism. Rights theorists understand politics to be a deliberative enterprise aimed at deciding what shared, fundamental values require in individual cases of dispute.[24] According to Oliver's theory, for instance, the five key values may be said to 'contribute to, even to a large extent constitute' a republican ideal of active citizenship and deliberative democracy.[25] On this account, courts, guided in their decision-making by adherence to the key values, are in an ideal position to act as a surrogate political forum.[26] Allan's account is essentially similar. He envisages an ideal community in which citizens of the republic debate in public, striving collectively to 'articulate and further a conception of the common good'.[27] He draws on - and extends - Rawls' idea of public reason as a means of capturing this conception.[28] For Allan, the ideal of public reason requires a process of 'systematic deliberation and justification' in relation to the 'fundamental discussions' of citizens and the decisions those discussions produce which entails

[24] See ch. 4, above.
[25] D. Oliver, 'The Underlying Values of Public and Private Law' in M. Taggart (ed.), *The Province of Administrative Law* (1997), pp. 230-231.
[26] See ch. 3, above.
[27] *Constitutional Justice*, note 4, above, p. 188.
[28] J. Rawls, *Political Liberalism* (1996), Lecture VI. See also J. Habermas, 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism' (1995) J of Pol Phil 92.

that policies cannot be 'defended by recourse to arguments that conflict with constitutional fundamentals'.[29]

The Ideal of Public Reason

The idea of public reason is an important one in the context of rights-based public law thought. It is also an increasingly important feature of contemporary public law scholarship in general. According to Duncan Ivison, public reason may be defined, in general terms, as a mode of reasoning specific to political questions:

> Public reasons are deployed in the course of public reasoning, or practices of public justification. Public reasons are meant as reasons to be shared in the sense that they are reasons for each in virtue of being reasons for all. The scope of public reasons is crucial; they are distinct from 'non-public' reasons insofar as they invoke reasons acceptable to all and not just to a particular group or class. In recent liberal political argument ... the legitimacy (and stability) of liberal-democratic regimes is said to lie in large part upon agreement on such fundamental first principles.[30]

The concept has substantial pedigree within traditions of liberal and republican thought. Thomas Hobbes used the term in *Leviathan* to refer to the reason or judgement of the sovereign.[31] Writing in the wake of the religious and political

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[29] *Constitutional Justice*, note 4, above, p. 284.

[30] D. Ivison, 'The Secret History of Public Reason: Hobbes to Rawls' (1997) 18 History of Political Thought 125, pp. 126-127. See also, e.g., D. Zaret, *Origins of Democratic Culture: Printing, Petitions, and the Public Sphere in Early-Modern England* (2000), ch. 1; J. Bonham, 'Public Reason and Cultural Pluralism: Political Liberalism and the Problem of Moral Conflict' (1995) 23 Pol Theory 253.

[31] For an historical survey of the use of public reason see, e.g., L.B. Solum, 'Constructing an Ideal of Public Reason' (1993) 30 San Diego LR 729; G. Postema, 'Public Practical Reason: An Archaeology' (1995) 12 Soc Phil & Pol 76.

conflagration of the mid-seventeenth century, Hobbes believed that the fact of diversity of moral opinion was perpetually threatening to the commonwealth. The only way to circumvent the divisive potential of differing individual ('private') opinions on moral and political questions was to abdicate moral and political decision-making to an all-powerful sovereign. '[W]e are not every one, to make our own private Reason, or Conscience, but the Publique Reason, that is, the reason of God's Supreme Lieutenant, Judge; and indeed we have made him Judge already, if wee have given him a Sovereign power, to doe all that is necessary for our peace and defence.'[32] Public reason, in the Hobbesian version, is the reason of the sovereign as opposed to the several reasons of the people.

The notion of public reason articulated by Hobbes, while important in terms of tracing the intellectual lineage of the term, is no longer representative of the central features of the concept.[33] The term was used in a different sense by Thomas Jefferson, for instance, in the context of explicating a political ideal of democratic government according to which state officials were to be called to account for their actions and decisions by the public, acting perhaps through their representatives. The 'essential principles of our government' include, Jefferson said, 'the diffusion of information and the arraignment of all abuses at the bar of public reasons.'[34] Again, according to the version of the concept developed in the philosophy of Immanuel Kant, public reason was defined in terms of the audience to which

[32] T. Hobbes, Leviathan (ed. R. Tuck, 1991), pt. 3, ch. 37, P 13/13, at 306. On Hobbes as a liberal thinker, see, e.g., S. Holmes, *Passions and Constraint* (1995), ch. 6.

[33] Jean-Jacques Rousseau connected the idea of public reason with his notion of the common will. Whereas the reason of private individuals is self-interested, public reason is concerned with the common good: see 'Discourse of Political Economy' in *Jean-Jacques Rousseau: The Basic Political Writings* (trans. D.A. Cress, 1987).

reasons are given. Thus, public reason is addressed to the entire public. And, Kant argued, public reason ought to be free if the public is to become enlightened.[35]

The ideal of public reason tends to be connected with republican ideals of politics and the constitution. Miriam Galston says that republicanism is essentially about 'creating a more deliberative or reflective political life.'[36] At the heart of the republican ideal in its contemporary form, Galston argues, lies the recommendation to make 'political life more deliberative is the establishment of certain procedures in the decision-making process designed to enhance, if not ensure, a rational or reasoned basis for legislative, judicial, and other political determinations.'[37] Underlying these demands for rationality and participation, republicans emphasise the importance for participation in political activity on the basis of a concern for the common good as opposed to what they perceive to be the excessive individualism of liberalism.[38]

In an important recent book on republicanism, Phillip Pettit argues that the republican tradition has been unified across time in two main ways. First, by 'a shared enthusiasm for the ideals and the lessons of republican Rome'. Second, 'by an emphasis on the importance of having certain institutions in place: for example, an empire of law, as it was often put, not an empire of men; a mixed constitution, in

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[34] T. Jefferson, First Inaugural Address, 4th March 1801 in *Thomas Jefferson: Writings* (ed. M. D. Peterson, 1984), pp. 494-5.
[35] See, e.g., I. Kant, 'What is Enlightenment?' [1784]; O. O'Neill, 'Vindicating reason' in P. Guyer (ed.), *The Cambridge Companion to Kant* (1992), pp. 298-299; L. Hunt, 'Principle and Prejudice: Burke, Kant and Habermas on the Conditions of Practical Reason' (2002) 23 Hist of Pol Thought 117;
[36] M. Galston, 'Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy' (1994) 82 California LR 331, p. 337.
[37] Note 36, above, p. 355.
[38] Note 36, above, pp. 334-335.

which different powers serve to check and balance each other; and a regime of civic virtue, under which people are disposed to serve, and serve honestly, in public office.'[39] Newer brands of republicanism in particular reveal what Pettit calls a 'juridical cast'.[40] They accord a central place was given to the notion of rights, have as their primary focus the need to avoid the evils associated with interference rather than the importance of democratic participation, and hold that 'the properly constituted law is constitutive of liberty'.[41]

In his magisterial work on the subject, John Pocock identifies virtue as the defining feature of republican thought:

> In the final, Boethian, analysis, the price to be paid for a life of civic activity was vulnerability to fortune; and the republic, being that community in which each individual was defined by his activity, was the community committed by its political form to contend against that vulnerability. States and nations, like individuals, might rise and fall as ambition condemned them to mount upon the Wheel, but only the obliged the individual to pit his virtue against fortune as a condition of his political being. Virtue was the principle of republics.[42]

This virtue-laden conception of republicanism finds a strong echo in the republican writings of John Milton. Milton devised principles of what might be called the moral economy of the commonwealth. He insisted that if the commonwealth is to

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[39] P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997), p. 20.
[40] Note 39, above, p. 21.
[41] Note 39, above, pp. 27 & 35. On republican theories of politics see, e.g., Q. Skinner, *Liberty Before Liberalism* (1998).
[42] J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975), pp. 349-350. See also Pocock, 'Virtues, Rights, and Manners: A Model for Historians of Political Thought' (1981) 9 Pol Theory 353; 'Political thought in the English speaking

flourish and retain its autonomy, then both rulers and ruled must cultivate the virtues.[43] 'The happiness of a Nation consists in the true Religion, Piety, Justice, Prudence, Temperance, Fortitude, and the contempt of Avarice and Ambition. They in whomsoever these vertues dwell eminently, need not Kings to make them happy, but are architects of their own happiness.'[44] In modern times, Pocock detects a divorce in Anglo-American political culture. American independence, he argues, was followed by a fairly rapid divergence of the political languages spoken in the two principal cultures of the now sundered Atlantic. The United Kingdom adopted a mixture of the prescriptive conservatism of Edmund Burke and the radical utilitarianism of Jeremy Bentham. Whereas, in the United States:

> the unique conditions of the continental republic and its growth were perpetuating the Augustan tension between virtue and commerce, the Puritan tension between election and apostasy, the Machiavellian tension between virtue and expansion, and in general the humanist tension between the active civic life and the secular time-continuum in which it must be lived.[45]

Federalist thought attempted to square the rise of the interest group with the desire to preserve the virtue of the republic. James Madison recognised the increasing importance in human affairs of the faction pursuing a collective but particular interest. But he argued that the checks, balances, and separations of powers which

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Atlantic, 1760-1790: (ii) Empire, revolution and an end of early modernity' in J.G.A. Pocock (ed.), *The Varieties of British Political Thought 1500-1800* (1993).

[43] For another classic republican account dating from a similar period see James Harrington, *The Common-wealth of Oceana* [1656] in J.G.A. Pocock (ed.), *The Commmonwealth of Oceana and A System of Politics* (1992).

[44] J. Milton, *Eikonoklastes* in D.M. Wolfe (ed.), *Complete Prose Works of John Milton* (1953-82), vol. III, p. 542. See also, e.g., M. Dzelainis, 'Milton's classical republicanism' in D. Armitage, A. Himy, and Q. Skinner (eds.), *Milton and Republicanism* (1995); C. Hill, *Milton and the English Revolution* 1977).

were to be built into the federal structure will ensure that interest does not corrupt. He also seemed to believe that the capacity of this structure for absorbing and reconciling conflicting interests is without known limits.[46]

There has been a renewed interest in republican theories of politics and the constitution in recent years, particularly in the United States. According to Daniel Rodgers, legal philosophers discovered the terminology of republicanism articulated in the historical studies of Pocock and Skinner (and others) in the 1980s. By the end of the decade, Rodgers says, 'the law journals were full of news of a "republican revival" in legal theory.'[47] Rodgers argues that, in the hands of scholars like Frank Michelman, Cass Sunstein, and Morton Horwitz, the terminology of republicanism was used 'as a shorthand for everything liberalism was not': namely, commitment to an active civic life; to explicit value commitments and deliberative justice; and to public, common purposes.[48]

Rawls on Public Reason

[45] Note 42, above, p. 549.
[46] Note 42, above, p. 522. See J. Madison, A. Hamilton, and J. Jay, *The Federalist* [1787-88]. Differences do exist between the accounts of republican history and republican ideals articulated by Pocock (and Skinner) on the one hand and Pettit and Galston on the other. In a recent article, Patricia Springborg suggests that whereas Pocock and Skinner give careful historiographical accounts of republicanism as a set of institutional practices designed to create constitutional balance, Pettit defines republicanism in terms of a set of values (particularly freedom from domination): see P. Springborg, 'Republicanism, Freedom from Domination, and the Cambridge Contextual Historians' (2001) 49 Pol Studies 851, p. 852. Even if correct, nothing rests on this difference for the purposes of the present discussion.
[47] D.T. Rodgers, 'Republicanism: the Career of a Concept' (1992) J of American History 11, p. 33.
[48] Above, note 47, p. 33. See, e.g., F.I. Michelman, 'Foreword: Traces of Self-Government' (1986) 100 Harv LR 4; C.S. Sunstein, 'Interest Groups in American Public Law' (1985) 38 Stanford LR 29; Sunstein, 'Beyond the Republican Revival' (1988) 97 Yale LJ 1539; M.J. Horwitz, 'Republicanism and Liberalism in American Constitutional Thought' (1987) 29 William and Mary LR 57; R.H. Fallon, 'What is Republicanism and is it Worth Reviving?' (1989) 102 Harv LR 1695.

In examining the use made of the notion of public reason in rights-based accounts, we will refer primarily John Rawls' account of the ideal since this is the account that forms the basis of the discussion by rights theorists. Rawls' *Political Liberalism* starts by posing a question fundamental to contemporary liberal democracies – the problem of toleration. How is it possible, Rawls asks, 'for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?'[49] Rawls assumes that many of the most intractable struggles that will divide a political community will be over higher things: 'for religion, for philosophical views of the world, and for different moral conceptions of the good.'[50] The idea of public reason comprises a central aspect of Rawls' response to this question. He defines public reason in this way:

> The point of the ideal of public reason is that citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood.[51]

Public reason is 'public', Rawls says, for three reasons: 'as the reason of the public; its subject is the good of the public and matters of fundamental justice; and its nature and content are public, being given by the ideals and principles expressed by

[49] Note 28, above, p. 4.
[50] Note 28, above, p. 4.
[51] Note 28, above, p. 226.

society's conception of political justice'.[52] Public reason relates to both a subset of reasons and a subset of political questions. First, not all reasons are to be regarded as public reasons. Certain categories of argument lie outside the scope of public reason. These include: (a) private reasons – the strictures of public reason, Rawls says, 'do not apply to our personal deliberations and reflections about political questions'[53]; (b) argument and deliberation about private reasons 'by members of associations such as churches and universities'[54]; (c) the reasons given by officials in non-democratic regimes.[55] Public reason relates primarily, then, to the reasoning of public officials in liberal democracies.

> [Public reason] applies in official forums and so to legislators when they speak on the floor of parliament, and to the executive in its public acts and pronouncements. It applies also in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review.[56]

In addition, not all political questions are governed by the ideals of public reason. It relates only that subset of political questions that concerns "constitutional essentials" and questions of basic justice. The reach or remit of public reason on Rawls' account thus excludes 'many if not most political questions'.

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[52] Note 28, above, p. 213.
[53] Note 28, above, p. 215.
[54] Note 28, above, p. 215.
[55] Note 28, above, p. 215.
[56] Note 28, above, p. 216. Rawls argues that the ideals of public reason may govern certain forms of debate amongst citizens; but there is no principled *need* for this to be so. Citizens are enjoined, however, 'to support the idea of public reason by doing what they can to hold government officials to it.'

Rawls understands public reason as a specific mode of argumentation which is restricted to a particular category of political questions: 'constitutional essentials' and 'questions of basic justice'. The concept is also limited in terms of the substantive nature of the argument it permits. It excludes any argument which is incompatible with the essential principles of a liberal democracy (above all, freedom and equality) and any argument which is dependent on self-interested or sectional or partisan conceptions of morality, justice or politics. These limitations are, for Rawls, a function of the defining characteristic of public reason: namely, its potential or hypothetical reciprocity. This feature stems directly from the democratic and pluralist condition of the political community. A democracy presumes that every citizen is of equal worth or value. If we know that there exists in the polity a plurality of potentially conflicting worldviews, the aim must be to find a common ground free from the domination of any of them, otherwise the basic principle of democracy (equality) will be traduced. If we fail to do that, there will be no basis for the ascription of legitimacy to the law that supposedly liberal polity produces.

> As reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, [citizens] should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality.[57]

Many commentators expressed difficulty with the limited nature of this conception of public reason. How, they ask, can an ideal that is so restrictive in terms of both content and application serve as the central mode of debate in modern pluralist

liberal democracies? Rawls has justified his position in more detail in a chapter of his more recent book, *The Law of Peoples*.

(a) The conception supposedly avoids conflict between potentially incompatible worldviews: 'I propose that in public reason comprehensive doctrines of truth or right be replaced by an idea of the politically reasonable addressed to citizens as citizens.'[58] The conception articulated by Rawls 'neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.'[59]

(b) Public reason, defined in this way, serves to ground the legitimacy of political acts: 'Our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political actions ... are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.'[60]

(c) But the corollary of this is that political discussion (at least in those contexts in which public reason operates) is severely curtailed. Rawls seeks to defend this position in this way: 'Political liberalism views [the] insistence on the whole

[57] Note 28, above, p. 218.
[58] J. Rawls, *The Law of Peoples* (1998), p. 132.
[59] Note 58, above, p. 132.
[60] Note 58, above, p. 137.

truth in politics as incompatible with democratic citizenship and the idea of legitimate law.'[61]

Allan and Public Reason

Allan claims that common law adjudication 'comes as close as possible to the moral dialogue between citizen and state' envisaged by the ideal of public reason.[62] Adversarial adjudication, he argues, gives litigants a central role. Argument in common law courts can thus be said to exude an essentially moral quality which reflects the high value courts attach to the 'dignity [of individual litigants] as autonomous moral agents.'

> [T]he particular virtues of adversarial adjudication may be better appreciated when we consider its intrinsic value, as a procedure intended to *justify* the outcome to the parties involved; and this dimension has especial constitutional importance in an administrative context, where the citizen's claim is brought against the state. ... It is the essentially collaborative nature of adversarial adjudication that explains its special moral force.[63]

Allan argues that the moral nature of adjudication means that in many instances 'common law adjudication is superior to the legislative process as a means of

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[61] Note 58, above, p. 138.

[62] *Constitutional Justice*, note 4, above, p. 188. Rawls similarly regards the Supreme Court of the United States of America as an exemplar of public reason, in that the Justices have to explain and justify their decisions within the confines of the constitution in an especially contentious and public manner: see *Political Liberalism*, note 28, above, pp. 231-240.

resolving questions of justice, even when the latter is accompanied by wide consultation to ascertain public opinion and preceded by vigorous political debate.'[64] The superiority of common law is most visible in cases which raise ethical questions of great complexity.[65] In this context, the 'common law method of reasoning by analogy ... may often be well adapted to wise and sensitive decision-making.'[66]

Allan's account of common law adjudication finds an interesting historical echo in the work of Sir Edward Coke. The key feature of Coke's theory of law (to the extent that it can be called a theory[67]) was the idea of law as artificial reason:[68]

> For reason is the life of the law, nay the common law it selfe is nothing else but reason, which is understood of an Artificial perfection of reason, gotten by long study, observation, and experience, and not of every mans natural reason, for *Nemo nascitur artifex*. This legal reason *est summa ratio*.[69]

In this passage, Coke makes three points. First, he argues that common law is in essence a system of reason (of a particular kind). Second, he claims that this system of reasoning is *unique to* the common law and cannot be equated with the 'natural'

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[63] *Constitutional Justice*, note 4, above, p. 85. (Emphasis of original.) See also T.R.S. Allan, 'Common Law Constitionalism and Freedom of Speech' in J. Beatson and Y. Cripps (eds.), *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (2000), p. 30.
[64] 'Common Law Constitutionalism', note 31, above, p. 22.
[65] See, e.g., the 'right to die' cases: *Airedale N.H.S. Trust v Bland* [1993] 1 All ER 821; *R (on the application of Pretty) v Director of Public Prosecutions* [2001] 3 WLR 1598.
[66] *Constitutional Justice*, note 4, above, p. 293.
[67] See ch. 5, above.
[68] D.E.C. Yale, 'Hobbes and Hale on Law, Legislation and the Sovereign' (1972) 31 CLJ 121, p. 124 describes Coke's jurisprudence as a 'theory of legal reasoning as the animating spirit of law'.
[69] Coke, *First Institute of the Laws of England* (ed. J.H. Thomas, 1836), 1. For a discussion of Coke's idea of law as a superior form of artificial reason see, e.g., C. Gray, 'Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke' in P. Zagorin (ed.), *Culture and Politics From Puritanism to the Enlightenment* (1980); H.J. Berman, 'The Origins of Historical Jurisprudence: Coke, Selden, Hale' (1994) 103 Yale LJ 1651, pp. 1673-1694.

reason characteristic of individuals. Third, Coke argues that common law reason represents the highest possible form of reason. It is superior to the natural reason of individuals because as a species of wisdom it is both practical and traditional.[70] These points reflect the main strands of the claim rights theorists make in favour of the superiority of the common law over other forms of politics.

(a) Investigating the Supremacy Argument: A Case Study of *Ex p Simms*

The most effective way of testing the argument that the common law forms a superior process of reasoning is to examine it in relation to examples drawn from juridical practice. The shift at this stage in the thesis from the construction of models towards the analysis of legal cases marks a significant but necessary change in methodological approach. The argument in this and subsequent chapters will depend increasingly on observations derived from the analysis of recent public law cases.

In this section, the claim that the common law is a superior form of reason will be challenged by looking at the reasoning process that led to the decision in the recent case of *R v Secretary of State for the Home Department, ex p Simms*.[71] *Ex p Simms* is a good choice of case for two main reasons. First, it has been explicitly approved

[70] J G A Pocock, *The Ancient Constitution and the Feudal Law* (2nd ed., 1987), p. 35 says that, for Coke, the common law 'embodies the wisdom of generations, as a result not of philosophical reflexion but of the accumulations and refinements of experience ... [W]hat speaks through the judge is the distilled knowledge of many generations of men, each decision based on the experience of those before and tested by the experience of those after, and it is wiser than any individual ... could possibly be.'
[71] [1999] 3 WLR 328.

by rights theorists[72] and so may be studied as a case which is seen by them as approximating (their version of) the ideal of public reason. Second, the case features, as we shall see, elements that seem – at least at first sight – to fit very comfortably within the rights-based theoretical framework.

The analysis of *Simms* contained in this chapter certainly cannot be said to constitute a complete account of the case. A number of elements are missing. No mention is made, for instance, of the pleadings or the written submissions that may have been made before the court. Nor is anything said – save in general terms - about the applicants or about how their case came to be brought before the court. And all but one of the opinions of the judges in the House of Lords – and all the judgments of the lower courts - are ignored. A case study whose aim was to capture the totality of the judicial review process would probably have to accommodate these (and perhaps other) dimensions of the case.

It can be argued, however, that the style of analysis conducted in this chapter is adequate for present purposes. First of all, since what will be argued in this and subsequent chapters depends to a great extent on our understanding of the reasoning process - and especially its limits - in judicial review cases, it is essential to conduct a thorough investigation into reasoning typical of public law.[73] This entails that we look very closely at the words used when a judge reasons towards a particular legal

[72] See, e.g., Allan, *Constitutional Justice*, note 4, above, pp. 46-47; Allan, 'Common Law Constitutionalism', note 31, above, p. 27

[73] It is important to be clear about what is being claimed at this point. The claim is not that *Simms* is typical judicial review case (if any such thing exists) but that the reasoning of Lord Steyn in *Simms* is reasonably typical of a contemporary senior judge in a case involving (difficult) public law issues.

conclusion in a 'hard' public law case.[74] For present purposes, I think that the precise choice of subject does not overly concern us: so long, that is, as it is accepted that the chosen text is reasonably typical of public law reasoning. Second, it would be possible to expand the analysis by looking at the reasoning of other judges (or other participants) in *Simms*, or by searching for other varieties of public law reason in other cases. But this expansion, while desirable perhaps on some levels, would come at a price. It has the potential both to reduce the clarity of the exposition at this point and to expand the discussion beyond an acceptable length. Moreover, if, as I claim, Lord Steyn's opinion in *Simms* is reasonably representative of the process of (judicial) reasoning in public law cases, and if the analysis is conducted here with sufficient precision and rigour, such an exercise might be said to amount to unnecessary duplication.

The applicants in *ex p Simms* were prisoners who had been convicted of murder. The Court of Appeal had refused their applications for leave to appeal against their convictions, yet they continued to protest their innocence. Wanting their case reopened, the applicants expressed a desire to hold oral interviews with journalists who were interested in their predicament. The applicants' prisoner governors were prepared to grant such a request only on condition that the journalists signed a declaration that they would not publish any of the material garnered from the interviews, a request to which the journalists were not prepared to accede.[75]

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[74] This raises the sceptical question about whether we can (or should) trust the text of judgments to be an honest reflection of the reasoning that went to produce the decision in question. Without addressing that challenge directly, I adopt Dworkin's position and say that we probably have no other choice. See R. Dworkin, *Law's Empire* (1986), pp. 76-86.

[75] For commentary on *ex p Simms*, see M. Elliott, 'Human Rights in the House of Lords: What Standard of Review?' (2000) CLJ 3; T. Poole, 'Justice, Rights and Judicial Humility: *Ex P. Simms*' [2000] JR 106.

The focus of the analysis that follows falls upon the structure of argument and decision-making evidenced by the selected case. The aim is to test the proximity of a case like *Simms* to an ideal of public reason and deliberative democracy. Since this examination needs to be conducted by a close investigation of specifics, the inquiry will concentrate on the lead opinion of Lord Steyn.

(b) Lord's Steyn's Opinion in *Simms*

Lord Steyn began his opinion by putting the case in context. 'My Lords, in the last 15 years a number of miscarriages of justice have been exposed. ... The risk of such miscarriages is ever present.' His Lordship also alluded to the central role of journalists in uncovering such mistakes: 'in recent years a substantial number of miscarriages of justice have only been identified and corrected as a result of painstaking investigation by journalists. And these investigations have included oral interviews with the prisoners in prison.'[76]

Having set the scene in this way, Lord Steyn neatly summarised the point of contention:

> The Home Secretary contends that prisoners have no right to have oral interviews with journalists in aid of an attempt to gain access to the Court of Appeal (Criminal Division). The policy of the Home Secretary is that such interviews would tend to undermine the discipline and control which are unquestionably essential conditions

> in a prison environment. On behalf of the applicants the consequentialist argument is that if the policy of the Home Secretary is upheld it will be virtually impossible for a journalist to take on a case which he believes to merit investigation.[77]

An account of the facts relevant to the case came next (see above) and a summary of the decisions of the lower courts.[78] Lord Steyn continued by outlining the legal principles relating to the restrictions on the rights of prisoners. While a prison sentence clearly intends to restrict the prisoner's freedom, his Lordship said that a prisoner 'retains all rights which are not taken away expressly or by necessary implication'.[79]

Having mentioned the enabling provisions of the Prison Act 1952,[80] Lord Steyn then cited the relevant sections of the Prison Rules dealing with correspondence between prisoners and journalists.[81] The Rules included the regulation that visits 'to inmates by journalists or authors in their professional capacity should in general not be allowed' and the stipulation that journalist friends of inmates 'will be required to give a written undertaking that any material obtained at the interview will not be used for professional purposes' before being granted access.[82] The applicants challenged the application of this general rule to their situation. Lord Steyn said that

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[76] Note 71, above, p. 330.
[77] Note 71; above, pp. 330-331.
[78] [1997] COD 217 (DC); [1999] QB 349 (CA).
[79] See *Raymond v Honey* [1983] AC 1; *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198.
[80] Sections 47(1) & 52(1).
[81] Prison Service Standing Order 5, paragraphs 37 and 37A.
[82] Note 71, above, p. 332.

what was at stake in this case were 'the rights *of prisoners* to be interviewed by journalists of the prisoners' choice.'[83]

Lord Steyn then summarised the principal arguments raised in the case. The Home Secretary argued that the relevant paragraphs of the Prison Rules authorised the Home Secretary to impose a complete ban on journalists interviewing prisoners for any purpose. To 'allow any interviews', it was argued, would be 'to undermine proper control and discipline in prisons.'[84] The applicants in turn argued that they claimed the right to hold oral interviews with journalists only in relation 'to the question whether [the prisoners have] been wrongly convicted'. To allow this would be to 'enlist the investigative resources of the media in righting a wrong.' And, they added, the process of journalist investigation was an 'integral part of the just functioning of the overall process of criminal justice'.[85]

Having summarised the arguments of applicant and respondent, Lord Steyn said that the basic legal question at issue was whether the relevant provisions of the Prison Rules were unlawful. To answer that question, the starting point, his Lordship said, was the right to freedom of expression. Drawing on Article 10 of the European Convention on Human Rights[86] and two earlier House of Lords decisions,[87] Lord Steyn argued that, in a democracy, freedom of expression is 'the primary right:

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[83] Note 71, above, p. 332. (Emphasis of original.)
[84] Note 71, above, p. 335.
[85] Note 71, above, p. 335.
[86] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950). On Art. 10 ECHR see, e.g., A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (2001), ch. 10; M. Janis, R. Kay and A. Bradley, *European Human Rights Law: Text and Materials* (2nd ed., 2000), ch. 5.
[87] *Attorney-General v Guardian Newspapers* (No. 2) [1990] 1 AC 109; *Derbyshire Country Council v Times Newspapers Ltd* [1993] AC 534.

without it an effective rule of law is not possible.'[88] Support for that proposition was also adduced from principles of United States free speech law.[89] While Lord Steyn recognised that there are limits to the right of free expression, he maintained that since the applicants wanted the right in order to challenge the correctness of decisions that deprived them of their freedom, 'it is not easy to conceive of a more important function which free speech might fulfil.'[90]

The argument in support of the Home Secretary's decision was then scrutinised in light of this jurisprudential background. Interviews had taken place from time to time in order to investigate potential miscarriages of justice prior to introduction of the blanket ban policy on oral interviews. Lord Steyn argued that there was 'no evidence that any of these interviews had resulted in any adverse impact on prison discipline' and that the current prohibition on interviews would mean that 'a means of correcting errors in the functioning of the criminal justice system has been lost.'[91] The judge concluded that the relevant provisions 'are exorbitant in width in so far as they would undermine the fundamental rights invoked by the applicants in the present proceedings and are therefore *ultra vires*.'[92]

(c) Analysing *Simms*

[88] Note 71, above, p. 337.
[89] On US free speech jurisprudence see, e.g., *RAV v St Paul, Minnesota* 120 L Ed 2d 305 (1992); *Wisconsin v Mitchell* 124 L Ed 2d 436 (1993); C. Sunstein, *Democracy and the Problem of Free Speech* (1993); D.A.J. Richards, *Free Speech and the Politics of Identity* (1999); R. Dworkin, 'Why Must Speech Be Free?' in Dworkin, *Freedom's Law* (1996); S. Gey, 'What if *Wisconsin v Mitchell* Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes' (1997) 65 George Washington LR 1014.
[90] Note 71, above, p. 337.
[91] Note 71, above, p. 339.

How well does the reasoning process exhibited in *Simms* fit with the ideal of public reason? Public reason, Allan says, is a process of 'systematic deliberation and justification' designed to elucidate what the shared values of a community require in a specific case.[93] According to Rawls, public reason is public in three ways:

> [It is] the reason of citizens as such, it is the reason of the public; its subject is the good of the public and matters of fundamental justice; and its nature and content is public, being given by the ideals and principles expressed by society's conception of political justice, and conducted openly to view on that basis.[94]

Rawls takes the United States Supreme Court to be the exemplar of public reason.[95] Similarly, rights theorists in this country think that legal argument and judicial decision-making in cases like *ex p Simms* are as close as we can get to this ideal. And, in some respects, the process of reasoning in *Simms* does fit the rights-based understanding of public law quite well. The case illustrates, first of all, the capacity of judicial review to act as a mechanism by which individual citizens are able to challenge governmental acts or decisions inimical to their interest. In *Simms*, two individual prisoners used judicial review to overturn the decision of their governors to refuse access to journalists. The effect of the judgment was thus to circumvent the application of the relevant rules to their situation.

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[92] Note 71, above, p. 340.
[93] *Constitutional Justice*, note 4, above, p. 284.
[94] *Political Liberalism*, note 28, above, p. 213.
[95] *Political Liberalism*, note 28, above, pp. 231-240. On the US Supreme Court see, e.g., B. Schwartz, *A History of the Supreme Court* (1993); H.J. Abraham and B.A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States* (7th ed., 2000); B.A. Perry, *The Priestly Tribe: The Supreme Court's Image in the American Mind* (1999); R.F. Nagel, *Judicial Power and American Character:*

It is certainly also the case that the court in *Simms* followed a rational mode of argument. The applicants drew support for their position both from general political standards – freedom of expression in particular – and from more specific legal principles. The government's strategy was to defend the relevant rules by averting to the adverse consequences that would occur should those rules be ignored. The opinion of Lord Steyn can also be seen as a model of rationality. Conflicting arguments were explained and explored, and detailed reasons were given for the decision eventually reached.[96]

Moreover, the decision in *Simms* is notable for its confident use of liberal ideas. Lord Steyn said that it was 'the rights of prisoners' that were at stake and the starting point for his opinion was the overriding importance of the right to freedom of expression. Support for this position was drawn from law and philosophy regarded as quintessentially liberal: US Supreme Court free speech jurisprudence and European Convention free expression cases, and J.S. Mill on the importance of liberty.[97] And while it is difficult to estimate how frequently the courts draw directly upon liberal ideals in their reasoning in the manner of the House of Lords in *ex p Simms*, it is a reasonable assumption that this approach represents an increasingly important strand in the decision-making of the courts.[98]

Censoring Ourselves in an Anxious Age (1994); W.N. Eskridge and S. Levinson (eds.), *Constitutional Stupidities, Constitutional Tragedies* (1998).

[96] On rational argument in the context of law see, e.g., A. MacIntyre, *Whose Justice? Which Rationality?* (1988); S. Veitch, *Moral Conflict and Legal Reasoning* (1999); D. Patterson, *Law and Truth* (1996); P. Schlag, *The Enchantment of Reason* (1998); C. Sunstein, *Legal Reasoning and Political Conflict* (1996); J. Raz, 'On the Autonomy of Legal Reasoning' in Raz, *Ethics and the Public Domain: Essays in the Morality of Law and Politics* (1994); N. Duxbury, *Patterns of American Jurisprudence* (1995), ch. 4; P. Cane, 'Consequences in Judicial Reasoning' in J. Horder (ed.), *Oxford Essays in Jurisprudence, Fourth Series* (2000).

[97] J.S. Mill, *On Liberty* [1859] (ed. G. Himmelfarb, 1974).

[98] See, e.g., M. Hunt, *Using Human Rights Law in English Courts* (1997); R. Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice* (1997).

Another aspect of *Simms* that chimes with the rights theory – or at least the version of the theory advanced by Allan[99] - is that the primary focus of the case was the *lawfulness* of the actions under review. The applicants' challenged the legality of the application of rules to their case; the respondents sought to defend those rules from that challenge; and the judge had to decide whose argument was correct. *Simms* could be said to reflect, then, an ideal of a system of government subject to legal safeguards.[100]

Thus, the process of argument in *ex p Simms* mirrors a number of elements identified by the rights-based approach. In that case, the government was forced to justify a series of decisions, and ultimately the rules upon whose authority those decisions were taken, before a court applying accepted legal and political standards and ideals. In addition, the mode of argument was decidedly rational and public. Argument was met with counter-argument in open court and the judge had to decide which of those arguments should prevail and provide reasons for that decision.

There are other elements of the case, however, which the rights theory does not adequately explain. The remainder of this section suggests six ways in which the process of reasoning in judicial cases, as evidenced by *Simms*, fails to match a reasonable ideal of public reason and deliberative democracy.

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[99] Oliver tends to champion the role of the court as a surrogate forum for more thoroughgoing political discussion and debate.

[100] On the rule of law see, e.g., R. Polin, *Plato and Aristotle on Constitutionalism* (1998), ch. 9; J. Jowell, 'The Rule of Law Today' in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (4th ed., 2000); J. Raz, 'The Politics of the Rule of Law' in Raz, *Ethics and the Public Domain*, note 62, above; D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (1999).

(1) Scope

In *ex p Simms*, argument focused on a narrow point: namely, the lawfulness of two relevant passages of the Prison Rules upon whose authority the challenged decision was said to rest. In fact, much of Lord Steyn's opinion can be seen as a process of narrowing and refining the dispute in question. The relevant facts were examined on two occasions, as were the rival sets of arguments, in order to produce a very fine statement of the *lis ad item* upon which the judge could rule. The point in dispute was ultimately a rather narrow question of legality, although one which also connected with some important issues of constitutional and political morality.

This process of narrowing and refining the dispute in question is characteristic of the process of argument in cases of judicial review. The focus of the court in such cases tends to fall on the legality (in the strict or narrow sense) of the impugned decision or on the process by which the decision was arrived. Examination of the substantive merits of the decisions, despite the recent genesis of principles like the 'anxious scrutiny' doctrine,[101] tends to be avoided by the court.

So, argument in judicial review tends to focus on a narrow legal point and that legal point tends to be restricted to questions of narrow legality and process. From the point of view of the litigant, the effect of these restrictions is to curtail debate since

[101] See, e.g., *R v Lord Chancellor, ex p Lightfoot* [1999] 4 All ER 583 (CA), [1999] 2 WLR 1126 (QBD); *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400; *R v Lord Saville, ex p A* [1999] 4 All ER 860; M. Fordham and T. de la Mare, 'Anxious Scrutiny, the Principle of Legality and the Human Rights Act' (2000) 5 JR 40.

they have the effect of limiting discussion of the actual merits of a dispute and of general matters surrounding the challenged decision that the litigant might regard as relevant.

A process which systematically confines deliberation to narrow questions of legality and proper procedures, and which curtails debate about the merits of particular policies being applied by the government, equates to an odd and unsatisfying ideal of deliberative democracy and public reason. A convincing ideal of public reason must surely attach to ends as much as means. Yet the rights theory insists not only that judicial review epitomises public reason but also that it attempts to defend at the same time the largely procedural character of judicial review. 'Individual rights in public law', Allan says, 'are rights to offer arguments to public agencies and to have those arguments, where relevant and cogent, fully and fairly taken into account.'[102]

(2) Reach

As well as confining discussion to specific issues of legality, the court in *Simms* also concentrated its attention upon the applicants who had brought the case to its attention. There was little by way of open and direct consideration of the situation of relevant third parties who might have been affected, or might be affected in future, by the court's decision. This is typical of judicial review proceedings: the rights and interests of parties other than those involved in the case do not generally receive open consideration. *Amicus curiae* briefs and other instruments of interest

[102] *Constitutional Justice*, note 4, above, p. 191.

representation are designed to address this difficulty; but they are rarely used in practice in this country.[103]

This limitations of the adversarial method can be an acute problem, especially in cases involving what Fuller called polycentricity.[104] Polycentric problems involve a complex network of interacting interests and considerations: 'situation[s] of interacting points of influence', which, 'involve many affected parties and a somewhat fluid state of affairs'.[105]

One way of counteracting some of the difficulties inherent with adjudication in complexity or polycentric situations is to broaden the reach of the dispute by allowing or encouraging pressure groups to bring cases of general application to court. But most rights theorists are against this development. Allan, for instance, argues that judicial review is rightly confined to questions of individual right and dismisses the possibility of group actions. Pressure groups, he says, are ideologically motivated and their inclusion in the judicial review process has an unwelcome politicising effect.[106]

> Judicial review may quickly become a substitute for the ordinary political process, sometimes invoked by well organized interests or pressure groups – 'ideological'

[103] C. Harlow and R. Rawlings, *Law and Administration* (2nd ed., 1997), pp. 550-552; Harlow and Rawlings, *Pressure Through Law* (1992).
[104] L.L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harv LR 353. Fuller derived the concept from M. Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (1951).
[105] Fuller, note 70, above, pp. 395-397. See also, e.g., Harlow and Rawlings, *Law and Administration*, note 69, above, p. 598; J.W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Analysis of English Public Law* (1996), pp. 192-206.
[106] Allan does not make clear the basis on which we are to differentiate between the 'political' motivation of individual complainants and the 'ideological' motivation of group applications.

> complainants who may have failed to convince public opinion, or duly elected representatives, of the value of their cause.[107]

The exclusion of third parties from due consideration in cases of judicial review connects with the overriding value the rights theory attaches to the essentialist idea of individual rights. But to dismiss the possibility of the involvement of groups in judicial review is to accept a truncated notion of public reason in which argument necessarily stops with the (legal) interests of the individual claimants. If this truncated process of deliberation equates with the ideal of public reason, that ideal is unsatisfactory because it fails to accommodate arguments from others who may be affected, perhaps even directly, by a decision.[108]

(3) Consequences

In *Simms*, there was no real discussion of the probable impact of the decision on the system of prison administration. In his opinion, Lord Steyn worked from broad generalisations in order to reject the (admittedly, rather tendentious) predictions of prison service experts. There was no attempt at a systematic analysis of the consequences or ramifications of the judicial decision on the administrative practice in question.

Rights theorists support this method of reasoning. Relying on an essentialist understanding of rights and the Dworkinian distinction between policy and principle,

[107] *Constitutional Justice*, note 4, above, p. 195.
[108] For more on third party intervention see s. 5, below.

they see public law as the forum of principle in which disputes are settled by reference to pre-existing rights according to pre-existing legal principles. Consequentialist reasoning, they maintain, belongs to the realm of policy and should be avoided by the court.

> The legitimacy of judicial review, however, is heavily dependent on the preservation of a clear distinction between adjudication, invoking existing legal principle, and prospective policy-making, based on judicial perceptions of the public interest or the general demands of social justice.[109]

The rights theory excludes from cases of judicial review, then, the possibility of systematic deliberation about the ramifications of competing courses of action on the relevant elements of public administration. But this process cannot be said to resemble a meaningful ideal of public reason. Debate over the consequences of chosen courses of conduct must lie at the heart of political deliberation.[110] To exclude such discussion from a process means that the process must be regarded as substandard in relation to the ideal of public reason.

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[109] *Constitutional Justice*, note 4, above, p. 198. See also Allan's discussion of *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 WLR 464: 'Parliament, Ministers, Courts and Prerogative: Criminal Injuries Compensation and the Dormant Statute' (1995) 54 CLJ 481.

[110] See, e.g., R. Rorty, 'The Priority of Democracy to Philosophy' in Rorty, *Objectivity, Relativism and Truth: Philosophical Papers, vol. 1* (1991); J. Raz, 'Government by Consent' in Raz, *Ethics in the Public Domain*, note 62, above; M. Loughlin, 'Rights, Democracy, and Law' in T. Campbell, K.D.

(4) Standard Forms of Action

Another noticeable feature of cases like *Simms* is that discussion takes place essentially by means of pre-set modes of argument. The claim is framed according to a set of given, standard forms. In *Simms*, the claim was that the relevant sections of the prison rules ought to be ruled *ultra vires*.[111] Likewise, claims derive force from their utilisation of accepted modes of argument. The prisoners in *Simms*, for instance, argued that the application of the relevant rules in their case was unfair because it amounted to an unjustified invasion of their rights. The prison authorities responded by referring the court to the relevant rules and defending them by articulating the purpose they were designed to serve.

This tailored method of argument is another characteristic of judicial review.[112] Argument in judicial review cases is structured: it adopts a pre-set form. The claimant, in effect, is allowed to choose from a limited number of forms of action.[113] If the claimant wants to have a chance of being successful, he or she must phrase his or her claim in terms of one of the standard judicial review categories: legality, procedural fairness, *Wednesbury* unreasonableness, proportionality, abuse of rights, legitimate expectations, and the like. Having chosen a suitable form of action,

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Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (2001); J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1.

[111] The very phrase 'ultra vires' is illustrative here. It is a typically legal phrase, decidedly not the sort of language a discussant would choose to frame his or her political arguments if free to do so.

[112] The discussion focuses on categories of substantive argument, not on procedural choices and the problem of the exclusivity principle. (On which see, e.g., *O'Reilly v Mackman* [1983] 2 AC 237; *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624; *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909; S. Fredman and G. Morris, 'The Costs of Exclusivity: Public and Private Re-examined' [1994] PL 69.)

[113] There is a useful analogy here with the medieval common-law forms of action, which were very rigid, standard-form methods of bringing legal claims. See, e.g., R.C. van Caenegem, *The Birth of the*

support for the claim must be drawn from the modes of argument suited to the discourse. (For instance, the language of authority, rules, fairness of procedures, rights, legitimacy, expertise.)

How does this process of argument match up against an ideal of public reason? There is no doubting that it is both public and rational. But, at least when set against the less rigid and more protean structures of ordinary political debate, judicial review exhibits a particularly Spartan process. A case will only be heard if the claimant can fit his claim within one of the 'set-form' forms of action. When putting their case before the court, both claimant and respondent are compelled to adopt a very discipline-specific mode of reasoning.

(5) Internalisation

Judicial review is not unconnected with the general currents of political debate. *Simms* provides evidence of this. The decision was explicitly framed by the general concern, produced by an embarrassing series of miscarriages of justice, about the state of the criminal justice system (in relation to which the judges have at least partial responsibility).

However, this sort of contextualisation does not occur in all cases of judicial review. Even when it does occur, it is rarely, if ever, a prelude to a general and thorough

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Common Law (2nd ed., 1988); S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd ed., 1981).

examination of underlying problems and possible solutions. Rather, issues of general concern - like the problem with the criminal justice system in *Simms* – are internalised rather than addressed directly. They form background considerations which frame the discussion and resolution of legal issues in relevant cases. This is not to say that general issues never alter the outcome of particular cases, but only that, when they do so, they do so in an indirect way: they weigh the scales for or against arguments for a particular position.

But the method of internalising matters of general, political concern identifiable in judicial review is not what we might expect from a vehicle supposedly epitomising the ideal of public reason. Any meaningful version of the ideal must entail the capacity to address social problems head on, rather than indirectly or obliquely.

(6) Focus

The basic grievance of the prisoners in *Simms* was that they believed themselves to have been wrongly convicted. But argument in the case did not address that point. It dealt instead with an intermediate stage concerned with getting evidence (and publicity) that might help in the quest. Nor did argument address, at least directly and openly, the merits of the government's general policy of refusing access to journalists. It focused instead on the application of the policy to the applicants' case. This attention to specifics at the expense of the general is evidenced by the lengths Lord Steyn went in order to make the statement of facts and the legal point of the

claim as precise as possible. Argument and decision-making takes place, in other words, *at a number of stages removed* from the root issues of concern.

The avoidance of general matters in favour of specific issues is a general feature of judicial review. But this unwillingness to tackle general issues, or their manifestation in general rules and policies, is another way in which judicial review falls short of a meaningful ideal of public reason. For a forum that truly exemplifies the ideal of public reason must have room for discussion of matters of root concern

(d) Conclusions from the Analysis of *Ex p Simms*

The judgment in *ex p Simms* is highly regarded by rights theorists. Rights theorists see the judicial review process as an exemplar of public reason. *Simms* was used to test this contention. It was accepted that, in a number of ways, *Simms* could be said to resemble this ideal. Argument and decision-making in the case was certainly public, rational, and infused with liberal values.

On further examination, however, it was suggested that the reasoning in *Simms* fell short of a meaningful ideal of public reason in six ways.[114] It was further suggested that these were characteristic of judicial review.

(1) Argument in judicial review tends to have a narrow focus.

[114] Note that these are failings not of the reasoning and decision in *ex p Simms*, but of the understanding of the practice of judicial review entailed by the rights theory.

(2) Argument in judicial review tends to deals with the rights and interests of the parties to the case and does not generally extend, at least directly and openly, to the interests of third parties, even those third parties who may be affected by the outcome of the decision.

(3) Argument in judicial review does not generally involve discussion about the consequences or ramifications of possible judicial decisions.

(4) Argument in cases of judicial review are structured according to pre-set patterns: claimants choose from a limited number of forms of action when bringing their claim and argument in court employs a relatively limited conceptual vocabulary.

(5) Issues of general concern are not addressed directly in judicial review cases but are internalised and form background concerns that frame – and indirectly influence – decision-making.

(6) Argument in judicial review tends to take place at a number of stages removed from the issue of root concern.

The analysis of the reasoning process in cases of judicial review based on the study of *ex p Simms* indicates that the rights theorists' understanding of the practice as the epitome of public reason in a republican, deliberative democracy is mistaken. A meaningful ideal of public reason would entail forms of direct, open, wide-ranging,

non-rigid, consequentialist argument that the judicial review process seems not to provide.

This analysis has implications for the rights theory's claim that common law decision-making superior form of reason. The case study of *Simms* indicates that reasoning in cases of judicial review cannot realistically be understood as an accurate reflection of the ideal of public reason. It shows, to the contrary, the prevalence of a mode of argument that can best be understood as a form of *stylised reasoning*.

The consequences of this analysis in terms of assessing the cogency of the rights theory are quite profound. The dualist constitution so central to rights-based thought rests on the ascription of moral superiority of constitutional politics. One of the primary reasons advanced by rights theorists for the superiority of common law modes of argument and reasoning is that it reflects an ideal of public reasoning. My analysis indicates that while it may be true that common law reasoning is marked by a high degree of rationality, it falls short of any meaningful ideal of public reason.

4. Conclusion

This chapter has examined the argument advanced by proponents of the rights theory of public law that judge-made law is a superior form of law. That claim in turn rests on positive and negative claims. The negative claim is that ordinary processes of political decision-making, centred on the legislature, are to be regarded

as morally neutral at best. The negative claim was analysed in section 2 of the chapter, where it was argued that the claim rests on a curious combination of perspectives. Rights theorists look at common law processes from a normative perspective; that is, they try to construct a reasonable ideal of the practice. By contrast, they analyse legislative practices through a sceptical lens, influenced perhaps by public choice theory. It was suggested that this analytical method fails to meet the demands of intellectual consistency.

The positive claim underpinning the claim for judge-made law is superior law is that the common law is necessarily moral since its decision-making structures embody a near-ideal process of public reason. This claim was put to the test against a case study of a recent judicial review case - *ex p Simms*. Six ways in which modes of argument in judicial review, as evidenced in *Simms*, fell significantly short of a meaningful ideal of public reason were articulated.

The conclusion drawn from the criticisms in this chapter of both the negative and positive arguments adduced by rights theorists is that their claim that judge-made law constitutes a higher-order of law has not been successfully made out.

5. Coda: Third Party Interventions and Representative Standing

I argued at the start of this chapter that the reasoning process underlying the opinion of Lord Steyn in *Simms* was a suitable subject for analysis of the rights-based claim that common law adjudication, particularly in cases of judicial review, may be seen

as the epitome of public reason. It was suitable, I suggested, both because rights theorists claimed it as a case representative of their approach and because it could be said to be reasonably representative of the process of argument that occurs within (hard) public law cases.

There is, however, one increasingly significant element of the judicial review process that is not reflected in *Simms*. This is the phenomenon of third party intervention and representative standing.[115] In this section, we will look at the question of standing and its connection with rights-based thought. For ease of explication, we will consider the question of standing outside the context of the Human Rights Act 1998. We will return to this issue of third party intervention in the context of the Human Rights Act in the final chapter of this thesis.

Standing is essentially concerned with the entitlement of particular individuals (or groups of individuals) to move the court to make a substantive decision.[116] Rule 3(7) of Order 53 and section 31(3) of the Supreme Court Act 1981 make it clear that unless the applicant has a 'sufficient interest' in the matter to which the application relates, he or she shall not obtain permission to bring the application. Introduced in 1978, the term 'sufficient interest' has been given 'a generous interpretation by the courts.'[117] Courts assess the strength of the applicant's interest not in isolation but in the context of all the factual and legal circumstances of the case.[118] Sufficiency of

[115] See, e.g., Lord Woolf, J. Jowell and A. Le Sueur, *Principles of Judicial Review* (1999), pp. 34-51; P.P. Craig, *Administrative Law* (4th ed., 1999), pp. 694-704.
[116] J. Miles, 'Standing Under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication' (2000) 59 CLJ 133, p. 148.
[117] Woolf, Jowell and Le Sueur, note 115, above, p. 35.
[118] *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

interest is an extremely flexible test of standing.[119] (Compare, for instance, the 'victim' test of the European Convention on Human Rights.[120]) In the *National Federation* case, Lord Roskill said that the test was selected 'as one which could sufficiently embrace all classes of those who might apply and yet permit sufficient flexibility in any particular case to determine whether or not "sufficient interest" was in fact shown.'[121]

Recent decisions suggest a trend firmly in favour of recognising the intervention of parties other than the applicant and respondent and the standing of interest groups (Carol Harlow prefers to call them 'campaigning groups'[122]) seeking to challenge the action decisions of public bodies.[123] In relation to third party intervention, while Order 53 rule 9 entitles third party *opponents* of a judicial application to be heard, the rules make no provision for intervention by putative *supporters*, which is left to the discretion of the judge.[124] The *Pinochet* applications suggest however an increased willingness to hear directly from third parties.[125] Indeed, Carol Harlow

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[119] See, e.g., P. Cane, 'Standing, Legality and the Limits of Public Law' (1981) PL 322; Cane, 'Statutes, Standing and Representation' (1990) PL 307.

[120] ECHR Art. 34. See, e.g., *Klass v Federal Republic of Germany* (1978) 2 EHRR 214; *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Leigh v United Kingdom* (1982) 38 DR 74. Third party intervention is now governed by Article 36(2). See, e.g., *McCann v United Kingdom* (1995) 21 EHRR 97.

[121] Above, note 118, at p. 658. See also, e.g., *R v Life Assurance and Unit Trust Regulatory Organisation, ex p Ross* [1993] 1 QB 17; *R v Felixstowe Justices, ex p Leigh* [1987] QB 582.

[122] C. Harlow, 'Public Law and Popular Justice' (2002) 65 MLR 1.

[123] See, e.g., *R v Secretary of State for Social Security, ex p Child Poverty Action Group* [1990] 2 QB 540; *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275; *R v Inspectorate of Pollution, ex p Greenpeace (No. 2)* [1994] 4 All ER 329; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement* [1995] 1 WLR 386; *R v Sefton MBC, ex p Help the Aged* [1997] 4 All ER 532. See generally, C. Harlow and R. Rawlings, *Pressure Through Law* (1992).

[124] Miles, above, note 116, p. 159. See also, e.g., Sir K. Schiemann, 'Interventions in Public Law Cases' (1996) PL 240; R. English, 'Wrongfooting the Lord Chancellor: Access to Justice in the High Court' (1998) 61 MLR 245; R. Singh, *The Future of Human Rights in the United Kingdom* (1997), ch. 7. Contrast the situation in the United States which is more favourable to third party intervention: see, e.g., A. Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv LR 1281.

[125] *R v Bow Street Metropolitan Stipendiary Magistrate & others, ex p Pinochet Ugarte (Amnesty International & others intervening) (no. 3)* [1999] 2 WLR 827.

argues that, today, '"respectable" campaigning groups, such as *Liberty* and JUSTICE, are allowed to intervene almost as a matter of course'.[126] Campaigning groups may also be able to present evidence in the form of affidavit evidence submitted by the applicant (assuming, that is, that the applicant is willing to introduce such evidence).[127]

Peter Cane has distinguished between three types of representative standing in a important article on the subject.[128] *Associational* standing generally involves an organisation claiming on behalf of its members.[129] *Public interest* standing involves an individual or organisation purporting to represent the public interest rather than the interests of any identified or identifiable individuals.[130] *Surrogate* standing involves one individual as nominal applicant representing the interests of another individual, who is the real applicant. The most common case of surrogate standing is where a campaigning group represents the interests of others who are often not well-placed to bring the actions themselves.[131] Cane says that the growing 'willingness of the courts to allow public interest challenges to public decisions suggests ... a sea-change in judicial attitudes and might justify a prediction that public interest and associational applications for judicial review will grow in numbers and importance in the years to come.'[132]

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[126] Harlow, above, note 122, p. 7.
[127] As did the Public Law Project in *R v Lord Chancellor, ex p Witham* [1998] QB 575.
[128] P. Cane, 'Standing up for the Public' (1995) PL 276.
[129] See, e.g., *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545.
[130] See, e.g., *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co.* [1990] 1 QB 504; *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1; *ex p Leigh*, above, note 121.
[131] See, e.g., *ex p Child Action Poverty Group*, above, note 123; *R v Stoke City Council, ex p Highgate Projects* [1994] Crown Office Digest 414.
[132] Above, note 128, p. 287.

In commenting on this trend, Joanna Miles argues that the courts have to articulate a coherent theory of standing. Instead, she argues, provided 'the issue is serious, and the applicant is "responsible" and can claim expertise in the field, the specific nature of the applicant's relationship to the impugned action and any victims seems rarely to detain the courts, not least where the case looks good on the merits.'[133] In a comparative survey of the standing rules of the High Court and the European Court of Human Rights, Miles suggests that, although the jurisprudence of both courts in relation to standing is under-theorised, the two Courts can be said to adopt to contrasting approaches to public law. English public law, she argues, is characterised by communitarianism (that is, the belief that the public at large has a legitimate interest in the observance by government of human rights guarantees) and expository justice (the belief that the exposition of legal principles is the primary function of the courts). The law of the European Convention, by contrast, is marked by its belief in individualism (the idea that only victims are proper persons to complain about rights violations) and dispute resolution (the understanding that courts are primarily resolvers of disputes). Miles concludes her discussion with the hope that the victim test of the Convention system, incorporated into United Kingdom law via the Human Rights Act, does not 'hamper the emergence of a communitarian philosophy of human rights'.[134]

[133] Miles, above, note 116, pp. 134-5.
[134] Miles, above, note 116, p. 167. For a similar perspective see, e.g., C. Hilson and I. Cram, 'Judicial Review and Environment Law – Is there a Coherent View of Standing?' (1996) 16 Legal Studies 1 in which the authors posit a 'citizen action' model of standing (and public law) against a 'private rights-influenced' variant.

Carol Harlow adopts a different perspective. In a recent article, Harlow registers her 'sense of unease about the phenomenon of group litigation and about the random way in which it has been allowed to evolve in this country.'[135] She suggests that the increased involving by campaigning groups in judicial review, an involvement encouraged by the judiciary, amounts to 'a partial colonisation of the legal by the political process.'[136] Drawing on an argument advanced by Peter Cane,[137] Harlow argues that 'representivity' (or 'democratic stake') cannot simply be assumed since no group can properly represent the views and interests of others unless there is an effective mechanism for ascertaining what those views and interests are.[138] The move to a style of lawsuit which is 'more fluid, less formal and possibly less individual in character',[139] Harlow argues, is unjustifiable as a matter of constitutional and political principle. Such an approach, Harlow concludes, brings with it 'obvious threats to the central tenets of judicial process: independence, objectivity and finality.'[140]

> Intervention and amicus procedure cannot hope to compete with this type of methodical exercise [that is, pre-legislative consultation processes] nor, indeed, should it. Courts are not surrogate legislatures. It is not their place to make this type of policy choice nor should they attempt to mimic legislative procedures.[141]

[135] Harlow, above, note 122, p. 1.
[136] Harlow, above, note 122, p. 2.
[137] See, e.g., P. Cane, 'Standing, Representation and the Environment' in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (1995).
[138] Harlow, above, note 122, pp. 4-5.
[139] Harlow, above, note 122, p. 7.
[140] Harlow, above, note 122, p. 16.
[141] Harlow, above, note 122, p. 11.

This discussion reveals, in a way that the earlier analysis of *Simms* could not, that the phenomenon of representative standing and third party intervention is not something that can be omitted from a theoretical account of judicial review. Recent cases underline the observation of Harlow and others that the involvement of third party intervenors,[142] *amicus* briefs,[143] and representatives[144] is an increasingly important part of the judicial review process. On examining post-Human Rights Act cases that will form a part of the discussion in later parts of this thesis, for instance, I observed that JUSTICE were allowed to intervene in *Brown v Stott*;[145] *Liberty* made a contribution in the *Pretty* case;[146] and the Attorney-General appointed an amicus in *Wilson v First County Trust*.[147] The place of third party intervention and representative standing in the legitimacy model will be examined in the final Part of the thesis. The remainder of this chapter seeks to explicate the rights-based position on this matter.

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[142] See, e.g., *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958 (UN High Commissioner for Refugees); *R v Bow Street Magistrates Stipendiary Magistrate, ex p Pinochet Ugarte* [2000] 1 AC 61 and *R v Bow Street Magistrates Stipendiary Magistrate, ex p Pinochet Ugarte (No. 3)* [2000] 1 AC 147 (oral submissions by Amnesty International and others; written submissions from Human Rights Watch); *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 (Lord Advocate); Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112 (the Children's Legal Centre). See also JUSTICE/PLP Report, *A Matter of Public Interest: Reforming the Law and Practice on Interventions in Public Interest Cases* (1996); R. Rawlings, 'Courts and Interests' in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (1995).

[143] For pre-Human Rights Act cases in which the assistance of an amicus curiae was sought by the reviewing court see, e.g., *In re Wilson* [1985] AC 750; *R v Brentwood Justices, ex p Nicholls* [1992] 1 AC 1; R *v Immigration Appeal Tribunal, ex p Patel (Anilkumar Rabindrabhai)* [1988] 1 AC 910; *R v Derby Magistrates Court, ex p B* [1996] 1 AC 487; *London Borough of Islington v Camp* 20 July 1999 (unrep.).

[144] See also, e.g., *R v Minister of Agriculture, Fisheries and Food, ex p The Protesters Animal Information Network Ltd* 20 December 1996 (unrep.) (serious application raising issues of real concern, made by a responsible body with serious interest in the subject matter); *R v Hammersmith & Fulham London Borough Council, ex p People Before Profit Ltd* (1982) 80 LGR 322; *R v Secretary of State for the Environment, ex p Beebee and others* [1991] COD 264 (representatives of British Herpetological Society had sufficient interest to challenge planning permission without environmental impact assessment); *R v Secretary of State for the Environment, ex p Friends of the Earth Ltd* [1994] 2 CMLR 760; *R v Sefton Metropolitan Borough Council, ex p Help the Aged* [1997] 4 All ER 532.

[145] [2001] HRLR 9.

[146] *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800.

[147] [2001] HRLR 44.

It is probably fair to say that the issue of representative standing does not receive a great deal of attention in the work of rights-based scholars. As we saw earlier in the chapter, Trevor Allan argues that the limited approach to standing entailed by traditional English public law remains correct. Echoing Cane and Harlow, Allan maintains that pressure groups are politically motivated and their inclusion in the judicial review process will have an unwelcome politicising effect. If the trend favouring the access of campaigning groups to court were to continue, he says,

> Judicial review may quickly become a substitute for the ordinary political process, sometimes invoked by well organized interests or pressure groups – 'ideological' complainants who may have failed to convince public opinion, or duly elected representatives, of the value of their cause.[148]

Applying the taxonomy devised by Miles, we could say that Allan, in insisting that judicial review should exclude campaigning groups, adopts an individualist approach to the question of standing. This understanding flows directly from Allan's core idea that the function of public law is to protect individual rights. Allan's conception differs from both the traditional and the contemporary English approach to standing. Whereas (according to Miles) the contemporary model is communitarian and expository, the traditional English approach, highly influenced by Dicey's constitutional theory, is individualist and dispute-resolving. However, Allan's

[148] Allan, *Constitutional Justice*, above, note 4, p. 195.

account is, by virtue of its emphasis on rights, individualist and, due to its stress on the judicial task of expounding public law principle, expository.

Chapter 7

Value-Driven Public Law:

A Programme for 'Lopsided' Review

Introduction

Elements of rights-based constitutional thought were examined in the previous chapter. The argument in that chapter centred on the proposition that the common law is a higher order of law by reason of its superior decision-making processes, a proposition which underlies the dualist constitutional structure central to rights-based thought.

The present chapter continues the critical examination of the rights-based approach by focusing more specifically on its public law dimension. It was suggested earlier in the thesis that rights theorists advance a *value-driven* account of decision-making in public law.[1] This account is criticised here. Developing the earlier analysis, the first section of the chapter examines the conception of the process of reasoning in cases of judicial review that the rights theory entails. That conception is criticised in section 2. And the flaws identified in that section are illustrated in section 3 by drawing on a series of recent public law cases decided both before and subsequent to the introduction of the Human Rights Act 1998.

1. 'Value-Driven' Judicial Review

According to the rights theory, the function of public law is to protect individuals from wrongful interference by the state. This means that the courts must apply fundamental standards of political morality, as enshrined in the principles of common law, to decide whether contested governmental decisions are lawful.[2] On this approach, decision-making in judicial review is necessarily value-driven. The term 'value-driven' is used to imply a style of judicial review in which argument is oriented directly towards the protection of values and fundamental rights. This model of decision-making stems from the belief that public law reasoning is a species of moral reasoning orientated towards the overriding need to protect essentialist individualist rights.[3] In this section, the argument that the rights theory enjoins a value-driven approach to judicial review is unpacked.

The core of the rights theory lies in the ascription of fundamental or higher-order status to certain values. These values, which are defended by reference to their connection to that which is vital to the human condition, provide a basis for rights theorists to generate propositions about the political function of the courts.[4] The theory advanced by T.R.S. Allan contains a number of fundamental values. Allan says that his theory is underpinned by the 'concepts of human dignity and autonomy' and suggests, elsewhere, that 'the governing ideal of equality' explains

[1] See ch. 4, above, p. 112.
[2] See ch. 4, above.
[3] See ch. 4, above, p. 118.

and justifies his constitutional scheme. These values - equality, autonomy and dignity - are consistently defended as essential 'liberal and individualist' values that lie at the heart of a constitutional democracy predicated on the rule of law.[5] In similar vein, Sir John Laws draws upon Kantian ideas to argue that the principle of autonomy stands as the cardinal moral and political principle at the heart of the good constitution. The notion of autonomy, Laws says, reflects 'man's essential moral nature' and provides the central principle and *leitmotif* of any decent constitutional order.[6] Dawn Oliver identifies five fundamental values: autonomy, dignity, respect, status and security. These key common values connect with dominant theories of citizenship, pervade legal decision-making and together constitute a framework of higher order law. In other words, the values 'contribute to, even to a large extent constitute, important *paramount* values, namely democracy, participation and citizenship.'[7]

Rights theorists believe that the fundamental values they articulate have overriding or paramount status within liberal democratic constitutions. To style a particular value 'fundamental' or 'paramount' is to accord it priority or greater weight when it comes to conflicts with other values. In relation to public law, this generates the proposition that judges ought generally to favour the values rights theorists identify as fundamental when they conflict with countervailing values or considerations.

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[4] See ch. 4, above, p. 116.
[5] See ch. 1, above.
[6] Sir J. Laws, 'The Constitution: Morals and Rights' (1996) PL 622, p. 623.
[7] D. Oliver, 'The Underlying Values of Public and Private Law' in M. Taggart (ed.), *The Province of Administrative Law* (1997), p. 230. (Emphasis of original.) See also ch. 3, above.

Rights theorists defend this position on two related grounds. First, they claim that that the values they regard as fundamental can be deduced philosophically from an analysis of the essential attributes of man. Second, they argue that these values are also rooted in the deep-rooted common morality of the people. All rights theorists agree, in addition, that judges are in a privileged position when it comes to interpreting and implementing these fundamental values. Allan argues that it is the role of judges, by dint of their position as experts in and interpreters of the common law, 'to express the collective understanding'. They are thus 'authoritative exponents' of a higher order of law.[8] Laws argues, similarly, that the duty of the courts to uphold higher-order law is a central aspect of the judicial 'duty is to defend for the present, and articulate into the future, [those] principles of a free society' which are logically prior to democracy. [9]

The delineation of a set of fundamental values and the defence of their superiority when it comes to conflict with countervailing values and considerations provides – for rights theorists - a means of escaping the counter-majoritarian difficulty associated with judicial review identified by Bickel (and others).[10] Since the fundamental values they articulate are deep-rooted values which are logically prior to democracy - a set of apolitical political principles which 'no democratic politician

[8] T.R.S. Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 LQR 221, p. 239.
[9] Sir J. Laws, 'Wednesbury' in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord* (1998), p. 201.
[10] A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed., 1986). See also, e.g., M. Tushnet, *Taking the Constitution Away from the Courts* (1999); J. Waldron, *Law and Disagreement* (1999); Waldron, *The Dignity of Legislation* (1999), pp. 4-5; N. Duxbury, *Patterns of American Jurisprudence* (1995), pp. 278-289.

could honestly contest'[11] - to apply them in cases of judicial review is not to act undemocratically since democracy itself rests on those principles.

Having reached this theoretical position, the task of deriving a coherent test for use in cases of judicial review becomes a relatively straightforward matter. Rights theorists agree that the test that ought to be applied in cases of review runs as follows:

> *The intensity of judicial scrutiny in any public law case is a simple factor of the importance of the right(s) or value(s) at stake and the level of interference produced by the contested decision: the more important the right or value at stake, and the greater the level of intrusion, the more the courts will require by way of justification.*[12]

The crucial feature of this test is that the level of scrutiny is seen as *a simple function of the seriousness of the complainant's objection*. This test embodies a value-driven approach to public law because, on the face of it, the court, when establishing the appropriate level of scrutiny in a case, needs only to look at the extent to which the claimant's fundamental values or rights are threatened by the challenged governmental action. The model of decision-making entailed by this test is thus one which has essentially simply one dimension or axis.

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[11] Sir J. Laws, 'Law and Democracy' (1995) PL 72, p. 93.

[12] See ch. 4, above, pp. 113. Allan: 'the appropriateness of judicial restraint will be simply a function of the seriousness and apparent cogency of a complainant's objection to administrative action'. Laws: 'the greater the intrusion proposed by a body possessing public power over the citizen in an area where his fundamental rights are at stake', the more searching the judicial inquiry. Oliver: the intensity of judicial review should depend 'on the effect of the proposed decision on the affected individual(s) or organisation(s)'.

2. 'Lopsided' Judicial Review

This section challenges the value-driven account of decision-making in judicial review propounded by the rights theory. The criticism is based on the observation that the fundamental values to which the rights theory requires the court to look in assessing the appropriate standard of review are for the exclusive use of claimants.

An examination of the five values articulated by Oliver is sufficient to demonstrate that the values regarded as fundamental by rights theorists are exclusively claimant values since her theory incorporates the values identified in the versions of the rights theory advanced by Allan and Laws. Since Oliver refers to those values that compete with the common values she identifies as 'defendants' interests',[13] it is reasonable to assume that her common values reflect the interests of claimants. This inference is supported by an examination of the values themselves.

> *Autonomy* is a quintessential claimant interest. Meaning 'living under one's own laws', it provides a basis for generating an argument that a governmental decision interferes unduly with an individual's capacity for self-government.
>
> *Dignity* performs a similar role. Reflecting the Kantian principle that individuals should always be seen as an end, never just as a means, the value

[13] D. Oliver, *Common Values and the Public-Private Divide* (1999), p. 250.

can be used to generate an argument that a governmental decision fails sufficiently to respect the claimant's self-worth.

Respect is a cognate of dignity. Oliver says that it provides, in particular, the basis for a claim that a public body's decision discriminates against the claimant.

Status concerns the recognition enjoyed by individuals by virtue of their membership of a group. It provides a basis for a claimant to argue that a decision that affects his or her membership of a social group is unlawful.

Security requires trust in those with whom one deals. It protects the weaker party in relationships where imbalances of power exist. In the context of judicial review, the claimant - always the weaker party - can draw on the value of security to argue that a public body's decision undermines the relationship of trust that should exist between citizen and state.

This examination of Oliver's five key values shows that each of the fundamental values identified by the rights theorists provides a basis for claimants to argue that public bodies have interfered unlawfully with their interests. These values are, in other words, pro-claimant values. The fundamental values identified by the rights theory are for the *exclusive* use of claimants, moreover, since rights theorists insist that defendant public bodies must draw upon another set of values in framing arguments before the court. Drawing upon an argument advanced by Laws, Oliver

states that public bodies can never rely on her common values.[14] She says that the interests of defendants are recognised instead by a separate category of values which includes the 'perceived need for those in authority to be treated with respect, the interests of good administration, of the market and of national security.'[15]

Rights theorists accept that conflicts between fundamental or pro-claimant values and defendants' interests will frequently occur and yet they offer little by way of sustained analysis as to what ought to occur in the event of such a dispute. Instead, the significance of defendants' interests tends to be downplayed. We saw in chapter 3 that Dawn Oliver employs this strategy when she suggests that the protection of defendants' interests explains the decisions in a number of high-profile cases which are now regarded as wrongly decided.[16]

Perhaps more significantly, the fact that fundamental values are understood by rights theorists to have overriding or paramount status brings with it certain implications. The point of calling a value overriding or paramount is to indicate that you think that value ought generally to prevail when it conflicts with other values. 'Fundamental' principles, by their very nature, ought to be capable of trumping countervailing principles regarded *ex hypothesi* as 'not fundamental'.

The argument advanced so far in this chapter can be summarised at this point. The value-driven approach to judicial review suggested by the rights theory implies a one-dimensional model of decision-making according to which the level of scrutiny

[14] *Common Values*, note 13, above, p. 251. See also, 'Underlying Values', note 7, above, p. 227.
[15] *Common Values*, note 13, above, p. 70.

in a case is a simple function of the seriousness of the complainant's predicament. The values to which courts are required to pay attention in making this assessment are those regarded by rights theorists as fundamental. But the analysis has shown that these values are exclusively pro-claimant in that they provide grounds for arguments against the decisions of public bodies and cannot be used by public bodies to defend those decisions. And, in cases where values conflict, the rights theory requires that pro-claimant values, by virtue of their overriding or paramount status, should normally prevail over countervailing considerations, including those values ('defendants' interests') which public bodies can draw upon to defend their decisions.

If this reasoning is correct, the rights theory can be said to entail that, in deciding conflicts between different values, pro-claimant values ought generally to trump defendants' values because they are fundamental or overriding. This means that defendants' values are thus structurally disfavoured by this model to the point where they are effectively excluded from consideration by the court. But this is not a viable model of the process of decision-making in public law since it cannot always be the case that claimants, simply by invoking purportedly fundamental notions, can succeed in their claims against governmental bodies.

[16] See ch. 3, above.

3. Illustrating the Failure of Value-Driven Judicial Review

The previous section sought to demonstrate that the rights-based model of judicial review as a value-driven process was unworkable. The remainder of the chapter illustrate the failure of this model by drawing on a number of recent cases. In the second part of this section, a number of important cases decided since the entry into force of the Human Rights Act will be examined. In the first part of the section, significant cases decided before the introduction of the Act are analysed. The cases are chosen for a number of reasons. They are all recent and high profile judicial review cases which contain sustained passages of reasoning within judgments of considerable merit. As such, they are well-equipped to act as examples of the process that is the subject of inquiry here. Moreover, the selected cases have the additional merit of containing discussions about rights and values. They are capable thus, at least at first sight, of being interpreted as having been decided in accordance with the terms outlined by the rights theory.

(A) Pre-Human Rights Act Cases

(1) *Ex p Simms*

In *R v Secretary of State for the Home Department, ex p Simms*,[17] the House of Lords ruled that the government's policy to prevent all interviews of prisoners by journalists was unlawful. In analysing the case in the previous chapter, it was

[17] [1999] 3 WLR 328.

accepted that some of the features of the decision of Lord Steyn could be accommodated within the rights-based model. In particular, the use of rule of law ideas and the language of rights could be said to reflect the prescriptions of the rights theory.

However, even if it is accepted that this aspect of the opinion corresponds to the rights-based model, there is another dimension of the decision which that model cannot accommodate. This dimension relates to the subject-matter of the dispute. Lord Steyn began his opinion in *Simms* with a series of observations that served to put the case into a wider context. Of particular relevance, his Lordship said, were the recent miscarriages of justice and the role journalists had played in exposing them. The opportunity for a prisoner to have journalists investigate his case was, then, an 'integral part of the just functioning of the overall process of criminal justice'.[18]

By connecting the availability of oral interviews with the prospect of gaining access to the Court of Appeal (Criminal Division) in this way, the court recognised that the judiciary shouldered at least partial responsibility for recent problems within the criminal justice system. The court also recognised that the decision under challenge provided an opportunity to do something to ameliorate those problems. This strand of argument had a substantial and visible influence on the outcome of the case. And yet the rights theory seems unable to accommodate it. According to the value-driven approach entailed by that theory, decision-making in *ex p Simms* should have been

straightforward: since vital rights were at stake, and these rights were quite seriously impeded by the challenged policy, a very high level of judicial scrutiny should apply. The House of Lords did not deal with the case in this one-dimensional way. The high level of judicial scrutiny in *ex p Simms* was the result of the combination of (at least) two distinct strands of argument. And while the first strand of argument did relate to the seriousness of the applicant's case and the importance of the rights at stake, the second strand concerned the question of the court's competence or entitlement to intervene in the relevant situation. In relation to this second strand of argument, the most significant factors - the prevalence of miscarriages of justice and the responsibility of the courts for maintaining the integrity of the criminal justice system - were unrelated (or at least not directly related) to the claimants' situation.[19]

The model of decision-making proposed by the rights theory misses, then, a dimension of the decision of the court in *ex p Simms*. That dimension relates not to the seriousness of the claimants' predicament, but more to the legitimacy of the court's involvement in the situation raised by the challenge.

[18] For other judicial review cases involving prisoners' rights see, e.g., *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531; *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539.
[19] See, further, e.g., I. Dennis, 'Reconstructing the Law of Criminal Evidence' (1989) 42 CLP 21.

(2) *Ex p Smith*

In *R v Ministry of Defence, ex p Smith*,[20] a group of men and women dismissed from the armed forces challenged a government policy that all personnel known to be engaging in homosexual activity would be discharged from service. Each applicant had an exemplary service record and none had engaged in sexual activity while active in service.

The applicants contended that the policy was unreasonable and in breach of Article 8 of the European Convention on Human Rights.[21] Since the policy took the form of a general prohibition, they argued that it was enforced without consideration of the merits of individual cases. They pointed out that homosexuals were not prevented from serving as ambassadors and permanent secretaries in the UK, nor as service personnel in other States: Canada, Australia, New Zealand, Israel, Ireland, and the USA do not operate this sort of policy. They argued that the ban amounted to an unjustified invasion of the individual's freedom to live in accordance with his or her sexual orientation. Accordingly, they suggested that the court ought to impose a higher ('anxious scrutiny') threshold when reviewing the challenged decision.[22]

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[20] *R v Ministry of Defence, ex p Smith* [1996] QB 517. See also M. Norris, 'Ex parte Smith: irrationality and human rights' (1996) PL 590.

[21] The applicants were successful in the action they brought before the European Court of Human Rights. See *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (2001), pp. 349-356. See also, e.g., *Antonio Mendoza v Ahmad Raja Ghaidan* (2002) LTL 5/11/2002 (the exclusion of same-sex couples from protection under Schedule 1 of the Rent Act 1977 violated Art. 14 ECHR).

[22] See, e.g., *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531; *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855; *R v Secretary of State for the Home Department, ex p Launder* [1997] 1 WLR 839 (House of Lords applying anxious scrutiny in extradition context); *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400. See also M.

The Ministry of Defence argued in response that the policy was grounded in a practical assessment of the implications for military discipline of accommodating homosexuals in the armed forces. To permit homosexuals to serve in the armed forces, the Ministry claimed, would have a deleterious effect on morale. The special nature of service life and its distinct operational requirements meant that civilian norms should not necessarily apply. The Ministry contended that the court should substitute a lower standard – the so-called 'super-*Wednesbury*' principle[23] - when reviewing the challenged measure, the effect of which is to increase the range of permissible options open to the decision-maker.

The claimants lost their case before the Divisional Court and on appeal. It is clear from the judgments that the judges were well aware of the human rights dimension to the case. The judge at first instance, Simon Brown LJ, noted that the policy in question was 'a grave invasion of the individual's freedom to live in accordance with his or her sexual orientation', a freedom, he said, which 'flows from article 8' of the European Convention.[24] In the Court of Appeal, Sir Thomas Bingham MR noted that the 'applicants' rights as human beings are very much in issue' and recognised that the court 'has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power.'[25] Thorpe LJ also chose to 'emphasise the importance of the human rights context.'[26]

Fordham and T. de la Mere, 'Anxious Scrutiny, the Principle of Legality and the Human Rights Act' (2000) 5 JR 40.

[23] See, e.g., *R v Secretary of State for the Environment, ex p Hammersmith and Fulham LBC* [1991] AC 521; Norris, note 20, above, p. 594.

[24] Note 20, above, p. 532.

[25] Note 20, above, p. 556.

[26] Note 20, above, p. 565.

The rights theory suggests that an assessment of the importance of the rights at stake and the seriousness of the interference with those rights is sufficient to set the appropriate standard of scrutiny in a case. If that were true, setting the appropriate level of judicial scrutiny in *ex p Smith* would have been a simple matter.

> I have to say that the balance of the argument upon them appears to me to lie clearly with the applicant. The tide of history is against the ministry. Prejudices are breaking down; old barriers are being removed. It seems to me improbable, whatever this court may say, that the existing policy can survive for much longer.[27]

Similarly in the Court of Appeal, Sir Thomas Bingham talked about 'the progressive development and refinement of public and professional opinion at home and abroad' being 'an important feature of this case'.[28] Thorpe LJ also attacked 'the complete absence of illustration and substantiation by specific examples' in support of the respondents' case.[29]

These remarks indicate that the courts would have set a very high threshold against which to examine the challenged policy had they looked only at the impact of the decision on the rights of the claimant. This is not what happened. A second strand of argument is visible in the judgments of the case, and it is the conclusion drawn in relation to this strand of argument which ultimately weighed decisively against the applicants. After predicting the demise of the challenged prohibition, for instance, Simon Brown LJ said:

[27] Note 20, above, p. 353 (per Simon Brown LJ).
[28] Note 20, above, p. 554.

> But the question arises: who should be determining the date of [the policy's] demise? More important still, are we in this court entitled, whatever view we may ourselves have formed of the general merits of the present policy, to declare it unlawful and to quash the decision to discharge these four applicants, in effect requiring Her Majesty's armed forces in future to recruit and retain their service personnel without regard to sexual orientation?[30]

The judge concluded that the court could not properly hold the policy unlawful. The reasons for this decision were based on considerations of what the judge called 'constitutional balance'.[31] The fact that 'Parliament is exercising a continuing supervision over this area of prerogative power' and that the court in judicial review exercises 'merely a secondary judgment' were both relevant issues. Simon Brown LJ thought that, as a result of these issues of constitutional balance, the court was 'bound, even though adjudicating in a human rights context, to act with some reticence.'[32] Since there was still room for debate on the merits of the policy, then, the judge decided that 'the decision upon the future of this policy must still properly rest with others, notably the government and Parliament.'[33]

The same line of argument was conclusive in the Court of Appeal. Sir Thomas Bingham said that the 'existing policy cannot in my judgment be stigmatised as

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[29] Note 20, above, p. 566.
[30] Note 20, above, p. 533.
[31] Note 20, above, p. 541.
[32] Note 20, above, p. 541.
[33] Note 20, above, p. 541.

irrational' since it had been 'supported by both Houses of Parliament and by those to whom the ministry properly looked for professional advice.'[34]

> The ministry did not have the opportunity to consider the full range of arguments developed before us. Major policy changes should be the product of mature reflection, not instant reaction.[35]

Similar considerations of constitutional balance also figure prominently in the concurring judgments. Henry LJ said that it was not 'legally irrational to continue the policy. What was needed is what has now been set up - namely the ministry preparing a paper of evidence to assist the select committee.'[36] Thorpe LJ agreed with this: 'it would be quite impossible to say in my judgment that the court is entitled to interfere with the Secretary of State's application of a policy which clearly commands a wide measure of general support.'[37]

Looking closely at the judgments in *ex p Smith*, then, it is clear that two distinct lines of argument underlie the courts' decision. The first concerns the implications of the contested policy on the rights of dismissed servicemen and women. The second turns on questions of what Simon Brown LJ called 'constitutional balance'. It was the sharp conflict between these two dimensions of argument that made the

[34] Note 20, above, p. 558.
[35] Note 20, above, p. 558.
[36] Note 20, above, p. 563.
[37] Note 20, above, p. 566.

case such a hard one.[38] The outcome was that the second line of argument ultimately proved decisive.

The cogency of this analysis does not depend on whether or not we regard the decision in *ex p Smith* to be correct. It cannot feasibly be suggested that the court was wrong to address matters of constitutional propriety. After all, the case raised the possibility of striking down a policy which was under active consideration by both the government and Parliament at the time.

(3) *Ex p B*

R v Cambridge Health Authority, ex p B[39] concerned a young girl seriously ill with leukaemia. After two courses of chemotherapy and a bone marrow transplant, B suffered a relapse. Doctors considered that a second bone transplant and a third course of chemotherapy would not be in her best interests and recommended a course of palliative treatment instead. B's father disagreed and applied to the health authority on B's behalf for funding for the transplant and chemotherapy instead. The treatment was to be administered in two stages. The chemotherapy, costing £15,000 and with an estimated success rate of between 10 and 20 per cent, would be followed if successful by a second bone marrow transplant at a cost of £60,000. The health authority, arguing that such treatment was not in the child's best interest, refused funding on the ground that it would not be an appropriate use of the

[38] 'I do not pretend to have found this an easy case. On the contrary I recall none harder.' (Per Simon Brown LJ, note 20, above, p. 541.)
[39] *R v Cambridge Health Authority, ex p B* [1995] 1 WLR 988 (CA). See also A. Parkin, 'Allocating Health Care Resources in an Imperfect World' (1995) 58 MLR 867.

authority's limited resources. B's father, acting as her next friend, challenged the authority's decision by way of judicial review.

Sir John Laws (in his judicial capacity) gave the judgment at first instance. His judgment began by noting the seriousness of the impact of the challenged decision on the applicant.

> Of all human rights, most people would accord the most precious place to the right of life itself. Sometimes public authorities, who are subject to the jurisdiction of this court, have the power of life and death - or at least to decide, as I find is the case here, whether a person otherwise facing certain death should, by means of resources at the public body's disposal, be given the chance of life.[40]

In assessing the appropriate standard of review, Laws J said that the importance of the matter at stake in terms of its implications for B's rights meant that the court was justified in imposing a high threshold or 'anxious scrutiny' standard of review.[41]

However, while it is clear that Laws J's decision as to the correct level of judicial scrutiny to be applied in B's case was strongly influenced by a consideration of the rights at stake, there was another element to his decision. That element concerned the appropriateness of anxious scrutiny review in a context where decision-making demands a high degree of expertise, and where a decision about the allocation of

[40] [1995] 1 F.L.R. 1055, p. 1056.
[41] *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] A.C. 514, 531. (Laws J referred to it in his judgment as '*ex p Musisi*'.) *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 A.C. 696, 748-9.

resources in one case is likely to have profound repercussions on other cases because resources are scarce.

> I quite accept . . . that the court should not make orders with consequences for the use of health service funds in ignorance of the knock-on effect on other patients. But where the question is whether the life of a 10-year-old child might be saved, by however slim a chance, the responsible authority must in my judgment do more than toll the bell of tight resources. They must explain the priorities that have led them to decline to fund the treatment.[42]

Laws J decided that countervailing considerations of administrative expediency did not obviate the need for high-intensity judicial review in the case before him. Applying that high standard of review to the facts before him, the judge quashed the health authority's decision on the ground that 'the respondents have in my judgment failed to have regard to a material factor, namely the family's perception of B's best interests, entertained on her behalf.'[43]

Laws J's decision was overturned on appeal essentially because, although the Court of Appeal agreed with his analysis of the rights that were at stake, it disagreed with his assessment of the importance of matters of administrative expediency. Sir Thomas Bingham MR gave the only judgment of the Court. After a detailed account of the exchanges between doctors, the health authority and B's father, the judge showed that he was well aware of the importance of the interests at stake.

> I should state very clearly, as the judge [i.e., Laws J] did, that this is a case involving the life of a young patient and that this is a fact which must dominate all considerations of all aspects of the case. Our society is one in which a very high value is put on human life. No decision affecting human life is one that can be regarded with other than the greatest seriousness.[44]

The judge then said that he parted company with Laws J's analysis of the role of judicial review in the context of specialist and polycentric decision-making.[45] Referring both to the scarcity of resources in the provision of medical services and to the fact that medical science is not an area in which the court has any specialist knowledge, Sir Thomas Bingham said that high-intensity or anxious scrutiny review was not appropriate in the present case. It would be totally unrealistic, the judge said, 'to require the authority to come to the court with its accounts and seek to demonstrate that if this treatment were provided for B. then there would be patient C. who would have to go without treatment. No major authority could run its financial affairs in a way which would permit such a demonstration.'[46] He continued,

> I have no doubt that in a perfect world any treatment in which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would,

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[42] Note 40, above, p. 1065.
[43] Note 40, above, p. 1065.
[44] Note 40, above, pp. 904-905.
[45] On polycentricity and judicial review, see ch. 6, above, p. 169. See also, e.g., L. Fuller, 'The Forms and Limits of Adjudication' (1972) 92 Harvard LR 353; J.W.F. Allison, 'Fuller's Analysis of Polycentric Disputes and the Limits of Adjudication' (1994) 53 CLJ 367; Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (1996), ch. 9.

> however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. ... Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticised for not advancing before the court.[47]

The analysis reveals that there were two distinct strands or axes of argument underlying the judgments in *ex p B*. The first strand concerned the rights of the applicant and the seriousness of her predicament as a result of the health authority's decision. The second strand concerned matters of administrative expediency: namely, the specialist nature of the type of decision in question, the scarcity of resources in the area in question, and the polycentric decision-making that scarcity entails. The judges at first instance and in the Court of Appeal agreed in relation to the first strand of argument: the right at stake was very serious and the health authority's decision had the most serious repercussions for the applicant. Their judgments differed in relation to the second strand of argument. Whereas Laws J at first instance thought that it was not sufficient for the respondent to 'toll the bell of tight resources', the Court of Appeal decided that to ignore matters of administrative expediency would be to live in an unreal world.

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[46] Note 39, above, p. 906.

(4) *Ex p Fewings*

In *R v Somerset County Council, ex p Fewings*,[48] members of the Quantock hunt challenged the legality of a decision to ban deer hunting on land owned by the council. The council took the decision after a lengthy debate which focused on prior consultation and committee reports, most of which had recommended that permission for hunting ought to be withdrawn.

The council's decision was driven by the belief that 'hunting involved unacceptable and unnecessary cruelty to the red deer who were the victims of the chase.'[49] Defending the decision in court, the council relied on a provision of the Local Government Act 1972 which provided that 'For the purpose of ... the benefit, improvement or development of their area, a principal council may acquire by agreement any land, whether situated inside or outside their area.'[50] This provision was not referred to during the council debate.

At first instance, Laws J decided in favour of the applicants.[51] Arguing that the court had no role as a moral arbiter on an issue, like the one in *ex p Fewings*, about which people hold sharply divergent views,[52] the judge held that the 'cruelty argument' was an irrelevant consideration outside the scope of the council's powers.

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[47] Note 39, above, p. 906.
[48] [1995] 3 All ER 20. See also, D. Cooper, '"For the sake of the deer": land, local government and the hunt' (1997) The Soc. Rev. 667; M. Loughlin, *Legality and Locality: The Juridification of Central-Local Relations* (1998), pp. 412-416.
[49] Note 48, above, p. 24 (per Sir Thomas Bingham MR).
[50] Section 120(1)(b).
[51] [1995] 1 All ER 513.

> What then is the scope of the words in s.120(1)(b) 'the benefit, improvement or development of their area'? In my judgment, this language is not wide enough to permit the council to take a decision about activities carried out on its land which is based upon freestanding moral perceptions as opposed to objective judgment about what will conduce to the better management of the estate.[53]

Laws J's decision displays a commitment to intervening on behalf of citizens whose interests are threatened by an exercise of public power. The judge argued that the fact that the council decision sought to restrict pre-existing liberties meant that the statutory provision on which it relied should be strictly construed. To that extent, then, his decision might be accommodated by the rights theory. But that aspect constituted only one dimension of the decision. Laws J also examined the relationship between citizen and local authority when deciding the appropriate judicial response. He argued that, since a local authority does not have rights of its own, only duties and disabilities, an authority acts legitimately only if it does so fairly and in furtherance of its public duties as specified by statute.

> A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed it exists for no other purpose. I would say that a public body enjoys no rights properly so called. . . it acts . . . only to vindicate the better performance of the duties for whose fulfilment it exists. It is in this sense that it has no rights of

[52] Note 51, above, p. 515.
[53] Note 51, above, p. 529.

its own, no axe to grind beyond its public responsibility: a responsibility which defined its purpose and justifies its existence.[54]

This understanding of the relationship between citizen and local authority is reflected in the way Laws J conceived of the dispute as a clash between two groups of private individuals. On one side, members of the Quantock Hunt defended deer hunting as a traditional practice and the most efficient way of ensuring the commons was not overstocked with deer. On the other side, the council, seen as a group of private individuals, wanted to ban hunting because they thought it was cruel. (Laws J spoke of 'the *subjective opinion of the majority of the councillors voting*, that deer hunting is morally repulsive'[55])

This way of looking at the dispute was crucial to Laws J's rejection of the council's argument that a degree of latitude should be accorded when construing the relevant statutory provision. The council argued that the point of local democracy is precisely that 'strongly held views upon issues arising in the locality may find vigorous expression in the deliberations of the elected representatives'.[56] Laws J said that, to the contrary, a local authority is essentially a subordinate decision-maker. Therefore, 'if Parliament intends to confer power on a subordinate body to regulate the morals of other people, it will choose words which make it plain beyond peradventure that that is in truth the *Padfield* purpose of the provision.'[57] This

[54] Note 51, above, p. 524.
[55] Note 51, above, p. 523. (Emphasis added.)
[56] Note 51, above, p. 527.
[57] Note 51, above, p. 530.

position left little room for local democracy. 'Whether hunting should be banned, or limited, seems to me to be pre-eminently a matter for the national legislature.'[58]

Issues of general constitutional propriety were thus crucial to Laws J's decision in *Fewings*. The judgment turned on a particular conception of the nature of local government and the relationship between Parliament and local authorities. The conception articulated by the judge provided the basis for his dismissal of an argument premised on the idea that the importance of local democracy was an important institution worthy of judicial respect. These matters are distinct from, although they might ultimately or indirectly relate to, the concern to protect citizens' rights or liberties.

The majority of the Court of Appeal upheld the Laws J's decision. Although Sir Thomas Bingham MR rejected Laws J's narrow construction of the statute ('I would not accept the judge's view that the cruelty argument . . . is necessarily irrelevant to consideration of what is for the benefit of their area.'[59]) he decided nevertheless that the decision would be quashed because the council had not referred to that provision during the relevant debate. Swinton Thomas LJ agreed. The 'views of the majority of councillors that hunting is morally repulsive', he said, was not a proper basis for imposing the ban.[60]

Simon Brown LJ, on the other hand, found in favour of the local authority. He took a contrary view because his understanding of the tripartite relationship between

[58] Note 51, above, p. 531.
[59] Note 48, above, p. 28.

Parliament, local authority and citizen was different. It was entirely appropriate, he said, that the council should select its regulatory strategy on the basis of 'considerations of public interest and a desire to advance the public good'.[61]

> I find it impossible to say that the councillors must shut their minds to the cruelty argument, still less that they must to so as a matter of the strict construction of s.120(1)(b). I readily accept that the concepts of benefit to the area, and public interest and good, invite consideration first of the council's human community, rather than its wildlife.[62]

Given this position, it was a simple step to the conclusion that 'the cruelty argument, as well indeed as the countervailing ethical considerations, were necessarily relevant to the decision'.[63] Simon Brown LJ also took issue with the way his fellow judges had approached the notion of local democracy, warning them that they should be careful not to be too strict when scrutinising political debates: 'Of course, combing through the notes of the debate, one can always find arguments recorded in terms suggesting an improper approach to the question at issue. That, however, is not a sound basis for impeaching a decision.'[64]

The key factor in the judgments in *ex p Fewings*, then, is not the question of pre-existing rights but rather the relationship between courts, citizen, local government and Parliament. But this dimension of argument does not fit comfortably within the

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[60] Note 48, above, p. 35.
[61] Note 48, above, p. 30.
[62] Note 48, above, p. 31.
[63] Note 48, above, p. 31.
[64] Note 48, above, p. 33.

model of decision-making outlined by the rights theory. According to that model, the importance of the rights at stake and the seriousness of the interference with those rights should be the only factors relevant to decision-making in public law. In *Fewings*, however, broader issues of constitutional and political propriety were of vital importance. The difference between the dissenting judgment of Simon Brown LJ and the other judges in the case lay in the different importance attached to the value of local democracy.

(5) *Ex p JCWI*

R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants[65] involved a challenge to government changes in asylum benefits policy. In 1996, the government enacted a set of regulations[66] which contained provisions withdrawing entitlement to benefit from asylum seekers who failed to apply for asylum immediately upon arrival in the United Kingdom or who were involved in an appeal against a refusal to grant asylum.[67] The government defended the policy change by making a connection between the stage at which the applicant made his or her claim and the distinction that lay at the heart of the policy change between 'genuine' and 'bogus' asylum applicants. Those who applied immediately upon

[65] [1997] 1 WLR 275.

[66] Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996, SI 1996 No. 30. For commentary on the regulations see, e.g., M. Feria, 'Commentaries on the Social Security (Persons from Abroad) (Miscellaneous Amendments) Regulations 1996' (1996) 10 Immigration and Nationality 91. The initial idea was for the regulations to have retrospective effect. But the idea was abandoned due to the hostile reception it received and under the threat of judicial review from a number of Conservative-run London councils. See, e.g., D. Stevens, 'The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum' (1998) 61 MLR 207.

[67] Social Security Regulations, above, note 66, regulation 8. See also regulation 7 (deprival of housing benefit); 3(b), 7(b) and 8(c) ('upheaval declaration' to be made where a home country had undergone a 'fundamental change in circumstances' such that the Home Secretary 'would not normally order the return of a person to that country').

arrival in the UK escaped the restrictions introduced by the regulations whereas those who applied after arrival ('in country' claimants), barring exceptional occurrences within their own country of origin, were caught by the new rules.[68]

The change in policy provoked a strong critical reaction from pressure groups concerned with the welfare of asylum groups.[69] One such group, the Joint Council for the Welfare of Immigrants, in conjunction with an asylum applicant, sought judicial review of the regulations. Counsel for the applicants argued that, although the regulations aimed (at least ostensibly) to deter only 'bogus' asylum claimants (i.e., those understood by the government to be purely economic migrants), they would fall on both genuine and bogus claimants alike.[70] Statistics were adduced to show that it was not only bogus claimants who claimed asylum after entry. This situation meant that many genuine claimants would face a situation of extreme poverty such that they might feel forced to leave Britain and return to situations in which they could be persecuted. Drawing on the opinions of bodies such as the UNHCR and the Social Security Advisory Committee, the applicants argued that the regulations violated international legal norms on the appropriate behaviour of the state towards asylum seekers because their effect was to deprive asylum seekers of access to the procedures for a full resolution of their claims. Since the introduction of the Asylum and Immigration Appeals Act 1993, these international agreements have become the standards governing Britain's domestic asylum laws. The court

[68] See the comments of Peter Lilley (then Secretary of State for Social Security) in Hansard Reports, 23 January 1996 and his remarks to the Conservative Party conference in 1995: 'Lilley to curb benefits for asylum seekers', *Independent*, 12 October 1995.

[69] See, e.g., Glidewell Panel, *Report on the Asylum and Immigration Bill 1995* (1996), p. 12; Amnesty International, *Slamming the Door. The Demolition of the Right to Asylum in the UK* (1996), p. 48. See also Social Security Advisory Committee, *Report on the Social Security Regulations*, para 38.

should not allow the government to use its powers to enact secondary legislation to violate commitments made in Act of Parliament.[71]

Simon Brown LJ gave the leading judgment for the majority of the Court of Appeal. Like other cases already examined in this section, the judgment displays a keen awareness not just of the need for judges to protect rights but also the need to reflect, in so doing, on the nature of the constitutional relationship between court and government. The applicants' arguments were broken into two. The 'inconsistency' argument referred to the applicants' contention that the enabling legislation could not accommodate the distinction drawn in the asylum benefits policy between 'in country' and 'on arrival' asylum seekers. This argument was rejected by the Court. Looking at the enabling legislation, Simon Brown LJ concluded that it was 'amply wide for these purposes.'[72] The Secretary of State for Social Security was entitled to reach his own decision on the matters at hand irrespective of the terms of the Asylum and Immigration Act 1993. In addition, the judge said that it was irrelevant whether or not there was a good reason for the distinction. The court had no jurisdiction to interfere; the Secretary of State is answerable in this situation only to existing parliamentary mechanisms of assessment and control.[73]

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[70] This summary is drawn from the court's response to the applicants' arguments and from the statement of appeal: see note 65, above, p. 277.
[71] The enabling powers were contained in the Social Security Contributions and Benefits Act 1992 and the Social Security Administration Act 1992.
[72] Note 65, above, p. 288.
[73] Note 65, above, pp. 288-9.

The 'conflict' argument referred to the applicants' contention that depriving asylum seekers of benefits would interfere to an unjust extent with their right of access to refugee determination procedures.[74] In relation to this argument, Simon Brown LJ said that the fact that the legislation aimed to reduce the number of asylum seekers was not *in itself* a ground for striking down the measure. On the other hand, the super-*Wednesbury* principle[75] that the court should allow a wide margin of discretion where a decision is made by a government minister did not apply. In this context, judicial deference to the decision-maker was limited: 'Parliamentary sovereignty is not here in question'.[76] By extending the principle in *ex p Leech*,[77] Simon Brown held that '[s]pecific statutory rights are not to be cut down by subordinate legislation passed under the vires of a different Act'.[78] The regulations, he said, should be struck down because they rendered appeal rights granted by the Act of 1993 nugatory for some genuine asylum seekers at least. 'Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma ... Primary legislation alone could in my judgment achieve that sorry state of affairs.'[79] The judge said, in addition, that the new measure meant that asylum seekers were faced with a bleak choice:

> the Regulations necessarily contemplate for some [asylum seekers] a life so destitute that to my mind no civilised nation can tolerate it ... [I]t suffices to say that I for my

[74] See Convention Relating to the Status of Refugees adopted by the UN Conference on the Status of Refugees and Stateless Persons at Geneva 1951 (UK Treaty Series, No. 39, Cmnd. 9171 (1954)) and Protocol Relating to the Status of Refugees 1966 (UK Treaty Series, No. 15, Cmnd. 3906 (1969)).
[75] *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521; *Nottingham County Council v Secretary of State for the Environment* [1986] AC 240.
[76] 292
[77] *R v Secretary of State for the Home Department, ex p Leech (No. 2)* [1994] QB 198. See also C.J. Harvey, 'Asylum seekers, *ultra vires* and the Social Security Regulations' (1997) PL 394.
[78] Note 65, above, p. 292.
[79] Note 65, above, p. 293.

part regard the Regulations now in force as so uncompromisingly draconian in effect that they must indeed be held ultra vires.[80]

In his dissenting judgment, Neill LJ rejected the applicants' arguments on two main grounds. First, the applicants had failed to show an *express* statutory limitation on the power of government to enact secondary legislation of the sort under challenge. 'Parliament has not imposed on the Secretary of State any express obligation to provide funds to enable persons claiming asylum to exercise all the rights conferred on them by the Act of 1993.'[81] Second, although the regulations would force some asylum seekers to 'live in penury', the potential hardship caused by the policy change was not disproportionate to its aims. 'The changes will interfere with existing rights and expectations. But the extent of that interference is important. Looking at the objects to be achieved by the legislation and its results I do not consider that the threshold of illegality has been crossed.'[82]

In addition to a concern with the plight of asylum seekers and an appreciation of the statutory and international norms relating to the treatment of asylum applicants, the judgments in *ex p JCWI* exhibit a keen awareness of the need to settle the case in a constitutionally appropriate way. The majority and minority judges differed not in their appraisal of the situation nor about how the rights in question ought to prioritised, but in their conception of the permissible role of the reviewing court in this type of situation. Whereas, despite his own hostility to the policy in question,

[80] Note 65, above, pp. 292-3.
[81] Note 65, above, p. 282.
[82] Note 65, above, p. 283.

Neill LJ felt unable to accept that 'the threshold of illegality'[83] had been crossed, the majority of the Court thought that the regulations were so draconian and so inconsistent with previous government policy towards the rights of asylum seekers, as expressed in Acts of Parliament, that they ought to be struck down.

(B) Post-Human Rights Act Cases*

The cases analysed in the sections above were all decided before the introduction of the Human Rights Act. In this section, the analysis will be extended by examining a number of judicial review cases decided since the Act was introduced. The purpose of this extension is to twofold. First, it provides a richer and more fully rounded account of the reasoning process in judicial review cases which involve rights issues. Second, it seeks to discover whether there has in fact been any substantial change in judicial practice since the introduction of this Act in respect of this type of case. Note, however, that the Human Rights Act – and its relationship to rights-based and legitimacy models of judicial review - is discussed in some detail in the final chapter of this thesis.

While reference will be made to a number of other significant cases, I will concentrate in this section on a series of cases decided since the passing of the Human Rights Act that involve asylum and immigration matters. This selection is justifiable. Asylum and immigration matters constitute a high proportion of judicial

[83] Note 65, above, p. 283.

* Cases in this section have been discovered by means of extensive searches of electronic databases (especially *Lawtel*) in addition to traditional, paper-based methods of research.

review applications. No other area has produced a comparable spread of judicial review decisions since the introduction of the 1998 Act.[84]

R v Secretary of State for the Home Department, ex p Mahmood[85] involved a challenge to the Secretary of State's decision to remove the applicant from the country as an illegal immigrant. The Home Secretary had decided that the neither the applicant's marriage to a British citizen nor the subsequent birth of children constituted an exceptional circumstance such as to justify the suspension of enforcement action. The challenge thus raised issues relating to the Art. 8 ECHR right to family life.

Giving the main judgment in the Court of Appeal, Laws LJ said that the case raised two issues. The first issue concerned the potential retrospective effect of the Human Rights Act.[86] Since the case concerned a decision made before the Act came into force to be applied after the Act was in force, the issue was whether the court ought to judge the legality of the pre-October 2000 decision upon the premise that

[84] There have, however, been a significant number of important cases decided since the HRA which involve matters of criminal justice: see, e.g., *R v Lambert* [2001] 2 WLR 211; *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326; *R v Kansal* [2001] 3 WLR 1562; *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800; *R v A (No. 2)* [2002] 1 AC 45; *Brown v Stott* [2001] 2 WLR 817; *Starrs v Ruxton* 2000, JP 208 (temporary sherrifs in Scotland incompatible with Art. 6(1) ECHR); *R v Offen* [2001] 1 WLR 253; *Lynch v Director of Public Prosecutions* [2001] EWHC Admin 882 (provision that person found in possession of lockknife in a public place must establish good reason held not to offend Art. 6); *Roger Sliney v Havering London Borough Council* (2002) LTL 20/11/2002 (s. 92(5) Trade Marks Act 1994 imposed a legal burden on a defendant which was necessary, justified and proportionate for the purposes of Art. 6(2) ECHR); *R v Commissioner of Police for the Metropolis, ex p U* (2002) LTL 29/11/2002 (the final warning scheme established by the Crime and Disorder Act 1997 was inconsistent with Art. 6 ECHR). Some of these cases will be referred to in this section and in the section devoted to the HRA in chapter 9. However, although they raise important matters about the judicial interpretation of the Act, they are less suited in the context of the present discussion because many of them are not cases of judicial review.

[85] [2001] 1 WLR 840.

[86] On the retrospective potential of the Human Rights Act see, e.g., D. Beyleveld, R. Kirkham and D. Townend, 'Which presumption? A critique of the House of Lords' reasoning on retrospectivity and the

European Convention rights are not domestic law. In relation to this matter, Laws LJ held that it is generally no part of the duty of the court reviewing the legality of an administrative decision to review the legality of the decision-maker's carrying the decision into effect at some future date. However, the judge continued, there would be no difference to the result of the case were the matter to be decided by reference to the Convention rights.[87]

The second issue raised by the challenge concerned the intensity of the standard to be applied in reviewing the Home Secretary's decision. Laws LJ said that there were three possible approaches: (a) the conventional *Wednesbury* standard; (b) a fundamental rights approach which required the decision-maker to justify its interference with the rights in question; (c) an approach that 'directly engages the rights guaranteed by the European Convention'.[88] Laws LJ rejected the *Wednesbury* approach because it fails to recognise what has become a settled principle of common law, namely, that 'the intensity of review in a public law case will depend on the subject-matter in hand; and so in particular any interference by the action of a public body with a fundamental right will require a substantial objective justification.'[89] The second approach was preferred: 'There is, rather, what may be called a sliding scale of review; the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required.'[90]

Human Rights Act' (2002) 22 Legal Studies 185. See also, e.g., *Lambert*, note 84, above; *Kansal*, note 84, above; *R v Benjafield* [2002] 2 WLR 235.

[87] Note 85, above, paras 29-31.

[88] Note 85, above, para 16.

[89] Note 85, above, para 18.

[90] Note 85, above, para 19.

This approach seems at first sight to be very close to the position developed by the rights theorists examined in this thesis. Applying the approach to the case in hand, however, Laws LJ rejected the applicant's challenge on more general grounds of administrative justice. 'Firm immigration control', he said, 'requires consistency of treatment between one aspiring immigrant and another.'[91] The Home Office's policy was entirely defensible. It would be 'simply that he [the applicant] should not have to wait in the queue like everyone else.'[92] To allow the applicant in this case to succeed (who had entered the country as an illegal immigrant) would be to prejudice those 'would-be entrants who are content to take their place in the entry clearance queue in their country of origin.'[93] The application of what purports to be a fundamental rights approach in *Mahmood* in fact shows not just an awareness of the rights of the applicant at stake but also a keen appreciation of and sensitivity towards the demands of administrative justice in a complicated and polycentric area.

R v Secretary of State for the Home Department, ex p Isiko[94] was another case which involved the application of Article 8 ECHR in the context of asylum law.[95] The two applicants (originally from Uganda) applied for orders of certiorari to quash the

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[91] Note 85, above, para 23.
[92] Note 85, above, para 26.
[93] Note 85, above, para 23.
[94] [2001] Imm AR 291; [2001] 1 FLR 930.
[95] Another recent cases which raise these issues include *B v Secretary of State for the Home Department* [2000] Imm AR 478. In that case, an appeal against a deportation order was made by a Sicilian who had served a prison sentence in the UK for a series of counts of indecent assault upon his daughter. After reviewing the EU and ECHR jurisprudence on proportionality, the Court of Appeal held that, given that the appellant had resided in the UK since he was a small boy, deportation was a disproportionate response. For a similar case decided before the Human Rights Act see, e.g., *R v Secretary of State for the Home Department, ex p Ahmed and Patel* [1998] INLR 570. See also *R (Montana) v Secretary of State for the Home Department* [2001] 1 WLR 552 (refusal to register a father's illegitimate son as a British citizen not an interference with family life); *R v Chief Immigration*

Secretary of State's decision to remove them from the country. At a time when they both knew that the immigration authorities were likely to deport them, the applicants married each other. They had since divorced and one of them had married a British citizen. Deporting the applicants at this juncture would have adverse effects on a number of family relationships.

As in *Mahmood*, the initial decision preceded the coming into force of the Human Rights Act. The court in *Isiko* decided to treat the case as though the Act had been in force at all relevant times.[96] The issue to be settled in the case concerned the proper approach the court should take when considering the lawfulness of a decision taken by the Secretary of State in the course of implementing immigration control policy. Counsel for the Home Secretary submitted that there was a whole series of ingredients which go into striking the balance which Article 8 requires to be struck and the person best equipped to strike that balance in principle was the Secretary of State. On this account, the task of the court was to see whether in so doing he had gone outside legitimate parameters.[97] The applicants argued that the court is in just as good a position to make a judgment as the original decision-maker. Once an interference with family rights is shown then the applicant's human rights must be upheld unless the Secretary of State can show that the interference is justified.

Officer, ex p Njai 1 December 2000 (unrep.) (removal not a breach of Article 8, being proportionate in the circumstances where family could accompany claimant).

[96] Note 94, above, para 4.

[97] Counsel cited *R v Secretary of State for the Home Department, ex p Dinc* [1999] Imm AR 380; [1999] INLR 256 (CA). In that case, the Home Secretary successfully appealed against a ruling quashing his decision to deport a visitor with unlimited leave to remain who had been convicted of drug trafficking.

The Court of Appeal, following its approach in *Mahmood*, held that the position on the matter was as follows. (1) 'Where the Court reviews a decision which is required to comply with the Convention by the Human Rights Act 1998 it does not substitute its own decision for that of the executive.' In performing this task, the Court has to bear in mind that 'there will often be an area of discretion permitted to the executive of a country which needs to be exceeded before an action must be categorised as unlawful.' In cases like the present, the courts recognise 'that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose decision is said to be incompatible'. (2) Where 'a fundamental right is engaged' the court will 'insist that this fact be respected by the decision maker, who is required to demonstrate either that his proposed action does not in truth interfere with the right, or if it does, that there exist considerations which may reasonably be accepted as amounting to a substantial objective justification for the interference.' (3) Within the framework of this approach, 'the court will give due deference to the primary decision maker'.[98] Applying this framework to the case before it, the Court of Appeal concluded that the decision which the Home Secretary made was one which he was entitled to make.[99]

The Court of Appeal's decision in *Isiko* is another demonstration of the sensitivity of the courts to matters of constitutional legitimacy – that is, finding an appropriate

[98] Note 94, above, para 31. See also the similar statements of Lord Hoffmann in *Alconbury*: 'in a democratic country, decisions as to what the general interest requires are made by democratically elected bodies, or persons accountable to them.' The HRA 'was no doubt intended to strengthen the rule of law but not inaugurate the rule of lawyers'. *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, paras 69 & 129.
[99] Note 94, above, para 38.

constitutional balance for the relationship between court and government or court and administrators – in the context of decisions which involve considerations of fundamental rights. The Court in that case, working within the new framework introduced by the Human Rights Act, produced an approach which attempted to marry the duty to protect Convention rights with a concern to ensure an appropriate degree of deference to primary decision-makers.[100]

A third case decided in the framework instigated by the Human Rights Act that concerns the application of Article 8 ECHR in the context of asylum and immigration is *Samaroo v Secretary of State for the Home Department*.[101] The two applicants were foreign nationals who were given permission to enter the UK many years ago and established families here. Both were convicted of serious drugs offences and were made the subject of deportation orders by the Home Secretary on the grounds that their deportation would be 'conducive to the public good'.[102] The deportation orders were challenged on the grounds that they would interfere with the applicants' right to family life. The challenge was unsuccessful at first instance.

The central issue in the case concerned the notion of proportionality: what is required for a deportation order to be a proportionate implementation of the legitimate governmental aim of protecting the health, rights and freedoms of others? Giving the judgment of the Court, Dyson LJ said that 'in deciding what

[100] On the articulation of principles of 'due deference' in early post-HRA cases, see, P. Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 LQR 589; R.A. Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859; D. Pannick, 'Principles of Interpretation of Convention rights under the Human Rights Act and the Discretionary Area of Judgment' (1998) PL 545; S. Singh, M. Hunt and M. Dennetriou, 'Is there a Role for the "Margin of Appreciation" in National Law after the HRA?' [1999] EHRLR 15.
[101] [2001] UKHRR 1150; [2001] EWCA Civ 1139.

proportionality requires in any particular case, the issue will usually be considered in two distinct stages.' The first question is: 'can the objective of the measure be achieved by means which are less interfering of an individual's rights?'[103] The second question is: 'does the measure have an excessive or disproportionate effect on the interests of affected persons?'[104]

In applying this test to the present case, Dyson LJ went on, the court had to determine 'whether the deportation order struck a fair balance' between the applicants' right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other. Doing this involves comparing the weight to be given to the wider interests of the community with the weight to be given to an individual's Convention rights.[105] When exercising this function, 'the court must recognise and allow to the Secretary of State a discretionary area of judgment.' A number of factors were relevant when deciding the extent to which the court ought to defer to the Secretary of State. (1) The nature of the Convention rights. The court is less likely to defer to the decision-maker where absolute rights are at stake. (2) The extent to which the issues require consideration of social, economic or political factors. 'The court will usually accord considerable deference in such cases because it is not expert in the realm of policy-making, nor should it be

[102] By virtue of Immigration Act 1971 s.3(5)(b).
[103] Note 101, above, para 19.
[104] Note 101, above, para 20. On the application of the proportionality test in the post-HRA context see, e.g., *R (Daly) v Secretary of State for the Home Department* [2001] 2 WLR 1622, p. 1633 (per Lord Bingham), pp. 1634-5 (per Lord Steyn); *B v Home Secretary*, note 95, above, pp. 441-443 (per Sedley LJ); *R (Farrakhan) v Secretary of State for the Home Department* [2002] 3 WLR 481 (per Lord Phillips MR at 502); *Betty Overton v Customs & Excise Commissioners* (2002) LTL 5/7/2002 (VADT) (unreported). See also, e.g., D. Feldman, 'Proportionality and the Human Rights Act' in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (1999); M. Supperstone and J. Coppel, 'Judicial Review after the Human Rights Act' [1999] EHRLR 301, pp. 312-315.
[105] Note 101, above, paras 24-28.

because it is not democratically elected or accountable'. (3) The extent to which the court has special expertise, for example in relation to criminal justice matters. (4) Where the rights in question are of especial importance, a high degree of protection will be appropriate (e.g. the right to freedom of expression and access to the courts.)[106]

Applying this framework to the case before the Court, Dyson LJ said that a significant margin of discretion to the decision of the Secretary of State was appropriate since, although the issues involved are not technical, 'the court does not have expertise in judging how effective a deterrent is a policy of deporting foreign nationals who have been convicted of trafficking offences'.[107] The Secretary of State was not obliged, his Lordship continued, 'to prove that the withholding of a deportation order in any particular case would seriously undermine is policy of deterring crime and disorder.' Considering the matter in this 'realistic manner', then, the Court rejected the applications.[108]

The approach to reviewing the decisions of governmental decision-makers in the framework of the Human Rights Act outlined in *Samaroo* is revealing. The judgment of Dyson LJ does display a concern to protect Convention rights, particularly those rights within the Convention that can be regarded as having 'especial importance' within a constitutional democracy governed by the rule of law.

[106] Note 101, above, para 35. On the protection of freedom of expression post-HRA, see, e.g., *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249 (3 Christian fundamentalists who had been preaching on the steps of a Cathedral were arrested for wilful obstruction of a police officer in the execution of his duty after refusing the officer's request to desist; appeal against conviction allowed by CA).
[107] Note 101, above, para 36.
[108] Note 101, above, para 39.

But the judgment also reveals an application of Convention right and the test of proportionality that is extremely context-sensitive. The balancing of competing factors in deciding at what level to fix the 'margin of discretion' due to a primary decision-maker in Dyson LJ's proposed test shows, in addition to a finessed understanding of the need to protect rights (points 1 and 4), an awareness of issues of constitutional legitimacy (point 2), relative expertise (points 2 and 3) and of the complexity of certain types of governmental decision (point 2).[109]

This sensitivity to political context is apparent in another post-Human Rights Act case involving deportation. *Secretary of State for the Home Department v Rehman*[110] involved a decision to deport the applicant on the ground of his suspected involvement with Islamic terrorism. The Special Immigration Appeals Commission had upheld Rehman's appeal against that decision. The Home Secretary appealed to the courts against the Commission's decision successfully to the Court of Appeal. The House of Lords in turn rejected Rehman's appeal. In doing so, their Lordships were keen to stress the need not to restrict unduly the Secretary of State's ability to decide matters that related to national security. Lord Steyn said that even

[109] On the contextual approach to judicial decision-making under the HRA framework, see Edwards, note 100, above, p. 874.

[110] [2001] 3 WLR 877. While not a judicial review case, the case serves to underscore the approach of the courts to its supervisory role in the Human Rights Act era: see, e.g., A. Tomkins, 'Defining and Delimiting National Security' (2002) 118 LQR 200. See also, e.g., *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502: CA held that detention of non-nationals under the Anti-Terrorism, Crime and Security Act 2001 s. 23 was not incompatible with the ECHR Arts. 5 & 14 since, given the existence of a situation of public emergency, the Secretary of State had an objective justification here for distinguishing between nationals and non-nationals; *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598: CA held that while a UK citizen detained by the US Government at Guantanamo Bay had a legitimate expectation that a request for assistance would be considered by the Foreign Office, it would be inappropriate for the Court to order the Secretary of State to make any specific recommendations to the USA, even in the face of what appeared to be a clear breach of a fundamental human right, because that would have an impact on the conduct of foreign policy at a particularly delicate time; *O'Driscoll v Secretary of State for the Home Department* (2002) LTL 22/11/2002 (s. 16 of the Terrorism Act 2000 was not incompatible with Arts. 10 & 11 ECHR).

'democracies are entitled to protect themselves, and the executive is the best judge of the need for international co-operation to combat terrorism and counter-terrorist strategies.'[111] In similar vein, Lord Slynn said that to 'require the matters in question to be capable of resulting "directly" in a threat to national security limits too tightly the discretion of the executive in deciding how the interests of the state, including not merely military defence but democracy, the legal and constitutional systems of the state need to be protected.'[112]

Another case in which the court was concerned to define the precise contours of the judicial task in reviewing governmental decisions in the Human Rights Act era which involved asylum and immigration matters was *R v Secretary of State for the Home Department, ex p Javed*.[113] The applicants in that case challenged a decision to refuse asylum claims on the ground that the country of origin (Pakistan) had been certified 'as a country or territory in which it appears to [the Home Secretary] that there is no general risk of persecution'.[114] The effect of certification was that unsuccessful claims should be disposed of summarily and expeditiously. The applicants were members of religious groups and feared persecution if returned to Pakistan. Relying on the so-called 'super-*Wednesbury*' standard of review developed in the *ex p Hammersmith and Fulham*[115] and *Nottinghamshire County Council*[116]

[111] Note 110, above, para 28.
[112] Note 110, above, para 16. See also, e.g., *McIntosh v HM Advocate* [2001] 3 WLR 107, in which the Privy Council held that a scheme in the Proceeds of Crime (Scotland) Act 1995 which allowed the assets of convicted drug dealers to be seized was 'one approved by a democratically elected Parliament and should not be at all readily rejected' (per Lord Bingham at 122).
[113] [2001] EWHC Admin 7.
[114] Using powers contained within paragraph 5 of Schedule 2 of the Asylum and Immigration Appeals Act 1993 as amended by the Asylum and Immigration Act 1996.
[115] *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521.
[116] *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240.

cases, the Secretary of State argued that if a statute required the House of Commons to approve a minister's decision before he could lawfully enforce it, and if the action which he proposed complies with that statute, then it is not for judges to declare that the proposed action unreasonable.[117]

Turner J rejected this argument. While it was true historically that, when reviewing on *Wednesbury* grounds, 'the courts have not been willing to embark on an exercise of the evaluation of evidence', under the Human Rights Act 'the Court is now under a positive duty to give effect to the European Convention.' Article 13 ECHR demands, in the present context, that there must be an effective remedy for a potential or prospective breach of Article 3 of the Convention. Thus, before making a certification order the Home Secretary must carry out an evidential investigation. In relation to the results of this investigation, the courts are hardly less well placed to evaluate the evidence once the relevant material is placed before it.[118] Applying this test to the situation at hand, Turner J concluded that the Secretary of State's decision that Pakistan was a country eligible to be certified 'can only have been reached on an erroneous view of the facts or of the law, or both.'[119]

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[117] Note 113, above, para 18.

[118] Note 113, above, para 31. See also *Turgut v Secretary of State for the Home Department* [2000] Imm AR 306 (CA), p. 316 (per Simon Brown LJ).

[119] Note 113, above, para 37. For other cases since the HRA dealing with the powers of the Home Secretary in relation to immigration and asylum matters, see, e.g., *R v Secretary of State for the Home Department, ex p Razgar* (2002) LTL 20/11/2002 (when determining whether an allegation that removal from the UK would breach human rights was manifestly unfounded, the Home Secretary could not rely on his own resolution of disputes of fact, he had to consider whether the claimant might prevail on the point before an adjudicator); *R v Secretary of State for the Home Department, ex p Kozany* (2002) LTL 4/12/2002 (although the process of setting policy guidance for immigration decisions where Art. 8 ECHR rights were engaged made him judge in his own cause, the Home Secretary would apply a policy that was designed to conform to Art. 8, and his decision was susceptible to judicial review); *R v Secretary of State for the Home Department, ex p Lackova* (2002) LTL 3/12/2002 (where the HS had certified that applications for asylum made on the basis of fear of persecution arising from Roma ethnicity were clearly unfounded, it was clear that he could, in legitimately seeking to regulate immigration, have an administrative scheme that dealt expeditiously with asylum applications); *R v Secretary of State for the Home Department, ex p B* (2002) LTL 21/11/2002 (HS had not been entitled

The decision of Turner J in *Javed* may indicate that, in the Human Rights Act era, claims based on principles grounded in ideas of very strong judicial deference to executive decision-making – like the super-*Wednesbury* doctrine – are perhaps less likely to succeed when addressed to a court mandated to apply Convention norms and principles. If we read this case alongside the decision in *Rehman* (or indeed the other cases discussed so far in this section) it is possible to suggest that the courts are adopting an approach to deference which is highly sensitive to all the factors of the case and particularly to the nature of the primary decision-making context. Whereas in the context of national security the court in *Rehman* thought that a high degree of deference was due for reasons of both pragmatism and constitutional principle, the judge in *Javed* thought that a high degree of deference was not due in a situation in which the court was in nearly as good position to analyse and assess the evidential basis for the decision under challenge.

So far in this section, I have examined a series of cases decided under the framework provided by the Human Rights Act. The cases so far have involved matters of asylum and immigration. This selection was merited since a series of cases was required to give a sense of decision-making in post-Human Rights Act judicial review cases and the asylum and immigration context provided just such a series.[120] For the remainder of the section, I will examine a number of other post-

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to refuse to exercise the immigration concession on domestic violence in such circumstances where there was clear evidence that the claimant's marriage had broken down on the basis of domestic violence).

[120] Other immigration and asylum cases decided since the introduction of the HRA include: *R v Secretary of State for the Home Department, ex p Baram* (2002) LTL 31/10/2002 (HL held that temporary detention of asylum seekers at IND Oakington, in order to expedite their applications, was not unlawful); *R v Secretary of State for the Home Department, ex p Hetoja* (2002) LTL 29/10/2002

Act cases to confirm that the dimensions of judicial reasoning discovered are symptomatic of decision-making in judicial review cases in the Human Rights Act era in general.

The cases examined so far in this section display the same combination of factors. First, an awareness of the need or duty to uphold Convention rights. Second, the importance of deferring when proper to primary decision-makers on grounds of (a) constitutional balance and (b) administative propriety or expediency. Third, a highly context-sensitive approach to the analysis of cases (as evidenced, for instance, by the general tests articulated by Laws LJ in *Mahmood*, the Court of Appeal in *Isiko*, and Dyson LJ in *Samaroo*). These elements are present in another post-Human Rights Act case *R (Pearson) v Secretary of State for the Home Department*.[121] In that case, the three claimants were prisoners who had applied for their names to be registered on the electoral register but their applications had been refused. They sought a declaration of incompatibility under Human Rights Act s. 4 on the basis that the disenfranchisement of all convicted prisoners in accordance with

(decision of Home Secretary to accommodate destitute asylum seekers in a hostel was not irrational and diod not breach Arts. 6 & 8 ECHR); *European Roma Rights Centre v Immigration Officer at Prague Airport* [2002] EWHC 1989 (application for judicial review of the UK's pre-entry clearance regime in the Czech Republic was dismissed because the regime's operation neither breached the UK's international obligations nor, on the statistical evidence, the Race Relations Act 1976); *Xhevdet Hoxha v Secretary of State for the Home Department* [2002] EWCA Civ 1403 (CA held that Art. 1C(5) of the Geneva Convention Relating to the Status of Refugees did not come into operation until there had been a prior formal recognition of refugee status); *R v Secretary of State for the Home Department, ex p Yogathas* [2001] EWCA Civ 1611 (HL dismissed the appeal of two Tamil asylum seekers against decisions by the Home Secretary to order their return to Germany as a safe third country); *R v National Asylum Support Service, ex p Westminster City Council* [2001] EWCA Civ 512 (HL held that when an infirm, destitute asylum seeker was entitled to local authority accommodation, she was excluded from consideration for asylum support); *R v Secretary of State for the Home Department, ex p Azoug* (2002) LTL 31/10/2002; *R v Secretary of State for the Home Department, ex p Mian* (2002) LTL 8/10/2002; *R v Secretary of State for the Home Department, ex p Nadarajah* (2002) LTL 2/12/2002.

[121] [2001] HRLR 39.

Representation of the People Act 1983 s. 3(1) was inconsistent with Article 14 and Protocol 1 Article 3 of the European Convention.[122]

Relying on *Raymond v Honey*[123] and the *Leech*[124] and *Simms*[125] cases, counsel for the claimants argued that convicted prisoners should not lose anything other than their liberty for the period prescribed by the sentencing judge. Kennedy LJ, giving the judgment of the Divisional Court, said that while an argument could be made which favoured the claimants, 'in deference to the legislature courts should not easily be persuaded to condemn what has been done, especially where it has been done in primary legislation after careful evaluation and against a background of increasing public concern about crime.'[126] In this instance, the judge continued, whether or not prisoners have lost the moral authority to vote is a matter which courts ought 'to leave to philosophers the true nature of this disenfranchisement whilst recognising that the legislation does different things.'[127] The claim was, accordingly, rejected.

The issue at the heart of the *Pearson* case – deference – was also a feature of the earlier case of *R v Director of Public Prosecutions, ex p Kebilene*.[128] That case concerned the arrest under Prevention of Terrorism legislation of three Algerians

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[122] 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'
[123] [1983] AC 1.
[124] Note 77, above.
[125] Note 17, above.
[126] Note 121, above, p. 816.
[127] Note 121, above, p. 823. Other HRA cases involving the rights of prisoners include: *R v Parole Board, ex p Justin West* (2002) LTL 14/11/2002 (the decisions of the parole board whether to recall a prisoner released on licence did not amount to the determination of a charge under Art. 6 ECHR, so the prisoner had no right to an oral hearing); *R v Nottinghamshire Healthcare NHS Trust, ex p Patrick Morley* (2002) LTL 27/11/2002 (a medical officer had no obligation to disclose the views of other professionals of the patient's condition when making a notification to the Home Secretary under s. 50 Medical Health Act 1983, so no breach of Art. 8 ECHR).

suspected of possessing terrorist-related information. The main issues in the case concerned the appropriateness of judicial review in a situation where a remedy was available within the criminal process and whether the Human Rights Act gave rise to a legitimate expectation that, prior to its taking full effect, the DPP would exercise his discretion in accordance with Art. 6(2) of the Convention. However, Lord Hope took the opportunity to comment more generally on the correct approach to be adopted by the courts in its dealings with governmental decision-makers once the Act was in force. In some circumstances, his Lordship said, it will be necessary for the courts to accord a 'discretionary area of judgment'.

> In this area difficult choices may have to be made by the executive or the legislature between the rights of individuals and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.[129]

In *International Transport Roth GMBH v Secretary of State for the Home Department*,[130] four groups of lorry drivers and haulage companies challenged the lawfulness of a penalty regime introduced by Part II of the Immigration and Asylum Act 1999. The scheme was created to deter those intentionally or negligently

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[128] Note 84, above.
[129] Note 84, above, p. 381. See also the analogous comments of Lord Steyn in *R (Pretty) v DPP* note 84, above, p. 833.
[130] [2002] EWCA Civ 158. See also the decisions of the Court of Appeal in *Official Receiver v Stern* [2000] 1 WLR 2230 (compelled evidence in directors disqualification proceedings under Insolvency Act were not criminal proceedings); *Han v Customs & Excise Commissioners* [2001] 1 WLR 2253 (the imposition of civil penalties for dishonest evasion of VAT amounted to a criminal charge); *R*

allowing clandestine entrants into the UK. Under the terms of the scheme, those responsible for the clandestine entry (usually the owner, hirer or driver of the vehicle in which the entrant arrived in the UK) were liable for each entrant to a fixed penalty of £2,000 unless they could establish that they were acting under duress or had no actual or constructive knowledge of the clandestine entrant. In addition, once the Secretary of State had issued a penalty notice, a senior immigration officer could detain the vehicle if he considered that there was a serious risk that the penalty would not be paid.[131]

At first instance, the judge declared the scheme incompatible with Articles 6 of the Convention and Article 1 of the First Protocol. Article 6 because it involves the determination of a criminal charge and therefore fails to meet the procedural requirements of that Article. Article 1 because the provisions for the detention of vehicles constitute an unjustified of the right to property.[132] Appealing that decision, the Secretary of State contended: (a) that the scheme was properly to be characterised as civil not criminal; and (b) even if the scheme was criminal, the reverse burden of proof and other suggested breaches of Article 6 were nonetheless permissible.[133]

Giving the leading judgment in the Court of Appeal, Simon Brown LJ noted first the harshness of the scheme under review. That harshness stemmed from the fact that

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(McCann) v Crown Court at Manchester [2001] 1 WLR 1084 (anti-social behaviour orders civil not criminal, and so not attracting the additional protections in Article 6(2)).

[131] Another case relating to forfeiture of goods by Customs and Excise is *HM Customs & Excise v Helman* (2002) LTL 18/10/2002.

[132] Note 130, above, para 14.

[133] Note 130, above, para 21.

the burden of establishing blamelessness lay on the carriers and that the penalty imposed was fixed and cumulative, with no flexibility allowed for degrees of blameworthiness or mitigating circumstances.[134] On the other hand, the judge recognised 'the obvious need for firm action of some kind to combat the acute problem of illegal immigration'.[135] Given this, and while acknowledging that 'the court role under the 1998 Act is as guardians of human rights', it was appropriate for the court to recognise 'a wide discretion in the Secretary of State' and 'a high degree of deference due by the Court to Parliament'. The question the court must ask in the present case was this: is the scheme not merely harsh but plainly unfair?[136]

Answering this question, Simon Brown LJ said that the mere fact that the burden of disproving dishonesty and negligence was placed by the scheme on the carrier did not of itself violate Article 6.[137] However, the judge continued, the scheme taken as a whole was 'quite frankly unfair' since 'the penalty far exceeds what any individual ought reasonably be required to sacrifice in the interests of achieving improved immigration control'.[138] Finally, talking generally about the role of the judge in the Human Rights Act era, Simon Brown LJ said:

[134] Note 130, above, para 24.
[135] Note 130, above, para 25.
[136] Note 130, above, paras 26-27. See also *Lynch v DPP*, note 84, above: 'Respect should be given to the way in which a democratically elected legislature has sought to strike the right balance' (per Pill LJ).
[137] Note 130, above, para 46.
[138] Note 130, above, para 47.

> Constitutional dangers exist no less in too little judicial activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to the decision-making of the courts.[139]

Parker LJ agreed with Simon Brown LJ that the scheme violated Article because it was disproportionate and unfair.[140] In an important dissenting judgment, however, Laws LJ laid down principles of deference which were designed to control judicial review of governmental decisions in the framework of the Human Rights Act. Courts in this country, Laws LJ said, have developed principles of administrative law to deal with the tension between the maintenance of legislative sovereignty and the vindication of fundamental constitutional rights.[141] First, a rule of construction according to which 'while the legislature possesses the power to override fundamental rights, general words will not suffice.' Second, where 'a statute admittedly travels in the field of a constitutional right, and the issue is whether the right is violated, or if it is whether the extent of the statute's intrusion is acceptable or justified.'[142]

In approaching this second area, in which courts will unavoidably be involved in trying to strike a balance 'between contradictory interests each possessing some substance of legitimacy, a crucial factor in the courts appreciation of the balance will be the degree or margin of deference it pays to the democratic decision-

[139] Note 130, above, para 54.
[140] Note 130, above, paras 182-189.
[141] On the early judicial attempts at dealing with this tension in the Human Rights Act era see, e.g., C.A. Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 LQR 248.
[142] Note 130, above, paras 73-74.

maker.'[143] Laws LJ went on to articulate four principles designed to guide the courts in assessing the appropriate degree of deference in a particular case: (1) 'greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure'; (2) 'there is more scope for deference where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified'; (3) 'greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more within the constitutional responsibility of the courts'; (4) 'greater or lesser deference will be due according to whether the subject-matter lies more readily within the actual or potential expertise of the democratic powers or the courts.'[144]

Applying these principles to the case before him, Laws LJ said that the need for deference in this case was particularly important given that there was 'more than one possible or reasonable view as to the balance to be struck between the efficacy of the policy aim here, and the interests and the fair treatment of potential responsible persons.' The principles of deference thus pointed to a conclusion that 'the democratic power's judgment upon the striking of the balance ought to be accepted.'[145]

While the conclusions reached by Simon Brown LJ and Laws LJ in the *International Transport* case certainly differ, they are undoubtedly engaged in the same enterprise: namely, the attempt to delimit the supervisory powers of the court in the

[143] Note 130, above, para 75.
[144] Note 130, above, paras 83-87.

context of the new Human Rights Act era. In this, they are joined by a plethora of judgments in the cases examined earlier in this section. There is little to separate, for instance, Dyson LJ's four principles of deference in the *Samaroo* case from Laws LJ's enunciation of deference principles in *International Transport*. (Or the comments of the judges in *Pearson* or *Kebilene* or *Alconbury*.[146]) Similarly, Simon Brown LJ's discussion of proportionality mirrors that in the discussions in *B v Home Secretary*.[147] Passages in the judgments of both judges in the case reflect the discussions of the need for principles of deference in *Samaroo*, *Rehman*, *Javed* and a host of other cases decided in the wake of the Human Rights Act.[148]

In the previous section, we saw that in a number of cases of judicial review that involved issues of rights the courts were concerned when setting the level of scrutiny appropriate to the particular case not just with the rights dimension but also with matters of what I called constitutional and administrative propriety. In this respect, then, decision-making in judicial review seems to be more complicated than the rights-based framework would seem to suggest. In this section, a number of cases were examined which have been decided since the passing of the Human Rights Act. In those cases too we saw consistently the same dimensions revealed in the decision-making, albeit tailored to reflect the particular legal and constitutional conditions of the new Human Rights Act era. Judicial debates over the scope of

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[145] Note 130, above, para 109.
[146] See also, e.g., F. Klug and K. Starmer, 'Incorporation through the "front door": the first year of the Human Rights Act' (2001) PL 654.
[147] Note 95, above. See also, e.g., M. Eliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 CLJ 301, pp. 302-308; I Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' (2002) PL 265.
[148] See, generally, Craig, note 99, above. For extra-judicial commentary on the same issue see, e.g., Lord Irvine, 'Activism and Restraint: Human Rights and the Interpretative Process' [1999] EHRLR 350; Lord Cooke, 'The British Embracement of Human Rights' [1999] EHRLR 243.

proportionality, deference, and respect for the primary decision-maker indicate a concern that human rights are protected, certainly, but also a highly context-sensitive approach to reviewing governmental decisions.

4. Conclusion

In this chapter the value-driven account of public law decision-making advanced by the rights theory was subject to critical examination. In section 1, the argument that the rights theory produces a value-driven approach to judicial review decision-making was defended. According to the rights theory, it was said, the appropriate level of scrutiny in a case of judicial review ought to depend on – or be a function of – the importance of the right at stake and the seriousness of the intrusion threatened by the contested decision. Given that this test requires the court only to look at the complainant's predicament when assessing the appropriate level of scrutiny, it propounds a decision-making structure that has essentially one dimension or axis.

In section 2, it was argued that the value-driven account entailed by the rights theory produces a skewed model of decision-making in judicial review. This is so because the values rights theorists regard as fundamental can, on examination, be shown to be exclusively pro-claimant: that is, they provide grounds for arguments against the decisions of public bodies and cannot be used by public bodies to defend those decisions. Given that these pro-claimant values are fundamental values within the

rights-based scheme, they should normally prevail over competing considerations, including those values (or 'defendants' interests') upon which public bodies may draw to defend impugned decisions. The effect of this is systematically to favour claimants over defendants. The value-driven model of judicial review advanced by the rights theory, then, cannot be a viable model of decision-making in public law.

In the first part of section 3, this analytical critique of the rights-based model of public law decision-making was supported by an analysis of five recent cases. It was argued that the rights theory cannot accommodate vital elements of the decision-making in all of these cases. In the second part of section 3, a number of cases decided under the aegis of the Human Rights Act were examined. The same elements - a concern to about constitutional balance and administrative propriety - were also present in the decision-making in those case, reflected in a discourse of deference to primary decision-makers and the legitimacy of judicial action.

Part III

Public Law

as

Legitimacy

Chapter 8

Public Law as Legitimacy I

Introduction

Part I of the thesis analysed the rights-based approach to public law, examining the work of three of its leading representatives - T.R.S. Allan, Sir John Laws and Dawn Oliver. The main points of contact in the work of those theorists were highlighted in chapter 4. Part II subjected some of the strands of the rights theory were subjected to critical examination. I argued, first, that the 'argument from history' was flawed; second, that judicial review does not correspond to a process of superior public reason; third, that the rights theory entails an unconvincing model of reasoning in judicial review.

The argument in Part III of the thesis moves away from criticism to address instead the question that arises from the criticism: namely, given that the rights theory fails in certain respects to provide a credible model of judicial review, how ought we to conceive of that process? It would be to go beyond the confines of the present inquiry to provide a comprehensive account of an alternative approach. Building on the criticisms identified in this thesis, however, it is possible to provide the outlines of an alternative theory.

1. 'Value-Free' Judicial Review? The *Ultra Vires* Model

In chapter 7, the rights-based model of public law was criticised on account of the *value-driven* approach to reasoning in judicial review cases which it entails. A '*value-free*' account of judicial decision-making might be a possible alternative to that approach. In defending an explicitly value-laden account of the process of decision-making in judicial review, rights theorists dismiss value-free judicial review as both impossible and undesirable.[1] That assessment is not disputed here. But the reasons why value-free judicial review fails need to be articulated.

The traditional English approach to judicial review, built around the concept of *ultra vires*, provides a model of decision-making which is ostensibly value-neutral.[2] The theory envisages a constitutional hierarchy in which Parliament stands at the apex. At the heart of this approach lies the Diceyan idea of indivisible sovereignty, according to which all law is supposed to conform to the dictates of Parliament as expressed in authoritatively posited law.[3] The *ultra vires* theory has the same

[1] D. Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' (1987) PL 543; P. Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 CLJ 63; Craig, 'Competing Models of Judicial Review' (1999) PL 428; Sir J. Laws, 'Illegality: The Problem of Jurisdiction' in M. Supperstone and J. Goudie (eds.), *Judicial Review* (2nd ed., 1997); J. Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' (1999) PL 448; D. Feldman, 'Convention Rights and Substantive Ultra Vires' in C. Forsyth (ed.), *Judicial Review and the Constitution* (2000).

[2] C. Harlow, 'A Special Relationship? American Influences on Judicial Review in England' in I. Loveland (ed.), *A Special Relationship? American Influences on Public Law in the UK* (1995) calls the traditional *ultra vires* theory the 'classic English' model of judicial review; M. Loughlin, *Public Law and Political Theory* (1992) uses the term 'the conservative variant of normativism'; D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986) refers to a 'private law model' of judicial review which he contrasts with a 'public law' model. See also, e.g., Galligan, 'Judicial Review and the Textbook Writers' (1982) 2 OJLS 257; J. Morrison and S. Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (1995), ch. 1; A.C. Hutchinson, 'Mice Under a Chair: Democracy, Courts and the Administrative State' (1990) 40 U of Toronto LJ 374; Hutchinson, 'The Rise and Ruse of Administrative Law and Scholarship' (1985) 48 MLR 293.

[3] A.V. Dicey, *Introduction to the Study of the Law and the Constitution* [1885] (10th ed., with intro. by E.C.S. Wade, 1959). On Dicey see, e.g., P. Craig, 'Dicey: Unitary, Self-Correcting Democracy and

normative component as Dicey's original constitutional theory: conformity to the legal dictates of Parliament, in harness with the political pressure generated in a properly functioning parliamentary democracy, and if properly enforced by the ordinary common law courts, will ensure that traditional liberties are not undermined.[4]

According to the *ultra vires* model, the purpose of judicial review is to uphold the rule of law by enforcing the will of Parliament, as expressed in legislation, against potentially aberrant or recalcitrant subordinate decision-makers. The court must ensure that those who exercise public powers do in fact have the legal - that is, (ultimately) Parliament-derived - authority they purport to have. Since the *ultra vires* theory conceives judicial review as a means of ensuring that administrative action conforms to relevant legislation, it offers a *formal* method of assessing the lawfulness of public decision-making. By formal, I mean that the court in principle should be able simply to examine the challenged action against the relevant provisions of the statute in order to make its assessment of legality.

Elliott makes this point succinctly in his account of what he calls the 'traditional *ultra vires* principle':

Public Law' (1990) 106 LQR 105; Craig, 'Public Law, Political Theory and Legal Theory' (2000) PL 211; C. Harlow, 'Export, Import. The Ebb and Flow of English Public Law' (2000) PL 240, pp. 240-247; D. Sugarman, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science' (1983) 46 MLR 102; Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in W. Twining (ed.), *Legal Theory and Common Law* (1986); Loughlin, note 2, above, pp. 140-162; P. McAuslan and J.F. McEldowney, 'Legitimacy and the Constitution: the Dissonance between Theory and Practice' in McAuslan and McEldowney (eds.), *Law, Legitimacy and the Constitution* (1985); McAuslan, 'Dicey and his influence on public law' (1985) PL 721; B.J. Hibbitts, 'The Politics of Principle: Alfred Venn Dicey and the Rule of Law' (1994) 23 Anglo-American LR 1; F. Mount, *The British Constitution Now* (1992), pp. 47-65.

> Orthodox theory holds that judicial review of the exercise of statutory power involves nothing more than the enforcement of parliamentary intention. Review lies on the sole ground that administrative action is ultra vires, or beyond the powers granted by Parliament, so that the familiar obligations which are incumbent on the executive – to observe the rules of natural justice; to take all relevant (but no irrelevant) considerations into account; to make only reasonable decisions, and so on – all spring from unwritten legislative intention.[5]

This analysis reveals two salient differences between the *ultra vires* theory and the rights theory. First, the *ultra vires* model assumes that the main threat to liberty comes not from the legislature but from subordinate decision-makers. Parliament, for theorists within the Diceyan mould, preserves rather than threatens liberty. Rights theorists take the legislature, like any other power-wielding institution besides the courts, to be a potential threat to the rights of individual citizens. Second, the hierarchical nature of the *ultra vires* model entails that Parliament is the only source of legitimate law. This is not true of the rights-based model. The rights theory develops a conception in which there are two orders of valid law: legislation and common law. Legislation may indeed be said to have a weaker claim to legitimacy since legal authority, within rights-based thought, is a function of moral legitimacy - in *ultra vires* theory, it is a function of the exercise of sovereign power - and, unlike judge-made law, legislation is not necessarily connected to fundamental principles.

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[4] See P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990), ch. 2; J. Goldsworthy, *The Sovereignty of Parliament* (1999), chs. 8 & 9.
[5] M. Elliott, *The Constitutional Foundations of Judicial Review* (2001), p. 23.

All contemporary commentators accept that, at least in its pure form, the *ultra vires* model of review is unworkable. Even those writers, like Christopher Forsyth and Mark Elliot, who defend the *ultra vires* principle do so while accepting that decision-making according to the model of judicial review to which that principle was originally linked is not a viable option. They advocate instead the continued use of the principle as a sort of ideological *motif*, a device capable of reinforcing in the minds of judges the idea that judicial review is essentially ancillary in nature.[6]

Why is the *ultra vires* model - in its pure form - unworkable? One reason must be that it allows insufficient scope for the influence of values in the judicial assessment of legality. It purports to operate a value-free scheme of review, but we expect our judges to do more than exercise a formalist or bureaucratic method of deciding judicial review cases. On the contrary, we expect judges to exercise prudence and judgement and to have recourse to relevant moral/political ideas and values, up to a point at least, in fulfilling their constitutional role.

While value-free judicial review is unworkable in that it places unrealistic restrictions on the process of decision-making in judicial review, it is also

[6] See C. Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 CLJ 63; Forsyth, 'Heat and Light: A Plea for Reconciliation' in Forsyth, *Judicial Review and the Constitution*, note 1, above; Forsyth, 'Collateral challenge and the foundations of judicial review: orthodoxy vindicated and procedural exclusivity rejected' (1998) PL 364; Forsyth, '"The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law' in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (1998); M. Elliott, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1998) 57 CLJ 129; Elliott, 'The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review' (1999) 115 LQR 119; Elliott, *Constitutional Foundations*, note 5, above. On the 'ultra vires debate' see Introduction, above.

undesirable as a normative ideal. To imagine, as the *ultra vires* theory does, that judges ought to operate a formalist legal system of bureaucratic justice is not a compelling picture the judicial review process. *Ultra vires* theory, since it regards Parliament as the sole source of normative authority, entails the absence of any judicial assessment of the relative importance of competing values in cases of judicial review. Were judges systematically to operate in this self-denying way, they would rightly be accused of dereliction of their constitutional duty. For, in order to fulfil their constitutional obligations, judges will often be compelled to act in a way which cannot be accommodated within a framework of formal justice.

An attempt to follow the *ultra vires* theory in practice would necessarily result in a complicated and convoluted system of public law jurisprudence due to the fact that the model purporting to govern decision-making in judicial review cases would in fact explain little and conceal much.[7] Judges pretending to speak the language of legal formalism would make decisions that would necessarily sometimes involve substantive considerations. And the mental gymnastics required to fit judgments based in part on such considerations into a conceptual framework which has no place for them is incapable of producing a coherent body of public law.[8]

[7] For commentary on the debate over the status and future of the *ultra vires* principle see, e.g., A. Halpin, 'The Theoretical Controversy Concerning Judicial Review' (2001) 64 MLR 500; N.W. Barber, 'The Academic Mythologians' (2001) 21 OJLS 369; Barber, 'Sovereignty Re-examined: The Courts., Parliament and Statutes' (2000) 20 OJLS 131; D. Dyzenhaus, 'Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review' in Forsyth, *Judicial Review and the Constitution*, note 1, above.

[8] For a similar argument, see J. Jowell and A. Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' (1987) PL 368.

2. Value-Driven Judicial Review? The Rights-Based Model

If a value-free approach is unworkable and undesirable, does it mean that we must adopt some form of value-driven conception of the judicial review process? In the previous chapter, a number of criticisms were levelled against the version of value-driven judicial review advanced by the rights theory. This critique will be extended and generalised here.

A general problem with the idea of value-driven judicial review, at least when it operates in conjunction with the idea that judge-made law constitutes a higher order of law, is that it seems to make judges ultimate arbiters of what is good in a political community. Value-driven judicial review entails, it would seem, that courts are to decide the relative weight of competing values by reflecting directly upon what certain fundamental moral principles require in particular cases. And, according to the rights theory, the courts have, or ought to have, the constitutional authority to enforce their conclusions irrespective of the nature of the opposition. But this is to go beyond what we would normally understand as the legitimate boundaries of the judicial role. Of course, we might ultimately have to accept that our assumptions on this matter are in need of readjustment. But it is an acceptable proposition that we should at first be reluctant to do so.

According to our general assumptions about the limits of judicial competence, judges do not decide about the priorities of values in this direct way. There are good reasons for this, reasons that are commonplace within public law scholarship. One

reason relates to a matter of constitutional principle. Judges are not elected to their positions by the public, nor are they accountable to the people in anything like the direct way democracy demands. A characteristic of the courts as an institution (and a reason for its distinctive strength) is that judges are seen as insulated, at least to some degree, from the ordinary political process. And this sense of judicial independence stems from the absence of a direct connection to the people. It is arguable, indeed, that to allow judges to have the ultimate say as to which values are to take precedence in cases of dispute is tantamount to the abdication of democracy in favour of a system of democracy layered with aristocracy (the decisions of the few best).[9]

Another reason underlying our sense of discomfort with value-driven judicial review is more pragmatic in nature and relates to the special features of a judge's expertise and training. Judges are trained lawyers rather than expert policy makers or political philosophers. They are selected on account of their legal wisdom and expertise rather than their ability to reason philosophically or their skills in practical politics. So to adopt a direct, value-driven approach to legal decision-making would demand skills which judges are not renowned for possessing. It requires them either to wrestle in the abstract manner of a moral philosopher in an attempt to divine the relative importance of moral principles, or to decide, in the way a politician might, which of an array of conflicting options should be followed in a particular case of dispute.

[9] For a similar argument, see, e.g., J. Waldron, *Law and Disagreement* (1999), pp. 264-265. On Aristotle's definition of aristocratic decision-making see R. Polin, *Plato and Aristotle on*

The previous section showed that value-free judicial review is not a viable option on which to base a theory of decision-making in public law cases. This section has cast further doubt on the credibility of the value-driven approach to judicial review of the sort advanced by the rights-based theory. Value-driven judicial review sits uncomfortably alongside our justifiable assumptions about the nature and limits of the judicial role. Moreover, there are serious objections - both of a constitutional and practical nature - to the idea that judges should generally make direct assessments about the relative importance of values.

3. Value-Influenced but not Value-Driven Judicial Review: Public Law as Legitimacy?

(a) Standpoint

In *Law's Empire*, Ronald Dworkin draws a distinction between internal and external analysis of law. The external point of view corresponds to the perspective of the sociologist or historian, who asks, for example, 'why certain patterns of legal argument develop in some periods or circumstances rather than others'. The internal point of view represents the standpoint of those who participate in legal argument. These people, Dworkin says, 'do not want predictions of the legal claims they will make but arguments about which of these claims is sound and why; they want theories not about how history and economics have shaped their consciousness but

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Constitutionalism (1998), ch. 9.

about the place of these disciplines in argument about what the law requires them to do or have.'[10]

Criticising in particular those theorists who ignore the internal - argumentative and normative – character of legal discourse, Dworkin argues persuasively that both 'perspectives on law, the external and the internal, are essential, and each must embrace or take account of the other.'[11] The theory of public law as legitimacy outline in this and the following chapters is an interpretative or hermeneutical[12] account of the subject. According to the general definition offered by Joseph Raz:

> an interpretation is an explanation of the work interpreted which highlights some of its elements and points to the connections and interrelations among its parts, and between them and other aspects of the world, so that (a) it covers adequately the significant aspects of the work interpreted ...; (b) it explains the aspects of the work it focuses on; and (c) in doing the above it elucidates what is important in the work.[13]

Public law as legitimacy aims to provide an interpretation of public law (more particularly the process of judicial review) which matches these criteria. In terms of

[10] R. Dworkin, *Law's Empire* (1986), p. 13. See also the similar division drawn by H.L.A. Hart in *The Concept of Law* (2nd ed., 1994), pp. 89-91.
[11] Note 10, above, pp. 13-14. Habermas adopts a similar starting-point: see *Between Facts and Norms*, (trans. W. Rehg, 1996).
[12] On the hermenuetical method see, e.g., H-G Gadamer, *Reason in the Age of Science* (trans. F.G. Lawrence, 1981); M. Moore, 'Interpreting Interpretation' in A. Marmor (ed.) *Law and Interpretation* (1995).
[13] J. Raz, 'Interpretation Without Retrieval' in Marmor, *Law and Interpretation*, note 13, above. See also, e.g., C. Geertz, *The Interpretation of Cultures* (1973); Geertz, *Available Light* (2000), ch. VI.

Dworkin's distinction, the account offered here seeks to combine external elements while capturing the essential internal or normative features of the discipline.[14]

(b) The Legitimacy Model in Outline

Existing theories of judicial review aim to identify the overriding *function* of public law. Although they recognise, no doubt, that public law serves a number of purposes, they try to pinpoint one dominant characteristic or feature which makes sense of the practice better than any other. So, the rights theory identifies as the central feature and dominant purpose of public law the protection of certain 'core' liberal values, expressed in the familiar catalogue of civil and political rights. By contrast, the *ultra vires* theory suggests that the judicial task of preserving individual liberties can be achieved primarily by ensuring that the boundaries of the powers accorded to public officials by a sovereign and publicly accountable Parliament are respected.

Both these theories agree that the underlying aim of a political community, at least in a liberal democracy, must be the preservation of liberty.[15] They disagree in important ways about the best means of achieving this general aim and, in particular, about the role courts, in the exercise of their public law jurisdiction, have

[14] See further, e.g., J, Eekelaar, 'Judges and Citizens: Two Conceptions of Law' (2002) 22 OJLS 497.
[15] In other words, both the *ultra vires* and rights theories of public law are liberal theories. On liberalism see, e.g., S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (1995); J.N. Shklar, 'The Liberalism of Fear' in Shklar, *Political Thought and Political Thinkers* (1998); P. Dunleavy and B. O'Leary, *Theories of the State: The Politics of Liberal Democracy* (1987); J. Raz, *The*

to play in ensuring that aim. So, while the rights theory thinks that courts have a pivotal - even dominant - role to play in ensuring that liberty is preserved, the *ultra vires* theory casts the courts in a role subordinate to the legislature. The remainder of this thesis stakes out an alternative conceptual framework for judicial review. While it remains consonant with the liberal premises that underpin the two rival theories, this approach builds on the insight that much of judicial review is centrally concerned with questions relating to legitimacy. As indicated above, the theory is interpretative in the sense articulated by Joseph Raz. It seeks to provide an account which covers adequately significant dimensions of the practice of judicial review, explains the dimensions it focuses on and, in so doing, elucidates what is important in the practice.

The theory begins by postulating that the primary function of the courts in public law constitutes a significant dimension of the general task of seeking to ensure the legitimacy of political institutions. But what does legitimacy mean in this context? A useful starting-point can be found in the work of the international law theorist Thomas Franck. According to Franck, the idea of legitimacy represents 'that attribute of a rule which conduces to the belief that it is fair because it was made and is applied in accordance with "right process".' Two things are implied, Franck says, when someone claims that a rule or its application is legitimate: 'that it is a rule made or applied in accordance with right process, and *therefore* that it ought to promote compliance by those to whom it is addressed.' In this way, the process of

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Morality of Freedom (1986); E. Barker, *Reflections on Government* (1942), chs. 1-3; J. Waldron, *The Dignity of Legislation* (1999).

legitimation serves 'to reinforce the perception of *communitas* on the part of the community members.'[16]

There are a number of significant aspects of this definition. First of all, it would seem from Franck's account that legitimacy claims tend to have both empirical and normative dimensions. They are empirical inasmuch as they tend to be grounded in the assertion that a rule or the application of a rule accords with another rule or rules. They are normative in the sense that they claim that the rule or application in question is right (usually on the very ground that it accords with a rule that is itself regarded as legitimate). Furthermore, Franck's account would indicate that legitimacy claims operate *cumulatively*: the task of assessing the legitimacy of a particular rule or rule application always occurs as part of a wider process. The discourse of legitimacy thus aspires to ensure the legitimacy not just of particular rules or rule applications, but also of the system of rules as a whole. This, I take it, is what Franck means when he talks about legitimacy claims serving to reinforce 'the perception of *communitas*'. The process of assessing rules and their application in particular cases of dispute – questioning in relation to specifics - is presumed to have a beneficial effect on the legitimacy of the political community in the long term.

This account can be elaborated by referring to the extensive analysis of the notion of political legitimacy of the LSE-based political scientist Rodney Barker. In his book

[16] T.M. Franck, *Fairness in International Law and Institutions* (1995), p. 26. Franck's rather proceduralist definition of legitimacy comes close to eliding the concept with the notion of due process. I argue in the following sections in favour of a broader conception of legitimacy capable of encompassing aspects of substantive as well as procedural fairness.

Political Legitimacy and the State, Barker emphasises that the idea of legitimacy is necessarily tied to the state and the authority of the laws made in its name. Having examined the theories of legitimacy articulated by (*inter alia*) Weber, Held and Luhmann, Barker maintains that a 'claim to or ascription of political legitimacy involves a statement about authority. It thus involves the belief that the state possesses some particular quality of its own which distinguishes it from other institutions.'[17] Because of this, he says, matters of legitimacy are said to be likely to arise more often 'not in the relations between state and subjects at all, but within the overall system or institutions of government.'[18]

According to Barker, then, primary responsibility for ensuring that the political system is perceived to be legitimate falls on government institutions. Government institutions alone have both the requisite self-interest to ensure that questions of legitimacy are frequently raised and the necessary power to effect changes to practices and decisions regarded as illegitimate. Being engaged in political science rather than normative political argument, Barker is not prescriptive when it comes to identifying the normative content of legitimacy. He recognises indeed that different legitimacy criteria may apply in relation to different types of political community.[19] To use Dworkin's terminology, Barker's analysis is an interpretation which is external to the practice that it interprets.

[17] R. Barker, *Political Legitimacy and the State* (1990), p. 194. See M. Weber, *Economy and Society: An Outline of Interpretative Sociology* (ed. G. Roth and C. Wintrich, 1978); D. Held, 'Power and Legitimacy' in Held, *Political Theory and the Modern State*, note 12, above; N. Luhmann, *A Sociological Theory of Law* (trans E. King & M. Albrow, ed. M. Albrow, 1985).
[18] Barker, *Political Legitimacy*, note 17, above, p. 196.

The German scholar Jürgen Habermas has developed a theory of law in which legitimacy plays a central role[20] and which attempts to combine empirical insight and normative argument. Habermas' theory is grounded in the idea that law, in modern societies especially, has a pivotal role in trying to secure the legitimacy of a political community. '[L]aw requires more than mere acceptance; besides demanding that its addressees give it *de facto* recognition, the law claims to *deserve* their recognition.'[21] It may have been possible in the past for laws to derive their legitimacy from a connection with a supposedly divinely-inspired natural law, but this option is no longer available. In the pluralistic conditions of modern societies, Habermas argues, 'such integrating world-views and collectively binding ethical systems have disintegrated.'[22] Instead, liberal theories maintain that law is legitimate by virtue of its connection with two sources, popular sovereignty and human rights. The system of democratic law-making, Habermas says, 'lays down the procedure that, because of its democratic features, justifies the presumption of legitimate outcomes.'[23] Human rights, on the other hand, 'guarantee the life and private liberty – that is, scope for the pursuit of life-plans – of citizens'[24]

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[19] Barker develops this non-normative and ruler- or government-focused analysis in his recent book *Legitimating Identities: The Self-Presentation of Rulers and Subjects* (2001).

[20] Barker, indeed, calls Habermas' account 'the most sustained examination of legitimacy since Weber': *Political Legitimacy*, note 17, above, p. 88.

[21] J. Habermas, 'Remarks on Legitimation Through Human Rights' in Habermas, *The Postnational Constellation* (trans. M. Pensky, 2001), p. 113.

[22] Habermas, 'Remarks on Legitimation', note 21, above, p. 115. See also *Between Facts and Norms*, note 11, above, pp. 138-139 & 145-147.

[23] Habermas, 'Remarks on Legitimation', note 21, above, p. 115. See also Waldron, *Law and Disagreement*, note 9, above.

[24] Habermas, 'Remarks on Legitimation', note 21, above, p. 116. See also J. Raz, 'Free Expression and Personal Identification' in Raz, *Ethics and the Public Domain* (1994). Rodney Barker criticises Habermas' conception of legitimacy for its failure to match empirical observations: *Political Legitimacy*, note 17, above, pp. 88-94. See also D. Held, 'Legitimation Problems and Crisis Tendencies' in Held, *Political Theory*, note 17, above.

Habermas believes that the relationship between these two sources - popular sovereignty and human rights - has yet to be understood fully by political philosophers. Theorists have tended to divide into two opposing camps. Civic republicans, on one hand, extol the "freedom of the ancients" and give 'the public autonomy of citizens priority over the pre-political liberties of private persons.' On the other hand, liberals in the Lockean mould invoke the danger of tyrannical majorities and assume the priority of human rights which are supposed provide 'inherently legitimate barriers that prevent[] the sovereign will of the people from encroaching on inviolable spheres of individual freedom.'[25]

Habermas takes issue with what he regards as the 'complementary one-sidedness' of these two traditions. Drawing upon his own theory of communicative action, he argues that it is in 'discourses' where it is possible for us to arrive at shared opinions by convincing one another about some issue through arguments.[26] Given this, the legitimacy of laws can be said to rest ultimately 'on an elaborate communicative arrangement: the forms of communication necessary for reasonable will-formation of the political law-giver, the conditions that ensure legitimacy, must be legally institutionalized.'[27] On this account, basic liberal and political rights are inseparable:

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[25] Habermas, 'Remarks on Legitimation', note 21, above, p. 116. On the liberty of the ancients and moderns see B. Constant, *The Liberty of the Ancients and the Liberty of the Moderns* [1820] (trans. and ed. B. Fontana, 1988); I. Berlin, 'Two Concepts of Liberty' in Berlin, *The Proper Study of Mankind: An Anthology of Essays* (ed. H. Hardy and R. Hausheer, 1997). On the relationship between republicanism and liberalism see, e.g., P. Pettit, *Republicanism: A Theory of Freedom and Government* (1997); D.T. Rodgers, 'Republicanism: the Career of a Concept' (1992) J of Am Hist 11.

[26] See also *Between Facts and Norms*, note 11, above, ch. 7; J. Habermas, *Legitimation Crisis* (trans. T. McCarthy, 1976), p. 111.

[27] Habermas, 'Remarks on Legitimation', note 21, above, pp. 116-117.

> The internal relationship between democracy and the rule of law consists in this: on the one hand, citizens can make appropriate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; on the other hand, they can realize equality in the enjoyment of their private autonomy only if they make appropriate use of their political autonomy as citizens.[28]

Habermas' theory is not without its critics. In relation to its historical dimension, David Zaret argues that Habermas is wrong to locate the genesis of a public sphere as a development of political and intellectual elites of the eighteenth century. An open, discursive, public space of the sort Habermas describes can be found in the context of the revolutionary arguments and counter-arguments of mid-seventeenth century England. 'The rationality and normative authority of public opinion', Zaret maintains, 'appeared in English politics, unevenly to be sure, long before they were celebrated in writings by Enlightenment philosophers.'[29]

Habermas has also been attacked on the philosophical front. From the perspective of systems theory, Gunther Teubner has argued that Habermas simultaneously overestimates and underestimates the role of law. 'On the one hand, Habermas overestimates the communicative rationality which is actually provided by legal procedure; on the other hand, he underestimates the single-mindedness of legal dynamics which does far more than just filtering out arguments.' As a result,

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[28] Habermas, 'Remarks on Legitimation', note 21, above, p. 118. See also *Between Facts and Norms*, note 11, above, ch. 3. For a sophisticated discussion of Habermas' ideas on legitimacy and law see D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (1997), pp. 235-247.

Teubner maintains, Habermas comes close to aping the work of New Republicans for whom 'constitutional law emerges as the locus of a social super-discourse of a fictitious civil society which takes over the tasks of integration of fragmented society.'[30]

However, the core idea in Habermas' theory – that the legitimacy of the laws of a political community is a function of the adequacy of the mechanisms for discussing and enacting such laws – is credible and has received considerable support. For instance, the French scholar Bernard Manin joins Habermas in his attack on the essentialist liberal tradition of Sieyès, Rousseau and Rawls which holds, according to Manin, that the unanimity of individual wills is a precondition of legitimate law-making in a democracy.[31] This precondition becomes problematic when we try to square it with the practical need to make laws with a reasonable degree of efficiency and the principle of majority decision-making. Instead, Manin argues, it is necessary to postulate that 'the source of legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself.'[32]

> As political decisions are characteristically imposed on *all*, it seems reasonable to seek, as an essential condition of legitimacy, the deliberation of *all* or, more precisely, the right of all to participate in deliberation. ... We must affirm, at the

[29] D. Zaret, *Origins of Democratic Culture: Printing, Petitions and the Public Sphere in Early-Modern England* (2000), pp. 6, 12-15 & 17-30.
[30] G. Teubner, '*Altera Pars Audiatur*: Law in the Collision of Discourses' in R. Rawlings (ed.), *Law, Society and Economy* (1997), p. 163. See also J. Rawls, 'Reply to Habermas' in *Political Liberalism* (1996).
[31] E. Sieyès, *Vues sur les Moyens d'Exécution don't les Représentants de la France Pourront Disposer en 1789* [1789]. (Emmanuel Sieyès was a leader of the French Revolution. Manin thinks that 'his importance as a political thinker is often underestimated. In fact, he is probably one of the first and

risk of contradicting a long tradition, that legitimate law is the *result of general deliberation*, and not the *expression of the general will*.[33]

The theory of judicial review outlined and defended in this part of the thesis draws on this body of theoretical work on legitimacy.[34] Franck tells us, first of all, that legitimacy claims are at once empirical and normative; and, second, that a challenge to a government decision or rule on the basis of legitimacy is part of a broader process which aims to legitimate the political community as a whole. Barker reminds us that legitimacy claims operate as part of a wider discourse that occurs principally between the institutions of government. The discourse theories of Habermas and Manin provide a philosophical framework within which the discourse of legitimacy can be situated. Habermas' account also attempts to give normative colour to the notion of legitimacy, at least as it applies in the context of modern liberal democracies. The search for legitimacy, he says, is a necessary characteristic of all modern law. And law is legitimate only if it originates in an open and fluidly discursive political environment. Such an environment, Habermas maintains, also ensures that the 'private autonomy' of citizens, expressed in terms of human rights, are fully respected and protected.

But how does this legitimacy-based framework relate to judicial review? I argued earlier in this chapter that, although persuasive in many respects, two of the most

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most important theoreticians of representative government.') J-J. Rousseau, *The Social Contract* [1762] (ed. M. Cranston, 1968); J. Rawls, *A Theory of Justice* (1971).

[32] B. Manin, 'On Legitimacy and Political Deliberation' (1987) 15 Pol Theory 338, pp. 351-352.

[33] Manin, 'On Legitimacy', note 32, above, p. 352. (Emphasis of orginal.)

[34] See also, e.g., J. Rubenfeld, 'Legitimacy and Interpretation' in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (1998). For a less positive view of the potential of the idea of legitimacy in

influential theories of judicial review currently available – the *ultra vires* and rights-based theories – ultimately fail to provide a credible explanation of what the courts do (and ought to be doing) in judicial review cases. To suggest that judicial review can best be understood when seen as operating as an important aspect of a wider process concerned with the legitimacy of laws - and through laws, the political community in general - may ultimately prove to be a better way of conceptualising the judicial review process. Some of the arguments that go some way to explaining why this might be so are advanced in this and the following chapter.

The conception of judicial review as legitimacy has the general character of a conversation between the courts on one hand and the institutions of government on the other. This reflects Barker's observation that legitimacy discourse occurs primarily between government institutions. From this perspective, the essence of a judicial review case is the submission of a government official or public body to the court and the acceptance by the official or body of the court's authority to scrutinise relevant aspects of its decision and decision-making processes. The intra-governmental dimension of judicial review is expressed in the UK context in the very terminology we use to describe judicial review cases: *R (on the application of a citizen) v Some Government Department or Public/Governmental Body*. The position of the aggrieved citizen or citizens in this equation is revealing. Having brought the case to the attention of the court, the intra-governmental dimension appears to take precedence; the essential feature of the case becomes whether the defendant public

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the context of law see, e.g., A. Hyde, 'The Concept of Legitimation in the Sociology of Law' (1983) Wisconsin LR 379.

body can convince the court that the challenged action meets certain standards of legality.

I will argue in some detail in the next section that the primary standards of legality against which the courts assess governmental action in judicial review cases can be interpreted in light of the notion of legitimacy. We can say something at this stage, however, about the way in which the general nature of the inquiry in judicial review cases is conceptualised within the legitimacy model. Legitimacy arguments challenge and test the legitimacy of particular rules, a process which is underpinned, Franck tells us, by the belief that the testing of rules and rule applications in particular cases can help to secure the legitimacy of the political community as a whole. Drawing inspiration from this account, we can argue that the immediate aim of the court in a judicial review case is to assess the legitimacy of the challenged rule or rule application and that the long-term reason for acting in this way is to ensure the legitimacy of the political community. (Or, to put the matter in more psychological terms, the understanding is that only through the testing of individual rules and decisions – in the courts and elsewhere - can sufficient trust be engendered among the citizens in their government.) It is this general function of judicial review that provides a possible basis or normative justification for the court's activity in judicial review cases. What might otherwise be viewed as an unacceptable exercise in aristocratic interventionism becomes a means of ensuring the propriety - and hence the longer-term sustainability - of the political community.

The approach outlined here is broadly consonant with the theory sketched by Robert Baldwin in part of his book *Rules and Government*.[35] That book has as its primary focus the complexity of rule-making and rule-following in the context of regulatory environments. Searching for a suitable theoretical framework in which to conduct his analysis, Baldwin addresses and dismisses as inadequate certain influential theories of the relationship between rules and discretion. Legalistic models of procedural justice, like the one advanced by the influential American scholar K.C. Davis,[36] tend to underplay the complexity of decisions and tend to see the 'decision' as existing as an isolated event separable from its administrative surroundings.[37] The interest-representation model of the type analysed by R.B. Stewart[38] looks instead 'to the affirmative side of government, which has to do with the representation of interests during the development of policies'.[39] The problem with this approach was its lack of normative content: it provides 'no comprehensive yardstick for assessing government procedures.'[40]

Baldwin argues instead in favour of an approach which 'explores the nature of legitimacy claims or attributions and employs the notion of a *discourse* of justification within which certain values operate.'[41] Baldwin isolates five distinct strands in this discourse of legitimacy as it pertains to the context of administrative justice. (1) The *legislative mandate claim* which attributes value to achieving objects

[35] R. Baldwin, *Rules and Government* (1995).
[36] K.C. Davis, *Discretionary Justice* (1971).
[37] Note 35, above, p. 24. See also, e.g., N. Lacey, 'The Jurisprudence of Discretion: Escaping the Legal Paradigm' in K. Hawkins (ed.), *The Uses of Discretion* (1992); D.J. Galligan, *Discretionary Powers* (1986).
[38] R.B. Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harv LR 1667.
[39] Note 35, above, p. 35.
[40] Note 35, above, p. 36.

that are set out in legislative form. (2) The *accountability or control claim* which seeks justification in the assent of the people but, instead of relying on the people's voice as expressed in Parliament, it looks to more narrowly-defined groupings as conduits for the democratic voice. (3) The *due process claim* which values the use of certain procedures that imply respect for individuals and fairness in government. (4) The *expertise claim* which acknowledges that, particularly in relation to complex and polycentric decision-making, many governmental and regulatory functions require that expert judgements be made and applied. (5) The *efficiency claim* according to which (a) stated objectives are being achieved in an effective manner and/or (b) that economically efficient actions are being taken.[42]

The following section of the chapter begins the process of elaborating and defending the legitimacy theory by arguing that the legitimacy theory is capable of explaining the process of judicial review as it currently occurs in the UK context more thoroughly than either of the rival accounts.

4. Explanatory Force of the Model of Public Law as Legitimacy

Legitimacy and the Three Heads of Review

I argue in this section that the legitimacy approach to judicial review is capable of making better sense of the existing taxonomy of review than alternative models. We

[41] Note 35, above, p. 41. For another analysis of regulation grounded in discourse theory see J. Black, 'Regulatory Conversations' (2002) 29 JLS 163.
[42] Note 35, above, pp. 41-46.

can begin with Lord Diplock's classification in the *GCHQ* case.[43] Argument in judicial review cases can be classified, Lord Diplock said, according to a three-part taxonomy: strict legality; procedural propriety; and substantive fairness or *Wednesbury* unreasonableness.

In reviewing under the *legality* head, the court aims to ensure that a decision is taken by the appropriate authority and that the decision-maker in question in fact has the power it claims to have.[44] In the *Fewings* case, for instance, the local authority was defeated by legality-based arguments. The court in that case decided that the decision to ban stag hunting ought to have been taken by Parliament rather than the council, and that the council did not have the power it purported to have because it had not borne the relevant statutory provision in mind during the relevant debate.

In reviewing under the *procedural propriety* head of review, the court examines the procedural context surrounding the challenged decision in order to ensure that it was reached with an appropriate degree of prior discussion, debate, and deliberation.[45] *Ex p B*, for instance, turned on the question of whether the consideration given by the Health Authority to stop B's treatment was sufficient in the circumstances.

A court reviewing under the *reasonableness* head of review aims to ensure that the decision reached was not, in substance, completely unreasonable or unfair.[46] (Or, to

[43] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. See also Lord Woolf, J. Jowell and A.P. Le Sueur, *De Smith, Woolf and Jowell's Principles of Judicial Review* (1999), p. 16; M. Fordham, *Judicial Review Handbook* (3rd ed., 2001), pp. 686-688.
[44] See *De Smith, Woolf and Jowell*, note 43, above, ch. 5.
[45] See *De Smith, Woolf and Jowell*, note 43, above, chs. 6-11.
[46] See *De Smith, Woolf and Jowell*, note 43, above, ch. 12.

use the more familiar terminology of the *Wednesbury* principle, that the authority did not act in a manner so unreasonable that no reasonable authority could have acted in that way.[47]) Thus, in *ex p Simms*, the Home Office's blanket prevention on journalists having access to prisoners was overturned because the policy impinged upon the important interest of obtaining redress of miscarriages of justice to such an extent that it was adjudged unreasonable.

How well does rights-based theory explain this tripartite classification? Under the existing taxonomy, review of the substantive content of decisions under the unreasonableness head was the poor relation of the other two heads. Accommodated under the restrictive formula of the *Wednesbury* test, unreasonableness review was effectively confined to the margins – to be used, in effect, as a residual category to be used when other types of argument failed.[48]

The value-driven method of reasoning entailed by the rights-based theory does not explain the heads of review currently operated by courts in this country. Value-driven review seems logically to demand a very different understanding of the relative importance of the three traditional heads of review. Given the idea - central to rights-based thought - of the common law as a higher-order body of (moral) law, the overriding concern of the reviewing court must be to ensure that the substance of governmental decisions approximates the principles enshrined in that body of law. On this account, it is the substance of decisions, seen in terms of fundamental moral

[47] *Associated Provincial Picture Houses v Wednesbury Corp.* [1948] 1 KB 223.
[48] See, e.g., *Champion v Chief Constable of the Gwent Constabulary* [1990] 1 WLR 1, 16 (per Lord Lowry); *Neale v Hereford and Worcester County Council* [1986] ICR 471, 483 (per May LJ); *R v Devon County Council, ex p G* [1988] 3 WLR 49, 51 (per Lord Donaldson MR).

principles, that counts. Matters of formal legality and procedural propriety are of decidedly secondary importance.

The *ultra vires* model does not fare much better when it comes to explaining the existing taxonomy. It has no problem in explaining the formal legality head of review. The difficulty arises in connection with the other two heads. Review for procedural fairness can be accommodated in the *ultra vires* model only by assuming that Parliament had tacitly required the powers it had delegated to be implemented in accordance with the rules of natural justice. But this accommodation is strained. The rules of natural justice and principles of procedural fairness, as Galligan and Craig have pointed out, are indisputably judge-made.[49] Given this, there seems little point in adhering to the fiction of tacit consent. (Other than the need to reconcile decisions in terms of an - in any case redundant - conceptual framework.[50]) The *ultra vires* model has even greater difficulty in explaining review for substantive fairness, in however limited a form. Given that the *ultra vires* theory presupposes that Parliament is the only source of legitimate authority, there seems to be no alternative basis from which a reviewing court might assess the substantive merits of an exercise of power.

The legitimacy model, by contrast, has little difficulty in explaining the tripartite scheme of review currently operated by the courts. Each of the existing heads of review outlined by Lord Diplock can be understood in terms of the discourse of

[49] D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1986), pp. 355-379; P. Craig, 'Competing Models of Judicial Review' (1999) PL 428, p. 429. See also *Cooper v Wandsworth Board of Works* (1863) 14 CB 180.
[50] See the argument in section 1 of this chapter, above.

legitimacy. Reviewing the *strict legality* of a challenged decision can be explained as the means by which the court checks the formal legitimacy of a challenged decision. Such scrutiny is legitimacy-based in that it is premised on the notion that it is illegitimate for a public official to act outside the scope of the powers granted to him or her by the legislature. The actual pedigree or provenance of the law underlying a claimed exercise of power is important in terms of democratic theory. Democracy is a system in which power is assumed to vest *ab initio* in the people; that power is held on trust for the people by a representative legislature.[51] On the democratic model, exercises of public power must be open to scrutiny by the people and that scrutiny must be capable of resulting in the removal from office of the members of government (at periodic intervals). For this system of democratic accountability to work, some way must be found to hold those officials who have been granted power by the legislature to the terms of their grant. To prevent public officials from acting outside the scope of their powers is designed to ensure the integrity of a system for making politicians accountable for the exercise of power they hold on trust for the people. Democracy, in other words, is a system which jealously guards grants of power; and the need to secure formal legality, just as much as the desire to foster due process, is part of the process of ensuring the legitimate functioning of the democratic system.

Review under the *procedural fairness* head can be seen as a reflection of the legitimacy model's concern with matters of constitutional and administrative

[51] The idea connects with the notion of a social contract: see, e.g., Rousseau, *Social Contract*, note 31, above; I. Kant, 'On the Common Saying "This may be true in theory, but it does not apply in practice"' in *Kant: Political Writings* (ed. H. Reiss, trans. H.B. Nisbet); H. Höpfl and M.P. Thompson, 'The

propriety. Attempting to ensure due process in decision-making procedures and processes is an important aspect of the quest to ensure the legitimacy of governmental decision-making.[52] Theorists like Habermas and Manin identify a direct connection in modern societies between the discursive openness and participative nature of decision-making contexts and the legitimacy of laws. This concern to protect the 'public autonomy' of citizens is a consequence, Habermas argues, of the recognition of the impossibility of any form of divinely-inspired natural law. The legitimacy approach, then, has little difficulty in accommodating the idea that a concern for 'fair hearings' and suchlike should be an important dimension to judicial review cases.

Review under the third category mentioned by Lord Diplock in *GCHQ* - *unreasonableness* - can also be said to be consonant with the legitimacy approach. The idea that government cannot legitimately interfere with certain interests vital to the preservation of an individual's freedom is a core feature of liberalism. No political community that aspires to be legitimate – at least no liberal democratic one - can be seen to violate what Habermas refers to as the 'private autonomy' of its citizens to any significant extent. Two different strands of liberal thought can be said to unite on this point. 'Ethical liberals' like Locke, Kant and Rawls assume the sanctity of the individual.[53] They argue that there are certain qualities or features of the human condition which ought under no circumstances to be infringed by state

History of Contract as a Motif in Political Thought' (1979) 84 Am Hist Rev 919; M. Loughlin, *Sword and Scales* (2000), ch. 11.

[52] See further, e.g., J. Mashaw, *Due Process in the Administrative State* (1985); R. Dworkin, 'Principle, Policy, and Procedure' in C. Tapper (ed.), *Crime, Proof, and Punishment: Essays in Memory of Sir Rupert Cross* (1981).

action.[54] 'Sceptical liberals' like Hume, Madison and Mill[55] start from a generalised distrust of the human capacity consistently to make good decisions. They believe in the essential fallibility of political institutions and decision-makers.[56] As liberals, they are concerned to ensure that individuals are protected from those who wield power. But they refuse to accept what they see as the unconvincing philosophical dogmatism of the ethical liberals. They reject, in Habermas's words, 'the metaphysical assumption of an individual who exists prior to all socialization and, as it were, comes into the world already equipped with innate rights.'[57]

The legitimacy model is not only capable of accommodating the existing nature of the tripartite classification of argument in judicial review cases, it is also capable of explaining the absence of any real judicial 'ranking' of the three categories of review. We have seen that the *ultra vires* theory encounters substantial conceptual difficulties when attempting to accommodate review under the procedural fairness and unreasonableness heads. Rights-based theory, by contrast, entails a value-driven approach that would have the effect of making review for substantive reasonableness the central and overriding concern of the judicial review process. The current practice of the court does not accord with either of these interpretations. Contrary to the *ultra vires* theory, there was nothing untoward or inappropriate with the way in

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[53] S. Shiffrin, 'Liberalism, Radicalism and Legal Scholarship' (1983) 30 UCLA LR 1103, p. 1107. See also chapter 4, below.
[54] See also, e.g., M.J. Detmold, 'Law as Practical Reason' (1989) 48 CLJ 436; Detmold, *The Unity of Law and Morality* (1984).
[55] T. Hobbes, *Leviathan* [1651] (ed. R. Tuck, 1995); J. Madison, A. Hamilton and J. Jay, *The Federalist* [1787-8] (ed. W.R. Brock, 1992); J.S. Mill, *On Liberty* [1859] (ed. G. Himmelfarb, 1974).
[56] See, e.g., Holmes, *Passions and Constraint*, note 15, above, chs. 1-3 & 6; R. Hardin, *Liberalism, Constitutionalism and Democracy* (2000).
[57] Habermas, 'Remarks on Legitimation', note 21, above, p. 126. For a critique of essentialist liberalism see, e.g., K. Marx, 'On the Jewish Question' in J. Waldron (ed.), *Nonsense On Stilts: Bentham, Burke*

which the court dealt with matters of reasonableness or procedural fairness, for instance, in the cases analysed in chapter 6. Contrary to rights-based theory, the courts have historically been wary of substantive review. This position seems to be undergoing some degree of revision. The formerly monolithic *Wednesbury* test appears to be on the verge of fragmenting into different standards of substantive review. In a number of recent cases, the courts have said that they are prepared to impose a more stringent test for unreasonableness in cases that involve human rights.[58] On the other hand, they have also said that they are prepared to relax the standard even beyond the generous limits of the original test in cases where matters of public policy (particularly financial policy) are concerned.[59] Nothing in these developments would suggest, however, that the category of substantive review is about to assume a priority over the other heads of review articulated by Lord Diplock. Despite recent developments, then, the courts show no signs of setting up unreasonableness as a principal category of review. The legitimacy approach, by contrast, entails no such ranking between the various heads of review.

Legitimacy and the Courts

Identifying legitimacy as of central concern of judicial review enables us to bring to the fore a characteristic feature of the process of argument which is downplayed within rights-based thought. The analysis of judicial review cases in chapters 6 and 7 revealed that courts are concerned with assessing not only the appropriateness of

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and Marx on the Rights of Man (1987); R. Rorty, 'Human Rights, Rationality, and Sentimentality' in Rorty, *Truth and Progress* (1998); A. MacIntyre, *Whose Justice? Which Rationality?* (1988).

[58] See, e.g., *R v Ministry of Defence, ex p Smith* [1997] 1 All ER 257.

the decision under challenge but also, and at the same time, the appropriateness of judicial intervention in the decision-making environment from which the decision originated. This second dimension of the cases is not easily contained within the rights theory which, as we argued in chapter 4, fails to articulate a credible position on the issue of what might be called the jurisdictional reach of judicial review.

The conclusions drawn from the earlier survey of cases can be reiterated here. In *ex p Simms*, for instance, the House of Lords thought that judicial responsibility over the criminal justice system justified (or was a significant reason for) the imposition of a high standard of scrutiny. The central issue dividing the judges in *ex p Fewings* was the role the court ought to play in relation to the tripartite relationship between local citizens, local authority, and the national legislature. The idea of 'constitutional balance', this time concerning the court and Parliament alone, was the decisive issue in *ex p Smith*. In *ex p B*, the Court of Appeal parted company with the first instance judge on the issue of the appropriate standard of scrutiny for the decision of a health authority taken in an inescapably polycentric situation and which called for a high level of specialist expertise.

From our analysis of these and other cases, we are in a position to make a general assessment of the importance of what might be called issues of constitutional and administrative propriety in the decision-making in judicial review cases. These cases show that is not possible to argue that these matters are simply a peripheral features of judicial review cases. This cannot be true since these issues were often of vital

[59] See, e.g., *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] AC 521.

significant to the outcome of a case: cases like *ex p Smith* would have been decided otherwise but for the strength of the countervailing 'constitutional balance' argument. And, even in those cases where this was not the case, the arguments adduced by litigants and the reasoning of the judges would have been very different.

Can this dimension of argument - and thus the complexity of judicial review as a whole - revealed in the cases be adequately recognised by the legitimacy theory? It as at least possible that an approach grounded in the idea of legitimacy provides a means of making sense of the fact that the reviewing court assesses the limits of its own jurisdiction *as an essential part of* its ordinary decision-making process. On the approach advanced here, legitimacy arguments must attach to all exercises of power by public officials and institutions. To allow a public institution to be exempt from the discourse of legitimacy would be to make a mockery of the idea of legitimacy itself. (And legitimacy, we saw from the theories of Habermas and others upon which this model rests, is vital to the proper functioning of modern liberal democracies.) The court itself is a public institution which wields considerable public power. The legitimacy approach entails that the court too must be subject to the arguments grounded in legitimacy. To put it another way, we can say that on this account *the court is subject to the same general discourse of legitimacy to which it subjects those bodies it reviews.*

There is no reason why legitimacy claims should not take different forms in different contexts, according to nature of the decision-maker under challenge and the general decision-making context. It is more likely, for instance, for arguments

about the formal legality (*vires*) of a decision to attach to subordinate decision-makers than to the legislature. And it is at least possible that arguments about substantive legality have more relevance in relation to those who are responsible for the setting of policy higher up the decision-making chain. The court is arguably unique in that no other body has the capacity to declare the decisions of the court to be unlawful.[60] (Although there are, of course, a number of other ways for this sort of argument to be voiced publicly.) The absence of such a body, combined with the fact that - on a Habermasian model – the application of law in liberal democracies necessarily entails a concern for legitimacy, means that the courts have an additional responsibility to assess the legitimacy of its own decisions.

Understanding judicial review in legitimacy terms reveals and makes sense of an essential part of the process. Courts are not only concerned with the legitimacy of the decisions of public decision-makers, as we have suggested in the previous sections of this chapter. They are also concerned, at the same time, with the legitimacy of their own (possible) intervention in the decision-making contexts the products of which they review. This analysis helps us to understand more fully what was going on in the cases discussed in the previous chapters. It also helps us to understand otherwise cases, like *Anisminic* and *Padfield*, in which the primary (and controversial) issue is the jurisdictional reach of the court.[61] It also provides a means of understanding those decisions in which, contrary to the exhortations of the rights-based theory, a court decides that the contentious substantive (moral or political)

[60] Although this is not always and necessarily true in the UK context. Parliament will on occasion adopt the mantle of a supreme court: see, e.g., the Burmah Oil case saga.
[61] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

nature of the issue in question provides a good reason for them to adopt a 'hands-off' approach. It may be possible to argue that this is really what occurred in *ex p Smith*. On this reading, the case was decided as it was because the courts, believing the matter to be too contentious for them to decide, passed the responsibility for settling it back to Parliament.

Legitimacy and the Nature of Judicial Review Argument

The argument so far has been that situating judicial review in the context of a more general discourse of legitimacy may help us to explain what the analysis of the cases revealed to be the Janus-faced nature of judicial review. I have argued that this approach can make sense of the existing tripartite categorisation of judicial review claims. And I have argued that it also makes sense of another important feature of judicial review cases: namely, the concern of the courts to assess the legitimacy of its own (possible) intervention in various decision-making contexts. In this section, this investigation will be pursued further by asking whether the legitimacy approach can make sense of what we characterised in chapter 6 as the curiously removed or intermediate nature of argument that is typical of judicial review. It may be recalled that the rights theory, which seems to entail a direct, moral inquiry into the substance of a challenged decision, was criticised for its inability to explain this distinctive feature of the cases.

Drawing on the earlier analysis of the cases, we can illustrate the removed or intermediate nature of judicial review argument. In *ex p Simms*, for example, although the claimant prisoners were protesting about the decision to prevent them talking to journalists and ultimately that they had been wrongfully convicted, the argument in the case focused on the legality of the rules under which the decision to prevent the prisoners' access to journalists had been taken. Similarly, the court in *ex p Fewings* did not examine the moral arguments for and against deer hunting, but focused instead on the powers of the council and to the relationship between Parliament, council, and court. The judgments in *ex p B* were directed towards the appropriate level of judicial scrutiny on a matter involving a high degree of specialist expertise in an area of scarce resources. Although the judgments in *ex p Smith* did touch on the moral legitimacy of the policy to ban homosexuals from serving in the Armed Forces, they focused more attention on the question of which institution – Parliament or the courts - had the authority to reassess the policy.

These types of argument are of the essence of judicial review. But we found that they were not easily explicable in terms of the model articulated by rights theorists. In particular, the rights-based approach fails to accommodate the fact that judicial review argument is concerned, generally speaking, with the legitimacy of governmental decision-making rather than the task of deciding which of a number of competing moral principles ought to preside in a given situation. By contrast, the theory articulated here presupposes that the basic responsibility of the court when engaged in judicial review is to assess the legitimacy of the challenged governmental action. The process of argument revealed in the cases can be said to match this

understanding of the function of judicial review. It explains, first of all, the reason for the focus on the government rules and the decisions of public officials. Legitimacy claims relate above all to the relationship between various government institutions and, for that reason, concentrate primarily on the behaviour of public officials and bodies. It also explains the removed or intermediate character of argument in judicial review. Legitimacy claims are at once empirical and normative. The character of argument in judicial review cases also has a Janus-like quality. Courts are concerned both the application of rules (do rules or rule-applications accord with other rules taken to be legitimate?) and the normative content of those rules (are these rules or rule-applications fair or just, when set against certain accepted standards?).

5. Conclusion

In this chapter, argument in this thesis turned from critical analysis to positive model-building. In the first two sections of the chapter, I argued that both value-free and value-laden conceptions of the process of judicial review failed to match our justifiable assumptions about the constitutional role of the courts.

In the third section, I began to articulate a model of the process of judicial review which could accept the influence of values but which was not value-driven. This process of model-building, it was said, would be a hermeneutical exercise; it would act as an interpretation of the practice of judicial review. A conception of judicial

review based on the notion of legitimacy was then outlined which drew on the work of Franck, Barker, and Habermas in particular.

The explanatory potential of the legitimacy model was tested in section 4. I argued that the model fitted the existing tripartite taxonomy operated by the courts. It also explained the reflexive (or Janus-faced) and removed (or intermediate) character of argument observed in judicial review cases.

Chapter 9

Public Law as Legitimacy II

Introduction

In the previous chapter, the outlines of a theory of judicial review were articulated, the core feature of which was the conceptualisation of judicial review in terms of a discourse of legitimacy. The key features of this discourse are as follows. It is, first and foremost, intra-governmental; it consists primarily of a conversation between various institutions of government about the legality or appropriateness of various governmental acts and decisions. (This conversation will often be sparked by a claim from a non-governmental source – often the citizen – that a governmental body has acted improperly. This is generally the case in judicial review actions.) The immediate aim of this process is to challenge and assess the legitimacy of individual rules and rule-applications. But what motivates this process of testing individual cases is the need or desire to ensure the legitimacy – and hence the longer-term stability - of the political community. The discourse theories of Habermas and others contributed to the normative dimensions of the theory. It was suggested that law, in the context of liberal democracies, can be legitimate only if it respects the public autonomy and private autonomy of the citizen.

It was argued in the last chapter that this model may provide a more useful way of understanding and explaining certain key features of the current practice of the courts. In this chapter, I will argue that the legitimacy model may have potential to

offer a more plausible and attractive normative justification for the practice of judicial review.

1. Normative Arguments for the Model of Public Law as Legitimacy

(a) Legitimacy and Disagreement

In this section, it will be suggested that the model of public law as legitimacy may be capable of accommodating pluralism and the fact of political and moral disagreement more adequately than existing theories. In his book *Law and Disagreement*, Jeremy Waldron argues persuasively that disagreement ought to be regarded as one of the essential 'conditions of politics' which theorists are obliged to take seriously when constructed their accounts of law and politics.[1]

Rights-based theorists argue that a set of values, shared by society, underlies and explains judicial review of governmental action. These values are considered to comprise a superior set of political standards; they can be regarded as fundamental precisely because they represent the 'deep-rooted morality' of the community. These shared, fundamental values are said to find their most consistent and direct expression in the principles developed incrementally in the jurisprudence of the common law courts. Thus, when governmental decisions are challenged in the courts, they are assessed essentially to see whether they comply with these

[1] J. Waldron, *Law and Disagreement* (1999), pp. ZZ. See also, e.g., J. Raz, 'Facing Diversity: The Case of Epistemic Abstinence' in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994); Raz, 'On the Authority and Interpretation of Constitutions' in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (1998), p. 155.

fundamental values. This conception of the nature and status of values provides one of the main reasons why rights theorists regard value-driven judicial review as normatively justified.

If we take pervasive disagreement to be one of the conditions of politics, however, we may have reasons for doubting the credibility of the rights theory on this point. Rights theorists provide no empirical support for their – somewhat counterintuitive - contention that there exists (in UK society?) something along the lines of a thoroughgoing network of shared and historically-grounded moral/political principles. The empirical work that exists in the UK (and US) context does not support this position.[2] And the liberal pluralist approach would deny both the descriptive and normative validity of the rights-based assumption of shared values.[3] In chapter 5, we examined the evidence adduced by rights theorists in order to sustain their position. We argued that this evidence – drawn in the main from seventeenth central legal sources and especially the dicta of Sir Edward Coke – was inadequate to perform the task rights theorists require of it. It was not persuasive as a matter of history. And, even if it were true that legal decision-making in England during the early part of the seventeenth century was underpinned by a well-

[2] 'That value consensus does not exist o a significant extent in Britain (and the United States) is confirmed by Mann (1970) in a survey of a large variety of empirical materials based on research conducted in the later 1950s and early 1960s': D. Held, 'Power and Legitimacy' in *Political Theory and the Modern State* (1989), p. 106.

[3] In contemporary modern pluralist societies, conflicts between conflicting moral positions are particularly acute in relation to freedom of religion. See, e.g., M. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000), ch. 3; S. Poulter, 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 OJLS 43; A. Feldman, 'Othering Knowledge and Unknowing Law: Oppositional Narratives in the Struggle for American Indian Religious Freedom' (2000) 9 Soc and Legal Stud 557; *Ahmad v Inner London Education Authority* [1978] QB 36; *Lemon v Kurtzmann* 29 L Ed 2d 745 (1971).

developed set of shared values, that in itself was no reason for assuming that this is still the case today.

We also saw, in our analysis of a number of judicial review cases in chapter 7, that the courts do not appear to decide cases in the way the rights-based approach, grounded in the notion of shared fundamental values, would suggest. It would seem from the case analysis that courts in practice tend to display sensitivity towards the specific context from which the challenged decision under challenge arose. The fact that the policy challenged in *ex p Simms* involved matters of criminal justice at the time of the application had a substantial bearing on the reasoning and the outcome of the case. The fact that the policy banning homosexuals from the armed forces was under review by the government had a distinct bearing on the outcome of the *Smith* case. *Ex p B* was marked by its sensitivity to the administrative background to the decision to withdraw funding for B's further treatment. And the tripartite relationship between council, Parliament, and court was a central feature in *ex p Fewings*.

It is possible to argue that this judicial awareness of the decision-making contexts indicates a more general awareness of the presence of competing discourses. Each of the four cases referred to above involved the court having to confront various arguments drawn from conflicting streams of normative authority. In *ex p Simms*, for instance, the court was faced with a number of conflicting arguments: an argument grounded in the discourse of rights; another based on the principle that government ought to be allowed to govern (itself related to the doctrine of

legislative sovereignty); and one reflecting the idea that judges have responsibility for maintaining the criminal justice system. Likewise, in *ex p B*, rights discourse conflicted with ideas of economic necessity and administrative expertise, and, in *ex p Smith*, arguments about rights and fairness competed with the notion of parliamentary sovereignty.

The reaction of the court in these cases was not, as the rights theory would predict, to assess the challenged decision against supposedly transcendent common law norms. Had this been the case, the results of many of the cases, and the reasoning in all of them, would have been markedly different. But can the legitimacy approach accommodate the fact of disagreement and the evidence provided by the case studies? We have argued that a central normative component of the legitimacy approach is the idea of discourse between conflicting political perspectives - or what Rawls would call different conceptions of the good. On this account, when it assesses the legality of a challenged decision, one of the primary tasks of the court is to assess the whether the decision-maker has adequately taken into account other relevant perspectives and arguments. In other words, the court must assess whether the decision-maker in question has taken appropriate action to deal with the fact of disagreement. And this position reflects one of the oldest and most established principles of administrative law: that public bodies have a duty to hear the other side - *altera pars audiatur*.

The importance of the maxim *altera pars audiatur* in the context of modern pluralist societies has been emphasised in recent work by Gunther Teubner. Judicial review

is characterised by Teubner as a body of *collision rules in the law of conflicts*.[4] He suggests that modern society is characterised by a plurality of competing discourses – economics, politics, science and technology, the health sector, the media, the law - each of which claims hegemony.[5] We are faced, Teubner suggests, with a legal pluralism which is radical not just on account of the existence of a 'plurality of local laws, of ethnic and religious rule-systems or of institutions and organisations' but also because of the presence of a 'plurality of incompatible rationalities, all with a claim to universality within a modern legal system.'[6]

One (flawed) reaction to this radical pluralism is to try to devise a unified theory of law. Teubner identifies a series of 'colonialist claims [which] come today from an economic theory of law, a political theory of law, and from a moral theory of law.'[7] (The rights theory can be seen as one such attempt.[8]) But this proposed solution simply attempts to accord normative priority to one of the competing discourses and, because the conflict between normative discourses is irreducible, it is a non-starter. Teubner suggests, instead, that we try to 'work out the concept of a new law of conflicts.'[9] By this he means that, as a first step, we should stop trying to reduce the conflict between discourses and simply accept the fact of permanent conflict.

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[4] G. Teubner, '*Altera Pars Audiatur*: Law in the Collision of Discourses' in R. Rawlings (ed.), *Law, Society, and Economy* (1997), p. 173. See also Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) L & Soc Rev 239.

[5] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (ed. G. Roth and C. Wittich, 1978); J-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (trans. G. Bennington and B. Massumi, 1984); N. Luhmann, *A Sociological Theory of Law* (trans. E. King and M. Albrow, ed. M. Albrow, 1985); M. King and A. Schütz, 'The Ambitious Modesty of Niklas Luhmann' (1994) 21 J of L & Soc 261.

[6] Teubner, '*Altera Pars Audiatur*', note 4, above, p. 157.

[7] Teubner, '*Altera Pars Audiatur*', note 4, above, p. 157.

[8] See, e.g., R. Dworkin, *Law's Empire* (1986).

This realisation is not the end of the matter. While, on the one hand, law cannot solve conflicts between rival normative discourses 'at the highest level of universal justice', since it 'does not perceive the different discourses as a conflict between universalities but only through the looking glass of a local conflict and resolves it as this level',[10] it does, on the other, incorporate incrementally and eclectically some of the arguments provided by other discourses. Just as the international law of conflicts 'constructs, in cases which touch upon foreign law, a mixture of domestic and foreign rules from the perspective of the local forum', so too does the court when faced with arguments drawn from conflicting normative discourses decide 'on the basis of the current law, which arguments are admissible, which aspects of the foreign argument are legally relevant and which are not, how priorities are set and how conflicting perspectives are treated.'[11] This conception of law implies that legal argument should focus on the potential consequences of legal decisions on the normative discourses with which the law is faced in a particular case. This means, in turn, that the implicated discourses must have an audience before the court can make a decision on the collision of discourses.[12]

The rights theory and legitimacy approach thus offer very different conceptions of the role of judicial review in the context of political disagreement. The legitimacy model replaces a model based on judicial fiat with the possibility of productive dialogue. It rejects the rights theory's insistence that a set of shared values, derived from the deep-rooted morality of the people and recognised by the common law,

[9] Teubner, '*Altera Pars Audiatur*', note 27, above, p. 159.
[10] Teubner, '*Altera Pars Audiatur*', note 4, above, pp. 163-164.
[11] Teubner, '*Altera Pars Audiatur*', note 4, above, p. 165.

ought to form a hegemonic standard against which all governmental action is to be assessed. It adopts instead Habermas' idea that only in properly constituted political discourse can the public autonomy of individuals be respected and their private autonomy protected. And it accommodates Teubner's account of judicial review as a body rules in the context of a modern political community beset by conflict. On this account, judicial review is a process which aims to assess whether decision-makers have dealt appropriately in the face of the competing streams of normative authority in which they operated. (The longer-term aim being the search for principles by which such collision might be accommodated.) The legitimacy theory seems at least potentially consonant, then, with the understanding of society as marked by a high degree of political disagreement.

(b) Legitimacy and the Limits of Judicial Review

In the previous chapter, I argued that one of the distinctive aspects of judicial review is what could be called its reflexive or Janus-faced nature. By this, I mean that reviewing courts seem to think quite systematically about the legitimacy or appropriateness of their own (possible) intervention in the administrative and constitutional context under examination. I argued further that this characteristic quality of argument in judicial review cases makes sense under the legitimacy model in a way which is not true of its rivals. The legitimacy model assumes that all public or governmental institutions are obliged to subject themselves to legitimacy claims.

[12] See also H. Collins, 'Democracy and Adjudication' in N. MacCormick and P. Birks (eds.), *The Legal Mind: Essays for Tony Honoré* (1986).

(This obligation, I have suggested, which rests ultimately on the belief that the continuing legitimacy of the political community as a whole can be assured only through challenges in individual cases.) And the court, as an institution that wields public power, must be subject to the same sort of legitimacy-based strictures.

The potential benefits – in normative terms – of this understanding of judicial review will be elaborated in this section. The main advantage this understanding of judicial review has over rights-based theory is that it provides a basis for critical arguments about the courts' own use of power. This type of criticism is a standard feature of judicial review cases. In the cases examined in chapter in Part II of the thesis, we saw a number of examples of judges themselves using this method of criticism in the cases examined in this thesis. In *ex p B*, the Court of Appeal argued that the first instance judgment of Laws J had failed to take sufficient account of the fact that the health authority was the appropriate institution to assess B's case, given the specialised and irreducibly polycentric nature of the case. Similarly, in *ex p Fewings*, the Court of Appeal - Simon Brown LJ in particular - criticised Laws J's first instance decision on the ground that it had failed to take into account the importance of local democracy and had neglected to explain precisely why the court was in a better position in this case to weigh up the competing interests in that case.

The cases show that the courts frequently – I would argue systematically - assess the appropriateness of their own intervention into the decision-making context under examination. This reflexive process – the court's self-examination - also provides a basis from which to formulate arguments, like those of the Court of Appeal in *ex p*

B and the *Fewings* case, which mitigate against intervention in a particular decision or decision-making environment. This important dimension of judicial review argument, I would suggest, cannot be accommodated properly within the rights theory. According to that theory, courts in judicial review cases apply a matrix of fundamental common law values and rights to the situation before them. These values and rights are taken to be both morally and constitutionally overriding; they constitute, in fact, a higher-order of law to which all governmental decisions are subject. While this conception provides a ready foundation for any argument wishing to criticise the court for its failure adequately to protect fundamental values, it contains nothing that would help ground the argument that the proposed action of a court would be inappropriate.

The legitimacy approach appears to be capable of accommodating, in a way that the rights theory cannot, the important reflexive nature of argument in judicial review cases. The legitimacy model provides, in particular, a principled basis from which to criticise the court's own arguments and decisions. It thus helps to explain the way in which – and some of the reasons for which – courts seek to place limits on their own jurisdictional reach in judicial review cases.

(c) Legitimacy and Four Fundamentals of Constitutional Thought

The *ultra vires* and rights-based theories of judicial review are both liberal democratic theories. While they agree on certain liberal constitutional fundamentals,

they disagree as to what those fundamentals entail at the level of constitutional practice. In particular, they diverge sharply in their conception of the appropriate function and purpose of the reviewing court. The model of public law as legitimacy is also a liberal democratic theory. In this section, I will show that the model connects with basic liberal ideas, ideas which also underlie the other theories of public law examined in this theory. In addition, I will suggest that the legitimacy model provides a superior interpretation of those constitutional fundamentals than either of its rivals.

In order to make this argument, I will set the legitimacy model of public law against four liberal democratic fundamentals: democracy, liberty, rights, and public reason. All theories of judicial review rest (explicitly or implicitly) upon normative assumptions relating to the structure and functioning of the political community. It would be very hard to suggest that the these ideas - democracy, liberty, rights, and public reason - should not form a significant part of the philosophical foundations of any meaningful understanding of the role of judicial review in a liberal democracy. Certainly, all four ideas are invoked, to a greater or lesser extent, in the other theories of judicial review we have examined. This is not to disclaim the possibility that there might be other, perhaps equally important, ideas that should also form a part of this substructure. However, in line with the basic aim of this section of the thesis, discussion of the legitimacy model in relation to these four ideals is sufficient to indicate the normative underpinnings of the theory.

(1) Democracy

The legitimacy theory may be able to accommodate the notion of democracy more persuasively than rival theories. Political legitimacy, as Barker reminds us, primarily concerns relations within the overall system or institutions of government.[13] The central intra-governmental aspect of the legitimacy model entails that judicial review is understood, on this account, as part of a complex web of governance. In a democratic political community, the most important institutions within that web are those which have been elected by the people. Since 'democracy means that the people as a whole – the whole population – has power or rules',[14] it is a key principle of democratic thought that laws made by elected institutions are presumptively legitimate. To adopt a legitimacy approach to public law in the context of a liberal democracy is to accept that one of the primary purposes of judicial review is to ensure that democracy is respected. This position entails two things. First, the courts must pay close attention to the presumption that the laws and decisions of those elected by the people have a high degree of legitimacy and ought, in general, to be carried out. Second, the courts should aim to ensure that, wherever possible, the democratic or participative element in decision-making is high.

[13] R. Barker, *Political Legitimacy and the State* (1990), p. 196.

[14] R. Geuss, *History and Illusion in Politics* (2001), pp. 111-2. See also J. Waldron, *Law and Disagreement* (1998), p. 51: 'Somewhere in our tacit theory of the authority of legislation is a sense – a sort of constitutional instinct – that discussion and enactment by a *large* assembly of representatives is indispensable to the recognition of a general measure of principle or policy, put forward by the powerful, as law.'

By contrast, the rights-based theory focuses primarily on the courts. According to that theory, the central feature of judicial review cases is the identification and application of fundamental values and rights grounded in the common law. But this conception leaves little room for the authority of the decisions of democratically legitimate institutions. The legitimacy approach, on the other hand, appears to be able to accommodate this important dimension of decision-making in political communities organised along liberal democratic lines. As the distinguished American legal scholar Cass Sunstein points out:

> Legitimacy stems not simply from principled consistency on the part of adjudicators, but from a justifiable exercise of authority, which requires a theory of just institutions. That theory should in turn be founded in democratic considerations. ... Legitimacy is the outcome of well-functioning democratic processes, not of a system of decision-making undertaken by judges.[15]

This democratic dimension of the legitimacy model may be seen as a corollary of the insistence that we ought to recognise disagreement as one of the 'conditions of politics'. Jeremy Waldron has argued that, in the context of widespread and thoroughgoing political disagreement, there is *no choice* but to encourage and facilitate participative, democratic decision-making. 'There is no alternative: if the problem affects millions, then a respectful decision procedure requires those millions to listen to one another and to settle on a common policy in a way that takes everyone's opinion into account.'[16] The legitimacy theory, which rejects the dubious

[15] Sunstein, *Legal Reasoning and Political Conflict* (1996), p. 53.
[16] *Law and Disagreement*, note 14, above, p. 110.

and unsupported assumption that the political community (in the UK) is underpinned by a core of shared values, has the capacity to secure participation in the decision-making process.

Neither of the alternative theories of judicial review discussed in this thesis seems as comfortable with democracy as the legitimacy approach. The *ultra vires* theory is certainly focused on ensuring that laws enacted by the democratically elected Parliament are enforced as Parliament intended them to be. But this does not conclude the matter. A useful distinction can be drawn in this context between *ex ante* and *ex post* scrutiny. We saw in the previous chapter how the *ultra vires* theory assumes that parliamentary scrutiny of executive law-making is sufficient to ensure that the liberties of the individual are not improperly affected. To put this in terms of our distinction, the model assumes that *ex ante* scrutiny is sufficient to ensure the democratic legitimacy of laws. But that assumption is questionable. The emphasis of the *ultra vires* theory on formal justice removes from the courts any real possibility of scrutinising the adequacy of participation and consultation in the formulation and implementation of governmental decisions. Somewhat paradoxically, then, its respect for Parliament renders the *ultra vires* theory incapable of taking democracy seriously.

The rights theory, on the other hand, is even less capable of accommodating democracy. The rights-based approach is grounded in the idea that there exists a set of fundamental values and rights which have their most complete expression in the common law and in relation to which the judges are to have the final and definitive

say. To use Dworkin's terminology in *Freedom's Law*, the rights theory represents a 'result-driven' (as opposed to a 'procedure-driven') theory of democracy. Result-driven democrats believe that 'the best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions.'[17] However, as Waldron argues, such an approach seems to rest on an improper elision between a decision *about democracy* and a decision *made by democratic means*. Something is lost, it can be said, 'from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires.'[18] The emphasis on substantive values in rights-based thought, allied with the assumption that judges are the best interpreters and upholders of such values, devalues democracy and turns judicial review into a form of aristocratic decision-making (that is, decision-making according to the few best).

There are a number of arguments why the legitimacy approach may be better equipped to avoid the criticism that judicial review constitutes an anti-democratic method of decision-making. First of all, as we saw in the previous section, the legitimacy approach explains and highlights the way in which courts seek to find limits to their jurisdictional reach. At least some of these limits will be grounded in democratic arguments. Second, the legitimacy model is very concerned with the process by means of which challenged decisions were made. Judicial review, on the legitimacy approach, concentrates first and foremost on the way in which the

[17] R. Dworkin, *Freedom's Law* (1996), p. 34.
[18] Note 14, above, pp. 292-293.

decision-maker arrived at its decision. And, following Habermas, the model accepts that one of the most important criteria of legitimate law-making is the democratic or participative quality of the process by which it was formed. In Dworkin's terminology, the theory is thus at least as much process-driven as result-driven.

(2) Liberty

The *ultra vires* theory and rights-based theory of judicial review have a different understanding of the relative trustworthiness – seen, that is, from a liberal perspective - of the different institutions of government. *Ultra vires* theory assumes that a properly functioning representative Parliament will act so as to ensure that individual liberties are not undermined. It follows from this assumption that the primary duty of the courts is to enforce Parliament's (presumptively legitimate) laws against potentially recalcitrant subordinate decision-makers. By contrast, the rights theory assumes that the court is the sole institution that can be trusted to protect individual rights. This is the case, rights theorists maintain, because the principles applied by the court are directly connected with the moral law. (The moral law is assumed to be liberal and individualist.) All other governmental agents and institutions are to be regarded as potential opponents of liberty.

The legitimacy model entails a different set of assumptions. It assumes, in classic liberal fashion, that no institution that exercises (public) power is to be trusted. Stephen Holmes says that one of the central and abiding features of liberalism is its

watchfulness in relation to – and its desire to protect against - abuses of accumulated political power.[19] Unlike rival theories, the legitimacy approach makes no assumptions about the inherent trustworthiness of any political institution. Its instinct for distrust thus extends not only to government (a main target of the rights theory) and subordinate decision-makers (the main enemy within *ultra vires* theory) but to the courts as well. A brief glance at the history of decision-making in the common law courts from *Entick v Carrington*[20] onwards in cases relating to civil liberties shows not only a series of note-worthy successes, but also a plethora of failures (a list which arguably includes *ex p Smith*[21]). As Ewing and Gearty put it, the 'harsh reality is that we need to be protected by Parliament from the courts, as much as we need to be protected from the abuse of executive power.'[22]

But, even though the legitimacy theory assumes that all institutions of government – including the courts - have the potential to act in an illiberal way simply by virtue of the fact that they wield power, it does not make the theory irredeemably negative. Precisely because it assumes that no single institution - Parliament, courts, or whatever - can be trusted to act as guardians of liberty, the legitimacy model requires all institutions to be involved in the task of preserving freedom. This position can be seen as a major strength of the legitimacy approach. Whereas rival accounts assume, in an *a priori* fashion, the 'liberal-ness' or otherwise of different political institutions, the legitimacy theory insists instead that this matter must be

[19] S. Holmes, *Passions and Constraint* (1995), p. 18.
[20] (1765) 19 St. Tr. 1029.
[21] See, e.g., K.D. Ewing and C.A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (1990); J.A.G. Griffith, *The Politics of the Judiciary* (4th ed., 1998); N. Whitty, T. Murphy and S. Livingstone, *Civil Liberties Law: The Human Rights Act Era* (2001), pp. 41-46.
[22] *Freedom Under Thatcher*, note 21, above, pp. 270-271.

continually re-assessed by reference to the practice of the institutions in question. Only this assumption, it can be argued, makes sense of the classic liberal maxim the price of freedom is eternal vigilance.

(3) Rights and Legitimacy

But where do rights fit into this account? There can be no doubt that there is a connection between liberalism and rights. Loughlin, for instance, argues that throughout the modern period (also the period of the ascendancy of liberalism) 'there has been a growing acceptance of the importance of rights in the conduct of politics.'[23] The constitutional system of the United States is structured so as to preserve the liberty of American citizens as encapsulated in particular in those rights identified by the various Amendments to the Constitution (especially the first Ten).[24] This structure has been so influential that the 'language of rights has been central to American political culture for centuries, and nearly every major issue in American political history has been argued as an issue of rights.'[25] Since the end of the Second World War in particular, the language of rights has come increasingly to permeate the political and legal systems of the liberal democracies of Europe. The impact of the system introduced under the aegis of the European Convention on Human Rights has been such that even traditionally rights-sceptic Britain – home of Jeremy Bentham who once famously said that rights were nothing but 'nonsense upon

[23] M. Loughlin, *Sword and Scales* (2000), p. 202. See also, e.g., R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (1995), ch. 9.
[24] R.S. Kay, 'American Constitutionalism' in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (1998).
[25] R.A. Primus, *The American Language of Rights* (1999), p. 1.

stilts'[26] – has incorporated the Convention into its law. The same era has also witnessed the proliferation of international and regional human rights documents and agreements: see, for instance, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the American Convention on Human Rights and the American Charter on Human and Peoples' Rights.[27]

In light of this background, any theory of judicial review which ignored rights would leave itself open to the charge of incompleteness. The legitimacy model advocated here starts by accepting Jeremy Waldron's claim that the idea of rights-based limits on the reach of public power is ultimately 'a matter of political self-understanding'. By this, Waldron means that the 'idea of rights is the idea that there are limits on what we may do to each other, or demand from each other, for the sake of the common good.'[28] On this understanding, rights form a constituent part of the discourse of the (modern liberal) political community. And, as an important part of the political vocabulary of liberal democracies, they are capable of reflecting and expressing the concern to define limits to what the state can ask of or impose on its citizens.

It is important to indicate precisely the points at which this understanding of rights differs from the account of rights assumed by rights theorists. Rights can be said to perform two main functions within the rights theory. First, rights serve to concretise the proposition that certain fundamental principles, deducible by reason and reflecting the essential properties of all human beings, underlie all good legal and

[26] J. Bentham, 'Anarchical Fallacies' in J. Wadron (ed.), *Nonsense Upon Stilts* (1987).
[27] See, e.g., H.J. Steiner and P. Alston, *International Human Rights in Context* (2nd ed., 2000).

political decisions. Second, such rights are said to be primarily the property or responsibility of the courts, and are to be used as the basis of all public law decision-making. On this account, then, rights act as universal and unbending standards of political morality, a failure to meet which will render any governmental action unlawful.

The legitimacy model, which recognises that rights form part of a more general search to articulate the limits of legitimate governmental action, contests this understanding of rights. It questions, first of all, the rationalist and essentialist assumptions of the rights theory's conception of rights.[29] Richard Rorty argues that the attempt of rights foundationalists to stake out a principled defence of rights that depends on reason alone, independent of historical fact, is outmoded.[30] The attempt, however sophisticated, to postulate a coherent set of rights by reflecting, in the abstract, on the nature of the human condition is certain to fail. There may be good *psychological* reasons for embarking on this kind of enterprise. 'The more powerless and isolated people feel', the political philosopher Raymond Geuss suggests, 'the stronger their attraction to a doctrine that assigns them an imaginary sphere of unrestricted and certain consequence.'[31] But no essentialist account of rights, whatever the quality of its rational argument, is capable of altering the fact that disagreement is of the essence of politics. 'Politics is about conflict and

[28] Note 14, above, p. 307.
[29] For an extremely thorough example of this type of thinking in relation to rights, see, e.g., A. Gewirth, *Reason and Morality* (1978) and *The Community of Rights* (1996).
[30] R. Rorty, 'Human Rights, Rationality, and Sentimentality' in Rorty, *Truth and Progress: Philosophical Papers, Vol. 3* (1998), p. 170.
[31] R. Geuss, *History and Illusion in Politics* (2001), p. 152. For a similar explanation of the power of Kant's moral thought see S. Neiman, *Evil in Modern Thought* (2002), pp. 57-84.

disagreement'.[32] And if disagreement - one of the prime conditions of politics - goes 'all the way down',[33] there is no way of isolating or insulating rights from the disagreement-ridden context of politics and political discussion. Rights, on this account, are simply another dimension of political argument which cannot be removed from - or given a privileged place within - the arena of political argument simply by means of *a priori* philosophical speculation.

This position does not mean that we are forced to abandon altogether the task of investigating the function of rights in the context of constitutional politics. An argument against essentialism, after all, need not entail a programme of nihilism. Rather than seeing rights as the definitive solution to the question of what counts as the essence of man, it may be more profitable to conceive of rights as an attempt to summarise our historically influenced sense what we ought to do in various situations - or, more accurately perhaps, our sense of what sort of behaviour is unquestionably wrong.[34] As Costas Douzinas argues, rights 'draw their force from the suffering of the past and the injustices of the present'.[35] On this account, rights result from an attempt to generalise particularly salient aspects of historical experience rather than represent universal postulations resulting from abstract theorising.

This understanding of rights may come at a price. To situate rights propositions partly in their historical context has the potential to detract from their universalistic

[32] Note 31, above, p. 5.
[33] Note 12, above, p. 295.
[34] For a similar argument, see C. Brown, 'Human Rights' in J. Baylis and S. Smith (eds.), *The Globalization of World Politics* (2nd ed., 2001).

pretensions. On the other hand, as well as being more coherent, this understanding of rights has the capacity to prevent what some scholars refer to as the ossification of rights discourse. Douzinas argues that the static, legalistic conception of rights leads almost inevitably to the negation of the critical and normative potential which made rights meaningful and potent in the first place. 'When the apologists of pragmatism pronounce the end of ideology, of history or utopia, they do not mark the triumph of human rights; on the contrary, they bring human rights to an end. The end of human rights comes when they lose their utopian end.'[36] Koskenniemi writes, similarly, that 'once rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalizes values or interests that resist translation into rights-language.'[37] The conception of rights outlined here seeks to address the danger in two ways. First, being dynamic, it allows specifically for the amendment and extension of the vocabulary of rights and the creation of new propositions about rights in light of new historical experience or social practice. Second, given that it situates rights as one (important) aspect of a general debate on the limits of state power, it does not insist that the language of rights is necessarily the best mode of expressing political (or legal) claims.

This understanding of rights has implications for the argument about institutions. In the rights theory, to reiterate, rights result from a philosophical or reflective enterprise and are said to represent the essence of what it is to be human. This

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[35] C. Douzinas, *The End of Human Rights* (2000), p. 380.
[36] Note 35, above, p. 380.
[37] M. Koskenniemi, 'The Effect of Rights on Political Culture' in P. Alston (ed.), *The EU and Human Rights* (1999), p. 100.

conception leads directly to a constitutional framework in which the overriding priority is the protection of rights (understood in essentialist terms). Given the assumption that the court is the only institution in a position consistently to prioritise rights in its decision-making, it follows that (in the good constitution) the court must have the final and definitive say in deciding the lawfulness of a proposed law.

The understanding of rights advanced here has very different implications for the constitutional relationship between court and government. First, the assumption that rights are not and can never be immune from political disagreement leads to a different understanding of the way rights claims play out in legal and political practice. Even if we can decide which rights we are going to consider to be of particular worth in our political community,[38] there will be much disagreement about what they entail as a matter of practice in particular cases of dispute. Rejecting the image of the judge as Platonic guardian, Lord Hoffmann said that, in general, cases involving rights do not reflect 'the conflict between good and evil but the conflict between good and good.'[39] This sort of conflict is easier to reconcile with the legitimacy approach than rights-based theory. Rights may indeed provide an important means of expressing the need to find limits to governmental power, but they provide us with little or no guidance when it comes to resolving the disagreement that surrounds any attempt to apply rights in practice.

Second, the fact that political disagreement besets rights discourse indicates that there is no be a settled core of principles and rights. (Or, at least no body of

[38] This is itself by no means an uncontroversial matter. In the context of the UK Human Rights Act see, e.g., K.D. Ewing, 'Social Rights and Constitutional Law' (1999) PL 104.

fundamental rights extensive enough to perform the functions the rights theory demands.) For one thing - on the account advanced here - any set of rights will reflect a bargain struck by a political community as a result of argument and reflection on the appropriate limits of governmental power. And this bargain will always be open to reinterpretation or revocation by the political community.[40] More importantly, if we accept that disagreement is one of the conditions of politics, then, even while the bargain subsists, the application of the bargain will be beset with disagreement and controversy. Given this, it is very hard to conceive of the practical application of rights in terms of the straightforward rational exegesis of certain fundamental principles. This being so, there is no firm platform on which to base the notion of the court as ultimate constitutional decision-maker since courts are no more immune from disagreement (including disagreement about rights) then any other institution.

I have argued in this section that rights are better understood not as universalistic postulations derived from essentialist philosophising but as part of a wider political discourse designed to locate the limits of governmental power. Rights, on this account, represent attempts to capture our historically-influenced inclinations about what sorts of behaviour is definitively wrong and worth protecting against in seemingly absolute terms. Being a product or aspect of political discourse, rights will be subject to disagreement. Disagreement may well attach to the preliminary question as to which interests should be protected as rights; it will almost certainly

[39] Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 MLR 159, p. 165.
[40] This is true, I would argue, whether or not the bargain itself allows for the possibility of change. However, this is not to deny that the actual construction of the bargain may itself have an important

attach to the secondary question of the practical application of those rights. This being so, there appears to be no sound basis – whether philosophical or jurisprudential – for the assertion, central within rights theory, that courts ought to have the ultimate say in deciding whether a controversial law ought to be on the grounds of its compatibility with fundamental principles and rights. In practical terms, then, rights can be said to play the following role within the legitimacy model. They constitute an important means of expressing where the limits of governmental power lie (or ought to lie). And, as such, they form a natural and potentially very potent resource within a jurisdiction whose first concern is the legitimacy of exercises of public power.

(4) Public reason

The notion of public reason was examined in some detail in chapter 6 during the analysis of key aspects of rights-based thought. Rights theorists assume that the internal discourse of the court – which, they say, necessarily relates to the fundamental principles - is superior to any other form of political discourse. On this account, the idea of public reason – understood on Rawlsian terms as the discussion of fundamental political questions in terms of a framework of shared, basic moral/political principles – finds its most direct and sophisticated expression in the practices of the common law court. The rights-based conception thus prioritises the internal discourse of the courts. Seen in terms of the ideal of public reason, the

bearing on the political debate. Nor does it rule out the possibility that the courts themselves may play a role in the re-negotiation of the bargain.

ultimate task of judicial review on the rights-based account is to ensure that (the results of) the wider political debate accords with standards and style of debate that occurs naturally within the common law process. The court thus stands – or ought to stand - at the heart of the debate on fundamental political questions and in so doing becomes, in Dawn Oliver's phrase, a 'Grand Inquest of the Nation forum'.

Judicial review, within the legitimacy model, assesses challenges to the legality of challenged decisions as part of a broader discourse aimed at securing the continued legitimacy of the political community. This approach entails a different understanding of both the nature of public reason itself and the role of judicial review in relation to that ideal. Whereas, on the Rawlsian conception adopted by rights theorists, public reason is narrowly defined so that it contains only those ideas and principles fundamental to the maintenance of a liberal society and relates only to supposedly fundamental constitutional questions, the legitimacy model recognises two forms of public reason. The first comprises the ordinary political discourse of the political community. The conception adopted by the rights theorists is rejected as overly restrictive. Rawls says that he recognises the pervasive nature of disagreement in modern societies; his theory of political liberalism, in fact, is ostensibly designed to accommodate it. However, given the fact of disagreement, it is not at all obvious how agreement is to be obtained in relation to the following matters in particular: (1) the content of those principles considered fundamental to liberalism which are meant form the core vocabulary of public reason; (2) what counts as a fundamental constitutional question suitable for the deployment of public reason.

The second form of public reason recognised by the legitimacy model relates more specifically to the discourse of legitimacy. In the previous chapter, we said that a supplementary political discourse can be said to exist concerned with the need to secure the legitimacy of the political community through the testing of particular rules and rule applications. The standards by which such rules and rule application may vary. But, within a liberal democracy at least, significant standards tend to relate for instance to the manner and process by which the rule or application was made. The primary participants in this process tend to be the various institutions of government themselves. The legitimacy model would clearly regard this discourse as an important and distinct part of a wider process of public political debate and discussion.

This conception entails a different understanding of the function of the court in relation to the ideal of public reason than that articulated by the rights theory. It leads to a rejection of the Cokean assumption that legal reason is superior reason, together with the Rawlsian belief that argument in the public law court is the exemplar of public reason. The legitimacy approach assumes that what is needed to ensure the vitality of a polity not the need to define and apply certain fundamental moral principles but rather the need to cultivate an open and sophisticated process of decision-making. Given this general position, judicial review is incapable of becoming as a substitute for ordinary politics or as acting as a Grand Inquest of the Nation forum. Our analysis of the cases in chapter 6, moreover, seems to confirm this. The analysis indicated that the process of argument in judicial review (as least

as it currently operates in domestic courts) is more tightly structured - more Spartan - than the process of argument that occurs within what rights theorists refer to as the ordinary process of political decision-making.

The emphasis of the legitimacy model, then, falls on the debate that occurs within the ordinary process rather than the internal discourse of the common law. This perspective, it can be suggested, is particularly important given the disagreement-ridden condition of modern societies. In such societies, as Sunstein says, 'a premium is placed on the exchange of reasons by people with different information and diverse perspectives. In a heterogeneous society, deliberation is to be welcomed precisely because of social pluralism.'[41] There can be no court-based substitute, we have said, for the political discussion that occurs within the public sphere. In Habermas' account, the public sphere is understood as the sphere in which 'private people come together as a public'. It is a space claimed by the public and used to engage the authorities in a debate over the organisational structure and decision-making of the political community.[42] On the legitimacy account, the overarching function of the court in exercising its public law jurisdiction is to maintain (at least in certain areas of political practice) those qualities – 'the more rational, critical habits of thought' – which constitute what David Zaret calls the hallmarks of the public sphere.[43] In so doing, the court may carve out for itself an important role in making the public sphere 'a sphere of criticism of public authority'[44] which is

[41] C. Sustein, *One Case at a Time* (1999), pp. 24-25.
[42] J. Habermas, *Structural Transformation of the Public Sphere* (1989), p. 266.
[43] See also D. Zaret, *Origins of Democratic Culture* (2000), p. 27.
[44] Habermas, note 42, above, p. 27.

ultimately the primary source of political legitimacy for a government operating in the democratic age.

Chapter 10

Legitimacy and the Human Rights Act

In the Introduction, I said that the thesis would not focus primarily on the Human Rights Act 1998.[1] That decision was justified by the observation that the rights theory of public law – the primary focus of analysis in this thesis – has an existence entirely independent of that Act. The rights theory was advanced prior to the passing of that Act and would continue to be advanced had the Act not have been passed.

That does not mean to say that the Human Rights Act does not form an important (albeit necessarily secondary) part of the discussion in this thesis. In chapter 7, for instance, a number of cases were examined in order to indicate the contours of judicial decision-making in light of the new Human Rights Act framework. In this chapter, the model of public law articulated in the final Part of the thesis will be placed within the context of the Act. I will suggest that the legitimacy approach makes more sense of certain distinctive features than rival theories.

[1] On the Act in general see, e.g., Lord Lester, 'Human Rights and the British Constitution' in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (4th ed., 2000); Whitty, Murphy and Livingstone, *Civil Liberties Law*, note 44, above, ch. 1; T. Campbell, K.D. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (2001); N. Bamforth, 'Parliamentary Sovereignty and the Human Rights Act 1998' (1998) PL 572.

Core Provisions of the Human Rights Act

Before the Human Rights Act, it was possible to use arguments based on the European Convention in English courts in certain circumstances.[2] The most important of these were: (a) as an aid to the construction of legislation in cases of ambiguity (e.g. *R v Secretary of State for the Home Department, ex p Brind*[3]); (b) to inform the exercise of judicial discretion (e.g. *Attorney-General v Guardian Newspapers Ltd*[4]); (c) to establish the scope of the common law (e.g. *Derbyshire County Council v Times Newspapers Ltd*[5]). At this stage, however, there was no overriding presumption that Parliament intended to legislate so as to conform with Convention rights nor a general duty on public authorities to exercise discretion in manner that complied with the Convention.

'The purpose of the Human Rights Act is to extend the ways in which the Convention can be used before domestic courts while retaining the existing ones.'[6] The method adopted is a complex one which reflects a compromise between incorporating Convention rights and retaining Parliamentary sovereignty.[7] **Section 2** requires any court or tribunal determining a question which has arisen in connection with a Convention right to take into account the jurisprudence of the Strasbourg institutions – the European Court and Commission of Human Rights and the

[2] See M. Hunt, *Using Human Rights in English Courts* (1997).
[3] [1991] 1 AC 696, at p. 760.
[4] [1987] 1 ALR 1248.
[5] [1992] QB 770, at pp. 812 & 830.
[6] J. Wadham and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (2000), p. 2. The preliminary analysis of the Act contained within this section of the thesis takes Wadham and Mountfield's account as its starting point.

Committee of Ministers.[8] The Act creates a general requirement that all legislation be read and given effect in a way which is compatible with the Convention.[9] **Section 3** provides that:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

This section applies to both past and future legislation: section 3(2) explicitly states that the section 'applies to primary legislation and subordinate legislation whenever enacted'.[10] The Act does not permit the Convention to be used so as to override primary legislation. In addition, if the terms of the primary legislation require subordinate legislation to be made in a way which means that the subordinate legislation is incompatible with the Convention, the courts must still give effect to it even though this may result in a breach of the Convention (section 3(2)(b) and (c)).[11]

If a court cannot interpret primary legislation in such a way as is compatible with the Convention, then, although primacy must be given to the statute, the higher

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[7] For an account of the parliamentary debate during the passing of the HRA see, e.g., J. Cooper and A. Marshall-Williams (eds.), *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (2000).

[8] For recent changes in the institutional structure of the European Convention system see, e.g., A. Mowbray, 'The composition and operation of the new European Court of Human Rights' (1999) PL 219.

[9] See, e.g., Lord Lester, 'The Art of the Possible: Interpreting Statutes under the Human Rights Act' (1998) EHRLR 665.

[10] C.A. Gearty, 'Reconciling Parliamentary Democracy and Human Rights' (2002) 118 LQR 248, pp. 250-258 offers three different interpretations of s. 3: (1) a *radical Parliamentary* reading which focuses on s.3(2)(b), (2) a *radical human rights* reading which focuses on s.3(1), and (3) Gearty's preferred *third* or middle way according to which 'neither the section 3(1) analysis nor the section 3(2)(b) analysis can take place separately from the other.'

[11] On s. 3 see also, e.g., M. Hunt, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession' (1998) 26 JLS 86, pp. 97-98; F. Bennion, 'What Interpretation is "Possible" under Section 3(1) of the Human Rights Act 1998?' (2000) PL 77; G. Marshall, 'Two Kinds of Compatibility: More about section 3 of the Human Rights Act 1998' (1999) PL 377.

courts have the power under **section 4** of the Act to issue a 'declaration of incompatibility'. Making a declaration may create public interest and so put pressure on the government to change the law. **Section 10** of the Act provides a 'fast-track' procedure for the amendment of legislation which has been declared incompatible to bring it in line with Convention principles. (Schedule 2 to the Act says that remedial orders can only be made by the relevant government minister where there are 'compelling reasons' to do so, and normally by positive resolution procedure.)

Section 6 of the Act creates important new obligations on public authorities by requiring them to act compatible with the convention. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Individuals will be able to rely upon Convention rights against public authorities and indeed any body exercising 'functions of a public nature' in respect of those functions (s.6(3)(b) and 6(5)).[12] Supperstone and Coppel refer to section 6 as the key provision of the Act since it provides 'a novel, rights-based ground of challenge to public decisions' which 'will add a new and powerful string to the bow of a vast number of applicants for judicial review.'[13] Section 6(1) can be enforced under **section 7** of the Act. Section 7(1) provides that a person who is or would be a victim of an act unlawful by virtue of s. 6(1) can bring proceedings

[12] In *R (Panjawani) v Royal Pharmaceutical Society of Great Britain* [2002] EWHC 1127 the appellant was struck of the Register of Pharmacists after the Statutory Committee of the RPS had found him guilty of misconduct. Sedley LJ said that, given that there is no doubt that the Statutory Committee is a public authority within s. 6 HRA nor that the impact of removal from the register upon a pharmacist's livelihood and standing is such as to attract Art. 6 ECHR safeguards, the court in this case must conduce a full rehearing of the case.

[13] M. Supperstone and J. Coppel, 'Judicial Review after the Human Rights Act' (1999) EHRLR 307, pp. 307-308. The potential 'horizontal' effect of the HRA is not examined in this section as the thesis is concerned exclusively with public law: see Introduction. On this issue, see, e.g., *Douglas v Hello! Ltd* [2001] 2 All ER 289. See also, e.g., M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1998) PL 423; N. Bamforth, 'The Application of the Human Rights Act to Public Authorities and

against the authority under the HRA 'in the appropriate court or tribunal' or rely on Convention rights 'in any legal proceedings'. We saw that, within the public law cases decided before the introduction of the Human Rights Act, claimants had to phrase their claim in terms of a set number of forms of action.[14] Section 6, in essence, introduces a new form of action: litigants can bring a judicial review action directly on the basis that their Convention rights have been violated.[15]

Section 7 of the Act says that only a 'victim' of an action or decision of a public authority has standing to bring an action under the Human Rights Act. This incorporates the test of standing operated by the European Court of Human Rights.[16] Applying the categorisation developed in a recent article on the subject by Joanna Miles, it can be said that this test of standing is underpinned by a conception of the role of the court in which notions of individualism and dispute resolution predominate. This can be contrasted with the general trend in English public law in recent years towards an approach to standing based on notions of communitarianism and expository justice.[17]

Private Bodies' (1999) 58 CLJ 159; Sir H.W.R. Wade, 'Horizons of Horizontality' (2000) 116 LQR 217; J. Morgan, 'Questioning the "true effect" of the Human Rights Act' (2002) 22 Legal Studies 259.

[14] See ch. 6, above.

[15] On the meaning of 'public authority' within s. 6 HRA see, e.g., *R v Hampshire Farmers Market Ltd, ex p Beer* (2002) LTL 25/11/2002 (a decision by a limited company to exclude the claimant from holding a stall at farmers' markets involved a public element making it amenable to judicial review, and the company had been acting as a public authority within s. 6).

[16] Art. 34 ECHR.

[17] J. Miles, 'Standing Under the Human Rights Act 1998: Theories of Rights Enforcement & the Nature of Public Law Adjudication' (2000) 59 CLJ 133. Discussed in chapter 6, above.

The Human Rights Act: Rights and Legitimacy

I have argued in this thesis that rights-based public law theorists envisage a scheme of constitutional politics with the common law court at its apex applying a system of public law rights derived from moral principles which are also embedded in the common law. The effect of the Human Rights Act is not to establish a system for the protection of basic rights and liberties with the court at its centre. As Conor Gearty writes, the 'Human Rights Act 1998 has a dialectical tension at its core. On the one hand the measure presents itself as establishing a new, justiciable language of human rights; on the other it declares itself to be still in thrall to the fundamental constitutional principle of Parliamentary sovereignty.'[18] At a level of generality, we can say, then, that the Act envisages a framework in which the court has a distinctive role in preserving freedoms in the context of a system of governance in which a variety of decision-making institutions are charged with a duty to consider the potential effects of their decisions on individual liberties. Richard Edwards suggests, rather grandiloquently, that the introduction of the Human Rights Act has the potential to 'a paradigm shift in the foundations of British constitutional law ... from a constitutional law based on the culture of authority to one of justification.'[19] Keith Ewing argues persuasively, however, that while the Act undoubtedly 'represents an unprecedented transfer of political power from the executive and legislature to the judiciary', the incorporation of the Convention has been secured

[18] Note 10, above, p. 248.
[19] R.A. Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859, p. 866.

'in a manner which subordinates rights to constitutional principle and democratic tradition.'[20] In similar vein, Lord Hoffmann rejects the casting of the judges 'in the improbable role of being the just rules whose reign the Act will establish, the Platonic guardians, as Judge Learned Hand called them, who will put the nation to rights'.[21]

But if we reject the conception of judicial decision-making under the Human Rights Act as the operation of a higher-order of constitutional politics rooted in the moral law, how instead should we understand the Act? A good starting point is the proposition, mooted by Kent Roach in his discussion of the Canadian constitution, that court decisions that relate to a rights document 'are best seen as starting points in a dialogue with legislatures and society.'[22] According to this dialogic model of constitutional discourse, the court 'after listening to aggrieved and often unpopular litigants, initiates a conversation with the legislature about important values such as minority rights, fair process, fundamental freedoms and constitutionalism that may have been neglected in the legislative process.'[23] Roach says that his approach can be distinguished in one crucial respect from what he calls 'conventional

[20] See also K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 MLR 79, pp. 79 & 98. See also Ewing, 'The Politics of the British Constitution' (2000) PL 405; A. Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157.

[21] See Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 MLR 159, p. 159. But contrast, for instance, the conception of the judicial role provided in T. Bingham MR, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 LQR 390, p. 390: there is 'no task more central to the purpose of a modern democracy, or more central to the judicial function, than that of seeking to protect, within the law, the basic human rights of the citizen, against invasion by other citizens and the state itself.'

[22] K. Roach, 'Constitutional and Common Law Dialogues between the Supreme Court and Canadian Legislatures' (2001) 80 Canadian Bar Rev 481, p. 484. See also P. Hogg and A. Bushnell, 'The Charter Dialogues between Court and Legislatures' (1997) 35 Osgoode Hall LJ 75. On the Canadian Charter in general, see, e.g., L. Weinrib, 'The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada's Constitution' (2001) 80 Canadian Bar Rev 699; M. Childs, 'Constitutional Review and Underinclusive Legislation' (1998) PL 647.

[23] Roach, note 22, above, p. 484.

constitutional theories' (a category that would include the rights-based theory examined in this thesis). Whereas the conventional constitutional theories as varied as those propounded by Ronald Dworkin, Robert Bork or John Hart Ely are 'based on the assumption of judicial supremacy in enforcing the constitution, ... dialogic theories of judicial review contemplate that judges should not necessarily have the final word.'[24]

The dialogic theory of constitutionalism has an ancestry composed of a number of related by distinct traditions of thought. Classical variants of the theory include the co-ordinate construction theory of the U.S. constitution advanced by Thomas Jefferson and James Madison. Madison, for instance, expressed concerns that if the constitutional interpretations of the courts were final, 'this makes the Judiciary Dept. paramount in fact to the Legislature, which was never intended and can never be proper'.[25] More modern versions include the majoritarian account of both democracy and judicial review advanced by Robert Dahl[26] and Mark Tushnet's proposal for a 'populist constitutional law' in which the 'people acting outside the court can ignore what the courts say about the Constitution, as long as they are pursuing reasonable interpretations of the thin Constitution.'[27] Roach rejects these majoritarian or populist variants of dialogic constitutionalism. Whatever their merits as empirical descriptions, he says, they cannot act as a normative ideal for the participants in the dialogue since they 'sacrifice the distinctive role of courts and

[24] Roach, note 22, above, p. 489.
[25] Quoted in C. Wolfe, *The Rise of Modern Judicial Review* (1986), p. 96.
[26] R. Dahl, 'Decision-Making in a Democracy: The Supreme Court as National Policy-Maker' (1957) J of Public Law 279.
[27] M. Tushnet, *Taking the Constitution Away from the Courts* (1999), pp. 33 & 186.

legislatures by suggesting that they both should devote their different talents to the same exercise: the discovery and reflection of majority sentiment.'[28]

Roach favours the modern variant of the dialogic theory advanced by Alexander Bickel. Bickel recognised, Roach says, in a way that rivals like Ronald Dworkin and John Hart Ely did not, that even the Court's final judgments on matters of constitutional principle were not and probably would not be the final word.[29] The U.S. Supreme Court, he wrote, 'interacts with other institutions, with whom it is engaged in an endlessly renewed educational conversation ... And it is a conversation, not a monologue.'[30] And yet, unlike Dahl and Tushnet, the court in Bickel's theory retained its distinctive identity as a forum of principle.

> Unlike dialogic theories based on co-ordinate construction or political interchange between the branches of government, Bickel's account of dialogue made room for a strong judicial voice of principle that would resist opposition form the majority and rival constitutional interpretations from the other branches of government. It shows that dialogic theories need not be based on moral relativism or judicial deference.[31]

In line with Roach's reading of the Canadian Charter, the legitimacy theory expounded in this thesis would entail a dialogic interpretation of the Human Rights Act. On this reading, the Act establishes - or formalises - a framework for a

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[28] Roach, note 22, above, p. 495.
[29] On Bickel and the legal process tradition see N. Duxbury, *Patterns of American Jurisprudence* (1995), pp. 278-290.
[30] A. Bickel, *The Morality of Consent* (1974), p. 111. See also Bickel, *The Supreme Court and the Idea of Progress* (1970) and *The Least Dangerous Branch: Supreme Court at the Bar of Politics* (2nd ed., 1986).
[31] Roach, note 22, above, p. 498.

constitutional dialogue between the courts, primary decision-makers, and Parliament. Within this dialogic framework, the legislature and court are given distinctive but complementary roles. The role of the court is to draw the attention of the legislature, with the help of aggrieved litigants, to the values and rights enshrined in the European Convention that are likely to be ignored or finessed in the legislative process.[32] On this reading, the Human Rights Act has 'reinforced and enhanced a pre-existing development in British constitutional law, namely that of the dialogue between the various branches of government over fundamental rights and freedoms.'[33] This interpretation is consistent with Ewing's claim that the Act constitutes, above all, a democratic moment. As Guido Calabresi has argued in a different context, the form of judicial review envisaged by the framework instigated by the Human Rights Act has the potential to promote 'constitutional accountability' by ensuring deliberation and requiring legislatures to be clear about how they treat rights.[34] Moreover, this constitutional dialogue will take place ultimately before the gaze (and, sometimes, the active participation) of the public - Bickel's 'bar of politics'.

The dialogic understanding of the Human Rights Act is reflected in a number of the important provisions of the Act. The process of constitutional dialogue can be said to commence with section 19, which requires a Minister of the Crown in charge of any Bill, before its second reading, either to make and publish a 'statement of

[32] See the similar account in the Canadian context: Roach, note 22, above, pp. 530-531.
[33] Edwards, note 19, above, p. 866. See also, e.g., C. Harvey, 'Governing after the Rights Revolution' (2000) 20 JLS 98.
[34] G. Calabresi, 'Foreword: Antidiscrimination and Constitutional Accountability (What the Bork Brennan Debates Ignores)' (1991) 105 Harv LR 103. See also Calabresi, *A Common Law in the Age of Statutes* (1981). In the UK context see, e.g., C. Harvey, 'Governing after the Rights Revolution' (2000) 27 JLS 61.

compatibility' or state that the legislation is not compatible with Convention rights. A 'statement of compatibility' is a statement to the effect that in the Minister's view the provisions of the Bill are compatible with Convention rights.[35] According to the Home Secretary at the time of the passing of the Human Rights Act (Jack Straw), the primary purpose of section 19 is to 'assist Parliament's consideration of Bills by highlighting the potential implications for human rights.'[36] The statement will also form the starting-point, should the occasion arise, for the discussion between legislature and court about the compatibility with the Convention of a challenged governmental decision. Since, where such a statement is made, it is likely that the courts will use it as evidence of Parliamentary intention, following the principle in *Pepper v Hart*.[37] Lord Hope in *R v A (No. 2)* emphasises the fact that statements issued under section 19 are merely the start and not the end of a process of constitutional dialogue.

> These statements may serve a useful purpose in Parliament. They may also be seen as part of the parliamentary history, indicating that it was not Parliament's intention to cut across a Convention right. ... No doubt they are based on the best advice that is available. But they are no more than expressions of opinion by the minister. They are not binding on the court, nor do they have persuasive authority.[38]

Section 3 of the Act is the central provision of the Act. It is also the provision which establishes the structure of constitutional dialogue in the post-Human Rights Act era. From the standpoint of the legislature, it constitutes a self-binding mechanism in that

[35] See Wadham and Mountfield, note 6, above, p. 33.
[36] House of Commons, Second Reading. Hansard HC, 16 February 1998, col. 780.
[37] [1993] AC 593.

it pre-commits itself to act within limits imposed by Convention norms and principles (subject to the mechanism outlined in section 4 – on which, see below).[39] As such, section 3 of the Act embodies the core idea of liberal constitutionalism: namely, that there must be legal limits to governmental power. And it also reflects the legitimacy model's attempt to temper democracy with the – ultimately democracy-enhancing – desire to protect the liberty of the individual. From the perspective of the court, it sets in place a structure in which - and sets the parameters for[40] - the dialogue between court and legislature is to occur.

Section 4 is the most obviously Bickellian feature of the Human Rights Act. In general terms, it provides an outlet should the conversation between court and legislature over the compatibility of a particular law or decision be on the verge of breakdown. In addition, the mechanism deprives the courts of the potential to have the final say in the matter, a factor crucial to the Bickellian dialogic theory and which is anathema to models of constitutionalism that assume judicial supremacism. Moreover, by its very nature, the declaration of incompatibility takes the form of a judicial statement to Parliament.

The central provisions of the Human Rights Act reflect, then, the sort of constitutional structure envisaged by the legitimacy model and the type of institutional dialogue mapped out by Roach in his analysis of contemporary Canadian constitutionalism. We can say, following Roach, that the structure put in

[38] [2001] 2 WLR 1546, para 69.
[39] On pre-commitment see, e.g., J. Elster, *Ulysees and the Sirens* (1984); *Ulysees Unbound* (2000). See also, e.g., J. Waldron, 'Precommitment and Disagreement' in L. Alexander (ed.), *Constitutionalism* (1998); S. Holmes, *Passions and Constraint* (1995), ch. 5.

place by the key sections of the Act 'encourages courts and legislatures to be themselves with the courts bringing to the table the importance of fundamental values and procedures that may be inconvenient for the legislature to consider and legislatures bringing to the table a knowledge of its regulatory objectives and obstacles that the court may otherwise have difficulty appreciating.'[41] And, we might add, by refusing to grant the courts the power to declare Acts of Parliament unconstitutional, the Act reflects the objections of the legitimacy model to notions of judicial supremacism.

Reasoning within the Framework of the Human Rights Act

In the previous section, I suggested that a dialogic understanding of the Human Rights Act derived, in part, from Roach's analysis of Canadian constitutionalism and Bickell's theory of judicial review makes sense of many of its key provisions. But how have the courts interpreted these provisions in the cases that have come before them since the introduction of the Human Rights Act?

In a survey of post-Act judicial review cases in chapter 7, we saw that judicial reasoning in those cases combines – in a way which is entirely typical of the process of review – a concern for the interests of the claimant with consideration of broader issues of constitutional and administrative propriety (of various sorts). The presence of the Human Rights Act added an additional layer to the decision-making in the cases. The reviewing court, as part of the process of deciding the case before it, had

[40] See, e.g., Gearty, note 10, above.
[41] Roach, note 22, above, p. 531.

to work out the relationship of the court *vis-à-vis* the legislature in the new framework. This issue, more often than not, took the form of a search for general principles of judicial deference: given the terms of the Human Rights Act, what factors are relevant in setting the appropriate level of deference in relation to the actions of the primary decision-maker? (The most thorough and sophisticated examples of this sort of consideration are Laws LJ's four principles of deference in the *International Transport* case,[42] Lord Hope in *ex p Kebilene*,[43] and the Court of Appeal's enunciation of deference principles in *Isiko*.[44]) In addition, there has been a growing concern among the judges of the higher courts to elucidate the precise nature (and to define the outer limits) of the test of proportionality which is due to become a significant element of the reviewing process in the wake of the incorporation of the Convention.[45] (See, for instance, the opinions of Lord Bingham and Lord Steyn in *Daly*[46] and Sedley's judgment in *B v Home Secretary*.[47])

We can see these concerns to establish the appropriate basis for the relationship between court and legislature in the post-Human Rights Act era – often expressed in the discourse of deference[48] – reflected in other cases decided under the Act. In *Brown v Stott*,[49] the defendant was charged with theft of a bottle of gin from a superstore and taken to the police station. There, under s.172(2)(a) of the Road

[42] *International Transport Roth GMBH v Secretary of State for the Home Department* [2002] EWCA Civ 158, paras 83-87.
[43] *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, p. 381.
[44] *R v Secretary of State for the Home Department, ex p Isiko* [2001] Imm AR 291, para 31.
[45] See, e.g., M. Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 CLJ 301; I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' (2002) PL 265.
[46] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, pp. 543-545 & 547-548.
[47] *B v Secretary of State for the Home Department* [2000] HRLR 439, pp. 441-443.
[48] For a general account, see, e.g., P. Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 LQR 589; Edwards, note 19, above.
[49] [2001] 2 All ER 97; [2001] 2 WLR 817 (PC).

Traffic Act 1988, the defendant was required to indicate who had been driving the car when she travelled to the superstore, and admitted that it was her. After a positive breath test, the defendant was charged with driving while her breath alcohol level was above the legal limit. In the Scottish High Court of Judiciary, it was held that the evidence compulsorily obtained from her could not be led by the procurator fiscal because s.172(2)(a) infringed the defendant's Convention right to a fair trial (Art. 6), particularly the right to freedom from self-incrimination.[50] The procurator fiscal and the Advocate General appealed to the Privy Council. The Privy Council first held that the case raised a devolution issue so that the question of compatibility of the provision in question with Convention rights could be raised.

In addressing the issue of compatibility, Lord Bingham started by delineating the limits of the judicial role in protecting Convention rights under the Human Rights Act. Judicial protection of rights is designed to complement the democratic process, he said. In applying the Convention, the court 'will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies'.[51] Looking at the in light of the purpose that the provision in question was designed to serve – the prevention of death and injury on the roads - his Lordship decided that s. 172 does not represent a disproportionate response to a serious social problem.[52] The opinion of Lord Steyn took a similar course. In this context, he said, there were legislative choices to be made and, under the Convention system, the courts 'may accord to the decisions of national

[50] See *Brown v Procurator Fiscal, Dunfermline* (2000) SLT 379.
[51] Note 49, above, para 39.
[52] Note 49, above, para 44.

legislatures some deference *where the context justifies it*'.[53] Bearing in mind the narrowness of the interference with the rights in question and the non-absolute nature of the article 6 guarantees, it could not be said that the provision was incompatible with the Convention.[54]

The House of Lords decision in *R v A (No. 2)*[55] involved a substantial consideration of the new interpretative powers contained within section 3 of the Human Rights Act. In that case, the defendant was charged with raping the complainant. His defence was that sexual intercourse had occurred with the complainant's consent (or, alternatively, that he believed that she consented). The defendant claimed that he and the complainant had had consensual sexual relations over a period of about three weeks prior to the incident in question. The Court of Appeal upheld the ruling of the trial judge that the effect of s. 41 of the Youth Justice and Criminal Evidence Act 1999 was that the alleged sexual relationship between the defendant and the complainant was inadmissible on the issue of consent (but not on the issue of belief in consent). However, in view of the Court of Appeal's opinion that this might result in a breach of the Art. 6 right to a fair trial, the Crown appealed to the House of Lords on the following certified question: 'May a sexual relationship between defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?'

[53] Note 49, above, para 58. (Italics of original.)
[54] For analysis of this case, see, e.g., Gearty, note 10, above, pp. 261-268.
[55] [2001] 2 WLR 1546 (HL).

Lord Steyn started with the proposition that, as 'a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent.'[56] Then he said that, while (following *Brown v Stott*) the courts must give weight to the decision of Parliament, 'when the question arises whether in the criminal statute in question Parliament adopted a legislative scheme which makes an excessive inroad into the right to a fair trial the court is qualified to make its own judgment and must do so.'[57] The existing purposive methods of statutory interpretation, Lord Steyn said, could not cure the problem of the excessive breadth of the section in question. But the 'interpretative obligation under section 3 of the 1998 Act is a strong one', his Lordship continued, 'an emphatic adjuration by the legislature' which, in this case, 'requires the court to subordinate the niceties of the language of section 41(3)(c) ... to broader considerations of relevance judged by the logical and common sense criteria of time and circumstances'.

Wilson v First County Trust Ltd[58] was the second English case in which a declaration of incompatibility was made under the Human Rights Act.[59] In that case, a credit agreement between the claimant and the defendant pawnbrokers was improperly executed in breach of the 1983 regulations made under s. 61 of the Consumer Credit Act 1974 because the amount of credit was incorrectly stated. In 1999, a district judge refused the claimant's application for a declaration that the rate of interest was

[56] Note 55, above, para 31.
[57] Note 55, above, para 36.
[58] [2001] EWCA Civ 633; [2001] 3 WLR 42. On the case, see, e.g., N Bamforth, 'Human Rights and Consumer Credit' (2002) 118 LQR 203.
[59] The first was *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 1389 (Divisional Court made a declaration to the effect that a statutory planning law

extortionate and that the agreement was unenforceable by court order by virtue of sections 64(1) and 127(3) of the 1974 Act, which prohibited the making of an order to enforce a credit agreement if s. 61 was not complied with. On appeal by the claimant, in an interim injunction in November 2000, the Court of Appeal decided that s. 127(3) might be incompatible with the Convention and adjourned the appeal so as to allow a later hearing on the question of compatibility.

Giving the judgment of the Court, Sir Andrew Morritt V-C said that the question to be addressed was whether the exclusion of any judicial remedy in a case where the document signed by the debtor does not include all the prescribed terms of the agreement is legitimate in light of Art. 6 of the Convention.[60] Counsel for the Secretary of State argued that, since the issue was one of social policy, the issue fell within an area in which the courts should be ready to defer. But this argument was rejected. 'It is one thing to accept the need to defer to an opinion which can be seen to be the product of reasoned consideration based on policy; it is quite another thing to be required to accept, without question, an opinion for which no reason of policy is advanced.'[61] The policy basis for the provisions in question, the courts discovered, was the need for an appropriate degree of formality in consumer credit agreements. However, the interference with the creditor's Art. 6 rights were held to be infringed to an extent which was disproportionate to the policy aim. 'There is no reason that we can identify – and, as we have said, no reason has been advanced –

procedure contravened the right to a fair trial in Art. 6 ECHR; the House of Lords reversed the Divisional Court ruling).

[60] Note 58, above, para 31.

[61] Note 58, above, para 33.

why an inflexible prohibition is necessary in order to achieve the legitimate policy aim.'[62]

The question became what was the appropriate solution to the case. The Court looked first at section 3 of the Human Rights Act. That section required was said to require the following:

> The court is required to go as far as, but not beyond, what is legally possible. The court is not required, or entitled, to give to words a meaning which they cannot bear; although it is required to give to words a meaning which they can bear, if that will avoid incompatibility, notwithstanding that that is not the meaning which they would be given in a 'non-Convention' interpretation.[63]

It was decided that it was not possible to read and give effect to the provisions in question in a way which was compatible with the pawnbroker's Convention rights. Accordingly, the court had to decide whether it was appropriate to issue a declaration of incompatibility under s. 4 HRA. Sir Andrew Morritt held that the issuing of a declaration was appropriate: there had been a full hearing on the issue and a reading of the provisions in question that was compatible with the Convention was impossible to find.[64]

This analysis of the reasoning in both these cases reveals that, at this early stage in the Human Rights Act era, the courts are concerned, above all, to establish a viable

[62] Note 58, above, para 39.
[63] Note 58, above, para 42. Compare the approach of Lord Steyn in *R v A*: note 55, above.
[64] Note 58, above, para 47.

and constitutionally appropriate format for the protection of Convention norms under the framework provided by the Act. Even at this early stage, the format which the courts are developing can be understood in terms of the dialogic model. The debate about when to use the section 4 power to declare legislation incompatible with the Convention - a central issue in *Wilson v First County Trust* and *Brown v Stott* and a feature of the opinions (particularly that of Lord Hope) in *R v A* - reflects the dialogic model's understanding of section 4 as a declaratory outlet for use by the court when the process of constitutional dialogue seems on the verge of breaking down. Aspects of the judgments in these cases exhibit a burgeoning awareness of the communicative potential of this new power. The section 4 declaration, as Sir Andrew Morritt put it in *Wilson v First County Trust*, 'serves a legislative purpose under the 1998 Act; in that it provides a basis, under section 10(1)(a) of that Act, for a Minister of the Crown to consider whether there are compelling reasons to make amendments to the legislation by remedial order'.[65]

The courts' discussions of the interpretative obligation contained within section 3 can also be read within the context of the legitimacy model. The central concern in these judgments seems to be the establishment of principles of interpretation that square the need to protect Convention rights (the principal reason the Act was passed in the first place) with principles of constitutional democracy that ground the functioning of the system of governance in the UK. The very different conclusions about the proper scope of the interpretative power reached by the majority of the House of Lords in *R v A* and the Court of Appeal in *Wilson v First County Trust*

[65] Note 58, above, para 47.

represent different solutions to this issue. Certainly, it ought to come as no surprise, given the general presuppositions of the legitimacy theory, that much of the judicial discourse at present is oriented towards constructing principles capable of establishing the legitimate limits to the jurisdictional reach of the court in the new order. The debate at this stage centres on the need to reconfigure the dynamics of legitimacy in light of the legal framework imposed by the Human Rights Act.

Conclusion

1. Part I – Analysing the Rights Theory

In the Introduction, it was stated that the aim was to provide a dissertation in public law theory. The thesis has been an examination into the conceptual underpinnings of public law, the argument in which has concentrated on questions concerning the relationship between court and Parliament.

The major part of the thesis comprised an analysis and criticism of what appears to be the strongest theory of public law currently available. In Part I, the work of three of its leading representatives was examined. The work of T.R.S. Allan was examined first. Allan's theory centres on a notion of the rule of law imbued with liberal constitutionalist values and rooted in the common law. Public law, on his account, is concerned with the task of subjecting governmental decisions to critical scrutiny through the application of these values by the courts.

The idea of society as an organic, moral community that shares certain fundamental or deep-rooted values underpins Allan's theory. Three such fundamental values recur in Allan's thought: dignity, autonomy, and equality. The political theory developed in Allan's work is republican, rooted as it is in ideals of deliberative democracy and public reason.

Allan advances a dualist conception of the constitution which draws a sharp distinction between ordinary and constitutional politics. Ordinary politics centres on the legislature and should be treated with scepticism. Constitutional politics concerns the public law jurisprudence of the common law courts. In this theory, the common law is seen as a body of reason and principle. It also plays a constitutive or foundational role since it is said to reflect or embody the deep-rooted values of a society. These basic values are necessarily applied in juridical practice, Allan maintains, since it is the exclusive duty of the court to uphold the rule of law, a principle which is itself formed of the self-same values. On this account, public law is seen as a species of moral reasoning. Decision-making in cases of judicial review is necessarily oriented to those deep-rooted values that are embodied in the common law and reflected in the principle of the rule of law.

Chapter 2 examined the theory of public law advanced by Sir John Laws. Laws' approach is resolutely philosophical. Embarking in Aristotelian fashion on a search for the good constitution, Laws outlines an account of the essential nature of man in which the Kantian notion of individual moral autonomy features prominently. In light of this analysis, Laws argues that the good constitution must primarily be concerned with ensuring that individual autonomy is protected.

Laws maintains that translating abstract moral principles relating to autonomy so that they fit the conditions of the real world gives rise to three conditions. First, autonomy requires a democratic political system since only democracy reflects the ideal of the equality of individuals. Second, because our world is an imperfect one

where a person will abuse another's autonomy if allowed to do so, individuals must have rights capable of protecting their autonomy from outside interference. Third, laws and a legal system are required to ensure that these autonomy-protecting rights can be enforced against the potentially recalcitrant.

Like Allan, Laws develops a dualist account of the constitution. He thinks that the elected legislature exists to turn the desires of socially powerful interest groups into tangible policies and laws. And, since the legislature represents the interests of the powerful in this way, it cannot be regarded as being anything more than morally neutral. By contrast, the common law courts are a necessarily virtuous institution since it is their task to enforce the moral law relating to autonomy. In addition, by virtue of its necessary connection with the moral law, judge-made law should be understood to be a superior or 'higher-order' of law.

Laws captures this dichotomy analytically by means of a distinction between positive and negative rights. Positive rights relate to social benefits and are the stuff of political debate. In relation to these rights, the legislature is sovereign. Negative rights enforce the moral law. In relation to these, the courts, as guardians of the moral law, are supreme.

Applying this theory in the public law context, Laws maintains that it is the court's duty to apply negative rights, as well as the more general principle of reasonableness, to ensure that governmental decisions do not unduly infringe individual autonomy. Public law principles, on this account, although they clearly

reflect political ideals, are apolitical in the sense that they are not open to democratic debate, being principles on which that very debate rests. Moreover, since they comprise an essential part of the higher order of law, judges should show no restraint or deference in applying them in cases of judicial review.

The theory of public law developed by Dawn Oliver was examined in Chapter 3. Oliver argues that considerate altruism and participative communitarianism theories of government and citizenship are taking over from older, rival theories of positivist authoritarianism and liberal majoritarianism as the basis for law and legal decision-making. While this trend is visible in many fields of both public and private law, Oliver argues, it is particularly noticeable in the field of judicial review.

Oliver identifies five common values - dignity, autonomy, respect, status, and security. These values pervade the law and connect with the two now-dominant theories of citizenship and the constitution. They are not to be regarded as rights because they exist on a higher level of abstraction and are less absolute. Although Oliver recognises that the values she identifies will often come into conflict with other values, she does not articulate a coherent strategy for dealing with such conflict. Instead, she argues that defendants in judicial review cases ought not to be allowed to rely on any of the common values and suggests that the courts should not give too much weight to considerations of the need to defer to authority.

This theory has a number of significant implications for public law. First, it entails that what are typically thought to be public law principles are really manifestations

of general principles of considerate decision-making in a particular context. There is, then, no real division between public and private law. This implies, in turn, that the *ultra vires* rule should no longer be regarded as the foundational principle of judicial review. The courts are primarily concerned, Oliver argues, with the task of ensuring that public bodies do not abuse their power.

The theory also entails that scrutiny in cases of judicial review ought to depend on the effect of the proposed decision on the individual claimant. Courts ought to impose higher order duties of considerate decision-making - which are connected umbilically with the five common values - on public bodies. To do this in a systematic way, Oliver maintains, would allow the courts to become a Grand Inquest of the Nation.

The analysis of this strand of public law thought was concluded in Chapter 4. A series of connections was made between the theories advanced by Allan, Laws, and Oliver. The extent of these connections was such, it was suggested, that the three theories could justifiably be seen as belonging to the same general approach. These connections were systematised in terms of a set of essential propositions that were collated into a single model. This was called the rights-based theory of public law because that term best captures vital elements of the approach in question.

At the level of moral theory, the rights-based model of public law employs an essentialist method which ascribes to the individual a set of fundamental needs. These needs generally relate to the Kantian notion of the moral and rational

autonomous individual. Morality, on this account, becomes a matter of deducing the values that best protect these essential needs. In terms of political theory, then, the rights theory articulates a set of values seen as necessary to give practical expression to the need to protect individual autonomy. Because they relate to the need to protect individual autonomy, these values are regarded as overriding or fundamental and are usually translated into the language of rights. Politics, on this model, is essentially a matter of deciding what these moral values require in particular cases of dispute.

The rights theory articulates a dualist account of the constitution that postulates a rigid allocation of functions according to which the primary responsibility for protecting fundamental values rests with the court, while the legislature exists to enact socially popular policies. On this account, judge-made law is considered to be the moral, and hence the constitutional, superior of legislation.

In relation to public law, the rights theory starts with the proposition that it is the duty of the court to protect individual autonomy from interference by antagonistic public decision-makers through the application of principles of higher-order law. The intensity of judicial scrutiny in such cases is thus taken to be a simple factor of the importance of the values and rights at stake. This value-driven model of adjudication requires the court to decide public law cases by direct reference to fundamental values. Rights theorists suggest, finally, that this value-driven model is historically grounded within our own constitutional traditions.

The analysis of rights-based public law thought was extended by focusing on the approach of rights-based scholars to matters grouped under the umbrella term 'legitimacy'. After a detailed analysis of aspects of rights-based work, it was argued that the rights-based approach contained nothing by way of a systematic and integrated theory of jurisdiction or institutional balance. In addition, insufficient account was taken in rights-based work of the complexity produced by situations of polycentricity in the context of administrative decision-making.

2. Part II – Criticising the Rights Theory

Part II of the thesis comprised a critical examination of the rights theory of public law that had been analysed in Part I. Chapter 5 examined the rights theorists' argument from history: that is, the claim that good precedents are to be found in our traditions of legal and constitutional thought which support some of the central features of the rights-based approach. The examination of this argument concentrated on the claims made by the rights theory in relation to the early seventeenth-century legal practice. The argument was examined first for its plausibility as a matter of history. It was found that the way in which rights theorists use historical material render the argument from history uncompelling. The argument was then examined for its cogency as a matter of law. It was suggested that the changes that have occurred as a matter of legal and political practice since the seventeenth century are so profound that seventeenth-century cases have very little precedent value in the present. The chapter ended with the suggestion that,

since it cannot be regarded as either plausible history or cogent law, the argument from history should be seen as an exercise in mythmaking.

Chapter 6 examined the rights theory's argument that judge-made law comprises a superior body of higher order of law. That argument was divided into two claims. The *negative* claim was that legislation ought to be treated with scepticism. This claim was found to rest on a dubious method. Whereas the brand of (constitutional) politics that occurs within common law courts is given a normative – or 'reasonable ideal' - interpretation by rights theorists, legislative practice is seen through sceptical lenses influenced by rational choice theory. The *positive* claim was that the common law is essentially good. This claim, represented by Allan's notion of the common law court as exemplary forum of public reason, was put to the test against a study of a recent case: *R v Secretary of State for the Home Department, ex p Simms*. It was suggested that argument in judicial review cases in practice falls short of any meaningful ideal of public reason in a number of significant ways. The study showed that argument in judicial review cases is characteristically 'removed'. In other words, it is restricted to narrow points of law, tends to focus on the interests of the parties to the case, does not tend to assess the potential consequences of judicial decisions, adheres to a limited number of pre-set forms, and does not directly address general social or political issues. Towards the end of the chapter, the issue of third-party interventions and standing in judicial review – a matter not brought out by the *Simms* case – was examined.

Chapter 7 concentrated on the value-driven approach to decision-making in judicial review entailed by the rights theory. Value-driven review was defined as decision-making directly and exclusively oriented towards fundamental values. On examination, this approach was found not to be viable. Given that the values fundamental within the rights theory are for the exclusive use of claimants, and that the whole point calling a value fundamental is that thereby becomes generally capable of overriding competing values, this model implies that claimants ought generally to triumph over defendants in public law cases. This point was reinforced by an examination of a number of recent cases of judicial review drawn from both before and after the Human Rights Act was introduced. In these cases, the one-dimensional model of decision-making advanced by the rights theory did not capture an essential aspect of the judgment: namely, judicial concerns about constitutional or administrative propriety.

3. Part III – An Alternative Approach

In Part III, the outline of an alternative theory public law was provided. As a prelude to this model-building enterprise, the possibility of value-free judicial review was examined and rejected by means of a critical examination of the *ultra vires* theory. It was argued that value-free review is not an option because it fails to allow sufficient scope for the influence of substantive values. This is an important deficiency because we expect judges in judicial review cases to operate more than formal legal methods of checking the lawfulness of governmental decisions.

In light of the failure of the *ultra vires* model, the possibility of value-driven judicial review was examined once more. A general problem identified with value-driven decision-making was that, in asking judges directly to decide on the relative importance of competing values, it goes beyond what would normally regarded as constitutionally acceptable judicial behaviour and seems to ask judges to act either as politicians or moral philosophers.

In light of the failure of these existing theories, a number of assumptions to be used as a basis for constructing a more viable theory of public law were drawn up. From the failure of the *ultra vires* theory, it could be said that a workable theory must be able to accommodate the influence of values in the decision-making process, at least to some extent.

The idea of legitimacy was postulated as a general basis for public law. On this approach, the primary function of the courts in public law becomes the general need to preserve and enhance the legitimacy of public decision-makers and political institutions. I argued that the legitimacy approach is capable of explaining, first, the existing taxonomy used in judicial review cases and, second, the characteristic nature of decision-making in judicial review.

In terms of normative cogency and attractiveness, three arguments were advanced in support of the legitimacy model. First, it was argued that the legitimacy theory is able to accommodate political disagreement. Second, because of its understanding of the reflexive nature of the inquiry in judicial review, the legitimacy approach is

capable of putting reasonable and realistic limits on the scope of the judicial inquiry. Third, the legitimacy model may also be said to entail a more attractive interpretation of basic constitutional ideas than either of its main rivals.

In the final chapter of the thesis, it was argued that the Human Rights Act is not at all incompatible with the legitimacy approach. In fact, the legitimacy approach seems to make better sense of a number of significant aspects of the structure of decision-making established by that Act.

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