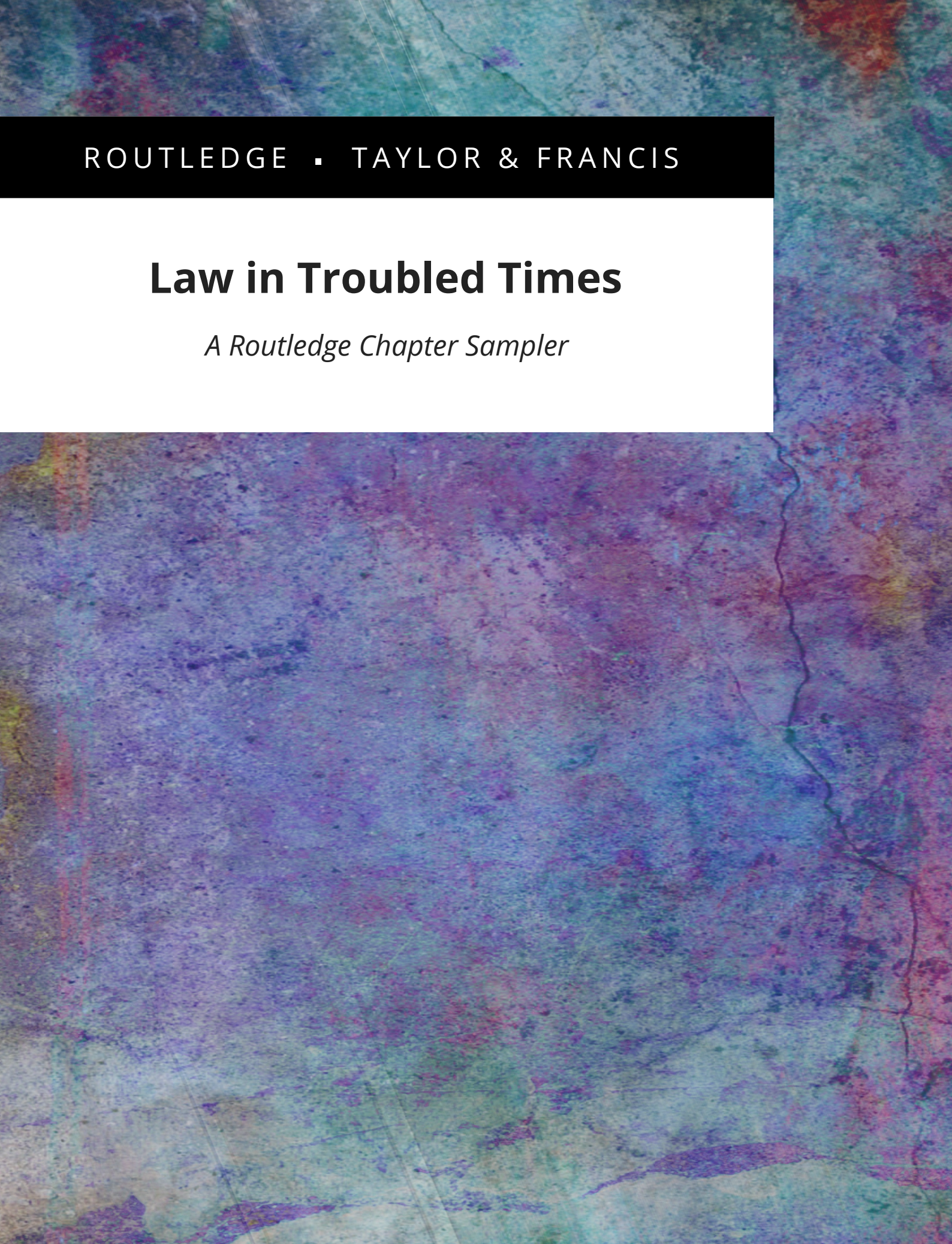

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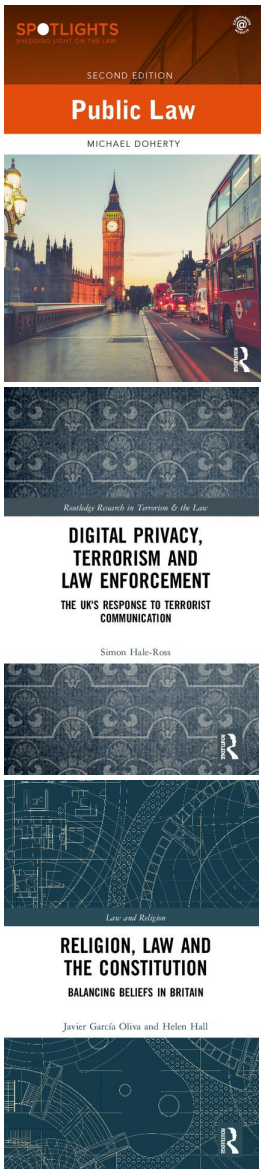

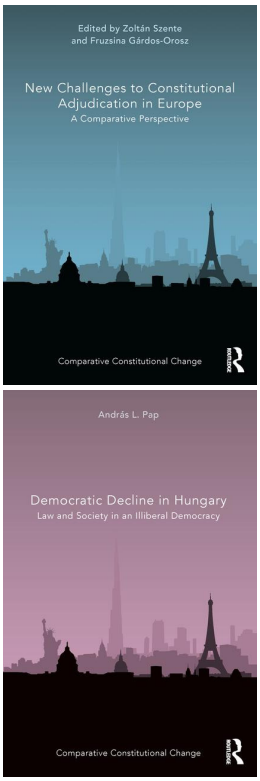

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CHAPTER 10
THE RULE OF LAW

Here are some fundamental questions: why should people obey the law? Does the Government always need legal authority for its actions? Should public officials be bound by the same rules and subject to the same courts as ordinary citizens? Can oppressive dictatorships ever be said to be lawful? These are addressed by the constitutional principle of the rule of law. It is not in itself a legal rule but it organises a number of legal principles into a broad and powerful influence on the constitution. It outlines something of a paradox, that whilst the law is a powerful tool in the hands of the state, the need for lawful authority can be a powerful restraint on governmental abuses of citizens.

AS YOU READ

The meaning of the rule of law has been the subject of considerable debate. It is often described, even by some judges, as a particularly slippery and elusive concept. This chapter hopes to persuade you that this is not necessarily so. Each writer has their own particular take on the rule of law but, without unduly simplifying the approaches, we can place them into three categories. First, the **legality principle** states that Governments must act in accordance with the law. Secondly, the **formal school** adds the notion that laws should have certain characteristics (e.g. clarity) regardless of their content. Third, the **substantive school** argues that the rule of law additionally requires that the content of laws is consistent with human rights and human dignity.

In this chapter, you will need to understand these different approaches and be able to illustrate them and compare their strengths. You should not lose sight, however, of the important *practical* role that the rule of law plays in UK Public Law. Before you start you should view this video, with endorsement of the rule of law from the likes of Bill Gates and Archbishop Desmond Tutu: http://worldjusticeproject.org/endorsements

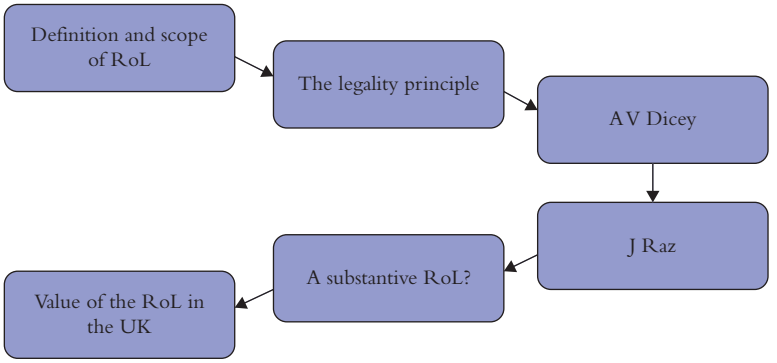

Figure 10.1 Structure of Chapter 10

10.1 INTRODUCTION

EXPLAINING THE LAW– WHAT DANGERS MAKE THE RULE OF LAW SO IMPORTANT?

Imagine that Elizabeth makes some critical remarks about the rulers of a country. She is abducted by state agents who refuse to tell Elizabeth's relatives where she is being held or what law she has broken. When the relatives go to court, their application fails because the Minister for Justice has informed the judge (without telling Elizabeth's relatives) that a secret law was passed that morning by the President. That law cannot be shown to the court but the Minister tells the judge that it covers Elizabeth's past behaviour.

The police later confiscate all of Elizabeth's property. Her relatives cannot find any law that authorises this. Their first application for a court order is rejected because the Minister simply instructs the court to refuse them access and pays the judges a bonus when they act on his orders. A different court agrees to hear the claim and issues an order for the return of the property. The Minister commands the police to ignore the court order.

This is a hypothetical scenario but it is also an amalgam of real life historical events. It represents aspects of England at the time of Magna Carta 1215 and the Habeas Corpus Act 1679 and of Britain at the time of the *Entick v Carrington* case in 1765. It is a depressingly familiar summary of the situation in dictatorships and totalitarian regimes from around the world through recent centuries and right up to the present day. Some of the issues from this scenario, such as refusing a prisoner access to a court, have been amongst the most heated topics in recent decades in the Western liberal democracies of the UK and the US, particularly in relation to responses to terrorism and the operation of Guantanamo Bay.

A bit of empathy never hurts in trying to understand the importance of legal protections, so go ahead and imagine that Elizabeth is one of your relatives. How are you likely to feel about your obligation to obey the laws of this state? What conclusions will you draw about the role of law within this country and the ability of law to control the Government?

In a state based on the rule of law, these things would simply not be allowed to happen. Public officials acting without lawful authority, secret and retrospective laws, governments controlling judges or instructing the police to ignore inconvenient court orders are all direct breaches of the principle of the rule of law.

As we go through the contested definitions of the rule of law and the subtle implications of one school of thought over another, you should keep this scenario in mind. Notice, in particular, that the rule of law has this core content in all its different guises and that it tries to prevent the sort of evils that some rulers are tempted into (or are hell-bent on doing).

EXPLAINING THE LAW – ZIMBABWE LAND REFORM

Southern Rhodesia was an apartheid state in southern Africa where black people were excluded from political and economic life by the white minority. A guerrilla war brought an end to the apartheid regime and the establishment of a new republic, Zimbabwe, in 1980. Zimbabwe is a signatory to numerous international agreements, including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights. These require the equal protection of the law and the independence of the judiciary.

The issue of land reform was a vexed one, and 20 years after the foundation of Zimbabwe, many large farms were still owned by white farmers. The ruling ZANU-PF party of the President, Robert Mugabe, sought to speed up the process of land redistribution. In the process they incited 'war veterans' to invade white-owned farms and evict the owners. These invasions were not legally authorised property transfers, and serious violence occurred, including murder. A Human Rights Watch study of 2002 reported allegations that the police and army were involved in assisting the land invasions and in the beating and torture of farm workers. The reluctance of the police to protect victims of violence was well reported.[1]

The farmers obtained court orders requiring the trespassers to leave. Ordinarily, the police would enforce such orders, but President Mugabe's Government instructed the police not to do so. This was part of the process of a country that had previously held a commitment to the rule of law now sliding into authoritarianism.

1 Human Rights Watch, 'Fast Track Land reform in Zimbabwe', http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.pdf (last accessed 05/11/17).

10.2 DEFINITION AND SCOPE OF THE RULE OF LAW

There has been a good deal of worrying about the definition and scope of the term 'rule of law'. Barnett argues that 'Of all the constitutional concepts the rule of law is also the most subjective and value laden'.[2] Some commentators go further, and Shklar's declaration that the term is 'meaningless thanks to ideological abuse and general overuse' is often quoted.[3]

Yet to describe the principle as 'meaningless' is overstepping the mark. There is actually a good degree of consistency between the differing accounts of what the 'rule of law' means. You will see that the rule of law has a core meaning – the legality principle. Whilst this is limited in scope, it is hard-edged and has a defined legal content and mechanisms for securing legality. There is a penumbra of wider meaning that is subject to lively debate. It is generally accepted that this includes notions of natural justice, access to the courts and clarity and prospectivity in legal rules.

Writers have largely agreed on the core content of the rule of law and differ mainly on how wide the principle is. Some prefer a narrower formal approach, others agree that the rule of law requires these formal characteristics but also that there is a broader need for the *substance* of the legal rules to have a minimum content of fairness and equity. At its widest, these arguments say that the rule of law requires democracy, human rights and even social and cultural rights.

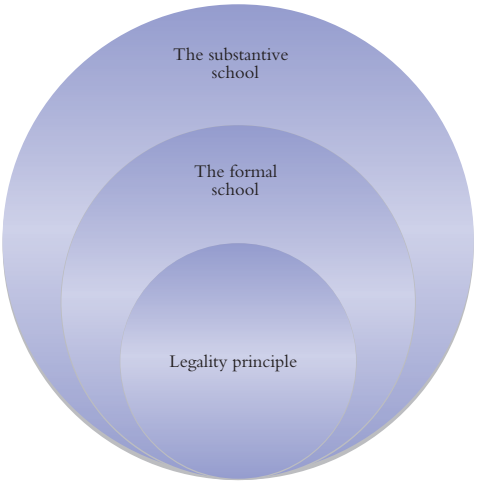

Figure 10.2 Different models of the scope of the rule of law

2 H Barnett, *Constitutional and Administrative Law* (11th edn, Routledge, 2016) 48.

3 J Shklar, 'Political Theory and the Rule of Law' in A Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1.

10.2.1 ASSESSMENT TIP

Do not let the contested nature of the concept put you off. Exploring these competing claims can be a very stimulating exercise, and (perhaps more important than debates on where the boundaries of the concept lie) the rule of law has crucial *functions* to perform. Jowell argues that the rule of law is defined in the course of its practical application[4] and when you see the work that the concept does, you will recognise its importance in the UK constitution.

10.2.2 THE RULE OF LAW AS A BENCHMARK

The rule of law can be used as a *benchmark* that allows scholars of Public Law (which now includes you) to evaluate and critique laws and constitutions. Proposals which do not measure up to the standards required by the rule of law can be criticised in those terms. This does not stop measures that breach the rule of law from being passed. Yet because there is such a widespread commitment to the rule of law, these sorts of criticisms are very powerful and have resulted in proposals being dropped or amended.

The principle is particularly important in delivering constitutionalism, i.e. limited government and the prevention of abuse of state power. Most important amongst those who accept this function of the rule of law are the judges. They do not simply use the concept as a theoretical benchmark but also as a practical tool. The rule of law is a strong general principle that helps guide the development of the common law and a powerful presumption in statutory interpretation.

At its heart is the insistence on the supremacy of law over people, on a rules-based over a whim-based system. Its roots go deep into Western thought; Aristotle said, 'the rule of law is preferable to that of any individual', and English medieval writer Bracton wrote that 'the King ought not be subject to man but to God and the Law, because the law makes him King'.[5] It is also firmly embedded in the English constitutional system. The Magna Carta, signed in 1215, did not make any reference to the term 'rule of law' but it did provide some key rule of law protections:

- Chapter 39 – 'no freeman shall be taken or imprisoned . . . save by lawful judgement of his peers or by the law of the land'.
- Chapter 40 – to none will we sell, 'to none deny or delay, right or justice'.
- Chapter 45 – only those with knowledge of the law and 'minded to observe it rightly' will be appointed as judges.
- Chapters 52 and 55 – fines and confiscation of property must be in accordance with the law.

4 J Jowell, 'The Rule of Law's Long Arm: Uncommunicated Decisions' [2004] *Public Law* 246.

5 Bracton, *On the Laws and Customs of England*, c.1236.

10.3 THE RULE OF LAW IS NOT A RULE OF LAW

T R S Allan says: 'In the mouth of a British constitutional lawyer, the term "rule of law" seems to mean primarily a corpus of basic principles and values, which together lend some stability and coherence to the legal order'.[6] The rule of law is a principle of governance or an expression of state morality, albeit one that that can have powerful effects on how laws are made and interpreted. Its basis is not in formal legal sources, and there is no authoritative statement of its meaning in statute or case law.

The Constitutional Reform Act 2005 highlights its importance, stating in section 1 that 'This Act does not adversely affect the existing constitutional principle of the rule of law'. There is no attempt, however, to define the principle. The Act seems to recognise the importance of the rule of law as a pre-existing 'constitutional principle', but it does not help us to decide which formulation of the principle is the best one. Judges, as we will see, already use the rule of law in a wide and active manner. They probably did not need any further encouragement from statute to regard the rule of law as a constitutional principle. So what is the point of section 1 of the Constitutional Reform Act 2005?

The answer lies in the governmental reforms introduced by the Act (see Chapter 9, 'Separation of powers'). These initially put the existence of the office of Lord Chancellor in doubt. The Lord Chancellor was seen as the primary defender of the rule of law within Cabinet. The Lord Chancellor at the time of the passage of the Act, Lord Falconer, said that: 'The Government have no problem in accepting that the rule of law must and does guide the actions of Ministers and all public officials. It is also clear that Ministers and other public officials must comply with the law'.[7] Even though the office was reprieved, there are concerns that the new redefined Lord Chancellor (who is not necessarily a lawyer) will be less alive to the constitutional role of the rule of law than their predecessors.

10.3.1 OBEDIENCE TO THE LAW

The rule of law expresses a preference for a society ordered by law and order rather than anarchy. Whilst much of the focus of the rule of law is on the obligation of the Government and public bodies to abide by legal rules, this society ordered by law would be impossible if ordinary citizens did not obey the law.

APPLYING THE LAW – THE DEATH OF SOCRATES

Socrates was a philosopher in ancient Athens (c. 469BC–399BC). His philosophical approach did not expressly call for the overthrow of the government or the rejection of the accepted morals or religious beliefs of the city. His approach, however, was

6 T R S Allan, *Law Liberty and Justice: The Legal Foundations of British Constitutionalism* (OUP, 1995) 143.

7 Hansard HL, vol 667, col 738.

to constantly question things, including notions of justice, honour and bravery, and this in turn provoked and embarrassed the leaders of the city. He was charged with corrupting the minds of the youth of Athens, convicted and sentenced to death by poison.

Socrates' pupil, Plato, described the opportunity for Socrates to escape from prison and this unjust sentence, and his refusal to do so. Socrates chose to accept the death penalty and drank the poison. Why would he do so? Did he have an obligation to obey the law? Did this obligation even extend to laws that were oppressive and unjust?

Apply this to your life. Consider why you obey the law (if you do). Can you think of any legal restrictions that you obey but that you feel are unnecessary or unjust?

There are a number of reasons put forward by scholars for Socrates' resignation to his legal fate, including his feeling that the time was right for his death and that he had nothing to fear, but the key reason can be seen as an early version of what is known as *social contract theory*.

Socrates is reported to have said, 'do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force but are nullified and destroyed by private persons'.[8] Having chosen to continue to live in Athens, Socrates felt that he had entered into a sort of contract with the city. It would provide protection and order, and in return the citizen would provide obedience to the law.

Social contract theory provides a rationale for the obligation to obey the law and also an indication of the limits of that obligation. Thomas Hobbes and Jean-Jacques Rousseau came up with related ideas of why humans come together in civil society and the consequences that follow: individuals limit their own liberty and give some power to the state to rule over them. There are echoes of this in the House of Lords' judgment in *Heaton's Transport v Transport and General Workers Union* [1973] AC 15, where Lord Wilberforce said, 'The justification for the law, the courts and the rule of law is that they protect us from unfair and oppressive actions by others, but if we are to have that protection we must ourselves accept that the law applies to us too, and limits our freedom'.

Many social contract theories, however, go on to argue that when the state acts injuriously to the people, then the obligation of obedience is curtailed or suspended. There are obvious difficulties in identifying who gets to decide whether a law is unjust or not. Any civil disobedience should be proportionate to the injustice, and most theorists draw a line between non-violent resistance and violent acts.

8 Plato, *Crito* (CreateSpace, 2015), http://classics.mit.edu/Plato/crito.html (last accessed 05/11/17).

KEY LEARNING POINTS

- The rule of law is an important constitutional principle rather than a single legal rule.
- There are competing conceptions of the rule of law, but they can be used as a benchmark to assess Government action.

10.4 THE LEGALITY PRINCIPLE – GOVERNMENT ACCORDING TO THE LAW

'Legality' includes the idea that there are established institutions and established processes for making valid law. The rulers of a country cannot simply make up legal rules as and how they wish. For primary legislation (as we saw in Chapter 3, 'Parliament and legislation'), this involves Bills being submitted to Parliament, going through the various stages of debate and scrutiny, and being approved by the House of Commons, approved by the House of Lords and then receiving the royal assent.

Ultimately, it is the *judges* who police even this aspect of the rule of law (as we saw in Jennings's rule of recognition, Chapter 7, 'Supremacy of Parliament'). We can see this process even more clearly with secondary legislation, such as local authority bye-laws, where the courts can quash these purported legal rules on the basis that there was no lawful authority to make them or that the established procedures for law-making were not used.

The impact of the legality principle, however, does not fall heaviest on the legislature but on the executive. It requires that ministers and public officials act in accordance with the law and have lawful authority for their actions.

EXPLAINING THE LAW – *ENTICK V CARRINGTON* (1765) 19 ST TR 1029 (COURT OF COMMON PLEAS)

John Entick wrote pamphlets critical of the Government. The Secretary of State (a role broadly equivalent to the Home Secretary) ordered King's Messengers (the nearest modern equivalent would be the police) to seize his papers and gave them a warrant that purported to authorise their actions. They forcibly entered Entick's house, arrested him and took away his papers. Entick sued for trespass.

The King's Messengers claimed authority from a statute, but this did not authorise the warrant, so the argument shifted to state necessity. It was claimed that the defendant's writings were an attack on the state (an offence known as sedition) and therefore it was necessary for the state to defend itself. This necessity, it was argued,

made the warrant lawful. Lord Camden, the judge in the Court of Common Pleas, dismissed this defence of state necessity and handed down one of the landmark judgments in English legal history:

> This power, so claimed by the Secretary of State, is not supported by one single citation from any law book extant . . . If it is the law, it will be found in our books. If it not to be found there, it is not law.
>
> By the laws of England any invasion of property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action.
>
> According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done it is a trespass . . . Where is the written law that gives any magistrates such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce such a practice legal, which would be subversive of all the comforts of society.

This insistence that even public bodies must act according to the law and that even Government ministers could not simply extend their legal powers because they thought it necessary was highly unusual at the time.

At first glance, it might seem to impose substantive limits on state power, e.g. making it impossible to issue general warrants authorising arrest, search and seizure. By looking at subsequent developments, though, the scope of the principle in *Entick v Carrington* becomes clearer, in particular the rather narrow scope of the legality principle and its inability to prevent oppressive laws being passed becomes more apparent. This is especially so in the UK which does not have a written constitution and in which Parliament is supreme and legally entitled to make any law it wishes.

10.4.1 POWERS GRANTED BY PARLIAMENT

Section 20C of the Taxes and Management Act 1970 provides that: 'An officer of the Board [of the Inland Revenue] may enter premises, . . . on the issue of a warrant, and search them . . . may seize and remove any things whatsoever found there which he has reasonable cause to believe may be required as evidence for the purpose of proceedings . . .'

The reference to 'for the purpose of proceedings' might indicate that the warrant should state the particular offences which the company is suspected of. The section, however, does not expressly state a need for this. The danger that hovers over this is that state officials will be given the power to go on 'fishing expeditions', i.e. to search through property for evidence of wrongdoing without having to say beforehand what they suspect and why.

EXPLAINING THE LAW – *R V INLAND REVENUE COMMISSION, EX PARTE ROSSMINSTER LTD* (1980) AC 952

Rossminster Ltd was a company suspected by the Inland Revenue of committing some unspecified tax fraud. The Inland Revenue obtained warrants allowing them to enter and seize anything they thought might be relevant evidence of tax fraud. The warrant gave no particular details of what specific offences were suspected, and the warrant just followed the wording of section 20C of the Taxes and Management Act 1970. It was a general warrant.

Lord Denning in the Court of Appeal said:

> Once great power is granted there is a danger of it being abused. Rather than risk such abuse, it is, as I see it, the duty of the courts to construe such a statute so as to see that it encroaches as little as possible upon the liberties of the people of England.
>
> As a matter of construction of the statute and therefore of the warrant . . . in pursuance of our traditional role to protect the liberty of the individual – it is our duty to say that the warrant must particularise the specific offence which is charged.

On this basis the warrant was invalid, but this finding was reversed by the House of Lords who said: 'The Act authorises officers of the board of Inland Revenue, acting upon a search warrant, to enter premises by day or night, if necessary by force, and seize anything whatsoever reasonably believed to be evidence of an offence involving fraud in connection with tax . . .' and 'There is nothing in the statute to require the particular offence to be stated in the warrant. Since the provisions of the statute had been complied with, there was no violation of the principle of *Entick v Carrington*'. (Lord Scarman).

Lord Scarman was deeply troubled by the breadth of the power given by statute, describing it as 'a breathtaking inroad upon the individual's right of privacy and right of property'. Nevertheless, once a statute had granted the power to the public body, then as long as it operated within the bounds of that power, the legality principle was complied with. The legal principle is not breached if a Government gets their additional powers, no matter how intrusive or disproportionate, granted by Parliament. 'Legality' in this sense provides no substantive protection, merely requiring the state to 'jump through the hoop' of authorising its own actions.

One common interpretation of *Entick v Carrington* was that the law insisted that public bodies had authority for all of their actions, particularly those that interfered with the lives of citizens. The following case, however, cast doubt on even this limited protection.

APPLYING THE LAW – *MALONE V METROPOLITAN POLICE COMMISSIONER* [1979] CH 344

It emerged during the trial of Malone on charges of handling stolen goods that his phone had been tapped as part of the investigation. There was no statute at this time authorising the phone tapping. The physical process of tapping the phone took place at the telephone exchange rather than at Malone's home. Malone argued that his right to privacy had been infringed and that the trial should have been stopped.

Imagine that you are counsel for Malone. How would you use the previous authority of *Entick v Carrington* to support your client's claim?

10.4.2 ASSESSMENT TIP

You could use a process called reasoning by analogy. This is a typical form of reasoning used in the common law. You would argue that the relevant facts of the earlier case (*Entick*) are the same as the material facts in the current case (*Malone*) and therefore the legal finding, i.e. the ratio decidendi, from the earlier case is a precedent. Whether this is a binding or a persuasive precedent depends on other factors, principally the status of the court in the earlier case.

Using this approach, you could characterise *Entick v Carrington* as a case where public officials acted without lawful authority. In the absence of that authority, they were not entitled to interfere with the citizen's life in the way they did, and the court duly gave Entick a remedy. You would characterise the facts in *Malone* along similar lines – that the police had no authority to tap Malone's phone, that as the interference was without legal authority the police were not entitled to act this way, and that the court should give Malone a remedy (overturning the conviction).

This is essentially the argument that Malone's lawyers did use, and it was rejected. The judge, Megarry VC, stated that there was no general legally enforceable right to privacy in English law and that 'if the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it'.

As the phone tap involved no physical trespass to Malone's property or goods, it was not a breach of law. Public bodies did not need lawful authority for all of their actions, only those actions that would otherwise breach a citizen's legal rights. In this way *Entick* was distinguished from the facts in *Malone*. Entick had legal rights to his person, his goods and his home as recognised by the existing laws of trespass; Malone had no legal right to his privacy (at this time).

So where there is a recognised civil right in UK law, such as the right to be free from trespass to your property, then when the state makes 'great inroads' into those rights, at least it has to go through the open and (to some extent) accountable process of legislating. Where there is no recognised civil right, the state can use its huge power and resources to interfere with citizens' lives without being required to show lawful authority.

10.4.3 ASSESSING THE LEGALITY PRINCIPLE – DOES IT CONSTRAIN THE STATE?

Consider these points:

- Any law can be introduced or amended by legislation.
- Parliament can use legislation to authorise the actions of the state.
- The legality principle therefore does not impose any substantive restrictions.

Does the legality principle have any value?

Its value lies in the fact that it imposes procedural restrictions on the state. By forcing the Government to use *law* as the legitimate means of interfering with the lives of its citizens then it makes this process subject to the general characteristics of law. These are discussed in more depth below when we look at the work of Joseph Raz, but in the context of the UK system this has a number of consequences. When a Government wants to change or expand its powers it must (usually) get Parliament to pass an Act of Parliament. This is an open and public procedure. It calls for the proposals to be published and they must be explained by the minister and be subject to debate. They will be scrutinised by the Opposition and by Parliamentary Committees.

The Government will normally be able to rely on a majority in the House of Commons, but this is not guaranteed, particularly with controversial proposals. The House of Lords cannot veto legislation but can exercise a considerable moderating influence over controversial proposals and amend and delay measures. There is limited time in Parliament's law-making schedule, and Governments are wary of using this time on proposals that may fail.

The public nature of the process allows the press, pressure groups and public to contribute to debates on the desirability of the measures, and Governments take note of the strength of public feeling. Other normal and desirable characteristics of law, such as being general (not directed to a single person or even a single group) and prospective (not changing the legal character of past behaviour) also help in protecting citizens.

The following example illustrates some of the strengths of the legality principle and the difficulty that even Western liberal states with explicit commitments to the rule of law sometime have in meeting its standards.

EXPLAINING THE LAW – IN-DEPTH INTERROGATION IN NORTHERN IRELAND

In 1971, the Troubles in Northern Ireland were causing serious loss of life. The Northern Ireland Government's response was to introduce internment, i.e. detention without trial. The internment itself had a legal basis: the Civil Authorities (Special Powers) Act (Northern Ireland) 1922. Some of the 342 people arrested and interned were subject to special interrogation practices that became known as the 'five techniques' or in-depth interrogation.

Internees were subjected to hooding, constant 'white noise', deprivation of food and water, deprivation of sleep and were forced to stand in 'pressure positions' for extended periods. These techniques were applied by the police in Northern Ireland, but they were trained by the British Army and senior UK Government intelligence officials.

There were a number of reports into these practices but Lord Parker, the Lord Chief Justice, was particularly asked to look at the legality of the five techniques. The Report concluded that 'There has been no dissent from the view that the procedures are illegal alike by the law of England and the law of Northern Ireland . . . Only Parliament can alter the law. The procedures were and are illegal'.[9]

One member of the Committee, Lord Gardiner, went further and issued a minority report. He pointed out that the British Army did not seem to have considered whether the techniques were lawful, and the police trained by the army simply assumed that the army would not coach them in unlawful practices. He concluded that the blame for the 'sorry story' lay with those who had introduced 'procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe still to be the greatest democracy in the world'.

The UK Government responded immediately that use of the techniques would not continue, and directives expressly prohibiting them were issued to the security services.

The role of the legality principle here is that it can help force such practices out into the open and shine some light on them. If the UK Government wanted to authorise its security forces to apply procedures that involve torture or, at best, inhuman and degrading treatment (as the European Court of Human Rights thought it was: *Ireland v UK* (1978) 2 EHRR 25), then it would have to persuade Parliament to pass a law to that effect in the open, contested and closely scrutinised manner outlined above; not something that any Government would be particularly keen to do.

9 Report of the Committee of Privy Councillors Appointed to Consider Authorised Procedures or the Interrogation of Persons Suspected of Terrorism, Cmnd 4901, 1972.

KEY LEARNING POINTS

- The legality principle lies at the heart of the rule of law, requiring the state to have legal authority for its actions.
- This is more a procedural than a substantive limitation. The Government can get legal authority for its action by way of an Act of Parliament.
- This requirement is useful in making executive claims to power more public and transparent.

10.5 FORMAL AND SUBSTANTIVE CONCEPTIONS OF THE RULE OF LAW

Does the term 'rule of law' mean anything more than simple legality? In the scenario above, the UK Parliament *could* have passed an Act that authorised the use of inhuman and degrading interrogation techniques. As Parliament is legally supreme, it *could* state that the previously unlawful treatment was retrospectively lawful. It *could* declare that the techniques may only be used against Northern Irish Catholics. It *could* state that a minister can authorise other techniques (torture by electricity, waterboarding) without notifying the public. Anything authorised by the law would be consistent with this narrow concept of the legality principle, but could we really say that such a country observed the 'rule of law'? There are no mainstream writers on the subject who would answer 'yes'. They all have some extended notion of what the rule of law requires.

We can categorise these extended notions into formal and substantive schools of thought. The *formal school* focuses on, whether the law was made properly, by authorised persons using authorised procedures; the clarity of the law and whether it enables individuals to make informed decisions about their conduct; and whether the law only applies to future conduct.

The *substantive school* uses this formal conception as its starting point but goes further. It tries to use the rule of law as the basis for substantive rights. This would allow a critique of legal provisions as being 'good' or 'bad' laws depending on their content and their adherence to these substantive rights. We will discuss next what have been the two most influential versions of the formal school, from Albert Dicey and Joseph Raz.

10.6 DICEY AND THE RULE OF LAW

Albert V Dicey was the founding father of the academic subject of Public Law in the UK. In his classic *Introduction to the Study of the Constitution* (1885), he argued that the rule of law was a central pillar of the UK constitutional system and that it consists of three essential elements: no arbitrary law; equality before the law; and the constitution is the ordinary law of the land.

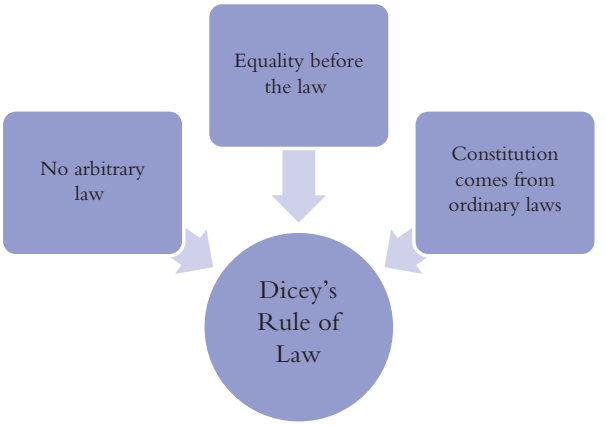

Figure 10.3 Dicey's rule of law

10.6.1 NO ARBITRARY LAW

Dicey said that 'No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land'.[10] The idea here is that there is no arbitrary power and regular law predominates. 'Arbitrary' means power exercised on an unrestrained or personal whim and not according to a rational system. The Government cannot simply punish a person because it wishes to do so. Punishment can only follow a finding of guilt by a court of law.

Dicey went much further than this common-sense condemnation of arbitrary power and punishment. 'Discretion' means choice, and that a decision-maker can legitimately choose from a range of options. He argued that the rule of law is opposed to giving the state discretionary powers and equated discretionary powers with arbitrariness, saying that 'Government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint' is contrary to the rule of law. This has the value of identifying a very wide or an unregulated discretion as a danger to individual liberty.

There are, however, serious objections to this aspect of Dicey's formulation. For example, police on their way to the scene of a violent crime may pass people committing speeding offences, driving through red lights or dropping litter. We would not expect the police to have a mechanistic duty to investigate, arrest and charge every offence they see in the order that they see it. They must have discretion to prioritise and even to overlook some offences. This was as true in Dicey's era as it is today, but, in addition, it is clear now that discretion is necessary in a modern state. The scope and volume of state activities mean that it is impossible for a state to address issues such as health and education provision, social welfare and care for the elderly and infirm, and environmental protection, without being able to exercise discretion.

10 A V Dicey, *Introduction to the Study of the Constitution* (8th edn, Liberty Fund, 1982).

Davis explains that 'Elimination of all discretionary power is both impossible and undesirable. The sensible goal is development of a proper balance between rule and discretion'.[11] It is better to aim for discretion that is structured through detailed procedures, open criteria, clear limits on the scope of power, and the right to challenge the lawfulness of the exercise of discretion before a court.

It is now a normal part of the constitutional system that ministers and public officials have choices as to what actions to take, e.g. what benefit to grant or withhold from a citizen. Whilst Dicey may simply condemn this, a more modern conception of the rule of law tries to control the power. For example, a statute can give powers to a minister to act 'as they see fit'. Rule of law concerns have led the courts to avoid reading this phrase literally and to say that such clauses do not stop the courts from examining the legality of the minister's actions (*Padfield v Minister for Agriculture* [1968] AC 997, see Chapter 13, 'Grounds of judicial review').

10.6.2 EQUALITY BEFORE THE LAW

Dicey said that 'No man is above the law but . . . that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'. This means that Government is subject to the law, and public officials are subject to the same general laws as ordinary citizens. The law reports 'abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority'.[12] Clearly, cases like *Entick v Carrington* were important to this line of reasoning.

There are, however, a wide range of exceptions. MPs have Parliamentary privilege; judges have immunity from being sued etc. Dicey allowed that there were exceptions. He mentioned the position of clergymen (of the Church of England) and soldiers who were subject to different bodies of laws and different courts, but perhaps underestimated the way in which each person has a unique set of legal rights and responsibilities. Nonetheless, the notion of equality before the law and that public officials are subject to the jurisdiction of the ordinary courts can be a powerful one, as the following case illustrates.

EXPLAINING THE LAW – *M V HOME OFFICE* [1994] 1 AC 377

M was a national of Zaire and claimed asylum in the UK. His application was refused and Home Office officials made plans to return him to Zaire, via Paris. An emergency application was made to a judge in chambers to judicially review the decision. The judge required that M be returned to the UK jurisdiction and noted that he had

11 K Davis, *Discretionary Justice* (5th edn, University of Illinois, 1971) 42.
12 Dicey, above n 10, 194.

received undertakings from Home Office lawyers that he would be returned from Paris. The undertakings were not understood (or not intended to be given) and M was put on to the Paris–Zaire flight. The judge made a mandatory order requiring his return to the UK. The Home Secretary received legal advice that the judge had exceeded his powers and decided not to act on the court order.

Ordinarily, if an individual refuses to obey a court order then they can face contempt of court proceedings. These are taken very seriously by the courts, and terms of imprisonment are often imposed for contempt. The difficulty here lay in the supposed immunity of the Crown from contempt of court proceedings. The Queen could not be guilty of contempt in the Queen's courts, and this immunity had been thought to extend to the Crown's ministers, i.e. the Government.

Lord Templeman made a crucial distinction between the Crown as Monarch and the Crown as executive (Government). He said, 'The judges cannot enforce the law against the Crown as monarch . . . but judges enforce the law against the Crown as executive, and against the individuals who from time to time represent the Crown'.

In a vivid echo of Dicey, he said, 'For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and in their personal capacity, the courts are armed with coercive powers exercisable in proceedings for contempt of court' and rejected any notion that 'the executive obey the law as a matter of grace and not as a matter of necessity'. The House of Lords found in this case that the Secretary of State was guilty of contempt in his official rather than personal capacity and that a declaration of guilt was sufficient.

Dicey was hostile to the French style of Administrative Law, with its separate rules for state conduct and separate courts. He feared that the *droit administratif* and administrative courts would result in preferential treatment for public bodies and officials. In this he probably misunderstood the French system which simply recognised that public bodies have powers that private individuals do not and that these distinct powers need to be controlled by a distinct body of law.

There are so many exceptions to 'equality before the law' that Dicey cannot have meant that all citizens and Government officials should be subject to exactly the same rules. Therefore, the focus should be on the range of circumstances where Government officials can be subject to the jurisdiction of ordinary courts. The main vehicle for this is through judicial review (see Chapters 12 and 13).

Barnett admits that the scope of 'equality before the law' is contested, but that it is a positive contribution to Public Law and that 'to dismiss – as some writers do – this aspect of Dicey's exposition of the rule of law, is to deprive the student of the constitution of a valuable tool

for analysis'.[13] The view taken here follows to some extent that of Jennings, who thought that rather too much has been loaded onto the term 'equality before the law',[14] but we would not want to deprive you, as a student of the constitution, of this valuable tool for enquiry and exploration.

10.6.3 ASSESSMENT TIP

In your seminars, when you prefer one view over another, your tutor may fire back a question ('why?', 'on what basis?') or a simple demand ('justify'). They are trying to get you to hone your thinking skills through these questions. The answer given here for departing, slightly and respectfully, from Barnett's view is that these issues can be dealt with better by considering Raz's formulation of the rule of law; that Raz's formulation has a firmer theoretical foundation and a greater contemporary relevance; and that the issues of access to the courts, natural justice, and the independence of the judiciary flow more logically from Raz's central thesis.

10.6.4 THE CONSTITUTION OF THE UK IS THE ORDINARY LAW OF THE LAND – LAWS CONCERNING THE LIBERTIES OF THE CITIZEN ARE JUDGE-MADE

Dicey's third element was that 'The general principles of the constitution are, with us, the result of judicial decisions determining the rights of private persons in particular cases before the courts'. This element emphasizes the failure of many written constitutions to limit abuses of power *in practice* and the contrasting English approach where individual rights are linked to a specific remedy available in the courts. This is linked to the idea of residual liberty – that British people have the right to do anything which is not prohibited – and a political tradition of Parliamentary restraint. The UK Parliament would hold back from interfering too readily or too extensively with the liberties of the British people.

Dicey was very sceptical of foreign constitutions where the 'security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution'.[15] The two little asides in this quote are very telling. He felt that whilst written constitutions had wonderful sounding declarations of rights, in practice those rights were not delivered. The courts in those countries did not do the real practical work of English courts under a common law system of restraining abuses of governmental power. There was some evidence for this in the eighteenth century when the record of the UK on issues such as freedom of the press and freedom from arbitrary arrest compared favourably to other European countries.

The evidence now, however, has overtaken any approach that might have been defensible in the Victorian age. To continue to hold strictly to this view would misunderstand the effectiveness of general declarations of rights, such as the European Convention on

13 Barnett, above n.2, 69.

14 I Jennings, *The Law and the Constitution* (5th edn, Hodder & Stoughton, 1959).

15 Dicey, above n 10, 187.

Human Rights. Lord Bingham defends Dicey's third element by pointing out that the courts still have a central role in determining individual rights even under a general declaration of rights.[16]

10.6.5 PROBLEMS WITH DICEY

Dicey had very particular political views (including a lifelong opposition to granting votes to women). He was a Liberal Unionist who believed firmly in a *laissez faire* state. This means that he only saw a very limited role for public bodies, with the emphasis on individual liberty rather than on a state intervening to promote social goals such as health or the relief of poverty. We can accept that we all have our own political views, and accept that this may inform our evaluation of particular ideas and systems (even then it is better to be explicit about our perspective). The problem was that Dicey's work was primarily descriptive, and he allowed his political views to underplay some aspects (such as the role for discretion) and overplay others (such as the role of the courts in defending liberty). He described the rule of law in the UK constitution in a way which aligned with these political views.

There are other problems with taking a descriptive approach to the rule of law and basing it largely on one legal system. It will become less relevant as time passes, and it has limited use as a benchmark for evaluating other constitutions. The process should arguably be the other way around; a definition of the principle should be formulated and then a constitution can be described as meeting or failing to meet the relevant standard (*what ought to be*). Nevertheless, as Lord Bingham said, Dicey was 'effectively responsible for ensuring that no discussion of modern democratic government can properly omit reference to [the rule of law]'.[17]

10.7 JOSEPH RAZ

Joseph Raz outlined his ideas in 1977 in a hugely influential article 'The Rule of Law and its Virtue'.[18] He tried to overcome some of the difficulties inherent in Dicey's approach to the 'rule of law'; 'The Rule of Law should define what ought to be rather than what is'. In addition, he wanted to emphasise that the rule of law is a political ideal but only one of the virtues that a legal system might possess. He argued that one of the problems with the rule of law was that it had been confused with democracy, justice and fairness (this is explored in the critique of Raz below). For him, the concept ought to be as neutral as possible so that it could be used as an aspiration, a benchmark and an interpretive guide, in different times and different places.

16 Lord Bingham 'Dicey Revisited' [2002] *Public Law* 39, 51.

17 Ibid., 50.

18 J Raz, 'The Rule of Law and its Virtue' (1977) *Law Quarterly Review* 93.

EXPLAINING THE LAW– THE KNIFE METAPHOR

Raz had therefore set himself a difficult challenge, to arrive at a universal conception of the rule of law. To help illustrate his aims and methods he uses a metaphor: the metaphor of the knife. Answer these questions:

- What is the purpose of a knife?
- What general characteristics must a knife have to meet this purpose effectively?
- What sort of structure or design must a knife have to exhibit these characteristics?

Hopefully you decided that the purpose of a knife is *to cut*. Did you make any sort of moral judgement in deciding this? Probably not, and a knife can be used for good (slicing a cake) or for evil (stabbing someone through the heart). Its purpose as a tool is independent of the wider objective to which it is put.

The general characteristics that a knife needs to be able to cut effectively are sharpness and durability. Since its purpose is to allow *someone* to cut, then it also needs to be capable of being handled.

The structure and design of knives varies very widely, but they will include some sort of handle, some sort of blade, the blade will have one or two sharp edges, and the blade will be made of a material that either stays sharp or is capable of being sharpened.

APPLYING THE LAW – THE PURPOSE OF LAW

So let us apply this metaphorical structure to the social tool which is 'law'. What is the purpose of law? This is an interesting question for you as a law student to think about, independently of this question and this subject. For Raz, 'law should conform to standards designed to enable it effectively to guide action'.[19] So it is to allow people to know where they stand: to make decisions and know whether they are breaching the law.

We could argue that is not morally neutral. To allow individuals to plan their actions promotes their autonomy and protects human dignity. Yet, that is a necessary consequence of 'law directing human conduct'; it is not the same thing as saying that it has moral intention. The tool can be used to direct human behaviour in good ways (ensuring confidence in contractual agreements, protecting basic human rights) or in bad ways

19 J Raz, *The Authority of Law* (OUP, 1979) 218.

(allowing employers to exploit employees, directing state officials to undermine citizens' rights). Raz says that identifying this underlying purpose of law is a 'basic intuition' and it does not have a moral or ethical end as its starting point.

Let us move on to stage two and identify the characteristics that flow from this overall objective of guiding human behaviour. Raz argues that the most important characteristics are that laws should be prospective, open and clear and relatively stable. We cannot be guided by secret or obscure or confusing laws.

The third stage is to identify the underlying design that promotes these characteristics. They cannot be delivered in a vacuum, so a legal system having a certain structure or design is necessary. This legal system must have an independent judiciary and easily accessible courts that observe rules of natural justice. You cannot have clear laws if disputes as to the meaning of laws cannot be resolved by courts. It is interesting to note that Lon Fuller comes up with an almost identical list not on the basis of the morally neutral purpose of law but on his conception of the morality of law.

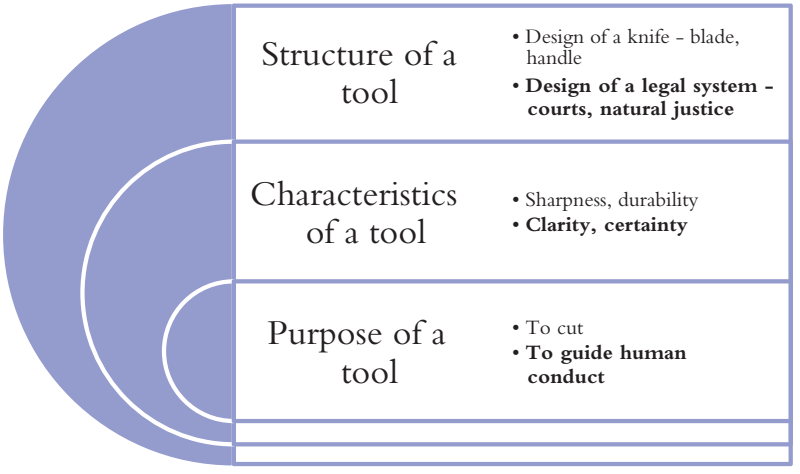

Figure 10.4 Raz's conception of the rule of law

10.8 CENTRAL CHARACTERISTICS

We will explore some of these core characteristics of law that allow it to guide human behaviour.

10.8.1 CLARITY

The European Court of Human Rights said in *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 'a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct'. It is not a requirement that all laws

are perfectly understandable by all lay people, but people should be able to find out where they stand, even if this means using a legal adviser to interpret the law and to guide them. As Lord Diplock found in *Black-Clawson International Ltd v Papierwerke Waldhof-Ascaffenberg* AG [1975] AC 591, 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it'.

EXPLAINING THE LAW – *MERKUR ISLAND SHIPPING CORP V LAUGHTON AND OTHERS* [1983] 2 AC 570

This case concerned an action by the owners of a ship against the International Transport Workers Federation. It was a complex industrial dispute that led to a complex action. The court had to decide whether the union was tortiously liable for financial loss as a result of the strike and had to assess the interlocking effect of three separate Acts of Parliament.

The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two prerequisites. First, people must understand that it is in their interests, as well as in that of the community as a whole, that they should live their lives in accordance with the rules and all the rules. Secondly, they must know what those rules are' (Lord Donaldson in the Court of Appeal).

British appeal court judges are amongst the best legal technicians in the world, yet even they struggled to establish the legal position, and expressed their frustration at this: 'Absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law' (Lord Diplock in the House of Lords).

10.8.2 PROSPECTIVITY

Prospectivity means that laws should only apply to future conduct. If a statute comes into force on 1 April, it should only apply to conduct from 1 April onwards and not try to change the legal character of what you did in March, February or January. There is an instinctive moral dislike of retrospective legislation in that it offends against our ideas of fairness, but it also directly relates to Raz's formulation because a retrospective law cannot guide human conduct: from 1 April you cannot go back in time and change your actions from the preceding months. This is particularly important in Criminal Law, because of the sorts of sanctions that can be imposed, but it is also a very strong principle in Civil Law where established legal relationships may be severely disrupted by retrospective legal effects.

The courts actively use this element of the rule of law in their interpretation of statutes. There is a strong presumption that legislation is not retrospective, and this can only be overcome by express words in the statute. The courts must do everything they can short

of 'doing violence to the language of the enactment' (*Re Athlumney* [1898] 2 QB 547, Wright J), to avoid retrospective effect.

In *Phillips v Eyre* (1870) LR 6 QB 1, an Indemnity Act was passed by the parliament of Jamaica which retrospectively took away rights to sue for acts such as assault and false imprisonment.

> Retrospective laws are contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions.
>
> (Willes J)

This highlights that the judicial hostility to retrospective legislation springs from the notion that the purpose of law is to guide conduct, as Raz argued. However, Willes J went on to say that the prohibition on retrospectivity is not absolute and there may be circumstances calling for 'special and exceptional remedy', and this is to be decided by Parliament. So it seems that retrospective legislation is permissible under the UK constitution, as further illustrated by the following case.

EXPLAINING THE LAW – *BURMAH OIL CO LTD V LORD ADVOCATE* [1965] AC 75

Property belonging to Burmah Oil had been destroyed by British forces during the Second World War to stop it falling into the hands of advancing Japanese forces. The House of Lords decided that these actions were covered by the prerogative of the Crown to lawfully wage war, but that the exercise of this legal power brought with it an obligation to pay compensation. The Government was deeply troubled by this judgment, and shortly afterwards Parliament passed the War Damage Act 1965: section 1(1) stated: 'No person shall be entitled at common law to receive from the Crown compensation in respect of damage to property caused (whether before or after the passing of this Act, within or outside the United Kingdom) by acts lawfully done by the Crown during a war in which the Sovereign was engaged'.

See if you can highlight the crucial words here – 'whether before or after the passing of this Act'. This retrospectively takes away legal entitlements that existed at the time the property was destroyed.

You might think that at least Burmah Oil, as opposed to other property owners, having fought through the courts to establish their entitlement to compensation, would be able to obtain that compensation, but section 1(2) of the War Damages Act stated that: 'Where any proceedings to recover at common law compensation in respect of such damage have been instituted before the passing of this Act, the court shall, on the application of any party, forthwith set aside or dismiss the proceedings'.

JUSTICE (an international human rights lawyers group) issued a report stating that 'The refusal to meet a legitimate claim for compensation affirmed by the highest court in the land . . . is in the view of JUSTICE an action inconsistent with the Rule of Law and a dangerous precedent for the future'.[20]

ANALYSING THE LAW – ACTING RETROSPECTIVELY

Imagine that you are a Cabinet Minister in the immediate aftermath of the *Burmah Oil* judgment. What do think are likely to be the competing arguments around the table?

The rule of law arguments have been set out above. Against them you would consider the costs of applying the judgement. The Government had already set aside money for a compensation scheme for war losses. The result of the case meant that this fund would have been wholly inadequate and large sums of additional taxpayers' money would need to be found. In relation to other property owners, there was no estimate of the bill, but it would have been huge. As a Government you are also responsible for finding the money for education, the NHS, national security etc. The point is that the rule of law is not an absolute; breaching it makes us a little queasy and states should only depart from prospectivity with the strongest possible justifications.

There would have been far less room for manoeuvre for the British Government if the case concerned Criminal Law. Article 7 European Convention on Human Rights states:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This is a human rights prohibition on retrospective Criminal Law. Looking very carefully at Article 7, however, you will see that there does seem to be scope for retrospectively extending criminal liability in national law, but only if the action was a criminal offence in international law at the time it was committed. This allowed the UK to legislate consistently with Article 7 ECHR when it passed the War Crimes Act 1991. This Act allows proceedings for murder and manslaughter against a person in the UK irrespective of their nationality at the time of the alleged offence if a) it was committed during the time of the Second World War in Germany or under German occupation and b) it constituted a violation of the laws and customs of war. This is necessarily a very limited exception to the general prohibition.

Problems can be caused by the retrospective nature of **common law** developments. You will have seen from Public Law and your other subjects that the common law does not remain static. It evolves from case to case, applying existing principles to new situations.

20 C Turpin and A Tomkins, *British Government and the Constitution* (7th edn, Cambridge UP, 2011) 87.

This can result in a slow and gradual development or, in rare cases (e.g. the neighbour principle in tort from *Donoghue v Stevenson* [1932] AC 562), in great leaps forward. This process of development raises questions of whether people could know the legal consequences of their actions at the time they acted. If a court, ruling a number of years after the contested incidents, develops the common law in some appreciable way, then this potentially has retrospective effect.

EXPLAINING THE LAW – MARITAL RAPE AND RETROSPECTIVITY

It might surprise you to learn that up until 1991 there was no known offence in English law of a man raping his wife. If a man forced his wife into sexual intercourse without her consent, then there may have been general offences against the person, but not the sexual offence of rape. The wife was deemed from the time of her marriage to have generally consented to sexual intercourse with her husband. In a landmark ruling in *R v R* [1991] 4 All ER 481, the House of Lords decided that the defendant could be guilty of rape in relation to his wife. The 'rule of law' problem was that the offence seems to have been legally unknown at the time the actions took place in 1989.

There was a challenge to this development, on the basis of Article 7 ECHR, in *SW v UK and C v UK* (1995) 21 EHRR 404. The European Court of Human Rights rejected the claims on the basis that whilst it 'is unfair to expect citizens to live their lives according to laws which are unclear or are not even in existence when decisions or actions have to be taken by individuals . . . the development of criminal liability [in this case] was clearly defined and foreseeable . . . and [the case] continued a perceptible evolution of case law'.

The European Court of Human Rights noted that the 'marital rape' rule had been crumbling; a number of exceptions had developed over the years, e.g. where a couple were still married but legally separated. A husband in 1989 ought to have foreseen that non-consensual sex with his wife could be treated as rape. This is an unusual argument, and the substance of the issue (i.e. the appalling lack of effort by the UK Parliament to protect women from sexual assault by their husbands, and the lack of sympathy for husbands who physically coerce their wives into intercourse) surely influenced the outcome.

Subsequent courts have emphasised that whilst the 'requirement is for sufficient rather than absolute certainty', if the ambit of the common law is to be enlarged, it 'must be done step by step on a case by case basis and not in one large leap' (*R v Rimmington* [2006] 2 All ER 257 [HL]).

10.8.3 SECRET LAWS

Secret laws are rare; more common are secret military orders as seen in the 'Northern Ireland in-depth interrogation' example. The courts have also considered whether unpublished criteria on how laws are going to be applied are consistent with the rule of law.

In *Salih v Secretary of State for the Home Office* [2003] EWHC 2273, there was a scheme of discretionary support for accommodation for failed asylum seekers. The Minister's policy was not to inform failed asylum seekers of this scheme. Burton J said, 'It is a fundamental requisite of the rule of law that the law should be made known. The individual must be able to know of his legal rights and obligations'. The issue in *R v Secretary of State for the Home Department ex parte Anufrijeva* [2003] UKHL 36, was whether individuals had the right to be informed of decisions; '. . . a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system' (Lord Steyn).

10.9 THE STRUCTURE AND DESIGN OF THE LEGAL SYSTEM

The third level of Raz's construct of the rule of law is to emphasize that a legal system must have certain features to be able to deliver clarity, openness, etc.

10.9.1 INDEPENDENCE OF THE JUDICIARY MUST BE GUARANTEED

The rule of law can only exist if there is redress for executive lawlessness. This is linked to the role of law in guiding human conduct in the sense that public bodies and officials must know that the law can be enforced against them and, conversely, that citizens know that they can rely on law rather than being dependent on the whim of public officials. This redress needs to come from courts and judges who are independent of the executive that they are holding to account.

The independence of the judiciary is explored in depth in Chapter 9, 'Separation of powers', but to summarise here: there are a range of legal and conventional protections for that independence. Judges have security of tenure (they cannot be sacked because of their judgments), security of salary (the executive cannot pressurise them through wage threats) and immunity from suit (they cannot be subject to harassment through being sued for what they do as a judge). The Constitutional Reform Act 2005 strengthened this independence by establishing a separate Supreme Court and making the judicial appointments process more transparent and much less reliant on executive discretion.

10.9.2 NATURAL JUSTICE

EXPLAINING THE LAW – *R V SECRETARY OF STATE FOR THE HOME DEPARTMENT, EX PARTE PIERSON* [1998] AC 539

Pierson was convicted of killing his parents and received two mandatory life sentences. At the time, the Home Secretary had the power to set his tariff (i.e. the

punitive and deterrent element of his sentence). The Home Secretary set the tariff at 20 years. It later emerged (through another case that forced the Home Secretary to communicate his reasons for setting a particular tariff) that this tariff had been based on Pierson being guilty of a double premeditated murder. Pierson's lawyers argued that the murders were not premeditated and were part of a single incident. This was accepted by the Home Secretary, but he decided to keep the 20 years tariff in place.

Section 35(2) of the Criminal Justice Act 1991, stating that 'the Secretary of State may . . . release on licence a life prisoner who is not a discretionary life prisoner', was not ambiguous and gave a very wide and general power. Even so, rule of law principles had not been explicitly excluded by Parliament, and these included the principle that a sentence should not be retrospectively increased. This amounted to a limitation on the Home Secretary's power even if it was not a limitation stated in the statute: 'unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural'.

10.9.3 THE COURTS SHOULD BE EASILY ACCESSIBLE

Laws cannot guide behaviour if they cannot be enforced by courts. The same problem arises if people cannot access courts so as to receive a ruling on what the law means and how it applies to their particular circumstances. This requirement has a number of different facets.

It could be a question of jurisdiction. Governments sometimes try to prevent the courts from hearing challenges to the decisions of public bodies by inserting *ouster clauses* into legislation. If these were read literally by the courts, their jurisdiction to hear claims that a public body had acted unlawfully would be ousted. For rule of law reasons, the courts have consistently been hostile to ouster clauses and have used the rule of law as an interpretive aid in severely restricting the scope of ouster clauses (see Chapter 12 and *Anisminic v Foreign Compensation Commission*). Some judicial comment has gone further and suggested that it is impermissible under our constitution even for Parliament to try to stop people accessing courts (see Chapter 12). Similarly, the liberalisation of the rules on standing for judicial review (i.e. *who* has the ability to access a court to challenge unlawful action by a public body) has been achieved over the past 30 years not by legislation, but by judges motivated by rule of law concerns.

Secondly, there are questions of physical or practical access. This can encompass disability, and courts must make reasonable adjustments to allow disabled people to access courts, including disabled parking spaces near courts and hearing aid induction loops in court rooms.

In *R (Karas) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin), the Home Office planned the deportation of a husband and his pregnant wife in such a way as to prevent them from obtaining or acting upon legal advice. They were to be spirited away quickly and with very little notice (less than 24 hours). Munby J said that this

showed 'at best an unacceptable disregard by the Home Office of the rule of law, at worst an unacceptable disdain by the Home Office for the rule of law, which is as depressing as it ought to be concerning'. In *R v Lord Chancellor, ex parte Witham* [1997] 2 All ER 779, the High Court said, 'Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door' (Laws J).

The cost of accessing justice has long been an issue, but it has been brought into sharp focus by the deep cuts in legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In setting aside regulations on Employment Tribunal fees, the Supreme Court in *R (Unison) v Lord Chancellor* [2017] UKSC 51, found that excessively high court fees could breach the 'access to justice' requirements of the rule of law to such an extent that they would be unlawful.

Hickman points out that whilst this case addresses one costs issue in relation to employment tribunals, the expense of bringing public law cases remains; 'The irony that the right of access to justice has been developed in judicial review procedure, which fails its own test for ensuring access to justice, is not only unmistakable, but disgraceful'.[21] Zuckerman makes a more wide-ranging critique of costs and access to justice when he says that 'Access to justice is barred not only to those seeking judicial review but to every person who requires court assistance. Whether we are involved in disputes concerning family breakup, inheritance, child welfare, eviction, damages for breach of contract or for damage to property, all of us are denied affordable access to justice. This state of affairs undermines the rule of law'.[22]

10.10 DOES THE RULE OF LAW HAVE SUBSTANTIVE CONTENT?

Raz firmly believed that the rule of law:

> is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirements of the Rule of Law better than any of the legal systems of the more enlightened western democracies.[23]

21 T Hickman, 'Public Law's Disgrace: Part 2' U.K. Const. L. Blog (26 October 2017), https://ukconstitutionallaw.org/ (last accessed 05/11/17).

22 A Zuckerman, 'The Law's Disgrace' U.K. Const. L. Blog (27 February 2017), https://ukconstitutionallaw.org/ (last accessed 05/11/17).

23 Raz, above n 19.

At the other end of the spectrum, the New Delhi Declaration 1959 from the International Commission of Jurists included social and economic rights and even cultural rights: 'the Rule of Law is a dynamic concept . . . which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised'.

Most writers agree that this is going too far and that it is unrealistic to expect the rule of law to be a vehicle for educational and cultural aspiration and dignity. On the other hand, there have been many, very distinguished, commentators who regard Raz's approach as too narrow and sterile. Sir Ivor Jennings argued for a definition broader than legality: 'it contains, something more, although it is not capable of precise definition. It is an attitude, an expression of liberal and democratic principles, in themselves vague when it is sought to analyse them, but clear enough in their results'.[24] This inability to pin down the boundaries of the substantive content of the rule of law has caused difficulties for other writers on the subject.

T R S Allan argues that the rule of law is aimed at the common good and that this necessarily requires adherence to the most basic features of human rights and human dignity, such as freedom of expression.[25] This tries to establish some of the environmental prerequisites for the rule of law to operate. It states that substance is inextricably bound up with formal characteristics and that they are part of the same functioning system.

Lord Bingham goes further than this basic minimum content but similarly has difficulty in explaining what particular human rights fall within the substantive content of the rule of law. Lord Bingham thought that the rule of law is based on a 'fundamental compact' between the individual and the state, with both parties sacrificing a 'measure of the freedom and power which they would otherwise enjoy'. This necessarily involves restrictions not just on the formal characteristics of law. Bingham accepts that there are different conceptions of human rights in different countries, but argues that the advantages of a broad interpretation of the rule of law outweigh these difficulties.[26]

The view taken here is that these problems ultimately lead back to Raz's limited but elegant solution. If the rule of law is to have serious critical force, to be a benchmark against which we can evaluate not just our legal system but legal systems generally, then it cannot be a catch-all for 'good things'. As Raz argues, it is not 'necessary or desirable to cloak the [conclusion on what is a just society] in the mantle of the rule of law'.[27] Raz goes further and says that the problem with loading too much onto the term 'rule of law' is that it becomes a contestable legal theory, i.e. you would need a complete social science conception of the world to justify it. Seeing the opposing sides (Spanish state authorities,

24 Jennings, above n 14, 48.

25 Allan, above n 6.

26 Lord Bingham, 'The Rule of Law' [2007] *Cambridge Law Journal* 67.

27 Raz, above n 19.

Catalan government) hurl the language of 'democracy' and 'rule of law' at each other in the Catalan independence crisis of October 2017, illustrates that when concepts are framed too broadly they cease to make useful contributions to debate.

Critics of the formal approach might say that it would not prevent a regime passing laws that permit human rights abuses and assaults on human dignity. But a theory of the rule of law would not *practically stop* this either, just allow commentators to condemn, on the basis of the rule of law, abuses that they could be condemning on other grounds anyway. Adherents of the formal school, such as Raz, are not prevented from holding views (or doing more active things) on human rights abuses.

There is also a danger of under-estimating the restrictions which the formal approach imposes. No state that has committed extensive human rights abuses has been able to be a 'rule of law' state. Nazi German laws allowed punishment according to the 'healthy instincts of the people' (breaching clarity requirements). Soviet laws subjecting every human freedom to the 'interests of the Communist Party' did *not* satisfy the formal school requirements. These regimes only had very tenuous claims to be 'rule of law states'. Apartheid-era South Africa did make more explicit claims to be based on the rule of law but was wracked by breaches of *habeas corpus*, extra-judicial state killing and lack of access to justice.

10.11 THE MODERN SIGNIFICANCE OF THE RULE OF LAW

In the UK constitutional system, principles and politics play a larger role in restraining Governments and preventing abuse than in countries with a written constitution, and this is true for the rule of law. The most important use of the rule of law in the hands of the judges is as an interpretive tool. As Lord Bingham said, 'the judges, in their role as . . . judgment-makers, are not free to dismiss the rule of law as meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie, even if they were inclined to do so. They would be bound to construe a statute so that it did not infringe an existing constitutional principle, if it were reasonably possible to do so'.[28]

In *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, Bennett was suspected of committing offences in the UK. It became known that he was in South Africa. Rather than commencing lawful extradition proceedings against him, he was taken by South African police (with UK authority collusion), put on flight to Heathrow airport, handcuffed to his seat, and arrested on his arrival into the UK. Could his trial be

28 Bingham, above n 24, 69.

stopped on the basis that the UK authorities had colluded in bringing him to the UK by unlawful means?

The House of Lords concluded that Bennett had been 'illegally abducted', and Lord Bridge said:

> When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance.

The previous practice of English courts was not particularly concerned with how evidence came to be obtained (or, how the suspect was brought before the court), but in *Bennett*, and on the basis of these rule of law concerns, the trial was stopped as an abuse of process.

This notion of the rule of law as an interpretive tool was also seen in *R (Evans) v Attorney-General* [2015] UKSC 21. The Prince of Wales has for a long time been sending confidential memos to Government departments giving his views on a range of policy matters; due to his scribbly handwriting, these are known as the 'black spider memos'. It was successfully argued before the Upper Tribunal that these should be released to the public. The Attorney General exercised his statutory power to issue a certificate ordering non-disclosure of this information on 'reasonable grounds'. This certificate was quashed by the Supreme Court on rule of law grounds. The statutory phrase 'reasonable grounds' seems very open-ended, but the Court found that it had to be read in a way that was consistent with the rule of law, including that judicial decisions cannot be set aside by executive order. Only where there was a demonstrable flaw in the judicial decision or a material change of circumstances would there be reasonable grounds.

Perhaps the last word in this chapter should go to Lord Hope who, in *R(Jackson) v Attorney-General* [2005] UKHL 56, said 'The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'.

POINTS TO REVIEW

- Dicey's formulation of the rule of law has been very influential and still has useful elements, but becomes less relevant with the passage of time.
- Raz's conception of the rule of law has been criticised as sterile, but is a focused and well-constructed attempt to build a wider benchmark.
- The rule of law is a principle that exerts strong influence on the courts and others and performs a valuable function in limiting state power and promoting an equitable relationship between citizen and state.

TAKING IT FURTHER

M Elliott, 1,000 words/The Rule of Law, *Public Law for Everyone* https://publiclawforeveryone.com/2015/10/16/1000-words-the-rule-of-law/ One of Mark Elliott's estimable 1000 word summaries of key Public Law concepts.

J Raz, 'The Rule of Law and its Virtue' [1977] *Law Quarterly Review* 195 As you read this chapter, you may have noticed that it finds Raz's view of the rule of law to be persuasive. His original argument is laid out here in an elegant and subtle article.

Tom Bingham, *The Rule of Law* (Penguin, 2011) As a law student, if you buy one law book, beyond your recommended textbooks, make it this one. Lord Bingham was the leading British judge of his generation and was passionately concerned with the rule of law as the basis for a just society.

World Justice Project, http://worldjusticeproject.org/what-rule-law This takes a broad and accessible view of the rule of the law and, in particular, charts its impact on people. As the site says, 'everyday issues of safety, rights, justice, and governance affect us all; everyone is a stakeholder in the rule of law'.

13 The UK Supreme Court and Parliament

Judicial and Political Dialogues

John McEldowney

Introduction

The UK offers a distinctive case study of the role of courts and Parliament[1] in a modern parliamentary democracy during a period of rapid change and uncertainty. The pivotal constitutional doctrine is parliamentary sovereignty that defines the basis of the UK's constitutional arrangements. Sovereignty attributes to the UK Parliament unlimited authority in domestic matters by permitting Parliament virtually unfettered power. It also defines the relationship between Parliament and public institutions, prioritises political power[2] and sets the constitutional agenda. Most controversial is the UK's continued membership of the European Union as well as the jurisprudence of the European Convention on Human Rights following the EU referendum decision to leave in June 2016. In general the courts operate within the limits of not being able to hold an Act of Parliament unconstitutional or illegal[3] because of obedience to parliamentary sovereignty. EU law is one of the few exceptions to the doctrine of sovereignty, conceding EU law has priority over UK law. In the case of Brexit and leaving the EU, the most significant constitutional case heard by the Supreme Court[4] relates to the role of Parliament in the decision to trigger Article 50 of the Treaty of European Union to withdraw from the European Union after the June 2016 referendum decision to leave.

The UK's constitutional arrangements are also defined by the rule of law[5] as a means of restraint on arbitrary power. The rule of law expresses the moral constraints on arbitrary power that inform both political and legal worlds.[6] In the UK, political choices of the government of the day, are subject to few constitutional limitations as elected politicians are the final determination of policy making, often overriding legal considerations and propriety. The UK example is illustrative of tensions between judicial decisions in the Supreme Court and political choices of the Government, often between law and politics. Three substantive areas highlight the role of the Supreme Court; namely, cases involving judicial review including human rights; devolution cases and decisions on EU law, including more recently the role of Parliament and Article 50. There is also the question of the funding of judicial challenges before the courts and the political sensitivity of the funding arrangements.

1. The historical context: Defining the role of the courts in the common law tradition; the rule of law and parliamentary sovereignty in the UK

It is over 800 years since Magna Carta (1215) defined legal and political powers in the United Kingdom. It will be recalled that Magna Carta represented the triumph of judicial process and ultimately the rule of law over arbitrary power exercised by the King or other royal authority. It provides a useful point of reference to begin analysis of the role of judges in contemporary times. The common law is justifiably well-known for the case by case approach to the development of judicial review that refers to the procedure whereby there can be judicial scrutiny over the lawfulness of a decision or discretion exercised by a public body. Seldom does this involve the merits of a political policy though the grounds for review are broadly drawn. The grounds for review include illegality where the decision is not in accordance with the relevant law, irrationality where the decision is so unreasonable that no reasonable body could have taken it. Procedural impropriety is where the failure to consult or to act in accordance of natural justice is claimed. There is also proportionality where the decision is not proportionate to the outcome.

The English common law system of judicial review through independent courts has strong medieval origins through a system of remedies, the most famous of which is *habeas corpus*. The development of the common law is distinctive from civil law systems. Judicial review is about adaptation and change as much as the pragmatic style of case by case decisions. The doctrine of parliamentary sovereignty makes it impossible for a UK Act of Parliament to be held to be illegal except where EU law is concerned.[7] After Brexit the role of EU law is likely to diminish, but this will depend on the nature of the negotiated settlement under Article 50. The UK is a unitary, non-federal state, with widely defined legislative powers to Scotland, Wales and N. Ireland. Local government is subservient to central government and is susceptible to judicial review for its decisions and discretion.

2. The role of the Supreme Court – Parliament and the courts

Dawn Oliver identifies the various strands of the relationship between the courts and Parliament in the UK.

> The courts interpret Acts consistently with the UK's Treaty obligations, and with fundamental rights and as the law develops with principles of legality, constitutionalism and the rule of law; if Parliament intends to legislate in breach of these then it should use express and clear language, not general or ambiguous words.[8]

Oliver's overall analysis is that the UK's constitutional system places shared responsibilities across the institutions of government without a Supreme Court to adjudicate on the constitutionality of an Act of Parliament, except in the rare

circumstances of conflict with EU law. This leaves open the possibility that politicians or judges may make 'unconstitutional laws', though this is unlikely and has only rarely happened. The doctrine of parliamentary sovereignty retains ultimate political authority rather than a written constitution with a Supreme Court or Constitutional Court with powers of judicial review including the power to strike down legislation that may be interpreted as unconstitutional or illegal. In the UK context democratic accountability is given greater pre-eminence over the perspectives of unelected judges. Prioritising policy making by elected politicians is premised on strong and vibrant political parties that provide electors real choices that are not pre-determined but are part of a five-year electoral cycle.[9]

The democratic legitimacy of government depends on the dynamic interaction between politics and law-making. In *Jackson v Attorney General*[10] a challenge to the validity of the Hunting Act 2004 was considered that raised precisely the political decisions of an elected government with an electoral mandate. The Hunting Act was highly controversial and political. It was introduced by the Labour Government on the basis of an election manifesto promise, banning the hunting of foxes with dogs that initially passed in the House of Commons was on the first attempt not passed by the House of Lords. The Act was re-introduced in the House of Commons and after further debate was passed for the second time in the House of Commons. The second debate in the House of Lords involved the use of the Parliament Act 1949 that resulted in the Act being passed even though the House of Lords opposed the details of the Act. This was a rare use of the Parliament Act which defined the role of the House of Lords as confined to a revising function rather than a power of absolute veto. This confirmed the elected chamber, the House of Commons having overall authority over the unelected House of Lords. In discussing the changing nature of sovereignty, Lord Hope acknowledged the role of the courts and Parliament:

> Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute. Step by step, gradually but surely, the English principle of the absolute sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified … . The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.

What precisely might the rule of law mean? Would it be possible for the courts to overturn an Act of Parliament when the act was considered in conflict with the rule of law? The rule of law provides both normative and evaluative mechanisms to ensure that there is accountability over the government of the day but it is unlikely to be used to overturn an Act of Parliament. Lord Hope's speculation has yet to be fully realised.

While the rule of law may appear weak when compared with the authority of elected government with parliamentary control of the legislative agenda in Parliament, it is important to recognise parliamentary forms of oversight. Despite the ability of Government to pass the vast bulk of its legislation, there are systems of

scrutiny and oversight provided by select committees and parliamentary watch-dogs. These are too often overlooked in the discussion of legal and constitutional powers provided by courts as a check on arbitrary power.

3. The UK courts and EU law

There are, two possible exceptions that challenge the UK's constitutional orthodoxy and the simple principle of majority created legislation. The first arises from EU law and the second from the law relating to human rights (discussed in more detail below). In the case of European law, the courts accept its primacy over domestic laws.[11] The UK's decision to leave the EU will require careful calibration and adjustments to the future role of the European Court of Justice. That role is far from clear. This is mainly because of the interpretation afforded to EU law because of the European Community Act 1972 and also because of the jurisprudence of the European Court of Justice on Member States even though the UK will leave. Since 1972, EU law has been interpreted to be an exception to the traditional doctrine of sovereignty of parliament or alternatively a variation on the doctrine itself.[12] Concerns about legal and political sovereignty have been highly influential in the UK. The UK has negotiated a series of opt outs including in the Treaty of Lisbon an 'opt out' though a protocol of the ECHR. The UK is not a member of the Euro and not part of the Schengen agreement allowing citizens of Member States cross boundary access. Currently the UK Government is in discussion with the EU, having triggered Article 50 to leave. Negotiations are expected to be concluded by March 2019 when the UK is expected to leave the EU. Sovereignty is of enormous influence in how the UK has applied principles laid down in the Treaty. The strength of the Anglo-Saxon common law tradition has created a certain resistance to the civil law tradition especially the role of codified rules and EU approaches to problems solving is seen as too bureaucratic in creating regulatory burdens on Government and business. EU law in fact settles many issues where the law defines the areas of EU competences. Beyond this narrow interpretation lies many normative rules and principles that have become influential on the courts and how legal rules should be interpreted. One example is the development of proportionality as a ground of review that has been encouraged by EU law and applied by UK courts. European public law has also proved to be inspirational and grown though a mixture of UK courts interacting with many EU principles. The law of many Member States is intermixed with EU law and adopted and developed by the European Court of Justice in Luxembourg. It is hard not to appreciate the on-going importance and influence of mutual understandings and the coming together of both common law and civil law systems. Cases such as *Francovich*[13] establishing the nature of remedies in damages for state liability are path breaking in establishing the full effectiveness of EU rights that requires Member States to comply with EU law.

Resolving competing competences between national courts and the European Court of Justice is likely to be a matter for some speculation over the next decade as economic and political frictions within the EU between Member States has

increased in recent years and the UK's withdrawal will have an impact. There are also the conceptual questions of the reasoning and approach adopted by courts in reaching their decisions and to what extent has the European Court of Justice's teleological approach to interpretation become accepted by British courts. Sir William Wade acknowledged in his *Constitutional Fundamentals* in 1989 that in matters of sovereignty, 'shifts' in judicial loyalty are possible and that this occurred in the seventeenth century in England, in the attitudes of the courts in eighteenth-century America and in the general dissolution of the British Empire. It is possible that new 'generations of judges' will have a different attitude to a new constitutional settlement.[14] Lord Bridge in *Factortame* when discussing the European Communities Act 1972 explained how it should be interpreted on the basis that

> whatever the limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgement to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.[15]

Lord Bingham in his book on the *Rule of Law*[16] commented that:

> This (the Factortame decision) is the best example from the critics' point of view, since the process does involve the invalidation of statutes by the courts. But the courts acts in that way only because Parliament, exercising its legislative authority, has told them to. If Parliament, exercising the same authority, told them not to do so, they would obey that injunction also.[17]

The argument that statutory interpretation provides a satisfactory explanation of the *Factortame* decision on how to construct EU law as part of the national legal system, has some limitations. *Factortame* was the first time that a UK statute was set aside by the courts. Interpreting Parliament's intention is one way the courts may seek to understand legislation. However, the decision goes beyond the courts merely interpreting Parliament's intention alone. The approach taken is more far reaching than the traditional way courts in the UK interpreted Parliament's intention. What appears to be at work is a purposive approach which is commonly used when interpreting EU law allowing for a broad inquiry[18] beyond mere intention. It looks at how EU law has created a special legal regime and this is a radical break with the past and one that is not simply explained by construing a statute alone. Sir William Wade accepts this by arguing that the way in which EU law is construed operates outside the traditional role of the courts and is not explicable by the construction of a statute. Even the express words of a statute could be overridden by EU law. This may be regarded as a 'revolution' or simply a shift in legal reasoning and doctrine.

Paul Craig[19] supported by Trevor Allan[20] suggests another approach beyond the construction argument and also different than Sir William Wade:

> There is however a third way in which to regard the courts' jurisprudence. This is to regard decisions about supremacy as being based on normative arguments of legal principle the content of which can and will vary across time.[21]

This is a welcome and refreshing approach that is subtle and nuanced in the politics of the time and the underpinnings of legal doctrine. It also reaffirms that the UK's relationship with the EU is not fixed in any one point in time but continues to evolve. This is well illustrated by the passage of the European Union Act 2011 predicated on the principle that power resides with the UK Parliament with the addition of a referendum as a 'double lock' against any erosion of that power.[22] There is, however, nothing in the European Union Act 2011 that seeks to entrench the referendum requirement and this may be modified or repealed by a future Act of Parliament. Section 18 of the Act contains a declaratory statement on the status of EU law continuing on a statutory basis. This extends the long standing rule that Treaty obligations require an Act of Parliament for their enforcement but there is the interesting prospect of such a change being rejected by a referendum even if approved by an Act of Parliament. Craig admits that:

> The United Kingdom's relationship with the EU, and the conception of sovereignty that shapes and is shaped by it, will continue to occupy the political terrain.[23]

Dawn Oliver also identifies[24] some of the main reasons for British courts accepting the authority of European law and the doctrine that European law will be given effect even if it conflicts with an Act of the UK Parliament. The most obvious reason is that the doctrine was well developed by the European Court of Justice long before the UK joined; that the courts in other Member States have accepted the role of the European Court and the principle of giving direct effect and primacy to EU law is well established. Section 2(4) of the European Communities Act is also relevant as it provides instructions to British Courts to accept the express intention of Parliament and this is an obligation in UK law as well as in EU law. The last point is that section 18 of the European Union Act 2011 confirms that UK membership under the European Communities Act 1972 Act is the basis for EU law to be 'recognised and available' in law in the UK, and together the two Acts have altered the doctrine of implied repeal. Perhaps the underlying basis for the acceptance of European law is also partly contractual – it was part of the package agreed on accession and the terms of the agreement set out in the European Communities Act 1972 have to be followed.

The importance of the democratic principle is as Oliver[25] admits unconvincing as a rationale for sovereignty. Sovereignty may allow Parliament to pass legislation that is unrepresentative and unfair or discriminatory. In the context of the EU this raises a euro sceptical concern that the courts giving way to the primacy of EU law may enable policy and laws passed within the EU to have sway when their democratic credentials are in doubt. Future directions are difficult to predict. The relationship between the government of the day, Parliament and the courts is always evolving

through elements of pragmatism and some degree of self-limitation that has avoided outright conflict. Writing in 1971, de Smith was rather cautious in his prediction and measured in his judgement of the potential impact of membership of the European Community on the UK and cautioned against rash prediction or hasty conclusions. In this well-known analysis de Smith explains the time-less quality of sovereignty as it is defined and re-defined by each generation, often underpinning the overall political realities of where economic and legal powers actually reside:

> If, however, with the passage of time, the Community develops characteristics of a political federation, and if the incongruity of the orthodox doctrine of parliamentary sovereignty becomes increasingly apparent in a context of expanding Community law, then a climate of opinion will doubtless develop in which heterodoxy will thrive and eventually prevail. The legal concept of parliamentary sovereignty may then drift away into the shadowy background from which it emerged.[26]

Professor Sir Francis Jacob in his Hamlyn Lectures, *The Sovereignty of Parliament: The European Way*[27] in 2006 admitted that sovereignty was not always compatible 'both internationally and internally, with another concept which also has a lengthy history, but which today is widely regarded as a paramount value: the rule of law'.[28] The UK's decision to leave the EU will profoundly impact on the question of UK sovereignty and it will remain to be seen what arrangements will be agreed in terms of enforcing EU law in the UK. It is intended to pass a Great Repeal Bill that the Government intends will adopt all EU law into UK law and repeal the European Communities Act 1972.[29] Notwithstanding the UK leaving the EU, the implications of EU law will remain an influence over the UK in how the UK courts have developed legal methodology and approaches to legal reasoning.

4. The UK courts and human rights

Human rights in the UK courts is highly contentious amongst academics and politicians that raise questions about the legitimacy of the European Convention on Human Rights, the jurisprudence of the Strasbourg Court and its application to United Kingdom domestic law.[30] The starting point is the Human Rights Act 1998, passed by the UK government to bring Convention rights into UK law and is an important source of rights. The Act has permitted the Convention to be interpreted and pleaded directly before the UK's national courts. This has given rise to a highly contested discussion about how to place rights within the UK's constitutional arrangements. A rights-based approach to constitutional and administrative law has enormous significance for judicial review. Courts are obliged to interpret legislation, UK Acts of Parliament in so far as it is possible to be compliant with the Convention. If this proves impossible then the court may issue a declaration of incompatibility and based on the declaration, the UK Parliament may decide to pass amending legislation or decide to take no further action. The Human Rights Act has an important significance in creating a rights presumption

that public bodies are expected to be rights complicit. This means that all public bodies, including courts are aware of their human rights responsibilities and are expected to comply with the legal requirements under the Convention. However, the Act does not define the term public body and this has been left to judicial interpretation. The exclusion of private bodies is intended. For example, a private care home was held by the House of Lords[31] not to have to apply the Human Rights Act. The presumption that public bodies are compliant also applies to the passage of legislation whereby the relevant Minister has to sign a certificate that the proposed legislation is rights compliant. This leaves the courts with a discretion as to whether or not the legislation is compatible with Convention rights under the Act. The express aim is to avoid judges overturning Acts of Parliament. This makes sense if the government is based on a parliamentary system where the government is answerable to parliament and political choices or policy are regarded as drawn from political choices rather than the imposition of judicial opinions. The pre-eminence given to party political choices is easier to achieve under a parliamentary rather than a presidential system of government.

It is inevitable that a rights-focussed agenda may become enmeshed in the attitude of the courts in interpreting the law and this may create a change in approach to the role of the UK courts and a noticeable shift from political forms of power to judicial influences. One example is the Supreme Court decision in *Pham v Secretary of State for the Home Department*[32] in which the court considered the doctrine of proportionality as a common law ground for judicial review. The facts of the case concerned the question of whether or not it was lawful for the Home Secretary to take away the appellant's British citizenship and deport him to Vietnam. The appellant had acquired British citizenship in 1995 but did not renounce his Vietnamese citizenship based on where he had been born. The Home Secretary's actions were in connection with terrorism and the allegation that he had participated in terrorist activities. There were EU issues but the doctrine of proportionality was not dependant on EU law. Instead the UK courts are enabled to develop their own contextual approach to what is reasonable and a careful consideration of the policy implications as well as the value of judicial discretion on a case by case basis. The Supreme Court were far from convinced that the Home Secretary's decision was a proportionate one. *Pham* is a good example of the evolution of the common law through an understanding of EU influences that is not wholly dependent on interpreting EU law. The UK Supreme Court allowed the Secretary of State the powers to make a decision even though its effects might be to take away British citizenship.

The Human Rights Act 1998 provides a statutory basis for international obligations to be honoured by interpreting the European Convention on Human Rights as part of domestic law. The European Union has also created a complementary set of obligations including rights and legally enforceable rules. In the UK context this has given rise to tensions between the government of the day and the courts that provide the basis for an ongoing conflict that is often presented as conflict between elected politicians and unelected judges.[33]

The interaction between courts and Parliament has become acute in respect of a relatively small number of cases. The Strasbourg Court in *Hirst v UK (No.2)*[34] concluded that the blanket ban on prisoners voting was discriminatory and disproportionate. In the UK, the Government is opposed to the Strasbourg Court's perspective. On this occasion it decided to appeal the original decision and was reluctant to fast-track legislation to implement the incompatibility between UK law and the analysis offered by the Strasbourg Court in 2005. The issue of prisoners' voting remains unresolved even to this day as the UK has persistently failed to remove the ban and the House of Commons voted to retain the ban notwithstanding the decision of the Strasbourg Court. In *Scoppola v Italy (No. 3)*[35] the Grand Chamber affirmed the earlier decision in *Hirst* and concluded that a general and automatic disenfranchisement of all serving prisoners was incompatible with Article 3 of protocol 1 of the Convention. The question of prisoners' voting was debated at various stages of the discussion between the UK Government and the Strasbourg Court.[36] In November 2012 the Government published a draft Bill, the Voting Eligibility (Prisoners) Bill for pre-legislative scrutiny by a Joint Committee of both Houses. The Government published a draft report recommending that all prisoners serving sentences of 12 months or less to vote in all UK parliamentary, local and European elections. The Government has been fairly non-committal about this recommendation. The Strasbourg Court in August 2014 and February 2015 noted that the UK continued to violate the Convention in respect of prisoners' votes but the Court did not award any compensation or legal expenses.[37]

Further complexity arises in cases where prisoners are serving custodial sentences in terms of EU law.[38] In October 2015, the Court of Justice of the European Union (the Luxembourg Court), in an important decision on the rights of EU citizens and the EU Parliament, considered a French law that denied certain categories of prisoners the vote. The Luxembourg Court held that the French law was legal in *Thiery Deligne v Commune de Lesparre-Médoc and Préfet de la Gironde*.[39] The reasoning in the case was that the French law was proportionate under Article 52(1) of the Charter of Fundamental Rights of the European Union. The case might raise the possibility that UK law might be regarded as compatible. The problem is that the UK's position is based on a blanket ban rather than a more targeted response. The French law took account of the nature and gravity of the criminal offence committed and was not a blanket ban. The French case involved the defendant Mr Deligne being convicted of murder and receiving a 12-year sentence. He was not permitted to register to vote and his subsequent complaint was based on arguing that the French law was incompatible with EU law.

The UK Government has not decided how to respond to the Interim Resolution of the Council of Europe's Committee of Ministers calling on the UK to consider its obligations[40]. The UK is currently considering what response to make and is taking time to consider its options.

Resolving potential conflict between the courts and Parliament is almost an inevitable consequence of UK courts having to adapt to influences from international and European sources. The question is how such tensions and potential

conflicts be best resolved? The answer involves a mixture of possibilities. Dawn Oliver suggests an evolving comity between 'institutions and workability'.[41] There are other possibilities. Developing priorities and setting boundaries that provide adequate road maps of constitutional propriety and respect for the rule of law is essential. Political policy making is the most difficult where judges are less likely to be able to settle legal debate without the Executive giving way to judicial interpretation.

Some guidance as to what might be involved in defining the future role of the courts came in *Thoburn v Sunderland City Council*.[42] In this case street traders were prosecuted for selling goods using imperial measures rather than metric measures. The UK Government's obligations to apply metric measurement arose from Directives and section 2(2) of the European Communities Act 1972. Lord Justice Laws found that there was no inconsistency between the Directive and the Weights and Measures Act 1985 and therefore no implied repeal of the European Communities Act 1972 arose. Lord Justice Laws recognised the changes in UK sovereignty and this had modified the doctrine of implied repeal when it came to EU law. The doctrine of implied repeal suggests that a later Act of Parliament may overturn an earlier Act. In the case of UK law the 1972 Act is seen as setting out a position where later Acts of Parliament will be read as consistent to the 1972 Act. Of course in the future it is possible for a UK Act of Parliament to expressly repeal the 1972 Act. That would require clear and unambiguous words and repeal would have to be spelt out very clearly. The basis of the UK's relationship was a matter of the common law and the common law was the basis of any resolution. Consequently he reasoned that while ordinary statutes were subject to the implied repeal doctrine what he called 'constitutional statutes' were not. Defining a constitutional statute was one which dealt with fundamental constitutional rights, including the European Communities Act 1972, and the only conditions where such a repeal might be possible arose from express words in the later statute.

Further elaboration is forthcoming in *R (HS2 Action Alliance Ltd.,) and others v Secretary of State for Transport*[43] where the applicants argued that the adoption of a Hybrid Bill procedure was not compatible with the requirements of the Environmental Impact Assessment Directive (Directive 2011/92/EU) requiring effective opportunities for objectors to participate in environmental decision-making procedures. The process of Hybrid Bill allows more detailed inquiry and investigation than would be possible under the normal procedure. The Government were pushing forward a plan to create a fast train link between the capital and Birmingham and the objectors to the proposed link claimed that there was a serious impact on the environment. The adoption of a Hybrid Bill was subject to Government whipping procedures in the House of Commons, meaning that there would be inadequate time to debate the detailed and complex nature of environmental issues; and that the alternatives to the proposal would not be considered until the relevant elect committee after second reading. The Supreme Court had rejected the view that the issues raised by the applicants should be referred to the European Court of Justice. The result of the Supreme Court decision is to allow the Hybrid Bill procedure to continue and the Bill is currently at the stage of

debate in the House of Lords. Lord Reed made clear that where EU law is in direct conflict with UK domestic constitutional law, it was a matter to be resolved by the UK Supreme Court. The Supreme Court accepted that there is no *acte Claire* and that the *Factortame* principle of a disapplication of a statute was not pertinent to a constitutional principle such as settled in the Bill of Rights.

The emergence of constitutional fundamentals that are unalterable by EU law and defined by the national court creates potential limitations on the general expansionist direction of the European Court of Justice. It is in line with other cases recently decided by the Supreme Court[44] and rests on the re- assertion of domestic supremacy to be found in section 18 of the European Union Act 2011. It remains unclear what the reaction of the European Court of Justice might be. The European Court of Justice may, as it has done in the past, subscribe to the view that it has the competence to settle any competing competence between EU law and domestic law of the Member States and that the national courts are obliged to follow its opinions. The European Court of Justice is increasingly of the view that in matters of EU law, national courts are behaving as European courts integral to the requirements of the Treaty obligations. Conceptually this view fits very well within the analysis that EU law is not determined within the boundaries of national states but within the conceptual framework of the jurisprudence of the EU.

5. The UK courts and devolution

The UK's unitary and non-federal state has suffered from over-centralisation for some time. Devolved arrangements, including directly elected legislative bodies, to Scotland, Wales and N. Ireland in 1998 were introduced to give different nations powers over their own regions. Devolution has resulted in important cases defining the powers of devolved legislatures. Soon after the Scotland Act 1998 came into effect questions arose in litigation as to the nature and powers of the new Parliament. In *Whaley v. Lord Watson of Invergowrie*[45] it was held by the Inner House of the Court of Session that the Scottish Parliament, being a creature of statute, does not enjoy the privilege of the UK Parliament to regulate its own proceedings (though by section 28(5) of the Act the validity of an Act of the Scottish Parliament is not affected by any invalidity in proceedings leading to the enactment).

Issues to do with devolution have been raised in the UK Supreme Court. A number of recent cases highlight the cultural distinctiveness of the Scottish legal system and the political sensitivities surrounding it. As we shall see, courts have generally upheld the powers of devolved bodies against challenge, except in relation to the primacy of EU law and interpretations of human rights, when the Supreme Court has on occasions overridden interpretations made by Scottish courts.

In *Axa General Insurance and others v The Lord Advocate*,[46] the lawfulness of an Act of the Scottish Parliament, the Damages (Asbestos-related Conditions) (Scotland) Act 2009, was challenged as to its compatibility with Article 1 of Protocol 1 of the European Convention on Human Rights and its reasonableness

in terms of the general judicial review jurisdiction of the Supreme Court, in particular on grounds of irrationality and arbitrariness. The claimants were insurance companies and their claim arose from their undertaking to indemnify employers against liability for negligence. The point of the Scottish Parliament's legislation was to include under Scots law liability for personal injury claims arising from various asbestos-related pleural plaques and related conditions. The UK Supreme Court held that the claimants were entitled to make such a claim and that the courts had an overarching power to ensure that the 2009 Act was legitimate in its aims and proportionate in its response. The Court took into account the political context of the legislation, including social policy and the public interest. It found that the legislation had a legitimate purpose and that the means to achieve its aims were reasonable and proportionate. The Court rejected the claimants' case and held that the legislation was compatible with the European Convention and did not offend any of the other grounds for judicial review on which the claimants relied.

The significance of the *Axa* decision is that the UK Supreme Court indicated that it has a residual jurisdiction to consider the legality of Acts of the Scottish Parliament. Lord Hope held that the approach to the question of the Supreme Court's review powers also applied to the other devolved institutions in Wales and Northern Ireland, but that it was significant that the Scottish Parliament is 'a self-standing' democratically elected legislature. This sets an important benchmark for judicial review. Lord Hope cautioned that the courts 'should intervene, if at all, only in the most exceptional circumstances'.[47] His analysis is drawn not only from a comparative analysis of the sovereignty of the UK and Scottish Parliaments, but on the basis of the power of review itself: it constitutes an important oversight of the constitutional processes and checks and balances on the legislative programme of the Scottish Parliament and other devolved administration exercising legislative powers.

The Human Rights Act 1998 has also been relied on in cases raising devolution issues. In *Cadder (Peter) v HM Advocate*[48] the Criminal Procedure (Scotland) Act 1995, passed by the UK Parliament before the Scotland Act 1998, was the subject of judicial review on a claim by a suspect who had made admissions under caution to the police but in the absence of legal representation. The admissibility of the admissions was contested after the accused was convicted, and formed the basis of his appeal. It was argued that the absence of legal representation at the time of the police interview was a violation of Article 6 of the European Convention on Human Rights. The High Court of Justiciary refused leave to appeal on the basis of an earlier leading Scottish authority, *HM Advocate v McLean*[49]in which the argument that legal representation was a legal right had been rejected. Mr Cadder appealed to the Supreme Court of the UK. The Supreme Court followed the Grand Chamber of the European Court of Human Rights in *Salduz v Turkey* (2008)[50] in holding that a person detained by the police had the right of access to a lawyer prior to being interviewed unless there were compelling reasons to restrict that right. The Scottish court's decision in *McLean* was overruled and it was held that nothing in the Scotland Act 1998 protected the Criminal Procedure

(Scotland) Act 1995 from review. The 1995 Act could not be read compatibly with Article 6 of the European Convention on Human Rights on access to justice. The day after the Supreme Court delivered its decision, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 was passed by the Scottish Parliament allowing a person under suspicion a right of access to legal assistance.

The Supreme Court has also held that its jurisdiction over devolution issues under the Scotland Act 1998[51] includes the power to deal with Human Rights Act claims arising in criminal – and other – cases and to determine whether the Scottish courts have correctly interpreted Article 6 rights. In *Fraser (Nat Gordon) v HM Advocate*[52] the High Court of Justiciary had refused an appeal against conviction in which the defendant sought to adduce new evidence in support of a claim that the original trial was a miscarriage of justice. The defendant claimed that the Crown's failure to disclose information to him before the trial infringed his Article 6 rights and that this raised a devolution issue as to whether the conviction was outside the powers of the Scottish courts under the 1998 Act as being contrary to the Human Rights Act 1998. The Supreme Court held that this was indeed a devolution issue over which it had jurisdiction, and that the test applied by the Scottish court was not consistent with the interpretation adopted by the Supreme Court in the leading case of *McInnes v HM Advocate*.[53] It therefore remitted the case to a differently constituted Appeal Court for consideration.

The Scotland Act 2012 addresses a number of important constitutional issues. Section 14 of the 2012 Act sets a time limit for actions against the Scottish Ministers under the 1998 Act where it is claimed that they acted incompatibly with Convention rights.[54] The jurisdiction of the UK Supreme Court over Convention rights and EU law has been clarified under section 34 of the Scotland Act 2012. This gives the Advocate General for Scotland the express power to refer a compatibility issue to the High Court of Justiciary. Under section 35 of the 2012 Act additional powers are granted to the Lord Advocate and the Advocate General for Scotland to require a lower court to refer a compatibility issue to the High Court of Justiciary or if necessary to the UK Supreme Court. Sections 36 and 37 provide the UK Supreme Court with power to hear criminal appeals from Scotland that may raise Convention rights or EU law issues.

6. Administrative and financial pressures on the UK courts

Undoubtedly the funding of judicial challenges in the courts has become highly politicised, especially as many cases are taken against the Government or public bodies. Funding arrangements for cases through legal aid are vulnerable to change. In December 2012, the Coalition Government launched a consultation process on reform of judicial review that continued until 24 January 2013, *Judicial Review: Proposals for Reform*. This was followed by an additional consultation from September 2013 until November 2013 *Judicial Review: Proposals for Further Reform*.

There are mixed motives behind the consultations and the Coalition Government's desire for reform. At one level it is to save money and prevent useless cases from being taken that are filtered out from the procedures for review. The aim is to reduce time, money and simplify procedures including shorter time limits to take cases, restrictions on the right to an oral renewal of an application where a judge has refused permission in a prior judicial process or where the claim is judged to be unmeritorious. There are proposals to limit the right to appeal to the Court of Appeal and changes in the rules relating to costs and also standing rules to prevent the taxpayer having to pay for unmeritorious cases.

One motive might be to save the Government uncertainty over judicial review through a reduction in the number of applications. This is a highly debateable point as the statistical evidence indicates that the courts are already effective in setting parameters for cases to be carefully considered.

The number of judicial review applications varies in any one year but the average[55] is around 12,000 applications lodged with the Administrative Court.[56] The bulk of applications are related to immigration and asylum cases. Only a small number of applications are granted permission to proceed to a full hearing and this is roughly about 1500 cases. Many cases are not proceeded with and nearly 50 per cent of cases were refused permission meaning that the judge was not convinced that there was an arguable case. Settlements are common and may represent a potential for changing the way in which judicial review is undertaken. There are also suggestions that some form of alternative dispute resolution might be the best way forward. This is a largely unchartered area but alternative dispute resolution would offer a way to resolve disputes in a highly cost effective way. The Pre-action Protocol for judicial review applications includes the instruction that the parties should consider alternative dispute resolution as it may offer a more suitable procedure than proceeding to litigation.

Judicial review claims that are proceeded with do not inevitably lead to the Government losing their case. Only a small number are cases where the courts find against the Government. This may not ease concern that judicial review is a 'threat' to the smooth working of Government or may be used by opponents of the Government to cause embarrassment and delays in implementing policies. Pressure groups may justify the use of judicial review as a means to test the legality of Government decisions and raise public awareness. An important part of judicial review is to check on the legality of the Government of the day as a means of upholding the rule of law.

Steps taken to reduce the workload of the administrative courts are on-going. The bulk of cases involving immigration judicial review have been moved to the Upper Tribunal (Immigration and Asylum) Chamber under section 23 of the Crime and Courts Act 2013. This is partly in response to delays in having cases heard but also the increase in the work load that made the Administrative Court less efficient than it should have been.

In planning cases the Government reduced the time limit from three months to six weeks and 30 days and in procurement cases to 30 days. In cases without any merit the right to an oral hearing was removed and the fees were increased to

£215 for oral renewals. These changes attracted criticism that they would reduce the accessibility of judicial review. The Government has gone further and decided to create within the High Court a specialist Planning Court to deal with judicial review and statutory appeals relating to nationally Significant Infrastructure Projects and other planning matters. The Criminal Justice and Courts Act 2015 creates a new Planning Court and sets various safeguards restricting judicial review in planning cases including changes to the costs arrangements for planning cases.

Judicial review is particularly vulnerable because of high costs and expenses. The complexity of legal analysis and argument makes it difficult to take cases as litigants in person. In most cases judicial review is dependent on legal aid and this has in the past been generously provided. The Coalition Government in 2013 announced restrictions on the availability of judicial review especially in certain prison cases or for applicants 'lacking a clear connection with the UK'. Legal costs are normally borne by the losing party which also enters a note of caution when taking cases. There is no absolute right to any remedy even if the application proves to be meritorious and successful. Remedies are only discretionary and may be refused and this creates a further hurdle to any application. Attempts to remove guaranteed legal aid for judicial review set out in the Civil Legal Aid (Remuneration) (Amendment) (no 3) Regulations 2014 that came into force in April 2014 was challenged as to its legality. The High Court held that this was illegal as there was no rational link between the regulations and the aim claimed by the Government to only bring cases that were likely to succeed.[57]

7. Conclusions

The UK's constitutional arrangements do not provide the courts with the power to review primary legislation nor the power to hold Acts of Parliament unconstitutional and illegal. This is unusual when compared with countries with written constitutions. Defining the democratic credentials of a representative democracy, the UK's doctrine of parliamentary sovereignty has an overriding influence over the main institutions of government and defines the pre-eminence of Parliament. The one exception is European Union law that concedes the power of illegality to be vested in the European Court of Justice. The motivation behind Brexit was largely to bring UK sovereignty to the fore and a rejection of the European Court of Justice. The other exception is the area of human rights and the rapidly developing jurisprudence of rights with its enormous potential for transforming the UK's system of public law. The UK's constitutional arrangements also should not overlook the various checks and balances to be found in the elaborate system of parliamentary oversight that defines important accountability mechanisms within the UK's constitutional arrangements. Parliament provides technical and procedural opportunities to hold government to account while acknowledging the ultimate political nature of policy making that rests in the government of the day. The recent *Miller* decision[58] affirms Parliament's role in leaving the EU.

The UK courts are under increasing pressures from mainly political perspectives about the nature of political power and its system of accountability. On human

rights, the UK is certainly at risk of passing laws that are incompatible with Convention rights and are likely to be considered inconsistent with international norms. Leaving the EU brings with it the political demand for removal from the Strasbourg Courts and the enactment of a British Bill of Rights.

The rationale and justification offered for UK sovereignty is defined in terms of democratic mandates achieved through elected government. Such an explanation is convincing to a point – but as elections are single points in time, however many or how regularly held, there is little day to day monitoring of how governments behave. Trusting in Government is partly cultural, often a manifestation of social and political values and not always a reliable way to prevent abuse or misuse of power. The UK courts act as an important check on arbitrary power. The sensitivity of their role has intensified since the UK decided to leave the EU with questions about the role of the Government and the UK Parliament intensely debated.[59]

There are also financial pressures. We have also seen how the UK courts are coming under increasing financial pressures during a period of austerity finance since the financial crisis in 2008 that challenges the availability of the courts in the area of judicial review.

There are pressures on the role of the courts in terms of accountability and oversight. Expanding the role of the UK's Supreme Court is favoured by some academics[60] as a way of ensuring that judicial oversight is facilitated and improved. Constructing a constitutional court on the lines of Germany might be seen as a possible way forward. However much this possibility may be doubted it is likely to become increasingly possible as traditional constitutional orthodoxy in the UK falls under the influence of giving way to international standards that are the product of EU influences and the jurisprudence of the European Court of Justice. This is an ongoing process of evolution rather than revolutionary change. The options open to the UK include the possibility of a written constitution. There is limited support for a written constitution that would grant the UK Supreme Court the power of judicial review of legislation. There has been a noticeable use of codified manuals and explanatory documents setting out the powers of the Cabinet and Civil Service as well as the means of financial scrutiny. The devolution settlements in Scotland, Wales and Northern Ireland are being revisited with additional devolved law making powers including taxation. This is likely to transform the United Kingdom through mini-written constitutions that will ultimately require clarification of the position of England and its relationship to the devolved nations. The UK Supreme Court has shown a willingness to become pro-active on devolution issues when interpreting the limits and extent of devolved powers.[61] This is an important dimension in identifying the legality of devolved powers and ensuring that devolved governments operate within the boundaries of constitutional propriety. This falls short of ensuring a formal constitutional court that applies to UK legislation.

Strengthening the existing system of parliamentary scrutiny is ongoing but often with only limited results as the government of the day has opportunities to take overall control if not influence over parliamentary process. Overall, there are many doubts and uncertainties for the future direction of the system of public law in the UK. Unhappily the courts are at the focus of much political attention, raising

some major constitutional questions about how conflicts between judges and politicians might be best resolved.[62]

Notes

1 See Hirschl (2014) 1–10.
2 See Griffith (1979) 1.
3 Waldron, (2007) 91.
4 *R (Miller) v Secretary of State for Exiting the EU etc* [2017] UKSC 5.
5 Waldron (2002) 137.
6 See Bingham (2011) 1.
7 Case C-213/89 [1990] E.C.R. 2433; [1990] 3 C.M.L.R. 1; [1990] 2 AC 85, [1991] 1 AC 603. *R. v Secretary of State for Transport ex parte Factortame Ltd., (No.2)*. [1991] 1 AC 603.
8 Oliver (2013) 310.
9 Five year fixed term Parliaments in the UK are required since the Fixed-term Parliaments Act 2011 passed in 2011 under the Coalition Government but remains in force.
10 *Jackson v Attorney General* [2005] UKHL 56 [2006] 1 AC 262.
11 *R. v Secretary of State for Transport ex parte Factortame Ltd., (No.2)*. [1991] 1 AC 603. H.W.R. Wade, 'Sovereignty and the European Communities' (1972) p.4. Sir William Wade (1991). Also see: House of Commons Library (2015).
12 Allison (2007) 120–123; Bradley (2007) 25–58; Allan (1997) 443; Allan (2013); Collini (2006); Gaus (1950); Hailsham (1978).
13 *Francovich v Italian Republic* C-6/90 and 9/90 [1991] E.C.R. I-5357.
14 Wade (1989) 17.
15 *Factortame* [1990] E.C.R. I-2433, [1991] 1 AC 603, 658–9.
16 Bingham (2010). 164.
17 Ibid., 164.
18 See Lord Simon in *Maunsell v Olins* [1975] AC 373.
19 Craig (2000) 211.
20 Allan (1997) 443.
21 Craig, op cit. 120–121.
22 Craig (2013) 165–8.
23 Ibid. 185.
24 Oliver (2013) 313.
25 Ibid. 335–336.
26 de Smith (1971) 614.
27 Jacob (2006) 5.
28 Ibid., page 6.
29 The Great Repeal Bill is likely to be published during the period of negotiation over the two years after Article 50 is triggered.
30 The Human Rights Act 1998.
31 *YL v Birmingham City Council* [2007] UKHL 27.
32 [2015] UKSC 19.
33 There is a rich literature on the role of the courts. John Gardner (2009); Mark Tushnet (2010); Robert Behn (1998); Antoine Bozio et al. (2015).
34 [2005] 42 ECtHR 849.
35 [2012] ECtHR 868.
36 House of Commons Library Standard Note (2015).
37 *Frith and Others v UK* [2014] 47784/09, *McHugh and others* [2015] ECHR 155.
38 See House of Commons Library Briefing Paper CBP 7461 Prisoners' Voting rights: developments since May 2015 12th January 2016).
39 Case C-650/13.

40 Interim Resolution CM/Res DH(2015) 251 adopted by the Committee of Ministers 9th December 2015.
41 Oliver (2013) 310.
42 *Thoburn v Sunderland City Council* [2003] QB 151.
43 *R (HS2 Action Alliance Ltd.) and others v Secretary of State for Transport* [2014] UKSC 3 Also see: Gaston (2014).
44 See *Osborn v The Parole Board* [2013] UKSC 61 and *Kennedy v Charity Commission* [2014] UKSC 20.
45 [2000] SC 340.
46 [2011] UKSC 46 and [2011] CSIH 31.
47 Ibid. para. 49.
48 *Cadder (Peter) v HM Advocate* [2010] UKSC 43 (SC).
49 *HM Advocate v McLean* [2009] HCJAC 97, 2010 SLT 73. See the discussion in (2011) Public Law 166.
50 *Salduz v Turkey* (2008) 49 ECHR 421.
51 See section 98 and Schedule 6, Parts I and II as amended to substitute the Supreme Court for the Judicial Committee of the Privy Council.
52 *Fraser (Nat Gordon) v HM Advocate* [2011] UKSC 24. See the discussion in (2011) Public Law 805.
53 *McInnes v HM Advocate* [2010] UKSC 7.
54 *Somerville v Scottish Ministers* [2007] UKHL 44 and the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 now replaced by section 14 of the Scotland Act 2012.
55 See House of Commons Library (2013) pp. 15.
56 The Administrative Court was created out of the Divisional Court of the High Court (Queen's Bench Division) where judicial review applications are lodged.
57 Unreported case (2015) *New Law Journal* 5 (6th March 2015).
58 *R (on the application of Miller and another)* [2017] UKSC 5.
59 Ibid.
60 Allan (2004) 671; Allan (2006); Murkens (2009); McEldowney (2015).
61 See *Axa General Insurance and others v Lord Advocate* [2011] UKSC 46.
62 D'Alterio (2011) p 394–424.

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5 Implications of the UK's legal response: striking the right balance between individual privacy and collective security in the digital age

Introduction

This chapter will assess if the bulk powers under IPA can stand to legal challenges over breaches of data protection and privacy rights. The chapter starts by examining the EU's constitutional and legal influence on the UK legislature, specifically with regard to data protection and the rule of law. This is simply because the EU has been instrumental in the UK's development in terms of data protection and data privacy, and data retention of electronic communications data.

As a result of the CJEU's ruling in *Digital Rights Ireland*, a new criterion will be developed with which to test new UK legislation, ensuring it remains within the limits set by EU law.[1] Applying this criterion specifically to IPA, the chapter will illustrate that having been tested by the CJEU, the initial bulk interception powers may be constrained. In addition, the new Judicial Commissioners' role will be examined focusing on the available powers, limited to judicial review rules. The overall aim of this chapter is to assess if IPA strikes the right balance between individual privacy and collective security in the digital age, and stands up to CJEU and ECtHR judicial scrutiny.

UK data protection

The Data Protection Act 1998 (DPA) provides statutory control over how a citizen's personal information is used by organisations, private businesses and the Government.[2] Those responsible for using the data must abide by the data protection principles ensuring data is:

1 used fairly and lawfully;
2 used for limited and/or specific expressed purposes;
3 accurate and used adequately;

1 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others and the conjoined case of Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and others* delivered on 8 April 2014 and reported at [2015] QB 127. Hereafter referred to as *Digital Rights Ireland*.
2 The Data Protection Act 1998, Introductory Text.

4 deleted when no longer required;
5 kept secure;
6 not transferred outside the European Economic Area without adequate protection.[3]

Should the data contain sensitive information, such as sexual health, criminal records or ethnicity and religious beliefs, then stronger protections must be in place.[4] When it was enacted, the impact of DPA was felt right across the public and private sectors. For the purposes of this chapter, the seventh data protection principle relates to security, and it states that 'appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data'.

This is particularly relevant to the issues raised in Chapters 2, 3 and 4 combined, where the use of Internet and email raises problems when private or public organisations wish to monitor its use. Briefly, an organisation has a right, even a duty, to monitor the use of the Internet and emails to prevent them being used for unlawful purposes or to distribute offensive material. However, running concurrent to this obligation is the fact an individual has a right to data privacy and protection. It is the duty of all organisation to provide access to email and the Internet to balance these two conflicting principles. In specific policing terms section 29 of DPA deals with crime and taxation exemptions that permit personal data to be processed and withheld from the individual concerned for the purposes of the prevention or detection of crime. Such exemption must be proportionate, and the 'data controller' must record the data being processed. This means of course that a person may not be able to ascertain what information law enforcement has collected.

Key human rights instruments: influencing the UK's approach

The right to data privacy is enshrined in the EU at the constitutional level through Article 8 of the Charter of Fundamental Rights (CFR or Charter) and at the legislative level by way of two directives, namely the Data Protection Directive in 1995 and the e-Privacy Directive in 2002.[5] In the interests of fullness, the 2002

3 The Data Protection Act 1998, Schedule 1.
4 The Data Protection Act 1998, s 2 and Schedule 3.
5 European Union Directive 95/46/EC of the European Parliament and of the European Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Also European Union Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector. See also *S and Marper v UK* [2008] 48 ECHR 1581, [66]–[67], the Court noted the concept of private life is a broad term not susceptible to exhaustive definition.

Directive repealed the earlier 1997 version aimed primarily at the telecommunications sector, so it is no longer relevant.[6]

EU constitutional protection: the Treaty of Lisbon

As a result of the ratification of the Treaty of Lisbon 2007, which came into effect in 2009, the Charter of Fundamental Rights 2000 was given legal status. Therefore, constitutionally speaking, data privacy and protection is afforded by Article 8 of the Charter which states individuals have a right to the protection of personal data:

> Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data, which has been collected concerning him or her, and the right to have it rectified.

The Charter also states compliance must be subject to control by an independent authority. However, the right afforded here requires implementation into EU surveillance legislative instruments to make them effective. The EU's instruments have so far failed in this regard as they do not provide sufficient oversight. Since the terrorist attack on the US on 11 September 2001, data protection appears to have been almost ignored as governments focus on data collection and mining.[7] Analysis illustrates that 'creating a stable and unequivocal system of data protection was not a priority'.[8]

EU legislative protection

The 1995 Directive was implemented in the UK by way of the Data Protection Act 1998, and the 2002 Directive was implemented through the Privacy and Electronic Communications (EC Directive) Regulations 2003. Following this in 2008, the EU adopted a framework decision aimed at providing similar legislative protection, but focused primarily on police and judicial cooperation when dealing in criminal matters.[9] The e-Privacy Directive in 2002 dealt with most aspects of protecting privacy in electronic communications, such as:

6 European Union Directive 97/66/EC of the European Parliament and of the European Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.
7 H. Hijmans and A. Scirocco (2009) Shortcomings in EU Data Protection in the Third and the Second Pillars, *Common Market Law Review*, 46, 1485–1525, 1496.
8 *Ibid.*
9 European Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters 2008/977/JHA.

Implications of UK's legal response

- *Security*: Article 4 requires the service provider to take appropriate technical security measures. Subscribers must be informed if there is a risk of a security breach;
- *Confidentiality*: Article 5 requires legislative assurance of confidentiality of communications made through public electronic communications services, or to such. Monitoring or storing communications is prohibited unless required for national security or crime prevention;
- *Location data*: Article 9 prohibits using location data unless it remains anonymous, or has the user's consent. It can only be used to provide a value added service, such as local weather details. Article 10, however, permits the use of location data in life threatening circumstances, such as mobile contact with emergency services;
- *Billing*: Article 6 stipulates that billing data must be erased or made anonymous once the service providers' reasons for retention have expired (i.e., the bill has been paid). Under Article 8, service users have a right to receive non-itemised billing;
- *Automatic call forwarding*: Article 11 provides service users the right to prevent automatic call forwarding by third parties;
- *Unsolicited marketing*: Article 13 prohibits unsolicited communication unless consented to by the service user.[10]

For Hijman and Scirocco, however, the protection afforded by way of these instruments lacked comprehensive cover for all data processing and thereby illustrated issues of practicality.[11] Balancing an individual's right to data privacy with the needs of national security has not been an easy task to fulfil, either within the UK or the EU. For example, the DPA introduced safeguards applied to access to communications data. The problem is that law enforcement agencies could only make use of electronic communications data for a limited period, and were thereby 'obliged to rely solely on data routinely retained by communications companies for their own purposes'.[12] This usually meant that the data was deleted following the payment of the last outstanding bill. In light of this, and the fact that no mandatory data retention regime existed, the EU introduced a number of Data Retention Directives. The first dealt with fixed networks and mobile telephony only, and was incorporated into UK law by way of the Data Retention (EC Directive) Regulations 2007 (S.I. 2007/2199). These were then superseded by the Data Retention (EC Directive) Regulations 2009 (S.I. 2009/859), 'which contained additional provisions relating to Internet access, Internet telephony and email'.[13]

10 *R (on the application of David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis) v The Secretary of State for the Home Department* [2015] EWHC 2092, summary.
11 *Supra* as per H. Hijmans and A. Scirocco (2009) 1496.
12 *R (on the application of David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis) v The Secretary of State for the Home Department* [2015] EWHC 2092, [37]–[38].
13 *Ibid*, [42].

The start of a new focus on data retention began when the EU's Council Action Plan on Combating Terrorism highlighted the emphasis to broaden security.[14] At this time, the EU focused on creating the next generation of Schengen, a visa information system and biometric passports with a focus on information gathering, analysis and exchange.[15] In meeting this agenda, the EU's Action Plan paved the way for framework decisions aimed at simplifying information exchange between the law enforcement agencies, Europol and Eurojust, and called for a Data Retention Directive.[16]

Bulk retention of electronic communications data: key human rights instruments

Mitsilegas followed this change in the use of EU level surveillance and noted five transformational trends: the linking of immigration with security and counter-terrorism; increasing biometric data; a sharp shift towards prevention; broadening the access to data by law enforcement agencies; and taking a risk assessment approach.[17] These links and growth in the use of surveillance highlight a utilitarian logic where 'information must be seen as a tool for collective benefits like fighting terrorism', ensuring 'that information is available when needed'.[18] This idea of the availability of data counters the EU's data protection principle, the aim of which is to limit the use of data to a specified purpose.

For Murphy, surveillance represents the broadest counterterrorism action taken by the EU.[19] In the 21st Century, national surveillance systems, such as the UK's IPA, subject to warrants and authorities can potentially affect a large section of the population and are not simply targeted towards immigrants, asylum seekers or suspected criminals. The EU's 2006 Data Retention Directive represents a classic example of targeting the whole population. For this reason, Murphy describes it as unpalatable.[20] The Directive:

> [a]ims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are

14 European Union Council (2007) *EU Action Plan on Combating Terrorism*, Brussels, 9 March.
15 *Ibid.*
16 *Ibid.*
17 V. Mitsilegas (2010) The Transformation of Border Controls in an Era of Security: UK and EU Systems Converging? *Journal of Immigration Asylum and Nationality Law*, 24(3), 233–245, 233.
18 *Supra* as per H. Hijmans and A. Scirocco (2009), 1490.
19 C. C. Murphy (2015) *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart Publishing).
20 *Ibid.*

> available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.[21]

Prior to the terrorist attack in London on 7 July 2005, the EU's attempts to create such a measure failed due to heavy opposition from the European Parliament.[22] However, in the aftermath of this attack the UK effectively suppressed any opposition, arguing that mobile telephones were used in the coordination of the attacks, as well as in the earlier Madrid attack on 3 March 2004, and unsubstantiated claims were made confirming telecommunications information was vital to the investigation.[23] This Directive amended the earlier e-Privacy Directive and as such, following adoption of the Data Retention Directive on the basis of Article 95 EC (now Article 114 Treaty on the Functioning of the European Union (TFEU)), Ireland supported by Slovakia brought forward an application to have it annulled by the CJEU. In *Ireland v European Parliament and European Commission* the CJEU reached the decision that the amendment was within the legal scope under the current Article 114 TFEU. In drawing a comparison to an earlier ruling concerning Passenger Name Record data, discussed in the next chapter, the Court confirmed the Directive merely aimed to harmonise the retention of data by private actors within the EU so that a distortion of competition within the internal market could be avoided.[24] Although the legality of the Directive is sufficient as it was adopted correctly, this further rationale represents a startlingly poor decision. The reason behind the adoption in the first place was to provide a lawful basis for the retention of data, both the traffic and location data of individuals, effectively permitting a total derogation from Articles 7 and 8 of the CFR, which would require the deletion of such information once the billing purpose was satisfied.

21 Article 1 of the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

22 Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism 2004/0813/CNS.

23 European Commission (2005) Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC COM (2005) 438 final, Brussels, 21 September 2005. See also Euractiv.com, Data Retention: Parliament caves in to Council pressure, 14 December 2005, available at http://www.euractiv.com/section/digital/news/data-retention-parliament-caves-in-to-council-pressure accessed 30 March 2018.

24 *Ireland v European Parliament and European Commission* [2009] ECR-I-593, [60]–[69].

The breadth of the 2006 EU Directive

It is particularly concerning when one notes the sheer breadth of the 2006 Directive, which effectively includes a plethora of crimes for which the data may be utilised, with regard to both the number of people who can access the data and the retention period. The 'excess of crimes' argument stems from the fact Member States cannot agree upon a definition of serious crime, and therefore Member States have implemented the directive in their own very individual way, contrary to EU law.[25] The same can be said for the different law enforcement agencies' permitted access to the data stored, with some Member States allowing not only security and policing agencies to have access, but also military services, tax and customs officials and border authorities.[26] Retention periods also fluctuate given the Directive allows for such divergence, permitting between 6 and 24 months.[27]

These facts prove beyond doubt the 2006 Directive derogated from the very purpose of EU directives. Even though the situation may have been improved given the previous total lack of uniformity, some divergence remains, illustrative of the failure of the instruments' claim to harmonise the internal market.[28] A rather peculiar clause within the Directive, although subject to EU Commission approval, allows the Member State to extend the retention period beyond the two years should particular circumstances exist.[29] It is startling to note that the Commission only reviews the Member States' decision checking for compliance with the internal market, rather than data protection rights.[30] The lack of clarity surrounding the necessity of this provision and the fact it has not been used deem it somewhat superfluous and arguably unpalatable, given the lack of focus on fundamental data protection.[31]

It terms of human rights infringements, the Directive directly reversed the requirements under the e-Privacy Directive 2002, which as per above required immediate deletion of traffic and location data once the billing process has been completed.[32] This was challenged through the judicial process where the CJEU

25 Council of the European Union, Document 9439/11, Brussels, 27 April 2011.
26 European Commission (2011) Report from the Commission to the Council and the European Parliament: Evaluation report on the Data Retention Directive 2006/24/EC COM (2011) 225 final, Brussels, 18 April 2011 p.9.
27 Article 6 Data Retention Directive, Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.
28 The Commission noted a wide range of retention periods existed prior to the Data Retention Directive, from three months to four years. See *supra* European Commission (2005) p.1.
29 Article 12 and Article 12(2) Data Retention Directive 2006/24/EC.
30 M. Vilasau (2007) Traffic Data Retention v Data Protection: The New European Framework, *Computer and Telecommunications Law Review*, 13(2), 52–58, 58.
31 See *supra* European Commission (2005) p.13.
32 Article 6 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

dismissed the first claim that was based on the legality under what is now Article 114 TFEU, as discussed above.[33] However, in 2010 the Irish High Court granted a motion brought by a campaign group known as Digital Rights Ireland, where they specifically requested the CJEU look at the compliancy of the Directive with Article 5(4) of the Treaty on the European Union (TEU) and with certain fundamental rights protected under the CFR.[34] Additionally, in 2012 a number of applicants brought an action in the Austrian Constitutional Court claiming the national law transposing the Directive infringed Article 8 of the CFR. The two claims were merged together by the CJEU where it was finally held that the Directive was invalid, overall, because the EU legislature had exceeded the limits imposed by Articles 7, 8 and 52(1) of the CFR.[35]

They decided the Directive failed to provide sufficient safeguards against unlawful access to and the use of retained data, particularly by public authorities.[36] Although noting the sheer breadth of the Directive and that, in effect, no limits on the power to retain data existed, the CJEU failed to expressly lay down particular restraints or conditional requirements should such retention be necessary.[37] The Court did, however, confirm:

1 The protection of the fundamental right to respect for private life requires that derogations and limitations in relation to the protection of personal data *must apply only* in so far as is strictly necessary. Consequently the legislation in question must lay down *clear and precise rules* governing the scope and application of the measure in question and imposing *minimum safeguards* sufficient to give effective protection against the risk of abuse and against any unlawful access to and use of that data;[38]
2 Any legislation establishing or permitting a general retention regime for personal data *must* expressly provide for access to and use of the data to be strictly *restricted* to the purpose of preventing and detecting *precisely defined* serious offences or of conducting criminal prosecutions relating to such offences;[39]
3 Above all, access by the competent national authority to the data retained *must* be made dependent on a *prior review by a court* or an independent administrative body whose decision seeks to *limit access* to the data and their use to what is *strictly necessary* for the purpose of attaining the objective pursued, and which intervenes following a reasoned request of those authorities.[40] [My emphasis]

33 C-301/06 *Ireland v European Parliament and European Commission* [2009] ECR-I-593.
34 *Ibid*.
35 *Digital Rights Ireland*.
36 *Ibid*, [57]–[59], [60]–[67].
37 *Ibid*, [58], [59].
38 *Ibid*, [52], [54].
39 *Ibid*, [61].
40 *Ibid*, [62], this was also highlighted by Bean LJ in *R (on the application of David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis) v The Secretary of State for the Home Department* [2015] EWHC 2092, [91].

Albeit the Court invalidated the Directive, a generalised rationale for the existence of such a data retaining measure was legitimised: 'the retention of data for the purpose of allowing the competent national authorities to have possible access to those data … genuinely satisfies an objective of general interest'.[41]

The impact of the CJEU's *Digital Rights Ireland* decision on the UK cannot be overstated, given it effectively neutered any national law giving effect to the Directive, which was transposed into UK national law by way of the Data Retention (EC Directive) Regulations 2009.[42] Immediately following the CJEU's landmark decision, the then Home Secretary Theresa May put before the UK Parliament the Data Retention and Investigatory Powers Bill, specifying the UK must merely retain the powers under the invalid Directive, by fashioning such primary legislation.[43] This is made clear in the opening words of the statute, confirming that it was '[a]n Act to make provision, in consequence of a declaration made by the [CJEU] in relation to Directive 2006/24/EC, about the retention of certain communications data'.[44] To ensure *Digital Rights Ireland* had no bearing on the legislation, it did not purport to transpose any EU law.[45] It was introduced on 14 July 2014 and rushed through UK Parliament as emergency legislation, receiving Royal Assent some four days later on 17 July 2014.[46] A sunset clause was applied, to take effect on 31 December 2016, in order to alleviate MPs' fears with regard to rushed and inadequately debated legislation, which contains far-reaching powers.[47]

As a result and following the enactment Ministers David Davis and Tom Watson brought a judicial review action to the UK High Court, arguing the provisions were incompatible with the EU law, namely the CFR and CJEU's decision in *Digital Rights Ireland*, and additionally the ECHR.[48] Lord Justice Bean discussed the *Digital Rights Ireland* cases, specifically referring to the CJEU's interpretation of Articles 7 and 8 of the CFR. Bean LJ replied in part on an earlier decision reached by Lord Kerr in the UK Supreme Court, in *Rugby Football Union v Consolidated Information Services Ltd.*, confirming the CFR has direct

41 *Ibid*, [44].
42 The Data Retention (EC Directive) Regulations SI 2009/859, adopted pursuant to the European Communities Act 1972 s 2(2). Regulations under the ECA 1972 depend upon the existence of a valid EU instrument. See also A. Roberts (2015) Privacy, Data Retention and Domination: *Digital Rights Ireland Ltd v Minister for Communications, The Modern Law Review,* 78(3), 522–548, 536.
43 *Supra* as per D. Anderson QC (2015) p.16. See also V. Mitsilegas (2015) *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer) p.39.
44 *R (on the application of David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis) v The Secretary of State for the Home Department* [2015] EWHC 2092, [44]–[46].
45 *Supra* as per A. Roberts (2015) p.537.
46 *Supra* as per D. Anderson QC (2015) p.15.
47 Data Retention and Investigatory Powers Act 2014, s 8(3).
48 *R (on the application of David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis) v The Secretary of State for the Home Department* [2015] EWHC 2092.

effect in UK national law, when implementing EU law.[49] Given UK data protection law has been within the scope of EU law since 1995, Bean LJ really had no option but to illustrate the fact he was dealing with the implementation of EU law.[50]

Referring to the ruling in *Digital Rights Ireland* rendering the Directive invalid, Bean LJ went on to say:

> The invalidation of the Data Retention Directive by the CJEU put in doubt the legal basis for requiring the continued retention of communications data under the [UK's Data Retention (EC Directive)] 2009 Regulations. Although the 2009 Regulations remained in force, they had been made under s. 2(2) of the European Communities Act 1972 to implement the Data Retention Directive and were already subject to a legal challenge that had been stayed pending the outcome of the Digital Rights Ireland case. We were told that following the Digital Rights Ireland judgment, some CSPs [Crown Prosecution Services] expressed the view that there was *no legal basis* for them to continue to retain communications data, and indicated that they would start to delete data that had been retained under the 2009 Regulations.[51] [My emphasis]

Therefore, in the absence of a clear legal power to retain electronic communications data, the UK's law enforcement agencies' ability to use the Data Retention (EC Directive) Regulations 2009 was endangered. In disseminating the CJEU's judgment in *Digital Rights Ireland*, Bean noted the Court's failure to stipulate possible conditions. However, following the ratio it is clear that 'legislation establishing a general retention regime for electronic communications data infringes rights under Articles 7 and 8 of the CFR unless it is accompanied by an access regime which provides adequate safeguards for those rights'.[52]

The claimants' application for judicial review succeeded and the High Court declared that section 1 of DRIPA was inconsistent with EU law in so far as:

a it does not lay down *clear and precise rules* providing for access to and use of communications data retained pursuant to a retention notice to be *strictly restricted* to the purpose of preventing and detecting precisely defined serious offences or of conducting criminal prosecutions relating to such offences; and
b access to the data is not made dependent on a *prior review* by a court or an independent administrative body whose decision limits access to and use of

49 See *Rugby Football Union v Consolidated Information Services Ltd., (formerly Viagogo Ltd)* [2012] 1 WLR 3333, [27]–[28].
50 *R (on the application of David Davis MP, Tom Watson MP, Peter Brice and Geoffrey Lewis) v The Secretary of State for the Home Department* [2015] EWHC 2092, [6]–[8], [11].
51 *Ibid*, [44]–[46].
52 *Ibid*, [89].

> the data to what is strictly necessary for the purpose of attaining the objective pursued.[53] [My emphasis]

The High Court therefore made an order suspending section 1 of DRIPA postponed until 31 March 2016 to give Parliament time to consider their judgment and introduce measures consistent with EU law.[54] The High Court's decision is not surprising given that inherently bulk collection of evidence has not been particularly welcomed or upheld, quite separately from constitutional EU law principles, within the jurisprudence of the ECtHR.[55]

European Court of Human Rights jurisprudence

The ECHR and the ECtHR provide an additional layer of judicial accountability of UK statutes. Although the examples illustrated below do not cover electronic communications data, they do concern the state retaining data of persons who have not been either charged or convicted of a criminal offence. The jurisprudence of the ECtHR has illustrated that the state cannot simply retain the information for future use, or as a 'just in case measure'.[56] This has been evident for some time, and by way of example, under section 64(1A) of the Police and Criminal Evidence Act 1997 (PACE), the state was permitted to keep on file DNA and fingerprint evidence of those either not charged or convicted of the crime of which they were suspected. This also included DNA from those who volunteered to give samples for elimination. Challenged by way of *R (S) v Chief Constable of South Yorkshire Police* in the House of Lords, it was held the Association of Police Officers (ACPO) policy of allowing retention of DNA and fingerprints was lawful.[57] Later the case became known as *S and Marper v UK* where the ECtHR decided that a blanket and indiscriminate policy amounted to a breach of Article 8 ECHR.[58] This particular case highlights the clash between the UK judiciary and the jurisprudence of the ECtHR, where Lord Steyn in dismissing the appeal affirmed, whilst accepting the necessity that the Court interpret the ECHR in a harmonious way with the ECtHR's jurisprudence: 'The whole community, as well as the individuals whose sample was collected, benefits from there being as large a database as it is possible … The benefit to the aims of accurate and efficient law enforcement is thereby enhanced.'[59]

The dichotomy is interesting here, given Lord Steyn favoured the interests of the wider community over the individual, and the ECtHR ultimately favoured the opposite, highlighting particular areas of concern: 'have due regard to the specific

53 *Ibid*, [114].
54 *Ibid*, [121].
55 *R (GC) v Commissioner of the Metropolis* [2011] 1 WLR 1230.
56 *Ibid*.
57 [2004] UKHL 39.
58 [2008] (Application Numbers 30562/04 and 30566/04), [67], and see also [2008] 48 EHRR 1169.
59 [2004] UKHL 39, [78].

context in which information at issue is recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained'.[60]

In light of the final ECtHR ruling, ACPO decided to do nothing, believing it should follow the earlier ruling in the House of Lords. This inevitably led to the database being further challenged in *R (GC) v Commissioner of the Metropolis* in the UK Supreme Court.[61] It held that the ECtHR's decision should be followed and therefore retaining the database was unjustified interference with Article 8 of the ECHR. Although the decision was welcomed, the Supreme Court did not make a declaration of incompatibility under the Human Rights Act 1998 with regard to section 64(1A) of PACE, stating Parliament had intended discretion to be used as to what could be kept on the database. The Court did, however, clarify that should Parliament not remedy the situation within a reasonable time then citizens would have viable public law challenges. As a result Parliament introduced the Protection of Freedoms Act 2012, where section 1 brought about the removal of DNA and fingerprints being kept on the database for those citizens not convicted.

Considering the ECtHR's approach and particular emphasis in *S and Marper* that in order for the powers to be in accordance with the rule of law, and ECHR compatible, there must be adequate legal protection against arbitrariness and sufficient clarity about the discretionary scope given to authorities with a focus on the way the powers are exercised.[62] The Court findings are not that surprising given their earlier ruling in *Klass v Germany* where they emphasised proportionality and a focus on the individual's rights.[63] It is clear that blanket policies do not sit well within the ECHR framework, and where the ECtHR sees the dignity of the individual prevailing over the interests of the wider community. Although the ECtHR disapproves of blanket policies the CJEU appears to be somewhat in favour, providing that minimum safeguards are put in place. It was evident from the *Digital Rights Ireland* case that the collection of data was not the main issue, rather the safeguards surrounding the access to it.

More recently, however, in *Zakharov v Russia* the ECtHR held that any authorisation for the use of surveillance powers must be capable of:

> verifying the existence of a reasonable suspicion against the person concerned, in particular, whether there are factual indications for suspecting that person of planning, committing or having committed criminal acts or other acts that may give rise to secret surveillance measures, such as, for example, acts endangering national security.[64]

60 [2008] (Application Numbers 30562/04 and 30566/04), [67].
61 [2011] 1 WLR 1230.
62 [2008] (Application Numbers 30562/04 and 30566/04), [95].
63 [1978] (Application number 5029/71), [68].
64 47143/06, 4 December 2015, [260].

Accordingly, the ECtHR has made it quite clear here that privacy and the freedom of expression are important principles that must be protected.

Therefore, the ECtHR's findings would be, to my mind at least, entirely reliant upon whether or not it views the initial retention of electronic communications data as a form of surveillance. If it does take this view, then the court will undoubtedly find it unjustifiable for a government to conduct surveillance on the private communications data of potentially millions of people who it does not suspect of being involved in criminal or terrorist-related activity.[65] This would have a profound impact on law enforcement's capabilities as highlighted in the previous chapters, and unbalance the scales weighting the right to life and right to privacy.

It is argued, however, that the initial collection and retention of data is not surveillance, given that much of the data is never viewed by law enforcement, and disregarded following autonomous filtering. Likewise, the autonomous electronic screening of this retained data does not equate to surveillance, and it is deleted after 12 months. As discussed, the use of the bulk powers is heavily curtailed, requiring warranted and independent judicial approval, and is subject to four additional layers of independent scrutiny.[66] They are essential to finding the ever-elusive terrorist, a fact made clear when a terrorist suspect was found working at a UK airport, planning to use his security access to plant bombs for al-Qaeda.[67] It remains essential, of course, that ensuring restrictive laws provide for data protection and privacy remains a high priority when the UK leaves the EU, in terms of intelligence exchange, as explored in the next chapter.

Creating a new data retention law: the digital rights criterion

Returning to EU law, in order for UK legislation to fit with constitutional EU law and the jurisprudence of the CJEU, and the ECtHR, the following criteria are proposed to ensure compatibility:

1 Primary legislation must lay down clear and precise rules governing the scope and application of the measure;
2 Minimum safeguards must be imposed sufficiently reducing the risk of abuse or unlawful access to the data;
3 Access to the data must be expressly provided for, limiting the number of persons authorised to have such access and restricted to the purpose of preventing and detecting precisely defined serious criminal offences;

65 *Ibid.*
66 The four layers are: the UK's independent reviewer of anti-terrorist legislation, currently Max Hill QC; the Intelligence Services Committee; Investigatory Powers Commissioner; and the Investigatory Powers Tribunal.
67 See http://news.bbc.co.uk/1/hi/4778575.stm accessed 30 March 2018.

4 Access to the data will only be granted after a prior assessment has been made by an independent administrative body or court, with the primary focus on human rights and the proportionality of the measure;
5 Retained data will be deleted after 12 months unless an independent administrative body or court decides otherwise, having weighed the evidence and conducted a proportionality test.

Focusing on EU law, it could be argued IPA is purely domestic legislation and thereby not subject to the CFR, namely Article 8 right to data protection. DRIPA was arguably different, enacted to give effect to an EU instrument. One could generalise and state that the EU lacks competence in legislating within the field of fundamental rights and Member States must only respect the CFR when implementing EU law. However, legally it is much more complex as the CJEU expansively magnifies the term 'implementing EU law' particularly when Member States seek to rely on a derogation from EU law principles.[68] The IPA in fact specifies under Schedule 10 Part 1 that the Privacy and Electronic Communications (EC Directive) Regulations 2003 do not apply in relation to any personal data breach which is to be notified to the Investigatory Powers Commissioner in accordance with a code of practice.[69] Considering UK data protection laws have been founded on EU law, particularly the e-Privacy Directive, it is argued IPA is based upon EU derogation and it will undoubtedly be classed as implementing EU law by the CJEU. For this reason, the Act must respect the CFR and implement the digital rights criterion.

The Investigatory Powers Act 2016: striking the right balance

It has been recognised IPA needs to strike the right balance between individual privacy and collective security in the digital age. It has been said that holding privacy and security concerns to be irreconcilable is unhelpful and constraining given 'we all share an interest in maximising both our individual privacy on the one hand and collective security on the other'.[70] Particularly since *Digital Rights Ireland*, it is vital any new intrusive surveillance powers that are passed do so with due regard to the CFR.[71] Although the IPA was written to last, not just for the remaining time the UK is within the EU, it is important that UK counterterrorism legislation meets the CFR thereafter, in order to secure and maintain intelligence

68 Case C-390/12 *Pfleger* EU:C:2014:281, Case C-418/11 Texdata Software EU: C:2013:588 [71]–[75].
69 S.I. 2003/2426.
70 House of Commons Second Reading, 15 March 2016, Column 824, available at http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm160315/debtext/160315-0001.htm#16031546000001 accessed 20 March 2018.
71 A. Murray and B. Keenan (2015) Ensuring the Rule of Law, LSE Law Department Briefings on the Investigatory Powers Bill, *LSE Law Policy Briefing*, 12, Social Science Research Network, available at http://ssrn.com/abstract=2703806 accessed 30 March 2018.

exchange. Accordingly, the right to data protection includes data security and was described in *Digital Rights Ireland* as the essence of this right.[72]

Bulk powers: digital rights criterion

In the previous chapter it was shown that the bulk powers of interception, retention and equipment interference have been instrumental, and sometimes pivotal, in preventing acts of terrorism and other serious crimes. The idea is to gather large volumes of data, which is then subject to stringent controls, used to filter out irrelevant material, so the security services can simply focus on the small fraction that provides intelligence on known and potential threats.[73] The issue here is regardless of the filtering process many innocent citizens' electronic communications data would have been collected in the course of the action. King argues that whilst there 'needs to be formidable intrusive powers for law enforcement agencies' to operate', they must be targeted only and proportionate, rather than catchall bulk powers.[74] The bulk powers are extraordinarily broad in scope and the 'catchall' part to the bulk collection does not sound proportionate, however, the practical effect of the breadth is limited by what can follow after the device has been accessed, or the telephone line tapped. It has been put forward that this stage makes the former proportionate.[75]

The question is, of course, does IPA meet the digital rights criterion? IPA clearly satisfies the first test insofar as it forms primary legislation that lays down clear and precise rules that govern the scope and application of the measures. The many accompanying codes of conduct, although not law, may perhaps go some way in further satisfying this test. The access to the data is expressly provided for, with the bulk powers in particular stating that only intelligence and security agencies can apply for the necessary warrants. This therefore limits the number of persons authorised to have such access and it is restricted to the purpose of preventing and detecting precisely defined serious crime.

In order to pass the digital rights criterion measures must introduce minimum safeguards that sufficiently reduce the risk of abuse or unlawful access to the data, and guarantee that access to the data will only be granted after an independent administrative body or court has made a prior assessment, with the primary focus on human rights and the proportionality of the measure. It is clear the UK

72 O. Lynskey (2015) Beyond privacy: the data protection implications of the IP Bill, LSE Law Department Briefings on the Investigatory Powers Bill, *LSE Law Policy Briefings*, 15, Social Science Research Network, available at http://ssrn.com/abstract=2704299 accessed 30 March 2018.

73 House of Lords Second Reading 27 June 2016, Volume 773, Column 1362, available at https://hansard.parliament.uk/lords/2016-06-27/debates/1606278000466/InvestigatoryPowersBill accessed 20 March 2018.

74 First Sitting Committee Debate Session 2015–16, Investigatory Powers Bill, Publications on the Internet, Column 14, 24 March 2016, available at http://www.publications.parliament.uk/pa/cm201516/cmpublic/investigatorypowers/160324/am/160324s01.htm accessed 30 March 2018.

75 *Ibid*, Column 6, 24 March 2016.

Government has listened to the recommendations made, and perhaps learned from past mistakes, and has taken a human rights approach highlighted by the opening part of IPA, which imposes certain duties and introduces general privacy protections and safeguards.[76]

The intrusive powers can only be used when it is necessary and proportionate to do so, and requires an independent judicial commissioner to review the Secretary of State's decision before the warrant is valid.[77] IPA's new double lock system creates a number of new posts, including judicial commissioners and an independent Investigatory Powers Commissioner.[78] This new position brings together the responsibilities of the Interception of Communications Commissioner, the Intelligence Services Commissioner and the Chief Surveillance Commissioner.[79] Additionally, the commissioners will be provided with inspectors, technical experts and independent legal advisers, and should an individual suffer as a result of an error the IPC will have the power to inform them.[80] These provisions certainly increase the difference between IPA and all other surveillance legislation including RIPA.

In deciding whether the warrant is necessary on relevant grounds and whether the conduct authorised is proportionate, judicial commissioners must apply the same principles as would be applied by a court on an application for judicial review.[81] The meaning of judicial review was discussed during the first sitting committee stage of IPA and criticised by Sara Ogilvie from Liberty as being inherently limited in terms of jurisdiction.[82] In response Suella Fernandes confirmed that the double lock involves, 'an intensive analysis of necessity and proportionality'.[83]

Checks and balances: judicial commissioners and other mechanisms

In labouring the point Ogilvie argued that the level of judicial review would naturally be less intensive due to the 'national security' argument. Although Fernandes did offer some assurance in that the process is not meant to be a 'rubber-stamping' exercise, it certainly appears that way considering section 229(6) confirms that judicial commissioners must not act in a way that is contrary to the public interest, or prejudicial to national security, the prevention or detection of

76 Investigatory Powers Bill 2015.
77 Investigatory Powers Bill 2015, ss 19 and 23; see also House of Commons Second Reading, 15 March 2016, Column 815, available at http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm160315/debtext/160315-0001.htm#16031546000001 accessed 20 March 2018.
78 *Ibid* Column 813.
79 *Ibid* Column 822.
80 Investigatory Powers Bill 2015, ss 19 and 23; see also *ibid*.
81 Investigatory Powers Bill 2015, s 23 (1)(2).
82 First Sitting Committee Debate Session 2015–16, Investigatory Powers Bill, Publications on the Internet, Column 17, 24 March 2016, available at http://www.publications.parliament.uk/pa/cm201516/cmpublic/investigatorypowers/160324/am/160324s01.htm accessed 20 March 2018.
83 *Ibid*.

serious crime or the economic well-being of the UK.[84] Adding further contention is the fact a judicial commissioner must not jeopardise the success of an intelligence or security operation, compromise the safety of those involved or unduly impede the operational effectiveness of an intelligence service.[85] Although these particular sections are not to be applied when performing the 'double-lock' function, it does indicate a peculiar set of functions to be placed on the role, requiring the commissioner to either agree or disagree with the Secretary of State.[86]

David Davis MP and Shami Chakrabarti both voiced similar concerns, referring to where IPA specifies the judicial commissioners have to make their decisions based on judicial review principles, rather than based on the evidence.[87] Both Davis and Chakrabarti do have an agenda, however, with the latter having been the director of Liberty for some years.[88] For Murray and Keenan., it seems relatively clear from IPA that 'the judicial commissioner will be asked to review the Secretary of State's action in issuing a warrant on judicial review principles alone, this is whether the action was illegal, unfair (illegitimate), irrational or disproportionate'.[89] This is simply another layer of accountability on state action by the judiciary. Although the IPA does not appear to read it this way, it could be further argued that the judicial commissioner's position would be untenable, if access to the data and evidence put forward to the Secretary of State remains unavailable to them. Murray *et al.* remain concerned that this lack of evidential transparency 'does not offer judicial independence required by the rule of law', and is not representative of an independent judiciary supposedly at the 'heart of the warrant process'.[90]

Notably, in terms of English public law, this new judicial position may challenge the doctrine of separation of powers, as the commissioners will be asked to 'cross the waterline between secrecy and transparency', and effectively draws judges into 'the realm of executive decision-making, thereby threatening the impression of impartiality on which the legal system ultimately depends'.[91] Prior independent judicial authorisation, however, is a new measure, so it is perhaps not possible to know with absolute certainty how it will work in practice. Inescapably, and to balance this view, the result of judicial approval means that public bodies do not simply have unlimited power to 'intrude upon the privacy of citizens' without proper 'justification and authorisation'.[92]

84 *Ibid.*
85 Investigatory Powers Act 2016, s 229(7).
86 Investigatory Powers Act 2016, s 229(8).
87 See http://www.theguardian.com/politics/blog/live/2015/nov/04/surveillance-internet-snoopers-charter-may-plans-politics-live accessed 20 March 2018.
88 See https://www.liberty-human-rights.org.uk accessed 30 March 2018.
89 A. Murray and B. Keenan (2015) *Ensuring the Rule of Law*, LSE Law Department Briefings on the Investigatory Powers Bill, LSE Law Policy Briefing Series, 12, *Social Science Research Network*, available at http://ssrn.com/abstract=2703806 accessed 27 March 2018.
90 *Ibid.*
91 *Ibid.*
92 House of Lords Second Reading 27 June 2016, Volume 773, Column 1363, available at https://hansard.parliament.uk/lords/2016-06-27/debates/1606278000466/InvestigatoryPowersBill accessed 20 March 2018.

Governmental committees: holding law enforcement to account

The Intelligence and Security Committee (ISC) simply adds another additional layer to state and law enforcement agencies' accountability. It was first established by the ISA to 'examine the policy, administration and expenditure of the Security Service, Secret Intelligence Service, and the Government Communications Headquarters'.[93] Since then the Justice and Security Act 2013 has increased the ISC's remit, including the oversight of operations, and has been granted greater powers.[94] The ISC can now look at other intelligence-related work carried out by the Cabinet Office and Defence Intelligence for the Ministry of Defence and the Office of Security and Counter Terrorism. The members of this committee are appointed by Parliament, who then report back to Parliament and to the prime minister, often dealing with sensitive information.

The ISC members, drawn from both the House of Commons and the House of Lords, are able to hear classified material, meaning they can hold the intelligence agencies to account. On 7 November 2013 the ISC held its first ever open evidence session with the heads of the Security Service, GCHQ and Secret Intelligence Service (SIS). Although the sessions are closed when assessing information that is deemed highly classified, the Committee intends to hold further public sessions in future.[95] In the ISC's 2016–2017 Annual Report, headed by the Chair the Rt. Hon. Dominic Grieve, the members confirmed they are of the view that the agencies' powers provided by IPA are justified. In November 2015, a Joint Committee was appointed to commence pre-legislative scrutiny of IPA. Given the role of the ISC in overseeing the intelligence agencies and its ability to take evidence on classified matters, the Committee provided the pre-legislative scrutiny focusing on 'those aspects of the draft Bill which relate primarily to the agencies' investigatory powers'.[96] In addition to the ISC report, the Joint Committee on the draft IPA made a total of 86 recommendations.[97] Whilst the former report focused on the overseeing arrangements surrounding the policing security agencies, due to its ability to take evidence on classified matters, the latter report

93 See Intelligence and Security Committee of Parliament website, available at http://isc.independent.gov.uk accessed 30 March 2018.

94 *Ibid.*

95 *Ibid.*

96 Intelligence and Security Committee of Parliament, Annual Report 2016–2017, HC655, paragraph 5, available at https://b1cba9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/2016-2017_ISC_AR.pdf?attachauth=ANoY7coJr3ybKy_li-2Mo-wKmKDInUqpeClCvEUyKVZsWsrBri8ckF6HZiA2JqGUnbHM4sCChlHhKpdIr6ph9b6rPf4ch0gStHReiFTKuDGwMQ_Wg8mrb9CCaExzz29DaQDu14EhwYefRq2lG3CnQnFvEFgRsQHfJxW-VVw24o-7eGfWLHY–rBwQdyR2kcUHT9b5vINyKVhXE2Egr4ROrNPDiiRKgi3EGSI3gTx0AzK1BopkAO0Fws%3D&attredirects=0 accessed 27 March 2018.

97 Joint Committee on the Draft Investigatory Powers Bill (2016) Report of Session 2015–2016, 11 February, HL Paper 93 and HC 651 available at http://www.publications.parliament.uk/pa/jt201516/jtselect/jtinvpowers/93/9302.htm accessed 27 March 2018.

focused on issues of clarity, judicial oversight and the justification for the various powers.

The Home Affairs Select mechanism used to hold Government and law enforcement agencies to account. This was seen on 6 December 2016, when David Armond the Deputy Director General of the NCA was questioned on EU policing and security issues.[98] This hearing led on from the earlier October 2016 hearing focusing on UK policing after the UK's exit from the EU.[99]

In response to the issues raised by the various committees, according to Prime Minster Theresa May, IPA starts with a presumption of privacy, where privacy protections form the 'backbone' of the Act, and the safeguards introduced further 'bolster' this in ensuring that high thresholds exist when sanctioning the most intrusive powers, and it limits the public authorities that can use the powers.[100] The question of trust between the citizens and the state is an important one.

Privacy and trust: balancing individual privacy and collective security

The previous chapter made it clear that powers of surveillance, particularly the proposed bulk powers, impinge upon individual privacy. Goold states, 'A public that is unable to understand why privacy is important – or which lacks the conceptual tools necessary to engage in meaningful debates about its value – is likely to be particularly susceptible to arguments that privacy should be curtailed'.[101]

Although different perspectives and theories exist with regard to the term 'privacy', this chapter has focused on the term's legal meaning. Privacy is important as it not only allows individualised expression and autonomy, but the concept can empower citizens to challenge state decisions. In *R v Spencer* the Supreme Court of Canada described the protection of privacy as a prerequisite to individualised security, autonomy and self-fulfilment, which is essential in maintaining a thriving democratic society.[102] Privacy is not an absolute right as per the ECHR or the EU's CFR, but rather qualified and limited. On the one hand the state must protect the qualified rights of its citizens insofar as possible, but on the other hand it has a duty to protect the lives of its citizens and keep them safe from criminality. In order to achieve this, the state must intrude on the privacy of

98 See http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news-parliament-2015/161202-europol-ev accessed 27 March 2018.

99 See http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-subcommittee/news-parliament-2015/counterterrorism-lead-evidence-brexit accessed 30 March 2018.

100 House of Commons Second Reading, 15 March 2016, Column 814, available at http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm160315/debtext/160315-0001.htm#16031546000001 accessed 20 March 2018

101 B. J. Goold (2009) Surveillance and the Political Value of Privacy, *Amsterdam Law Forum*, available at https://commons.allard.ubc.ca/cgi/viewcontent.cgi?referer=https://www.google.co.uk/&httpsredir=1&article=1153&context=fac_pubs accessed 20 March 2018

102 *R v Spencer* [2014] 2 SCR 212, [15].

individual citizens, usually of course as part of targeted intelligence-led policing, where proportionate, necessary and lawful to do so.

In terms of balancing individual privacy rights and maintaining collective security, debates turn on the level of individual privacy verses the level of state powers of surveillance. This focal point is unhelpful and dismisses less tangible aspects to be taken into account such as the individual's horizontal and vertical relationships, which form their perspectives on the social norm of privacy.[103] Sir Thomas Erskine May rather poetically captured the issue when he stated in stated in 1863:

> Men may be without restraints upon their liberty: they may pass to and fro at pleasure but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators – who shall say that they are free? Nothing is more revolting to Englishmen than the espionage that forms part of the administrative system of continental despotisms. It haunts men like an evil genius, chills their gaiety, restrains their wit, casts a shadow over their friendships, and blights their domestic hearth. The freedom of this country may be measured by its immunity from this baleful agency.[104]

Modern attitudes towards surveillance are perhaps not as robust as during May's time, however, an element of mistrust exists.[105] It is also relevant that attitudes towards privacy depend heavily on the citizen's own perspective, informed by history, experience, environment, education and development.[106] Research has illustrated such positions are exceedingly contextual.[107]

Fears of the surveillance society: the Snowdon revelations

Anderson insinuates societal vertical relationships depend heavily on trust.[108] He leads the reader to what he calls is the 'Snowden effect', referring to the leaking of classified and sensitive US National Security Agency (NSA) documents by Edward Snowdon in 2013.[109] The documents emphasised the relationship between the NSA and the UK's GCHQ, whereby intelligence exchange ensued initiating widespread trepidation over the potential violations of human rights, arguably

103 Britain is surveillance society (2006) The threat of sleepwalking into a surveillance society was thought to be a reality by the Information Commissioner, introducing his Report on the Surveillance Society, 2 November 2006, available at http://news.bbc.co.uk/1/hi/uk/6108496.stm accessed 30 March 2018.
104 T. E. May (1863) *Constitutional History of England since the Accession of King George III*, (W. J. Widdleton) vol. 2, p.275.
105 *Supra* as per D. Anderson QC (2015), pp.32–33.
106 *Ibid*, pp.32–33.
107 *Ibid*, p.33.
108 *Supra* as per D. Anderson QC (2015), p.34.
109 *Ibid*.

flouting legal protection for individual data privacy.[110] The documents highlighted the fact that a program called PRISM allowed US Federal agencies direct access to Internet servers, infiltrating Internet firms such as Microsoft, Apple, Facebook and Google.[111] Hopkins reports that between May 2012 and April 2013, 197 PRISM program intelligence reports were passed to the UK's counterterrorism law enforcement agencies.[112] The NSA, according to the leaked documents, was additionally recording millions of telephone conversations of US citizens despite the fact they were not under any suspicion of unlawful behaviour.[113] Snowden passed secret documents to Glen Greenwald, a *Guardian* employee, who in the first of a series of reports revealed that since April 2013 and under PRISM the NSA had collected and was retaining indiscriminately the telephone records of millions of US customers.[114] Although initially sanctioned to collect the communications records of foreign nationals, Greenwald confirmed that the NSA moved very quickly to concentrate on domestic communications.[115] As Greenwald continued with the series, he reported that the GCHQ had gained access to intelligence that included sensitive personal information, which it then shared with the NSA.[116] Additionally it was also reported that the US Government had paid GCHQ over £100 million to secure access to the UK's intelligence gathering programs.[117]

This is where the legal and cultural differences between the EU and the US become quite distinct, in that the Snowden revelations had the potential to damage diplomatic relationships, not only between the EU and the US but the EU and the UK. This could have also affected international intelligence exchange between all parties as discussed further below. In light of this danger, UK and US politicians were somewhat forced to provide honest information, and defend the actions of the NSA and GCHQ. The then UK Foreign Secretary William Hague MP confirmed that both the UK and the US had operated within the rule of law and used the intelligence obtained to protect their citizens' freedom.[118] Despite

110 D. Lowe (2014) Surveillance and International Terrorism Intelligence Exchange: Balancing the Interests of National Security and Individual Liberty, *Terrorism and Political Violence*, 13 August 2014, 1.

111 *Ibid* 4.

112 N. Hopkins (2013) UK Gathering Secret Intelligence via Covert NSA Operation, *Guardian*, 7 June 2013, http://www.theguardian.com/technology/2013/jun/07/uk-gatheringsecret-intelligence-nsa-prism accessed 30 March 2018.

113 G. Greenwald (2013) NSA Collecting Phone Records of Millions of Verizon Customers Daily, *Guardian*, 6 June 2013, http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order accessed 30 March 2018.

114 *Ibid.*

115 *Ibid.*

116 E. MacAskell, J. Borger, N. Davies and J. Ball (2013) GCHQ Taps Fibre-Optic Cables for Secret Access to World's Communications, *Guardian*, 21 June 2013, available at http://www.theguardian.com/uk/2013/jun/21/gchq-cablessecret-world-communications-nsa accessed 30 March 2018.

117 N. Hopkins and J. Borger (2013) Exclusive: NSA Pays £100m in Secret Funding for GCHQ, *Guardian*, 1 August 2013, available at http://www.theguardian.com/uk-news/2013/aug/01/nsa-paid-gchq-spying-edward-snowden accessed 30 March 2018.

118 See http://www.bbc.co.uk/news/uk-politics-23053691 accessed 30 March 2018.

UK and US officials' assurances, the actions taken by the NSA and GCHQ reverberated even further when reports indicated that EU politicians were also spied on, in particular Angela Merkel the German Chancellor.[119]

In terms of the public trust, despite assurances the UK public's reaction has evidenced a suspicious attitude.[120] In light of Snowden, an Austrian citizen and privacy advocate, Maximillian Schrems, took action against the Data Protection Commissioner.[121] His argument turned on the fact that Facebook Ireland has transferred his personal data to the US, and that the USs did not ensure sufficient protection of his personal data.[122] Referring to NSA's practices as reported by Greenwald and leaked by Snowden, he claimed the NSA and other US agencies could have retained his personal data.[123] The US Foreign Intelligence Services Act 1978 permits the NSA access to personal data held on US servers. Therefore, because Facebook Ireland is a subsidiary of Facebook US, *Schrems'* details had in fact been transferred. The CJEU noted that the US Foreign Intelligence Surveillance Court did not offer a judicial remedy to EU citizens and declared the 2000/520/EC Decision invalid, bringing an end to the Safe Harbour Agreement.

Article 25 of the 1995 Data Protection Directive (discussed in Chapter 4) was critical to the CJEU, particularly concerning the Commission's responsibility to ensure adequate personal protection of transferred data.[124] The CJEU confirmed that the level of protection provided by the US need not be identical to that of the EU, but must evidence adequacy at the very least, ensuring it has a high level of fundamental rights protection in place, equivalent to that which is afforded by Article 25.[125] The leaking of this information and GCHQ's actions regarding the allegation of conducting mass surveillance led to the German Justice Minister Sabine Leutheusser-Schnarrenberger asking UK ministers for reassurance that actions taken were legal and whether they affected German citizens. He stated further, 'In our modern world, the new media provide the framework for a free exchange of opinions and information. Transparent governance is one of the most important prerequisites that a democratic state and the rule of law requires.'[126]

The legal director of Liberty also accused GCHQ of violating citizens' Article 8 rights to privacy, commenting on the then proposed IPA:

119 G. Greenwald (2014) *No Place to Hide: Edward Snowden, the NSA, and the US Surveillance State* (Metropolitan Books) p.141.

120 A. Travis (2015) Snowden Leak: Governments' Hostile Reaction Fuelled Public Distrust of Spies, *Guardian*, 15 June 2015, available at https://www.theguardian.com/world/2015/jun/15/snowden-files-us-uk-government-hostile-reaction-distrust-spies accessed 20 March 2018.

121 *Maximillian Schrems v Data Protection Commissioner* [2015] C-362/14.

122 *Ibid.*

123 *Ibid.*

124 Data Protection Directive 1995, 95/46/EC, Article 25.

125 *Maximillian Schrems v Data Protection Commissioner* [2015] C-362/14, [73], [141], [142], [147].

126 Germany Seeks UK Surveillance Assurances, *BBC News*, 25 June 2013, available at http://www.bbc.co.uk/news/uk-23048259 accessed 30 March 2018.

> Those demanding the [Investigatory Powers Act, also termed as the] Snoopers' Charter seem to have been indulging in out-of-control snooping even without it – exploiting legal loopholes and help from Uncle Sam [US]. No one suggests a completely unpoliced Internet but those in power cannot swap targeted investigations for endless monitoring of the entire globe.[127]

In light of such reports and adversarial commentary, the EU's Justice and Home Affairs Council (JHAC) showed concern for the level of protection of EU citizens' constitutional right to privacy, which resulted in Viviane Reding the EU Justice Commissioner stating:

> The European Commission is concerned about the possible consequences on EU citizens' privacy. The Commission has raised this systematically in its dialogue with the U.S. authorities, especially in the context of the negotiations of the EU-U.S. data protection agreement in the field of police and judicial cooperation …[128]

It is interesting to note the dichotomy between the civilian and the state when discussing powers of surveillance and personal data privacy. Citizens' behaviour presents something of a paradox in that they seem unconcerned about sharing information freely in a horizontal fashion, by means of social media, for example, where people seem quite happy for others to know everything about them, but become quite aggrieved when information is viewed vertically, by the state.[129] In this regard the previous chapters have shown the importance of personal privacy being paramount in the minds of citizens, with a generalised fear of a Big Brother state given weight by the law enforcement agencies' use of OSINT and SOCMINT data. Many fear the UK is moving towards a surveillance society, given that what follows a terrorist act or perceived threat usually takes the form of new legislation introducing more restrictive measures. The fluid relationship between terror threats and new legislative prowess has been emphasised throughout this book, in addition to proposed new legislation dealing with extremism.

Conclusion

Part One of IPA could be equated to simply paying 'lip service' because for some, overall, the introduction of bulk powers under IPA fails to extend human rights protection, specifically related to the right to privacy, protection of personal data and freedom of expression. Although these bulk powers may pass the digital rights

127 *Ibid.*

128 N. Watt (2013) PRISM Scandal: European Commission to Seek Privacy Guarantees from U.S., *Guardian*, 10 June 2013, available at http://www.theguardian.com/world/2013/jun/10/prism-european-commissions-privacy-guarantees accessed 30 March 2018.

129 K. D. Ewing (2010) *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (Oxford University Press) p.54.

criterion and could be described as necessary in finding would-be-terrorists, IPA may ultimately come to fail the CJEU and ECtHR jurisprudence when testing the proportionality of the measures.

In terms of checks and balances, IPA does introduce a double lock system whereby a judicial commissioner must agree with the Secretary of State, in line with judicial review influences, that the powers permitted under the warrant are necessary and proportionate. The ISC and the Home Affairs Committee, both independent governmental scrutiny mechanisms, with the former able to see classified information relating to intelligence operations, provide another form of checks and balances. The Right Honourable Sir Adrian Fulford has been appointed Investigatory Powers Commissioner, and provides additional safeguards overseeing the security agencies' arrangements for access to the data.[130] The new double lock system under IPA has additionally fashioned 13 new judicial commissioners.[131]

It has been stipulated in IPA that judicial commissioners must apply judicial review principles. Although this is not particularly concerning, given the commissioners will undoubtedly view the evidence used by the Home Secretary in approving the authority, it is a new element and until it is seen working in practice it will be difficult to make any judgement. It will also be interesting to see if the bulk powers under IPA will survive in their current form given legal challenges will undoubtedly come from human rights organisations such as Liberty. Even if the UK has left the EU prior to any future CJEU ruling on the subject, it must still keep within current criteria to ensure international intelligence exchange with EU continues.

The EU has led data protection and data privacy initiatives, legally and constitutionally up to now. However, looking forward it may be the case that the ECtHR takes the lead, given the EU's focus on data retention. Should the UK's bulk powers under IPA be challenged in the ECtHR, which historically does not approve of blanket policies, or the keeping of data of innocent civilians, it may not survive. This would be detrimental, however, and it is argued the CJEU and ECtHR should accept that terrorism in the digital age means the Internet must be monitored, allowing for bulk analysis of electronic communications data.

The chapter found, however, that the balance between collective security and individual data privacy rights in the UK are fairly stable because of the role of judicial review, judicial independence and the overarching scrutiny provided by commissioners and parliamentary committees. It is further argued that a blanket approach to retaining electronic communications data is necessary to find the terrorist in the ever growing haystacks because sometimes privacy rights and data protection must be curtailed to ensure the state can protect citizens' rights to life.

130 See https://www.ipco.org.uk accessed 20 March 2018.

131 See https://www.ipco.org.uk/docs/JC%20Announcement%2020171018.pdf accessed 20 March 2018.

3. Dismantling rule-of-law guarantees

First, the Constitutional Court. The first important institutional action in building the Hungarian illiberal democracy was aimed at dismantling one of the world's most powerful judicial organs authorized to carry out constitutional review: the specialized Constitutional Court. The 1989 roundtable discussions ending Communist rule and opening the constitutional pathway to a liberal democracy produced a consensus on having a very powerful constitutional court authorized to review laws based on *actio popularis* abstract ex post review claims that procedures can be initiated by anyone, with no standing, injury, or ongoing judicial procedure required. Indeed, most of the Court's formative decisions were initiated by *actio popularis* petitions. It was a well-established, well-functioning element of Hungarian political and legal culture, and it contributed to making the Hungarian Constitutional Court a powerful, internationally respected body. As European University Institute professor Gábor Halmai argues,

> Over the past two decades or more, this unique institution has provided not only private individuals, but also non-governmental organizations and advocacy groups with the opportunity to contest in the Constitutional Court, for the public good, legal provisions that they regard as unconstitutional. While other democratic states have of course been able to survive without this institution, it has nevertheless contributed substantially to ensuring a level of protection of fundamental rights which is now diminishing.
>
> (Halmai, 2012)

The reason for opting for this model lay in the unique political power field of the time. The 1989 roundtable talks and the subsequently revised constitution (for more on this, see Chapter 2) prepared a constitutional amendment, making way for the first democratic elections, which would decide the fate of further legislation and constitution making. However, since neither the Communists nor the self-appointed, at the time practically unknown, dissident opposition representatives were in the position to foresee the outcomes of this election, it was in everybody's interest to institute as many control mechanisms as possible, in case of electoral defeat. Thus, a strong Constitutional Court was made. Its first activist and charismatic president and future head of state László Sólyom, who believed in an "invisible constitution," (23/1990) actually made the Court one of the major participants in the constitutional transition and an important political powerhouse as well. The court's seminal decisions included striking down the death penalty (23/1990) carving the path for lustration (11/1992), defining the limits of abortion (64/1991, 48/1998) and the standards of free speech, (95/2008, 96/2008, 46/2007, 18/2004, 14/2000, 13/2000, 2/1999,

30/1992) and even getting involved in direct political issues such as torpedoing austerity measures (43/1995, 56/1995).

The new Constitution and a new law on the Constitutional Court (Act CLI of 2011), as well as constitutional amendments, delivered serious blows to the competences, independence and autonomy of the court. Severe measures such as the elimination of *actio popularis* procedures for ex post review, the abolition of powers to review all budget-related legislation[2] and the repeal of all court decisions made before 1 January 2012 (when the new Constitution entered into force) were introduced to weaken the competences of the Constitutional Court. Thus, precedents of the Court cannot be invoked in new cases based on the new Constitution. Additionally, the number of justices has been raised from 11 to 15, allowing the government to nominate and elect seven judges (out of a body of 15) within a few months; the procedural requirement to try to reach a consensus within Parliament regarding their election was eliminated. Now, all of the judges are government loyalists, including two former members of Orbán's first government, several appointed directly from their positions as (majority) members of Parliament. The new laws allow "infinite membership" for judges, should a new member not be elected by a two-thirds majority by the time the term of office of another justice ends. The new provisions also state that only the government, one-fourth of MPs, and the Commissioner of Human Rights are entitled to request ex post review of any piece of legislation. In the post-2010 constellation, it is almost impossible that one-fourth of the opposition MPs would submit such a motion, as it would require an unlikely coalition of the far right and the Socialists. The possibility of turning to the Constitutional Court became even more difficult as legal representation became mandatory and legal aid is not available for this purpose. At the same time, a procedural fine ranging from 20,000 to 500,000 HUF (from 70 to 1700 EURs) may be imposed on petitioners initiating procedures in an "abusive" way; the sum of the fine is due to the Constitutional Court. The uncertainty of the word "abusive" might deter many from turning to the Constitutional Court (Halmai, 2012, p. 5).

Second, the judiciary. In an attempt to weaken the independence of the judiciary, the six-year-long mandate of the former President of the Supreme Court was prematurely ended after two years, and the mandatory retirement age for all judges was reduced from 70 to 62 years of age, a move that practically removed all court-presidents (chief judges) – with replacements to be chosen by the head of the newly created administrative unit. A new powerful administrative organ for the judiciary titled the National Judicial Office was created with powers to appoint judges. The body is presided over by one of the new constitution's drafters – who is also the wife of a Fidesz member of the European Parliament

2 The right to review financial laws is restricted to review from the perspective of rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion or the right to Hungarian citizenship), which they typically cannot breach. The restriction remains in effect for as long as state debt exceeds half of what is referred to in the Hungarian text as the 'entire domestic product', the content of which is uncertain.

and a long-time friend of the prime minister. Her mandate, similarly to the prosecutor general, a former Fidesz MP candidate, is automatically prolonged if no new president is elected by two-thirds of Parliament. As Halmai argues,

> According to the new act on the judiciary, any judge in the ordinary courts can be elevated or demoted by this single state official, who has the sole power to appoint judges and no other judicial bodies have a decisive role in the process.
>
> (Halmai, 2012)

Another innovation that raises questions about the independence of the judicial process is that despite traditional rules for designating judicial fora, the president of the new National Judicial Office and the prosecutor general have been authorized to appoint courts for hearing individual criminal proceedings. The prosecutor general, whose mandate was extended from 6 to 9 years, is neither responsible to the government nor to the Parliament: he/she has the duty only to report to the Parliament annually, and MPs only have the right to pose questions to him/her; the right to pose interpellations was abolished.[3]

Third, the independent parliamentary ombuds offices. A single Office of the Commissioner for Fundamental Rights was created, which replaced four formerly independent ombuds institutions. The portfolio of the former Ombudsperson for Data Protection and Freedom of Information was transformed into a quasi-governmental office. Since the institutions of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities and the Parliamentary Commissioner for Future Generations, the ombudsperson responsible for environmental issues, were abolished, the mandate of the respective commissioners was also terminated before the end of their term of office.[4] For the new ombuds office, the (parliamentary) Commissioner for Fundamental Rights, Parliament elected a former civil law professor and former Fidesz government commissioner who had no any constitutional or human rights track record.

Fourth, the Central Bank. The centralization of the Central Bank also initiated an infringement procedure against Hungary by the EU concerning provisions of the new Constitution on the Central Bank, which merged it with

3 The Council of Europe's European Commission for Democracy through Law (Venice Commission) issued a special report on the case (2012a). On 17 January 2012, the EC launched an accelerated infringement proceeding against Hungary regarding the independence of the judiciary. In 2016, the Grand Chamber of the European Court of Human Rights held (Baka v. Hungary) that Hungary had been in violation of Article 6 § 1 (right of access to a court) and of Article 10 (freedom of expression).

4 In 2014, the Grand Chamber of the EU's European Court of Justice held in the infringement procedure initiated by the European Commission that, by prematurely bringing to an end the term served by the supervisory authority for the protection of personal data, Hungary has failed to fulfill its obligations under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (EC v Hungary, 2014).

the Financial Supervisory Authority. The Central Bank's new president, György Matolcsy, a former Fidesz MP and government minister, is one of Orbán's closest advisors.

Fifth, the Fundamental Law also creates a National Budget Council, an unelected body with limited democratic legitimacy, with members chosen by the government, tenured for up to 12 years, who can only be replaced if two-thirds of the Parliament can agree on the successors. The new body can practically veto the budget. According to the new Constitution, if Parliament fails to pass a budget by March 31 of each year, the head of state, elected by a simple majority, with a mandate exceeding that of the Parliament, can dissolve the Parliament and call new elections. Thus, even if Fidesz is outvoted in the next elections, severe constraints burden any future government; for example, Scheppele argues that if Fidesz loyalists can veto the budget by making it miss the deadline, the president (also named by Fidesz) will call new elections. This can be repeated until an acceptable government is voted back into power (Scheppele, 2011).

Sixth, local governments. The government introduced substantial reform concerning self-governments (Act 189 of 2011; eGov Hírlevél, 2012). Besides restructuring local elections, most administrative competences (including health care and secondary education) have been removed from elected local municipalities and given to either central regional administration or newly established administrative entities. The Committee of the Regions (the EU's Assembly of Regional and Local Representatives) expressed serious concern for Hungarian local democracy, pointing to, *inter alia*, the limitations on the autonomy of local authorities. Particular concern was raised over the fact that under the new Constitution, elected municipal councils can be dissolved by the national Parliament on the grounds of a breach of the constitution, without a binding judgement from the Constitutional Court. Moreover, the new constitution's provisions curtail the autonomous management of local authorities' property and provide the possibility to "nationalize" it (COR, 2012).

Seventh, media laws. Rewriting the regulations of the press and electronic media was a highly significant stage of the transformation of the Hungarian constitutional order. Through two new laws, the government not only established such a wide-ranging government control of the print and electronic media unprecedented in constitutional democracies, but it also abolished the safeguards against unilateral political influence. Without these safeguards, the governing majority had the opportunity to create an entirely politically homogenous body, with all members nominated by the governing party, to oversee compliance with the rules. As a result of these measures (Act CIV of 2010; Act CLXXXV of 2010), the freedom of the press, which has a key role in holding those exercising public authority accountable, has been curtailed to an extraordinary degree.

The main criticisms voiced by the Hungarian Constitutional Court (165/2011), alongside academics and human rights NGOs and various European and international organizations (such as the European Newspaper Publishers' Association, the World Association of Newspapers and News Publishers (2010), the International Press Institute (2011), the South East Europe Media Organisation (2011,

2012), the European Federation of Journalists (2012), the Reporters without Borders (2011) and larger international civil organizations, like Amnesty International (2011) and Freedom House (2011) concerned the political dependence of the Hungarian Media and Telecommunication Authority and its overbroad regulatory authority powers; the unreasonable and unconstitutional regulation of the print and online press; the political influence on public service media and the disproportionate and unpredictable sanctions causing chilling effects. In March 2011, the European Parliament passed a resolution condemning the new media laws, calling on the Hungarian authorities to restore the independence of media supervision and to put an end to governmental interference in the freedom of expression and "balanced programming" (EP, 2011c). In February 2011, the OSCE (2011) also prepared a detailed critical analysis of the Hungarian regulation, which was soon followed by a critical analysis of the Human Rights Commissioner of the Council of Europe, released on 25 February 2011. Following negotiations with the European Commission (Hungarian Government, 2010; Kroes, 2011), Parliament amended the regulations in 2011. Still, criticism has not subdued.

And more… Newly adopted rules allowed for the dismissal of civil servants without justification. As a result, thousands of civil servants were fired from public administration positions (HCLU, EKI, HHC, 2010). The law was held to be unconstitutional by the Constitutional Court and was squashed *pro futuro.* Dismissals nevertheless continued. Nominally independent institutions have, of course, been staffed by government loyalists elected by a two-thirds majority. Often the heads (and in some cases the full membership) of certain institutions have been removed and replaced before the official term of their office – mostly through the amendment of the related legal framework (HHC, EKI and HCLU, 2011a). As mentioned above, for example, besides the President of the Supreme Court and the Data Protection Commissioner, members of the National Election Committee and the National Radio and Television Body were removed before the end of their term of office. According to Freedom House (2015), by 2014, all major independent institutions were headed by partisan or personal loyalists who (in Scheppele's words): "will be able to conduct public investigations, intimidate the media, press criminal charges and continue to pack the courts long after the government's current term is over" (2011). Former members of the Fidesz parliamentary group were elected as President of Republic, the Head of the State Audit Office and one member of the Constitutional Court, while the president of the Central Bank and another judge of the Constitutional Court was a member of the previous Fidesz government.

4 The rule of law and the religious character of the Constitution and the wider legal framework

4.1 Introduction – penguins and catching fish

In the preceding chapters, our journey through history and the contemporary legal world has revealed how dramatically the role of religion within the juridical system has changed over time, and the question remaining is whether the model which has emerged from the evolutionary process is fit for purpose. Is the current treatment of religion positive and beneficial for citizens and the state, a cumbersome and anachronistic irrelevance, or even an actively damaging force?

In the concluding part of Chapter 2, we suggested that there are good reasons to assert that this current structure, like the wings of a penguin, has altered but remains a valuable asset. Furthermore, although the *form and role* of penguin wings are very different for a swimming bird than a bird that flies, some of the underlying *purposes* of the wings have remained constant. In the days when penguins flew and swooped like guillemots, they spent a great amount of their time and energy catching fish. Modern penguins still require nutrition, but they now have a very different technique for capturing their prey.

Similarly, is it possible that some continuity might be discerned in the deep collective needs of the state? It could be suggested, for example, that the problem of keeping an appropriate check on the exercise of executive power is a recurring theme in the history of Great Britain. Are there some repeated patterns to be found in the wrangling over the Divine Right of Kings in the Stuart era, and modern judicial review actions brought against government ministers? Arguably the core issue of keeping executive action accountable and within identifiable boundaries remains. It is true that the parallels are not entirely unproblematic. For instance, how far is the basis and nature of accountability within an early modern state truly comparable with that in a twenty-first century representative democracy? We will return to the specific issue of judicial review later in our study. Nevertheless, the overarching question of continuity at a deep level certainly merits exploration.

Essentially, in this and the following chapters, we shall be taking one of the founding pillars of the British Constitution and asking how it relates to the religious character of the legal framework – the religious character in this sense being understood to reflect the tripartite structure set out in the preceding chapter,

and to distinguish it from secular frameworks such as those of France or the United States of America. In the first section we shall explore the operation of the principle in the contemporary context. We shall then move on to analyse whether the principles enshrined within that pillar are strengthened or weakened by the British legal framework concerning religion, and this will be followed by a discussion of how the teachings and perspective of the various religious groups (including Humanist organisations, as described at the beginning of Chapter 3) influence their members' perceptions of the rule of law. The final section will explore some of the practical ways in which the activities of faith groups facilitate or promote the practical outworking of this constitutional principle. As set out in the Introduction, this is not intended to be a sociological exercise, and certainly not to balance the benefits and detriments of faith-based activities. It is simply an observation of some tangible ways in which such groups currently enrich these constitutional foundations.

In concrete terms, this chapter will adopt the following structure (and Chapters 4 to 6 will be essentially isomorphic):

1 What does the rule of law mean in the context of the UK Constitution?
2 Does the religious character of the legal and constitutional system enhance or weaken the rule of law?
3 How do the teachings and perspective of the various religious groups influence their members' perceptions of the rule of law?
4 From a more practical point of view, do faith communities in Great Britain make a tangible contribution to the operation of the rule of law?
5 Conclusions.

4.2. What does the rule of law mean in the context of the UK constitution?

Before assessing the impact that religious bodies have upon the functioning of the rule of law, it is obviously necessary to establish what the term 'rule of law' actually means. This is a challenging task, because as Elliott and Thomas rightly observe,[1] of all of the main constitutional principles, the rule of law is probably the most elusive.

Commentators have produced varying schools of thought on the concept, and although we shall consider each of them in detail below, our aim is not to carry out a thorough analysis of the doctrinal understandings of every principle in every chapter, as this has been successfully done elsewhere.[2] However, it is crucial not

1 M. Elliott and R. Thomas, *Public Law* (Oxford University Press: Oxford) 2nd edn, 2014, 62.
2 T. Bingham, *The Rule of Law* (Penguin: London) 2011; B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press: Cambridge) 2004; T. Etherton, 'Religion, the Rule of Law and Discrimination', *Ecclesiastical Law Journal*, Vol, 16, No. 3 (2014) 265–82 ; A. Staiculescu and M. Bala, 'The Rule of Law: Challenges and Opportunities', *Contemporary Readings in Social Justice*, Vol. 5, No. 2 (2013) 837.

to allow the rule of law (or, indeed, any of the other constitutional foundations) to disappear into the mist of political philosophy by virtue of its contested nature, like the Loch Ness monster of doctrines. Just because the rule of law is a much debated principle, it does not follow that it is vague or without substance. It has long been firmly established as one of the pillars of the UK legal framework.[3]

In some senses, the content of the rule of law resembles the formula for creating the perfect pancake. Pancakes are different according to varying national and cultural contexts (spongey, cakey American breakfast pancakes are very distinct from their refined French cousin, crêpes); similarly, the way in which the rule of law is understood to operate in Great Britain, particularly in terms of notions such as legal certainty, is quite distinct from that of jurisdictions such as Japan.[4] However, even when the national context is established, there is scope for endless dispute about the best recipe and method of serving.

There are, undoubtedly, many variations on the traditional British Shrove Tuesday pancake. Should it be served with sugar and lemon juice, or butter and golden syrup? Is the European innovation of Nutella now an accepted component? Nevertheless, there are some core elements (flour, milk, eggs, butter and salt) which are universally agreed to be non-negotiable ingredients. Furthermore, it is possible to put forward a reasoned justification as to why the other possible additions are either beneficial and/or essential (for example, to avoid blandness, or to use up sugar before Lenten austerity commences).

In a similar way, it is also feasible to identify certain key components widely understood to be included in the UK conception of the rule of law, and further to examine the merits of the arguments for incorporating other factors within its formulation. On this basis, having a focused discussion about the rule of law and to arrive at a rationally defensible definition of the doctrine is an achievable aim, even though no one definition would ever be accepted by all commentators in the British context.

4.2.1 The principle of legality (plain pancake)

In his insightful book on the rule of law, Tamanaha observes that a common strand in all understandings of the principle is the contrast between the rule of law and the rule of man. This commentator states as follows:

> To live under the Rule of Law is not to be subject to the unpredictable vagaries of other individuals, whether monarchs, judges, government officials or fellow citizens. It is to be shielded from the familiar human weaknesses of bias, passion, prejudice, error, ignorance, cupidity of whim.[5]

3 J.H. Baker, *An Introduction to English Legal History* (Butterworths: London) 3rd edn, 1990, 165.
4 See, e.g., M. Dean, *Japanese Legal System* (Cavendish Publishing: London) 2002.
5 Tamanaha, n. 2 above, 122

The principle of legality requires that society operates in accordance with rules, and that the rules are introduced in the prescribed and approved manner. Anyone who has ever had the experience of playing board games with younger children (and, indeed, certain adults) knows how frustrating it is when a small arbitrary tyrant purports to make up and change the rules from minute to minute to suit his or her purposes. Arbitrary powers are the antithesis of the rule of law. In order to satisfy the principle of legality, rules must be properly enacted in accordance with the requirements of the relevant legal system.[6] Therefore, in the case of an Act of Parliament in the United Kingdom, the provisions must be approved by both Houses of Parliament.[7] Although this might at first sound rather obvious and somewhat theoretical, the principle of legality does have practical application and is called upon by the courts. The classic example is the celebrated case of *Entick v Carrington*:[8] a government minister purported to issue a warrant authorising his agents to burgle Mr Entick's house in search of seditious papers. The court found that the minister had no legal power to issue such a warrant, and held that his agents had committed trespass in violating the plaintiff's home and damaging his property.

However, it would be wrong to think that the need to call upon the principle of legality disappeared when powdered wigs fell out of fashion. In the far more recent case of *Witham*[9] a government minister attempted to make rules which were beyond the scope of the power delegated to him. Here again the court cited the principle of legality in striking the rules down.

Similarly, in *Begbal v DPP*[10] the courts highlighted the importance of the principle of legality in relation to protecting fundamental freedoms. In this case, the appellant was questioned at an airport on the basis of Schedule 7 of the Terrorism Act 2000. She was not formally detained, but the questioning process lasted for around an hour and three quarters. During this time, she refused to answer any questions and was subsequently convicted of wilfully refusing to answer questions contrary to Schedule 7, paragraph 18 of the 2000 Act.

The Supreme Court considered, among other factors, whether the legislation relied upon was compatible with the principle of legality. The decision stressed that in order to comply with this principle, the law must contain sufficient safeguards to prevent powers from being arbitrarily exercised and fundamental rights being potentially interfered with in an unjustified manner. Although in this instance the Court found that sufficient safeguards were in place to satisfy this requirement, it remains important that the issue was the subject of judicial scrutiny, and it was emphasised that government action had to be taken on the basis of identifiable legal rules.

6 Elliott and Thomas, n.1 above, 64.
7 Unless the provisions of the Parliament Acts 1911 and 1949 apply, in which case approval by the House of Lords may be dispensed with.
8 *Entick v Carrington* (1765) 19 St Tr 1030.
9 *R v Lord Chancellor, ex parte Witham* [1998] QB 575.
10 *Begbal v Director of Public Prosecutions* [2015] UKSC 49.

4.2.2 Formal conception of the rule of law (pancake topped with butter and sugar)

However, while the principle of legality is a *necessary* component of the rule of law, most commentators would deny that it is *sufficient*. The legal pancake needs topping to be palatable for society. The formal conception of the rule of law, famously asserted by commentators like Joseph Raz,[11] defines the doctrine as a set of principles which enable the law to perform its function effectively. In Raz's view, the function of law is to enable citizens to make choices and order their behaviour in accordance with known rules. He sees this as essential if human dignity is to be respected and individual autonomy is to be maintained.

In practical terms, the rule of law, therefore, has to include formal rules. These must be clear, ascertainable and non-retrospective. They must also be binding on all citizens. On this basis, individuals can suffer adverse consequences only for failing to comply with rules which they knew, or at least could have chosen to know about, before falling foul of them.

A notorious example in the English and Welsh context was the judicial treatment of marital rape. Until the late twentieth century, it was legally impossible for a man to rape his wife within this jurisdiction, as she was deemed to have given her irrevocable consent to intercourse.[12] In *R v R*[13] the House of Lords declared that such implied consent was a common law fiction which had never been a true rule of English law, and defendants could no longer rely on it to avoid a rape conviction. The decision was highly controversial and Strasbourg considered the judicial removal of the UK marital rape exemption in relation to another case with similar facts.[14] The Court found that the trajectory of the law towards abandoning the immunity was obvious at the time when the offences were committed.[15] Consequently, the appellant, on the facts, was not being subjected to sanctions as a result of retrospective lawmaking; nor was the position unclear.

Furthermore, the leading speech in *R v R*, given by Lord Keith in the House of Lords, had stressed that the Court was *not* creating a new criminal offence to impose liability on unacceptable conduct, but removing a legal fiction which had historically allowed a certain category of offenders to escape liability.[16]

It was apparent from the judgments of both the domestic courts and Strasbourg that the repugnance of the behaviour at issue would not itself have

11 J. Raz, 'The Rule of Law and its Virtue', *Law Quarterly Review*, Vol. 93 (1977) 195–211, 201.

12 *R v Miller* [1954] 2 QB 282; *R v Kowalski* (1988) 86 Cr App R 339; *R v Sharples* [1990] Crim LR 198.

13 *R v R* [1992] 1 AC 599

14 *SW v United Kingdom*, App. no. 20166/92, Judgment, 22 November 1995 (ECtHR).

15 Ibid., para. 43: 'Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law'.

16 *R v R*, n. 13 above, per Lord Keith, 611: 'This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it'.

been a justification for suspending the rule of law and imposing a retrospective sanction. Ultimately, the case did not turn on whether the defendant had wilfully committed a heinous act (that much was uncontroversial), but whether the formal requirements of the legal process could be satisfied.

This is in keeping with the view often understood to be espoused by commentators like Raz, that the rule of law as a concept is a morally neutral tool.[17] The reasoning behind this is that the function of the rule of law is to enable the law to fulfil its purpose efficiently, and there is a moral dimension to this only in so far as morality is *instrumental* in furthering this purpose. A favoured analogy employed by Raz is that of sharpness being of instrumental value to knives, because (butter knives aside) this quality is a requirement for fulfilling their purpose as cutting tools. Thus, moral considerations are relevant for Raz, at least in relation to the rule of law, *only* where they advance its core purpose.

However, it must be acknowledged that the argument is more nuanced than this. Although, as Hamara argues,[18] it is difficult to read Raz in the round as advocating anything other than a morally neutral conception of the rule of law, he nevertheless 'tries to make room for understandings which link "The Rule of Law" to some desirable state of affairs'.[19]

While not a moral value in his terms, the rule of law is nevertheless a value which society sustains. Therefore, although on this basis the rule of law cannot be characterised as *good* or linked to the pursuit of moral good, it is nevertheless cast as a necessary tool for the common pursuit of good, or at least the collective interest, as may be determined on the basis of identifiable goals with a moral dimension to them (such as respect for human dignity and autonomy). These last considerations make the formal conception of the rule of law likely to be subject to robust criticism.

4.2.3 Substantive conception of the rule of law (pancake topped with butter and sugar with golden syrup inside)

Nevertheless, a significant number of commentators still regard this formal conception of the rule of law as deeply problematic. Sharp knives may be used in a street fight or for peeling apples, rendering the use to which they are put crucial to their desirability in any given context. If the rule of law is to be a *universally* desirable principle, then the argument goes that it must have an inbuilt moral compass which governs the uses to which it may be turned.

The substantive conception of the rule of law rejects the notion that the principle could be applied in the service of totalitarian regimes which trampled human rights. Proponents of this school of thought, such as Allan,[20] point out

17 J. Waldron, 'Why Law? Efficacy, Freedom and Infidelity, *Law and Philosophy*, Vol. 13 (1994) 259–84.

18 C.T. Hamara, 'The Concept of the Rule of Law', in I. Flores and K. Himma (eds), *Law, Liberty and the Rule of Law* (Springer: Heidelberg, London, New York) 2013, 11–26.

19 Ibid., 16.

20 T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of UK Constitutionalism* (Clarendon Press: Oxford) 1993.

that formal understandings of the rule of law, put forward by Raz and others, are themselves based upon substantive, moral foundations.[21] Why should the purpose of the law be to enable individuals to enjoy autonomy and dignity? Surely the answer can only be that these things have been deemed to be morally good.

Furthermore, Allan observes that the courts have to apply principles, rather than simple formulaic rules, and make determinations based on abstract notions of justice and fairness; this process would not be possible without an ethical dimension being present.[22] The judicial task is not akin to following directions for building flat-pack furniture: it is one of adjudication, rather than the straightforward application of rules. He notes also that this reality is demonstrable in the way in which common law courts in the United Kingdom operate in practice.[23]

Other commentators are similarly persuaded. Laws,[24] for example, adopts a rights-based approach to the rule of law and, indeed, the legal system and Constitution more generally. It must be acknowledged, of course, that the influence of the acclaimed twentieth century philosopher Dworkin can be felt strongly in the writing of both Laws and Allan. Dworkin[25] rejected the formal understanding of the rule of law, and built a case instead upon the idea that citizens owe one another moral rights and duties, and have political rights vested in them against the state. In this understanding, the legal system embodies these rights in positive law, knitted together by liberal principles.

Dworkin rested much of his discourse on a particular understanding of the role of judges within the rule of law.[26] He sought to draw a distinction between law and moral principles, and cast the judiciary in the role of guardians of unchanging moral obligations, which might be threatened by the democratic tyranny of the majority should the elected legislature see fit to enact morally repugnant law.

As Dyzenhaus argues:

> Dworkin relied explicitly and with wholehearted approval on Hart's account in 'The Concept of Law' of the relationship between moral and legal obligation, specifically on the section where Hart maintained that certain important differences between law and morality arise from the fact that morality, unlike law, is immune from deliberate change.[27]

Inconveniently for both Hart and Dworkin, this fundamental assertion is by no means irrefutable. In fact, an inconvenient puff of analysis threatens to bring

21 Ibid., 28–39.

22 Ibid., 39.

23 Ibid., 28–43.

24 J. Laws, 'The Constitution, Morals and Rights', *Public Law* (1995) 622; and 'Law and Democracy', *Public Law* (1995) 72.

25 R. Dworkin, *A Matter of Principle* (Oxford University Press: Oxford) 1985.

26 Ibid.; R. Dworkin, 'Political Judges and the Rule of Law', British Academy, *Proceedings of the British Academy*, Vol. 23, No. 3 (1980).

27 D. Dyzenhaus, 'The Rule of Law as the Rule of Liberal Principle', in A. Ripstein (ed.), *Ronald Dworkin* (Cambridge University Press: Cambridge) 2007, 56–79, 73.

down the whole house of cards. In practice, moral principles are subject to dramatic and sometimes rapid social changes. Furthermore, legal development may be a catalyst for, rather than a consequence of, evolving moral principles.

Various contemporary examples throw this into sharp focus. Within living memory in the United Kingdom, homosexuals could face criminal sanction for loving and consensual sexual activity between adults,[28] while owners of boarding houses could freely display signs proclaiming 'No blacks, No Irish',[29] and parents could beat their children, using rubber slippers or belts, without risking legal or social censure.

In recent decades there has been a paradigm shift in both the legal *and* the moral centre of gravity with regard to all of these issues. However, it would be a gross oversimplification to state that the legal framework has simply *responded* to shifting moral principles. For instance, in outlawing racial discrimination, legislation may well have played a role in actively reshaping perceptions about acceptable and desirable behaviour. The law was one of the many social forces that encouraged a change in both culture and morality.

It would, therefore, be wrong to present a substantive conception of the rule of law as being without philosophical challenges of its own, or the end point of our collective dialogue on the question. If law can be deemed legitimate only if it is within the territory laid out in a moral map, how and by whom is the map to be drawn?

4.2.4 Choosing a pancake recipe

As Craig[30] notes, it is no coincidence that Raz, one of the principal advocates of the formal conception of the rule of law, is also a card-carrying legal positivist. Bennett perceptively and helpfully observes that academic dialogue about the rule of law often becomes obscured by the wider positivist versus anti-positivist debate.[31]

Defining legal positivism is a complex endeavour in itself,[32] and it is certainly beyond the scope of our analysis. However, in essence, legal positivism is the intellectual tradition which asserts that the validity of legal norms and rules depends

28 The Sexual Offences Act 1967 decriminalised consensual acts in private between two men where both parties were aged 21 or above. However, it applied only to England and Wales, it excluded the army and merchant navy and imposed a higher age of consent than that applicable to heterosexual activity.

29 'Signs of the Times of Racism in England that was All Too Familiar', *The Guardian* (22 Oct 2015), http://www.theguardian.com/world/2015/oct/22/sign-of-the-times-of-racism-in-england-that-was-all-too-familiar.

30 P.P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework', *Public Law* Vol. 21 (1997) 467–87, 477.

31 M.J. Bennett, 'Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: A Reconsideration', *Law and Philosophy*, Vol. 30, No. 5 (2011) 603–35.

32 D. Plunkett, 'Legal Positivism and the Moral Aim Thesis', *Oxford Journal of Legal Studies*, Vol. 33, No. 3 (2013) 563–605.

upon the legitimacy of the source, rather than their intrinsic moral merits. In other words, law is law because the legal system says it is. It is the positive assertion which makes law (hence the name). In contrast 'anti-positivists' maintain that a link between the law and moral argument is necessary.[33] Unsurprisingly, as we have seen, philosophers like Dworkin, whose work bolsters the substantive model of the rule of law, tend to be anti-positivists. Consequently, clashes between the formal and substantive concepts of the rule of law are played out in the shadow of this larger debate about the very nature of law itself. This fascinating discussion is extremely complex and exploring this further would detract from the purpose of our analysis.

At this point, worryingly, it might well feel that despite earlier promises, the tangible doctrine of the rule of law is starting to slope off, Nessie-like, into the mist of philosophical wrangling. However, it is possible to coax the beast back into the sunlight.

4.2.4.1 The function of academic theories of the rule of law: an explanation rather than a blueprint

First, it should be remembered that while these underlying theories are important in understanding the deep background to what is going on within the legal framework, they *explain, rather than dictate* what actually happens in the courts of Great Britain. On most occasions, judges in applying principles contained within the rule of law do not need to decide whether they are subscribing to a substantive or a formal understanding of the same. In the *Pierson*[34] case, for instance, the Court found that it was unlawful for the Home Secretary to retrospectively increase a sentence for a criminal conviction when it had been lawfully passed. Whether the rule of law is driven by formal rules that demand openness and clarity and forbid retrospective change, or is driven by a set of ethical values which encompass fundamental human rights, the destination is the same: actions with retrospective legal effect are incompatible with the rule of law.

It should also be remembered, and indeed stressed, that the academic identification of many of the core principles of the rule of law, in particular by the influential commentator, A.V. Dicey,[35] took place prior to the philosophical debates within the twentieth and twenty-first century jurisprudence. Furthermore, there is judicial awareness that many of the precepts of the rule of law are of ancient pedigree and unquestioned application. In *Re M*[36] the House of Lords roundly rejected the Home Secretary's contention that government ministers should not be liable, in the same way as other citizens, to fine or imprisonment for the flagrant breach of a court order (in this instance directing

33 S. Taekema, *The Concept of Ideals in Legal Theory* (Kluwer Law International: The Hague) 2003, 206.

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

35 A.V. Dicey and J.W.F. Allison (eds), *The Law of the Constitution* (Oxford University Press: Oxford) 2013.

36 *Re M* [1994] 1 AC 377.

the deportation of an asylum seeker). Lord Templeman stated that if the Home Secretary's reasoning were followed, 'the executive would obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War'.[37]

We are not suggesting, therefore, that it does not matter whether a formal or a substantive conception of the rule of law is adopted, rather that both schools of thought are attempts to explain the same constitutional principle. In other words, the system is older and deeper than either conception in its modern form.

4.2.4.2 Points of convergence

It must certainly be acknowledged that many followers of both schools of thought would be unimpressed by the pancake analogy, on the basis that it at first *appears* to treat the substantive conception as nothing more than the formal understanding with an added dimension. However, this would be an inaccurate understanding of our proposal, as the picture being painted is rather more nuanced than this.

It is, of course, uncontroversial that at one level the two systems are distinct, each having an entirely separate basis. The formal conception is essentially positivist and rule-based, whereas the substantive conception is anti-positivist and held together by moral precepts. Notwithstanding, when the situation is looked at on another level, there are many harmonious elements and the intrinsic differences are no longer observable. The level at which the question is approached is key. Borrowing an image from science, it is uncontroversial that the concept of temperature does not exist at the level of individual particles,[38] but this does not mean that temperature is not a highly real and relevant consideration when deciding whether oven gloves are necessary to lift a lasagne. Whether substantive and formal conceptions of the rule of law are *functionally* distinct depends upon the level at which they are analysed. Not only are the practical effects of both systems frequently identical, there are points of theoretical convergence as well.

Bennett argues persuasively that many commentators are misguided in assuming that advocates of the formal conception, such as Raz and Hart, dismiss the idea that the rule of law is entirely without non-instrumental moral value (in other words, moral value that does not directly further its purpose).[39] In Bennett's analysis, their writing reveals instrumental moral value and non-instrumental moral value side by side. Even within what is ultimately a positivist paradigm, there is a necessary place for ethical principles. This echoes an important element of Allan's[40] critique of their position – namely that their conception of the purpose of the rule of law is itself constructed upon substantive moral values. The imperative to promote human autonomy and dignity itself originates from ethical considerations.

37 Ibid., 395.

38 L.M. Brown and F. Rohrlich, 'Chapter 17 Comments', in T.Y. Cao (ed.), *Conceptual Foundations of Quantum Field Theory* (Cambridge University Press: Cambridge) 1999, 261.

39 Bennett, n. 31 above, 612.

40 Allan, n. 20 above.

The flip side of the coin, however, is the acknowledegment by advocates of the substantive conception, such as Bingham, that attaining consensus on moral principles, and therefore 'good' law, is deeply problematic.[41] Even among liberal Western democracies there is scope for near endless debate over which values and rights are so fundamental as to form part of the rule of law. How is 'good law' to be determined?

In reality if either position is pushed to the extreme, it becomes difficult to sustain. Few voices for the formal conception would wish to endorse an understanding of the rule of law which could support a regime like that of ancient Sparta, where clear law, legitimately enacted, demanded the exposure of sickly and disabled infants.[42] On the other hand, those who favour a substantive understanding of the concept are faced with an insurmountable challenge in identifying and achieving consensus on the substantive moral principles which they claim suffuse the doctrine.

Some illumination can be found in the terminology adopted by commentators like Bingham,[43] who refer to 'thin' (formal) and 'thick' (substantive) understandings of the doctrine. This language implies a spectrum of understanding, rather than rigid binary division, and in our view, at least for present purposes, this is a far more productive approach. Hence, a return to the image of the pancake, with a non-negotiable base of ingredients, but scope for debate about additions to the recipe.

In relation to the UK Constitution, the rule of law encompasses the principle of legality and the recognised rules within the formal conception. In essence, the law must be clear, ascertainable and non-retrospective, and it must apply equally to all persons regardless of status or role. Furthermore, the rule of law pancake is currently folded to contain a layer of golden syrup (or possibly continental Nutella), which is the recognition of human rights as set out in the European Convention on Human Rights (ECHR). While respect for human rights is now arguably a separate constitutional principle (and, indeed, has its own chapter in this book), it is also a component element of the rule of law. This dimension provides an identifiably substantive layer to the principle, as it now functions.

Nevertheless, it would be wrong to suggest that the substantive element is an entirely modern innovation, transplanted Nutella-like from the wider European context. The practical problems of identifying the moral principles underpinning the law must be acknowledged, as ethics are complex, subjective and constantly shifting sands. Despite this difficulty, it remains the case that down the centuries a procession of distinguished jurists have accepted, both implicitly and explicitly, that such ethical foundations are present within the common law and the UK Constitution.

In *Somerset*[44] Lord Mansfield CJ was required to decide whether chattel slavery was recognised by English law. On his decision rested the fate of James Somerset,

41 Bingham, n. 2 above, 68.
42 H. Michell, *Sparta* (Cambridge University Press: Cambridge) 1964, 165.
43 Bingham, n. 2 above, 162.
44 *Somerset v Stewart* (1772) 98 ER 499; 1 Lofft 1 (KB).

who was imprisoned on a slave ship by his purported owner, facing a future of suffering and degradation on a plantation in Jamaica. His abolitionist friends and supporters made an application for habeas corpus. In an often quoted passage from his judgement Mansfield CJ held:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England.[45]

In other words, because of the immoral nature of slavery, the common law could not and would not recognise it. Such an institution could only enter the corpus of the law of Great Britain by virtue of 'positive law' or statute. As this was not the case, there was no legal justification for treating a human being as property. Thus, the developments which have flowed from the Human Rights Act have been an additional layer, rather than a change of direction, in relation to the substantive component of the rule of law.

Judges in Great Britain, like Mansfield, have always been alive to the risk of cutting themselves adrift from the legal principles which they are required to apply, and substituting their individual moral assessment of the case. He was very clear that his decision could not rest simply on his sense of compassion for James Somerset. However, judges have been equally aware that an application of legal principles to a given factual context cannot be correct if the outcome would be a gross violation of overarching moral precepts, which are the foundation of the law.

The courts' treatment of *R v R*[46] and *SW*[47] provides a helpful illustration of this dichotomy in the modern context, and an essentially harmonious approach from domestic and international tribunals when it came to reconciling the clash. In deciding what could be deemed an *acceptable* interpretation of *existing legal provisions*,[48] human rights and human dignity were key considerations. As noted above, the morally repugnant nature of the crime and its impact upon the rights and dignity of the victim would not have justified setting aside the rule of law. However, the human rights implications of interpreting the law in a way which

45 Ibid., para. 19.

46 *R v R*, n. 13 above.

47 *SW v United Kingdom*, n. 14 above.

48 Ibid., para. 43: 'There was no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law'.

would have effectively shielded a sub-category of rapists from prosecution, was highlighted by the European Court of Human Rights in support of the stance taken by the House of Lords:

> The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords – that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim – cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 34 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.[49]

Neither the domestic courts nor Strasbourg were prepared to allow legal rules to be interpreted in a manner which was fundamentally incompatible with human rights and dignity. The case was undeniably controversial, and the decision close to the margins of what the European Court of Human Rights could be expected to permit in relation to retrospective change.[50] However, it is precisely for this reason that it is so instructive. On the one hand, it demonstrates that there clearly is a substantive dimension to the way in which the rule of law is applied in a UK context. The principles at its core are undoubtedly now consciously viewed through the prism of human rights. Yet, on the other hand, it reveals how malleable and uncertain this substantive ethical aspect is in practice. Both the right of citizens not to be subjected to retrospective criminal sanction, and the right of citizens to enjoy corporeal integrity and freedom from inhumane and degrading treatment, are non-negotiable in a civilised society which upholds *any* understanding of the rule of law. A head-on collision between the two was always going to be difficult to resolve. As with other constitutional principles, the reality of the rule of law in its practical application is one of balance and compromise between opposing needs and demands.

4.3 Does the tripartite religious character of the legal and constitutional system enhance or weaken the rule of law?

4.3.1 Establishment and quasi-establishment: preliminary observations about possible challenges to the rule of law in the field of marriage

As we have discussed at length, the British Constitution and its religious character are the results of haphazard historical evolution. Within the United Kingdom

49 Ibid., para. 44.

50 R. Beddard, 'Retrospective Crime', *New Law Journal*, Vol. 145 (1995) 663.

no founding fathers set out to draft a coherent Constitution and craft its terms carefully around any guiding principles. Just because the constitutional system embraces both establishment relationships and a robust doctrine of the rule of law, it does not automatically follow that the two are mutually compatible. There are potential challenges and they should not be underestimated. One clear point of possible tension lies in the exercise of clerical discretion in relation to the remarriage of divorcees within the Church of England[51] and the Church in Wales.[52] We have identified this as an area which is capable of presenting challenges for the rule of law and it would be disingenuous to pretend that it does not exist.

One facet of establishment which has survived in both England and Wales is the implicit right vested in all citizens, regardless of personal dogma, to marry in their parish church (or indeed any church with which they have a qualifying connection).[53] However, if one or both parties has/have been divorced, this right becomes contingent upon the willingness of the cleric involved to conduct the ceremony.

Because this arrangement is in place to safeguard freedom of conscience for clergy in this matter, the exercise of discretion cannot be subject to challenge on grounds that it is arbitrary or irrational. On one level, this appears to be unsatisfactory, because a ruling which could be construed as having quasi-judicial effect is not open to review. Furthermore, an individual cannot know in advance what conduct will render him or her unable to marry in a particular church. For example, some ministers might marry a person who had committed adultery in a previous marriage some years ago, provided that the person expressed regret and a sincere intention to remain faithful to his or her current fiancé(e), whereas others might consider adultery a permanent bar. Therefore, while it seems fairly unlikely that anybody would pause before undressing a clandestine lover in order to check the canon law implications of their actions, the fact remains that were they to do so, they would not find a clear answer as to the consequences.

Nevertheless, despite being problematic in some respects and without underestimating the possible challenges to the rule of law, in our view this state of affairs does not render the legal framework fundamentally incompatible with this constitutional foundation, and it simply demonstrates the limits of the territory into which the legal framework should extend. An established Church is still a faith group, and as such its members are entitled to their collective and individual Article 9 right to freedom of conscience and belief. The legal system in the United Kingdom allows all faith groups the flexibility to decide whom they wish to marry according to their rites (whether or not in the particular circumstances of the case those rites have consequences in secular law), and there is no reason to restrict this in the case of the Church of England and the Church in Wales. Moreover, a couple who may not marry in an Anglican church can still contract a valid marriage in the eyes of secular law.

51 The Church of England, 'Marriage after Divorce', http://www.yourchurchwedding.org/youre-welcome/marriage-after-divorce.aspx.

52 The Church in Wales, 'Marriage – Frequently Asked Questions', http://www.churchinwales.org.uk/life/marriage/faq.

53 Marriage Measure 2008.

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It should also be noted that in conceptual terms, the Church of England and the Church in Wales could remove the potential for arbitrary decision making by simply refusing to marry *any* person with a former spouse still living. Although this might make for a system more smoothly compliant with an abstract understanding of the rule of law, it would also deprive many more citizens of the church wedding which they might otherwise be offered. It would seem on balance that the practical cost would outweigh the theoretical benefits. Aside from this one example, it is difficult to find facets of establishment relationships in Great Britain which might be deemed incompatible with the rule of law.

However, compatibility does not equate to desirability. Is the current model in any way positively beneficial for the functioning of the rule of law? Or are we dealing with vestigial whale legs, a harmless but unhelpful relic from the past that should be allowed to fade? We would argue that if the legal landscape is properly surveyed, there are some elements of its functioning in relation to religion which do positively enhance the rule of law. Examples of this can be discerned not only in relation to establishment, but also much more widely.

Taking establishment first, despite the fact that there are some controversial areas of the marriage law framework, there are also some other dimensions within this field and beyond that can be seen, on balance, as being advantageous to the rule of law.

While it is not conceived of as a branch of the state, the Church of England has retained a unique function in relation to marriage law.[54] As already observed, this element of establishment was not dismantled by the Welsh Church Act 1914, and the position in Wales remains essentially the same. An undeniable question which arises from this relates to whether the unique treatment of the established/quasi-established Churches in this regard is in harmony with the rule of law principle of equality before the law. Are members of these Churches either favoured, or perhaps even disadvantaged, by being subject to specific legal arrangements?[55]

In England[56] and Wales[57] Anglican clergy have a *duty* to solemnise marriages of individuals resident in their parish if requested to do so. There is an exemption, as discussed, where one or both parties is divorced and has a surviving spouse.[58]

54 The Church of England, 'A Response to the Government Equalities Office Consultation: Equal Civil Marriage', Annex, 'Marriage Law: the Position of the Church of England', para. 6.

55 In the political debate that preceded the introduction of same-sex marriage, the Church of England highlighted its special situation and argued that this could potentially be disadvantageous for the religious freedom of its members if the proposed changes were introduced: see, e.g., The Church of England, Marriage (Same Sex Couples) Commons Second Reading Briefing, 'The Unique Position of the Established Church', p. 2.

56 Faculty Office of the Archbishop of Canterbury, 'A Guide to the Law for Clergy' (1999); see also *Davis v Black* (1841) 1 QB 900.

57 Welsh Church Act 1914.

58 Matrimonial Causes Act 1965, s. 8(2): 'No clergyman of the Church of England or the Church in Wales shall be compelled – (a) to solemnise the marriage of any person whose former marriage has been dissolved and whose former spouse is still living; or (b) to permit the marriage of such a person to be solemnised in the church or chapel of which he is the minister'.

In that case Anglican clergy have a discretion, rather than an obligation, to carry out the marriage. Special provision is also made where one party has undergone gender reassignment. The Gender Recognition Act 2004 amended the Marriage Act 1949[59] to the effect that '[a] clergyman is not obliged to solemnise the marriage of a person if the clergyman reasonably believes that the person's gender has become the acquired gender under the Gender Recognition Act 2004'.[60]

Furthermore, unless and until the Anglican Churches of England and Wales decide that they wish to conduct same-sex marriages, these provisions will be of no benefit to same-sex couples.[61]

The above regime leaves us with several distinct but related questions: (a) Are these provisions imposing an undue burden on the established and quasi-established Churches? (b) Are these provisions placing other faith groups who lack these powers and duties at an unfair disadvantage? (c) Are these provisions leaving some groups of citizens in a less favourable position than others?

Questions (a) and (b) can helpfully be taken together. First, it should be observed that marriage law in England in Wales has been assembled bit by bit. There are several ways in which religious marriage may be carried out.[62]

Basically, all marriages which are solemnised other than according to the rites of the Church of England or the Church in Wales are conducted on the authority of a Superintendent Registrar's certificate or the Registrar General's licence. Although this is not expressly provided for in the Marriage Act 1949, as Lowe and Douglas argue, this is the obvious intention and the necessary effect of the statute.[63]

A marriage on the authority of a Superintendent Registrar's certificate may be solemnised in a registered building, according to the usages of the Society of Friends and the Jews, or in any place where a housebound or detained person is situated.[64] Any building that is registered as a place of worship under the Places of Worship Registration Act 1855 may be registered by the Registrar General for the solemnisation of marriages.[65]

A marriage in a registered building may take place only in the presence of a registrar or an authorised person;[66] 'authorised persons' will ordinarily be ministers of the relevant faith or denomination. The marriage rites in this instance

59 Ibid., Sch. 4.

60 This provision has now been replaced by the Equality Act 2010, Sch, 3, Pt 6, s. 24(4): 'A person does not contravene section 29, so far as relating to gender reassignment discrimination, by refusing to solemnise, in accordance with a form, rite or ceremony as described in sub-paragraph (3), the marriage of a person (B) if A reasonably believes that B's gender has become the acquired gender under the Gender Recognition Act 2004'.

61 Marriage (Same-Sex Couples) Act 2013.

62 See further N. Lowe and G. Douglas, *Bromley's Family Law* (Oxford University Press: Oxford) 10th edn, 2007, Ch. 2 'Formation and Recognition of Adult Partnerships'.

63 Ibid., 57.

64 Marriage Act 1949, s. 26(1) (as amended by the Marriage Act 1983, Sch. 1, and the Marriage Act 1994, s. 1(1)).

65 Marriage Act 1949 ss. 41–42 (as amended by the Marriage Acts Amendment Act 1958 s. 1(1) and the Marriage (Registration of Buildings) Act 1990 s. 1(1)).

66 Marriage Act 1949, s. 2.

may take any form, provided that they contain a declaration similar to that required when the marriage is in a registry office,[67] and the parties contract the union *per verba de praesenti* (present vows – that is, an exchange of promises in the present tense with a present intention, rather than a declaration about what may happen in the future).

Unpacking all of the above, Jewish and Quaker couples who wish to marry are subject to special rules, because historically they were granted exemptions from the general regime of Anglican marriage. Other religious groups may choose to have marriages on their premises if they have a registered building, and may do so either by arranging a secular registrar or by having one of their ministers approved as a registered person. The other option, of course, is for religious groups to advise their prospective spouses to arrange a civil law marriage with the registrar, and to separately conduct a religious marriage with no legal force, whenever and however they choose.

Therefore, the precise legal provisions that will apply to any given religious couple will depend upon their particular context. It would be deeply misleading to present a picture of a dual regime for religious marriage, with a choice between established and quasi-established Churches on one side, and other faiths groups on the other.

Arguments might be made for harmonising and simplifying what has become a rather cluttered legal space, with a plethora of applicable provisions scattered in different statutes and case law. However, this (essentially administrative) issue does not, in and of itself, demonstrate that there is a lack of equality before the law. The truth is that differing situations require different treatment and it is far from clear that a one-size-fits-all regime would dramatically advance religious liberty. At the risk of stating the obvious, an acceptance of the duty to marry all-comers (aside from statutory exemptions prompted by the state changing its definition of marriage) is part of Anglican theology and self-understanding (at least within a UK context). It is what these Churches do and have always done and, in our view, dismantling this would strip them of a part of their self-identity and disable them from putting some of their beliefs into practice.[68]

However, to state the even more obvious, expanding the scope of this legal duty and imposing an obligation on all faith groups to marry anyone who asked within a defined geographical area would not be a popular or a practical move. In fact, it would undeniably be the subject of a successful challenge founded on Article 9 of the European Convention. Imagine the feelings of a priest from a conservative Christian denomination on learning that he had an obligation to marry two Atheists who had once attended a christening in his church and just adored the pretty statues and the lingering smell of incense.

Neither would the third option of constructing a middle ground necessarily resolve the issue. Even if all religious groups were given the theoretical power

67 Marriage Act 1949, s. 44.

68 The Church of England actively promotes the church weddings that it offers: The Church of England, 'Thinking of a Church Wedding', https://www.churchofengland.org/weddings-baptisms-funerals/weddings.aspx.

to elect to marry couples within their buildings on the same legal basis, this would still not create a level playing field. There would be the obvious problem of administration and accountability, and the law would have to require appropriate procedures and registration of documentation. This would be difficult for some faith traditions which do not adopt a formalised, central structure with trained and monitored ministers. Furthermore, not all groups choose to have buildings or records. So, how could they fit within such a framework? In fact, not all religious pathways even involve groups: there are, for example, solitary Pagans.

To sum up, we do not suggest that the marriage law framework in the United Kingdom is perfect at present, or that reform of some areas would not be beneficial. However, arguably, the gradual evolution of the legal system in this regard, with establishment holding it all together like the bone structure of a penguin wing, has enabled the needs and circumstances of various groups to be met as society has changed and new challenges have arisen. The principle of equality and, indeed, the rule of law in general are not offended, as citizens effectively have a variety of legal pathways towards marriage, all of which are known and identifiable. They are in a position to choose an appropriate route depending on their personal belief system. Thus points (a) and (b) do not reveal this aspect of the establishment to be problematic for the rule of law. In fact, they demonstrate how a soft and pliable establishment model has helped to develop a framework which bends to accommodate evolving needs.

A far more compelling issue, however, is raised by question (c). Given that the established and quasi-established Churches have a basic duty to marry all citizens who request this service, why should divorcees, those wishing to marry someone of the same sex and individuals who have had their gender reassigned be excluded? This aspect has already been discussed at length in this chapter. It seems especially harsh that individuals from vulnerable minority groups, and those who have experienced the trauma of divorce, should be placed at a comparative disadvantage. The answer ultimately lies in the need to balance individual and collective rights. The acknowledged reality is that it is the state, rather than the Churches, that moved the goal posts in relation to the eligibility criteria for marriage, and the beliefs of conservative Anglicans were accommodated in the legal reforms. Carving out exemptions was deemed preferable to either attempting to forcibly drag the Church along with the state, or to slow secular legal reform to the pace of continental drift/Anglican doctrinal debate. This flexibility is a feature of the soft and collaborative model of establishment that is in operation in Great Britain.

Marriage within the established and quasi-established Churches is expressly acknowledged to be a religious matter and the executive and legislature continue to demonstrate concern for the collective rights of the Anglican provinces in England and Wales.[69] From this perspective, it would be as inappropriate to force these denominations to carry out marriages for all divorcees as it would

69 See, e.g., the ministerial response to consultation prior to the introduction of Same Sex Marriage in England and Wales: M. Miller, 'Ministerial Foreword', *Equal Marriage: The Government's Response* (Dec 2012).

be to attempt to compel an Orthodox Synagogue to facilitate the wedding of a same-sex couple. Individual religious freedom cannot extinguish collective religious freedom.

4.3.2 Prison chaplains

Prisons are contexts in which the courts have acknowledged that citizens are especially vulnerable and disempowered, and in which particular vigilance towards their legal rights and due process is required.[70] Legislation[71] provides that every prison in England and Wales must have an Anglican chaplain.[72] This does not operate to the exclusion of other religious and secular traditions. In fact, there are arrangements for the spiritual and emotional care of all prisoners, and religious prisoners who are not Anglican have the right to receive spiritual care from a minister of their own faith should they wish to access this.[73]

However, the mandatory presence of a representative of the established or quasi-established Church in every facility helps to ensure that the rule of law is applied to even the most vulnerable members of society. The availability of an Anglican chaplain provides an unofficial form of internal oversight, and thereby functions as an additional safeguard against prisons becoming an enclave where the rule of law might be entirely suspended. Not all faith groups require clergy to undergo formal training and not all faith groups would see prison visiting (or sick visiting for that matter) as part and parcel of the role of their priests or ministers. If the guaranteed Anglican presence in prisons were to be removed, some facets of prison chaplains could be lost. The mandatory appointment of an Anglican chaplain means that in every prison there is at least one chaplain who has the training and support of a large national organisation, as well as a framework for comparison in terms of other prisons. The link means that Anglican chaplains should always be in a position to seek guidance about normal and acceptable practice and standards if they are in any doubt. They also should have support from wider Anglican authorities should they ever need to be in the position of whistle-blower. If there was no requirement for at least one Anglican representative, arguably there would be no guarantee that any of the active chaplains had access to a way of benchmarking standards of prisoner treatment, nor of assured backing in the event of those standards being breached. They might or might not have this, depending upon the faith group or secular tradition to which they were attached.

70 See, e.g., *Shahid v Scottish Ministers (Scotland)* [2015] UKSC 58.

71 Prison Act 1952.

72 J. Beckford and S. Gilliat-Ray, *Religion in Prison: Equal Rights in a Multi-Faith Society* (Cambridge University Press: Cambridge) 1998.

73 P. Phillips, 'The Statutory Presence of the Church of England in Prisons Should Give It a Voice on Issues of Imprisonment, but it Remains Largely Silent', London School of Economics and Political Science, http://blogs.lse.ac.uk/religionpublicsphere/2016/09/the-statutory-presence-of-the-church-of-england-in-prisons-should-give-it-a-voice-on-issues-of-imprisonment-but-it-remains-largely-silent.

In addition, the liminal position of the Anglican prison chaplain allows him or her to function as an intermediary between inmates and officials. There can be a balance between a figure perceived as official and powerful enough to receive grievances or even fears and make a tangible difference, yet sufficiently detached from the source of the actual or perceived problem to appear safe and approachable. Authors like Scott have specifically argued for the potential of the chaplaincy role to bring about challenge in the prison context.[74]

Once again, we are not suggesting that the current system is the *only* way of achieving the ends described above. There are other mechanisms which could be conceived of which might function and have merit: for example, it could become mandatory that every prison has an official 'Lead Counsellor' who is trained to counsel prisoners and is backed up by a specially established independent organisation or network. This might achieve success in terms of winning prisoner trust, and providing a system for internal oversight and a conduit for communication. Such a system, however, would have to be set up from scratch and does not exist in Great Britain at the present time. The statutory regime of Anglican prison chaplains, on the contrary, does. We would like to emphasise that we are not asserting that the current establishment framework is the *only* method of achieving these benefits; rather we are observing the system as it has evolved and the benefits that it currently confers. The present discussion is grounded in how things are, rather than how they might be.

4.3.3 The chameleon character of clergy employment

Turning now to the legal framework beyond establishment, the way in which UK employment law deals with ministers of religion is another complicated and ongoing story.[75] However, for present purposes, the salient point is that British courts have essentially moved away from a position where there was at least a strong presumption that ministers of religion were bound by spiritual rather than temporal ties;[76] as such, their working arrangements were not subject to the jurisdiction of secular courts. The courts will now examine the circumstances on a case-by-case basis, and decide whether there was an intention to create legal relations as far as state contract law was concerned. The courts have been and remain crystal clear that they will not impose a contract where this would be a legal fiction, and would fly in the face of the parties' understanding and beliefs.[77]

In respect of contract law, this is a relatively orthodox conclusion. In fact, an intention to create legal relations is a necessary element of any contract. However,

74 D. Scott, *Heavenly Confinement: The Role and Perception of Christian Prison Chaplains in North East England's Prisons* (LAP Lambert: Saarbrucken) 2011.

75 See, e.g., *Sharpe v Worcester Diocesan Board of Finance Ltd* [2015] EWCA Civ 399; Moore v President of the Methodist Conference [2013] UKSC 29; *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73.

76 *Re National Insurance Act 1911* [1912] 2 Ch 563.

77 *Macdonald v Free Presbyterian Church of Scotland* [2010] All ER (D) 265 (Mar).

the legal framework has been flexible enough to recognise that the status and role of religious ministers is unique. Instead of categorising clergy as employees or self-employed persons, the courts have been prepared to adopt different definitions for various contexts. Chameleon-like, ministers are effectively able to be employees for some purposes, but not others. Perhaps the most striking and significant context where this plays out relates to vicarious liability. In the case of *Maga*[78] a Roman Catholic priest was treated as an employee solely for the purposes of a claim in tort with the agreement of all parties to the litigation.

Vicarious liability attaches to an employer where an employee commits a tort which is related to his or her employment.[79] However, the matter is always particularly complicated where the tortious conduct is contrary to the express commands and desires of the employer: see, for example, the recent litigation involving Morrisons supermarkets, in which the Supreme Court disagreed with the Court of Appeal as to where the boundary lay.[80] The Supreme Court found an employer vicariously liable for a vicious and unprovoked assault which an employee inflicted on a customer entering a petrol station kiosk. In such cases the courts are required to determine if there is a sufficient nexus between the tort and the employee's role to fasten the employer with liability for the conduct. It is not relevant whether the employer was at fault or in any position to prevent the harm. Vicarious liability is a form of strict liability. The Court of Appeal determined that there was an insufficient link between the assault and the employment relationship to justify the imposition of liability, but the decision was finely balanced and, as we have seen, the Supreme Court took the opposite view.

In *Maga* the Court of Appeal had to consider how these principles might apply where a Roman Catholic priest had groomed and assaulted a boy who was not part of the church congregation and with whom he did not have a spiritual relationship, but whose trust was nevertheless gained in part by the priest's standing in the local community. The court found that there was a sufficiently strong connection between the tortious assault and the role to which the priest was appointed in order to justify the imposition of liability on the diocese. In reaching this conclusion, the judges applied essentially the same legal principles as they would for a secular employee in an unusual working context.

In *JGE*,[81] the Court of Appeal went even further, and was prepared to expressly find that the priest was in a position 'akin' to employment, *for the purposes of vicarious liability*. Thus, the legal framework has adopted a creative and flexible approach to the employment status of religious ministers. It is possible for an individual to be treated as an employee for some purposes, but not for others. The Roman Catholic diocese in the *JGE* case did not succeed in using its theological position to justify avoiding vicarious liability, but the court engineered its finding to achieve this outcome without altering the status of Roman Catholic priests in

78 *Maga v Roman Catholic Archdiocese of Birmingham* [2010] EWCA Civ 256.
79 *Lister and Others v Hesley Hall* [2001] UKHL 22.
80 *Mohamud v W.M. Morrison Supermarkets plc* [2014] EWCA Civ 116; [2016] UKSC 11.
81 *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938.

contract law.[82] In allowing clerics to adopt this chameleon legal existence, judges have strengthened the rule of law in a number of important respects.

First, they have maintained the basic principle of freedom of contract, and have refrained from imposing what must necessarily remain voluntary obligations where this was clearly never the intention of the parties (and the motivation for avoiding it was spiritual, rather than economic). Thus, they have avoided any allegation of having retrospectively altered the fundamental rules of contract law, or driving a coach and horses through the Article 9 rights of the parties involved.

Second, they have prevented a situation where religious beliefs could be a mechanism for ousting the jurisdiction of the courts and depriving vulnerable victims of deliberate wrong-doing (tragically often of a heinous nature) of an action in tort. It would be incompatible with concepts of natural justice and fairness to simply state that because the Roman Catholic Church (or any other faith organisation) had a doctrinal objection to treating its clergy as employees, it could enjoy complete immunity in terms of vicarious liability. Put another way, the chameleon solution avoids a victim of sexual assault being informed by a court that he or she has no claim, because to allow a cause of action would be incompatible with the spiritual beliefs of the perpetrator and/or the organisation for which he or she worked.

Consequently, treating ministers of religion as a special case and dealing with them as such proves to be beneficial for all parties to the litigation, and to the legal system as a whole. Ironically, in later cases, which are arguably less satisfactory, unfortunate decisions have been made on the basis of inadequate attention being paid to the beliefs of the parties. At present, where vicarious liability is concerned, it could be argued that, if anything, too little (rather than too great) emphasis is placed on the unique dimension which a religious context may give to cases.

In *Various Claimants*,[83] the Supreme Court found that lay brothers in a religious order could be vicariously liable for the actions of one another. The decision was heavily influenced by *JGE* and relied heavily on the principle of a relationship akin to employment. However, unlike the connection between a priest and his bishop, monks or nuns have a relationship ordered upon family, rather than working or quasi-employment lines. The British legal system does not impose vicarious liability upon married people for the torts of their spouse, so it is not self-evidently appropriate to impose vicarious liability upon individuals who choose to 'marry' their religious order. Arguably, the Court was comparing apples and oranges in this case, and ought not to have applied the principles in *JGE*. Just as those who form their long-term adult relationships on the basis of marriage or civil partnership are not responsible for the torts of their spouse or civil partner, arguably those who enter into alternative family relationships should not be liable for the torts of their elected spiritual family. Religious brotherhoods and sisterhoods are understood by their members

82 Ibid.

83 *Catholic Child Welfare Society and Others v Various Claimants (FC) and Others* [2012] UKSC 56.

(at least in a traditional Christian context)[84] as being based on familiar rather than employment structures. Significantly, had the Court adopted a more nuanced understanding, it would not have left the victim without a solvent defendant to sue, given that the perpetrator had an employer who was also found to be liable. Importantly, the case also confirms the proposition that more than one party may be vicariously liable for the same tort.

Thus, in general terms, from the perspective of tort, treating religious contexts differently from other settings is beneficial for the administration of justice and the rule of law. If anything, it would be preferable for judges to pay more attention to the factors which genuinely make religious contexts unique and address these in the application of legal rules.

4.3.4 Oaths

The Oaths Act 1978 acknowledges that the legal system in England and Wales provides for an oath to be taken on Holy Scripture.[85]

The Act specifically provides that the oath shall be valid and binding, even if it is later revealed that the person taking it had no religious belief at the time it was sworn.[86] This provision would need to be applied only in the case of a person who, either through cynicism or mistake, had opted to swear an oath, despite not having any underlying faith conviction. The Act also explicitly provides for individuals to take a solemn oath if this is more appropriate to their wishes and beliefs.[87]

The continuing appropriateness of oaths in criminal proceedings was debated by the Magistrates' Association in 2013, and the majority of members opted to retain it.[88] The practice is not uncontroversial and faced some criticism after a trial in 2015 was halted when a Muslim witness swore on the Bible, rather than the Quran.[89] The judge decided that his evidence could not be accepted in that form, and ordered that a new trial be commenced.[90]

However, it was accepted by all parties, including the unfortunate judge, that this decision had been a mistake. The witness asserted that he had been happy

84 See, e.g., the Rule of St Benedict: Order of St Benedict, 'Rule of St Benedict', http://www.osb.org/rb/text/toc.html; also the Rule of the De La Salle brothers themselves: De La Salle, 'The Rule of the Brothers of the Christian Schools', Rome (2008), http://www.lasalle.org/wp-content/uploads/pdf/institucionales/fsc_rule.pdf.

85 Oaths Act 1978, s. 1(1).

86 Ibid., s. 4(2).

87 Ibid., s. 5.

88 R. Pigott, 'Motion of End Bible Oaths in Court Defeated', *BBC News* (19 Oct 2013), http://www.bbc.co.uk/news/uk-24588854.

89 C. Howse, 'The Trouble with Swearing an Oath on a Holy Book', *The Telegraph* (7 Mar 2015), http://www.telegraph.co.uk/comment/11455853/The-trouble-with-swearing-an-oath-on-a-holy-book.html.

90 H. Saul, 'Judge Stops Robbery Trial when Muslim Witness Swears on Bible instead of Koran', *The Independent* (28 Feb 2015), http://www.independent.co.uk/news/uk/crime/judge-stops-robbery-trial-when-muslim-witness-swears-on-bible-instead-of-koran-10075745.html

to take an oath on the Holy Book of the country in which he lived and, as noted above, the Oaths Act 1978 is explicit that oaths remain valid and binding even if they are for some reason made without the support of an appropriate underlying belief. The person giving evidence was satisfied with the proceedings, and statute prevented third parties from attacking his evidence on religious grounds.

The problem arose not really from the law, but the manner in which it had been understood and applied. Until such time as scientists working on artificial intelligence develop judicial droids, we shall be reliant on fallible human beings who will make mistakes whatever legal rules are in place. It is not difficult to conceive of circumstances in which a judge might call into question a solemn affirmation on the basis of some practical or administrative error.

In any case, the present legal framework is flexible and inclusive. It allows individuals giving evidence or making a commitment in public life to swear a religious oath, and one that is in keeping with their individual beliefs. For instance, Hindus sometimes opt to swear by the Gita and Sikhs by Guru Nanak.[91] Equally, those with no religious belief are free to solemnly affirm, and the law is explicit that their word in this context is to be given equal weight to that under oath. Everyone may express themselves in the way in which they feel is most appropriate for them when making a profound, personal commitment to act with honour and integrity. Yet, there are some citizens who wish to remove this freedom and impose a blanket secular affirmation in all cases.[92]

It is hard to see how this could be defended as a move in the direction of advancing individual or collective liberty. Ian Abrahams, the magistrate who proposed the motion to remove religious oaths, argued that the spiritual dimension made people no more likely to tell the truth, and maintained that the point to be emphasised to individuals was that if they lied in court they could face a prison sentence.[93] However, Nick Freeman, a solicitor arguing for the retention of religious oaths, asserted that for some people the religious character of an oath has meaning, and that '[t]he way you stamp out lying under oath is to punish people who do so, not to get rid of the religious oath. By changing it you are depriving people with a religious faith of the chance to reinforce their evidence by swearing on their religious text'.[94]

Both points have merit. First, it is not clear that the religious or secular character of a promise to tell the truth relates to an understanding on the part of those making it that they will be punished by the legal system if they break their word. Second, in removing the choice to swear a religious oath, some people of faith would feel a sense of genuine deprivation. Why should they suffer this detriment?

Prior to the introduction of same-sex marriage, there were some religious voices who argued that the proposed changes would damage faith communities and others opposed to same-sex unions, as it would deprive them of an exclusively

91 Howse, n. 89 above.
92 Ibid.
93 Pigott, n. 88 above.
94 Ibid.

heterosexual legal institution.[95] The persuasive response from many within the LGBTQ community can be summed up with the slogan 'If you don't like gay marriage, don't get gay married'.[96] Introducing same-sex marriage for those who wanted it in no way prevented other citizens, whose beliefs were incompatible with such unions, from contracting a heterosexual partnership with the legal status of marriage, and ordering their relationships in accordance with their beliefs. In a similar way, citizens who wish to continue to have the capacity to make religious oaths could equally assert 'If you don't like religious oaths, don't make one'. Allowing all citizens to make the choice which feels most appropriate for them, in expressing their commitment to the truth and the judicial process, would appear to be a more positive way forward than forcing some citizens to conform with the worldview of others.

The current legal framework uses the serious nature of religious oaths to reinforce the strength of the commitment that individuals are making to the words which they speak. Arguably, some secular individuals might even feel an added sense of solemnity, conferred by the understanding that their personal promise is *as important* as an oath which a religious person would make before their conception of the divine. Therefore, religious oaths might be seen to enhance the rule of law by supporting the collective belief in the importance of legal proceedings, the powers of the courts and evidence given before them. In recent debates, magistrates have considered them sufficiently valuable and powerful to retain, and they are not simply a vestige of former times, which have survived because they have been overlooked and ignored.

As a secondary point, the present system is respectful and inclusive of all beliefs and none. Making a solemn promise and tying this commitment to your sense of integrity and identity is a grave and deeply personal matter. It is not a coincidence that the verb 'to perjure' has retained its reflexive character in the transition from French to English. For some individuals, both religious and Atheist, a personal commitment to the truth is greater and more fundamental than the fear of prison or other state-imposed punishment. Consider, for example, Camus' lyrical and heartbreaking account in *L'Étranger*[97] of a man whose sense of self is so linked to a commitment to truth and his lived reality that he ultimately faces execution for his refusal to abandon this.

For many people, telling the truth in a courtroom or other solemn situation is about something more profound than the avoidance of prison, and this conviction is by no means confined to religious people (indeed, it would be insulting, as well as inaccurate, to suggest that it was).

95 See our analysis of this argument in J. García Oliva and H. Hall, 'An Inevitable Challenge to Religious Liberty and Establishment', *Oxford Journal of Law and Religion*, Vol. 3, No. 1 (2014) 25–56.

96 M. Moore, 'If You Are Against Gay Marriage Don't Get Gay Married', *Pink News* (25 Oct 2016), http://www.pinknews.co.uk/2016/10/25/michael-moore-if-you-are-against-gay-marriage-dont-get-gay-married.

97 A. Camus, *L'Étranger* (Gallimar: Paris) 1972.

In light of this, moving from a legal framework where all individuals are free to make this kind of public commitment in a manner which reflects their personal worldview, to one in which everybody would have to make a secular affirmation, would curtail, rather than promote, liberty and diversity. Given that individuals of faith would mostly be well aware that the format had been changed and that the option of making a religious oath had been removed, this could indeed be perceived as a 'deprivation', as rightly argued by Freeman.[98] Some witnesses, and indeed others, could feel alienated by a process which they perceived as having dismissed their worldview as an option, and enforced a secular one. This would not be conducive to the effective functioning or legitimacy of the justice system. Consequently, the current framework, which respects and accommodates all spiritual and secular outlooks, is better equipped to bolster the rule of law than one stripped of its religious dimension.

4.3.5 Violation of sepulchres

Violation of sepulchres is a common law offence which appears to have its origins in responding to the problem of 'body-snatching'.[99] It is a crime without a direct human victim, although clearly the relatives of the recently bereaved may suffer if a corpse is disturbed, or even if this is known to be a threat. However, the offence has been used in recent years, in relation to ancient tombs, where no close family members of the deceased were in a position to be distressed.

In 2004 some teenagers, who broke into an ancient grave in Greyfriars Kirkyard in Edinburgh,[100] hacked the head off a corpse and used it as a puppet,[101] were convicted of this offence. Judge Lord Wheatley[102] observed during the case '[w]hat lies behind this offence, and always has done, is the notion that in any civilised society there should be respect for the dead. The essence is the dead should be treated with a proper degree of reverence'.

Therefore, while it might be debatable whether this offence is religious in nature, there is undoubtedly a recognition that it exists because there is an accepted societal understanding that human remains should be treated with dignity. This is a shared cultural belief, which for many people has an ethical or spiritual dimension. As the maximum penalty for the offence is life imprisonment, desecrating a sepulchre is manifestly treated differently from other acts of criminal damage or vandalism, which do not have the potential to attract such a lengthy sentence. The relevant conduct is specifically criminalised precisely

98 Pigott, n. 88 above.

99 P. Ferguson and C. McDiarmid, *Scots Criminal Law: A Critical Analysis* (Edinburgh University Press: Edinburgh) 2014, 440.

100 'Corpse Ghouls Walk Free', *The Scotsman* (23 Apr 2004), http://www.scotsman.com/news/corpse-ghouls-walk-free-1-1009541.

101 'Teenagers Deny Violating Corpse', *BBC News* (25 Mar 2004), http://news.bbc.co.uk/1/hi/scotland/3568075.stm.

102 'Corpse Ghouls Walk Free', n. 100 above.

because of the 'belief' held by citizens that the dead should be 'treated with a proper degree of reverence'.

The social response to this kind of behaviour is demonstrated by press reports which suggest that the crime haunted the offenders in later years.[103] The conviction appears to have been one factor in one of the defendants losing his job as a traffic warden in later life. While we do not condone the persecution of offenders after they have served their lawfully imposed sentences, this story does suggest that irreverent behaviour in relation to graves is still a cause of shock and outrage. Although the offence is rarely used, it appears that there is support within Scottish society for maltreatment of graves to be treated as a serious and special offence under criminal law.

The surprising survival and acceptance of what at first sight appears to be a somewhat archaic crime demonstrates a subjective, moral dimension to the rule of law, especially where beliefs are concerned. Many legal rules are observed, and their enforcement is supported, not simply because they have been lawfully enacted, but because they are in harmony with widely held values. Although 'body-snatching' is no longer a widespread problem in Scotland, there remains a general consensus that disturbing human burials in a disrespectful manner is culpable behaviour worthy of criminal sanction. Thus the respect which the juridical system accords to beliefs about the dignity of the dead and the feelings of their loved ones helps to strengthen the rule of law, as it can be seen that this offence safeguards values and social norms which remain important to many citizens.

4.4 How do the perspective and teaching of different religious belief groups influence perceptions of the rule of law?

Undoubtedly, this is a question which needs to be approached with caution. It is important to bear in mind the radically different nature, hierarchical structure and self-understanding of the various religious belief groups that are represented in contemporary Britain. It would be easy for commentators coming from a Western Christian paradigm to fall into the trap of asking what does a particular denomination teach about the rule of law. For many Christian denominations, this would be a viable investigation, at least on one level. Many Churches have a clear hierarchical structure, with a body and process for declaring official policy and doctrine. They also frequently have their own body of canon law or comparable regulations, and a long tradition of engaging with the secular state in which they are set. They may well have an official position in relation to the rule of law. It might, however, be legitimate to question how far this official position of the Church reflects the beliefs and opinions of its membership. For example, some polls suggest that the attitude of Anglicans at grassroots level towards

103 'Former Grave Robber Loses Job after Colleagues Discover Past', *Daily Record* (31 Jul 2009), http://www.dailyrecord.co.uk/news/scottish-news/former-grave-robber-loses-job-1032478.

same-sex marriage is radically at odds with the institutional stance of the Church of England, as asserted by its Archbishops.[104]

So even though such a line of enquiry would be possible and meaningful in many Christian contexts, at least, generally speaking, the value and scope of its conclusions would be open to debate. However, when this kind of enquiry is transposed into different faith settings, it can become even more problematic in a number of respects.

For many religious belief groups, there is no single figure or assembly able to give a definitive or universal interpretation of doctrine. Within Judaism[105] and Islam,[106] individuals frequently seek advice from local scholars and experts when faced with moot points. Furthermore, not all such groups accept even the abstract idea of a single truth, and do not regard a set of shared abstract beliefs as the tie which binds them together as a community. For example, many of those who self-define as Neo-Pagan would not regard this as requiring them to subscribe to a single, common theological understanding of the universe.[107]

Moreover, not all religious beliefs embrace the idea of exclusivity, membership or identity. Many branches of Buddhism, for example, not only operate without the need or desire to foster conformity in terms of belief,[108] but can be embraced alongside other faith traditions. Even among faith traditions which invest members with a sense of identity and shared doctrinal beliefs, these beliefs are not concerned with earthly politics: Zoroastrianism is arguably a good example of a religious path in this category.[109]

Furthermore, as we discussed in Chapter 3, for many of our very specific purposes, some Humanist and Atheist organisations can be properly termed 'religious belief groups'. They are held together by shared beliefs on religious matters and function along lines which are parallel to organised religion as it is conventionally understood. The selection of religious belief groups which we deal with in each chapter will be slightly different, to give a variety of perspectives and, in some instances, to avoid repetition,[110] and in Chapter 7 we include the British

104 H. Sherwood, 'The Church of England Backs Same-Sex Marriage', *The Guardian* (29 Jan 2016), https://www.theguardian.com/world/2016/jan/29/church-of-england-members-back-same-sex-marriage-poll.

105 J. Baskin and K. Seeskin (eds), *The Cambridge Guide to Jewish History, Religion and Culture* (Cambridge University Press: Cambridge) 2010.

106 J. Esposito, *The Future of Islam* (Oxford University Press: Oxford) 2010.

107 S. Hawkings, *Goddess Worship, Witchcraft and Neo-Paganism* (Zondervan/Harper Collins: Michigan) 1998, 35.

108 M. Spiro, *Buddhism and Society* (George All & Unwin: London) 1971.

109 M. Boyce, *Zoroastrians: Their Religious Beliefs and Practices* (Routledge and Kegan Paul: London) 1987.

110 In particular, because different Christian denominations in Britain have had differing experiences of the operation of the legal system and continue to have different links with the state, it is logical to consider them separately when discussing matters such as the rule of law and parliamentary sovereignty. However, in doctrinal terms they are likely to occupy broadly the same theological territory in relation to concepts such as human rights. Similarly, among the Dharmic religions, there are instances of convergence and divergence, and we have tried to tailor our analysis to reflect this, attempting to strike a balance between avoiding repetition on the one hand and doing justice to each unique tradition on the other.

Humanist Association. As with some of the faith traditions we have discussed, it is not in the nature of Humanism to demand subscription to any identifiable creed when an encouragement of free thought is one of its core values.[111]

Taking all of these factors into account, it would not be fruitful to ask simply 'How do the various religious belief groups represented in contemporary Britain regard the rule of law'?' Put starkly, it is not helpful to explore what members of X tradition believe about the rule of law (or, indeed, the other constitutional pillars discussed in later chapters). In fact, it is not the primary function of most religions to provide a blueprint for the political structure of society, and even religions which have firm doctrine and mechanisms to interpret and maintain this do not generally deal in detail with how to arrange the Constitution of a nation state. In some ways, it could be argued that Christianity is an excellent paradigm example of this. The religious wars and political turmoil of the seventeenth century, discussed in Chapter 1, were possible precisely because there was no clear answer as to what model of government would be desirable and pleasing to the Christian God.

Yet, at the same time, as we noted earlier, ideas from Christian Scripture and tradition fuelled and inspired the debate. All sides believed that their perspective was at least compatible with Christian values and ideas, and religious faith and identity have enormous influence in shaping the thoughts and actions of individuals. It does not necessarily give the answer to political questions, but it may provide intellectual building blocks from which to construct an answer.

Given the diversity of human character and creativity, it is not surprising that there will be huge variation in the sculpture constructed from the available blocks. This is why it is only to be expected that not all Methodists, Orthodox Jews or Hindus will come to the same conclusion about the rule of law or human rights in a particular context. Equally, however, the building blocks do provide some common possibilities and constraints.

To take a dramatic example to illustrate this point, the sanctity of human life is a core principle within all branches of Judaism. The rabbinic principle *pikuach nefesh*[112] means that almost any of the commandments may be suspended in order to preserve an endangered human life. The willingness to dispense with other fundamental requirements indicates just how profound and far-reaching this imperative is. For example, if an individual is faced with starvation or eating non-kosher food, he has a duty to eat non-kosher food. Equally, taking a sick person to the hospital both justifies and necessitates driving on the Sabbath. In light of this, it would be extremely difficult to construct any governmental or legal system which requires the destruction of human life, and claims that this is compatible with a Judaic understanding of the world. Because the ideas and values imparted by religious traditions are important to those who subscribe to them, it is useful to consider how these might relate to abstract concepts such as the rule of law,

111 British Humanist Association, 'Humanist Thinking', https://humanism.org.uk/humanism/humanism-today/humanists-thinking.

112 R. Eisenberg, *The JPS Guide to Jewish Traditions* (The Jewish Publication Society: Philadelphia) 2004, 548.

not in an effort to assert what members of the different groups might think in concrete terms, but to understand some of the factors which mould their thinking on these topics. Bearing all this in mind, we now turn to consider what building blocks might be imparted by the perspectives of religious groups in Great Britain.

4.4.1 The Church of England

The established denominations in Great Britain are all Christian, and these relationships are important for members of these Churches in terms of their understanding of temporal authority. Furthermore, until the twentieth century, Judaism was the only non-Christian faith group with a strongly entrenched presence in England, Scotland and Wales. Therefore, religious minorities were seen mainly in terms of Christians from outside the establishment settlement. The other Christian groups also inevitably understood their identity and place within society in the shadow of establishment, and were well aware that they were not worshippers within the 'state religion'. Essentially, establishment moulded the perceptions of all Christian groups in one way or another.

For this reason, in this chapter (and also in the following discussion of parliamentary supremacy in Chapter 5) we will consider the teachings of these and other Christian denominations separately, whereas we will not always divide other faiths into distinct subgroups. This clearly should not be taken to imply that the non-Christian faith groups are of any lesser significance, but simply to deal with the nuance of the particular cultural paradigm in which we are working, shaped by its history.

For good or ill, the Church of England is part of the constitutional framework of the state.[113] The unique position of Anglicanism means that the beliefs which it fosters must, in general terms, be supportive of the legitimacy of the state and its Constitution. Its own canon law exists within the corpus of national law and has the power to enact legislation.[114] Some of its bishops sit in the House of Lords and take part in the debates of that chamber. Given that the Church forms part of the constitutional structure, exercises its own legislative powers, and actively assists in the general legislative process via its participation in the House of Lords, its doctrines generally approve accepted constitutional principles and the legal system more widely. In fact, it could not reject the system of governance to which it owes its form and powers, if not its existence.

Indeed, in the recent debates before the introduction of same-sex marriage in England and Wales,[115] there were voices from within the Church asserting that a legal change (even in relation to family rather than constitutional law), which left the secular rules at odds with Anglican doctrine, would be an innovation that would lead to the breakdown of establishment.[116]

113 The Church of England, 'Detailed History', https://www.churchofengland.org/about-us/history/detailed-history.aspx.

114 The Church of England, 'Measures', https://www.churchofengland.org/about-us/structure/churchlawlegis/legislation/measures.aspx.

115 Marriage (Same Sex Couples) Act 2013.

116 García Oliva and Hall, n. 95 above.

As we argued in a journal article,[117] this extreme position was difficult to defend, not least because the state introduced divorce long before the Church accepted the possibility of dissolving a valid marriage (as opposed, of course, to setting aside an invalid one). Even today there continues to be a gulf (in fact, in some instances a yawning chasm) between what the state permits in connection with remarriage and what the Church will allow. Secular law would have no difficulty in validating the fifth marriage of an individual divorced for adultery four times and demonstrating not a shred of remorse for the pain this behaviour had caused to others. The Church, however, would take a very different line. The establishment relationship managed to flex, rather than snap, when faced with legal divergence in the past. Nevertheless, the very fact that the argument could be made sufficiently credibly, and could also require consideration and rebuttal, demonstrates the undeniably close bond that continues to exist between state and canon law.

Yet equally, secular law on divorce, and now same-sex marriage, prove that a close bond does not equate to state and canon law being coterminous on all matters. Therefore, it is helpful to find support for the rule of law elsewhere within Anglican formularies. Article 37 of the Thirty Nine Articles deals with 'the Civil Magistrates', and affirms the legitimacy of the power of the Crown and the right to govern and uphold the laws of the realm.[118]

> Of course, the individual clauses of the Thirty-Nine Articles are now somewhat antiquated. The official position of the Church of England is that Anglican clergy and officers are required to affirm them as part of the historic development of the Church, while acknowledging that the Gospel must be proclaimed afresh in every generation.[119] In other words, they are not accepted wholesale as a modern statement of belief. A useful test case is Article 37 itself, and its explicit endorsement of capital punishment.[120] The Church of England debated capital punishment in the General Synod (its governing body) in 1983, and passed the following motion: 'That this Synod would deplore the reintroduction of capital punishment into the United Kingdom sentencing policy.'[121]

117 Ibid.

118 Book of Common Prayer, Articles of Religion, Article XXXVII.

119 See further, The Church of England, 'Being An Anglican', https://www.churchofengland.org/our-faith/being-an-anglican.aspx, and in particular the oath required of clergy, readers and some lay officers: 'I, [name], do so affirm, and accordingly declare my belief in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness; and in public prayer and administration of the sacraments, I will use only the forms of service which are authorized or allowed by Canon'.

120 Book of Common Prayer, Articles of Religion, Article XXXVII: 'The Laws of the Realm may punish Christian men with death, for heinous and grievous offences'.

121 The Church of England, 'Justice Issues and Prisons', https://www.churchofengland.org/our-views/home-and-community-affairs/home-affairs-policy/justice-issues-prisons/capital-punishment.aspx.

Therefore, despite the content of Article 37, the Church is supportive of the state having rejected capital punishment, and by extension arguably the developments from the European Court of Human Rights which now require the state to protect even non-citizens from exposure to capital punishment abroad in some circumstances.[122]

Taken in the round, the Church of England can be seen as a national Church which is part of the constitutional framework, and therefore is, in broad terms, supportive of the Constitution and its principles. However, the Church as an institution is not required to approve of every aspect of secular law. On the contrary, it promotes the idea that people of faith should engage in constructive criticism of political and social decisions, both individually and collectively, if they conflict with core Christian values, such as compassion for the suffering and oppressed. Also, in many of its policy statements,[123] the Church demonstrates an ethical concern for the weak and those at risk. Furthermore, it is important to remember that engaging in dialogue within the democratic framework is in itself supportive of the rule of law, and a commitment to bringing about change from within the existing system.

It is also useful to note that the Church itself has a conception of the rule of law in relation to its internal framework. This was one of the identified principles of canon law common to the whole Anglican Communion.[124] The definition and understanding adopted is narrower in scope than that which sits within the UK Constitution, but it is undoubtedly compatible with it:

1 The Law binds the bishops, clergy and lay officers.
2 The law may bind lay people who do not hold office.
3 No-one shall be above the law. All institutions and persons in positions of authority or office, ordained and lay, shall act in accordance with law.
4 Rights, laws and duties are enforceable within a church by its own ecclesiastical authorities by executive action or judicial process.
5 Any person or body injured by a violation of law should be able to obtain a remedy before a competent ecclesiastical authority in accordance with the law.
6 A voluntary declaration, or other form of assent prescribed by law, to comply with ecclesiastical jurisdiction, binds the person who makes that declaration.[125]

122 European Court of Human Rights, Press Unit, 'Factsheet, Death Penalty Abolition' (Feb 2015), http://www.echr.coe.int/Documents/FS_Death_penalty_ENG.pdf.

123 See, e.g., its statement on immigration and asylum: Church of England, 'Immigration and Asylum', https://www.churchofengland.org/our-views/home-and-community-affairs/asylum-and-immigration.aspx; and on social care: Church of England, 'Social Care', https://www.churchofengland.org/our-views/medical-ethics-health-social-care-policy/socialcare.aspx.

124 Anglican Consultative Council, *Principles of Canon Law Common to the Anglican Communion* (Anglican Communion Office: London) 2008.

125 Ibid., Pt 1, Principle 5.

This understanding is, of course, shared by the Church in Wales and the Scottish Episcopal Church in Great Britain, also being provinces within the Anglican Communion. A crucial caveat must be added, however. The Church of England does not give unconditional support for the rule of law in all circumstances, and its understanding of the concept must undoubtedly be of a substantive nature, with an inbuilt ethical compass. Within its Holy Days, it commemorates as saints and exemplars men and women who resisted the lawful but immoral exercise of power. For instance, Dietrich Bonhoeffer is remembered on 9 April and Oscar Romero on 24 March.[126]

4.4.2 The Church in Wales

As explained in the previous chapter, until it was forcibly disestablished by Act of Parliament, the Church in Wales formed part of the Church of England. It therefore shares the same theological tradition set out above and, as already outlined, its members were not actively seeking to break away from it. Indeed, pre-establishment ecclesiastical law remains part of the law of the Church in Wales unless and until the Church elects to alter it.[127] (As Doe observes, however, *in general*,[128] it no longer applies as it does in England as part of the law of the land. Instead, it takes effect by virtue of the statutory contract.)[129]

Consequently, as a matter of overarching principle, the Church in Wales shares with its sister province the stance of being broadly supportive of the state legal framework, including the rule of law. Having existed within the Church of England from the sixteenth to the twentieth centuries and has only reluctantly departed, very similar doctrinal considerations apply to those set out above in relation to England.

4.4.3 The Church of Scotland

As our historical discussions above have revealed, the Church of Scotland has always had a very different relationship and bond with temporal authority from that of the Church of England. Nevertheless, its teachings have always recognised and upheld the right of secular authority to operate in the secular sphere. Obedience to lawful and just commands of the earthly state is one facet of the lifestyle it promotes. This is reflected by section 3 of the Church of Scotland Act:[130]

126 The Church of England, 'Common Worship Daily Prayer', https://www.churchofengland.org/prayer-worship/worship/texts/daily2.aspx.

127 Welsh Church Act 1914, s. 3.

128 There are exceptions, e.g., in relation to marriage and burial. This is one reason why, as discussed in Chapter 2, the Church in Wales is more appropriately described as 'quasi-established' than it is as 'disestablished'.

129 See further, N. Doe, *The Law of the Church in Wales* (University of Wales Press: Cardiff) 2002, 15–18.

130 Church of Scotland Act 1921, s. 3.

> Jurisdiction of civil courts.
>
> Subject to the recognition of the matters dealt with in the Declaratory Articles as matters spiritual, nothing in this Act contained shall affect or prejudice the jurisdiction of the civil courts in relation to any matter of a civil nature.

Furthermore, as can be seen from its Standing Orders,[131] the life and governance of the Church is arranged in accordance with identifiable rules and principles. These incorporate provisions which guard against conduct that would amount to an arbitrary exercise of authority or offend the concept of natural justice: for example, decisions in contentious cases must be made by impartial judges who have heard the relevant evidence:

> 74. Announcement. Before parties are heard in any contentious case the Clerk shall read the following announcement, viz – 'The Commissioners are reminded that justice requires that all the pleadings at the bar should be heard by all those who vote in this case, and that their judgement should be made solely on the basis of the pleadings.' Immediately before a vote is taken in such a case, the Clerk shall read the following further announcement, viz – 'The Commissioners are reminded that only those who have heard all the pleadings at the bar are entitled to vote in this case.'

Thus, as we observed with the Church of England, the Church of Scotland runs its own internal affairs in way which affirms the concepts underpinning the rule of law. Therefore, in adopting this template, it encourages its membership to value and support the principle.

4.4.4 The Roman Catholic Church

The Roman Catholic Church has a long tradition of co-operating with temporal authority, and a respect for secular law continues to be enshrined in its canon law.[132] Yet, as with the Church of England, it is clear that obedience to secular laws is not an absolute mandate. Moreover, the mere fact that conduct is permitted by secular law will not, in and of itself, be sufficient to render it licit in the eyes of the Church. There is also an acknowledgement that secular law may not be in compliance with the beliefs and values of the Church. For example, Can 1259 states: 'The Church can acquire *by every just means* of natural or positive law permitted to others'.[133]

131 The Church of Scotland, General Assembly, 'Standing Orders', http://www.churchofscotland.org.uk/__data/assets/pdf_file/0012/705/standing_orders.pdf.

132 See, e.g., CCI Canon 231, s. 2, which deals with the payment of laymen fulfilling certain offices, and specifically demands that the prescripts of civil law be observed; and Canon 1259, which stipulates that the Church may acquire temporal goods in any way which, by natural or positive law, it is lawful for others to do. It therefore expressly accepts that it may properly make use of secular law.

133 CCI Canon 1259 (emphasis added).

In other words, the Church is permitted to make use of secular law in this regard only in so far as it is just in the Church's understanding, and the same logic applies to the Roman Catholic faithful. Furthermore, it is clear that the Church will not defer to or recognise civil law that it deems to be in conflict with its teaching: 'Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise'.[134]

In contrast to the canon law of the two Anglican provinces described above, the canon law of the Roman Catholic Church has to be drafted to fit an international framework. There are, of course, provisions which allow for specific regulations to apply to designated locations and people,[135] but the general norms of the Church have to be of worldwide application. An unqualified affirmation of civil law would be difficult to justify, as there are many Roman Catholics living within oppressive, totalitarian regimes with little or no regard for human rights.

In addition to this, as noted above, there are national and cultural differences when it comes to defining the juridical concept of the rule of law. An international Church cannot engage with only one understanding of a secular legal term when multiple understandings of it exist among the temporal systems that affect its members, and its explicit doctrines cannot shape the views of all members in relation to a concept which is not universally shared. However, the core aspects of the particular understanding of the rule of law, which forms a pillar of the UK Constitution, are compatible with, and indeed supported by, the theology of the Roman Catholic Church. Squeezed into a nutshell, Roman Catholic teaching supports secular law where it is for the common good and is compatible with natural law and justice.[136]

For instance, Aquinas in the *Summa Theologica* deals with the need for law to be promulgated for it to be valid:

> In order that a law obtain the binding force which is proper to a law, it must needs be applied to the men who have to be ruled by it. Such application is made by its being notified to them by promulgation. Wherefore promulgation is necessary for the law to obtain its force.[137]

This relates directly to the ideas discussed above: that in the United Kingdom laws must be known, clear and identifiable. It can be seen, therefore, that in this regard the principle of Roman Catholic teaching and the constitutional understanding of the rule of law are coterminous. Nevertheless, as we have seen, it should not be forgotten that there is a dark side to state law in relation to the Roman Catholic

134 CCI Canon 22.

135 See, in particular, CCI Part 2, 'Hierarchical Constitution of the Church, Section 2, Particular Churches and their Groupings.

136 T. Aquinas (trans. Fathers of the English Dominican Province), *The Summa Theologica of St Thomas Aquinas*, 2nd and revised edn, 1920, Questions 90–108.

137 Ibid., Question 90, Art. 4.

Church in Great Britain. We should not underestimate the degree to which the state, historically, used its powers of lawmaking and enforcement in ways that were deeply oppressive, both for the Roman Catholic Church as an institution and for its individual members. As a result, many worshipping communities and families chose to break the law in preference to abandoning their faith, and were forced to risk torture and death in doing so.[138] This is now part of our history, as these forms of abuse, alongside legislation excluding Roman Catholics (or any other religious group) from Parliament and universities, would not be compatible with the rule of law as it operates in contemporary Britain. The plain pancake of legality has now been enhanced with the treacle and butter of human rights and substantive ethical considerations.

Thus, in functional terms, the Roman Catholic Church is in a similar position to that of the Churches discussed previously. It is essentially supportive of the rule of law as it is embedded within the Constitution, because its structure fits well with its own ethical stance. However, like other Christian denominations, it teaches its followers that there may be extreme circumstances in which deference to secular law must be sacrificed to higher spiritual and moral principles.

4.4.5 The Methodist Church

Methodism grew out of the Anglican tradition, and it was the intention of its founder, John Wesley, to revitalise, rather than escape from, the Church of England.[139] It, therefore, had embedded within its ideological DNA a respect for the rule of law and those who administered it, and Wesley was anxious that his followers should be respectable and law-abiding citizens. Even in the nineteenth century, as Methodism went its own way and also splintered into numerous factions, this trait continued within the predominant groups. It has even been argued by academics that Methodism was a force in holding back the tide of revolution.[140] Despite a passion for social justice, the consensus of opinion within the movement was that it was preferable to work towards reform from within the political and social system, rather than seeking to overturn it. Munsey Turner quotes the response of the local preachers in Burnley, when asked about individuals using sermons as a vehicle to further radical politics:

138 J. Childs, *God's Traitors: Terror and Faith in Elizabethan England* (Oxford University Press: Oxford) 2014.

139 Despite the controversy sparked by the very elderly John Wesley's laying hands on individuals for the purposes of ordination, in response to the refusal by the Church of England to assist the rebel side in the American War of Independence, he died as he had lived, a member of the established Church: see further H.D. Rack, *Reasonable Enthusiast: John Wesley and the Rise of Methodism* (Epworth Press: London) 3rd edn, 2002, Ch. XIV 'I Live and Die in the Church of England: Methodism in the 1780s'.

140 J. Munsey Turner, *John Wesley: The Evangelical Revival and the Rise of Methodism in England* (Epworth: Peterborough) 2002, Ch. 7 'Did Methodism Prevent Revolution?'.

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> We are unanimous in our opinion that as preachers of righteousness and followers of Christ whose Kingdom is not of this world, we ought to respect every ordinance of man for the Lord's sake, whether of the King as Supreme Governor of the Realm or of the magistrates acting under authority.[141]

However, this respect for the legal system and its principles again should not be equated with blind and unquestioning acceptance of everything done with appropriate legal sanction. The same pattern of respect for the rule of law as applied by the state, but with vigilance as to how this might be worked out in practice, can be found in Methodism as in other Christian denominations.

The explicit statement of 'Vision and Values' made by the contemporary Methodist Church in England and Wales draws out the importance of justice for this faith group: 'The Church exists to be a good neighbour to people in need and to challenge injustice'[142] and 'we share with one another our concerns about things which do not seem right, or cause trouble in our community, or appear unjust'.[143]

Therefore, the principles of justice and fairness rooted in the rule of law, as well as the impact their operation may have on the poor and vulnerable, are serious concerns for modern Methodists.

4.4.6 Judaism

Sadly, Judaism too has known its share of persecution, oppression and marginalisation. Throughout much of its history, the faithful have had to live as members of a religious and ethnic minority group. Unlike Christianity and Islam, Judaism has not been closely tied to regimes that exercise temporal power for much of the last two thousand years. Consequently, it is no surprise that the interface between religious law (Torah) and secular law is dealt with in the Talmud.[144]

As a general rule, observant Jews are expected to abide by the laws of the country in which they reside.[145] The guiding principle which has emerged is *dina d'malchuta dina*:[146] in other words, the law of the land is the law. In essence, where there is no conflict between religious and secular law, and the state has a legitimate interest, the observant Jew should obey the law. So, for instance, it is clear that a good Jew should pay taxes and avoid speeding; neither of these injunctions conflict with the Torah, and it is appropriate for secular authorities to be using tax money to fund hospitals and legislative power to minimise road

141 Ibid., 141.

142 The Methodist Church, 'Vision and Values', http://www.methodist.org.uk/who-we-are/vision-values.

143 Ibid.

144 Collective authoritative rabbinical teachings.

145 J. Rosen, *Understanding Judaism* (Dunedin Academic Press: Edinburg) 2003, 111.

146 S. Atlas, 'Dina D'Malchuta Delimited', *Hebrew Union College Annual*, Vol. 46 (1975) 269–88.

accidents. Clearly, as the experience of the Jewish community in historic times demonstrates, the position is more complex where there is a conflict.[147]

As might be expected, Rabbinic opinion is divided over exactly when the principle of *dina d'malchuta dina* is engaged. The entirety of Jewish law is predicated on the opinion of an expert.[148] It is generally accepted that the principle applies between individuals and government; it is also generally accepted that it does *not* apply to ritual matters, while everything in between is up for grabs. A detailed assessment of when it should be called upon is beyond the scope of this book (and our expertise), but for present purposes the point is that Judaism, broadly understood (encompassing Reform, Conservative, Orthodox and Ultra-Orthodox groups), acknowledges the legitimacy of the law of the land in 'public law' matters. In a state such as the United Kingdom, which guarantees the right to both hold and manifest religious beliefs,[149] this should equate to a general support for the rule of secular law within its proper remit.

Furthermore, respect for justice and the rights of the individual, combined with a need to contribute to communal life, is another theme which is common to Jewish groups across the religious spectrum. For instance, the UK-based Movement for Reform Judaism defines its core values as being:

> Creating inclusive, egalitarian communities, valuing difference
>
> Bringing Holiness into the world by seeking meaning in our lives and a just society for all
>
> Treasuring the autonomy of the individual, Jewish tradition and the insights of the wider World.[150]

Speaking recently from an Orthodox perspective, Rabbi Jonathan Sacks made the following comments on the current political debate surrounding immigration to Britain:

> They [his parents and their contemporaries] were doing what Jews have been doing since the days of the prophet Jeremiah, twenty six centuries ago, when he wrote to the Jews who'd been taken as captives to Babylon. Don't weep, he said. Seek the welfare of the city where you have been taken, and pray to God on its behalf, for in its peace you will find peace. In other words, keep your identity but contribute to society. That's what my parents taught us to do. They had a Hebrew phrase for Britain. They called it a *malkhut shel chessed*, a 'kingdom of kindness'.[151]

147 M. Motis Dolander, 'Estructura interna y ordenamiento juridico de las aljames judias del Valle del Ebro', *Segunda Semana de Estudios Medievales* (1993) 111–52.

148 Rosen, n. 145 above, 111.

149 Art. 9 ECHR.

150 The Movement for Reform Judaism, 'Our Core Values', http://www.reformjudaism.org.uk/about.

151 J. Sacks, 'Living in a "Malkhut Shel Chessed", a "Kingdom of Kindness"', The Office of Rabbi Sacks (28 Oct 2014), http://www.rabbisacks.org/living-malkhut-shel-chessed-kingdom-kindness.

In summary, observant Jews of all shades of opinion acknowledge the importance of respecting state law, but also of contributing towards a cohesive and mutually respectful society. This, therefore, suggests a similar desire to that observed in a Christian context: to collaborate with the rule of law in so far as it furthers justice and enables the state to carry out its proper duties, while at the same time questioning any abuses which are problematic. Again, we have an example of a faith group supporting the rule of law, provided that it has an acceptable moral guiding compass.

4.4.7 Islam

As we have observed within Judaism and Christianity, Islam encompasses a wide spectrum of opinion on most topics. In addition to the divergence between Sunni and Shia, there are of course many shades of thought within these two groups. Furthermore, in common with all other religions, Islam cannot exist in a cultural vacuum. It is not always easy, either for insiders or external observers, to disentangle what is an Islamic belief or practice from what is in reality a Pakistani or Turkish cultural belief or practice. In fact, as Lewis observes, young British Muslims are increasingly using Islam to critique their parental culture.[152]

In contrast with Roman Catholicism, for example, there is no structure with accepted spiritual authority to determine what a demand of the faith is, and what a matter of cultural habit or preference is instead. So, for instance, the Congregation for the Doctrine of the Faith pronounced in 1976 that it was no longer mandatory for women to cover their hair in church,[153] and this position was affirmed when the 1983 Code of Canon Law did not reissue previous canons about veiling.[154] However, within Islam there are several perspectives on the religious obligations of women in terms of dress and veiling, and no single hierarchical structure to arbitrate.[155] This leaves young British Muslim women able to argue that the habits adopted by their mothers, grandmothers and aunts are either greater or lesser than the demands of their faith, properly understood. Of course, the flip side of the coin is that since there is no universality, some anthropological commentators, such as Green, prefer to talk of 'Islams', rather than Islam.[156] (Although Green's study is historical, the recognition of a lack of homogeny, and even more crucially the *equal validity* of differing strands within a faith tradition, is a valuable insight into the contemporary context).

152 P. Lewis *Young, British and Muslim* (Continuum: London) 2011, 150.

153 The Vatican, Sacred Congregation for the Doctrine of the Faith, Declaration *Inter Signiores* on the Question of Admission of Women to the Ministerial Priesthood, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19761015_inter-insigniores_en.html.

154 The Vatican, Code of Canon Law 1983.

155 R. Aluffi Beck-Peccoz, 'Burqa and Islam', in A. Ferrari and S. Pastorelli (eds), *The Burqa Affair Across Europe: Between Public and Private Space* (Ashgate: Farnham) 2013, 15.

156 N. Green, *Bombay Islam: The Religious Economy of the West Indian Ocean 1840–1915* (Cambridge University Press: Cambridge) 2011.

In other words, if an individual or group understands a particular practice as being a requirement of Islam, then it is indeed a requirement of *their* Islamic faith. This conception is, of course, reflected in the approach of the ECtHR in interpreting Article 9, as it is now well established that a belief or practice need not be doctrinally orthodox or accredited in order to be protected.[157] In the *Eweida* and *Chaplin*[158] cases, for instance, the fact that mainstream Christian denominations do not teach that their members are required to wear a visible cross was no barrier to the applicants arguing that the display of such a symbol was a manifestation of their beliefs for the purposes of Article 9.

However, it would be disingenuous, and in pragmatic terms futile, to pretend that the current geopolitical situation does not complicate the dialogue in respect of understandings of Islam. When terrorist atrocities and acts of war are being committed by individuals and groups asserting that they are motivated by the teachings of Islam,[159] to treat all incarnations of the faith as having parity in terms of authenticity becomes deeply problematic. Put another way, are the elements of the ideology espoused by ISIS and similar movements, which drive acts of hatred, in fact present within the various understandings of Islam adopted by the majority of people living in Britain who self-identify as Muslim? If the answer is no, then to simply give both the label 'Islam' is troubling. Such terminology potentially exposes people following an ideology devoid of such deeply destructive elements to misunderstanding and stigma. Tragically, at the time of writing, Islamophobic incidents are dramatically on the rise in Great Britain, and Muslim citizens are increasingly subject to abuse for their spiritual identity and choices.[160]

So we are caught on the horns of a dilemma. On the one hand, our general default position is to accept that people have a right to self-identify as *they* choose, and that it is neither appropriate nor rational for third parties to deny this personal election. We were critical of organisations like the British Human Association for attacking the validity of citizens' self-identification on census forms, and we have also acknowledged that it is difficult to defend the proposition that there is one, authentic and objectively discernible form of Islamic doctrine and practice, against which beliefs and praxis can be judged. However, equally, we do not wish to ascribe the same terminology to differing worldviews, when some contain highly destructive elements and others do not.

One possible response is to adopt a similar approach to that taken by Hirsi Ali,[161] and impose an additional layer of labelling on different groups within Islam, from the perspective of an external observer. However, taking on this model, we do not assert that we wholeheartedly endorse all of her contentions

157 *Eweida and Others v United Kingdom*, App. no. 48420/10, [2013] ECHR 37 (ECtHR).

158 *Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust* [2010] ET 1702886/2009.

159 A. Hirsi Ali, *Heretic: Why Islam Needs a Reformation Now* (Harper: London) 2015.

160 T. Jeory, 'UK Entering Uncharted Territory of Islamophobia after Brexit Vote', *The Independent* (27 Jun 2016), http://www.independent.co.uk/news/uk/home-news/brexit-muslim-racism-hate-crime-islamophobia-eu-referendum-leave-latest-a7106326.html.

161 Hirsi Ali, n. 159 above, 13–19.

and, partly for this reason, we do not adopt the same labels which she ascribes to differing groups. In her controversial work, *Heretic*, Hirsi Ali assumes a role in relation to the Islamic community, which is somewhere between critical friend and dissenting member. She argues that there are aspects of Islamic doctrine itself which do in reality run counter to liberal values such as tolerance, individual autonomy and respect for the dignity and freedoms of others, regardless of their beliefs or status. Furthermore, she divides the global Muslim community into three groups: (i) Medina Muslims; (ii) Mecca Muslims; and (iii) Modifying Muslims. In Hirsi Ali's terminology, Medina[162] Muslims are fundamentalists who believe in forcible conversion and the imposition of Sharia law by violent means if necessary. In contrast, Mecca Muslims are 'loyal to the core creed and worship devoutly but are not inclined to practice violence'.[163] Hirsi Ali states that the vast majority of the world's Muslim population belong to this group. In her analysis, there is an inevitable cognitive dissonance between their faith and their experience of living with rationalism, modernity and science, but Mecca Muslims learn to cope with this disconnect. In her view, one strategy for achieving this is 'cocooning', or opting to live within self-contained and frequently self-governing enclaves. However, her third and final category is that of Modifying Muslims, who are attempting to generate reform and dialogue, and find ways of living out their faith without a cognitive dissonance.

We are not in a position to analyse in detail the strengths and weaknesses of Hirsi Ali's analysis, nor do we adopt her categories. However, we suggest that a similar categorisation exercise might be helpful in resolving the dilemma set out above. Instead of three groups, we will divide understandings of Islam into two categories for our purposes: Exclusivist and Pluralist Muslims. Exclusivist Muslims are those who regard an Islamic regime governed by Sharia as the only acceptable context for the faithful to make a home, and clearly this group would include Hirsi Ali's Medina Muslims, but would also encompass individuals from the more conservative end of the Mecca Muslims, who would never contemplate using violence to further this religious end. They might be present in Britain upon what they regard as a temporary basis, with a plan to return 'home' to another jurisdiction when economic conditions allow;[164] or they may be saving money in order to move for the first time to what they regard as a better religious environment.

Pluralist Muslims, our second category, would of course include the more open Mecca Muslims, as well as the Modifying Muslims. Pluralist Muslims have an understanding of Islam which accepts that living in a non-Islamic regime is entirely compatible with a devout lifestyle, provided that individuals enjoy sufficient freedom to live in accordance with their faith and have the required inclination and self-discipline to do so. In choosing to live in Great Britain, either

162 Hirsi Ali adopts the term 'Medina' because this group aims to emulate the warlike approach and enforced conversion tactics adopted by the Prophet Muhammad after his move to Medina: Hirsi Ali, n. 159 above, 15.

163 Ibid., 16.

164 G. Marranci, *The Anthropology of Islam* (Berg: Oxford) 2008, 55.

by rejecting the option of emigration if they were born here, or having elected to come and remain if they were born elsewhere, the vast majority of British Muslims are by definition Pluralist.

Having said that, it cannot be denied that there is a complexity for Muslims living outside Muslim majority countries where the rule of law is concerned, because initially Islam developed in a context where both temporal and spiritual power were wielded by the Prophet Muhammad.[165] Furthermore, the strong links between temporal and spiritual authority, and a fusion of religious and secular law, continued in many succeeding Islamic regimes.

Contemporary opinion is divided about whether, in an ideal context, there should be a boundary between sacred and secular authority. Some surveys have suggested that a significant number of Muslims in the West regard the introduction or maintenance of Islamic principles within political and legal life as being optimal,[166] and we do not deny the existence of Exclusivist Muslims in Britain, as elsewhere. However, it is essential for us to highlight that many others argue that observance of Islamic law should be voluntary to be of any true spiritual value, and assert that Islam has tragically lost touch with its proud heritage of multiculturalism and tolerance.[167]

Yaran notes that Muslim countries were among the founding states of the United Nations.[168] This demonstrates willingness by the states concerned to be an active and collaborative part of a legal framework, which is shared with non-Muslims and not constructed along specifically Islamic lines. Of course, this is not uncontroversial, and at the present time there is an ongoing conversation within the Muslim world about the degree of accommodation that is desirable and acceptable, both in relation to Muslims living in non-Muslim majority contexts and vice versa.[169] Although we have referred to Exclusivist and Pluralist Muslims, we do not claim that the issues are black and white, with no shades of grey in between. Against this backdrop, however, it is significant that in a speech on British and Islamic Values given by the Secretary General of the Muslim Council for Britain,[170] Dr Shuja Shafi, the rule of law was cited as a gateway to inclusion and justice for Muslims in this society: 'Nevertheless, it is the Magna Carta and the rule of law that I point to when I talk to young people and encourage them that they do have a stake in this society'.[171]

165 Z. Sardar and Z. Abbas Malik, *Introducing Islam* (Icon Books: Royston) 2004.

166 M. Lutz, 'Muslim World: Poll shows Majority want Islam in Politics; Feelings Mixed on Hamas, Hezbollah', *Los Angeles Times* (5 Dec 2010), http://latimesblogs.latimes.com/babylon beyond/2010/12/hamas-hezbollah-islam-sharia-public-opinion-muslim-countries.html.

167 Sardar and Abbas Malik, n. 165 above, 125.

168 C. Yaran, *Understanding Islam* (Dunedin Press: Edinburgh) 2007, 89.

169 Ibid.

170 The Muslim Council of Britain is a national representative Muslim umbrella body with over 500 affiliated national, regional and local organisations, mosques, charities and schools, http://www.mcb.org.uk.

171 The Muslim Council of Britain, 'Speech by Dr Shuja Shafi on British and Islamic Values' (29 Jan 2015), http://www.mcb.org.uk/shuja-shafi-speech-british-values-290115.

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Although there is a genuine debate in both global and domestic Muslim circles about the compromises which can and should be made when living in a non-majority Muslim context, there is widespread recognition that all countries, Muslim or otherwise, are distinct. Clearly, living in a country that permits the Islamic faith to be practised openly and with respect is essential to Muslims. Followers of this faith in Britain in general find this compatible with their conscience because it is possible to live freely and practise their faith (the same statement could, of course, be made about Christian and Jews), and given that these rights and liberties are supported by secular law, there are strong pragmatic reasons to endorse the British constitutional model.

Furthermore, Muslims also have a duty to keep promises and covenants, and to act honourably in their dealings with others,[172] and there is a strong imperative to promote justice for all. It is very difficult to see how these key spiritual obligations could be fulfilled by anyone not respecting the rule of law. Therefore, for the majority of British Muslims, who should properly be thought of as Pluralist, the teachings of their faith encourage individuals to support and engage with the values underlying the rule of law.

4.4.8 Hinduism

We now turn our attention to the Dharmic faiths, and must therefore change our approach in some respects. First, it is advisable to be cautious in terms of what we infer from the Western term 'religion' in this context. Is this even an appropriate label to apply to what are arguably ways of life, which bind together spirituality, philosophy and ethics?[173] Certainly, it is acceptable only if we understand the term to mean something beyond a belief system which is isomorphic to the Abrahamic faiths, as these Eastern faith groups do not assert a monopoly on spiritual truth and sit more naturally within a pluralistic context. Although they have holy writings, they do not have a corpus of 'law' laid out in codes in the same sense as the Abrahamic faiths.[174]

This is not to suggest that these spiritual traditions have not shaped highly sophisticated legal systems where they have been an integral part of an intellectual and cultural paradigm.[175] Although Hinduism does not seek to answer questions akin to the debates about 'Church and state', which have moulded Anglican history and self-understanding, it undoubtedly does provide its followers with ideas and perceptions which shape their approach to the underlying questions and principles at issue.

172 S. Al-Oadah, 'Obeying the Law in Non-Muslim Countries', *Islam Today*, http://en.islamtoday.net/node/604.

173 A. Bahnot (General Secretary, Hindu Council UK), 'The Advancement of Dharma: A Discussion Paper for Faith Leaders', Hindu Council UK (20 Nov 2011), http://www.hinducounciluk.org/images/stories/report/the_advancement_of_dharma.pdf.

174 W. Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press: New Delhi) 2012, 545.

175 See, e.g., Menski, ibid.; M.A. Nathan, *Buddhism and the Law: An Introduction* (Cambridge University Press: Cambridge) 2014.

Hinduism is an ancient faith, encompassing many strands of belief and a rich diversity of traditions, customs and practices. However, there are some themes common to all branches, one being the central endeavour to live a virtuous life. What this means in terms of individual duties and concerns varies both according to the characteristics of an individual and the stage of life which that individual has reached. The priorities and duties of a 10-year-old girl at school are not seen to be the same as a woman of 40 with a family and profession or an elderly great-grandmother of 95. Equally a priest will not have the same obligations as a warrior.

This proposition flows from the concept of Dharma, revealed in the Holy Scriptures (Vedas). Dharma is the spiritual power which drives all natural forces and also which gives human beings the potential to live a virtuous life (and ultimately to escape the cycle of rebirth and unite with the Divine). Dharma is a universal force, but its practical requirements will depend upon the precise circumstances. Perhaps one parallel for those from a Judeo-Christian background might be drawn from the words of Ecclesiastes 3:1-8:

> For everything there is a season, and a time for every matter under heaven:
> a time to be born, and a time to die;
> a time to plant, and a time to pluck up what is planted;
> a time to kill, and a time to heal;
> a time to break down, and a time to build up;
> a time to weep, and a time to laugh;
> time to mourn, and a time to dance;
> a time to throw away stones, and a time to gather stones together;
> a time to embrace, and a time to refrain from embracing;
> a time to seek, and a time to lose;
> a time to keep, and a time to throw away;
> a time to tear, and a time to sew;
> a time to keep silence, and a time to speak;
> a time to love, and a time to hate;
> a time for war, and a time for peace.

The demands of Dharma and a virtuous life will depend upon the circumstances and the characteristics of the individual. This is the focus of Hinduism, so at one level drawing out a perspective on the rule of law is problematic. However, at another level, it is possible to see that the core values of the faith are very much in harmony with the principle. For all Hindus a virtuous life requires a commitment to serve both divinity and humanity, and serving humanity necessarily encompasses an interest in charity, compassion and justice. In helping to maintain a peaceful society, in which individuals can work, study and prosper while suffering can be minimised, the rule of law is in harmony with the goals and desires of those striving to live in accordance with Hinduism. Therefore, while the teaching may not be direct, the effect may be profound. Those who follow this pathway should be drawn towards supporting the application of just and transparent rules, and the resolution of disputes without corruption or oppression.

4.4.9 Sikhism

Similarly, Sikhism promotes the values of community, justice and mutually respectful relationships:

> At the same time, we have to knock down the false barriers of belief and exclusivity between religions. When we do so, we will see our different religions as they really are: overlapping circles of belief, in which the area of overlap is much greater than the smaller area of difference. In that area of overlap, we find common values of tolerance, compassion and concern for social justice: values that can take us from the troubled times of today, to a fairer and more peaceful world.[176]

Furthermore, Juss[177]argues that Sikhism, on its collective journey to date, has been a moderate 'middle of the road' religion, which is essentially in harmony with the values of a liberal, secular state. Principles such as equality, universal brotherhood and hard work mean that Sikhs are often motivated by their faith to strive towards a cohesive and mutually respectful society. Disregarding laws imposed by a democratically elected administration, disturbing the peace or depriving others of their rights would be incompatible with Sikhism in the eyes of many of its followers.

It is also interesting to note that in many cases the Sikh community has been successful in advocating a relaxation of legal rules which are problematic for them in terms of observance. For instance, before laws on religious equality were introduced, Sikhs gained an exemption from the general obligation to wear motorcycle crash helmets.[178] Again, the interest in pursuing and gaining legal concessions demonstrates a desire to work within the legal framework, rather than seeing it as an oppressive or negative force.

4.4.10 Buddhism

In common with Hinduism, Buddhism is not concerned primarily with temporal politics. In fact, for many branches of Buddhism, the primary spiritual focus is on promoting a detachment from all earthly concerns and distractions. Notwithstanding, it is important to remember the rich diversity of traditions, beliefs and practices within Buddhism, and some Buddhist groups present in contemporary Britain very actively promote social and political engagement as part of their worldview – for example, Soka Gakkai.[179]

176 I. Singh, 'Religion and Society: A Sikh Perspective', Network of Sikh Organisations (20 Oct 2013), http://nsouk.co.uk/religion-and-society/#more-105.

177 S. Juss, 'The Secular Tradition in Sikhism', *Rutgers Journal of Law and Religion*, Vol. 11 (Spring 2010) Pt 2, 271, 275.

178 Motorcycle Crash Helmets (Religious Exemption) Act 1976.

179 Soka Gakkai International UK, http://www.sgi-uk.org.

It is also the case that Buddhism has a long heritage of engaging both directly and indirectly with secular legal systems. The Buddha is believed to have given rules to his followers in order to assist them on their spiritual journey.[180] It is, therefore, not unreasonable to assert that Buddhism does have an internal concept of law, but equally it is important to exercise a degree of caution in doing so. As Voyce[181] argues, the concept of law within a Buddhist paradigm is not in reality isomorphic to the concept of law within either the Abrahamic traditions or within Western secularism.

First, the rules given by the Buddha are not spiritual goods in themselves, akin to the Jewish understanding of Torah, but effectively mere tools. In other words, the rules are a means rather than an end. So, unlike the Abrahamic faiths, there is no acceptance of a need to abide by rules for their own sake and a support for the rule of law in that sense. However, there is an understanding that observing the rules will advance progress towards spiritual liberation, whereas breaking them will not.[182]

Moreover, a person acting in accordance with the Buddha's teachings will not engage in the kind of activities that would be prohibited by the secular legal system in Great Britain, such as assault, murder, theft or fraud. The idea is that if such a person is free from greed, hatred and delusion, he or she will inevitably not be drawn into such forms of behaviour, any more than water will flow uphill. Therefore, in practical terms, pursuing Buddhism will encourage citizens to live in a way that supports the rule of law.

In addition, there is also some strong indirect support. The Vinaya is part of the canon of Buddhist sacred texts, although multiple versions of it have been transmitted by different schools of Buddhism.[183] It is believed to be the word of the Buddha himself, and is effectively a Buddhist monastic legal code. Many of the principles within it have influenced secular law in Buddhist societies[184] and much of the substance resonates with the rule of law, as it exists in contemporary Britain.

For instance, the principle of *nullum crimen, nulla poena sine lege* (no crime or penalty unless there is a law to justify it) effectively prohibits retrospective and arbitrary sanctions. Furthermore, there must be no punishment without culpability, so those lacking mental capacity must not suffer detriment for actions beyond their control – an idea that chimes with the concept of natural justice. Therefore, taken in the round, Buddhist teachings encourage followers of this pathway to act in a manner which is supportive of the rule of law.

180 R. Gethin 'Keeping the Buddha's Rules: The View from the Sūtra Pitaka', in R. French and M. Nathan (eds), *Buddhism and the Law* (Cambridge University Press: Cambridge) 2015, 63–77, 76.

181 M. Voyce, 'Ideas of Transgression and Buddhist Monks', *Law Critique*, Vol. 21, No. 2 (2010) 183–98.

182 Gethin, n. 180 above, 76.

183 P. Kieffer-Pulz, 'What the Vinayas Can Tell Us about Law', in R. French and M. Nathan (eds) *Buddhism and the Law* (Cambridge University Press: Cambridge) 2015, 46–62, 46.

184 Ibid., 53.

4.4.11 Paganism

Very similar considerations apply to Paganism. Once again, despite not being prescriptive, the label 'Paganism' embraces a variety of worldviews[185] which, in general, value community in the widest sense and respect the rights of individuals. Consider, for instance, from the Wiccan branch of Paganism, the three-fold law:

> Mind the Threefold Law you should,
> Three times bad and three times good.

and the close of the Wiccan Rede:

> Eight words the Wiccan Rede fulfill:
> An' it harm none,
> Do what ye will.

In essence, these statements champion freedom of individual choice, but with the accompanying notion of individual responsibility for choices. Actions should not have a negative impact upon others, and both good and evil deeds will rebound on the doer with triple impact.

While the imposition of external rules do not at first appear to sit comfortably with this, recalling the philosophical basis of the rule of law (at least in the formal sense outlined by Raz) has, at its heart, a respect for personal autonomy and a need to safeguard the vulnerable from the consequences of anarchy. Couched in those terms, it can be observed that although Paganism does not sit within a structure which imposes juridical notions that support an express doctrine of the rule of law, it does foster an understanding which would lead its followers towards supporting the concept in general terms, while being alert for potential abuses and transgressions in relation to individual freedoms.

4.4.12 Zoroastrianism

Interestingly, much the same point might be made of Zoroastrianism, an ancient faith which straddles the border between Eastern and Western thought patterns. It is a monotheistic faith with surviving scriptures, which tend not to unpack its tenets in great detail. Nevertheless, one of its core maxims is '*Humata, Hukhta, Huvarshta*", which translates as 'Good Thoughts, Good Words, Good Deeds'.[186]

It would be disingenuous to assert that there is an articulated Zoroastrian response to the rule of law. Despite this, it is a religion which encourages a sense of active social responsibility and engagement, and it is interesting to note that the first three Asian MPs in Westminster were all Zoroastrians (and they each stood for a different political party).[187] In upholding the importance

185 The Pagan Federation UK, 'Homepage', https://paganfed.org/index.php

186 Zarathustra, http://www.zarathushtra.com/z/article/overview.htm.

187 P. Allen, 'Zoroastrian Faith Joins Queen's Coronation Celebrations', *The Telegraph* (4 Jun 2013), http://www.telegraph.co.uk/news/uknews/10097326/Zoroastrian-faith-joins-Queens-Coronation-celebrations.html.

of justice and positive collective action, the Zoroastrian faith can be seen to be supporting the rule of law, at least in a functional sense. An acceptance of the need for agreed norms which govern a communal life, taken together with a concern for individual needs, flow from the kind of social engagement which Zoroastrianism promotes.

4.5 Do faith communities make a practical contribution towards the functioning of the rule of law?

Religious groups, including the established and quasi-established Churches, have a role not merely in responding to the rule of law, but also in playing an active part in its administration. It would not be possible to assess all current examples of formal and informal co-operation in this regard, but it is nevertheless helpful to focus on a few instances which illustrate this in practice.

4.5.1 The efforts of religious communities in tackling the problem of spiritual marriage without legal force

An important example of how the social contribution of faith groups may enhance the rule of law is demonstrated by the efforts of some religious communities in tackling the problem of spiritual marriages without legal force.

In fact, the established Churches are not the only religious bodies to collaborate with the state in relation to the rule of law where marriage is concerned. At present, there remains the problem in Great Britain of some religious couples marrying according to the rites of their faith without ensuring that the accompanying civil law requirements are fulfilled. This leaves the parties with no greater claims than any other cohabiting partners in the event that the relationship breaks down, which has serious implications for the economically weaker member of the partnership.

For illustrative purposes we will consider this in the Muslim context, but we are in no way suggesting that the difficulty is confined to Islam.[188] In fact, the issue is not even an exclusively religious one. Many people who have never been through *any* form of marriage ceremony, sacred or secular, still harbour the erroneous belief that they are protected by a mythical institution unhelpfully dubbed 'common law marriage'.[189]

However, a religious setting can increase the chance of misunderstanding arising, as it is easy to see how couples who have experienced a religious marriage ceremony of some sort might wrongly assume that it had legal force, especially if accompanied by 'formal' papers. The risk is even greater where one party originates from a jurisdiction with a very different legal framework, for whom English is a second language, and for whom accessing independent information can be challenging as a result of linguistic barriers.

188 D. Talwar, 'Wedding Trouble as UK Muslim Marriages Not Recognised', *BBC News* (3 Feb 2010), http://news.bbc.co.uk/1/hi/uk/8493660.stm.

189 C. Fairbairn, '"Common Law Marriage" and Cohabitation', House of Commons Library, Briefing Paper 03372 (9 Mar 2017), http://www.parliament.uk/business/publications/research/briefing-papers/SN03372/common-law-marriage-and-cohabitation.

The rule of law

At present there remains the acknowledged problem that a large number of Islamic marriages are unregistered in Great Britain. However, the Muslim community is working positively with the Government to try to improve the position. In January 2012, a Round Table meeting was held at the Foreign Office,[190] and a number of influential members of the Muslim community attended, including Baroness Warsi. The meeting was addressed by Lord Tariq Ahmad with the aim of launching the Muslim Marriage project, which seeks to tackle the issue of unregistered marriages.

It is significant to note that even though a legislative requirement for the registration of Muslim marriage was not ruled out, and was in fact flagged as a probable way forward, it was also made clear that it was crucial to put resources into raising awareness and moving towards a consensual change of culture. Aina Khan, a solicitor involved in the initiative, drew up a number of resources to assist, which significantly included the following:

> A 2-page simple Islamic narrative is being drafted, to be downloaded and given out at Mosques and other places frequented by Muslims. This has been given the support of key Islamic scholars; emphasizing that 'Islam was the first religion to introduce the concept of marriage as a contract, with clear terms to protect the interests of both parties and the children – secret marriages or those that exploit or hurt one party are not acceptable in Islam'.

Remarkably, proper engagement with secular law in order to protect the interests of those involved was effectively presented as a religious obligation for good Muslims, and a failure to register a marriage with the civil authorities, taking advantage of the other party's legal vulnerability, could be said to amount to non-Islamic behaviour. A similarly strong message was given by the Muslim Parliament of Great Britain:[191]

> For the marriage to be properly valid in the UK, it must be registered according to UK law. No Muslim should seek to contract a marriage without the full protection of the law of the land. If the marriage is not registered in a civil ceremony it is not recognised legally, and although the couple may feel married before Allah, they are in effect committing zina (adultery) so far as UK law is concerned. The husband, wife and children would therefore have

190 Duncan Lewis Solicitors, 'Aina Khan and Baroness Warsi Kickstart Muslim Marriage Project' (14 Jan 2014), http://www.duncanlewis.co.uk/news/Aina_Khan_and_Baroness_Warsi_kickstart_Muslim_Marriage_Project_%2814_January_2014%29.html#sthash.u3HEQ64F.dpbs.

191 The Muslim Parliament of Great Britain is 'a forum whose purpose is to debate, campaign and lobby on issues concerning the Muslim community in Britain. It is a non-governmental organisation dedicated to promoting community interests. It operates through a number of committees, each with its own remit. These committees work along with related campaign groups in the country': Muslim Parliament of Great Britain, 'About the Muslim Parliament', http://www.muslimparliament.org.uk/about.htm.

> no rights in law as regards pensions, benefits etc, and the children would be regarded as illegitimate.[192]

On the one hand, it must be acknowledged that the very existence of these statements and campaigns evidences that there is a problem with large sections of this religious community failing to properly engage with the secular legal framework, to the particular detriment of vulnerable women and children. We do not seek to minimise the seriousness of this point. Yet, crucially, influential members of these communities are seeking to engage their fellow believers in bringing about a paradigm shift, and are appealing to the principles of their faith in order to do so.

In some sense, the campaign is aimed at bringing the principle of the rule of law into practice as far as marriage is concerned, and it is trying to ensure that individuals are aware of their rights and obligations, are treated equally and have access to a judicial hearing if wronged. Where parties fail to engage with voluntary aspects of secular law in relation to personal obligations, they are in practice denied the protection of its rule. This situation leaves vulnerable individuals exposed to harm and exploitation. Co-operation between the state and religious authorities, therefore, strengthens the reach and effect of the rule of law.

In this context it is perhaps appropriate to note, in passing, the anxiety sometimes expressed in the popular press over Muslim Sharia law encroaching on British soil.[193] The implication is almost that the rule of law might be undermined by citizens preferring to live in accordance with, or even being coerced into 'opting in' to an alternative religious legal system which would be incompatible with the secular understanding of the rule of law. For instance, Sharia law treats men and women differently for a large number of purposes, in a way that many commentators would view as irreconcilable with a substantive concept of the rule of law which embraces European notions of human rights.

In many ways this debate is primarily sociological, rather than legal, and therefore beyond the scope of this book. The reason for this contention is that the legal framework itself, including the rule of law, has shifted little in this regard, and the questions are more about the use that citizens choose to make of it.

For these purposes, there are two types of legal regulation: that which is universal and involuntary, and that which citizens may opt into by action or express agreement. Clearly, the former binds all citizens, regardless of their religious affiliation. So, if a marriage breaks down, it does not matter what documentation the parties have signed: they cannot oust the jurisdiction of the court to determine the best interests of any children involved if those with parental responsibility cannot agree a way forward. To do so would run counter to the welfare principle at the heart of s. 1 of the Children Act 1989.

192 Muslim Parliament of Great Britain, 'Getting Married – Some Guidelines: Validation of Marriage', http://www.muslimparliament.org.uk/marriage_guidelines.htm.

193 See, e.g., J. Bingham, 'Sharia Law Guidelines Abandoned as Law Society Apologises', *The Telegraph* (24 Nov 2014), http://www.telegraph.co.uk/news/religion/11250643/Sharia-law-guidelines-abandoned-as-Law-Society-apologises.html.

In contrast, with regard to voluntary legal regulation and private matters with no legal effect, Muslims and other citizens have always been free to order their affairs as they see fit. Contractual agreements and wills may be drawn up along Sharia lines if this is the basis upon which the parties choose to operate. There is nothing new or revolutionary about Muslim or Jewish citizens electing to order their affairs in accordance with their religious laws and, at times, making use of the secular courts to enforce agreements. The extent to which religious laws are in harmony with, or contrary to, human rights and other aspects of the constitutional rule of law is, of course, a matter for intense and complex academic debate, although in one sense it is irrelevant given that non-religious citizens frequently enter into contracts or make wills about which the same criticism could be levelled.

There is nothing to stop an Atheist testator in the United Kingdom deciding to leave his entire estate to his son, rather than his daughter. It makes no legal difference whether he did this because (a) he believed that men should inherit and women should be cared for financially by their husbands, (b) he and the daughter had agreed that he would pay out her 'share' early during his lifetime because she needed it when her business became insolvent, or (c) she insulted his pet cat. Provided that he is of sound mind and the formalities are complied with it is equally valid in each case: it does not matter whether his motives are unjust, irrational or even offensive.

Religious and non-religious citizens alike are equally free to order their affairs as they desire within the parameters allowed by the law. If more Muslim citizens are opting to arrange their lives in accordance with the demands of Sharia, it may be interesting and important for academics to explore the reasons behind this. However, it is not something which need directly undermine the rule of law, provided always, of course, that those involved are making conscious and free choices, which is why the problem of unregistered marriages is critical. Having said that, as outlined above, Muslim authorities in Great Britain are commendably seeking to address this issue and strengthen the application of secular law and the reach of its protection.

4.5.2 Religious bodies and individuals, litigants and campaigners in relation to the rule of law

Religious groups also arguably have a role in supporting the rule of law from their position as litigants and campaigners. As outlined above, they are placed to challenge what they perceive as abuse of executive or legislative power and a threat to the rule of law. At times, they do this through judicial means and in their own perceived interest. For example, in *Core Issues v London Transport*,[194] a conservative Christian group protested against a decision by Transport for London not to allow them to run an advertising campaign on the side of London buses proclaiming 'Not gay! Ex-gay, post-gay and proud. Get over it!' It was done in direct response to the Stonewall campaign 'Some people are gay. Get over it!'

194 *R (on the application of Core Issues Trust) v Transport for London* [2014] All ER (D) 285 (Jul).

The Christian group was evidently pleased with its slogan and aggrieved when Transport for London declined to plaster homophobic slogans across its iconic vehicles. The applicant sought judicial review on the grounds of improper purposes, claiming that Transport for London had been unduly influenced by the London Mayor who was concerned about the possible impact of the 'bigot-buses' on his chances of re-election. The court found that the decision had not been made for the improper purpose of advancing a political campaign, and that it was legitimate for the Mayor to express his views on the issue. The decision had ultimately been made by Transport for London on the grounds that the slogan contravened its advertising policy.

Perhaps unsurprisingly, the Christian group involved was not impressed with the decision, describing it as 'contrived and punitive'.[195] However, despite the lack of success, the claim itself arguably had a beneficial influence upon the functioning of the rule of law. Periodic judicial review actions provide citizens with some reassurance that those exercising executive power will be held accountable for their behaviour. They also serve as a disincentive to politicians, officers and civil servants who may be tempted to abuse their discretion. Obviously, faith groups are by no means the only sections of society with a role to play in this process, but they are certainly among the players who contribute by making judicial review applications.

Therefore, in common with other parties who bring such actions to challenge executive decision making, the Christian group in this case was participating in the system of constitutional checks and balances which keep the exercise of power within appropriate bounds. However, it is hardly the raison d'être of faith groups to bring judicial review actions, and this procedure is in any case available exclusively to parties who have *locus standi*. The law allows only those who are directly affected to intervene in this way: the doors of the administrative courts are not open to any party with an inclination to go in and stir the pot.

Similar considerations could be said to apply to individuals who bring private claims in respect of discrimination, family law disputes or other issues which may relate to religion. Faith groups may support members of the faithful in this position, and may on occasions even join as intervening parties,[196] but litigation is by no means their primary purpose or focus. Consequently, while faith groups can and do actively respond when they or their members are subjected to the rule of law, this is not their greatest contribution to the functioning of this principle.

4.5.3 Religious bodies: a voice in the collective dialogue from a liminal place

As outlined above, religious bodies have a significant part to play both in collaborating with the state in relation to the application of the rule of law, and in helping to challenge it from the position of subjects. In addition to these contributions, they have a third and critical crucial role. It is one which owes much to the way in which the establishment framework has reshaped itself to

195 J. Miller, 'Bus Ad Ban Was Lawful', *New Law Journal*, Vol. 164, No. 7618 (2014).
196 See, e.g., *Eweida and Others v United Kingdom*, n. 157 above.

encompass the contributions of other belief communities, and we referred to it in the latter part of Chapter 2.

The penguin wings of the state are no longer used for flying, and their function in swimming relies on the help of more than simply the established Christian communities. The third vital role of all faith communities in relation to the Rule of Law is to be a voice in the arena of public debate, highlighting injustices and campaigning for change. The commitment to social concern and compassion, which is deeply rooted in almost all of the religious traditions, encourages and enables this. Not coming generally from a professional or economic perspective, faith communities are equipped to advocate on behalf of many groups of vulnerable people and to challenge a range of abuses of power, not just through the highly formal channels of litigation but also in more fluid ways at varying levels of our collective life. When the substantive moral dimension to the rule of law appears to be lost in its practical application, faith groups are in a position to point this out. They can and do make a noise when the pancake needs more treacle to be poured on.

The establishment framework has provided a structure and platform from which this can take place, but there is now an expectation that the established Churches will share this platform with other faith groups, where appropriate. The tradition of having religious representatives taking part in public life, at every stratum from the House of Lords to the village fête, has given an opportunity and legitimacy to faith groups in seeking to point out flaws and injustices. Yet, at the same time, it has always been a liminal voice, both connected and disconnected from official power structures. At its best the religious voice can raise concerns and influence the behaviour of secular decision makers, without being tainted with direct responsibility, or political and financial motives.

This can operate in many ways when the rule of law appears to lose its moral way or proper application. Responses and opportunities range widely: comments in the press, local clergy liaising with councillors and sitting on school governing bodies, and chaplains making the needs of the communities that they serve heard in practice. For instance, a number of senior faith leaders in Great Britain (including Archbishop Barry Morgan, primate of the Church in Wales; Rabbi Laura Janner-Klausner, Head of the Jewish Reform Movement; and Shaykh Ibrahim Mogra, Assistant Secretary General of the Muslim Council of Great Britain) spoke in protest at the failure of the United Kingdom to do more to provide a safe haven for Syrian refugees in line with promises which the Government had made. It is striking that the highly influential secular pressure group, Amnesty International, regarded this as a sufficiently important and valuable contribution to highlight it in a press release.[197] While this kind of response may not at first seem to relate directly to the rule of law, it in fact demonstrates

197 Amnesty International, 'Great Britain Has a "Moral Responsibility" to Refugees from Syria Say Faith Leaders' (28 Jan 2015), https://www.amnesty.org.uk/press-releases/great-britain-has-moral-responsibility-refugees-syria-say-faith-leaders.

a sense of responsibility to monitor and comment upon the manner in which legal and executive power is exercised. It enhances the ethical dimension identified in the substantive understanding of the rule of law. It also reveals the role of religious bodies within the modern legal framework, echoing the part played by the medieval Church in questioning excesses and injustices perpetrated by secular authority. In some sense, the penguin is indeed still catching fish, albeit in a radically different manner with very different wings.

4.6 Conclusion

To sum up, on balance our analysis demonstrates that the functioning of the religious dimension to the legal framework operates to enhance the rule of law, as the concept is understood in a British context. There are some problematic elements within the current legal landscape (such as marriage law), but taken in its entirety the vista is a positive one. Moreover, the ideological building blocks supplied by the faith traditions considered also in general terms would encourage adherence to those traditions to respect and support the rule of law (within a liberal democratic society). Finally, we observe that there are a number of practical ways in which faith communities are among the forces in society that support the day-to-day outworking of the rule of law.