Constitutional Law Without a Written Constitution

Trinity College, Dublin

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Lord Sales

Gillian Peele provides a schema for comparing constitutions.[1] She emphasizes the importance of political culture in their operation – 'the complex set of values, attitudes and assumptions, political prejudices and practices that interact with the more formal elements of a constitutional system'.[2] Peele observes that 'the particular mix of modes of argument which will command legitimacy is not something which … is cut and dried or can be nicely measured. It reflects the nuances of a legal culture and the varying weight placed on such values as equality, procedural justice and fairness as well as broad assumptions of social policy. The fact that a court may appeal to a variety of values in the wider society and that the particular mix that will give it legitimacy may change with the passage of time is then one which makes it necessary to look beyond formal legal doctrines for an understanding of how courts interact with the polity.' [3]

Any political order has to satisfy what Bernard Williams calls the basic legitimation demand.[4] This is required in order to secure public consent for the rule associated with that order. A legal system depends on the willing compliance of most persons subject to it.[5]

Hanna Pitkin refers to an ambiguity in the meaning of 'constitution'.[6] It is both the composition or fundamental make-up of a community, a product of its particular history and social conditions – something we *are*, rather than have - and it is the action or activity of constituting, ie something we *do*, reshaping it all the time through our collective activity. The two aspects are linked: 'Except insofar as we *do,* what we think we *have* is powerless and will soon disappear. Except insofar as, in doing, we respect what we *are* – both our actuality and the genuine potential within us – our doing will be a disaster.'[7]

Constitutional law in the UK inevitably has a different character from that in Ireland, since in Ireland it is centrally preoccupied with the interpretation of the text of a written instrument. There is no foundational written constitution in the UK, so the legal rules

[1] G Peele, 'Comparing Constitutions', ch 10 in D Kavanagh and G Peele (eds), *Comparative Government and Politics: Essays in Honour of S.E. Finer* (1984).
[2] Ibid 196-197.
[3] Ibid 203.
[4] B Williams, *In the Beginning was the Deed* (2005).
[5] Tom Tyler, *Why People Obey the Law* (1990).
[6] H Pitkin, 'The Idea of a Constitution' (1987) 37 J Legal Educ. 167
[7] Ibid, 169.

which can be counted as constitutional tend to be more in the nature of general principles which, at certain points, achieve sufficient solidity to be enforced as legal norms. The absence of a written constitution also means that there is no specific body of law which is clearly demarcated as constitutional. Viewed as an aspect of the public law of the state, constitutional law in the UK tends to emerge from aspects of administrative law, which is the law which has the main role in determining the powers and responsibilities of public authorities and the conditions which they have to fulfil in terms of respecting citizen's rights when taking decisions.

At the same time, however, there are statutory texts with constitutional significance. These are studded throughout the regime of administrative and constitutional law and are capable of producing concrete legal effects. British constitutional values and underlying principles have in turn been informed by important texts and the assimilation of statutory reforms within a common law system. These include Magna Carta (1215), the legislation to exclude papal jurisdiction in the sixteenth century, the Petition of Right 1628, the Act to abolish Star Chamber, the Habeas Corpus legislation, the Bill of Rights 1689, the Act of Union of 1707 and the Great Reform Act 1832 and the expansion of the franchise thereafter.[8]

In addition, the Human Rights Act 1998, which incorporates the European Convention on Human Rights into domestic law, functions in many ways as a form of written constitutional law. Under section 3, the courts are required to read statutes in a way which is compatible with Convention rights, so far as it is "possible" to do so. This gives the courts an editorial power, subject to certain limits, to amend the reading of legislation to make it conform with Convention rights. Section 6 imposes a general duty on public authorities to comply with Convention rights when they take action.

In the application of both these provisions, there is a written text to refer to and the main function of the courts is to interpret it. That is all very well as a statement of theory, of course, but the exercise of interpretation is not necessarily easy or straightforward. It calls for an exercise of judgment in relation to which they may well be considerable scope for reasonable disagreement.

The other typical dimension of constitutional law across the world is dividing up responsibilities between different areas of government. The UK is not a fully federal state, but it does have federal elements. There are devolved legislatures in each of Scotland, Wales and Northern Ireland. Their powers are also defined in written instruments, namely the relevant devolution statutes, such as the Scotland Act 1998.

So as a preliminary point I have to explain that there is a lot of what is in reality written constitutional law in the UK, and the significance of the written/unwritten distinction should not be exaggerated. Further, it is generally observed that codified systems also

[8] N. Johnson, *Reshaping the British Constitution: Essays in Political Interpretation* (2004), 14-15.

depend on custom and convention.[9] For this reason Nevil Johnson emphasizes other features of the British constitution which tend to make it distinctive: it is customary, conventional, traditional and informal.[10]

Moreover, jurisdictions with written constitutions also have forms of constitutional law which devolve into judicial precedent, on the theory that the constitutions are to be regarded as 'living instruments' which can be adjusted according to social expectations over time.[11] In this respect, too, they resemble the UK style of doing constitutional law. However, written constitutions are more resistant to change via judicial caselaw than is the case in the UK's common law system. They tend to be more embedded, fixed by the requirement of good faith interpretation of the constitutional text.[12]

Nonetheless, despite the areas of similarity, it is highly significant that there is no comprehensive written instrument with constitutional status in the UK. There are nine major points which flow from this which should be emphasised.

First, the overriding constitutional rule is a very simple one, the sovereignty of Parliament. Anything which Parliament legislates into law as a statute will be accepted as such and applied. The absence of a written constitution like that of the US means that there is no scope for strong form judicial review, whereby a statute can be struck down as unlawful, as judged against that higher form of law.

The principle of the sovereignty of Parliament grew out of the political settlement after 1688 and ideas of local representation. It was reinforced in the course of the nineteenth century by a sense on the part of the courts that Parliament had acquired greater expertise in assimilating information to deal with social problems.[13] It received further powerful impetus in the nineteenth and twentieth centuries from the expansion of the franchise and the growing importance of democratic ideology,[14] together with a reduction in the role of the House of Lords under the Parliament Acts 1911 and 1949, with the result that the sovereignty of Parliament (in reality, of the House of Commons as the elected chamber) is treated as a principle of democratic rule.[15] Ideas of comparative expertise and democratic authorisation continue to inform the development of administrative and constitutional law.

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[9] See eg K. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999); M. Foley, *The Silence of Constitutions: Gaps, 'abeyances' and political temperament in the maintenance of government* (1989).
[10] Johnson, *Reshaping*, 13
[11] M Florczak-Wator (ed), *Constitutional Law and Precedent: international perspectives on case-based reasoning* (2022); D Strauss, *The Living Constitution* (2010), on the US experience; P Sales, 'Long Waves of Constitutional Principle' in J. Varuhas (ed), *The Making (and Re-Making) of Public Law* (2025).
[12] Cf J. Balkin, *Living Originalism* (2011).
[13] N. Duxbury, *Elements of Legislation* (2013), 33-34.
[14] J Dunn, *Setting the People Free: the Story of Democracy* (2005).
[15] Johnson, *Reshaping*, 31.

Second, this means that in the UK the distinction sometimes drawn between constituent law and constituted law does not exist. They collapse into each other. This makes the constitution very flexible. It is easy to amend it through the ordinary process of legislation. This carries advantages in some situations: the constitution is good at absorbing political shocks and changes in the distribution of political forces in society. It also carries disadvantages in other situations, which are the flip side of the advantages. The constitution is open to capture and adjustment by the political party in power in Parliament, which commands a legislative majority, and does not supply a firm point of resistance in the longer term interests of the state. But, of course, what the longer term interests of the state might be is a very contestable question, which is difficult to disentangle from political debate in the present.

However, thirdly, the simplicity of this constitutional rule masks a complex picture. The doctrine of the sovereignty of Parliament means that distinctions which are in fact important in constitutional terms are pushed down to the level of statutory interpretation. A series of constitutional principles and rights are found to be located at that level. They are taken to be so deeply embedded in the UK's constitutional order that the presumption is that Parliament legislates intending to preserve their effect. They thus form a presumptive constitutional order. Presumptive, in that Parliament can if it chooses, and makes its meaning very clear, legislate to override them. In English law this doctrine is given the odd label of the principle of legality. It has been extended to cover certain statutes which are deemed to have constitutional status. If they have that status, the usual principle of implied repeal is not applied. They are only repealed if Parliament expressly makes that clear.

Fourth, operating within the presumptive constitutional order reflected in the principle of legality, the criteria for identifying constitutional principles and rights are vague. They have to be distilled from constitutional history and traditions, dicta in previous cases, and an underlying theory of how a liberal democratic state like the UK should function. In some respects this makes this form of constitutional law harder to formulate and apply than where there is a written constitution and the relevant question is how the positive rights set out in that instrument should be applied. But again, the differences should not be over-emphasised. The constitutional principles and rights in the UK tend to become more definite over time, as they are given authoritative statement in court decisions. Also, it is typical for constitutional rights and principles set out in written instruments to be expressed in very open-textured language, which calls for a good deal of interpretation on the part of the courts. Such interpretation will necessarily draw on constitutional traditions in much the same way, to flesh out and give determinate substance to the written rights as they fall to be applied in particular cases.

Fifth, courts have to be careful not to overextend the principle of legality, since that would end up subverting the principle of parliamentary sovereignty to an unacceptable

degree. The principle of legality has a narrow application and is not applicable as an approach to statutory construction in the absence of a relevant established fundamental right or legal principle.[16] In the *Lightfoot* case,[17] Laws J warned that "[i]f the courts were to hold that more marginal claims of right should enjoy the protection of a rigorous rule of statutory construction not applied in contexts save that of the protection of fundamental rights and freedoms, they would impermissibly confine the powers of the elected legislature." This statement has been endorsed at the highest level in the case of *O v Secretary of State for the Home Department*.[18] By treating the principle of legality with caution and keeping it within narrow bounds, the courts have made a choice to protect the general constitutional principle of democratic choice subject only to limited presumptive constitutional constraints. The scope under a written constitution for wider application of constitutional rights may well be greater, as the German experience tends to indicate.

Sixth, there is no legitimisation of the constitutional order and what the courts, executive and legislature do by reference to a document which has received prior approval in some way by 'the people', and which can therefore supply a sort of root of title in terms of constitutional authorisation. So legitimisation of what the courts and others do in the UK has to proceed by reference to underlying constitutional principles rather than a constitutional text. This explains why the rhetoric of the rule of law and of parliamentary sovereignty is so prevalent in UK judicial decisions. These two principles were identified by AV Dicey – still the leading writer on the British constitution – in his *Introduction to the Law of the Constitution* of 1885 as the two pillars of the constitution. Their rhetorical appeal has been a firm fixture since then.

The criteria for recognising a norm as constitutional revolve around whether it tends to protect the sovereignty and preeminent role of Parliament (as in the two *Miller* cases[19]); whether it tends to ensure respect for the proper separation of powers as between courts and the executive; and whether it reflects established political traditions, including principles of personal liberty and of fair and reasonable exercise of governmental power, which it may reasonably be expected that Parliament intended should be recognised in the interpretation of statutory powers as an aspect of the principle of legality. The criteria for identification of such norms, where there is dispute,

[16] see, eg, *R v Secretary of State for the Home Department, ex p Stafford* [1999] 2 AC 38, 49 per Lord Steyn (the principle of legality had no application, and the relevant wide discretionary power conferred on the Secretary of State could not be read down, because there was "no relevant and applicable principle which could be said to have been the assumption upon which Parliament entrusted the … discretion" to him).
[17] *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, 609.
[18] *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, para 43 .
[19] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; *R (Miller) v Prime Minister* [2019] UKSC 41.

are vague.[20] They are essentially rooted in political and legal tradition, of which case-law is an important part.

Two Scottish cases demonstrate how the norm of parliamentary sovereignty has a radiating effect and tends to qualify or limit other claims to constitutional agency. In the *Continuity Bill* case[21] the Scottish government tested the limits of the powers of the Scottish Parliament under the Scotland Act 1998 to influence or veto the legal rules to be put in place by the UK Parliament to give effect to the Brexit deal between the UK and the EU. The Scotland Act preserves the principle of the sovereignty of the UK Parliament, so the Supreme Court found that the Scottish Parliament lacked the power to affect the legislation of the UK Parliament on this issue. And in the *Indyref 2* decision[22] the Supreme Court held that it was not within competence for the Scottish Parliament to legislate for an advisory second referendum on Scottish independence, since this was designed to put political pressure on the UK Parliament and would undermine its agency in relation to deciding whether to take any action on this topic.

Seventh, according to Dicey's account of the constitution, there is a third part of it which is convention, or political morality. Conventions are not legally enforceable. Two points may be made about them. First, the notion of non-enforceable political conventions continues to play a role in constitutional law. In the first *Miller* case,[23] the Scottish government asked the Supreme Court to give legal effect to a constitutional convention known as the Sewel convention that the UK government would not legislate on a matter affecting Scotland without first seeking to secure the agreement of the Scottish government. The Court rejected this argument. It again drew on established constitutional traditions derived from Dicey's schema to hold that the convention was just a matter of custom and practice which did not have legal force. Secondly, there is a considerable literature about the erosion of the conventional political morality which was such an important part of the unwritten constitution in the nineteenth century. In a work of 2004, Nevil Johnson argued, '… in recent times deference has largely collapsed and the very notion of elite rule is widely rejected. It follows that there are few social and moral resources available in the society to impede the steady withering away of the customary practices by which the constitution itself has been extensively defined. We have, therefore, to face the fact that a customary constitution might in some circumstance require resort to an injection of the kind of explicit principles thought to be characteristic of codified constitutions if it is to survive'.[24]

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[20] P Sales, 'Rights and Fundamental Rights in English Law' [2006] CLJ 86.

[21] (*In re UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; [2019] AC 1022

[22] [2022] UKSC 31.

[23] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

[24] Johnson, *Reshaping*, 19-20.

This perspective supports the general contribution of the Human Rights Act to the current constitutional settlement and the renewed emphasis given to the principle of legality from the 1990s. There has been a shift from political morality to law in terms of control of the executive, which has great powers under the UK constitution because of its holding a majority in the House of Commons in Parliament and consequently its ability to benefit from the doctrine of parliamentary sovereignty.

My eighth major point is that the absence of a written constitution has an impact in terms of securing a clear focus of emotional loyalty to the constitution on the part of the public. The issue of a constitution being able to inspire loyalty on the part of those subject to it is sometimes overlooked. But it is part of the whole legitimation process. To make the comparison with the US, it is clear that the constitutional document itself is the object of a degree of veneration. It provides a focus for loyalty to the constitution. I don't know if this is the case in Ireland. But it is not so easily achieved in the UK. In the eighteenth and nineteenth centuries Magna Carta fulfilled a similar rhetorical role.[25] But that is mainly about fish-weirs and seems outmoded now. I do not think appeals to Magna Carta carry the same resonance today.

This is something of a problem. In an interesting article entitled "Sovereignty and the persistence of the aesthetic" Illan Wall and Daniel Matthews argue that there is an important aesthetic dimension to the construction of the sovereignty of a legal order, alongside political and legal elements.[26] I would call it the emotional dimension of loyalty to the constitution. Any constitutional order requires an element of emotional resonance to sustain public support for it. Judge Learned Hand made this point with force in relation to the US constitution:

> 'Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it'.[27]

The need to find a focus for emotional support for the constitutional order is particularly important in the case of the UK, which does not have a constitutional instrument like the US Constitution to serve as a focus for loyalty and public attachment. Despite its constitutional significance, the Human Rights Act has not inspired this sense of loyalty, partly because the rights it contains are branded as 'European' rather than 'British'. Instead, the UK constitution has to inspire loyalty through a sense that it meets public needs in terms of protection of individual interests, including by allowing fair opportunity for participation in the exercise of political control through the electoral system and to vindicate individual rights by going to court. There is also a need to seek

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[25] Linda Colley, *The Gun, the Ship and the Pen: Warfare, Constitutions and the Making of the Modern World* (2021).
[26] Illan Wall and Daniel Matthews, "Sovereignty and the persistence of the aesthetic" (2024) 87 MLR 1393.
[27] Learned Hand, speech on 21 May 1944, in *The Spirit of Liberty: Papers and Addresses of Learned Hand* (ed. Irving Dilliard, 1954), 190.

emotional resonance in identifying its underlying value in an ethic of liberty, both at the individual and the collective level. An historical sense that the UK's constitutional order has successfully given effect to that ethic over a long time and enabled the country to survive n a world of challenges may also be significant.

Ninth, in the absence of a written constitution, the courts in the UK employ the language of the rule of law and the separation of powers to legitimise and explain their constitutional role, and also the constitutional roles of others. They do this facing in different directions in different contexts, to delimit the role of courts vs legislature, of courts vs the political executive, of courts vs specialised executive agencies, and of the executive vs the legislature, as in the second *Miller* decision.[28]

There is a rich history of the idea of the separation of powers. Montesquieu classically elaborated the three-fold division between executive, legislature and judiciary.[29] This division has proved remarkably resilient as a general organising framework over time.[30] In general terms, it maps fairly readily onto the three central features of liberal democratic states: respect for the democratic principle (the legislature), for a principle of effective state action (the executive) and for the principle of the rule of law (the judiciary). But it conceals considerable differences at the level of detail.

One constitutional boundary that has not emerged in the UK is one between the political executive and the professional or expert executive. In the UK's constitution the executive has a dual role. On the one hand, it emerges from Parliament as the government selected by the majority party, elected on the basis of a manifesto presented to the public. This governing group has responsibility for dealing with the public finances, for the management of public affairs and for initiating legislation.[31] It is the active element of the democratic principle, selected and maintained in power through the political process.

On the other hand, the executive is also the body which has access to the expertise of a professional cadre of civil servants maintained by the state and necessary for the effective fulfilment of a growing range of state functions. According to constitutional theory, this civil service exists as a neutral body which is in place to carry out the directions of the political executive.[32] It has not achieved an independent status of its own giving it a distinct legal standing or power of resistance against the political executive. Instead, the executive is treated by the courts as one undifferentiated whole, represented in a typical case by a Secretary of State at the head of a government

[28] *R (Miller) v Prime Minister* [2019] UKSC 41.
[29] Montesquieu, *The Spirit of Laws* (1748), section 6 of Book 11.
[30] Cf eg E. Carolan, *The New Separation of Powers* (2009).
[31] T. Daintith and A. Page, *The Executive in the Constitution* (1999).
[32] Johnson, *Reshaping*, 94-97, 228-235.

department, which has an authority to act based on a combination of the democratic principle and a principle of professional expertise.

The UK version of the separation of powers is the product of a long process of constitutional development regarding the relationship between different institutions, in which the executive is accountable to Parliament, which has supreme legal power; but where Parliament is also an enabler for the exercise of power by the executive;[33] where the executive has exclusive control over aspects of state action, including in particular the conduct of foreign affairs; and there is no distinct written constitution to underwrite any legal power for the courts to disregard statutes, but the limited doctrine of interpretation under the principle of legality. The practical outcome of the historic jealousy of Parliament of its powers against those of the Crown has been respect for the democratic principle, under the mantle of the sovereignty of Parliament.

A distinct view of the separation of powers is implied in the European Convention on Human Rights, as interpreted by the Strasbourg court. As an international treaty, the Convention draws no explicit distinction between action by the executive and by the legislature. But it does require a central role for independent courts in making determinations on criminal charges and in relation to legal rights, especially the right of liberty: article 5(4) and article 6. However, this basic picture is qualified in two ways. First, the Strasbourg Court has recognised that actions taken by the regulatory, bureaucratic state may have the indirect effect of affecting the legal rights of individuals and in that way determining their application. The Court has developed a jurisprudence which seeks to produce a compromise between the principle of effectiveness of administrative action by the state and judicial protection of rights, by accepting that limited judicial review of administrative action in such cases will satisfy the requirements of article 6, provided it is combined with a degree of procedural protection at the stage of administrative action.[34] Secondly, the Convention is an instrument designed to foster democracy and respectful of choices made because regarded as "necessary in a democratic society", and the Strasbourg Court has developed its doctrine of the margin of appreciation in such a way as to widen that margin (and hence reduce the scope for a finding of violation) where it is clear that a state has made a choice after due consideration by the democratic legislature.[35] Thus human rights doctrine has developed in a way which gives effect to the democratic principle and also, to some degree, to a principle of effective action by the executive and to regulatory expertise.

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[33] See Johnson, *Reshaping*, 104 (Parliament's role is ambiguous: is it "to confer authority on the executive and to exercise a critical and controlling function in relation to its members, or is its main function now to facilitate majority rule and the fulfilment of promises made by a party in an election?").
[34] *Bryan v UK* (1995) 21 EHRR 342.
[35] *Hatton v UK* (2003) 37 EHRR 28; *Draon v France* (2006) 42 EHRR 40.

The UK model and the Convention model map only imperfectly onto each other, but they have grown more closely together, and each has developed in the light of ideas of functional responsibility. Both have come to recognise ever more explicitly the importance of the democratic principle, while the Strasbourg Court has recognised the legitimacy of light-touch judicial review in many areas of administrative action. The principle of legality has become more important in domestic public law doctrine, drawing it more closely in line with human rights standards under the Human Rights Act.[36]

Without a written constitution to do it for them, the courts have to explain, carve out and delimit their role versus that of other agencies of the state. Separation of powers tends to be the framework in which they seek to do this. Separation of powers has gone up the legal agenda and has also become more finely tuned over the last 60 years or so. This is partly a result of the widening application of a "principle of functional specialisation and responsibility" in the public sector and the "ever-greater functional differentiation" of the concept of the Crown, standing for the executive.[37] A conception of specialised zones of policy-making by different agencies of the state has developed, and the courts have had to define where the boundaries are and then police them. This means the courts have had to address the boundary between law and politics, but also that between courts (using legal expertise) and specialist policy-makers (using other forms of expertise). On both boundaries, the Diceyan concept of the rule of law as one set of rules for all has come under pressure, to be replaced by the concept of the rule of law as appropriate demarcation to secure what Sir Jack Beatson aptly calls "the balance of responsibilities".[38] The connection between the rule of law and the separation of powers is thus made central. Contrary to the Diceyan conception of the rule of law, the courts have recognised a specialised domain of public law.[39]

Executive functions are parcelled up in different ways. They may be exercised by Ministers, quasi-independent executive agencies, fully independent bodies (like the Bank of England) or specialist bodies and tribunals (eg the Competition and Markets Authority and the Competition Appeal Tribunal). Specialist bodies may take decisions which determine citizens' rights, but in order to respect their specialist role the courts will generally only review their actions according to conventional judicial review standards.[40]

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[36] See *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115, 131.
[37] Johnson, *Reshaping*, 63-64.
[38] Sir Jack Beatson, *The Rule of Law and the Separation of Powers* (2023), 123.
[39] See also Johnson, *Reshaping,* 149-153.
[40] *Bryan v UK* (1995) 21 EHRR 342; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295; and, adopting the same approach for EU law, *R (Association of Independent Meat Suppliers) v Food Standards Agency* [2021] UKSC 54. See also *R (Richards) v Environment Agency* [2022] EWCA Civ 26.

The application of human rights under the Human Rights Act and the principle of legality, and the proportionality standard of review associated with those rights and with the doctrine of legitimate expectation arising from government statements of policy, have drawn courts more into the realm of specification of policy. This has meant that the courts have had to articulate with greater care and specificity the proper limits of their role as against other agencies. By doing this the courts seek to defend a zone of law distinct from politics and policy, which are recognised as properly being the subject of political contestation[41] or specialist evaluation.[42] Witness the *Alconbury* case,[43] for example, and the important *SC* decision.[44] Section 3 of the Human Rights Act has given the courts an enhanced interpretive role as explained in *Ghaidan v Mendoza*,[45] which is quasi-legislative, so the courts have had to explain how far they can go in modifying the meaning of legislation so as not to undermine the essence of the legislature's role. At the same time, the Convention rights have authorised the courts to examine the quality of law laid down by Parliament or in subordinate legislation in terms of accessibility and clarity, according to the standards of "law" laid down in *Sunday Times v UK*.[46]

Public law has increasingly come to be concerned with functional specialisation and the response of the courts to this in the light of underlying constitutional principles of the rule of law and democracy, for which parliamentary sovereignty stands as a cipher. Both have implications for the separation of powers, as a series of Supreme Court judgments illustrate. In *Majera*[47] the court emphasised the obligation of the executive to obey a court order. In *SC* the court emphasised the width of the margin of appreciation for Parliament on matters of economic and social policy. In *Begum*,[48] following the *Rehman* decision,[49] the court emphasised the responsibility of the executive for judgments about national security, on grounds of democratic accountability and expertise. In *Privacy International*[50] the court divided where there was a collision between different aspects of these principles.

Conclusion

The absence of a written constitution is very significant for the content of constitutional law and the practice of constitutional argument. The UK is close to being unique in the world in not having one (New Zealand is another country). The UK constitution tends to

[41] Cf N. Simmonds, "Constitutional Rights, Civility and Artifice" [2019] CLJ 175.
[42] Eg by a designated agency, such as in *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23 (HL), discussed in Beatson, n 31, 129-130.
[43] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295.
[44] *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26.
[45] [2004] UKHL 30; [2004] 2 AC 552.
[46] (1979) 2 EHRR 245.
[47] *R (Majera) v Secretary of State for the Home Department* [2021] UKSC 46.
[48] *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765.
[49] *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153.
[50] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22;]2020] AC 491.

work because it has such a long history, in which many of the complexities have been thrashed out and resolved – though others have arisen. Political life is framed in the light of it and is thoroughly adapted to it. In the historical record, its flexibility has on balance been an advantage. For any constitution to be successful, a lot of political foundations have to be in place. In broad terms, they are in the UK. It would not be straightforward to produce a written constitution for the UK and there is comparatively little demand for one. The unwritten one – with its many embedded written elements – seems to work.