

# NOT WAVING, BUT DROWNING? : EU LAW, COMMON LAW FUNDAMENTAL RIGHTS AND THE UK SUPREME COURT

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## Introduction

The relationship between European Union ('the EU') law and the municipal law of the United Kingdom ('the UK') seems to lend itself to allusions to water. In *Bulmer v Bollinger*, Lord Denning famously referred to the incoming tide of what is now EU law, observing that '[i]t flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.'<sup>1</sup> And the *Factortame* litigation, too, was all about water, and the right to fish in it: specifically the Treaty based rights of Spanish fishermen not to be subject to discrimination on grounds of nationality when seeking to exercise their free movement rights to trawl for fish in UK waters.

## A turning of the tide

The long decade of *Factortame* litigation—in which the House of Lords unequivocally accepted that national courts in the UK should treat EU law based rights as being of a *higher* normative level than Acts of Parliament<sup>2</sup> and confirmed that the UK could be liable by UK courts to pay damages to those who suffered loss from Parliament's enactment of an EU law incompatible statute<sup>3</sup>—might now be seen to represent the high-water mark of the influence of EU law on domestic law. For tides ebb, as well as

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1 *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418 (Lord Denning).

2 *R v Secretary of State for Transport ex parte Factortame (No 2)* [1991] 1 AC 603, 658-59 (Lord Bridge).

3 *R v Secretary of State for Transport ex parte Factortame Ltd (No 5)* [2000] 1 AC 524.

flow. The complaints of those of a Eurosceptic ilk of the Member States being 'swamped' by a tsunami of EU regulation and of businesses drowning in EU rules have been increasingly dominant in our political discourse. Eurocracy is associated with ever growing popular distrust. The binding of Europe into monetary union is now seen as an act of *hubris* (the Greeks always have a word for it). Even among the Europhiles, ideals and ideas seem to have drained from their grand post-WWII European project. Scripture says: 'without vision the people perish; but he that keepeth the law, happy is he'. Yet what law is to kept, as the happy certainties of post-sovereign supra-nationalism embodied in *une certaine idée de l'Europe* no longer command common assent and have become unhappy uncertainties?

Our courts are, of course, not insensible to this shift, this seeming turning of the political tide. Recent judgments of the UK Supreme Court ('the UKSC'), in particular, have marked an increasing turn inward, as the 'Continental' is abandoned for the 'Insular', and the primacy of national constitutional fundamentals are re-emphasised over the provisions of international treaties. Thus in *Pham v. Home Secretary* Lord Mance (joined by Lord Neuberger, Lady Hale and Lord Wilson) warned against the Court of Justice reaching decisions which 'overstep jurisdictional limits which member states have clearly set at the European Treaty level and which are reflected domestically in their constitutional arrangements' and affirmed that 'a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the European Communities Act 1972 what jurisdictional limits exist under the European Treaties and on the competence conferred on European institutions including the Court of Justice', while suggesting that direct confrontation might be avoided if 'all concerned ... act with mutual respect and with caution in areas where member states' constitutional identity is or may be engaged' all done in 'the spirit of co-operation of which both the *Bundesverfassungsgericht* and this court have previously spoken.'<sup>4</sup>

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<sup>4</sup> *Pham v. Home Secretary* [2015] UKSC 19 [90]-[91] (Lord Mance)

## The constitutional identity of the UK rediscovered

But what precisely is the 'constitutional identity' of the UK which the CJEU should be careful not to trespass upon? Classically, the only constitutional certainty which existed in the UK under the Diceyan analysis of the constitution was the sovereignty of the Westminster Parliament – and that has been considered and dealt a seeming death blow in *Factortame*. What, then, is left within the UK constitution after *Factortame*?

The judicial and extra-judicial writings of Sir John Laws seem to provide the beginnings of an answer. In *R v Lord Chancellor ex parte Witham*, Laws J noted that: 'In the unwritten legal order of the British state ... [it is] the common law [which] continues to accord a legislative supremacy to Parliament'.<sup>5</sup> He also observed that the courts should recognise certain fundamental rights at common law whose 'existence would not be the consequence of the democratic political process but would be logically prior to it'.<sup>6</sup>

In *Thoburn v Sunderland Council*, Laws LJ stated that 'the traditional doctrine [of Parliamentary sovereignty] has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle'.<sup>7</sup> He spoke of a new category of statutes as being 'constitutional' in the sense that, while not being entrenched, their provisions are not subject to implied repeal by later 'ordinary' Acts of Parliament. Parliament could modify the terms of constitutional statutes, but only expressly. In *H v Lord Advocate*, Lord Hope adopted this concept of 'constitutional statutes' in observing that:

the fundamental constitutional nature of the settlement that was achieved by the

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5 *R v Lord Chancellor ex parte Witham* [1998] QB 575, 581 (Laws J).

6 *Ibid.*

7 *Thoburn v Sunderland Council* [2002] EWHC 195 (Admin), [59] (Laws LJ).

Scotland Act 1998 ... in itself must be held to render it incapable of being altered otherwise than by an express enactment.<sup>8</sup>

In *Jackson v HM Attorney General*, Lord Steyn went further, suggesting that there might be some constitutional fundamentals 'which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'.<sup>9</sup>

Despite some initial scepticism about the need or utility for reliance upon notions of common law constitutionalism in a post HRA/post EU Charter era,<sup>10</sup> the ideas of Sir John Laws appear now to have triumphed into the new constitutional orthodoxy before the UKSC. They were certainly central to the finding of the UKSC in *Axa General Insurance Company Ltd v Lord Advocate* that statutes of the devolved legislatures were subject to a form of common law review (for breach of the rule of law and/or fundamental common law rights).<sup>11</sup>

In *R (Osborn) v Parole Board*, the UKSC emphasised that the starting point in fundamental rights cases should be 'our own legal principles *rather than* the judgments of the international court'.<sup>12</sup>

In *R (Buckinghamshire County Council) v Transport Secretary*, Lord Neuberger and

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8 *H v Lord Advocate* [2012] UKSC 23, [130] (Lord Hope).

9 *R (Jackson) v HM Attorney General* [2005] UKHL 56, [102] (Lord Steyn).

10 See e.g. *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [29] (Lord Bingham), [59]-[61] (Lord Rodger)

11 *AXA General Insurance Company Ltd v Lord Advocate* [2011] UKSC 46.

12 *R (Osborn) v Parole Board* [2013] UKSC 61, [62] (Lord Reed) [emphasis added].

Lord Mance—in rejecting what looked like a fairly clear line of case law from the Court of Justice of the European Union (‘the CJEU’) on Directive 2001/42/EC on the issue of what might properly be expected in and of a Strategic Environmental Assessment for large infrastructure projects (such as HS2)—suggested that there may be constitutional fundamentals which even EU law could not overcome. Their Lordships noted that:

The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Right Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law.<sup>13</sup>

In *Kennedy v Charity Commission*, Lord Toulson regretted what he saw as ‘a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.’<sup>14</sup>

In *A v BBC*, Lord Reed relied upon and referred to Acts of the pre-Union 17<sup>th</sup> century Scottish Parliament (the Court of Session (Scotland) Act 1693 and ‘Act Anent Advising Criminal Processes with Open Doors’ of 12 June 1693) which guaranteed the presence of the parties and their lawyers before the court in civil and criminal causes (respectively) as one basis for the current principle of open justice in the courts in the

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<sup>13</sup> *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3, [207] (Lord Neuberger and Lord Mance).

<sup>14</sup> *Kennedy v Charity Commission* [2014] UKSC 20, [133] (Lord Toulson).

21<sup>st</sup> century.<sup>15</sup> In this Lord Reed was following the early twentieth century Scottish jurist and Lord of Appeal in Ordinary, Lord Shaw of Dunfermline, who had previously described these two statutes of 1693 as:

[A] part of the emphatic testimony borne to the determination of the nation to reap the full fruit of the Revolution Settlement and *to secure against judges*, as well as against the Sovereign, the liberties of the realm.<sup>16</sup>

Thus is the common law resurrected, historic statutes and ancient charters deemed ‘constitutional’, old legal rules become fundamental principles, and rights discourse de-Europeanised, repatriated and rebranded as embodying the *une certaine idée de l’Angleterre* (or sometimes, even, *de l’Ecosse*).

### **The uses and abuses of history**

Now, at one level, one can see this move ‘back to (common law) basics’ as a canny response from our higher judiciary to a political climate of ever increasing hostility toward all things European and legal, and an oft-expressed distaste by certain politicians and journalists for un(der)-qualified foreign judges making judgment on British ways. But is it a wholly wise move? Even a cursory look at the ‘constitutional instruments’ now being increasingly relied upon as sources of law shows that they have to be cleansed and decontextualised by our judges if they are to do the work called upon them to be the source of our current constitutional principles and basic rights in the 21<sup>st</sup> century. So many of these historic constitutional instruments are premised on what might now be termed a particular political theology and contain terms which would now be regarded as in breach of fundamental rights. For example:

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15 *A v British Broadcasting Corporation* [2014] UKSC 25, [24] (Lord Reed).

16 *Scott v Scott* [1913] AC 417, 475 (Lord Shaw) [emphasis added].

- *Magna Carta* expressly provides for the *unequal* treatment of serfs, and Jews and women. Serfs have no rights, Jews cannot enforce interest payments on their loans to Barons, and women are restricted in standing witness against men before the courts;
- the Bill of Rights 1688 insists, among other claims that (only) Protestants have a fundamental right to bear arms;
- the Scottish Claim of Right 1689 has a presumption (but not a prohibition) against the *ordinary* use of torture, clearly allowing for its use where there is evidence that might justify its being prayed in aid;
- the Act of Settlement 1701 originally provided that 'that all Papists and persons marrying Papists, shall be excluded from and forever incapable to inherit possess or enjoy the Imperial Crown of Great Britain and the Dominions thereunto belonging or any part thereof'. With effect from 26 March 2015 the prohibition against any member of the Royal family succeeding to, or holding, the Crown for 'marrying a person of the Roman Catholic faith' was repealed with the bringing into force of s 2 of the Succession to the Crown Act 2013, but the prohibition against Papists inheriting the throne remains; and
- the Acts of Union 1707 required that all university teachers in Scotland subscribe to the Presbyterian Confession of Faith. This requirement was only repealed by s 5 of the Universities (Scotland) Act 1932.

The constitutionality of the repeals effected by both s 2 of the Succession to the Crown Act 2013 and by s 5 of the Universities (Scotland) Act 1932 might be questioned, insofar as one accepts the analysis of the fundamental status of the Acts of Union 1707 which found favour with Lord President Cooper in *MacCormick v Lord Advocate*<sup>17</sup> as limiting the powers of the Union Parliament. The Protestant Religion and Presbyterian Church

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<sup>17</sup> *MacCormick v Lord Advocate*, 1953 SC 396.

Act 1707 states, after all, that: ‘this Act of Parliament with the Establishment therein contained shall be held and observed *in all time coming as a fundamental and essential condition of any Treaty or Union* to be concluded betwixt the two Kingdoms *without any alteration thereof or derogation thereto in any sort forever.*’ (Emphasis added).

It is certainly difficult to draw from the actual terms of these ‘constitutional instruments’ the claim made by Lord Mance in *Axa General Insurance Company Ltd v Lord Advocate* that at the ‘very core’ of common law fundamental rights and notions of the rule of law lie ‘principles of equality of treatment’.<sup>18</sup>

It appears, then, that finding common law principles or discovering common law rights does not really involve the judges in actual legal historical research to establish original meaning. The constitutional instruments which are said to be the source of constitutional fundamental principle or common law fundamental rights are, instead, mined by the judges in a decontextualised ahistorical manner, and filleted for principles which make sense here and now. Lord Sumption, a judge of the UKSC who *is* also an historian, has said:

Magna Carta as we know it was reinvented in the early seventeenth century, largely by one man, the judge and politician Sir Edward Coke. ... Coke transformed Magna Carta from a somewhat technical catalogue of feudal regulations, into the foundation document of the English constitution, a status which it has enjoyed ever since among the large community of commentators who have never actually read it. ... [W]hen we commemorate Magna Carta, perhaps the first question that we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative

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<sup>18</sup> AXA (n 11) [97] (Lord Mance).

millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not.<sup>19</sup>

Certainly, the fashion for a (re)turn to the common law may be thought to encourage the creation of a new 'mythistory', to employ the useful coinage of the American historian William H McNeill who, in an essay of the same name, noted that:

[E]ven the most abstract and academic historiographical ideas do trickle down to the level of the commonplace, if they fit both what a people want to hear and what a people need to know well enough to be useful.<sup>20</sup>

And, in terms that might be applied to lawyers/judges as much as to historians, observed:

Truths are what historians achieve when they bend their minds as critically and carefully as they can *to the task of making their account of public affairs credible as well as intelligible to an audience that shares enough of their particular outlook and assumptions to accept what they say*. The result might best be called mythistory perhaps, ... for the same words that constitute truth for some are, and always will be, a myth for others, who inherit or embrace different assumptions and organizing concepts about the world.<sup>21</sup>

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19 Lord Sumption, 'Magna Carta then and now' (2015) <https://www.supremecourt.uk/docs/speech-150309.pdf> accessed 1 May 2015.

20 W H McNeill, 'Mythistory, or Truth, Myth, History, and Historians' (1986) 91 *The American Historical Review* 1, 10.

21 *Ibid* 8-9 [emphasis added].

## **(Un)Constitutional (in)consistency**

Apart from issues of respect for historical truth, one other danger in this developing landscape, which de-emphasises European fundamental rights and resurrects the common law, is the lack of judicial consistency in approach to this apparent fundamental constitutional shift.

For example, in *Assange v Swedish Prosecution Authority*<sup>22</sup> Lord Mance (dissenting on the result) provided a detailed analysis of why Framework Decisions (concluded by the EU under the then Justice and Home Affairs pillar of the Maastricht Treaty) could *not* be counted as EU law for the purposes of the European Communities Act 1972<sup>23</sup> and therefore, contrary to what the House of Lords had previously assumed<sup>24</sup> and the Court of Justice of the European Union had asserted,<sup>25</sup> the strong EU law (*Marleasing/Lister*) principle<sup>26</sup> of conforming interpretation of national laws implementing EU law could *not* be prayed in aid in relation to the proper interpretation of what was meant by 'judicial authority' for the purposes of the European Arrest Warrant legislation.

At some levels the analysis in *Assange* appears to rest on a certain (perhaps even understandable) resistance to the quasi-automatic provisions of the European Arrest Warrant<sup>27</sup> which allow little of any judicial supervision in the receiving state and rely upon the courts presuming the good faith, honesty and efficiency of the prosecuting and

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<sup>22</sup> *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22.

<sup>23</sup> *Ibid* [198]-[218] (Lord Mance).

<sup>24</sup> *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6.

<sup>25</sup> See e.g. Case C-105/03 *Criminal proceedings against Pupino* [2006] QB 83.

<sup>26</sup> Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135; *Lister v Forth Dry Dock Engineering Co Ltd* [1990] 1 AC 546, UKHL .

<sup>27</sup> See Council Framework Decision 2002/584/JHA [2002] OJ L190/1

judicial authorities of all the other member states of the European Union.<sup>28</sup> But more generally, Lord Mance's analysis of EU law in *Assange* (which was concurred in by the other Justices) is a strong judicial indication for the proposition that EU law principles and decisions should not be prayed in aid or applied, except where *absolutely required* as a matter of strict interpretation of the precise terms of the European Communities Act 1972.

The UKSC (without Lord Mance) took a contrasting approach in *Preddy v Bull*, a case involving claims of discrimination on grounds of sexual orientation in the provision of services (in particular a double-bedded room in a B&B), a field which does not (yet) fall within the ambit of EU law.<sup>29</sup> There, the UKSC referred to and relied upon *unclear and equivocal* CJEU authority on the issue of the proper definition of, and distinction between, direct and indirect discrimination. Lady Hale's rationale was that it was important that there be consistency in this area between CJEU case law on discrimination in the workplace on grounds of sexual orientation and the non-EU law area of discrimination in the provisions of goods and services.<sup>30</sup> Now this need for consistency between EU and non-EU approaches may be correct, but it goes completely against the rationale and reasoning of Lord Mance in *Assange* about the need to contain EU law within its bounds.

### **How strong a bulwark is the common law ?**

It may be that these common law constitutional instruments (as they are now described) and the fundamental common law rights which they are said to embody have some

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<sup>28</sup> An obligation which has been underlined by the CJEU Grand Chamber decision in Case C-399/11 *Melloni v Ministerio Fiscal* [2013] QB 1067.

<sup>29</sup> *Preddy v Bull* [2013] UKSC 73.

<sup>30</sup> *Ibid* [29] (Baroness Hale).

usefulness as a means of challenging the lawfulness/constitutionality of certain actions of the executive (on the basis that the basic constitutional principle is that sovereignty rests not with the Crown alone—whether exercising common law or prerogative powers—but with (the Crown in) Parliament). But even then there is a lack of consistency from the courts as to when they will adopt a common law constitutional or fundamental rights analysis.

For example, in *R (Sandiford) v Foreign and Commonwealth Office*, the UK Government's blanket policy of refusing to provide funding for legal representation for British nationals facing criminal proceedings abroad was challenged.<sup>31</sup> Before the Court of Appeal the appellant's main argument was that her situation fell within the material scope of EU law under Council Decision 2004/757/JHA which lays down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, and the Foreign Secretary was in breach of his duty to protect her rights under the Charter of Fundamental Rights of the European Union.<sup>32</sup> After the UKSC refused leave on the EU law point (which challenged the correctness of the *Assange* analysis) but allowed the common law and European Convention on Human Rights ('the ECHR') based challenge to proceed to a hearing, the appellant presented arguments to the effect that the Foreign and Commonwealth Office policy was in breach of common law fundamental rights, notably the right to life and the right to a fair trial. These arguments were not even adverted to in the decision of the UKSC which dismissed the ECHR arguments for want of territorial jurisdiction and held that because the Foreign Secretary's power to provide assistance, including legal funding, to British citizens facing trial abroad was not derived from statute but was an exercise of Minister's prerogative powers, it was permissible for him to adopt a blanket policy which made no

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31 *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44.

32 *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 581, [12]-[31] (Lord Dyson).

provision even for exceptional cases involving the death penalty (and notwithstanding the consequent direct breach of the right to life).

In any event, common law fundamental rights simply cannot do the work that EU law does post-*Factortame* in allowing Acts of Parliament to be challenged before and disapplied by the courts insofar as incompatible with EU law.

For example, in *R (Evans) v Attorney General* the Court of Appeal held that the Attorney General was unable to exercise the powers conferred on him by s 53 of the Freedom of Information Act 2000 to issue a certificate to the effect that correspondence between the Prince of Wales and government departments should not be disclosed, at least in so far as the information concerned was 'environmental information' (and so subject to the EU law freedom of information regime set out in art 6 of Aarhus Directive 2003/4/EC).<sup>33</sup>

And in *Benkharbouche v Embassy of Sudan*, the Court of Appeal held that foreign embassies were not entitled to rely upon the provisions of the State Immunity Act 1978 so as to bar employment tribunal claims being brought against them in the UK by those of their foreign national employees not exercising any aspect of the sovereign power of the state, insofar as these employees' claims fell within the ambit of EU law.<sup>34</sup> Both of these decisions from the Court of Appeal rely upon the fundamental rights of access to a court and to an effective judicial remedy from the courts contained in art 47 of the EU Charter of Fundamental Rights.

In upholding the Court of Appeal decision in *Evans* the UKSC majority relied, instead, on common law constitutional principle (that the legislature should not be presumed to empower the executive to overrule the courts) but declined to rule on whether the

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<sup>33</sup> *R (Evans) v Attorney General* [2014] EWCA Civ 254.

<sup>34</sup> *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33.

effective remedy provisions of the Charter provided ‘another, or reinforcing, reason for the conclusion that the Certificate is unlawful in so far as it relates to environmental information.’<sup>35</sup> In *ClientEarth*, however, in the face of an admitted breach by the Government of EU law setting limits on permissible levels of nitrogen dioxide polluting emissions, the UKSC felt able to issue a mandatory order requiring the Secretary of State to prepare new air quality plans under article 23(1) [of Directive 2008/50/EC] in accordance with a defined timetable set by the court, to end with delivery of the revised plans to the Commission not later than 31 December 2015 so as to ensure the effective remedy required by EU law.<sup>36</sup>

By contrast, common law constitutional principle or fundamental rights gave no protection to disenfranchised prisoners in *R (Chester) v Secretary of State for Justice* and, on Lord Mance’s analysis, neither did EU law confer any substantive right to vote on UK nationals in UK elections to the European Parliament.<sup>37</sup> This meant that the claimants in *Chester* could not seek dis-application of their blanket statutory disenfranchisement by s 3 of the Representation of the People Act 1983, as the domestic courts had no such ‘*Factortame* jurisdiction’.

### **The elusive Bill of (common law) Rights**

The other related and equally problematic issue with turning back to the unwritten common law as the source for our constitutional fundamentals and basic rights is that since there is no one text which authoritatively embodies or enumerates these rights, counsel are rather left in the dark as to how and what they should argue, and quite how much legal archaeology to engage in.

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<sup>35</sup> *R (Evans) v Attorney General* [2015] UKSC 21 [107] Lord Neuberger.

<sup>36</sup> *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 [35] Lord Carnwath (with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreed)

<sup>37</sup> *R (Chester) v Secretary of State for Justice* [2013] UKSC 63.

For example, in *Moohan v Lord Advocate*<sup>38</sup> the lawfulness of the exclusion by the Scottish Parliament of convicted prisoners from the franchise for the Scottish independence referendum was challenged on, among other grounds, that such exclusion was incompatible with the fundamental common law right to vote, the existence of which is a *sine qua non* of what it is to be democracy.

From its oligarchic, phallographic and sectarian beginnings in 1707, the United Kingdom may be said to have evolved over the course of 300 years towards *becoming* a democracy, with the gradual extension of a franchise originally restricted to Protestant propertied adult males in the 18<sup>th</sup> century, through the easing and abolition of property and religious tests for male voters in the 19<sup>th</sup> century, to the early 20<sup>th</sup> century's granting of women (and, in the first decades of 21<sup>st</sup> century Scotland, at least, the lowering of the voting age to 16).

The majority of the Justices in *Moohan* had difficulty in countenancing a 'living instrument' approach to common law fundamental rights, involving looking to what the common law in a democracy embodies here and now. Instead, and more than a little problematically, the right to vote was said to be historically derived and dependent on statute (and so presumably could be abolished or radically restricted by ordinary Act of Parliament). Democracy was not seen to embodied in, or protected by, the common law. Lord Hodge, giving the majority judgment, said:

'The UK Parliament through its legislation has controlled and controls the modalities of the expression of democracy. It is not appropriate for the courts to develop the common law in order to supplement or override the statutory rules which determine our democratic franchise.'<sup>39</sup>

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38 *Moohan v Lord Advocate* [2014] UKSC 67.

39 *Ibid* [34] (Lord Hodge).

But if common law fundamental rights cannot be relied upon to protect *the* fundamental democratic value—namely universal suffrage—what use is the concept as a bulwark for the protection of individual against excesses of the state? Very little, one fears.

At times, common law constitutionalism as the basis for fundamental rights seems to rely upon judicial intuition and a feeling for the right or the good result here and now in 21<sup>st</sup> century post-WWII, post-colonial, post-Nuremberg Britain.

In *Montgomery v Lanarkshire Health Board*<sup>40</sup> a unanimous 7 judge Supreme Court bench referred to and relied upon the Oviedo Convention on Human Rights and Biomedicine as support for a newly discovered common law right of involvement and self-determination for patients in decisions relating to their medical treatment.<sup>41</sup> But quite how, from a common law constitutional perspective, the terms of a Council of Europe Treaty which the UK has neither signed nor ratified can spill over and alter the common law is simply not explained by the judges.

Common law constitutionalism appears to transform judges into Platonic guardians able to perceive these pre-existent common law rights in the ether, or divine these fundamental common law principles from some imagined Whiggish past. Ultimately this kind of Platonism in a judicial context may lead to what the French might characterize as ‘the Government of Judges’.

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<sup>40</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

<sup>41</sup> *Ibid* [80] (Lord Kerr and Lord Reed).

In relation to judging, however, problems arise with the Platonic approach precisely because it is consequentialist—the good end justifies the means—such that adherence to the strict letter of the rules become less important if this leads to an unjust and unworkable result (i.e. floodgates arguments). The problem with simply seeking to achieve what seems or feels like a ‘right result’ is that it might lead the judges to be overly sensitive to the general populace’s sense of ‘justice’ (with its tabloid driven views on what justice requires in a particular case) and the sensitivity to ‘workability’ of results might lead to too great a deference to the Executive’s definition of what they can cope with.

## Conclusion

In *A v BBC*, Lord Reed quoted approvingly from an earlier judgment of Toulson LJ (as he then was) in *R (Guardian News & Media Ltd) v Westminster Magistrates’ Court* as follows:

‘[S]ociety depends on the courts to act as guardians of the rule of law. Sed quis custodiet ipsos custodes? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.’<sup>42</sup>

The openness of the courts to public scrutiny cannot be the *sole* criterion to establish the legitimacy of judicial decision-making. There have to be elements, too, of predictability of decision-making and agreed limitation on what the judges can do with the law.

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<sup>42</sup> *A v BBC* (n 15) [23] (Lord Reed), referring to *R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (Article 19 intervening)* [2012] EWCA Civ 420, [1] (Toulson LJ).

It is precisely to embody those virtues and to protect (unelected) judges from allegations that the power they wield in their decision-making is an undemocratic exercise in the tyranny of the dead (where past precedents rule over present circumstance) that post World War II Bills of Rights—whether the ECHR, the International Covenant on Civil and Political Rights or the EU Charter of Fundamental Rights—were created. Conscious of the danger that the democratic process could itself be subverted and undermined by the political manipulation of the majority,<sup>43</sup> democratic governments across Europe signed up and continue to sign up to these human rights charters, to ensure that minorities can be protected.

These charters and the bodies of law which have built up around should not be too readily abandoned, nor the mechanisms for their enforcement be too readily disparaged by our own courts, echoing political and popular sentiment. The architecture of enforcement involved international courts and bodies—whether the European Court of Human Rights, the CJEU or the UN Human Right Committee—precisely to ensure the advantages of distance and, to an extent, a necessary isolation from the immediate national political fray. This was, and is, seen as necessary in order to ensure a degree of objectivity and protection for the individual even against the interests of the nation state in all its forms and manifestation and emanations.

Let's, then, hold on to these international charters, value their developed and developing jurisprudence lest, to end on a last watery metaphor, we lose the (fundamental rights) baby in jettisoning the (foreign) bathwater.

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43 See e.g. *Refah Partisi (Welfare Party) v Turkey* (2003) 37 EHRR 1, [35]-[36].