

## Review Article

# Late to the Party: Chronicling the Role of the Courts in the Continuing Evolution of UK Public Law

*Landmark Cases in Public Law*, edited by Satvinder Juss and Maurice Sunkin, Hart Publishing: Oxford and Portland, Oregon, 2017, x + 334 pp., £80 (hbk), ISBN 978-1-84946-603-5

### 1. The Third Branch of Government

*Landmark Cases in Public Law* is one of a forty-four book series by Hart Publishing seeking to explore the historical roots of landmark common law cases across a multitude of fields. It is generally accepted that public law as a legal discipline consists of three pillars: constitutional law, administrative law and human rights law. This volume, as acknowledged by the editors, covers all three (vii). However, although the volume does not state so explicitly, it is submitted that it is concerned principally with the development of UK administrative law and the ability of the courts to judicially review the lawfulness of decisions made by public bodies, in particular the government.

The British constitution is inherently contestable in nature, in no small part due to the fact that it is both uncodified and unentrenched.<sup>1</sup> This can be attributed to the fact that the British constitution is the product of evolution over many centuries.<sup>2</sup> Given its long history, therefore, the origins of the contemporary British constitution span many time periods, each with radically different views on the concept of good governance.

For most of its history, the Crown dominated the constitutional landscape of what would become the United Kingdom. From the seventeenth century onwards, however, Parliament, following years of conflict and unease between it and the Crown, largely took up this mantle, albeit with the Crown acting through it in the form of parliamentary sovereignty or ‘the Queen-in-Parliament’. The new constitutional settlement reached at the end of the seventeenth century has, as Adam Tomkins argues, shaped much of the contemporary constitution.<sup>3</sup> There is accordingly, he argues, a bipartite rather than tripartite separation of powers in the UK, with the courts playing a subservient role to both Parliament and the Crown.<sup>4</sup>

Whatever the accuracy of Tomkins’s claim, it is fair to say that the predominance of AV Dicey’s understanding of parliamentary sovereignty in the late nineteenth and early twentieth centuries largely minimalised the role of the court.<sup>5</sup> This arguably curtailed judicial contributions to the development of public law, in particular administrative law, which is very much a late arrival to the UK. As Dicey observed over a century ago, ‘[i]n England ... the

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<sup>1</sup> See RB Taylor, ‘The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism’ (2018, in press) *Public Law*.

<sup>2</sup> See WI Jennings, *The Law and the Constitution* [1933] (University of London Press, 5th edn 1960) 8.

<sup>3</sup> See A Tomkins, *Public Law* (Oxford University Press, 2003) 47-60.

<sup>4</sup> *Ibid*, 55.

<sup>5</sup> See R Stevens, *The English Judges: Their Role in the Changing Constitution* (Hart Publishing, 2005) chapter 2.

system of administrative law and the very principles on which it rests are in truth unknown'.<sup>6</sup> The constitution has thus traditionally relied on political mechanisms of control and accountability rather than legal ones, most notably constitutional conventions.<sup>7</sup> Yet, today's constitutional landscape is far removed from that of Dicey's era. Administrative law is now not only recognised, but fundamental to the contemporary understanding of the UK constitution. Its development, however, was largely the product of the courts who, from the mid-twentieth century onwards, took on a more active role, and in the process helped reshape the constitutional landscape in a way that challenged Dicey's previously popular constitutional orthodoxy.<sup>8</sup> Many of the cases instrumental in this shift are present in the book under review.

## 2. Defining a Landmark Case in UK Public Law

The volume under review identifies fourteen landmark cases, each accorded a chapter by leading scholars and practitioners in the field. Selecting cases of constitutional significance is, especially under a common law jurisdiction, no easy task. As the volume's editors note, the cases selected for discussion should not be viewed 'as being clear, non-controversial steps along a defined path to greater justice ... [L]andmark decisions may only be identified as such with the benefit of hindsight' (viii).

In justifying their selection, the editors argue that each case satisfies one or more of the following characteristics of a landmark decision: 'they establish, illustrate or clarify foundational principles of public law'; 'they mark a turning point in judicial approach, indicating a break in the past'; 'they establish principles that are novel'; 'they help to define key constitutional relationships including those between UK legislative competence and EU law ... courts and Parliament ... courts and the executive ... judicial review of devolved legislative powers ... and between the prerogative power of the executive and the role of Parliament' (vii-viii).

On this basis, the constitutional importance of the cases selected are beyond dispute. What is striking about the case selection is not their inclusion in the volume, but rather the dates on which they were decided. Of the fourteen cases selected, only one – *Entick v Carrington*<sup>9</sup> – was decided before the twentieth century, with the remaining cases spanning fifty-three years from 1964 to 2017. For a collection of essays on legal history, this may come as a surprise to many. It is submitted, however, that this is neither an accident nor a coincidence but, as noted above, a reflection of the growth in judicial activism which began in the mid-twentieth century. The history of the courts' contribution to the development of UK public law is very much a recent one. As a result, it is the inclusion of *Entick*, an eighteenth century case, which is *prima facie* the odd one out in the volume. However, as discussed below, *Entick*, despite being a temporal outlier, nevertheless complements the predominantly administrative law theme of the volume well.

The jurisdictional scope of the cases selected is also noteworthy, as the volume does not address the issue directly but instead in passing. Although the preface states that the volume contains cases which contributed to the development of 'UK public law' (vii), the foreword by Sir Stephen Sedley notes that the volume contains 'some of the major markers of the great landscape of public law in England and Wales as it lies in the second decade of the twenty-first

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<sup>6</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* [1915] (Macmillan and Co, 8th edn1923) 326.

<sup>7</sup> See RB Taylor, 'Foundational and Regulatory Conventions: Exploring the Constitutional Significance of Britain's Dependency upon Conventions' (2015) *Public Law* 614.

<sup>8</sup> See generally Stevens (n 5).

<sup>9</sup> *Entick v Carrington* [1765] 2 Wilson KB 275, 85 ER 807; 19 Howell's State Trials 1029.

century' (vi). This is a contradiction which runs throughout the volume, and one requiring further analysis.

All cases discussed in the volume were decided after the creation of the United Kingdom in 1707. Older English cases, despite their continued constitutional significance, are thus absent from the book (although they are mentioned along with many other equally important decisions as part of other case discussions). Of all the cases discussed in the volume, however, *AXA General Insurance Ltd v HM Advocate and Others*<sup>10</sup> is the only one which did not originate in England and Wales, but instead Scotland. Most of the cases involved a decision either by the highest appellate courts (formerly the House of Lords or latterly the UK Supreme Court), with the only exceptions being *Entick* (King's Bench) and *Coughlan*<sup>11</sup> (Court of Appeal).

The distinction between UK public law and English public law is arguably largely academic due to Article XVIII of the 1707 Acts of Union between England and Scotland, which unified UK public law. However, it is nevertheless the case that decisions of the Court of Appeal are not binding in Scotland, nor were the decisions of the eighteenth century King's Bench. If landmark cases decided by these courts are to be discussed, it stands to reason that decisions by the Scottish Court of Session should likewise be included. One notable Scottish constitutional case is *MacCormick v Lord Advocate*,<sup>12</sup> which concerned an unsuccessful legal challenge to the validity of the Royal Titles Act 1953 on the grounds that it infringed the Acts of Union. Also, judicial review is one of the few areas of public law where English law and Scots law diverge. Although recent reforms in Scotland have brought the two sets of rules into further harmony,<sup>13</sup> significant differences remain, in particular the fact that in Scotland private bodies are amenable to review by the courts. *West v Secretary of State for Scotland*<sup>14</sup> is the leading Scottish administrative law case as it established a tripartite test for enabling judicial review of private bodies and it remains to this day the starting point for any judicial review action in Scotland.

The absence of these cases does not (and indeed should not) detract from the importance of the volume in question, or its scholarly quality. It highlights instead the inherent difficulty in trying to distil centuries of case law across four nations with three distinct legal systems (and soon no doubt four following the enacted of the Wales Act 2017). It also crucially highlights the need for future volumes on the subject to be produced in order to fully capture the complex tapestry which is the UK constitutional system. This volume is very much a starting point, not an end point, in the journey through the history of the UK's landmark cases in public law.

### 3. Volume Structure and Review Methodology

The volume discusses the fourteen chosen cases in chronological order with the exception of *Coughlan*, which, despite being decided in 2001, is discussed in-between two 2005 decisions. As the volume is concerned with legal history, the adoption of a chronological approach is indeed logical. If one is trying to capture changes in UK public law over the past half-century, a chronological approach should be able to achieve this. The volume, however, lacks this overall purpose. There is no single connection between all of the cases selected for discussion apart from their varying contributions to the development of UK public law, facilitated by a wide definition of what constitutes a landmark case.

This is not necessarily a disadvantage of the volume, however, as the approach adopted puts a greater emphasis on the individual cases themselves, thus permitting detailed and in-

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<sup>10</sup> [2012] 1 AC 868.

<sup>11</sup> *R v North and East Devon Health Authority* [2001] QB 213.

<sup>12</sup> 1953 SC 396.

<sup>13</sup> See the Courts Reform (Scotland) Act 2014, s.89.

<sup>14</sup> 1992 SLT 636.

depth discussion of each decision and their background in a way which is not possible in a piece of work designed to produce a bird's eye view of the constitution and its historical development. This is the major advantage of the volume, as it includes discussions of cases of significance to the development of UK public law which have otherwise been largely distilled to their bare ratio and relegated to footnotes in many instances. Researchers and students of UK public law are therefore unlikely to read the volume in its entirety but will instead focus on individual cases.

Despite this, it is submitted that the volume's case selection nevertheless indirectly reflects the change which has occurred under the constitution in the last half-century. This review article, therefore, will adopt a more thematic approach towards reviewing each of the cases discussed, grouping similar cases together where appropriate. The application of this innovative model of analysis to the volume will accentuate the constitutional changes underpinning the cases discussed. Doing so will better demonstrate how the chosen cases, both individually and collectively, contributed in distinct ways to the modern development of UK public law in a manner which is not immediately apparent from reading the volume alone. It will highlight in particular two key points advanced by this article: firstly, that the volume is concerned primarily with the development of UK administrative law; and, secondly, that advances in UK public law by the courts in the past half-century have been driven principally by the courts, but also in part by Parliament. The facts of each case are complex and diverse, and each author does a commendable job of detailing the background and facts of each case. As a result, this article will only provide brief summaries of each case in order to provide the context necessary for an effective evaluation of their contribution to the development of UK public law as advanced by their respective authors in the volume.

#### **4. The First Judicial Review: *Entick v Carrington***

*Entick v Carrington* is the focus of the first chapter of the volume and is written by Richard Gordon QC. The basic facts of the case are widely known. It concerned the issuing of a warrant by the Secretary of State to King George III against John Entick, an author suspected of writing seditious materials, for searching his property and seizing of all of his papers and books. Entick successfully argued in court that the search and seizure of his property was unlawful, and was thus awarded damages by the jury. Despite a warrant for search and seizure being issued, Lord Camden refused to recognise it, famously remarking that '[i]f this is law it would be found in our books, but no such law ever existed in this country'.

As Gordon himself acknowledges, the case is significant 'precisely because it is the most visible early stepping stone in the development of the doctrine of the rule of law' (2; see also 10).<sup>15</sup> *Entick*, he argues, 'paved the way for a system of judicial review that adds substance as well as process to the rule of law', and in so doing laid the early foundations for a demarcation of power between the courts and the executive (2), which, as noted above, had traditionally been very close. Indeed, Gordon asserts that the decision, in being the first to stress the supremacy of law over executive discretion since the 1688 Glorious Revolution, set a powerful precedent for recent claims as to judicial supremacy under the constitution (9). Two cases subject to separate chapters in the volume, *M v Home Office* and *Evans v Attorney-General*, he notes, are modern examples of this supposed precedent being applied, making *Entick* 'the first case of judicial review in which we understand those words today' (9).

This is a bold and striking claim. The case itself was not explicitly a judicial review decision as we would understand it today, in no small part due to the fact that formal procedures

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<sup>15</sup> For further discussion of the case's role in the development of the Rule of Law, see generally A Tomkins and P Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing, 2015).

for judicial review did not exist in the late-eighteenth century. The case was a trial for trespass, brought by *Entick*, against the King's messengers who had conducted the search and seizure. The jury's decision to award damages was contingent upon the lawfulness of the search and seizure; Lord Camden, as noted above, held this had not been lawful. The public law element of the case, therefore, was incidental and perhaps even accidental. Gordon, however, fully acknowledges that Lord Camden, in making his judgment, was not explicitly seeking to articulate an account of the Rule of Law (5). Lord Camden's decision was merely formal, in that he could find no legal authority for the search and seizure of *Entick*'s property (4). Gordon asserts instead that the decision in *Entick* has been used by subsequent courts to 'create the narrative of a rather more substantial rule of law principle' (5-6), which he demonstrates through a brief but concise and persuasive analysis of a series of subsequent cases (5-9). As a result, we are now, he claims, in a situation where '[m]odern judicial review now encompasses the rule of law at its centre' (9).

Whereas on paper *Entick* is the outlier case of the volume in terms of time period, Gordon's persuasive argument on the case as both a precursor to modern judicial review and an inspiration or catalyst for the development of our understanding of the Rule of Law justifies the inclusion of the case in this volume. It also provides further support for the claim of this article that the volume, although about the development of UK public law across all three pillars, is nevertheless concerned chiefly with the emergence of administrative law and our modern understanding of judicial review.

## **5. The Winds of Change: *Baldwin*, *Padfield* and *Anisminic***

Although this review adopts a thematic rather than chronological approach to discussing the cases included in the volume, it will nevertheless begin by examining the first three decided after *Entick*: *Baldwin* (Chapter Two), *Padfield* (Chapter Three) and *Anisminic* (Chapter Four). This trilogy of cases, all of which were decided in the 1960s, are widely seen to have made significant advances in judicial review, thus marking a break from past practice which laid the foundations for a more assertive judiciary in the years and decades which followed.

The first case to consider is the 1964 decision of the House of Lords in *Ridge v Baldwin*<sup>16</sup> as discussed in the volume by SH Bailey. Charles Ridge was the Chief Constable of Brighton Police Force, who was dismissed under s.191(4) of the Municipal Corporation Act 1882 by the Watch Committee. The decision, however, was reached without Ridge being present, and he was not even notified of the charges against him. When the Home Secretary rejected his appeal against the decision, he sought damages for breach of contract from the members of the Watch Committee, including its chairman, Councillor GB Baldwin. Ridge's claim, however, was also for a declaration by the courts that his dismissal had been ultra vires and thus illegal. The Court of Appeal found that the rules of natural justice would have been breached, thus making the dismissal voidable, if the Watch Committee's decision had been judicial (or quasi-judicial) in nature, rather than purely administrative. On appeal to the House of Lords, their Lordships, by a majority of four to one, held that Ridge's dismissal was void. All four of their Lordships in the majority found a breach for non-compliance with the Police Discipline Regulations, with three also finding a breach of the rules of natural justice. On the latter finding, their Lordships had been swayed by the fact that Ridge had not been notified of the grounds for his dismissal and did not have the opportunity to put his side of the story forward.

As Bailey notes, the case is significant in particular for deciding that the right to a fair hearing under the common law, which had traditionally applied to judicial decisions, now applied equally to administrative decisions (11). However, Bailey disputes this somewhat,

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<sup>16</sup> [1964] AC 40, HL.

arguing that whilst this is how *Baldwin* was ‘subsequently treated, it is not quite what was decided’ (11). On Lord Reid’s leading judgment on natural justice, Bailey notes that ‘one key objective achieved by the opinion was the rescue of long established principles from a relatively recent misunderstanding’ (26). Far from moving the law forward, therefore, *Baldwin* is perhaps better understood as restoring the legal status quo. This is further supported by Bailey’s analysis of their Lordships’ mixed views on the distinction between judicial, quasi-judicial and administrative decisions, and their applicability to the case before them. Lord Reid appeared in fact to identify a ‘judicial element’ within the power exercised by the Watch Committee, whilst Lord Morris stated that the power exercised was ‘quasi-judicial’ (28-33). Through a detailed analysis of subsequent case law, Bailey proves how the law was moved beyond *Baldwin* to extend the rules of natural justice explicitly to administrative decisions rather than merely judicial decisions (36-39). This, Bailey argues, is principally why *Baldwin* is a landmark case. It is a case which provided a ‘general approach or tone which can then be picked up and developed by subsequent courts’ (40).

The next case is *Padfield v Ministry of Agriculture Fisheries and Food*,<sup>17</sup> which was decided by the House of Lords in 1968, and is examined in the volume by Maurice Sunkin. Farmers in the South-East of England decided to challenge the rates set by the Milk Marketing Board under the now defunct milk marketing scheme. In accordance with s.19(3) of the Agricultural Marketing Act 1958, the farmers asked the relevant Government Minister if their complaint could be referred to a committee of investigation. The Minister refused to do so on several grounds, one of which was that he would have to change the scheme if the complaint was upheld, which he was unwilling to do on policy grounds. As a result, the farmers challenged the lawfulness of the Minister’s decision in court. The House of Lords, by a majority of four to one, decided that, despite statute conferring genuine discretion on a Minister to decide which complaints should be referred to a committee of investigation, this discretion was not unlimited but constrained by the objects and policy of the statute as interpreted by the courts.

Sunkin praises *Padfield* for being an ‘exceptional decision’ (43) which ‘showed the courts willing to be involved in politically important matters and not content to play a purely passive role in the political and constitutional system’ (44). Indeed, Sunkin’s analysis demonstrates that the majority in the case, lead again by Lord Reid, adopted a purposive approach towards statutory interpretation, thus enabling the court to ‘act in the name of parliament’s intentions while feeling able to depart from the actual wording of the statute’ (44). The object and purpose of the complaints procedure under the 1958 Act was designed to be a check on the power of the Board, enabling complaints that it had made decisions contrary to the public interest to be investigated. Section 19(3) was therefore less a discretionary power than a duty on the Minister to refer any complaints that the Board had acted contrary to the public interest. Should a Minister refuse to do so, he would be acting contrary to Parliament’s intention (50-52).

Although *Padfield* advanced administrative law, thus enhancing the role of the court in the process, an intriguing aspect of Sunkin’s analysis is his claim that the decision demonstrates the limitations of judicial review (55-59). Despite the claimants succeeding in court, they did not secure the changes to the milk marketing scheme they wanted as the Government at the time refused to implement the findings of the subsequent committee of investigation (54). Sunkin nevertheless makes the argument that the significance of *Padfield* lies not with the supposed judicial interference with executive decision-making, but instead with the use of judicial review ‘to ensure that a minister is fully accountable both to the courts and to parliament, which has the last word’ (60). As a result, the clear judicial activism in *Padfield*, far from weakening parliamentary sovereignty, in fact strengthens it. This is a powerful argument which taps into the ongoing debate into the nature of the contemporary British

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<sup>17</sup> [1968] AC 997.

constitution.<sup>18</sup> It also highlights an emerging theme of the volume's consideration of these earlier cases that what they are remembered for is not always accurate. The next case, *Anisminic*, is no exception.

*Anisminic Ltd v Foreign Compensation Commission*<sup>19</sup> was also decided by the House of Lords in 1968 and is discussed in the volume by David Feldman. In 1959, the UK Government agreed a compensation scheme with the Egyptian Government for British nationals whose property in Egypt had been affected by the Suez Crisis. The Foreign Compensation Act 1950 established the Foreign Compensation Commission, a tribunal charged with deciding who should receive compensation. Section 4(4) of the 1950 Act stipulated that '[t]he determination by the commission of any application made to them under this Act shall not be called in question in any court of law'. *Anisminic Ltd*, a mining company which had lost property in Egypt as a result of the Crisis, claimed compensation but was rejected. It thus challenged the decision in court. Although the Commission sought to argue that s.4(4) of the 1950 Act prevented the courts from hearing the case, the House of Lords eventually decided that s.4(4) only protected those decisions of the Commission which were not null as a result of an error. In the case before them, the Commission had made an error in law in their decision to reject *Anisminic's* claim which meant that they had acted outwith the powers conferred upon them, thus denying them any protection under s.4(4).

In considering the case, Feldman offers an extensive and detailed account of the background to the case, the decision itself and its legacy. On the latter issue, Feldman notes that the judicial review has been subsequently expanded 'well beyond anything justified by the ratio' (92). According to Feldman, the ratio of the decision is quite narrow (80, 82; see also 92), both circumscribed to the facts of the case and also a reaffirmation of:

[A] long line of cases holding that statutory provisions excluding the Court's supervisory function over inferior tribunals are not to be interpreted as excluding the Court's jurisdiction to check any attempt by an inferior tribunal to extend its remit by failing to comply with statutory limits on its functions. (82)

Despite this, he observes that *Anisminic* has nevertheless been treated subsequently as authority for nullifying *any* decision on the grounds of error of law, rather than purely jurisdictional ones (93, 95). Interestingly, Feldman appears to identify this as a hallmark of a landmark case, noting that 'what landmark cases decide and what they are later regarded as authority for may be very different' (92).

As with the analyses of both *Baldwin* and *Padfield*, therefore, Feldman's analysis of *Anisminic* demonstrates the merits in revisiting landmark cases in detail. All three decisions are examples of cases which, despite being well known, have been reduced to their perceived ratio. By placing them in their proper historical and political context, all three analyses have demonstrated that the cases' importance to the development of administrative law is far more nuanced than is otherwise acknowledged, and essential reads for anyone interested in the expansion in judicial review in the mid-twentieth century.

## **6. Controlling the Prerogative: *GCHQ*, *Bancoult* and *Miller***

It is in this section that this review begins to deviate from the chronological approach adopted by the volume. Although it begins with a discussion of the *GCHQ* Case (Chapter Five), which chronologically follows *Anisminic* in the volume, it will nevertheless be followed by

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<sup>18</sup> See Taylor (n 1).

<sup>19</sup> [1969] 2 AC.

discussions of *Bancoult* (Chapter Eleven) and *Miller* (Epilogue). All three cases concern the exercise of the Crown's prerogative powers by Ministers, a major source of governmental power which was traditionally immune from judicial scrutiny. As will be shown, all three cases were instrumental in subjecting the government's exercise of the royal prerogative to legal controls.

Richard Drabble QC begins by discussing *Council of Civil Service Unions v Minister for the Civil Service*,<sup>20</sup> commonly known as the *GCHQ* Case, which was decided by the House of Lords in 1985. Prime Minister Margaret Thatcher issued an instruction pursuant with Article 4 of the Civil Service Order in Council 1982 (an Order in Council issued via the royal prerogative, not statute), banning employees at GCHQ from being union members. A judicial review of this instruction was brought, challenging the lawfulness of the instruction on the grounds that it was issued without any prior consultation with either the unions or the employees. Although the House of Lords decided that the instruction was lawful on national security grounds, they crucially held that the source of governmental power (whether statute or prerogative) did not determine its reviewability by the courts, but instead its subject matter.

Drabble views the *GCHQ* Case 'as part of a self-conscious attempt by the higher courts to establish a principled body of administrative law primarily taking place in the 1980s and 1990s' (100), thus contributing to the creation of 'the new public law' (105). As he acknowledges (103-4), the *GCHQ* case is perhaps most well-known for Lord Diplock's pronouncements on judicial review, in particular his descriptions of the three grounds (illegality, irrationality and procedural impropriety), where Lord Diplock identified irrationality as a separate ground from illegality for the very first time (104). As Drabble notes:

[T]here can be no doubt that the dramatic *GCHQ* litigation was one of the catalysts causing the higher reaches of government, and government lawyers, to think hard about the risk of legal challenge in contexts where there might previously have been something of a sense of immunity, a sense that problems in relation to controversial issues might well arise in the political sphere but were unlikely to give rise to dangerous litigation – dangerous, that is, from the point of view of government. (104)

Although the decision makes significant pronouncements on legitimate expectation, Drabble nevertheless rejects this as begin the basis for the case's significance (100). He instead argues that the case's specific contribution to the development of administrative law lies with the court's unanimous decision to remove the source of governmental power as a barrier to judicial review, replacing it instead with subject matter (100, 113). Indeed, before the *GCHQ* Case, it was well established that whilst the courts could determine the existence and scope of prerogative powers, they were unable to review their exercise.<sup>21</sup> The House of Lords' decision thus allowed the expansion of judicial review to include non-statutory powers for the first time, thus signalling the closing of a gap in governmental accountability which had persisted for centuries.

However, the *GCHQ* case only concerned the reviewability of an instruction issued under an Order in Council, rather than the Order itself. Despite the significance of the judgment, therefore, questions persisted over the reviewability of prerogative legislation until the 2008 decision of the House of Lords in *Bancoult (No. 2)*,<sup>22</sup> which is discussed in the volume by Satvinder Juss. The facts of the case are exceptionally complex but can be summarised as follows. In 1965 the British Indian Overseas Territory (BIOT) was created, empowering the Commissioner of BIOT to 'make laws for the peace, order and good government of the

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<sup>20</sup> [1985] AC 374.

<sup>21</sup> See *Darnel's Case (Case of the Five Knights)* (1627) 3 St Tr 1.

<sup>22</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61.

territory'. In 1971, the Commissioner issued the Immigration Ordinance 1971, which forcibly relocated the entire population of BIOT—Chagossians or Ilois—to Mauritius in order to establish a US military base on the island of Diego Garcia. The Chagossians launched a series of legal actions against their removal, and in *Bancoult (No. 1)* the High Court found that the removal and relocation of the native population was unlawful.<sup>23</sup> Although the UK Government said that they would abide by the judgment and allow the Chagossians to return to their native islands, they nevertheless reneged on their promise following the publication of a feasibility study on Chagossian resettlement. As a result, the UK Government, in order to reinstate control over immigration and prevent Chagossian resettlement, used its powers under the royal prerogative to enact the BIOT (Constitution) Order 2004 and issue a new BIOT (Immigration) Order. Section 9 of the Constitution Order 2004 stated clearly that 'no person has a right to abode in the territory'. In *Bancoult (No. 2)*, the legality of the two new Orders in Council was challenged. However, although the House of Lords unanimously agreed that Orders in Council themselves were in principle amenable to judicial review, their Lordships, by a majority of three to two, nevertheless held that the Orders in question were lawful.

Despite extending judicial review to include Orders in Council, thus closing a gap in the reviewability of the prerogative since the *GCHQ* Case, *Bancoult (No. 2)* actually stands out from the other landmark cases discussed in the volume because it is almost universally seen as a bad decision. Juss launches a scathing attack on the reasoning behind the majority's decision, describing it as 'a regressive step back from cherished time-honoured common law values that helped develop the Rule of Law' (262). As Juss notes, the case 'will be remembered for its abandonment of the common law's affirmation of a Subject's right to be free from exile' (252).

Indeed, the right to abode of the Chagossians sits at the centre of the litigation, and what is striking about the case is the distinction that the Court draws between Britain and its overseas territories in the protection of this right by the UK Government, as well as the right's very existence, despite it arguably being guaranteed under English law by virtue of Magna Carta. Whereas the right of abode in Britain cannot be abrogated or overridden by the prerogative without the consent of Parliament, the same was not true in the colonies. This is because the majority in *Bancoult (No. 2)* deemed prerogative legislation for a colony to be plenary in nature for the territory to which it applies, effectively equating it with the unlimited legislative power of Parliament. As a result, not only could prerogative legislation be passed for a colony which denied its inhabitants their constitutional rights, but the courts would be unable to invalidate it for so doing. If the courts are unwilling (or unable) to determine the validity of an Act of Parliament where it breaches constitutional rights, they are equally unable to do so in relation to prerogative legislation passed concerning colonial governance. Juss therefore argues that the decision in *Bancoult (No. 2)* challenges the well-established rule against the prerogative's immunity from judicial scrutiny stretching back to the *Case of Proclamations* in 1611 (239). As he notes:

It held that the primary exercise of the prerogative could be reviewable on the grounds that the power breaches the principle of certainty or fundamental rights.

Whereas in this respect it moves judicial control of the prerogative forwards, the ultimate decision of the House of Lords left the unhappy impression that when it comes to the exercise of its legal powers in the Colonies, the Crown can behave as an absolute monarch, notwithstanding the most basic axioms of the Rule of Law. It can moreover do so free from any constitutional constraints. The case is troubling because it implied an absence of constitutional limits on the exercise of prerogative powers in circumstances where rights of British subjects were involved. (239)

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<sup>23</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

Juss's analysis of the case is detailed and compelling, providing counter-arguments for most of the arguments presented by their Lordships in justifying their conclusions. Juss's most intriguing argument, however, is that the prerogative is an anachronism which the House of Lords failed to take into account when it made its judgment (240). The modern exercise of colonial governance, he argues, if it is to be exercised at all, should be done in accordance with international law, specifically the UK's obligations of trusteeship under Chapter XI of the UN Charter (266; see also 245-52). This latter point is a unique and persuasive feature of Juss's analysis, and one which was mostly overlooked by the court.

The final case considered in this section is *R (Miller) v Secretary of State for Exiting the European Union*,<sup>24</sup> which is analysed in the volume by Paul Craig. Following the referendum on EU membership in 2016, where 52 percent of the British electorate voted to leave the EU, Gina Miller challenged the lawfulness of the Government's claim that they could use their powers under the royal prerogative to trigger Article 50 TEU and begin Britain's withdrawal from the EU. The UK Supreme Court, by a majority of eight to three, decided that the Government could not trigger Article 50 using the prerogative alone, but that prior authorisation in the form of an Act of Parliament was required.

Craig argues that '*Miller* is of enduring constitutional importance' (305), and identifies three ways in which the decision can be seen as a landmark case. First and foremost, Craig argues that the case 'forced courts and commentators alike to confront ambiguities in the well-known constitutional precepts through which limits on prerogative power are commonly expressed' (305). Secondly, he argues that the decision is of 'lasting importance' because of the methodologies it deploys in order to resolve ambiguities concerning the boundaries of doctrinal precepts; namely articulating the background values that inform them and ensuring that any doctrinal answer reached 'coheres with related constitutional principles' (305). Thirdly, he argues that the case is important 'because of what it tells us about the relationship between the "legal" and the "political"', noting that '[u]nderlying every significant constitutional case there is always a political story' (305).

On the third point, Craig recounts the political background to the case, and is highly critical of the Government's decision to defend their decision to trigger Article 50 via the prerogative in the courts (311, 313). On the first two points, Craig begins by outlining the well-established limits on the prerogative: firstly, that the prerogative cannot be used to alter the law of the land or rights (as per the aforementioned *Case of Proclamations*); and secondly that statute supersedes prerogative where they overlap (*De Keyser*<sup>25</sup>). On the first limitation, Craig highlights the confusion over what constituted 'the law' in the context of EU law and the triggering of Article 50, as s.2(1) of the European Communities Act 1972 acknowledges that EU law within the UK would vary 'from time to time'. On this point, the Court recognised EU law as being part of 'the law' of the UK, and thus incapable of change by the prerogative alone. In so doing, the majority drew a distinction between changes in the content of EU law resulting from new EU legislation, and the major changes to the law that would occur following the UK's withdrawal from the EU (307). On the second limitation, Craig acknowledges the ambiguity surrounding its applicability to *Miller*, noting that the decision 'did not turn on the application of the *De Keyser* principle', although it was accepted by the majority as a valid and well-established constraint on the exercise of prerogative powers (308).

According to Craig, one can only resolve the issues which arose in *Miller* when the principle behind the two constraints on the prerogative are understood, namely that of parliamentary sovereignty (310). Both constraints, he notes, are designed to prevent

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<sup>24</sup> [2017] UKSC 5.

<sup>25</sup> *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

parliamentary sovereignty from being undermined by the executive's use of the prerogative (309), explaining also why the referendum result was deemed to be advisory despite it otherwise being a democratic expression of popular will (310). Awareness of parliamentary sovereignty as the underlying background value to the case is significant, Craig argues, because it explains 'why for so many people the intuitive answer was that the decision to leave the EU should not rest with the executive acting alone, but should rather depend on statutory approval by Parliament' (310). Furthermore, Craig argues that the decision in *Miller* coheres with the reasoning of the UK Supreme Court in *HS2*,<sup>26</sup> which recognised the existence of constitutional statutes which are immune from implied repeal, such as the 1972 Act. The normative value behind this, Craig notes, 'is that a statute of such importance should not be repealed or amended other than through specific decision by the sovereign Parliament' (310). As he argues:

If statutes of such importance should not generally be susceptible to implied repeal, in order thereby to safeguard the sovereignty of Parliament, then it follows that they should not be capable of being deprived of effect by the executive, without specific authorisation from the sovereign Parliament. (311)

This is an interesting and novel argument by Craig, especially given the UK Supreme Court gave only passing (and ambiguous) consideration to constitutional statutes in *Miller*.<sup>27</sup> His view that parliamentary sovereignty is the underlying value behind the distinction between constitutional and ordinary statutes, however, is debatable. If anything, the distinction is instead a challenge to parliamentary sovereignty, as it places a limit as to manner and form on the legislative powers of Westminster.

Craig's contribution to the volume is impressive, providing a succinct summary of what is arguably the most important public law case in decades. Craig's summary, however, does exclude consideration of the secondary question considered by the Court, namely whether the devolved legislatures of Scotland, Northern Ireland and Wales had to be legally consulted before Article 50 could be triggered, which the Supreme Court unanimously answered in the negative. Despite this, it is nevertheless a testament to both the volume and Craig that *Miller*, which was only decided in January 2017, could be included in this book, and Craig is deserving of the praise he receives by the editors in providing as succinct and concise a summary as he did (x).

For the purposes of this thematic review, *Miller* also provides a useful contrast to the above discussion of *Bancoult (No. 2)*. Whereas *Miller* concerned the successful application of well-established limits on the prerogative to executive action domestically, *Bancoult (No. 2)* concerned the inapplicability of additional limits on the prerogative in the realm of colonial governance. The former suggests that the prerogative is subject to constitutional constraints which the courts are willing to enforce, whilst the latter suggests the opposite. Whether conformity on the issue will ever be reached remains to be seen.

## **7. The Rule of Law: *M v Home Office* and *Evans***

This section will discuss *M v Home Office* (Chapter Seven) and *Evans* (Chapter Thirteen). As already noted above, Gordon identifies both cases as examples of where the Rule of Law as first developed in *Entick* was applied (4-5). Both cases can therefore be seen as watershed moments in the development of the Rule of Law worthy of inclusion in the volume.

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<sup>26</sup> *R (on the application of HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

<sup>27</sup> *R (Miller)* (n 24) [67].

The 1992 decision of the House of Lords in *M v The Home Office*<sup>28</sup> is analysed by Christopher Forsyth. M, a teacher from Zaire (now the Democratic Republic of Congo), sought asylum in the UK but the Home Office refused his request. M therefore sought a judicial review of the decision, but the Court of Appeal refused the application. With his deportation imminent, M launched a second judicial review action at the High Court. Garland J., unable to consider M's application or review in the time remaining before his deportation, sought an undertaking from the Home Office that M would not be removed before the Court had time to consider his application, which he believed he received. Nevertheless, the Home Office had M deported before Garland J. could consider M's second application for review, and upon learning of this, Garland J. issued a mandatory order requiring the Home Office to return M to the UK. The Home Secretary decided to ignore this order and prevented M's return to the UK. The Home Office then formally applied to have the order set aside. Garland J., convinced by the argument that he had erred in law as interim relief cannot be granted against a Minister, accordingly set the order aside.

M, still in Zaire, responded by initiating proceedings for contempt of court against the Home Office and Home Secretary on the grounds that they breached their undertaking to prevent his deportation and failed to comply with the mandatory order issued by Garland J. requiring his return to the UK. The question before the court was whether Ministers of the Crown could be held liable for contempt of court notwithstanding Crown immunity. The House of Lords unanimously held that the courts could compel Ministers to comply with the law via injunctions or contempt of court proceedings, stating unequivocally that Crown immunity does not extend to Ministers in the exercise of their official duties.

It had been long established that the Crown, in the form of the Sovereign, was immune from both civil and criminal court proceedings. Section 21(1) of the Crown Proceedings Act 1947 gave statutory recognition to this fact in relation to the granting of coercive relief, but also appeared to suggest that Ministers were also protected by the Crown's immunity (151-2). This, Forsyth argues, was a misreading of s.21(1) caused by the earlier decision of *Merricks v Heathcote Amory*.<sup>29</sup> Ministers, he contends, clearly remain personally liable under the Act for any misuse of power, a distinction which he demonstrates had already been recognised by the courts prior to the decision in *M* (150-1). As Forsyth argues, the decision in *M* is thus significant for correcting this mistake, thus putting the Rule of Law 'back on the rails'.<sup>30</sup> As he notes:

This error ... was a threat to the rule of law since the vast majority of the powers exercised by central government consists in powers entrusted by law to Ministers of the Crown. If these Ministers only obeyed the law 'as a matter of grace', the rule of law in truth did not reach into central government. (159-60)

Because *M* concerned contempt of court rather than judicial review, Forsyth also notes that the Court's decision had no direct effect in making coercive relief available against Ministers in proceedings for the latter. Despite this, he argues that this case has had an indirect effect: Lord Woolf in his judgment in *M* corrected the mistake by Lord Bridge in *Factortame*<sup>31</sup> that s.31(2) of the Senior Courts Act 1981 prohibited the courts from granting injunctions against the Crown in judicial review proceedings. As a result of Lord Woolf's interpretation in *M*, injunctions can now be made against Ministers in judicial review proceedings (154-7).

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<sup>28</sup> [1993] WLR 433.

<sup>29</sup> [1955] Ch 567

<sup>30</sup> Quote by Lord Woolf, *The Times* 17 August 1993. Forsyth relies on the quote heavily throughout his discussion of the case.

<sup>31</sup> *R v Secretary of State for Transport, ex parte Factortame Ltd.* (No. 2) [1991] 1 AC 603.

It is clear from Forsyth's analysis of *M* that the decision upheld the Rule of Law or, more accurately, corrected mistakes in the law which otherwise put the Rule of Law at risk. As he notes:

The judiciary should be the reliable defender of the rule of law. In the end, with the decision of the House of Lords, it was. But before then the foundations rocked. The larger lesson surely is that the battle for the rule of law is never won but requires eternal vigilance. (160)

Despite his praise for the decision, Forsyth is nevertheless cautiously sceptical of it. Forsyth highlights an inconsistency in the enforcement of coercive orders, noting that '[u]ltimately it is the executive power, which has to enforce court orders, whose efficacy against the government thus depends in a sense upon the government's willingness to police itself' (158). Despite being a watershed moment for the Rule of Law, therefore, the decision nevertheless raises serious questions over the enforcement of the Rule of Law, suggesting that the courts alone are not enough. Forsyth's discussion of *M* also acknowledges the different legal position in Scotland (158-9), the only one in the volume to do so, even going as far as to say that '[m]uch of the fuss and drama that attended *M v Home Office* would simply not arise in Scotland' (158).

Thomas Fairclough discusses the next case in this section, *Evans v Attorney General*,<sup>32</sup> which was decided by the UK Supreme Court in 2015. In 2005, under the terms of the Freedom of Information Act 2000, newspaper journalist Robert Evans requested the release of Prince Charles's advocacy correspondence with government ministers, which the Government rejected. Although the Information Commissioner upheld the right of the Government to refuse the requested information, Evans nevertheless appealed, and in 2012 the Upper Tribunal agreed that the information should be released. Following the decision, however, the Attorney General decided to exercise his powers under s.53 of the 2000 Act to veto the Upper Tribunal's decision and prevent the release of Prince Charles's correspondence. Evans sought a judicial review of the Attorney General's veto. The UK Supreme Court, by a majority of five to two, held that the veto was not exercised lawfully, and that Prince Charles's correspondence had to be released.

According to Fairclough, *Evans*, unlike other landmark cases, 'is not one that marked a major shift in a particular doctrinal area of judicial review' (285), but is instead significant because of 'the range of disagreement and the starkness of the differing constitutional orders proposed by each Justice' (286). Indeed, the decision is a rare example in modern times of a split majority, and is a stark contrast in this way to the decision of the UK Supreme Court in *Miller* discussed above. The principal disagreement Fairclough refers to was between the leaders of the two majorities: Lord Neuberger and Lord Mance.

Despite the absence of any express limits on the power, Lord Neuberger held that the Attorney General could not invoke s.53 to overturn a judicial decision merely because he disagreed with it. To allow otherwise, Lord Neuberger notes, 'would cut across two constitutional principles which are also fundamental components of the rule of law'.<sup>33</sup> These are:

First ... a decision of the court is binding as between the parties and cannot be ignored or set aside by anyone ... Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are ... reviewable by the court at the suit of an interested citizen.<sup>34</sup>

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<sup>32</sup> [2015] UKSC 21; [2015] 2 WLR 813.

<sup>33</sup> *Ibid*, [51].

<sup>34</sup> *Ibid*, [52].

By contrast, Lord Mance emphasised that the standard of review applied in determining the lawfulness of the Attorney General's use of the veto would be context-dependent, but that he would have to have reasonable grounds for its use. Reasonableness was a standard higher than rationality, taking into account the relative roles of both the Tribunal and the Attorney General.

As Fairclough notes, both approaches use similar constitutional principles, but attach different weight to them (291). Lord Neuberger adopted what Fairclough describes as a 'strong constitutionalist approach' (292). He attached great weight to specific constitutional principles in his interpretation of s.53, in this case the Rule of Law, to such a degree that Lord Wilson even accused him of rewriting that section.<sup>35</sup> Lord Mance, Fairclough notes, adopted a relatively 'weaker constitutionalist approach' (292), which sought to understand s.53 by recourse to its wider constitutional context, in this case the separation of powers (290-1).

*Evans* was included in this section of this review on the Rule of Law precisely because of the weight attached to the doctrine by Lord Neuberger, evidence, perhaps, of the modern drive towards judicial supremacy eluded to by Gordon (4). Fairclough's purpose behind discussing *Evans*, however, is to show how 'public law discourse is often affected by normative concerns hiding beneath the surface' (302). His contribution to the volume certainly shows that, but, as he himself admits, the normative discourse he engages with in his analysis is not directly relevant to the decision in *Evans* (302). Fairclough's point is less about *Evans* specifically, therefore, and more about public law discourse in general. He uses *Evans* as evidence of the normative debates he argues are going on beneath the surface of all doctrinal debate in contemporary public law. Once this is understood, he notes, '[w]e then see that the stark doctrinal disunity in public law reveals a deeper unity and shared debate' (303). Although this makes Fairclough's analysis the most jurisprudential in the volume, it nevertheless highlights a potential shift in judicial reasoning, a 'rarity in public law' (302) at present, but one which may soon become the norm.

## 8. Substantive Legitimate Expectations: *Coughlan*

The final case included in the volume concerning judicial review of a public body in the classic sense is the 2001 decision of *R v North and East Devon Health Authority*,<sup>36</sup> commonly referred to as *Coughlan*, after the claimant in the case, Pamela Coughlan. It is discussed in Chapter Nine by Kirsty Hughes. The case concerned legitimate expectation, and the facts are as follows. Coughlan, who was dependent on daily medical care, successfully challenged the decision of North and East Devon Health Authority to close down the care home in which she resided, Mardon House, on the grounds that the decision to do so went against their promise to her that she would have a 'home for life' there.

According to Hughes, the case is significant because it marks the first time when a court enforced a legitimate expectation to a substantive promise made by a public body. Previously, the court had been willing only to enforce procedural, not substantive, legitimate expectations (181). Following a succinct but comprehensive account of pre-*Coughlan* case law on the matter (184-90), Hughes therefore argues, not only that *Coughlan* marked a clear turning point in the law of legitimate expectations (190), but that the decision contributed to the wider development of administrative law principles (201-7).

According to Hughes, *Coughlan* linked frustration of a legitimate expectation by a public authority with abuse of power,<sup>37</sup> resulting in a requirement that public bodies exercise their

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<sup>35</sup> *Ibid*, [168].

<sup>36</sup> [2001] QB 213.

<sup>37</sup> *Ibid*, [57]: '[W]hether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power'.

decision-making powers fairly in order to be lawful, thus limiting executive power (202). Furthermore, Hughes claims that *Coughlan* also provides early evidence of proportionality as a standard of review before the coming into force of the Human Rights Act 1998 (203-7), as it involved the court balancing the interests of the individual against the needs of a public body in making financial decisions in relation to the provision of public services (182), evidence also of a shift in favour of protecting the rights of individuals over the public interest (207).

Despite this, however, Hughes acknowledges that there have been hardly any cases post-*Coughlan* involving the enforcement of substantive legitimate expectations, and many more where it has been rejected (193). This raises the question whether the decision in *Coughlan* is a rare one-off, and thus perhaps undeserving of being singled out as a landmark case. Hughes insists on the case's importance, however, not only because she feels that it has contributed to the wider development of administrative law as noted above, but also because it represents 'a high point of judicial enforcement of substantive legitimate expectations' (193).

*Coughlan*'s inclusion is an anomaly in the volume. It is, with the exception of *Entick*, the only case not to have involved an appeal to the House of Lords or UK Supreme Court. This does not immediately negate the case's inclusion, as decisions do not have to go to the highest court to be binding and significant. However, the law on legitimate expectation, as made clear by Hughes, is anything but settled, and there is no doubt that this is in no small part due to the absence of any House of Lords or UK Supreme Court judgment on the matter.

As a purely English law case, its applicability to other parts of the UK is also in doubt, as it is merely persuasive. Given the fact that other common law jurisdictions, when faced with similar circumstances, have given *Coughlan* a negative to mixed reception (208), it seems unlikely that the position in the remaining constituent nations of the UK will be any more favourable to it. Its inclusion also, as noted above, raises questions over why other equivalent cases of importance (and ambiguity), especially those from the other constituent nations of the UK, were excluded, thus suggesting that the volume's scope does not necessarily extend to the whole of the UK.

Despite this, however, it is clear from Hughes's impressive analysis of the case that *Coughlan* raises some fundamental questions concerning the scope of administrative law in the UK, and it is unquestionably worthy of inclusion in the volume as a result. Whether or not the UK Supreme Court will one day address the issues raised in *Coughlan*, perhaps even replacing it as the landmark case on the issue, remains to be seen.

## **9. Challenging Parliamentary Sovereignty: *Factortame*, *Belmarsh* and *Jackson***

Being concerned with the exercise of power by the executive, whether statutory or prerogative, the decisions discussed so far did not, *prime facie*, pose a risk to the doctrine of parliamentary sovereignty (although some cases no doubt pushed the boundaries of statutory interpretation). This section, however, will discuss the cases of *Factortame* (Chapter Six), *Belmarsh* (Chapter Eight) and *Jackson* (Chapter Ten), all of which can be seen to challenge Dicey's understanding of parliamentary sovereignty as they involve the review of primary legislation by the courts. Whereas the cases discussed so far also concerned advances in administrative law driven by the courts, two of the cases discussed here (*Factortame* and *Belmarsh*) concern advances in UK public law which, despite empowering the courts, were nevertheless driven by Parliament.

John McEldowney offers an analysis of what he calls the '*Factortame* litigation' (115): a series of cases where the validity of the Merchant Shipping Act 1988 was challenged on the grounds that it infringed (what is now) EU law. Although McEldowney explores the background to the *Factortame* litigation, discussing more than one of the *Factortame* decisions, he nevertheless focuses primarily on *Factortame* (No. 2) (hereafter referred to as simply

*Factortame*).<sup>38</sup> This is unquestionably a landmark case in UK public law, as the House of Lords held that, where domestic legislation was incompatible with European Community law and could not be read compatibly with it, the courts could set aside the incompatible domestic legislation in favour of Community law. This is precisely what happened with regards to the Merchant Shipping Act 1988, thus challenging Dicey's understanding of parliamentary sovereignty.

McEldowney identifies numerous reasons why the case can be seen as being significant (115-17), but he unsurprisingly focuses his analysis on the decision's impact on the UK legal system as a whole, in particular parliamentary sovereignty. It is a detailed account of subsequent interpretations of the *Factortame* decision, encompassing both case law and academic commentary on the status of EU law and parliamentary sovereignty (131-8). Thorough consideration of this extensive debate is beyond the scope of this review, but it is submitted that McEldowney makes several observations concerning the debate which are worthy of note here.

Despite acknowledging the fact that the '[f]ull implications of the *Factortame* litigation are still being assessed today' (139), McEldowney argues that the decision in *Factortame* 'dramatically empowered judicial discretion', giving rise in particular to the disapplication principle when domestic legislation cannot be read compatibly with EU law (140). The application of the principle, however, turns on judicial discretion, which he notes is 'hard to predict' (140). On this crucial point, McEldowney turns in particular to the UK Supreme Court in *HS2*,<sup>39</sup> where Lord Reed noted that there were some constitutional fundamentals, mostly embodied by statute, that even EU law could not alter, even if they were in direct conflict with EU law. This demonstrates also that the court sees EU supremacy as an expression of parliamentary sovereignty rather than as a limit on it.<sup>40</sup> This, McEldowney notes, puts potential limits on the European Court of Justice (ECJ), something which seems to run contrary to the ECJ's understanding of national courts in the enforcement of EU law domestically (135).

*Factortame* was the first major challenge to parliamentary sovereignty, thus making McEldowney's observations conceptually intriguing from the perspective of this section of the review. Although McEldowney stresses that the courts have clearly accepted the primacy of EU law (141), it is submitted that his analysis nevertheless demonstrates that the judiciary's understanding of EU's impact on parliamentary sovereignty has changed dramatically since *Factortame*. Given the conceptual uncertainty surrounding constitutional statutes, it may be that the judiciary's subsequent reassessment of the reasoning behind the *Factortame* decision has resulted in the common law replacing EU law as the real challenge to parliamentary sovereignty.

Brexit, however, remains a significant factor in the determination of this issue in the foreseeable future. Once the UK withdraws from the EU, it may be that the issues surrounding *Factortame* will cease to have relevance. McEldowney, however, believes that the decision will continue to be important, depending on the withdrawal agreement negotiated (141). Given the current terms of the European Union (Withdrawal) Bill 2017-19, it seems likely that EU supremacy will have some role in the post-Brexit constitution, albeit a diminished one. Whatever happens, McEldowney's account of the *Factortame* litigation will remain a relevant account of a major chapter in the UK's constitutional history.

Meanwhile Richard Clayton QC provides an illuminating account of *A v Secretary of State for the Home Department*, also known as the *Belmarsh* Case.<sup>41</sup> Part 4 of the Anti-Terrorism Crime and Security Act 2001 empowered the Home Secretary to detain non-British

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<sup>38</sup> *Factortame (No. 2)* (n 31).

<sup>39</sup> *HS2* (n 26).

<sup>40</sup> See the European Union Act 2011, s.18.

<sup>41</sup> *A v Secretary of State for the Home Department* [2005] 2 AC 68.

citizens suspected of terrorism without trial until they were deported. If there was a substantial risk of torture in the destination country, however, a detainee was prohibited from being deported as doing so would breach Article 3 of the ECHR (prohibition of torture). This meant that such detainees would have to be held indefinitely without trial, thus breaching Article 5 of the ECHR (right to liberty and security). Realising this, the UK Government accordingly used Article 15 of the ECHR (derogation in time of emergency) to derogate from Article 5. Although detainees were entitled to challenge their detention, they could only do so to the Special Immigration Appeals Commission (SIAC), the decisions of which could be appealed to the Court of Appeal and the Supreme Court (formerly the House of Lords).

When fourteen detainees held under Part 4 of the 2001 Act at HM Belmarsh Prison challenged the legality of their detention in 2002, SIAC issued a declaration of incompatibility under the Human Rights Act 1998 (HRA) on the grounds that restricting Part 4 of the 2001 Act to non-British nationals breached Article 14 of the ECHR (prohibition of discrimination) because threats to national security also came from British nationals. Although the decision was overturned by the Court of Appeal, this in turn was overturned on appeal by the House of Lords, which issued a declaration of incompatibility for breaches of both Articles 5 and 14. Although the detainees remained in prison following the decision, the Government withdrew its derogation and enacted the Prevention of Terrorism Act 2005, which repealed and replaced Part 4 of the 2001 Act with a new system of control orders.

Clayton views the case as a major turning point where the court examined the lawfulness of detention where national security was engaged, something which the courts have 'traditionally been highly deferential to executive decision-making' (161; see also 180). In order to explain this new judicial assertiveness, Clayton identifies the HRA as being responsible, claiming that it 'fundamentally recast basic public law principles' (161). As he notes:

[A] challenge made under the HRA 1998 raised new legal possibilities, which went beyond traditional administrative law principles, demonstrating that Parliament cannot insulate itself altogether from a legal challenge where Convention rights are, themselves, breached. As a result, Parliament decides to rewrite the legislation and to introduce a new regime to combat terrorists. (161)

Although subject to some disagreement, the HRA can be seen to have introduced rights review into the UK constitutional system, thus enhancing judicial scrutiny of executive action. As Clayton observes, a decision which would otherwise be deemed rational under the traditional grounds of review, could now nevertheless be found to have breached the Convention Rights (166). Crucially, however, the HRA also extends rights review to parliamentary legislation, including Acts of Parliament. Consequently, Lord Bingham was able to say with complete confidence that the HRA gave the courts a 'very specific, wholly democratic mandate' to intervene in decisions from which they were traditionally barred.<sup>42</sup>

Whilst Clayton is thus correct to say that Parliament is now no longer insulated from legal challenge on human rights grounds, it must be stressed that this is of Parliament's own choosing, and it did so in such a way which expressly preserved parliamentary sovereignty. Although the courts can, as they did in *Belmarsh*, issue a declaration of incompatibility, this declaration does not affect the validity of the incompatible legislation,<sup>43</sup> thus leaving any remedial action up to Parliament.

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<sup>42</sup> *Ibid*, [42].

<sup>43</sup> The Human Rights Act 1998, s.4(6).

An interesting feature of Clayton's account of the case is the attention he places on the political response to the decision in addition to the decision itself (176-9). As he notes, the Court's decision compelled the Government to replace Part 4 of the Anti-Terrorism Crime and Security Act 2001 with the Prevention of Terrorism Act 2005, which substituted indefinite detention without trial with a system of 'control orders' designed to be compliant with the ECHR. Although Parliament may no longer be insulated from human rights review, Clayton's assessment nevertheless implies that legislative action following a declaration of incompatibility is near-automatic. Indeed, as Clayton observes in relation to the *Belmarsh* Case, the Prevention of Terrorism Act 2005 was passed through both Houses of Parliament in a mere seventeen days (178). This is somewhat of an exception, however, as Clayton also observes that '[i]n practice, successive governments have addressed declarations of incompatibility by making remedial orders' (166). This is indeed true, but it must be stressed that neither the Government nor the Parliament are obliged to respond positively to a declaration of incompatibility, and have to date refused to in relation to prisoner voting.<sup>44</sup> Although Clayton is therefore correct in arguing that the HRA has altered UK public law principles, in particular by introducing rights review of primary legislation, it cannot be forgotten that the extent of these changes, because they were introduced by Parliament, ultimately remain at their discretion, not that of the courts.

The 2005 decision of the House of Lords in *R (Jackson) v Attorney-General*<sup>45</sup> will be considered next, and is analysed in the volume by Elizabeth Wicks. *Jackson* concerned a legal challenge to the validity of the Hunting Act 2004 on the basis that the Parliament Act 1949 (which modified the procedure originally set out in the Parliament Act 1911 and allowed the 2004 Act to pass without the consent of the House of Lords as the upper chamber of Parliament) was equally invalid. This, Jackson argued, was because the 1949 Act was passed using the 1911 Act (thus without House of Lords consent), and the 1911 Act could not be used to expand its own powers or make constitutional changes. On appeal to the House of Lords, their Lordships unanimously held that both the Parliament Act 1949 and the Hunting Act 2004 were valid Acts of Parliament.

Wick argues that *Jackson* is significant for two reasons: firstly, because it concerned the courts determining the validity of the Hunting Act 2004; and secondly, because of the 'musings' by their Lordships on the evolution of parliamentary sovereignty (212). As she notes, the case provided 'a rare opportunity for nine Law Lords to explain their views on a range of constitutional matters' (220). Although Wick explores the various arguments surrounding the court's reasoning behind deciding that the 2004 Act was indeed valid, her great contribution is her argument that the case is the culmination of two distinct periods of evolution under the UK constitution: the first being the constitutional crisis between the two Houses of Parliament in the early twentieth century; and the second being the recent post-Dicey re-evaluation of parliamentary sovereignty, whereby attempts have been made to subject it to other democratic principles such as the Rule of Law (212).

Wick expertly explains the complicated background to the passage of both the 1911 and 1949 Parliament Acts, thus placing them in their proper historical context. In so doing, she does not shy away from criticism, describing the enactment of the 1949 Act as 'both unnecessary and unnecessarily antagonistic', and ultimately weakening Parliament's control over the executive (237). As she notes:

An executive-dominated House of Commons, when coupled with the conventional limits of on the powers of the Monarch and the Parliament Acts' restrictions on the

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<sup>44</sup> The declaration was issued by the Inner House of the Court of Session in *Smith v Scott* [2007] CSIH 9.

<sup>45</sup> [2005] UKHL 56; [2006] 1 AC 262.

powers of the House of Lords, means that parliamentary sovereignty is but a small step away from executive sovereignty. It is no surprise therefore that Dicey's traditional doctrine has been the subject of reconsideration in recent years. (237)

What is truly commendable about Wick's argument is that she links this weakening of parliamentary control over the executive, to which the Parliament Acts were a key contributor, with the increased scepticism of parliamentary sovereignty and the rise of the Rule of Law reflected in *Jackson*. In the case, Lord Steyn, Lord Hope and Baroness Hale expressed doubts over the applicability of Dicey's understanding of parliamentary sovereignty to the contemporary constitution (226-8), suggesting obiter that it was subject to common law limits, one of which was adherence to the Rule of Law (233-6). Wick is clearly supportive of the Rule of Law acting as a barrier against tyranny in the UK, but she nevertheless stresses that it should not completely replace parliamentary sovereignty under the constitution. As she concludes:

The rule of law is the means by which the judiciary may be able to ensure that the executive-dominated House of Commons is true to the democratic principle that justifies Parliament's sovereign authority, but a role must still be played by Parliament itself, including a revitalised and legitimate upper house. A truly democratic Parliament fit for the twenty first century would be entitled to regard its law as sovereign but only under a constitutional framework that adhered to the rule of law. (237)

The extent to which the Rule of Law, as expounded by the courts, will become the controlling factor under the constitution remains to be seen. *Jackson* was decided in 2005, and since then the only case to seriously consider the limits imposed by the Rule of Law on legislative power is *AXA*, the next and last case to be considered in this review.

## **10. The Territorial Constitution: AXA**

*AXA General Insurance Ltd v HM Advocate and Others*<sup>46</sup> (Chapter Twelve), decided by the UK Supreme Court in 2012, is discussed by the Honourable Mr Justice Lewis. As with *Entick* and *Coughlan*, *AXA* has been given its own section in this review in recognition of its unique status. Although the case touches upon many themes covered by the other sections of this review, including parliamentary sovereignty, judicial review and the Rule of Law, it is nevertheless the only case in the volume which addresses devolution. As Lewis notes:

The UK has undergone fundamental constitutional change in terms of the creation of devolved legislatures with legislative competence to enact primary legislation. The UK has, in reality, moved from being a unitary state with a single, sovereign legislature to a quasi-federal structure with legislative competence shared between the UK Parliament and the devolved legislatures. That change required the courts to consider the nature of the devolution settlement, the nature of devolved legislation and the relationship between the courts and the devolved legislatures. (283)

*AXA*, he notes, is accordingly 'the defining authority charting the waters of the new constitutional settlement' (283), and therefore a significant landmark case in UK public law worthy of inclusion in the volume.

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<sup>46</sup> [2012] 1 AC 868.

In the case of *Rothwell v Chemical & Insulating Co Ltd*,<sup>47</sup> the House of Lords held that employees in England who developed pleural plaques as a consequence of exposure to asbestos did not constitute personal injury for the purposes of claiming damages. Following the judgment, the Scottish Parliament enacted the Damages (Asbestos-related Conditions) (Scotland) Act 2009 to reverse the House of Lords' decision in relation to Scotland, stating that pleural plaques did constitute injury. Because many employers had indemnity insurance, the insurance companies immediately became at risk of employers claiming money paid out to employees for such injury. The lawfulness of the 2009 Act was accordingly challenged in the courts by insurance companies on two grounds: firstly, that it was outside of the legislative competence of the Scottish Parliament because it infringed the ECHR; and secondly, that, based on common law grounds of review, the decision to enact the legislation was irrational. The UK Supreme Court held that whilst legislation passed by the devolved parliaments was amenable to judicial review, it was not subject to review on the common law grounds of rationality or reasonableness.

On the first challenge, the courts were required to determine whether the Scottish Parliament had acted within its legislative competence as stipulated by the Scotland Act 1998. As s.29 of that Act categorically states, any legislation passed by the Scottish Parliament which is contrary to the ECHR is not law. This role, Lewis argues, 'is usual in quasi-federal or federal structures, although it represents a new, explicitly constitutional role for the courts in the UK' (274). At the same time, however, he refers to it as the courts' 'traditional role' (283), stating that the second challenge is what raised 'new, and far-reaching questions about the nature of devolved legislation and the role of the courts in reviewing that legislation' (274), as it would permit an Act of the Scottish Parliament to be deemed unlawful by the courts based on common law grounds separate from the explicit terms of devolution acts (275).

In considering the case, Lewis explores the approaches that were open to the Court in relation to dealing with the second challenge. Essentially, the Court could have treated the devolved legislatures either as being no different from any other statutory body, and thus amenable to judicial review on common law grounds (275-6), or as bodies with legislative competence equivalent to that of the Westminster Parliament within their own jurisdictions, and thus not susceptible to judicial review (278-81). As Lewis notes, however, the Court ultimately opted for a middle-ground between the two whereby judicial review on common law grounds was held to be inappropriate given the democratic legitimacy of the Scottish Parliament. Determining whether the legislation was rational or reasonable was accordingly a matter better left to the Parliament rather than the courts (276-7).

The Supreme Court did suggest, however, that the Scottish Parliament could not pass legislation that was contrary to the Rule of Law. Lewis appears to air caution on this point, stating that the scope of any such common law restrictions 'remains unclear' (281). As he notes:

The courts need ... to be circumspect in imposing additional restrictions on the powers of devolved legislatures. The precise scope of the constitutional limitations should respect the fundamental democratic legitimacy of the devolved legislature. They should also respect the fact that there are specific limitations already included within the constitutional settlement and those settlements were the subject of popular referenda in the relevant constituent part of the UK. In those circumstances, the courts should generally be wary of imposing further judicial-made restrictions on the legislative competence of devolved legislatures. (281-2)

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<sup>47</sup> [2008] AC 281.

Lewis's analysis of *AXA* thus reveals a tension in the court's approach towards devolution under the contemporary constitution. The court, in refusing to treat the devolved legislatures like other public bodies, accords them greater latitude in their decision-making, despite both types of body exercising decision-making powers conferred by Westminster. They do not, however, accord the devolved bodies the same legislative privilege as Westminster, thus enabling them to subject their legislative decision-making to the Rule of Law in a potentially more far reaching manner than is possible with Westminster legislation (although Lewis does appear to accept the proposition that such legislation is amenable to review by the courts in exceptional circumstances). The case thus simultaneously limits and extends judicial authority, thus demonstrating, not only the complex relationship between both the courts and the UK's now multiple legislatures under the contemporary constitution, but that the courts are very much at the forefront of defining that relationship.

## 11. The Future of UK Public Law

This review has demonstrated that the cases chosen for discussion, along with their associated analyses, reflect the many changes which the constitution has undergone in the last half-century. Most strikingly, we have seen, not only the expansion in judicial review of executive action, but the extension of review to primary legislation, albeit with Parliament's permission. Although late to the party, the courts' contributions to the development of UK public law, in particular administrative law, has accordingly been extensive, driven largely by the courts themselves, but also in part by Parliament.

Given the large number of landmark public law cases decided in the fifty-three years covered by the volume (excluding *Entick*), there will no doubt be many more opportunities for the courts to contribute to the continuing evolution of UK public law in the near future, in no small part due to Brexit. Indeed, UK public law faces an uncertain future, and *Miller* was likely only the first of many cases concerning the UK's withdrawal from the EU. This uncertainty, however, gives this volume even greater purpose. As the editors note:

At a time when, post-Brexit, the UK faces many unprecedented challenges and anti-democratic forces are on the rise in much of the developed democratic world, the record of the courts in the cases discussed in this collection of essays will, it is hoped, serve as salutary reminder of the role of the judiciary in keeping the constitution in balance and in holding those who abuse power to account. (x)

This collection of essays offers a rare opportunity for seminal cases in the development of UK public law, expounded by leading scholars and practitioners, to be showcased to audiences both new and old, in a field which has traditionally marginalised the role of the courts. It is a testament to the skill and expertise of the authors and editors that so many complex and varied cases could be compiled in this manner, making it an invaluable contribution to the field and one which, despite the ongoing evolution of the UK constitution, will no doubt stand the test of time.

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