

Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution

Mark Elliott*

United Kingdom – UK Supreme Court – European Union – The orthodox view of the British constitution: lack of hierarchy of laws – Britain's 'unwritten' constitution and the role of 'constitutional statutes' in *Factortame* – *HS2* judgment makes up for House of Lords' omission in *Factortame* – Relationship between parliamentary sovereignty and EU law more clearly articulated – A normative-hierarchical constitutional order

INTRODUCTION

There are many things that distinguish the United Kingdom from its continental neighbours. One of them is the absence of a written constitution. Another is the absence of a high-speed rail network of the type that many European countries built decades ago and now take for granted. The latter gap may be filled by the construction of 'HS2', a new high-speed railway that is intended to link several major English cities. In contrast, there is no immediate prospect of a written constitution. However, the decision of the UK Supreme Court in *R (HS2 Action Alliance Ltd) v. Secretary of State for Transport (HS2)*,¹ in which the decision to go ahead with HS2 was challenged, arguably points towards a British constitution that – while still unwritten, in the sense of there being no uniquely authoritative governing text – is richer and more complex than is usually supposed. And while it would be going too far to suggest that the *HS2* case is as transformative of the UK's constitutional landscape as the HS2 network might be of England's rural landscape, the constitutional implications of the Supreme Court's judgment are nevertheless highly significant.

*Reader in Public Law, Faculty of Law, University of Cambridge; Fellow, St Catharine's College, Cambridge

¹ [2014] UKSC 3, [2014] 1 WLR 324.

This article argues that three aspects of the *HS2* case form part of a constitutional tableau that exhibits characteristics which are either novel in themselves or which presuppose readings of the constitution that are in some respect novel. First, the case acknowledges that the UK constitution now differentiates between ‘constitutional legislation’ and ‘ordinary legislation’ – a legal distinction that was, until very recently, entirely alien in the British context. Second, *HS2* indicates that the former category may itself be hierarchically nuanced, some constitutional legislation (and principles) being more fundamental than others – an insight that impacts upon the way in, and the extent to, which European Union law is considered to enjoy primacy in the UK. Third, and most broadly, the *HS2* judgment forms part of a wider narrative arc being advanced by the UK’s senior judiciary, according to which the central notion of parliamentary sovereignty falls to be understood within a constitutional framework that is increasingly rich in nature.

THE ORTHODOX CONSTITUTIONAL LANDSCAPE

It is parliamentary sovereignty with which we must begin. Although *HS2* does not cast doubt upon the veracity of accounts of the UK constitution predicated on the concept of parliamentary sovereignty, the case – along with others that will be mentioned in this article – does much to alter, or at least reimagine, the constitutional setting within which the concept is situated. As such, it has important implications for our contemporary understanding of the constitutional significance of parliamentary sovereignty, as well as (given the centrality of that concept to traditional readings of the British constitution) for our understanding of the nature of the constitution itself.

The orthodox view of the British constitution holds that – as Dicey put it – ‘[t]he sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions’.² On this view, the legal authority of the UK Parliament is limitless: it has ‘the right to make or unmake any law whatever’, such that ‘no person or body is recognised by the law [...] as having a right to override or set aside the legislation of Parliament’.³ Although this claim about the extent of the UK Parliament’s law-making authority is an apparently extravagant one, Dicey acknowledged that the legal position is qualified by political reality. Thus the apparent starkness of position in the UK viewed from a purely legal-constitutional perspective is somewhat ameliorated once a political-constitutional lens is applied, the untrammelled authority of the legislature being circumscribed by *realpolitik* if not by law.

²A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* [1885] (Macmillan 1959), chap. 1.

³Dicey, *supra* n. 2, chap. 1.

A second, and related, characteristic of the traditional vision of the constitutional order is the absence of any hierarchy of legislation. This is not to deny the fact that the legal status of legislation differs according to the constitutional status of its author: Acts of the UK Parliament, for instance, are legally superior to any other form of domestic law; they therefore prevail, in the event of conflict, over legislative instruments created by, for instance, devolved legislatures or administrative authorities. However, hierarchy is absent, on the orthodox view, *within* the category of legislation enacted by the UK Parliament. As Dicey memorably said, ‘neither the Act of Union with Scotland’ – upon which the very existence of the modern United Kingdom is founded – ‘nor the Dentists Act 1878’ – a statute, whose importance to dental practitioners notwithstanding, could never have been regarded as *constitutionally* significant – ‘has more claim than the other to be considered a supreme law’.⁴ On this view, it is impossible for legislation to enjoy any form of legal superiority: such a status cannot accrue from its inherent constitutional importance; nor can such a status be legislatively bestowed upon it. Like it or not, every Act of Parliament is the legal equal of every other such Act.

When the absence of a written or entrenched constitution is factored into the analysis, the homogeneity of Acts of Parliament – viewed in terms of their strict legal status – results in a relatively ‘flat’ constitution in the UK. The upshot is that even primary legislation that is (or which creates or recognizes principles or norms that are) *constitutionally* fundamental does not enjoy a *legal* status any different from other primary legislation. According to this analysis, if a given constitutional value or freedom enjoys a degree of resilience, then such resilience must consist in the political difficulties likely to attend legislative attempts to displace or curtail it, as distinct from legal obstacles to doing so. It is against the backdrop of this conventional understanding of the UK constitution that the *HS2* case falls to be understood (although, as is noted below, the case is in fact not alone in pointing towards an analysis of the constitution somewhat at odds with the conventional picture).

THE *HS2* CASE

In 2010, the UK Government proposed the construction of a new high-speed rail network linking the cities of London, Birmingham, Manchester and Leeds. If built, it will be – as Baroness Hale DPSC⁵ put it in her judgment in *HS2* – ‘the largest infrastructure project carried out in this country since the development of the railways in the 19th century’.⁶ In the normal course of events, infrastructure-

⁴ Dicey, *supra* n. 2, chap. 3.

⁵ Deputy President of the Supreme Court.

⁶ *Supra* n. 1, para. 130.

related decisions such as the routing of new rail lines are taken by administrative authorities. However, the Government proposed that the legal permissions necessary to construct the new high-speed rail network should be granted not administratively but legislatively, by means of enacting a ‘hybrid bill’. This category of legislation has been defined by the Speaker of the House of Commons as ‘a public bill which affects a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class’.⁷ As Lord Reed JSC⁸ explained in his judgment in *HS2*, hybrid legislation is enacted in much the same way as regular legislation, save that an additional stage is inserted into the legislative procedure in order that ‘objectors whose interests are directly and specifically affected by the bill (including local authorities) may petition against the bill and be heard’.⁹

This aspect of the process notwithstanding, the claimants sought to challenge the use of the hybrid-bill procedure on the ground that it would fail to comply with requirements laid down in the European Union’s Environmental Impact Directive.¹⁰ In particular, the claimants relied upon Article 6(4) of the Directive, which requires the public to be afforded ‘early and effective opportunities to participate in the [relevant] environmental decision-making procedures’. Although the Directive confers an exemption in relation to ‘projects the details of which are adopted by a specific act of national legislation’, the Court of Justice has ruled that the exemption can be relied upon only when the legislative process fulfills the objectives of the Directive.¹¹ Citing the role that party-political factors would probably play in parliamentary scrutiny, the limited time available for consideration of the likely voluminous environmental information with which Parliament would be supplied, and the improbability of Members of Parliament adequately digesting that information, the claimants contended that the hybrid-bill procedure would fail to satisfy the Directive’s requirement of participative decision-making.

Those arguments were rejected by the Supreme Court.¹² However, neither that conclusion nor the reasons for it are, for present purposes, the most important aspect of the case. Rather, its significance lies in the way in which the Supreme Court dealt with the argument that it should not even *consider* whether the hybrid-bill procedure complied with EU law. The nub of that argument was that for a court to measure the adequacy of the legislative process against the benchmarks

⁷ Hansard (HC Debates), 10 Dec. 1962, Vol. 669, col. 45.

⁸ Justice of the Supreme Court.

⁹ *Supra* n. 1, para. 57.

¹⁰ Parliament and Council Directive 2011/92/EU.

¹¹ See, e.g., Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus v. Région Wallonne* [2011] ECR I-9711.

¹² At the time of writing, the Bill – the High Speed Rail (London-West Midlands) Bill – is before Parliament.

set out in the Directive would be constitutionally improper, because it would impinge upon what Lord Reed JSC described as ‘long-established constitutional principles governing the relationship between Parliament and the courts, as reflected for example in Article 9 of the Bill of Rights 1689’.¹³ According to that provision, parliamentary proceedings ‘ought not to be impeached or questioned in any court’ – an injunction of which, it was argued, judicial scrutiny of the hybrid-bill procedure would fall foul.

That argument did not succeed before the Supreme Court. However, in the course of deciding that scrutiny of the hybrid-bill procedure would not breach the constitutional principle reflected in Article 9 of the Bill of Rights, the Court had to deal with the contention that the Article 9 principle was in any event inapplicable. That contention rested upon the assertion that the Article 9 principle had been swept away by EU law to the extent that its application would prevent the court from determining whether the procedure complied with the Directive. The essence of the argument is apparent from the following extract from the joint judgment of Lord Neuberger PSC¹⁴ and Lord Mance JSC:

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 Rights 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. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.¹⁵

It is the Court’s treatment of this argument that lies at the constitutional heart of the *HS2* case, and with which the remainder of this paper is concerned.

‘CONSTITUTIONAL’ LEGISLATION

As noted above, on a standard Diceyan analysis of the British constitution, all Acts of Parliament are equal in legal status. However, this orthodox view is challenged by the Supreme Court’s judgment in *HS2*. In particular, it is challenged by the way in which the Supreme Court approached the key question concerning the

¹³ *Supra* n. 1, para. 78.

¹⁴ President of the Supreme Court.

¹⁵ *Supra* n. 1, para. 207.

relationship between UK and EU law. That question arose because, as we have seen, it was argued that UK law in the form of Article 9 of the Bill of Rights, or at least the principle reflected in it,¹⁶ was vulnerable to displacement by EU law in the form of the EIA Directive. The very notion that EU (or any other form of) law might enjoy priority over an Act of Parliament may seem to be fundamentally in tension with the doctrine of parliamentary sovereignty. However, as is well-known, it was established in the *Factortame* case that EU law can prevail over incompatible domestic legislation, and that UK courts can disapply Acts of Parliament in the event of such incompatibility.¹⁷ Constitutionally momentous though that conclusion was, it was accompanied by very little analysis or explanation. Instead, Lord Bridge – the only member of the Appellate Committee of the House of Lords¹⁸ to consider the matter in any depth at all – confined himself to the delphic observation that any limitation upon parliamentary sovereignty brought about by EU membership was necessarily a limitation that Parliament had accepted on an ‘entirely voluntary’ basis.¹⁹ But since the conventional account of parliamentary sovereignty holds that Parliament is legally incapable of diminishing its authority,²⁰ Lord Bridge’s analysis, such as it was, invited more questions than it answered.

The *HS2* judgment makes up, to some extent, for the House of Lords’ omission in *Factortame* by more clearly articulating the relationship between parliamentary sovereignty and EU law. Rejecting the notion that all Acts of Parliament are equal, Lord Neuberger PSC and Lord Mance JSC – whose joint judgment commanded the unanimous support of the seven-member bench – embraced a distinction between ‘constitutional legislation’ and ‘ordinary legislation’.²¹ Although this does not break entirely new ground – the distinction having been suggested over ten years earlier by Laws LJ in the Administrative Court in *Thoburn v. Sunderland City Council*²² – the Supreme Court’s judgment in *HS2* confers upon the idea of a special category of constitutional statutes an authoritative imprimatur that it has hitherto lacked.

Once the possibility of such a category is conceded, two questions immediately arise, respectively concerning the identification and implications of such

¹⁶The distinction between a legislative provision and a constitutional principle reflected in a legislative provision is a potentially significant one. This matter is addressed later in the paper.

¹⁷*R v. Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603.

¹⁸Until its jurisdiction was transferred to the newly created UK Supreme Court in 2009, the Appellate Committee of the House of Lords was the highest appellate court in the UK (save in respect of Scottish criminal matters).

¹⁹*Supra* n. 17, p. 659.

²⁰H.W.R. Wade, ‘The Basis of Legal Sovereignty’, 13 *CLJ* (1955) p. 172.

²¹*Supra* n. 1, paras. 207–208.

²²[2002] EWHC 195 (Admin), [2003] QB 151.

legislation. Neither of those questions were addressed in any detail in *HS2*, although, as to the matter of identification, Lord Neuberger PSC and Lord Mance JSC did venture a list of ‘constitutional instruments’,²³ one of which – importantly, for present purposes – was the European Communities Act 1972, which gives domestic legal effect to EU law. More generally, they signalled a degree of approval of – whilst stopping short of straightforwardly adopting – the judgment of Laws LJ in *Thoburn*, which, they said, offered ‘[i]mportant insights’ and amounted to a ‘penetrating discussion’ of the issues in this area.²⁴ According to Laws LJ’s analysis, constitutional legislation can be identified on a functional basis – it ‘conditions the legal relationship between citizen and the State in some general overarching matter’ or ‘enlarges or diminishes the scope of [...] fundamental constitutional rights’²⁵ – while the significance of its being characterised as constitutional lies in the immunity from implied repeal that it thereby acquires.

Three points should be noted in relation to the distinction between constitutional and ordinary legislation articulated in *Thoburn* and endorsed in *HS2*. First, the consequences of characterising a statute as constitutional are undeniably limited. Treating a statute as constitutional does not prevent its repeal through the enactment of regular legislation: it does not, for instance, necessitate recourse to some extra-legislative constitutional-amendment process. Repealing a constitutional statute does not even require a legislative super-majority. Rather, constitutional statutes can be repealed through the enactment of ordinary legislation, subject only to the proviso that any inconsistency between a constitutional statute and a later ordinary statute will be resolved in favour of the former unless the latter uses express – or, as Laws LJ put it, ‘specific’²⁶ – words of repeal. Constitutional statutes are thus immune from the normally applicable doctrine of implied repeal, according to which incompatibilities between statutes are resolved in favour of the more recent measure. The modesty of the consequences that attend treating a statute as constitutional may suggest that the distinction embraced in *HS2* between constitutional and ordinary legislation is trivial. However, such an interpretation would be wide of the mark, not least because the shift away from the Diceyan dogma that all legislation is equal is significant in itself, notwithstanding that the *degree* of practical superiority ascribed to constitutional statutes is presently limited. Indeed, as I argue in the final section of the paper, the premise upon which the distinction between constitutional and ordinary statutes is based may reflect the genesis of a more significant reconfiguration of the constitutional order.

²³ See text to n. 15, *supra*.

²⁴ *Supra* n. 1, para. 208.

²⁵ *Supra* n. 22, para. 62.

²⁶ *Supra* n. 22, para. 63.

Second, any attempt to demarcate a category of constitutional legislation necessarily raises profound definitional difficulties. This is so because, in the UK, any such category cannot be identified by reference to an easily applicable, formal device. In many legal systems, the distinction between constitutional and ordinary law is a wholly formal matter which turns simply upon the question whether the provision in question is situated within the text of the Constitution. However, in the absence of any such text, UK courts, if they are to seek to identify constitutional laws, have no option but to look to non-formal – functional, institutional or normative – criteria. Such criteria are necessarily more difficult to formulate than are formal criteria, and invite the further problem that the entirety of any given piece of legislation is unlikely to fulfil whatever non-formal criteria are judged relevant. As a result, it may well be that the notion of constitutional *provisions* is more apposite than that of constitutional *statutes*. At the very least, it is clear that if the notion of constitutional ‘measures’ (as Lord Neuberger PSC and Lord Mance JSC put it in *HS2*) is to develop into a meaningful one, then a good deal of definitional work remains to be done by UK courts.²⁷ This raises the question – explored further below – whether a sharp, binary distinction between constitutional and ordinary legislation is appropriate in a system, like that of the UK, that lacks the formalist tools which are arguably necessary to sustain such an approach.

Third, although the approach adopted in *Thoburn* and embraced in *HS2* is, as can be seen from the foregoing discussion, highly inchoate at the present time, it does have considerable potential as an analytical device. In particular, to the extent that it supplies an escape route from the unrelentingly flat nature of the Diceyan constitution, it facilitates an understanding of the constitution that acknowledges, at least to some degree, a hierarchical ordering of norms. This can be illustrated by reference to the specific context, concerning the relationship between EU and domestic law, with which the *HS2* case was concerned. It is evident from *HS2* – just as *Thoburn* before it made clear – that, as far as UK courts are concerned, the relationship between EU and UK law falls to be understood by applying a domestic-law lens. Thus, as Lord Reed JSC explained in *HS2*, any question about the relationship between EU and UK law ‘cannot be resolved simply by applying the doctrine developed by the [EU] Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the [European Communities Act 1972]’.²⁸

On this view, the 1972 Act forms the gateway through which EU law gains access to the UK legal system, and it follows that the extent to and conditions

²⁷ See further D. Feldman, ‘The Nature and Significance of “Constitutional” Legislation’, 129 *LQR* (2013) p. 343.

²⁸ *Supra* n. 1, para. 79. This view is consistent with the position set out by Parliament itself in the European Union Act 2011, s. 18.

upon which EU law operates domestically are to be determined by reference to that Act. Absent any distinction between constitutional and ordinary measures, the obvious difficulty with this mode of analysis is that post-1972 legislation that is incompatible with EU law ought to be accorded priority by application of the doctrine of implied repeal, subsequent domestic legislation that is incompatible with EU law operating to implicitly narrow the ECA gateway. However, once the ECA is characterised as a constitutional statute,²⁹ the relationship between it and any other, EU-incompatible legislation can be conceived of in hierarchical terms, such that the gateway created by the constitutional ECA is resistant to subsequent legislation that is merely implicitly incompatible with EU law. Projected back onto *Factortame*, this analysis suggests that EU law secured priority in that case because the impugned domestic legislation was only implicitly inconsistent with EU law, and therefore failed – through the lack of relevant explicit provision – to narrow the gateway erected by the constitutional ECA.

FROM A BINARY TO A MORE NUANCED NOTION OF CONSTITUTIONAL HIERARCHY

Whereas *Factortame* was concerned with the relationship between a constitutional statute (the ECA) and a *subsequent ordinary* statute, *HS2* was concerned with the relationship between a constitutional statute (the ECA again) and an *earlier constitutional* statute. Did the constitutional status of the European Communities Act 1972 mean that it – and therefore EU law given effect by it – could take priority over the Bill of Rights 1689?

There are several ways in which the relationship between constitutional statutes *inter se* – a matter that *Thoburn* did not address – might be understood. On one view, any conflict between two such statutes might fall to be resolved on a normal implied-repeal basis, the constitutional status of the two statutes cancelling out the significance of their being constitutional statutes in the first place. Thus the more recent ECA – and the EU law given effect by it – would be capable of overriding the earlier Bill of Rights. Alternatively, the conflict between two constitutional statutes might be resolved by applying the principle that constitutional statutes are not susceptible to implied repeal irrespective of whether the later statute is constitutional. On this basis, the earlier Bill of Rights, as a constitutional statute, would be immune from implied qualification by the ECA, notwithstanding the ECA's constitutional status.

There is, however, a further – and arguably more appealing – possibility: namely, that the conflict between two constitutional statutes falls to be resolved by

²⁹ Or at least once the relevant provision within the Act is characterized as a constitutional measure.

reference to their respective fundamentality. Of course, if the two statutes were to be regarded as equally fundamental, then it would be necessary to fall back on one of the two approaches suggested in the previous paragraph (or to adopt some further alternative approach). But if one constitutional statute were to be considered more fundamental than the other, then any discrepancy – absent express words of repeal – would be resolved in favour of the more-fundamental statute. This mode of analysis was at least hinted at in the joint judgment of Lord Neuberger PSC and Lord Mance JSC in *HS2*. After noting that the UK ‘has no written constitution’ but has ‘a number of constitutional instruments’ – including the ECA and the Bill of Rights – they went on to say that there may be some fundamental principles, ‘whether contained in other constitutional instruments or recognised at common law’, the abrogation of which might *not* be licensed by the ECA.³⁰ Lord Neuberger PSC and Lord Mance JSC were careful to express no concluded view about ‘whether or how far Article 9 of the Bill of Rights would count among these [fundamental matters]’.³¹ Be that as it may, the very fact that they contemplated the existence of a category of constitutional principles enjoying an *especially* fundamental status – rendering them immune to anything short of express displacement by other, including other *constitutional*, legislation – is, for three reasons, highly significant.

First, it represents a development of the approach set out in *Thoburn*. In particular, it signals a shift away from a bright-line distinction between ordinary and constitutional legislation, and instead embraces a more nuanced approach that is capable of accommodating varying degrees of constitutional fundamentality. This, in turn, suggests that the relationship between two pieces of legislation cannot be determined through a mechanical exercise in categorisation; rather, it calls for a more demanding – but more meaningful – evaluation of the respective constitutional significance of the two statutes. Indeed, this tells against the notion of constitutional (or, for that matter, ordinary) *statutes* at all. In their discussion of this matter, Lord Neuberger PSC and Lord Mance JSC place emphasis upon the notion of constitutional *principles* as distinct from statutes, the implication being that the degree of constitutional fundamentality ascribed to any given measure is a function of the significance of the constitutional arrangement or the normative importance of the value it embodies, as distinct from any particular constitutional significance ascribed to the legislative instrument in which, if at all, it is laid down.

Second, the analysis in *HS2* does not call into question Parliament’s sovereign capacity to interfere with or displace constitutional legislation or constitutional principles reflected in legislation. Any possibility of the Bill of Rights limiting the

³⁰ *Supra* n. 1, para. 207. See further the excerpt from the judgment set out *supra* text to n. 15.

³¹ *Supra* n. 1, para. 208.

effect given to EU law by the ECA was carefully couched in terms consistent with respect for the intention of Parliament, the suggestion being that it could not readily be assumed that, when it enacted the ECA, the legislature would have sought to disturb a principle as fundamental as that which is reflected in Article 9 of the Bill of Rights. The implication, then, is that although Parliament can override legislation that reflects fundamental constitutional principles, it must speak clearly when it wishes to do so: and that the more fundamental the principle in question, the more clearly Parliament must signal its intention to disturb or qualify it.

Third, the upshot of this analysis is that the primacy accorded to EU law under the UK's constitutional settlement is a qualified one. In fact, it has been clear for some time that EU law's primacy is limited (as a matter of domestic law) by the possibility of explicit legislative derogation:³² such provision in an Act of Parliament would necessarily narrow the gateway erected by the ECA, its constitutional status notwithstanding. However, *HS2* suggests a second type of qualification that has hitherto been thought to apply only in legal systems possessing hierarchically superior constitutional texts that may – at least from a domestic perspective – operate to circumscribe the impact of EU law upon national law. Indeed, the absence of such a text has been cited extra-judicially by Lord Neuberger *PSC* as a factor that results in a significant difference between the status of EU law in the UK and in other Member States. He has observed that 'the fact that Germany has a Constitution enables a German court to say that German law sometimes trumps EU law. This is an option which is much more rarely, if at all, open to a UK court as we have no constitution to invoke.'³³ *HS2*, however, indicates otherwise. It suggests that it would be open to a UK court to refuse to apply EU law to the extent that it was incompatible with constitutional law more fundamental than the ECA itself. On this approach, EU law that infringed domestic constitutional rights or values might be denied legal effect in the UK on the ground that the ECA had omitted to sanction the disturbance of such norms with a clarity commensurate with their fundamentality. This is not to suggest that such an approach would confer upon such norms a degree of constitutional security equivalent to that which is supplied by, for example, the German Constitution; but it does suggest that they might enjoy a form of security in excess of that which could be accommodated by a conventional Diceyan analysis of the British constitution.

³² See, e.g., *Macarthy v. Smith* [1979] 3 All ER 325, p. 329 (Lord Denning MR).

³³ Lord Neuberger, 'The British and Europe', <<http://supremecourt.uk/docs/speech-140212.pdf>>, para. 34, visited 9 July 2014.

A NORMATIVE-HIERARCHICAL CONSTITUTIONAL ORDER

The *HS2* judgment is important in itself; but its significance is heightened by the fact that it forms part of a recent series of decisions – including *Osborn v. Parole Board*,³⁴ *Kennedy v. Charity Commission*³⁵ and *A v. BBC*³⁶ – in which the Supreme Court has begun to sketch a particularly rich vision of the UK's unwritten constitutional order. An important aspect of that vision is concerned not with constitutional legislation, but with common-law constitutional rights. The notion that such rights exist is not novel: a flurry of cases in the 1990s, decided prior to the entry into force in October 2000 of the Human Rights Act 1998 (HRA), placed emphasis on the idea of common-law rights, their import being that courts would strive to interpret legislation compatibly with such rights unless the statute was irremediably inconsistent with them.³⁷ However, perhaps unsurprisingly, common-law rights have been largely eclipsed by those enumerated in the European Convention Human Rights since their domestic effect was enhanced by the HRA.

It is striking, therefore, that common-law rights are enjoying something of a renaissance (albeit that the judicial politics behind this – given that the HRA has proven unpopular such that its repeal is firmly within some politicians' contemplation – is not hard to fathom). Lord Reed JSC, for instance, said in *Osborn* that the HRA does not 'supersede the protection of human rights under the common law [...] Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate.'³⁸ This echoes a sentiment expressed by Lord Cooke when the HRA was in its infancy: some rights, he said, are 'inherent and fundamental to democratic civilised society', such that 'Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them'.³⁹ How, then, does the *HS2* judgment – concerned, as it was, with constitutional *statutes* – relate to the recent Supreme Court jurisprudence signalling the renaissance of common-law constitutional *rights*?

The endorsement of constitutional statutes in *HS2* is predicated on the same sort of normative analysis as that which obtains in relation to the identification of common-law constitutional rights. As observed above, one of the differences between *HS2* and *Thoburn* is that the former appears to eschew the quasi-formalistic approach of the latter, preferring instead to rely upon the normative significance

³⁴ [2013] UKSC 61, [2013] 3 WLR 1020.

³⁵ [2014] UKSC 20, [2014] 2 WLR 808.

³⁶ [2014] UKSC 25, [2014] 2 WLR 1243.

³⁷ See, e.g., *R v. Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539; *R v. Lord Chancellor, ex parte Witham* [1998] QB 575; *R v. Secretary of State for the Home Department, ex parte Simms* [2000] AC 115.

³⁸ *Supra* n. 34, para. 57

³⁹ *R (Daly) v. Secretary of State for the Home Department* [2001] AC 532, para. 30.

of the constitutional principle or arrangement reflected in the given statute as the acid test by which to determine whether – and, if so, to what extent – the legislation should be regarded as constitutional. On this analysis, the constitutional fundamentality of Article 9 of the Bill of Rights derives not from the fact that the Bill of Rights is a constitutional statute, but from the fact that the principle enshrined in Article 9 is one that is, in normative terms, properly to be regarded as fundamental. The identification and protection of common-law rights and constitutional legislation (or, more precisely, constitutional provisions within legislation) thus form part of a single constitutional endeavour which rests upon a normative-hierarchical vision of the constitutional order that is unfamiliar when viewed from the flat constitutional terrain of Diceyan orthodoxy.

It does not follow that the constitutional landscape sketched in *HS2* and the other recent cases mentioned above is one that is hostile to the doctrine of parliamentary sovereignty: there is nothing in any of those cases to suggest that any constitutional value or arrangement is so fundamental as to be wholly impervious to legislative disturbance. Rather, the constitutional space within which such principles may operate is carved out by means of the presumption that – as Lord Steyn put it in *Pierson* – ‘Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law’.⁴⁰ Any such presumption must be capable of being rebutted by legislation framed in suitably clear terms. However, the fact that Parliament may be capable of *displacing* constitutional values should not be allowed to obscure the fact that they have a constitutional existence independent of any exercise of legislative will. Rather, they reflect a legal dimension of the constitution that forms a crucial part of the backdrop against which legislation falls to be interpreted. This analysis is consistent with the view of writers such as Trevor Allan, who has argued that, to the extent that the HRA has been embraced by the courts, this must be, at least in part, because ‘it was planted in fertile soil’.⁴¹ On this view, the injunction in the HRA to interpret legislation compatibly with fundamental rights is one that requires little more of the courts than that which the inherent normative compass of the common law would anyway direct.

The importance of *HS2* is thus not confined to the acknowledgment of a hierarchy of statutes. Important though that aspect of the case is, its deeper significance lies in its embrace of a constitutional order that accommodates a hierarchy of norms – owing neither their existence nor their status to an exercise of legislative will – within a single framework that also acknowledges parliamentary sovereignty. In this way, the Diceyan gulf between the legal realm, in which Parliament

⁴⁰ *Pierson*, *supra* n. 37, p. 587.

⁴¹ T.R.S. Allan, ‘Parliament’s Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective’, 59 *Current Legal Problems* (2006) p. 27.

reigns supreme, and the political or moral realm, which may operate in practice to constrain the uses to which legislative authority may be put, is bridged. This is so because, on the view adopted in *HS2*, constitutional norms operate as *legal* constraints upon Parliament's legislative capacity, denying it the authority to effect their disturbance other than through express or specific provision.

While this does not detract from Parliament's substantive sovereignty – since it remains ultimately free to make or change any law – it may nevertheless be regarded as a formal qualification upon Parliament's legislative authority. And, modest though such formal restraints may be, their very existence as legal phenomena is noteworthy, not least because they challenge the traditional view according to which the sovereignty of Parliament is a quasi-political phenomenon beyond legal explanation or manipulation – a constitutional given changeable only through 'revolution'.⁴² In contrast, the new analysis suggests that the authority of Parliament is a legal phenomenon which exists on the same plane as the fundamental values that are immanent within the constitutional order.⁴³ They are thus matters that exist in legal relationship with one another, legal weight being accorded to fundamental constitutional values by means of commensurate formal constraints upon the exercise of legislative authority. In this way, that which might otherwise be conceived of as an exclusively political obstacle to displacing fundamental values acquires a legal aspect.

One consequence of this, as we have seen, is that the primacy accorded to EU law in the UK may be subject – as a matter of domestic law – to qualifications analogous to those more commonly associated with written-constitutional systems, such that certain values – whether reflected in statute or at common law – may enjoy a fundamentality rendering them resistant to disturbance by operation of EU law. Significant though this is, however, the *HS2* case falls to be understood upon a yet-broader canvas. It may contribute substantially to our understanding of how EU law impacts upon the UK constitution, but it tells us something more profound about the nature of that constitution itself. In particular, while *HS2* does not call into question the substantive scope of Parliament's authority, it envisages a constitution whose normative richness finds expression in legal terms – and which, as a result, knocks some of the hard edges off the notion of absolute legislative supremacy.



⁴² See Wade, *supra* n. 20.

⁴³ This point is discussed in more detail in M. Elliott, 'Embracing "Constitutional" Legislation: Towards Fundamental Law?', 54 *Northern Ireland Legal Quarterly* (2003) p. 25 at p. 35-40.