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Legal Sovereignty and Value Pluralism in the United Kingdom

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LEGAL SOVEREIGNTY AND VALUE PLURALISM IN THE UNITED KINGDOM
ABSTRACT

This thesis asks what a commitment to ethical value pluralism (EVP) can contribute to the current understanding of sovereignty in United Kingdom (UK) constitutional law. It is this ethical approach that serves as the core contribution to the current sovereignty debates.

The thesis considers whether criticisms of the dominant philosophical underlay of legal sovereignty, namely liberal universalism, can provide insight into current UK divisions over the concept. These divisions exist in the public sphere surrounding where legal sovereignty should lie, such as with ‘Brexit’ and the European Convention on Human Rights (ECHR), and in legal opinion over where legal sovereignty does lie, such as with Parliament or in the rule or law, or indeed ‘the people’. Two related criticisms of liberal universalism form the bedrock on which the thesis seeks to make its contributions: a rejection of abstract universalism and of ethical monism. Ultimately, these criticisms take the thesis towards the view that a commitment to EVP might provide direction for the de-escalation of division over legal sovereignty.

EVP, for these purposes, is understood to be the idea that human ends are multiple, can conflict and are sometimes incommensurable. This idea is distinct from relativism and corresponds with an internal and embedded essentialism. The thesis takes care to demonstrate this relationship and therefore the normativity within EVP, by understanding universal values in terms of truly human ways of interacting (the ‘human faculties’ approach). On this foundation, it progresses to identify certain process-orientated values, which derive from the ways in which human beings live, to sit comfortably with EVP, such as the familiar ‘self-creation’ and ‘practical reason’, and the slightly less familiar ‘empathy’ and ‘affiliation’. The thesis suggests that these values should form part of a UK constitutional value statement directing human and institutional interactions at this level and potentially beyond. Equally, by understanding universalism as embedded, a set of ‘other’ more substantive values
are expected to exist as hierarchical within a constitution, such as human rights, but these values are established by political contestation and ultimately agreement.

Otherwise, the thesis focuses on the UK’s internal constitutional structures and suggests that an embrace of EVP should amend the direction of the current constitutional flow. A direction which has in recent years been towards a more philosophically monist national legal system. EVP is best understood as rejecting any one claim to absolute sovereignty and instead supports a distributed sovereignty both within and beyond state boundaries, with a greater emphasis on ‘shared rule’. It is suggested that the UK’s current devolution structures have the potential to support an internal constitutional pluralism structure, more reflective of the norms of EVP.

Finally, while the process values ought to also direct an increased egalitarian liberalism within the UK by re-balancing the constitution towards empathy and affiliation, values that speak to the dependant and society-based nature of humans, the most important contribution of EVP is the process and character it fosters before final decisions result.
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I want to dedicate my PhD to my mum: ‘For the Dawn broke and the shadows went away’. Thankyou for the time you spent with me during these years. I love you and our crazy family lots. I will mention only those so deeply loved and departed: Denis, Sonny, Anne, Meg and Annie; and my beautiful nephews and nieces who come behind and are life’s delight: Bailey, Ethan, Ellen, Immanuel and Isla.

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CommESCR

Prosecutor v Furundzija, Case No. 17.95.17, Tribunal for Former Yugoslavia
**LIST OF ABBREVIATIONS**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>Brexit</td>
<td>British Exit from the European Union</td>
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<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<td>CFR</td>
<td>EU Charter of Fundamental Rights</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union (including the EUCJ and the General Court)</td>
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<td>CommESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>DUP</td>
<td>Democratic Unionist Party</td>
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<td>EC</td>
<td>European Communities</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ERG</td>
<td>European Research Group</td>
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<td>EU</td>
<td>European Union</td>
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<td>EUCJ</td>
<td>European Union, Court of Justice</td>
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<td>EVP</td>
<td>Ethical value pluralism</td>
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<td>GB</td>
<td>Great Britain</td>
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<td>HRA</td>
<td>Human Rights Act 1998</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>IndyRef2</td>
<td>Second Scottish Independence Referendum</td>
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<tr>
<td>JMC</td>
<td>Joint Ministerial Committee</td>
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<tr>
<td>Miller No. 1</td>
<td><em>R (Miller) v Secretary of State for Exiting the European Union</em> [2017] UKSC 5; [2018] AC 61</td>
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<td>Miller No. 2</td>
<td><em>R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland</em> [2019] UKSC 41; [2020] AC</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
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<td>NI</td>
<td>Northern Ireland</td>
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<td>SNP</td>
<td>Scottish National Party</td>
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<td>TEU</td>
<td>Consolidated version of the Treaty on European Union, OJ C 202/1</td>
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<td>TFEU</td>
<td>Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 202/1</td>
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<td>UDHR</td>
<td>Universal Declaration on Human Rights</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UKIP</td>
<td>United Kingdom Independence Party</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organisation</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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PART A

THE RESEARCH ENQUIRY: EXPLORING LEGAL SOVEREIGNTY
FROM THE ETHICAL FOUNDATION OF PLURALISM
1. THE RESEARCH ENQUIRY: EXPLORING LEGAL SOVEREIGNTY FROM THE ETHICAL FOUNDATION OF PLURALISM

1.1. Introduction

The United Kingdom (UK) has been experiencing over recent years significant political and constitutional unrest. At the time of conceiving this thesis in June 2015, this unrest was primarily expressed in terms of dissatisfaction with the UK’s relationship with supranational institutions, such as the European Union (EU) and the European Court of Human Rights (ECtHR). At the point of submitting this thesis in April 2020, the UK has formally left the EU and is within the agreed ‘transition period’ due to last until December 2020; by which time it is ambitiously hoped that a trade agreement can be achieved. Since the UK voted to leave the EU by way of a national referendum in June 2016, the UK Supreme Court has had occasion to issue a number of rulings articulating traditional approaches to UK sovereignty debates, namely by re-emphasising ‘Parliamentary sovereignty’. Yet despite the efforts of the Court, this Brexit (i.e. ‘British Exit’ from the EU) related case law only serves to temporarily divert attention from the sovereignty unrest. The referendum vote to leave the EU was notably divided along the UK’s constituent nation lines. As a result, Brexit has exacerbated existing UK sovereignty pressure points, especially among the

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5 ‘EU Referendum Results’ (n 3).
substantial independence and nationalist elements within Scotland and Northern Ireland (NI), as well as conceptions of popular sovereignty. Despite the current UK Prime Minister (the third since the thesis began) making efforts to limit that unrest, such as by refusing a second Scottish Independence referendum (‘IndyRef2’), there is wide acknowledgement that a body of effort is needed to present a vision of the UK’s territorial constitution before the present sovereignty narratives can subdue. Finally, although the sizeable effort of Brexit has quietened criticisms of the ECtHR, the November 2019 Conservative Manifesto which now underpins the comfortable majority held by the current Government has demonstrated that that issue has yet to obtain a fuller airing.

What is most relevant to this thesis is that the political arguments underpinning the forms of dissatisfaction outlined in the opening paragraph, closely reverberate with the long held normative differences in legal and political theory concerning whether the legislature, the courts or even the people, serve as the most appropriate site for final authority. In theoretical terms, these discussions take the familiar form of, among others, the desire for self-rule, the danger of ‘tyrannous majority’ rule and the importance of protecting minorities. These discussions also translate into normative arguments around the sovereignty of nation state versus supranational institutions. In addition, there are considerations within the thesis of human rights theory. The position of human rights within the UK constitution has been influential in increasing the power of both supranational institutions and the judiciary. In modern liberal democracies such as the UK, human rights have taken on a hierarchical position

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6 The UK Prime Ministers during the thesis include, David Cameron (May 2010-July 2016), Theresa May (July 2016-July 2019) and Boris Johnson (July 2019-present).
7 10 Downing Street, ‘Letter from Boris Johnson to Nicola Sturgeon (14 January)’ (2020).
11 For a classic example see Mill’s writings (1806-1873), John Stuart Mill, On Liberty (Virginia Tech 2001); Mill (n 10).
within the constitution, such that other norms have become at the very least equal, if not subordinate to them. In theoretical terms, there is an emergent body of literature questioning the coherence of human rights foundations, and in particular the ethical monism that underpins the dominant natural rights and liberalism approach.\textsuperscript{12} As philosophical ideas, natural rights and liberalism also pervade the theoretical literature, such as social contract theory, which underpins the legitimacy of the UK’s sovereign institutions.\textsuperscript{13} This narrative is set out in detail in chapter 3 of the thesis. These parallels have therefore inspired the thesis core line of enquiry which is to investigate whether the opposite of ethical monism - ethical value pluralism (EVP) - can present a more coherent theoretical basis for wider UK debates about sovereignty in the UK, which present overlapping theoretical problems with human rights foundations theory. This is in essence the central research question of the thesis: ‘\textit{What can ethical value pluralism (EVP) contribute to the current understanding of sovereignty in UK constitutional law?}’

The thesis uses the term EVP consistently throughout, but the concept could equally be presented as ‘ethical pluralism’ or in the more familiar but potentially wider term of ‘value pluralism’. EVP refers to the idea that ethical values are irreducibly plural, can sometimes conflict and can even be incommensurable.\textsuperscript{14} It is the literature of the father of that idea, Isaiah Berlin, and subsequent proponents such as Martha


\textsuperscript{14} There is no one systemic account of Berlin’s idea but the core of his moral theory appears throughout: Berlin, \textit{The Crooked Timber of Humanity: Chapters in the History of Ideas} (n 12); Isaiah Berlin, \textit{Four Essays on Liberty} (Oxford University Press 1969).
Nussbaum, John Gray, Alex Zakaras, George Crowder and William Galston that drives the work of the thesis from chapter 4 onwards. While Berlin uses the term 'value pluralism' in his work, he does so to refer to both the ethical conception of value pluralism and the political conception. In an effort therefore to distinguish this ethical idea from political value pluralism, which simply means that diversity is valued in political institutions, and from the further idea of social fact pluralism, which is the empirical recognition that in society there is plurality at the level of interests and choices, EVP is the preferred term. It is also the ethical aspect of value pluralism which contributes the novelty of the thesis approach to legal sovereignty.

The core contribution of the thesis to the current legal sovereignty and EVP literature is how it extracts from Berlin’s original idea normativity, and in particular how it uses that normativity to suggest the establishment of a hierarchy of universal process norms within the constitution. EVP, it is argued, provides for a foundational theory that includes both an internal essentialism and an embedded universalism, allowing for higher order process values that are quasi-permanent. This is the focus of the thesis and the constitutional consequences are presented in Table 1 of chapter 6, section 6.2. Inspired by the emergent human rights theoretical trend towards EVP, the thesis finds constitutional examples of emergent EVP, albeit subtle. Such examples include hints of an internal constitutional pluralism emerging despite the

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21 Value pluralism can be conceptualised in a wide variety of additional forms. See for one discussion, Paul H Conn, ‘Social Pluralism and Democracy’ (1973) 17 American Journal of Political Science 237, 237–239.
Brex case law’s emphasis on Parliamentary sovereignty. This has in turn increased the necessity for shared dialogic spaces. To realise EVP within the UK Constitution, the thesis suggests a much greater emphasis on these emergent features as well as the need for a more egalitarian liberalism to again orientate the direction of UK law. While the thesis concludes that the premise concerning the legitimacy of multiple value positions and the universalised process values should be realised in a constitutional value statement, there is no need to codify the UK Constitution. Ultimately the flexibility of the uncodified constitution is more reflective of the multiple sources of legitimate authority embraced by EVP and the process values will ensure EVP adherent decision-making whatever the site of final authority.

The thesis argument is structured across four parts. **Part A** concerns the parameters of the research enquiry, which is the exploration of legal sovereignty from the ethical foundation of pluralism and incorporates only chapter 1 using the same title. The aim of this chapter is to identify the contribution of the thesis, summarise the research problem concerning the complexity of sovereignty tensions in both the political and legal sphere and justify the normative approach taken to that problem, namely EVP.

**Part B** of the thesis is focused on providing a more detailed account of the research context and problem and therefore the ‘why’ of the thesis. It includes chapters 2 and 3, which centre on a positivist understanding of legal sovereignty today, before turning toward the underlying normative approaches framing this account and their emergent critiques. The sub-research questions for chapters 2 and 3 are respectively:

- **What are the current debates that dominate the sovereignty discourse in UK constitutional law?**
- **What values underpin these dominant accounts of sovereignty in UK constitutional law?**

**Part C** of the thesis then seeks to bridge the gap between ethical knowledge and legal sovereignty. It does this by demonstrating how EVP can be reconciled with universal values, and by discussing to what extent EVP might be said to already manifest within
liberal-democratic constitutions. The sub-research questions of chapters 4 and 5 are therefore respectively:

- What is the relationship between EVP and universal values?
- To what extent is ethical value pluralism currently a feature of liberal-democratic constitutions, such as that of the UK?

Part D of the thesis contains the concluding chapter 6. It seeks to tie together the arguments contained within chapters 2 to 5 and make the main thesis contribution by outlining what a deeper commitment to EVP might look like for legal sovereignty in the UK and therefore any future constitutional arrangement.

While the thesis concludes by suggesting how the UK Constitution and its sovereignty arrangements might better reflect a commitment to EVP, it is of note that the thesis has a strong theoretical and sometimes philosophical focus. This is due to the necessity of justifying EVP as a basis for legal sovereignty and most notably, extracting from the idea – an idea focused on the structure of values – a normativity that can support higher order constitutional values. This approach to legal sovereignty is removed from institutions and electoral trends and is instead rooted in ethics. Ethics concerns itself with the ‘evaluation of human conduct’ and fundamentally ‘how human beings ought to behave, particularly in relation to one another’. This is sometimes expressed as in terms of human goods or aims. The effort is to reason from ethics towards a constitutional hierarchy of norms, in an effort to identify deeper, less volatile underpinnings, that might serve as the foundation for a new more stable constitutional settlement. The identification of higher order process values does not prevent a society such as the UK, from agreeing to other higher order values. Indeed, this is supported by the thesis as discussed in chapter 6. Yet, it should

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be emphasised that the purpose of the thesis is not to populate those other ‘agreed’ higher order values. They should be agreed by society, subject to the limitations set by EVP (see Table 1 of chapter 6, section 6.2). The thesis therefore avoids moralising outside of the EVP idea, and what it can bring to the constitution. In doing so, the thesis should not be misinterpreted as specifying the substantive moral ‘constellation’ of its author.

1.2. The Research Context: Sovereignty Debates and the Relevance of Human Rights Foundations

Sovereignty has a long history in both political and legal discourse, not least because it includes a variety of conversations pertaining to both its possession and its exercise, at times coextensive, and at other times separate. Modern sovereignty discussions in liberal democracies such as the UK, however, typically start with the constitution, wherein the rules governing authoritative legal institutions are located. In the case of the UK’s uncodified constitution, this means engaging with statute, case law and practice for an evolved representation of A.V. Dicey’s three constitutional pillars of Parliamentary sovereignty, the rule of law and convention. The thesis starts here in search of the current expression of sovereignty in the UK constitution (chapter 2), but ultimately decides to approach that expression through the lens of ethical value pluralism (chapters 4-6). The thesis title speaks of ‘legal sovereignty’ to form a research context for the thesis, i.e. sovereignty as described by the law, but it rejects assertions that sovereignty is an exclusively legal concept. The thesis’ approach rather is rooted in locating normativity within EVP and has commonalities with theoretical approaches to sovereignty centred on legitimacy, akin for example, to

24 See generally, Dieter Grimm, Sovereignty: The Origin and Future of a Political and Legal Concept (Columbia University Press 2015). Sovereignty typically means for example, either the ‘authority’ or ‘power’ to rule or control a territory. See, CUP, ‘Sovereignty’ (Cambridge Dictionary (Online), 2019).
social contract theory (see section 1.2.2 of this chapter, as well as chapter 3, section 3.3.1) which does not similarly depend on legal recognition for its validity.26

This introduction to the research context seeks therefore to identify the diversity of the contemporary debate about UK sovereignty and to help disentangle the overlapping political, legal and theoretical discussions. Sections 1.2.2 and 1.2.3 of this chapter, respectively introduce legal debates, often doctrinal, about sovereignty followed by the philosophical concept of universalism underlying the sovereignty of human rights: both sections setting the foundation for a deeper conversation in chapters 2 and 3. Before that, however, section 1.2.1 immediately below, details sovereignty debates occurring in the UK’s public and political sphere: debates that will be shown to traverse the legal and philosophical conversations of the thesis.

1.2.1. Political Debates about Sovereignty: Brexit, the Constituent Nations and the Popular Vote

The UK’s membership of the EU has been a matter of significant debate ever since joining its predecessor organisation the European Communities (EC) in 1973. The UK joined the EC under the Conservative Heath Government and gave domestic effect to EC law in the European Communities Act 1972 – a move supported by a subsequent referendum in 1975 initiated by the incoming Labour Government under Harold Wilson.27 As a result of joining the EU, EU law has held supremacy over UK law, with the judgments and rulings of the Court of Justice of the European Union (CJEU) serving as the authoritative judicial interpreter on EU law.28 In the resulting years since joining, as European integration evolved from the common market towards the contemporary political, economic and (for many) monetary union of the EU, there

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26 Grimm (n 24) 34. See for a recent merged political-legal approach to sovereignty and a rejection of the legal recognition of the judiciary as the sole interpreter of constitutional meaning, Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81 Modern Law Review 989, esp 1008-1009.

27 European Communities Act 1972 c. 68 (repealed). The legislation authorising the referendum - the Referendum Act 1975 c.33 - has since been repealed, see Statute Law (Repeals) Act 1986 c. 12.

were various UK election promises to either withdraw or hold a further membership referendum.\(^{29}\) To facilitate the expanding mandate of the EU in intervening years, the EU has been accused by critiques EU wide of ‘competence creep’ whereby the EU law making institutions have assumed implied powers to fulfil their explicit competences as stipulated by the framework treaties:\(^{30}\) treaties, which are today the Treaty on the European Union (TEU)\(^{31}\) and the Treaty on the Functioning of the European Union (TFEU).\(^{32}\) On 23 June 2016, a UK referendum on EU membership was eventually held, this time in fulfilment of the 2015 election manifesto pledge of the Cameron-led Conservative Party.\(^{33}\) The UK public was asked to vote on the question: ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’\(^{34}\) The result of the UK-wide vote favoured leaving the EU by 51.9%,\(^{35}\) setting in motion the most significant constitutional change in the UK since the devolution statutes of the late 1990s.\(^{36}\)

Presenting somewhat traditional criticisms then of the EU, the 2015 Conservative Manifesto asserted that the organisation had become ‘too bureaucratic’ and ‘too undemocratic’.\(^{37}\) It explicitly rejected any agreement with the ‘ever closer Union’


\(^{30}\) See e.g. Paul Craig and Gráinne de Búrca, *EU Law: Texts, Cases and Materials* (6th edn, Oxford University Press 2015) 93–94. The main treaty articles that have been used to facilitate competence creep are art. 114 and, albeit more so prior to 2009 (the Lisbon Treaty changes), art. 352 TFEU. For the EU’s treaty competences, see arts.2-4 TFEU.

\(^{31}\) Consolidated version of the Treaty on European Union (TEU) OJ C 202/1 13.

\(^{32}\) Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), OJ C 202/1 47.

\(^{33}\) The Conservative Party (n 1) 72.

\(^{34}\) European Union Referendum Act 2015 c.36 (n 3).


\(^{37}\) The Conservative Party (n 1) 72.
concept repeated in many EU treaties, and further argued that the expansion in EU membership over recent years, which granted the citizens of the (then) 28 Member States free movement throughout the EU, had resulted in excessive immigration to the UK. Importantly, the Manifesto outlined that future membership of the EU must be premised on the consent of the British people and not the decision of politicians; a consent that it suggested had ‘worn wafer-thin’ in recent years. The ‘Vote Leave’ campaign used the mantra of ‘taking back control’ from the EU, which in substantive policy terms, asserted greater control on matters of immigration and trade, with arguments that a post-Brexit UK would be ‘in charge of [its] own borders’. In addition, there was an explicit rejection of the CJEU, which it was stated, would no longer be ‘in charge’ of UK laws. Thus when the UK voted to leave the EU, the Cameron Government was insistent that such a decision rightfully lay with the people of the UK, such that through a referendum the decision was grounded to a greater extent in the ‘popular’ rather than the traditional ‘parliamentary’ conception of sovereignty.

EU Referendum campaign calls to ‘democracy’ and ‘taking control of our borders’ were of course evocative of more traditional conceptions of state power, such as that of national or state sovereignty. In recent times, these calls have included at least the hint of an ideological preference for national identity; a preference that is perhaps at

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38 See e.g. Article 1 TEU.
39 See e.g. Article 1 TEU. Free movement has been fundamental to realising the economic objectives of the EU since its conception. For current treaty rights on free movement of persons, see art. 3(2) TEU and arts. 20, 21 and 45 TFEU. The rights have however developed extensively through both secondary EU law and case law. See e.g. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77; Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1. See also, Ruiz Zambrano v Office National de l’Emploi (Case C 34/09) [2012].
40 The Conservative Party (n 1) 72.
41 ibid.
43 ibid.
44 See, BBC News, ‘EU Referendum: “The Choice Is in Your Hands” David Cameron (20 February)’ (YouTube, 2016) <https://www.youtube.com/watch?v=w87GNWJHtfM> accessed 12 October 2019: ‘you will decide, and whatever your decision, I will do my best to deliver it’. This was despite no requirement within the statute making provision for the EU referendum that the UK Government adhere to its outcome. See, European Union Referendum Act 2015 c.36 (n 3).
its most apparent in the context of political and public discussion around human rights and their enforcement by supranational courts. In addition to taking charge of national borders, the 2015 Manifesto invoked, for example, the idea of national identity in its promise to ‘break the formal link between British courts and the ECHR, and make our own Supreme Court the ultimate arbiter of human rights.’

This Manifesto reference was in relation to the Party’s intention to replace the Human Rights Act 1998 – the statute that incorporates the European Convention on Human Rights (ECHR) into domestic law – with a British Bill of rights. Until the November 2019 Conservative Manifesto, that conversation had appeared something of an abstraction, amidst the uncertainty of the 2016-2019 Brexit negotiations. The May Government had notably placed the issue on hold in the 2017 Manifesto until after the UK had left the EU. While the incumbent Prime Minister Boris Johnson has, generally speaking, adopted a more favourable stance on the Human Rights Act and the ECHR, than both the 2015 Conservative Manifesto and the May Government, the most recent Manifesto of 2019 has demonstrated that the issue is not forgotten.

The November 2019 Conservative Party Manifesto expressed the Government’s intention to ‘update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.’ To that end, the Manifesto announced that a ‘Constitution, Democracy & Rights Commission’ is forthcoming within 2020 to examine the issue as well as that of judicial review. Most recently in March 2020, a Bill was presented to Parliament, supported by the UK Government, to make provision to derogate from the ECHR in connection with operations of the armed forces outside the British Islands, effectively seeking to establish a statute of

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45 The Conservative Party (n 1) 60.
47 The Conservative and Unionist Party (n 46) 37.
49 The Conservative and Unionist Party (n 9) 48.
50 ibid.
limitations on prosecutions for human rights abuses by soldiers. Any contemplations therefore that Brexit will reduce the ambitions for further constitutional upset regarding the relationship with supranational institutions appear for the present time ill-advised.

Somewhat ironically, then, the apparent popular turn toward state sovereignty underpinning Brexit has demonstrated a very real potential to diminish the sovereignty of the UK state in its present form. Although the UK-wide vote had a majority to leave (51.9%), this preference was not shared through the UK’s constituent nations. In fact, while England and Wales both voted in favour of leaving by 53%, a clear majority in Scotland (62%) and a slimmer but still clear majority in NI (55%) voted to remain. This complication has exacerbated existing differences among the constituent nations resulting in distinct political sovereignty orientations among Scotland, NI and England and Wales, leading to serious questions about the sustainability of the UK as a unitary, sovereign state. While the Scottish referendum of 2014 resulted in 55% in favour of Scotland staying within the UK, Brexit stands as a stark representation of the control of the UK Government over Scotland’s international affairs as a member of the Union, despite the increasing devolution of powers to Scotland. In NI, the simple fact of its geographic configuration which sets it apart from the island of Great Britain and conjoined to its southern EU neighbour, the Republic of Ireland, coupled with the vital need (both political and legal) to avoid a hard border on the island of Ireland, have served to bolster nationalist calls for a united Ireland. On that matter, while explicit calls for an Irish border poll have been nationalist, there is evidence to suggest that a shift - either caused or accelerated by

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52 See on the dangers posed by populism to the UK Constitution, such as the susceptibility of the uncodified constitution to authoritarianism, Alison L Young, ‘Populism and the UK Constitution’ (2018) 71 Current Legal Problems 17.  
53 See, ‘EU Referendum Results’ (n 3).  
54 FM Nicola Sturgeon, ‘Brexit and Scotland’s Future: First Minister Statement (Speech 24 April)’ Scottish Government (2019). In her speech to the Scottish Parliament, Sturgeon stated: ‘Far from being an equal partner at Westminster, Scotland’s voice is listened to only if it chimes with the UK majority - if it doesn’t, we are outvoted and ignored.’  
55 The Belfast (Good Friday) Agreement 1998.
Brexit - is also occurring among traditionally voting Unionists.56 Meanwhile, in what is largely an English presentation, a recent poll of 892 Conservative Party members – which it might be noted is in its full title the ‘Conservative and Unionist Party’ - indicated that a majority would rather see both Scotland (63%) and NI (59%) leave the UK rather than avoid Brexit.57 Indeed, such is the significance of Brexit for the UK’s internal constitutional arrangements that in the very midst of Brexit negotiations it has been necessary, once more, to evaluate the devolution settlement in an effort to address the sense that Scottish interests are being marginalised.58

In England, it is the division between Westminster’s two largest political parties on social protection issues, rather than Brexit itself, that perhaps best represents tensions underpinning sovereignty discussions there. While both parties have significant internal divisions over Brexit, it may be noted that it is the Conservative Party (as opposed to Labour) which has recently championed the preference for national over international constitutional sources. Although many Conservatives voted to remain in the EU, most notably including the then Prime Minister David Cameron, the Conservative Party includes powerful Brexiteer wings such as the European Research Group (ERG) and has faced greater electoral pressure from Nigel Farage’s Brexit Party and its predecessor the UK Independence Party (UKIP), than Labour.59 In the 2015 Manifesto, the British Bill of Rights was identified as necessary on the disparaging basis that it would address ‘all the problems caused by Labour’s human rights laws’.60

While Labour has also been divided over Brexit, it has had its own notable shift in recent years marked by the end of the centralist ‘New Labour’ premierships of Tony Blair and Gordon Brown, to the party leadership of the prominent left-wing politician

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56 See results of LucidTalk tracker poll where 28% of previously voting Unionists asserted they would vote for a united Ireland because of Brexit, Anne Marie Gray and others, Northern Ireland Peace Monitoring Report: Number 5 (Ulster University 2018) 53.
58 See e.g. ‘Draft Agreement on Joint Working’ between the Governments of the UK, Scotland and Wales 2019. These changes are discussed in more detail in Chapter 5 (Section 5.4.1.) of the thesis.
59 See generally the political interviews in Michael Portillo, Portillo: The Trouble with the Tories (Channel 5 2019).
60 The Conservative Party (n 1) 60.
Jeremy Corbyn. Elected as party leader in September 2015, Corbyn’s leadership has been fractious in terms of his support and control over Labour Party parliamentarians; for example, nine MPs left the Party in February 2019 to set up as The Independent Group for Change.\(^6\) At the time of writing, Corbyn has suffered a recent and significant defeat in the December 2019 General Election, and now remains party leader only until his successor is elected in April 2020.\(^6\) Corbyn’s neutral position on Brexit and the promise of another referendum did not it appears play well in a Brexit-dominated election.\(^6\) His prior support had stemmed rather, from the ‘grassroots’ of Labour supporters, namely the British public sympathetic to Corbyn’s anti-austerity campaign message. Due to a change in Labour Party leadership voting rules away from a three part electoral college system comprised of MPs/MEPs, party members and trade unions/socialist societies, towards a ‘one member one vote’ and 15% MP/MEP threshold\(^6\) Jeremy Corbyn won the leadership contest in 2015 with a landslide 59.5% of first preference votes.\(^6\) Corbyn directly opposed the Conservative’s austerity agenda (implemented on the back of the 2008 economic crisis) and excessive inequality in UK society.\(^6\) In his first election Manifesto (2017) since being elected leader, entitled ‘For the Many, Not the Few’, Corbyn campaigned on a distinctly socialist agenda relative to the Conservative Party, promising to: scrap tuition fees; nationalise England’s water infrastructure; increase taxes for higher earners; increase free childcare for pre-school age children; and, end zero hours contracts.\(^6\) Human rights and social justice are common terms within the

\(^{61}\) The primary reasons cited were Corbyn’s handling of Brexit and allegations of anti-Semitism within the Labour Party. Since February, the new group has lost and gained members. See, ‘The Independent Group for Change: Where Are They Now? (15 August)’ ITV News (2019).


\(^{66}\) (video) ibid.

Labour leader’s speech and both the 2017 and 2019 Manifestos made an explicit promise to retain the Human Rights Act 1998. Furthermore, Corbyn rejects the tag of British Unionism because of its relationship with the Conservative Party and is a long-held supporter of republicanism, most notably sympathetic to the Irish republican movement during the conflict in NI.

Corbyn’s position as a relatively unpopular Party choice but, until recently at least, a popular grassroots choice for Labour leader is an interesting parallel to the trend observable in recent years towards uncovering the popular mandate through referendums for major constitutional decisions. Undoubtedly, there are broader cultural and scientific developments in recent years, such as in technology, which have empowered the individual in terms of their active citizenship. Yet what is most notable since the Brexit vote is that the UK’s Supreme Court has held that referendum results hold limited traction as against Parliamentary sovereignty in UK law, at least in so far as the referendum statute makes no commitment to fulfil the outcome. This is, notably, equally the case regarding Scottish claims to popular sovereignty (see chapter 2, section 2.4.1). In the seminal case of *R (Miller) v Secretary of State for Exiting the European Union* (referred to as ‘Miller No. 1’ in the thesis), the UK Supreme Court ruled that the EU referendum did not dispense with the need for the UK Parliament to approve the Article 50 Treaty on European Union withdrawal notification to the EU before the UK Government could issue it. This ruling was in the wider context of the Court having found that the UK Government’s prerogative treaty making power (exercised on behalf of the Crown), was displaced by section 2 of the European Communities Act 1972. According to the Court, the referendum was of

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68 The Labour Party (n 67) 80; The Labour Party (n 63) 69. The 2019 Manifesto also promised to establish a ‘Social Justice Commission’, 64.
72 The mass public use of the internet and technology to express opinion is a significant cultural phenomenon of the past two decades. More specifically on citizenship, see e.g. Juan-Gabriel Cegarra-Navarro, Alexeis Garcia-Perez and Jose Luis Moreno-Cegarra, ‘Technology Knowledge and Governance: Empowering Citizen Engagement and Participation’ (2014) 31 Government Information Quarterly 660.
73 *R (Miller) v Secretary of State for Exiting the European Union* (n 4) [88–93].
political significance (albeit ‘great’), rather than legal significance. The Justices re-emphasised the importance of parliamentary sovereignty, making it explicit that:

[Where] implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.75

Yet despite Miller No. 1 and the wider scrutiny of the legitimacy of referendums (including their legitimacy in representing popular sovereignty) in recent times, popular sovereignty has been a notable part of recent public discourse, not least because of its relationship to majoritarian preferences. Most recently, the UK Government under the Johnson premiership has sought to present itself as a representative of popular sovereignty, by emphasising the ambition toward ‘getting Brexit done’ and, at least allegedly, planning this achievement by employing both novel and legally questionable actions.77 In August 2019 for example, the UK Government used the prerogative powers of the Crown to prorogue Parliament from the 9-12th September to the 14th October 2019. Although ostensibly this move was to facilitate a new Parliamentary session and Queen’s Speech, in R (Miller) v The Prime Minister (referred to here as ‘Miller No. 2’) the Supreme Court held that it was not in fact explained why this activity, which typically takes four to six days, necessitated a prorogation of five weeks.78 In the absence of any reasonable justification, the UK Supreme Court held the action unlawful and of no effect, reasoning that it was an extreme infringement on the ‘fundamentals of our democracy’ namely, parliamentary sovereignty and parliamentary accountability.79

74 ibid 124.
75 ibid 121.
77 The Telegraph, ‘Boris Johnson Tells Tory Conference ‘Let’s Get Brexit Done’ in Key Note Speech (Video) (2 October)’ (YouTube, 2019).
78 R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland (n 4) [58–61].
79 ibid 58 (for quotation) and generally 41–48. The Johnson Government and Parliament are again opposed in relation to the European Union (Withdrawal) (No 2) Act 2019 c.26. This Act (known as the ‘Benn Act’) required the Prime Minister to seek a three month extension from the European Council
1.2.2. Legal Sovereignty Debates: Parliamentary Sovereignty, Sharing Sovereignty and Liberty

Legal sovereignty debates, as alluded to above, refer to articulations of the rule of recognition that grounds ultimate authority under the UK constitution and is distinguishable from legal constitutionalism mentioned later in this section. As demonstrated above, the two recent UK Supreme Court ‘Miller’ cases (brought by political campaigner Gina Miller) have responded to the constitutional context of Brexit by reiterating the enduring relevance of Parliamentary sovereignty in UK law. Yet, despite this effort by the UK’s highest court to offer some stability to UK constitutional law at a time of significant upheaval, it remains the case that legal sovereignty in the UK is now, like in liberal democracies generally, better understood as shared between both the legislative and the judicial branches (see chapter 2 for the thesis argument). The authority of the judicial arm of governance arises through their role as protectors of the ‘rule of law’: a constitutional principle recognised by Parliament itself. That said, the exact parameters of this ‘sharing’ is an area of enduring tension with various stances on whether there is a need to identify which institution will have the final say on a matter of controversy. These questions have

to the date on which the UK was due to leave (then 31 October 2019) if a deal was not agreed by 19 October 2019. The UK Government had suggested that it would seek to avoid this action by allowing the UK to leave the EU without a deal on 31 October. See, BBC News, ‘Brexit: Boris Johnson Will Send Extension Letter - Court Document (4 October)’ 2019. On 19 October, Boris Johnson took the controversial step of sending an unsigned request to the EU requesting an extension to the exit day date, and a second signed letter asking the EU not to agree to it. See, 10 Downing Street, ‘Letter from Boris Johnson to Donald Tusk (19 October)’ (2019).

80 R (Miller) v Secretary of State for Exiting the European Union (n 4) [41–43]; R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland (n 4) [41–48]; UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (n 4) [41].


82 Constitutional Reform and Governance Act 2010 c.25 s 1.
their roots, of course, in political and legal theory, where the ‘tyrannous majority’ of the legislature and the ‘counter-majoritarian difficulty’ of an elite judiciary collide (see further chapter 2, section 2.3.1). In modern UK law, however, the issue is informed by two prominent developments that have evolved over the past few decades and which mark additional sites of authority: the devolution of power and the inclusion of human rights into prominent interpretations of the rule of law concept. As chapter 2 explains, both these trends bolster the authority of the judiciary confirming the shared nature of sovereignty. Importantly, however, these developments also serve to reject any binary understanding of shared sovereignty in terms of the UK legislature and courts only. Although the binary debate could be expanded to include all the UK legislatures therefore taking account of devolution it would not fully account for the uniqueness of supra-state notions of sovereignty in terms of the role permitted for international organisations, such as the UN or Council of Europe, by the universalism of human rights (see below and chapter 3). It might be further suggested, that UK Executive over-reach, perhaps even underpinned by the popular sovereignty notions mentioned above, should be added (if unlikely to be justified) as another site to which sovereignty is arguably distributed within the UK.

The growth of the idea of a shared sovereignty within the UK (albeit in its predominantly binary conception), has been for some time used by certain scholars to move UK constitutional law discourse away from the sovereignty paradigm altogether; preferring instead a discourse of political and legal ‘constitutionalism’.

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84 On the latter, see for e.g., Tom Bingham, The Rule of Law (Penguin Books 2011).
85 For criticism in respect of the inadequate consideration the binary discourse has given to the role played by the executive, see, Paul Scott, ‘Comments’, Annual Doctoral Seminar in Constitutional Theory, 26-27 June (University of Strathclyde 2018). For fuller discussion on the Executive’s role, and the dangers of Henry VIII clauses and the codification of prerogative powers, see Alison Young, ‘The Relationship between Parliament, the Executive and the Judiciary’ in Jeffrey Jowell and Colm O’Cinneide (eds), The Changing Constitution (9th edn, Oxford University Press 2019); Thomas Poole, ‘The Executive in Public Law’ in Jeffrey Jowell and Colm O’Cinneide (eds), The Changing Constitution (9th edn, Oxford University Press 2019).
86 ‘Constitutionalism’, like sovereignty, has various definitions but in general terms can be taken to refer to the importance of a system of government that accords with a constitution often including the more specific focus on constitutional limitations on the exercise of government power. See, Collins Concise Dictionary (4th ed., HarperCollins Publishers 2000); see also, Roger Scruton, A Dictionary of Political Thought (Macmillan 1982). See generally for a discussion of the many
This shift is partly attributed to a feeling that sovereignty as traditionally understood no longer applies, and so the term serves to obscure the reality of modern relationships. In this case, political and legal constitutionalism respectively refer to the establishment of a normative basis for either the legislature or the courts, to serve as the primary decision-making body for determinations, including on matters of rights, within liberal democracies. In addition, a specific common law constitutionalism narrative has arisen which can be understood as an adaptation of the general discourse on legal constitutionalism to reflect the UK’s unique constitutional history: a history that does not include a single codified constitution nor its accompanying entrenchment of a separation of powers and bill of rights framework.


Grimm (n 24) 4 (focusing on Jean Bodin’s definition of sovereignty which linked the term with the state and was more absolute than prior conceptions).

Note that these narratives have not always been normative but have evolved to encompass strong normative arguments. See, Marco Goldoni and Christopher McCormand, ‘The State of the Political Constitution: A Special Edition of the German Law Journal’ (UK Const. L. Blog (20 December 2013)) <http://ukconstitutionallaw.org>. For some of the main political constitution narratives in the UK, see e.g., Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (Cambridge University Press 2007); Adam Tomkins, Our Republican Constitution (Hart Publishing 2005). For legal constitutionalism narrative, often considered to have originated in the US model of constitutional supremacy, see e.g. the work of Ronald Dworkin: Ronald Dworkin, Taking Rights Seriously (Duckworth 1977); Ronald Dworkin, A Matter of Principle (Harvard University Press 1985); Ronald Dworkin, Law’s Empire (Hart Publishing 1998).

Although globally speaking, legal constitutionalism appears to be the dominant paradigm (i.e. primary authority in the rule of law),\textsuperscript{90} it is not the agreed paradigm for framing legal authority in the UK.\textsuperscript{91} When framed in terms of constitutionalism, the UK is most commonly described as a form of collaborative enterprise between both institutions, such that Stephen Gardbaum dubs it a ‘commonwealth model of constitutionalism’.\textsuperscript{92} In reality, the constitutionalism model is itself developing in a way that suggests it too is insufficiently binary to capture the nuance of how authority is distributed in the modern liberal democratic state. Those who build on the writings of Etienne Mureinik’s ‘culture of justification’ exemplify such a shift.\textsuperscript{93} Mureinik’s constitutionalism narrative seeks to distinguish itself from a culture of authority by focusing instead on how the legislative and executive institutions justify the exercise of power through public and transparent reasons.\textsuperscript{94} The idea was first developed by Mureinik in the context of South Africa but has been further developed in the context of the UK to include a need for dialogue between the institutions, including the courts, thereby situating itself alongside forms of constitutionalism that advocate collaboration.\textsuperscript{95}

As the title suggests, this thesis continues with a focus on these matters through the more traditional lens of sovereignty rather than pursuing a constitutionalism

\textsuperscript{90} Gardbaum (n 81) 24 fn 14.
\textsuperscript{91} Young, ‘The Relationship between Parliament, the Executive and the Judiciary’ (n 85).
\textsuperscript{92} Gardbaum (n 81) 13–14. The UK has also been described as operating a ‘parliamentary bill of rights system’, ‘weak-form judicial review’, or a ‘dialogic model’, see respectively Janet L Hiebert and James B Kelly, 	extit{Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom} (Cambridge University Press 2015); Mark Tushnet, ‘Scepticism about Judicial Review: A Perspective from the United States’ in Tom Campbell, Keith D Ewing and Adam Tomkins (eds), 	extit{Sceptical Essays on Human Rights} (Oxford University Press 2001); Young, 	extit{Democratic Dialogue and the Constitution} (n 81).
\textsuperscript{93} See e.g. Young, 	extit{Democratic Dialogue and the Constitution} (n 81). See also, Sandra Fredman, ‘From Dialogue to Deliberation: Human Rights Adjudication and Prisoners’ Rights to Vote’ in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), 	extit{Parliaments and Human Rights: Redressing the Democratic Deficit} (Hart Publishing 2015); David Dyzenhaus, ‘What Is a “Democratic Culture of Justification”? ‘ in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), 	extit{Parliaments and Human Rights: Redressing the Democratic Deficit} (Hart Publishing 2015).
\textsuperscript{95} See e.g. Young, 	extit{Democratic Dialogue and the Constitution} (n 81); Fredman (n 93); Dyzenhaus (n 93).
narrative. This is partly because of the consistent reliance on ‘Parliamentary sovereignty’ by the courts - such as in the Miller No. 1 case mentioned above – and so its significance for UK constitutional thought. But so too is the concept of sovereignty imagined in this thesis to refer to a more flexible idea than constitutionalism such that there is no necessary link to absolute authority. As identified above and discussed further in chapter 2, the thesis understands current UK sovereignty as shared, and suggests that the UK should move this shared understanding towards more than just the two institutions.

In addition to specifying the devolved legislatures and supranational institutions as additional protagonists to Parliament and the courts in the legal sovereignty discussion, this section seeks to introduce what might first appear as a misfit: the value of ‘liberty’. Constitutions play a key role in bringing order to society, i.e. by ‘structuring’ the exercise of political power by identifying certain norms or ‘oughts’. The absence of a codified constitution within the UK can make the identification of UK constitutional values a challenge, not least because of different interpretations of what constitutes a ‘value’. For Dawn Oliver, UK constitutional values are not necessarily explicit or indeed explicitly interrogated by the UK courts, but rather background ‘terms of art’ which are heavily influential on the decisions the judiciary takes. Jeffrey Jowell and Colm O’Cinneide identify some more explicit and unusually specific ‘values’ (see below). Importantly, for the point in hand, both Oliver and Jowell and O’Cinneide, consider liberty (presented by Oliver as ‘autonomy’) to be a UK constitutional value. (Note that liberty is also often identified as an ultimate human value, see section 1.3.1 of this chapter below.)

96 See for example, sovereignty in the Middle Ages in Grimm (n 24) 16.
98 Dawn Oliver, Common Values and the Public-Private Divide (Butterworths 1999) 60.
99 Oliver explains autonomy as ‘freedom of action’ which is linked to dignity because human dignity depends on individual autonomies, such as freedom of conscience and religion, for its realisation. ibid 61. Oliver also notes that these values ‘have their roots in liberal theory dating from the seventeenth and eighteenth centuries’.
According to Jowell and O’Cinneide’s account, three core constitutional values underpin the UK constitution: the presumption of liberty, the imperative of representative government, and the rule of law.\textsuperscript{100} They describe the relationship between these three values as ‘ever-shifting’ and involving ‘complex interaction’\textsuperscript{101}. What is notable is that all three point to a separate sphere of sovereignty: respectively the individual, the legislature and the courts. The presumption of liberty within UK law essentially means that, ‘individuals are free to do anything not prohibited by law’.\textsuperscript{102} Jowell and O’Cinneide’s narrative on UK constitutional values tells of how the parameters of this presumption have evolved throughout the UK’s constitutional history. The foundation of its meaning, based on their account, appears to be rooted in negative liberty, namely ensuring that public power is limited.\textsuperscript{103} They argue however, that negative liberty has become enmeshed to some extent with positive liberty and the need for the promotion of social objectives by collective decision-making. Indeed, the presumption is considered so heavily based upon the ‘social contract’ theories, that it cannot be separated from the value of the primacy of representative government.\textsuperscript{104} The essence of social contract theory, which is noted in chapter 3 (section 3.3.1.), is that citizens relinquish a degree of personal freedom through a hypothetical contract in exchange for government exercising its power to protect certain individual rights.\textsuperscript{105} Social contract theorists instrumental in shaping UK political theory, such as Thomas Hobbes and (especially) John Locke, ultimately view the purpose of political society to be liberal in the sense that it is an organisation formed for the benefit of the individual. By elevating certain natural rights, such as freedom and property, liberalism becomes the dominant framework for the constitution.\textsuperscript{106} According to Jowell and O’Cinneide:

\textsuperscript{100} Jeffrey Jowell and Colm O’Cinneide, ‘Values in the UK Constitution’ in Dennis Davis, Alan Richter and Cheryl Saunders (eds), An Inquiry into the Existence of Global Values (Hart Publishing 2015) 359.
\textsuperscript{101} ibid 374 and 377.
\textsuperscript{102} ibid 360.
\textsuperscript{103} ibid 361.
\textsuperscript{104} ibid 361–362.
\textsuperscript{105} For example, John Locke, An Essay Concerning Human Understanding (PH Nidditch ed, Clarendon 1975) I, 3, 3.
Locke’s ‘social contract’ analysis both influenced and was influenced by the new British constitutional order that emerged after 1688. Therefore from the beginning of the modern UK constitutional system, the core value of personal liberty has been regarded as intimately intertwined with a second core value, the primacy of representative government.\textsuperscript{107}

The value of liberty is presented as an ever-fluid concept by Jowell and O’Cinneide, with representative government serving as the authority for the determination of the precise balance between negative and positive liberty in the UK.\textsuperscript{108} Therefore, while it might be true that popular sovereignty is not a doctrinal concept of significant weight within the UK, the freedom of the individual is intimately intertwined with social contract theory and the sovereignty of Parliament.

Finally, although UK constitutional law has elevated liberty as a higher order value, Dawn Oliver’s full account of UK values (i.e. values which she considers common to both UK public and private law) is careful to identify that only liberty (or as she prefers ‘autonomy’), is strongly individualistic. Oliver’s five values are ‘autonomy, dignity and respect’ (three values which she groups together), ‘status’ (legal and social) and finally ‘security’.\textsuperscript{109} Oliver’s reading of dignity, respect, status and security all have communitarian aspects. (As chapter 3 will detail further, the idea of communitarianism is often used to refute universalism, especially in its liberal formation.)\textsuperscript{110} Oliver tells us for example, that dignity and respect ‘are also civil or communitarian, since they require the position of the individual in society and in relation to others to be protected.’\textsuperscript{111} Similarly, legal status is not just about belonging to a particular class of legal persons but also incorporates the notion of group status.

\textsuperscript{107} Jowell and O’Cinneide (n 100) 362.
\textsuperscript{108} ibid.
\textsuperscript{109} Oliver (n 98) 60–70.
\textsuperscript{110} Daniel Bell describes three types of communitarian claims as: ‘methodological claims about the importance of tradition and social context for moral and political reasoning, ontological or metaphysical claims about the social nature of the self, and normative claims about the value of community.’ Daniel Bell, ‘Communitarianism’ in Edward N Zalta (ed), The Stanford Encyclopedia of Philosophy (Summer 2016 Edition) (2016). All three forms arise in the discussion in chapter 3 of the thesis.
\textsuperscript{111} Oliver (n 98) 64.
This latter form includes for example, being a member of some form of civil society group, such as a religious, sporting or other community organisation or a family – an identity Oliver believes is now recognised by the courts as a further ‘essentially communitarian value’ through for example, the legal protections around reputation which includes the tort of defamation.\(^{112}\) While security is the ‘condition of being protected from or not exposed to danger or risk’, it also carries with it the ‘right to considerate altruism’ by those in power.\(^{113}\) Oliver cites Bentham’s early security discussions to emphasise the close relationship with the concept of ‘trust’ - because of the need for trust between persons themselves and with government when interacting. The legal concepts of legitimate expectation, fiduciary duties, good faith and confidentiality all emanate, we are told, from the value of security.\(^{114}\) Oliver’s narrative is interesting for its demonstration of the historic importance of the communitarian narrative alongside that of liberty within UK law. The ‘considerate altruism’ she locates in UK public law is a breed of democratic theory which she defines as the concept that ‘public bodies have no rights or interests of their own and must exercise powers altruistically, and for the general good’.\(^{115}\) However, as the thesis will suggest in chapter 3 (section 3.3.3), the incorporation of much of the ECHR into UK law and the emphasis on human rights norms generally as a superior moral framework, has increased the emphasis on predominantly civil and political rights in UK law over the past twenty years, such that it is liberty and accompanying liberal norms which continue to take precedence in the UK constitution. Chapters 4 to 6 will move the discussion away from this research context and present the view that EVP foundations should trend the UK in the direction of a more egalitarian liberalism than presently manifest.

1.2.3. Human Rights, Universalism and Ethical Monism

\(^{112}\) ibid 66.  
\(^{113}\) ibid 67–69.  
\(^{114}\) ibid 67–70.  
\(^{115}\) ibid 5.
Human rights law plays a significant role in liberal democratic constitutions; often conditioning how sovereignty is exercised. As chapter 3 describes in more detail, human rights have overtaken other moral concepts as the dominant ethical discourse in law at the global as well as the national level: see for example, Francesca Klug’s now familiar description that human rights presently serve as ‘values for a Godless age’.\footnote{Francesca Klug, \textit{Values for a Godless Age. The Story of the United Kingdom’s New Bill of Rights} (Penguin Books 2000).} Indeed older ethical debates around concepts such as universalism, relativism and communitarianism have largely transferred to debates underlying the theory of universal human rights.\footnote{Bell (n 110).} Although only briefly explained above but described in detail within chapter 2, human rights law has strengthened the claims to authority of the judiciary and increasingly so as it has come to be considered part of the rule of law.\footnote{Bingham (n 84) 7.} Underlying this trend is the general framing of human rights and therefore human rights law on the foundation of universalism. International human rights law has for some time adopted the understanding that human rights are universal,\footnote{See for e.g. the \textit{Universal Declaration on Human Rights} and the references to suggest that the UN human rights treaties should apply to ‘everyone’. UN General Assembly, \textit{Universal Declaration of Human Rights} 10 December 1948 (217 A (III)). See generally, \textit{International Covenant on Civil and Political Rights} 1976; \textit{International Covenant on Economic, Social and Cultural Rights} 1976.} which has legitimised the growth in the human rights machinery at the United Nations level as well as in regional human rights courts, such as the ECtHR.

Universalism suggests that there are certain ethical or moral truths for all individuals irrespective of other features which distinguish them, such as culture, race, gender, ethnicity, sexual orientation etc. In an interview conducted in 1989, Jürgen Habermas offered an applied reading of the concept when he stated:

\begin{quote}
What then does universalism mean? Relativising one’s own form of existence to the legitimate claims of other forms of life, according equal rights to aliens and others with all their idiosyncrasies and unintelligibility, not sticking doggedly to the universalisation of one’s own identity, not marginalising that which deviates from one’s own identity, allowing the sphere of tolerance to
\end{quote}

become ceaselessly larger than it is today—all this is what moral universalism means today.¹²⁰

The claim to certain universal ethical truths which is at the heart of universalism facilitates an understanding that human rights law has its roots in the human being and should not therefore be subject to the fluctuations of ordinary political debate and agreement.¹²¹ In this way, UK human rights law has followed the global trend towards elevating human rights within the domestic constitution such that it represents, alongside liberty, a superior value system. This occurs in practice through the principle of legality, constitutional statutes (discussed in chapter 2, section 2.3.1) as well as the concept of *jus cogens*, i.e. peremptory norms¹²² (discussed in chapter 5, section 5.2)

Indeed, within international law, much has been written about how the growth in human rights has challenged traditional understandings about sovereignty. The discipline of international law emerged from the political-economic interests of individual states rather than an emphasis on the rights of the individual human being irrespective of citizenship; albeit that there was some later concern from state’s for their own citizens.¹²³ Within early international law, the only universal values that could be said to exist were state values, such as national identity and national security, and not the *human* values understood by international human rights law today. Stephen Krasner has described traditional international law as a replication of the liberal theory of the state but with the state replacing the role of the individual. In international law, he says, ‘[s]overeignty, independence, and consent are

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¹²¹ Linked with the idea of universalism is the revived idea of cosmopolitanism, primarily an orientation to ‘realise the imperative of universalism’. Those committed to cosmopolitanism endeavour to engage with the human world as one, whether that be morality or politics. James D Ingram, *Radical Cosmopolitics* (Columbia University Press 2013) 23. ‘Revived’ because it appeared first and briefly in Enlightenment thought, and after WWII.
¹²² *Belhaj v Straw* [2017] UKSC 3; [2017] AC 964.
comparable with the position that the individual has in the liberal theory of the state.\footnote{124}

The dominance of social contract thinking as well as the incorporation of the ECHR has made \textit{liberal} universalism the brand of universalism which underpins UK human rights law. As chapter 3 will discuss in more detail, it is also the dominant (but not the only) understanding of universalism underpinning international human rights law, referred to there as ‘classical human rights philosophy’\footnote{125} To give a brief introduction here, since universalism asserts a certain objectivity to truth, the philosophical theory of liberal universalism asserts that it is possible for humans to discern those truths through human reason. Important to that theory and ethical monism is that that reasoning process is undertaken in a way that is abstracted from the person’s situated context. Through this reasoning faculty, human beings determine what constitutes their generic humanity and so what ends or version of the good life should be pursued. This theory, heavily dependent on Enlightenment thinking assumes that all human rationality will lead to a right answer and in this way it is alleged\footnote{126}, on the inspiration of Isaiah Berlin, that the classical human rights theory is premised upon an ethical monism, as opposed to an EVP\footnote{127}. Despite some of the concerns about this theory (see below and especially chapter 3, section 3.4), liberal universalism is viewed as having such success that Francis Fukuyama is often quoted as suggesting it (or at least liberal democracy) marked the ‘end of history’.\footnote{128}

In terms of contemporary international law, the UN mandate takes a much more nuanced approach to sovereignty, by including both traditional notions of state sovereignty and a form of individual sovereignty through the incorporation of human rights.\footnote{129} International human rights law bestows upon individuals certain inalienable

\footnotesize{
\begin{itemize}
\item \footnote{124}{Stephen Krasner, \textit{Sovereignty: Organised Hypocrisy} (Princeton University Press 1999) 9.}
\item \footnote{125}{Hogan (n 12) 30.}
\item \footnote{126}{Kant’s philosophy is notably credited with attributing to the human being these supreme powers of rationality. Immanuel Kant, ‘An Answer to the Question: What Is Enlightenment?’, \textit{Konigsberg, Prussia, 30th September, 1784} (1784).}
\item \footnote{127}{Isaiah Berlin, \textit{The Crooked Timber of Humanity} (Henry Hardy ed, Pimlico 2003) 5–6, 13–15.}
\item \footnote{128}{Francis Fukuyama, \textit{The End of History and The Last Man} (Free Press 1992).}
\item \footnote{129}{Compare directly Charter of the United Nations 1945 Arts 2(7) with Arts 55-56.}
\end{itemize}
}
rights such that the reach of international human rights bodies, which oversee the international human rights treaties, now extends into the internal workings of all states having ratified the treaty (at least in terms of authoritative opinion, if not enforcement capabilities). By requiring states to first accede to or ratify an international human rights treaty before the treaty body has jurisdiction, state sovereignty is said to be respected. From this point on however, state sovereignty ought to show deference to the role of the UN treaty bodies. In this way, the authority international human rights law bestows on international mechanisms over the traditional sovereignty of the state can be rationalised on the basis that both the state and the supra-state institutions exercise power on behalf of the people.\footnote{130} Despite the obvious clash with traditional international law foundations, international human rights law and the elevation of the individual is now so fundamental to moral thinking in liberal democracies that it, as mentioned, plays the role of a superior value system in national constitutions including that of the UK.

Yet what is immediately apparent is that the discontent described above among some elements of the public concerning human rights judgments and the corresponding desire to tweak human rights to respond to national or state-based norms, runs contrary to the theoretical understanding just described. That understanding being that human rights laws are premised on universalism and fixed notions of truth. As the thesis later discusses, the coherence between constitutional norms and societal values is an important criterion for a successful and legitimate constitution. The relative popularity of the more socialist politics of Corbyn’s Labour among grass roots Labour supporters prior to the November 2019 election, is one feature which calls into question whether this coherence has been established in UK law (see chapter 6, section 6.3.1). These positions also demonstrate a potential conflict between different versions of individual sovereignty: one understood from a philosophical

\footnote{130 See, e.g. Kofi Annan, ‘UN Press Release (20 September)’ GA/9595 (1999). ‘The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty -- and by this I mean the human rights and fundamental freedoms of each and every individual as enshrined in our Charter -- has been enhanced by a renewed consciousness of the right of every individual to control his or her own destiny. These parallel developments -- remarkable and, in many ways, welcome...’}
perspective (liberal universalism) and the other from a political perspective (popular sovereignty). Yet, this too is not an altogether new development. Classical human rights theory, in the form of liberal universalism, has endured substantial criticism and is not accepted globally, or even formally, as the philosophical position of human rights despite its dominance. As chapter 3 will explain, there is no formal foundation for international human rights law. There are however, some emerging and competing human rights theories that arguably address some of the concerns that have emerged in the political sphere.\textsuperscript{131} These theories reject the suggestion that human ends can be identified through reason alone and instead emphasise the embedded nature of human beings within their societal, community and family contexts. These communitarian criticisms of liberal universalism are discussed in chapter 3 of the thesis, where attention is also paid to the legal reality that human rights laws are not universal in their application. This latter point is evidenced by the stronger legal protection afforded to \textit{jus cogens} and civil and political rights over for example, social rights (see chapter 3, section 3.3.3 and chapter 5, section 5.2).

By building on communitarian critiques of human rights theory and their liberal universalism underpinnings, the thesis uses the evolving literature that rejects a monist approach to human rights foundations by embracing EVP as inspiration for the idea of approaching the dominant UK constitutional battle of legal sovereignty from an EVP perspective. Linda Hogan’s ‘constructive ethical pluralism’, which requires that universal convictions are embedded in the cultures through which they are expressed and through which they evolve,\textsuperscript{132} is one such example (see further chapter 3, section 3.6.1). The relationship this approach has with sovereignty in UK law is explained in the following section.

1.3. The Research Methodology: A Normative Approach via Ethical Value Pluralism and Universal Process Values

\textsuperscript{131} McCrudden (n 12); Hogan (n 12).
\textsuperscript{132} Hogan (n 12) generally chs 4 and 5.
As stated in the introduction to this chapter, by investigating legal sovereignty in the UK through the lens of EVP, a normative approach to the law and legal sovereignty is presupposed.\(^\text{133}\) Although the thesis takes as its research context the current political and (primarily) doctrinal context, it does not assume the exercise and possession of sovereignty to be coextensive, as has often previously been the case.\(^\text{134}\) An EVP perspective on sovereignty will therefore contrast with a view that legal authority rests only with those who have the power to compel obedience and so too then the view that legal sovereignty amounts to the judicial recognition of political power.\(^\text{135}\) Instead, by understanding legal sovereignty as a deduction from ethics, the thesis does similarly situate the origins of sovereignty in a place external to the legal process, such that it cannot be considered a judicial construct. Furthermore, this thesis invokes the concept of legitimate authority, with authority’s legitimacy resting on its ethical (or moral) justifications. In the context of political authority it is often said that its legitimacy stems from its function, which (as we saw above with social contract theory) is to serve the governed: the so-called ‘service conception’ of authority.\(^\text{136}\)

The thesis takes the view that legal authority (a wider concept but inclusive of political authority) should also be viewed as a derivative of the service conception. Legal authority will serve the governed, at least in part, in the view of the thesis, if it is representative of EVP (as a more plausible form of ethical truth than ethical monism). In that sense, the thesis presumes a certain moral realism (as


\(^{134}\) See generally, Grimm (n 24).


\(^{136}\) Raz (n 23) 56.
opposed to moral scepticism), i.e. that we can possess, at least some, ethical knowledge.\textsuperscript{137}

Platforming off Hogan’s ‘constructive ethical pluralism’ as a new approach for coherent human rights foundations, the thesis turns in chapter 4 towards the father of EVP, Isaiah Berlin, to set out the idea that drives the sovereignty analysis and contribution in chapters 5 and 6. As chapter 4 will set out, the epistemology that EVP claims is that values are irreducibly plural, that they can sometimes conflict and can even be incommensurable. EVP, as discussed in detail in chapter 4, is a concept in meta-ethics (or axiology) that rejects a monist perspective on ethics. It understands that there is no one right answer about right ways of living. Yet if EVP is to offer anything to legal sovereignty, it must itself incorporate a certain normativity beyond the simple recognition that values are multiple and may conflict. This is where the significance of universal values lies in the thesis and chapter 4 is central to establishing that such normativity can be found in EVP, which is an idea distinct from relativism and one that can co-exist with universal values. As chapter 4 will demonstrate, such universal values are found via an internal essential and embedded universalism process whereby individuals consider what it is that makes a life recognisable as functioning in a fully human way. This is informed largely by Nussbaum’s human capabilities approach.\textsuperscript{138} As a result, the thesis is more confident about identifying process-orientated universal values with which it can infuse the UK’s legal sovereignty. The thesis research questions outlined above, seek to contribute to this core literature on EVP by applying the normativity within the idea and then using that as a foundation for interpreting contemporary legal sovereignty debates in the UK.

Before engaging in that investigation however, it is of note that EVP is not the most common version of value pluralism to be found in political or legal theory literature. In fact, a version of value pluralism more commonly found might be described as

\textsuperscript{137} For a similar read, see Gray (n 16) 49.

\textsuperscript{138} Nussbaum, \textit{Creating Capabilities} (n 15); Nussbaum, ‘Human Functioning and Social Justice: In Defense of Aristotelian Essentialism’ (n 15).
'social-fact pluralism' which concerns the simple reality that pluralism is common at the level of choice and interest without attributing any moral right or good to this feature.\textsuperscript{139} The literature is predominantly centred on how political organisations should deal with such social-fact pluralism, which might in turn be called ‘political value pluralism’ or simply political pluralism. Patrick Dunleavy and Brendan O’Leary offer the following definition of political pluralism as the view that there exists ‘diversity in social, institutional and ideological practices, and … that diversity [is valued]’.\textsuperscript{140} Political value pluralism is often therefore orientated towards ensuring that institutions allow individuals maximum freedom to accommodate the observed social fact pluralism and promote harmony. Typically, this is achieved through institutionalising democracy and the rule of law, which arguably allows for a degree of diversity within a framework of stabilising legal norms (see for example, the fuller discussion in chapter 5, section 5.4).

While EVP will often coincide with a societal, social-fact pluralism, it need not. The distinctiveness of the concepts might be further demonstrated by the fact that there are many ethical monists who recognise and seek to manage the existence of social fact pluralism embracing to some degree political pluralism.\textsuperscript{141} As described, the reading of EVP taken in this thesis is normative and so it seeks to move EVP into the substance of the law itself; something that cannot be so persuasively achieved through other versions of value pluralism. EVP has greater authoritative weight because it speaks to choices made by individuals concerning valuable forms of life and includes the normativity of universal values. As such, an ethical pluralist approach also infuses legal authority with justifications.\textsuperscript{142} Finally, EVP’s most famous proponent in fact referred to the idea as ‘value pluralism’. The term ‘values’ appears frequently throughout the thesis and requires some defining.

\textsuperscript{139} Conn (n 21) 237–239.
\textsuperscript{140} Dunleavy and O’Leary (n 20) 13.
\textsuperscript{141} See e.g. Dworkin, \textit{Justice for Hedgehogs} (n 23) 9. For Dworkin the meta-value (also called super-value) is dignity. On the recognition of diverse values at the level of choice, see generally, Elinor Mason, ‘Value Pluralism’ in Edward N Zalta (ed), \textit{The Stanford Encyclopedia of Philosophy} (Spring, 2018).
1.3.1 The Meaning of ‘Values’

The majority of uses of the word ‘values’ in this thesis pertain, not to a legal concept but rather a concept in ethics or even axiology referencing legitimate ultimate ends/objectives/goals that human beings pursue in their lives. Thus they should be conceived of as human values. The preferred term within the thesis is that of ‘values’ but it is also understood and occasionally used somewhat interchangeably with ‘ethics’ and ‘morals’ (despite their subtle distinctions in some philosophical thought). The account of these values is taken predominantly from the moral elements of Isaiah Berlin’s idea of ‘value pluralism’ – which the thesis calls ‘EVP’. The introduction to this chapter mentioned how Berlin included both moral and political elements to his theory. In light of that factor, and the various other forms of value pluralism mentioned immediately above, EVP has been chosen to retain clarity that the focus on value pluralism remains at the level of ethics.

As indicated, the concept of ‘value’ within EVP refers to ultimate or absolute values, which refers to the fact that these values do not typically need to be explained with reference to other values. That is to say, they hold within their own meaning an explanation to justify the judgment that it is of itself good. As chapter 4, section 4.2 sets out however, Berlin uses the term to refer to a range of ideas, such that they do not always appear to fall within the definition outlined above. This is most apparent perhaps in Berlin’s identification of values such as ‘murder’ or ‘slavery’, which incidentally, both he and the thesis do not recognise as legitimate because they fall

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143 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 12) 11.
144 As mentioned above, Dworkin identifies ethical standards as the criteria which dictate ‘how we ought to live ourselves’ and moral standards as criteria which concern ‘how we ought to treat others’. Dworkin, Justice for Hedgehogs (n 23) 191. In Justice for Hedgehogs, Dworkin aims to find some ethical standard that will guide his interpretation of moral, and in turn, political behaviour. On the breadth of values, see Ted Honderich (ed), ‘Value’, The Oxford Companion to Philosophy (2nd edn, Oxford University Press 2005). Also, Honderich, ‘Ethics and Morality’ (n 22).
outside the reasoning used to establish universal normativity in chapter 4, section 4.2. The idea of a ‘constellation of values’ as representative of the values pursued by a society also plays a role in the thesis as it attempts to tease out the norms underpinning different sovereignty arguments (see for example, chapter 2, section 2.2.1).

A further variation of the term values that appears in the thesis is that of constitutional values, discussed in section 1.2.2, above, and later in chapter 6. This is a legal concept, but since the UK does not have a codified constitution, the identification of constitutional values can be challenging and the distinction, if any, between a constitutional value and principle remains vague.\(^\text{147}\) Section 1.2.2 of this chapter demonstrated for example, two different approaches in the writings of Oliver and of Jowell and O’Cinneide to constitutional values as well as exemplifying the vagueness of distinction in the latter account.\(^\text{148}\)

Finally, international human rights law has been accorded the status of ‘global values’ (see section 1.2.3 above). Human rights have many manifestations but the form of relevance in the thesis is that of human rights law.\(^\text{149}\) In this sense rights are not human values as described above but rather legal obligations predominantly placed upon states, but they do demonstrate an effort to translate human values into tangible legal terms, and often mirror what would be traditionally understood as an ultimate value, for example equality and liberty (see further chapter 4, section 4.2).\(^\text{150}\) What is distinct about international human rights law is that it is said to represent global or universal values and can thus claim a moral authority (if not a legal one) over all human beings. It is for this reason that the thesis pursues in chapters 4, 5 and 6, a normativity within EVP that is objective and universal.

\(^\text{147}\) See for one discussion, Oliver (n 98) 56–60.
\(^\text{148}\) Oliver (n 98); Jowell and O’Cinneide (n 100). See further, Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 European Journal of International Law 187. Note however that the constitutional value v principle distinction is not a major focus of the thesis.
\(^\text{150}\) Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 12) 12.
1.3.2. Research Methods

Since the thesis main aim is to approach legal sovereignty from norms derived from EVP, the research methods employed are desk-based legal research of relevant statute and case law, as well as literature reviews of secondary legal and political theoretical literature. In addition, because the normative approach is one of EVP, the thesis includes some consideration of leading literature within moral philosophy. The thesis itself is not predominantly a philosophical undertaking,\(^{151}\) as this is not the expertise of the author. It attempts rather to engage closely with existing philosophical theories, such as EVP and universalism, and borrow from the theories of others, at least partially coherent foundations, from which it can contribute ideas for constitutional theory, as well as UK constitutional practice. Unsurprisingly then, as the thesis embarks on transitioning through legal analysis (chapter 2) - legal and political theory (chapter 3) - value focused philosophy (chapter 4) - legal and political theory (chapter 5) - UK constitutional law (chapter 6), the transitions and the final conclusions are not scientific in nature.\(^{152}\) They are instead, predominantly ideas, around how a commitment to EVP could benefit the UK constitutional framework considering the observable and evidenced present day political and legal unrest.

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\(^{151}\) Philosophers often begin analysis, from theories or intuition. The dominant engagement here is theories. See, AP Martinich, *Philosophical Writing: An Introduction* (Blackwell Publishing 2011) 18.

PART B

SOVEREIGNTY DISCOURSES AND THEIR NORMATIVE UNDERPINNINGS IN THE UNITED KINGDOM CONSTITUTION
2. A POSITIVIST ANALYSIS OF SOVEREIGNTY DEBATES: INTER AND INTRA-STATE

2.1. Introduction

The introductory chapter set out in section 1.2 a summary of the research problem addressed by the thesis, namely the current dissatisfaction and unrest with the United Kingdom (UK)’s constitutional arrangements as regards sovereignty. Part B of the thesis, comprising this chapter and chapter 3, develops that short introduction by presenting a more comprehensive narrative on both the legal and philosophical elements of this discord. This chapter takes a positivist approach, predominantly doctrinal, to answering the first sub-research question: ‘What are the current debates that dominate the sovereignty discourse in UK constitutional law?’ Chapter 3 then moves the discussion closer to ethics by interrogating the normative underpinnings of the identified debates, bringing the thesis closer to what seeks to be its core contribution, relying on ethical value pluralism (EVP) to redirect contemporary legal sovereignty narratives.

This chapter engages with the multi-level nature of sovereignty discussions by first interrogating contemporary debates around the UK’s legal sovereignty at the state level, vis-à-vis its fractured relationship with the European Union (EU) and its relationship with the European Convention on Human Rights (ECHR). The chapter then turns to the internal mechanics of the UK’s centralised state structures by investigating whether the UK Parliament, traditionally understood as sovereign, continues to hold this status. Finally, the chapter enquires into the realism of local and popular claims to sovereignty, through the prism of devolution and majoritarian choice. As chapter 1, section 1.2 has already introduced, all three layers of sovereignty discussion are intertwined, such that by understanding an authority to lie with one layer or institution, there are knock-on consequences for the other layers. The chapter concludes that, while legal sovereignty in the UK is trending towards the state level and thus away from supranational institutions, the very real internal challenges to state sovereignty that endure through human rights law and
devolution, mean that legal sovereignty in the UK is as sometimes suggested, better understood as shared with the courts,¹ but importantly, that it should also be understood as being significantly challenged by the devolved legislatures.

2.2. State Sovereignty

As discussed within chapter 1, section 1.2.3, state sovereignty plays a significant role in international law, which is largely premised on treaties as contractually based but binding relationships between equal and sovereign states; states being the primary recognised actors.² That section noted that international law emerged out of the political-economic interests of individual states rather than a concern for individual citizens, which came later. First, there developed a concern for the state’s own citizens,³ before the more recent concern for all individuals, irrespective of citizenship, emerged in the form of human rights. The impact of human rights law has been such that the previously impenetrable veil of state sovereignty within traditional international law is now much more porous. In particular, the universalism of human rights law has played a crucial role in the strengthening of supranational institutions, and in turn domestic judicial institutions (see especially section 2.3.1 of this chapter and chapter 3 below). Additionally, upon joining the European Communities (EC) through the enactment of the European Communities Act in 1972,⁴ EU law had automatic domestic effect in the UK. The UK Supreme Court stated in the seminal constitutional case of R (Miller) v Secretary of State for Exiting the European Union (‘Miller No. 1’), that ‘so long as that Act remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice

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⁴ European Communities Act 1972 c. 68 (repealed).
[will remain] direct sources of UK law. The EU has also interestingly been a harbinger of a developing international law concern for individual citizens through the gradual establishment of citizen’s rights and their development into fundamental rights. The UK’s 1972 Act was however repealed on 31 January 2020, otherwise known as ‘exit day’ marking the date on which the UK left the EU. The European Union (Withdrawal Agreement) Act 2020 introduced an implementation period to allow for transition whereby EU law is ‘saved’ until 31 December 2020. That event (‘Brexit’), and associated sovereignty debates and legal implications are discussed in section 2.2.2 below. It is of initial benefit to first contextualise Brexit against the concepts of ‘legal pluralism’ and especially, ‘constitutional pluralism’: ideas, which speak to the nature of the relationship that has developed between the UK, EU, and (albeit to a lesser extent) European Court of Human Rights (ECtHR) over the past few decades.

2.2.1. The EU, ECHR and Constitutional Pluralism

The precise meaning of legal pluralism is subject to different interpretations. It is to be understood in this thesis however to refer to the context in which ‘two or more legal systems coexist in the same societal field, sometimes in a contradictory way, in which each may have equally plausible claims to authority’. Importantly, the ‘legal systems’ in this definition are not to be read as limited to the legal systems as they present in the modern state, but are instead inclusive of other forms of law and legal

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5 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61 [61].
7 European Union (Withdrawal Agreement) Act 2020 c.1 s 1 and 20(1); European Union (Withdrawal Agreement) Act 2020 c.1 s 1 and 2. The original date for repeal was 29 March 2019 and was subsequently extended, see e.g., The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019; The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019; The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019.
8 European Union (Withdrawal Agreement) Act 2020 c.1 (n 7) s 1 and 2.
systems that emerge from the variety of social fields that exist, for example, indigenous law, religious law or other custom based orders.\textsuperscript{11} This version of legal pluralism is therefore a concept comfortably situated in the socio-legal, political science and anthropological fields because it includes the study of semi-autonomous social fields from which a form of law, legal system or self-regulation has emerged. Perhaps unsurprisingly then, one major aspect of the legal pluralist literature (from those who might call themselves ‘legal pluralists’) is the rejection of the modern state as the necessary and sole source of law – Alain Zysset calls this argument ‘a rejection of legal centralism’.\textsuperscript{12} The relationship between this form of legal pluralism and EVP, and thus legal pluralism as a normative theory, is important for the thesis and discussed further in chapter 5, section 5.4 below. For the present time, however, the focus is on its descriptive and conceptual facets and the particular strand of legal pluralism referred to as ‘constitutional pluralism’.

Constitutional pluralism, like legal pluralism, has a variety of definitions, but is taken here to refer to the same broad idea of legal pluralism, i.e. that two or more legal systems coexist in the same societal field but much more specifically then, that the claims to authority (and legal systems) are constitutional in nature.\textsuperscript{13} The pluralist scholar Neil Walker includes as part of his definition that each site of legal authority ‘ought to acknowledge and somehow accommodate the claims of the others as independent sites of constitutional authority—thereby ensuring the continuing absence of a single dominant authoritative framework’.\textsuperscript{14}

The EU has of course asserted the autonomy of its legal order since the seminal 1964 judgment of \textit{Flaminio Costa v ENEL} wherein the European Union Court of Justice (‘EUCJ’) stated:

\textsuperscript{12} Zysset (n 11) 181. See e.g., Nico Krisch, \textit{Beyond Constitutionalism: The Pluralist Structure of Postnational Law} (Oxford University Press 2010).
\textsuperscript{14} ibid.
By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.\(^{15}\)

In that case, the Court also established the well-known supremacy principle declaring the ‘precedence of Community law,’ which as an independent source of law cannot ‘be overridden by domestic legal provisions, however framed’.\(^{16}\) Since this time, the concept of constitutional pluralism has become especially prominent in the context of the EU as a way of capturing clashes between the authority of the EU order and national orders (or indeed between the EU and international order).\(^{17}\) It has been described as an effort to provide a systematic conceptualisation to ‘legitimise’ what is essentially a ‘heterarchical’ rather than a hierarchical relationship between the national constitutional orders and the EU constitutional order.\(^{18}\)

There are of course many that dispute the merits of the conceptualisation of the relationship between the EU legal order vis-à-vis national orders through constitutional pluralism. Such scholars instead argue that organising concepts such as the Article 4(2) Treaty on European Union (TEU)\(^{19}\) obligation to respect the national identity of member states or a conceptualisation of EU federalism\(^{20}\) better describe

\(^{15}\) Case 6/64 Flaminio v ENEL [1964] ECR 585, 593.
\(^{17}\) For the parenthetical situation, see, Case C-402/05P and C-415/05, P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities [2008] ECR I-6351.
\(^{19}\) Consolidated version of the Treaty on European Union (TEU) OJ C 202/1 13.
\(^{20}\) Article 4(2) TEU sets out that ‘[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. Timmermans argues that it ‘integrates the legitimacy claim of national constitutional core values into the EU legal system itself’. See, Timmermans (n 18) 356. For Federalist arguments, see Nicolaidis Kalypso and Robert Howse (eds), The Federal Vision (Oxford University Press 2002). See further for discussion, Walker (n 13) 342–347.
the relationship. Yet it is the openness of ‘constitutional pluralism’ to the complicated and competing nature of (the previous) EU-UK grounds for legal authority that makes it a favourable term, at least descriptively, for the thesis. Both the concept of federalism and arguments based on Article 4(2) TEU propose a relatively ‘unified’ constitutional arrangement when compared to constitutional pluralism, and thereby fail to capture as adequately the tensions between the EU and member states competing claims of authority. Federalism has additionally struggled for ground in the EU context because it is generally taken to require a substantial EU *demos*, EU control of foreign policy as well as widespread public support, none of which presently exist.\(^{21}\) The thesis will later describe (chapter 5, section 5.5) how a wide definition of federalism, based on the idea of ‘shared rule plus self rule’, has in fact much in common with constitutional pluralism.

Reflecting instead the definition of constitutional pluralism, the UK, like many EU member states, can be seen to resist the supremacy doctrine first laid out (indeed before the UK even joined) in *Costa*.\(^{22}\) As Robert Schütze notes, UK law has generally maintained an approach to its relationship with EU law whereby ‘the British Parliament stands supreme behind every European norm’.\(^{23}\) This approach began for Schütze, with the European Communities Act 1972, which did not conceive of the UK as ‘an “autonomous” legal order that directly applied within the UK *qua* membership of the EU’ but instead framed EU law as ‘subordinate to British legislation’.\(^{24}\) The UK is said to have maintained this approach ever since, such as in the more recent European Union Act 2011 (now repealed) which states that ‘EU law…falls to be recognised and available in law in the UK only by virtue of [the ECA 1972].’\(^{25}\)


\(^{22}\) For the general point see, Timmermans (n 18) 349.


\(^{24}\) ibid.

\(^{25}\) ibid. The Act was repealed by the European Union (Withdrawal) Act 2018 c.16 (n 7). See also and previously, *Thoburn v Sunderland CC* [2003] QB 151; [2002] 3 WLR 247.
Although Schütze is broadly accurate, there are also recent hints within UK law of accepting the EU as an autonomous legal order. It will not have escaped the reader that the *Miller* quotation which introduces this sub-section (see above), both recognises parliamentary sovereignty through the acknowledgment that EU law is subject to the 1972 Act, and simultaneously appears to acknowledge EU law as its own constituent form, so to speak, by referring to it as ‘a direct source’ of UK law.\(^{26}\) While, in Schütze’s terms, the UK’s ‘national “sovereigtist”’ perspective has led to ‘enormous judicial acrobatics’ within UK domestic law - much of which is discussed in detail through the parliamentary sovereignty/shared sovereignty narrative in section 2.3 below - such ‘acrobatics’ might equally be considered an inevitable part of jurisprudence in the context of constitutional pluralism. That is to say, given the inherently complicated and competing nature of the relationship this concept describes. Furthermore, with Walker’s above assertion in mind, it might be argued that the *Miller* judgment is one at ease with constitutional pluralism because it acknowledges the independent sites of constitutional authority of the UK and EU by simultaneously asserting the direct nature of EU law while celebrating parliamentary sovereignty (again, see section 2.3. for a more contextualised discussion of *Miller*).

Unlike EU law, the ECHR and accompanying court are not so commonly conceived as giving rise to a relationship of constitutional pluralism with the UK,\(^ {27}\) albeit that the constructive dialogue between the ECtHR and UK courts could be suggestive of some pluralism.\(^ {28}\) This position is in spite of a requirement within section 2 of the Human Rights Act 1998 that domestic courts must ‘take into account’ the judgments of the ECtHR (see below section 2.2.3). The main reason for distinguishing the ECHR and ECtHR from the EU in this way is on Zysset’s view due to the key role the subsidiarity principle (or ‘margin of appreciation’) plays in the ECHR system, i.e. the principle whereby decisions should be taken as close to the electorate as possible without

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\(^{26}\) *R (Miller) v Secretary of State for Exiting the European Union* (n 5) [61].

\(^{27}\) Zysset (n 11) 192.

compromising good government.\textsuperscript{29} As will be evidenced later in the thesis (chapter 5, section 5.4), the ECHR observes and embraces a lot of pluralism in practice, such that the ECHR has not been considered sufficiently sovereign to legitimately contest the national legal systems as a site of authority.\textsuperscript{30} On Zysset’s view, the ECHR in fact relies on the existence of democratic pluralism for its authority and as such the ECHR’s authority ‘is exercised not in the name of a novel political community but in the name of the democratic community of the state party in question – and the democratic ethos that comes with it.’\textsuperscript{31} Note that while Article 5 Treaty on the Functioning of the European Union (TFEU)\textsuperscript{32} also embed the principle of subsidiarity in the EU, which establishes that the EU should only act if member states alone could not achieve the result. The EU institutions are distinct however, from the ECHR framework because of their explicit competence over certain areas as well as the light touch approach taken by the Luxembourg court concerning subsidiarity claims brought by Member States.\textsuperscript{33}

That being said, the discourse of constitutional pluralism is a helpful backdrop for understanding the key sovereignty messages espoused during the run up to the UK’s 2016 referendum on EU membership as well as the, albeit weaker, assertions of the need for a British Bill of Rights. This is because conversations around Brexit and a British Bill of Rights often reflect a desire to retreat to the familiar organising structures of the nation state, which might now be otherwise framed as a desire to return to a philosophically monist perspective of the legal system or the ‘legal centralism’ noted by Zysset.\textsuperscript{34} The latter idea being one to which normative legal pluralists are opposed. Philosophical monism, which refers to oneness or singleness, is distinct from the use of monism to describe a relationship whereby national law

\textsuperscript{29} Constitution Committee, ‘The Union and Devolution (2015-16, HL 149)’ 51 (para 195).
\textsuperscript{30} See, Zysset (n 11) 192.
\textsuperscript{31} ibid 197.
\textsuperscript{32} Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), OJ C 202/1 (n 6).
\textsuperscript{33} See e.g. Article 3 TFEU. See also for an evaluation and examples, Paul Craig and Gráinne de Búrca, \textit{EU Law: Texts, Cases and Materials} (6th edn, Oxford University Press 2015) 99–102.
\textsuperscript{34} Zysset (n 11) 181.
incorporates international law without the need for additional domestic legislation.\textsuperscript{35} A philosophically monist view of the nation state will be inclined towards a dualist view of international law, such as is the present case in the UK.\textsuperscript{36} Neil MacCormick, said to be the ‘father’ of constitutional pluralism,\textsuperscript{37} has himself identified this link between the traditional conception of ‘state’ sovereignty and monist or foundational thinking because of the ‘grounding of political certainties in the unquestionable word of the sovereignty in the state’.\textsuperscript{38}

2.2.2. ‘Brexit’

The UK Government, then under the premiership of Theresa May, notified the EU of its intention to withdraw its membership from the organisation on 29 March 2017.\textsuperscript{39} It did so, notably, not based on an authority derived from the UK referendum vote or indeed, the prerogative powers, but on the basis of powers conferred by the UK Parliament, as was the key point of contention in \textit{R (Miller) v Secretary of State for Exiting the European Union} (see section 2.4 below for more on this aspect of that seminal case.)\textsuperscript{40} This notification initiated a process of withdrawal negotiations whereby the UK and EU have sought a withdrawal agreement. Article 50(3) TEU sets out that the withdrawing Member State will automatically cease to be a member of the EU two years after the withdrawal notification unless the European Council in agreement with the Member State unanimously decides to extend that period.\textsuperscript{41} Such an extension was requested by the UK and granted by the European Council three

\textsuperscript{35} Jonathan Schaffer, ‘Monism’ in Edward N Zalta (ed), \textit{The Stanford Encyclopedia of Philosophy (Winter 2018 Edition)} (2018); \textit{R (Miller) v Secretary of State for Exiting the European Union} (n 5) [167].

\textsuperscript{36} See e.g., \textit{R (Miller) v Secretary of State for Exiting the European Union} (n 5) [55].

\textsuperscript{37} Timmermans (n 18) 354.

\textsuperscript{38} The traditional conception of state sovereignty is tracked by MacCormick through from Thomas Hobbes’ state as Leviathan theory, through to Rousseau’s ‘will of the people’, Kant’s faith in the ‘constitutional state’ and finally, to Diceyan ‘parliamentary sovereignty’. Neil MacCormick, ‘Beyond the Sovereign State’ (1993) 56 The Modern Law Review 1, 15. See also for general discussion, Francis W Coker, ‘The Technique of the Pluralistic State’ (1921) 15 American Political Science Review 186, 186.

\textsuperscript{39} Pursuant to Article 50(2) TEU.

\textsuperscript{40} See, European Union (Notification of Withdrawal) Act 2017 c. 9. See also, \textit{R (Miller) v Secretary of State for Exiting the European Union} (n 5) [101 and 121].

\textsuperscript{41} Consolidated version of the Treaty on European Union (TEU) OJ C 202/1 (n 19).
times, with exit day eventually occurring on 31 January 2020. In UK domestic law, the European Communities Act 1972 was repealed on exit day by virtue of the European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020, with the effect that any new EU law will no longer form this automatic part of UK domestic law.

As pointed out in the introductory chapter (section 1.2.1), Brexit has thus far not in fact served to quell dissatisfaction around sovereignty in political terms but has instead served to exacerbate other pre-existing divisions on the issue, especially as concerns the constituent nations. The following two sections focus on Northern Ireland (NI)’s land border with Ireland and Scottish devolution; issues which exemplify how the legal complexity of Brexit has exacerbated underlying political tension.

i. Northern Ireland: The Backstop and a Border in the Irish Sea

The peace process in NI and the border it holds with Ireland (making it the only land border between the UK and the EU) presented a crucial sticking point in withdrawal negotiations with the EU. The issue of an Irish ‘backstop’ first appeared in an early negotiations agreement between the UK and EU to the effect that, in the absence of an alternative agreed solution in a future trading deal between the UK and EU, NI would maintain full alignment with the rules of the EU’s internal market and customs union. It then featured in the Ireland/NI Protocol to a draft agreement agreed by the May Government and endorsed by the European Council on 25 November 2018.

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42 EU CO XT 20024/2/19 REV 2, EUROPEAN COUNCIL DECISION taken in agreement with the United Kingdom extending the period under Article 50(3) TEU ibid; The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019 (n 7). European Union (Withdrawal) Act 2018 c.16 (n 7); European Union (Withdrawal Agreement) Act 2020 c.1 (n 7) s 1 and 2. See also, The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019 (n 7); The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019 (n 7); The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019 (n 7). 43 European Union (Withdrawal) Act 2018 c.16 (n 7).
In an endeavour to ensure that the internal market integrity of the UK would not be undermined, Article 7 of the Protocol, like the early agreement, promised ‘unfettered market access’ for goods between NI and the rest of the UK. To make this work, May’s Protocol importantly also included a single customs territory between the EU and the UK until a future trading deal was agreed (Article 6). The aim of the backstop was to uphold the terms of NI’s peace settlement – the Good Friday Agreement 1998 and specifically the vital need to avoid a hard border on the island of Ireland while facilitating North/South cooperation and an all-island economy.

As per the terms of the European Union (Withdrawal) Act 2018, the UK Parliament was required to debate and approve the draft agreement (and pass a further Act of Parliament) before it could be ratified and form part of international law. That legislation also included in section 10 the commitment that Brexit would not create or facilitate after exit day any new border arrangements between NI and Ireland, such as physical infrastructure, including border posts, or checks and controls. On 15 January 2019 however, the withdrawal agreement was rejected by a significant majority in the UK Parliament with the backstop as the primary point of controversy. Despite the May Government agreeing subsequent additions with the EU in a ‘joint statement’ of March 2019 - such as a legal commitment to try to avoid the backstop coming into play, and the establishment of a dispute settlement mechanism with the potential unilateral suspension of the backstop in the event of a consistent failure to comply with the mechanisms rulings - the UK Parliament

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46 ‘Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Atomic Energy Community, as Endorsed by Leaders at a Special Meeting of the European Council on 25 November 2018’ (n 45).

47 The Belfast (Good Friday) Agreement 1998.

48 ‘Joint Report on Progress during Phase 1 of Negotiations under Article 50 TEU on the United Kingdom’s Orderly Withdrawal from the European Union (8 December)’ (n 44) 49.

49 European Union (Withdrawal) Act 2018 c.16 (n 7) s 13.


rejected the agreement two further times on the 12 March and 29 March 2019 by again significant (though slightly lesser) majorities.\footnote{HC Deb, 12 March 2019, Vol 656 Col 291-295 (Division 354 Ayes 242 Noes 391) and HC Deb, 29 March 2019, Vol 657 Col 771-775 (Division 395, Ayes 286 Noes 344).}

The main objection to the existence of the backstop was that it had the potential to keep the entire UK tied to EU rules i.e. to maintain a ‘level playing field’ and as part of the single customs territory, for an undefined period, in the event that no future trade agreement could be determined. This undermined a major intention of leave campaigners throughout the UK to establish future trading agreements with third countries free of EU rules.\footnote{‘Theresa May’s Brexit Deal Fails Again (12 March)’ The Economist (2019). See also, Rowena Mason and Jessica Elgot, ‘Boris Johnson: EU Must Scrap the Backstop to Avoid a No-Deal Brexit (30 July)’ The Guardian (2019).} It was also argued by NI’s largest unionist political party, the Democratic Unionist Party (DUP), that the backstop would inevitably introduce some checks between NI and Great Britain (GB) because NI had to maintain full regulatory alignment with EU rules. This differential position was perceived to undermine the status of NI within the UK union.\footnote{HC Deb, 29 March 2019, Vol 657, Col 712 (Nigel Dodds).}

The Attorney General advised that the risk of the backstop ever coming into play had been reduced by the subsequent March 2019 additions to the agreement, ‘at least in so far as that situation had been brought about by the bad faith or want of best endeavours of the EU’.\footnote{Geoffrey Cox QC MP, ‘Legal Opinion on Joint Instrument and Unilateral Declaration Concerning the Withdrawal Agreement’ (2019) paras 17–18.} He continued however to note that in the ‘highly unlikely’ event the UK and EU were unable to agree a replacement scenario for the backstop, the legal risk of the backstop ‘remained unchanged’. The Attorney General’s advice was therefore an insufficient guarantee for UK parliamentarians fearing the indefinite application of the backstops terms.\footnote{ibid.} The legal risk in question was that in the absence of bad faith or a lack of best endeavours, there was ‘no internationally lawful means of exiting the Protocol’s arrangements, save by agreement’.\footnote{ibid 19.}
Upon the resignation of Theresa May, incumbent Prime Minister Boris Johnson presented to the UK Parliament a renegotiated Withdrawal Agreement and Political Declaration with the EU on 19 October 2019. The alterations to the May deal were almost exclusively focused on the backstop and appear in the revised ‘Protocol on Ireland/Northern Ireland’. Article 4 of the revised Protocol removes the commitment to the temporary single customs territory that was enshrined in Article 6 of the original Protocol between the EU and UK and sees the whole of the UK leave the EU customs union. There remains however a free trade area relating to goods between NI and Ireland within the new Article 5. Goods travelling between GB and NI will be exempt from customs duties ‘unless that good is at risk of subsequently being moved into the Union’ (new Article 5(1)). In addition, new Article 18 stipulates that the arrangements are to remain permanent unless the NI Assembly agrees by simple majority otherwise. It is this Withdrawal Agreement that was approved by the UK Parliament by virtue of the European Union (Withdrawal Agreement) Act 2020 which gained royal assent on 23 January 2020, and the passage of which was made possible by the Johnson led Conservative Party’s majority election victory after calling an early election on the 12 December 2019 vote and winning 365 out of 650 Parliamentary seats. The revised Withdrawal Agreement and Protocol is now an international treaty between the EU and UK signed on 24 January 2020 and Brexit occurred on the 31 January 2020.

59 For this final agreement, see ‘AGREEMENT on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (12 November 2019), OJ C 384 I/1’.
61 For analysis, see House of Commons Briefing Paper, The October 2019 EU UK Withdrawal Agreement (17 October), Number CBP 8713 (HC Library 2019).
At the NI level, the issue of the backstop (and Brexit itself) has exacerbated enduring political divisions beyond just the separate inclinations of the leave and remain political parties. A vital part of the peace settlement in NI is that its constitutional status is based on the principle of consent.\textsuperscript{65} NI remains part of the UK under this principle and by preventing border checks on the island of Ireland through the backstop, there were fears, now potentially realised, that these would by default occur between GB and NI.\textsuperscript{66} Indeed, while this was inferred from the May agreement, it is a more explicit part of the Johnson’s deal. This separation has been regarded by some NI Unionists, notably the DUP, as undermining the Union and ultimately the consent principle (even though the consent requirement on the wider constitutional issue has not technically changed).\textsuperscript{67} Both withdrawal agreements have, on a whole, been favoured by NI’s nationalist parties taking a ‘remain’ position in the original EU referendum because of the unique arrangements for NI and the EU compared to the rest of the UK, although arguably this is also the NI majority position with most of the province (55.8%) voting to remain.\textsuperscript{68} On a more macro level, the Brexit vote itself has proved fertile landscape for nationalist parties in both NI and Scotland, seeking separation or independence from the UK. Discussion of an Irish referendum on reunification on the island of Ireland have become more frequent from Irish nationalist parties and the proposition more plausible.\textsuperscript{69} Most notably, however, the Brexit vote arrived less than two years after the Scottish Independence Referendum held in September 2014, which decided by 55.3% that Scotland should not become

\textsuperscript{65} The Belfast (Good Friday) Agreement 1998 (n 47).
\textsuperscript{67} The Belfast (Good Friday) Agreement 1998 (n 47) (constitutional issues).
\textsuperscript{68} Lisa O’Carroll, ‘DUP and Northern Irish Businesses at Odds over May’s Brexit Deal (17 November)’ (\textit{Guardian}, 2018); ‘Brexit: Sinn Féin and SDLP Welcome Draft Withdrawal Deal (15 November)’ (\textit{BBC News}, 2018).
an independent country. The momentum created by this vote had subdued but was subsequently swiftly reignited by a UK decision to leave the EU against the will of a sizeable 62% majority of the Scottish voters. Before turning to the discussion of a second Scottish Independence Referendum (‘IndyRef2’) below, it might be noted that the main arguments in NI discussions centred on the importance of the Good Friday Agreement, have obscured at least in NI and UK conversations the reality that Ireland is set to be one of the EU countries most affected by Brexit at an economic level due to its relatively high trade, financial, and labour market links with the UK.

ii. Scotland: A Second Independence Referendum (‘IndyRef2’), Devolution and the Sewel Convention

In March 2017, the Scottish First Minister (and leader of Scotland’s majority party, the Scottish Nationalist Party (SNP)) was calling for Westminster permission to hold a second referendum on the basis that there had been a ‘significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out the EU against [its] will’. The then UK Government responded by refusing to permit a second independence referendum, at least for the present time.

During the October 2018 SNP party conference, the First Minister, Nicola Sturgeon, described the goal of independence as still ‘in sight’ but also called for the ‘fog of Brexit to clear’

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before seeking to initiate a second referendum. Since that time, both the Scottish Government and Scottish Parliament have rejected the draft Withdrawal Agreement, and the Scottish Government had given its momentum to the possibility of a second EU referendum, known as a ‘People’s Vote’, which had for a time occupied a significant portion of the national discourse in Scotland and the rest of the UK. It was also a pledge of the Labour Party during the December 2019 referendum campaign to present a renegotiated deal with the EU to the UK public within three months of being elected for a ‘final say’ public vote. The CJEU had confirmed the possibility that a second referendum could reverse the UK decision to leave the EU in a ruling on 10 December 2018 to the effect that the UK could change its mind on Brexit before leaving the EU by unilaterally revoking its Article 50 TEU notification. The Conservative Party win in December 2019 and subsequent passage of the Withdrawal Agreement did of course close off any plans for a second EU referendum. It has also meant a Prime Minister less amenable to the idea of an IndyRef2 than would have been found in Jeremy Corbyn. The SNP did however also achieve high approval ratings gaining 48 out of the 58 Scottish seats in the Westminster Parliament. In January 2020, Boris Johnson rejected the Scottish First Minister’s formal request for an IndyRef2, emphasising that the 2014 referendum had been promised by all sides as a ‘once in a generation’ vote. Given the constitutional significance of the interim event of Brexit however, the discussion appears unlikely to subside. The First Minister has maintained a rhetoric of patience and negotiation,

77 Case C-621/18 Andy Wightman and Others v Secretary of State for Exiting the European Union, ECLI:EU:C:2018:999. The possibility of revoking Article 50 was suggested to be a delaying tactic to Brexit. See, BBC, ‘Andrew Marr Show (6 November)’ (2018).
78 BBC, ‘Andrew Marr Show (13 October)’ (2019).
80 10 Downing Street, ‘Letter from Boris Johnson to Nicola Sturgeon (14 January)’ (2020).
but escalations towards either a legal challenge to the Prime Minister’s decision or a Scottish mandated vote remain possibilities.  

The UK majority decision to leave the EU in contradiction to the Scottish majority vote to stay further sits somewhat at odds with the general trend within the UK to increasingly devolve power to the constituent nations (discussed further in section 2.4 below). In withdrawal discussions, there has been significant disagreement, especially in Scotland (but also in Wales), over where powers repatriated from the EU to the UK should lie, i.e. at the UK or Scottish levels. Due to this ‘disagreement’, the Scottish Parliament withheld its consent from the European Union Withdrawal Act 2018. The significance of withholding consent is due to the important political convention known as the ‘Sewel Convention’; the principle of which provides that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislatures. This convention gained statutory recognition within both the Scotland Act 1998 (as amended by the Scotland Act 2016) and the Government of Wales Act 2006 (as amended by the Wales Act 2017) but was held by the UK Supreme Court in the Miller No. 1 case to have no legal force (see section 2.4 for further discussion below). In March 2018, the Scottish Parliament then passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (referred to as the ‘EU (Legal Continuity) Bill’) designed to ensure that EU law operating in devolved areas was retained in domestic law, and gave Scottish Ministers certain powers to further this end. Section 17 of the EU (Legal Continuity) Bill for example, included a provision to the effect that the ability of UK Government Ministers to make subordinate legislation pertaining to the devolved competences (as granted under the Scotland Act 1998) would be conditional upon the consent of Scottish Ministers. The EU (Legal Continuity) Bill was subsequently referred to the UK Supreme Court, which ruled on 13 December 2018 that while the Bill as a whole was

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82 Wales also introduced and passed a legal continuity bill but subsequently repealed it. See, The Law Derived from the European Union (Wales) Act 2018 (Repeal) Regulations 2018.

83 See, SSM-12223.

84 R (Miller) v Secretary of State for Exiting the European Union (n 5) [148–149].
not outside the competence of the Scottish Parliament, certain provisions including section 17 were, because they modified Acts of the Westminster Parliament, including the subsequently enacted European Union Withdrawal Act 2018. In so ruling, the Supreme Court noted that the decisive issue at play in the case was the UK’s ‘reserved’ power of international relations. This being the case, the Court spelled out that Scotland was not a sovereign ‘state’ in terms of international law and that EU obligations can only be viewed from an international perspective as the obligations of the UK. That being the inevitable case for the time being, on the view of some scholars, the motivations of the Scottish Parliament were in any event, primarily political.

What appears clear for the time being, is that the contrasting positions of the majority of the Scottish people and the majority of English and Welsh voters concerning membership of the EU, has served to enhance different political directions concerning intra-UK sovereignty debates. Whether a UK Labour Government, campaigning in November 2019 on an anti-austerity, social justice and second EU referendum message, would have served to mitigate these intra-UK sovereignty tensions, or alternatively foster the potential break-up of the UK by offering an Indyref2, is an unknown in light of the seemingly significant support the Conservatives obtained in the election, including among traditional Labour constituencies, based on their ‘Get Brexit Done’ message.

2.2.3. A British Bill of Rights and Common Law Rights

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85 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland [2018] UKSC 64; [2018] 12 WLUK 159 [125]. It was held that section 17 and section 33 of Schedule 1 would modify the Scotland Act 1998 while sections 2(2), 5, 7(2)(b) & (3), 8(2), 9A, 9B, 10(2), (3)(a) and (4)(a), 11, 13B, 14, 14A, 15, 16, 19(1), 22, 26A(6), 33(1), (2) & (3) and Schedule 1 paragraphs 11(a) and 16 would, at least in part, modify the EU Withdrawal Act 2018 (enacted after the Bill but before the Supreme Court case).
86 ibid 29.
87 ibid.
89 The Conservative and Unionist Party, Manifesto: Get Brexit Done Unleash Britain’s Potential (2019).
As discussed in chapter 1, section 1.2.1, the Conservative Manifesto of 2015, which promised an EU referendum, also tapped into a public mood of dissatisfaction around supranational human rights courts and in particular the ECtHR, through its promise to establish a British Bill of Rights and break formal links with the Strasbourg court. Upon enquiry into replacing the Human Rights Act with a British Bill of Rights, however, the House of Lords EU Committee found in 2016, that the proposed Bill of Rights would represent relatively minor changes to the UK’s human rights framework in terms of substantive protections but would nevertheless represent significant constitutional change. The EU Committee concluded that the then Government’s primary reasons for the move rested on nationalist grounds: specifically to ‘restore national faith in human rights, and to give human rights greater national identity’.

In terms of tangible legal change, the UK Government told the Committee that a British Bill of Rights would allow for uniquely common law interpretations of the qualified rights. These would reflect subtle differences of emphasis, so-called ‘glosses’, between the UK and its European neighbours on issues such as the right to freedom of expression vis-à-vis the right to privacy. Yet it has been noted by several commentators that although section 2 of the Human Rights Act 1998 requires UK courts to ‘take into account’ the judgments of the ECtHR, this duty is now read to permit a certain divergence between the two legal systems, imposing a duty more akin to a ‘consideration’ (as well as promoting a ‘constructive dialogue’). This is in...
contrast to the view that UK courts are required to ‘mirror’ the ECtHR. In the 2015 case of *Moohan v Lord Advocate*, for example, Lord Wilson stated that:

...where there is no directly relevant decision of the ECtHR with which it would be possible (even if appropriate) to keep pace, we can and must do more. We must determine for ourselves the existence or otherwise of an alleged Convention right...  

In this way, the EU Committee have perceived little of substance beyond the calls towards national identity in the UK Government’s previous efforts to replace the Human Rights Act with a British Bill of Rights. Efforts, which for the time being, are not at issue. What is perhaps of greater interest in the context of the Human Rights Act 1998, is the apparent shift, albeit also prior to Brexit, among some elements (though by no means all) of the national judiciary towards the common law vis-a-vis statute law, on rights issues. While it is possible to conceive of that shift as preparatory steps in the event of a repeal of the Human Rights Act, the mood has also been portrayed as the common law reacting to a sense of being smothered by the dominance of international standards, especially the ECHR. In a frequently cited 2014 speech on the issue, Lady Hale did not attribute a reason for the trend, but left open a variety of possibilities, including the aforementioned when she stated:

Whether this trend is developing as a response to the rising tide of anti-European sentiment among parliamentarians, the press and the public, whether it is putting down a marker for what might happen if the 1998 Act

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95 The mirror principle previously applied meant that UK courts had a duty to keep pace with the judgments of the Strasbourg court. It was at times also construed to mean that UK courts should not recognise the substance of a claim under the ECHR where there is an absence of clear guidance on this matter from the ECtHR. See, *R v Special Adjudicator ex p Ullah* [2004] UKHL 26; [2004] 2 AC 323. For the latter issue, see also the shift as expressed in *Moohan and another v The Lord Advocate* (n 94) [105]. See also, *Commissioner of Police of the Metropolis v DSD and another* (n 94) [76–79].

96 *Moohan and another v The Lord Advocate* (n 94) [105]. See also, *Commissioner of Police of the Metropolis v DSD and another* (n 94) [76–79].


were repealed, whether it is a reflection of distinctive judicial philosophies of the judges who are at the forefront of this development, or whether it is simple irritation that our proud traditions of UK constitutionalism seemed to have been forgotten, I leave it to you and to the academics to decide.99

For a more complete picture of the sovereignty discourse in the UK, it is also necessary to have awareness of conceptions beyond that of state sovereignty. There is, for example, a significant amount of debate concerning what are primarily internal sovereignty arrangements. The following two sections discuss these conceptions of sovereignty but note that their relevance can extend beyond the national sphere with parallels to the state sovereignty debate; and similarly, that the debates extend to legally monist and pluralist constitutional arrangements.

2.3. Parliamentary Sovereignty and Shared Sovereignty

As the underpinning democracy discourse demonstrates, moves to evoke the state sovereignty of the UK also centre on the dominant view of legal sovereignty within the state, which is that of ‘parliamentary sovereignty’.100 It was in 1885 that A.V. Dicey first published his seminal Introduction to the Study of the Law of the Constitution, in which he espoused that two principles pervade the UK constitution: the legislative supremacy of Parliament, and the rule of ordinary law.101 The former principle was defined to mean that Parliament has ‘the right to make or unmake any law whatever; and further, that no person or body is recognised by the law […] as having a right to override or set aside the legislation of Parliament.’102 Inherent in this concept is the premise that the Westminster Parliament cannot bind its successors; from which the doctrine of implied repeal, whereby a later Act of Parliament takes precedence over

99 Lady Hale (n 97).
100 R (Miller) v Secretary of State for Exiting the European Union (n 5) [43].
101 AV Dicey, An Introduction to the Study of the Law of the Constitution (10th edn, Macmillan 1965). Note that Dicey also pointed to constitutional conventions as a third principle, and most commonly referred to the law of ‘England’.
102 ibid 40. Note that though earlier expositions exist dating back to 1885, the 7th edition was published in 1908 and was the point at which Dicey settled the text. See, ‘note by editor’.
a former, derives. Dicey’s principle of parliamentary sovereignty has endured within UK constitutional thought and was affirmed by the UK Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* (2017) (i.e. *Miller No.1*), which addressed the constitutional question of whether the UK Parliament must first approve any UK Government decision to notify the EU of UK withdrawal from the organisation. Speaking generally to sovereignty in the UK, the Court identified some seminal events and statutes underpinning Parliamentary sovereignty when it stated that:

Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the [Bill of Rights 1688/9 and the Act of Settlement 1701 in England and Wales, the Claim of Right 1689 in Scotland, and the Acts of Union 1706 and 1707 in England and Wales and in Scotland respectively]... [and]... was famously summarised by Professor Dicey.

That said, it would be remiss to not also identify an additional and sometimes competing sovereignty discourse centred on the UK courts – under the rubric of their role as protectors of the rule of law – and Dicey’s second constitutional principle (albeit that the competing conception of the rule of law is significantly more substantive than that outlined by Dicey, for discussion see below). This conception of sovereignty manifests most clearly in the ‘common law constitutionalism’ first mentioned in chapter 1, section 1.2.2., that has emerged from certain judicial figures and scholars and which understands that the rule of law as articulated by the national judiciary is the sovereign principle. Although common law constitutionalism has

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104 *R (Miller) v Secretary of State for Exiting the European Union* (n 5) [41–43].

105 The UK Parliament has also recognised this constitutional principle in statute, though it has not defined it. See, Constitutional Reform Act 2005 s 1.

106 Lord Hope of Craighead, ‘Is the Rule of Law Now the Sovereign Principle?’ in Richard Rawlings, Peter Leyland and Alison L Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 97. For examples of common law
tapered away of late (at least as regards sovereignty discussions) and the courts have asserted in both the Miller No 1 and No 2 cases the supremacy of Parliament, the rule of law retains a fundamental role for UK legal authority. Over the years, the strengthening of judicial authority through the rule of law has occurred largely through the development of the principle of legality and by incorporating into that principle the protection of certain common law rights. Common law rights are by their very construction centred on the individual, leaving Murray Hunt to suggest in 2003 that the expanding application of the rule of law in this way is a key challenge to parliamentary sovereignty, and indeed sovereignty’s ‘double-blight’. Yet overly expansive readings of the rule of law through the principle of legality (see section 2.3.1 immediately below for the detail) and other concepts (especially in administrative law) such that the judiciary might be asserted as sovereign, are in the view of this thesis over-expressed. The Supreme Court held in Miller No 1 that Parliament had not expressly permitted Ministers to withdraw from the EU treaties. The principle of legality requires that Parliament must have done so, since fundamental rights would by virtue of that action be lost to the UK public. Even without the recent Brexit-induced emphasis on Parliamentary sovereignty in Miller No 1 and No 2, the normative status quo of parliamentary sovereignty should be recognised, because as we will see, even on the common law constitutionalist view, judicial sovereignty is only ever applicable in the exception. The better view rather, is the idea of a shared sovereignty between the courts and Parliament, sometimes also called within the literature, a ‘dual’ or ‘bipolar sovereignty’. constitutionalists, see, TRS Allan, Constitutional Justice: A Liberal Theory of the Rule of Law (Oxford University Press 2001); TRS Allan, The Sovereignty of Law (Oxford University Press 2013); Sir John Laws, ‘The Rule of Law: The Presumption of Liberty and Justice’ (2017) 22 Judicial Review 365; Sir John Laws, The Common Law Constitution: Hamlyn Lectures 2013 (Cambridge University Press 2014); Sir John Laws, ‘Constitutional Guarantees’ (2008) 29 Statute Law Review 1. 107 R (Miller) v Secretary of State for Exiting the European Union (n 5) [41–43]; R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland [2019] UKSC 41; [2020] AC 373 [42]. 108 Murray Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in Nicholas Bamforth and Peter Leyland (eds), Public Law in a Multi-Layered Constitution (Hart Publishing 2003) 339. 109 R (Miller) v Secretary of State for Exiting the European Union (n 5) [87]. 110 Young (n 1) 86–87. For an early discussion of the issue in this contemporary form, see, Sedley (n 1).
As alluded to above in the Dicey rule of law discussion, there are both thin and thick versions of the rule of law concept. The greatest area of disagreement between these versions is whether the concept should encompass only procedural rules, refusing therefore to speak to the more substantive concept of the ‘goodness’ of the law itself, or whether it should also inhere substantive moral content. The content of this initial ‘thinner’ conception of the rule of law today is generally not controversial and is considered to include the requirements that the law should be prospective, adequately publicised, clear and relatively stable. Dicey’s rule of ordinary law concept has been described as ‘ambiguous’ but generally indicative of a thin definition and limited to formal equality. More popular within contemporary thought however, is a ‘thicker’ definition of the rule of law, which additionally includes some indication of the moral content of the law itself. Sir Tom Bingham’s important contribution on the subject, for example, adds to the thinner conception eight ‘ingredients’ or features of the law: accessibility of the law (intelligible, clear and predictable); law not discretion; equality before the law; the lawful, fair and reasonable exercise of power; the protection of human rights; dispute resolution without undue cost or delay; a fair trial; and state compliance with international obligations. Bingham’s incorporation of the protection of human rights into his rule of law definition includes not only the procedural rights in the agreed ‘thinner’ core definition but also the substantive rights set out in the ECHR. According to Bingham, ‘[t]here are probably rights which could valuably be added to the Convention, but

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111 This distinction in perspectives might be partly explained by competing objectives, such as whether the rule of law is used to explain the management of public power, or whether it is used as a general theory of law. See, Jeffrey Jowell, ‘The Rule of Law’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), The Changing Constitution (8th edn, Oxford University Press 2015) 19. See also, Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] Public Law 467, 487: ‘what ultimately divides the formalist and substantive conceptions of the rule of laws disagreement about the way in which we identify legal norms.’
113 See e.g., Constitution Committee, Relations between the Executive, the Judiciary and Parliament, p (2006-07, HL 151) p.97 (Appendix 5. Paper by Professor Paul Craig: The Rule of Law).
none which could safely be discarded’.\footnote{Bingham (n 114) 84.} Notably, Bingham recognised these rights to derive from a mixture of common and statute law, with the ECHR filling in the gaps.\footnote{Ibid 68.} For the rule of law to function in a way that can justify even a shared sovereignty paradigm, it must manifest in its thicker definition such as has been developed by the judiciary through the principle of legality as discussed below. The EU has in this regard assisted in the development of the thicker rule of law conception through the Charter of Fundamental Rights (CFR) which has had treaty status since 2009 and encouraged human rights based judicial review of EU law on CFR grounds.\footnote{See e.g. Case C-293/12 Digital Rights Ireland v Minister for Communications EU:C:2014:238. This case successfully challenged the Data Retention Directive on the grounds it violated arts 7 and 8 CFR.} Albeit not holding treaty status, the more recent Regulation (EU) 2016/679 known as the General Data Protection Regulation (‘GDPR’)\footnote{Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Da.} has had a significant cultural impact across the EU, including in the UK and might be included in this suggestion.

\subsection{2.3.1. The Principle of Legality and Common Law Rights}

The principle of legality is a rule of statutory interpretation applying the principle that Parliament cannot itself override the rule of law, or indeed a common law fundamental right, by general or ambiguous words.\footnote{R (on the application of Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22; [2019] 2 WLR 1219 [111]; R (Miller) v Secretary of State for Exiting the European Union (n 5) [87]; AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland) [2011] UKSC 46; [2012] 1 AC 868 [151–152]; R v Secretary of State for the Home Department, ex parte Simms [1999] UKHL 33; [2000] 2 AC 115 [131]; Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 1 All ER 208 [170].} In \textit{R v Secretary of State for the Home Department, Ex p Simms}, the Court put it as follows: ‘the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost’, and so ‘[f]undamental rights cannot be overridden by general ... words’ in a statute, ‘because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process’.\footnote{R v Secretary of State for the Home Department, ex parte Simms (n 119) [131]; R (Miller) v Secretary of State for Exiting the European Union (n 5) [87].}
emphasis on fundamental rights under the principle of legality is indeed suggestive of a trend away from a procedurally orientated definition of the rule of law towards a more substantive one.

In addition to the Human Rights Act 1998, a clear body (although falling short of a ‘catalogue’) of common law rights, such as the rights to liberty, private property and the freedoms of expression and assembly, have existed for some time in UK domestic law. Civil rights such as these are considered to have emerged as a gradual evolution from 17th and 18th century developments that curtailed monarchical power, perceiving value in individual choice (and as briefly discussed in the context of democracy, self-government). More recently, the rights to life and access to justice have also been identified within the common law. In addition, the body of rules and principles that developed in the latter third of the twentieth century concerning the regulation of the relationship between individuals and the state within administrative law has been described as an almost ‘surrogate human rights law’. The principle of legality has for example, been developed within the realm of administrative law where it has coincided with a debate about the role that proportionality now plays in domestic law. Rather famously, over two decades ago the House of Lords Judicial Committee called for ‘the most anxious scrutiny’ in the case of Bugdaycay (AP) v Secretary of State for the Home Department in regard to an administrative challenge that was argued to put the applicant’s right to life at risk. This is interpreted as an attempt to broaden the common law test for substantive review by importantly to some limited degree the doctrine of proportionality from the ECtHR.

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121 Dickson (n 94) 17–20, 33–34; Blackstone’s, Commentaries on the Laws of England (1765–1769).
123 Dickson (n 94) 33.
125 Bugdaycay (A.P.) v Secretary of State for the Home Department (n 122).
‘Fundamental’, ‘basic’ and ‘constitutional’ appear to be interchangeable terms to refer to the significant status of common law rights protected by the principle of legality (though these terms are sometimes also applied to rights embodied in statute). The term ‘constitutional rights’ is the least embraced in what may actually be perceived as an effort to avoid any suggestion of the entrenchment of rights and thus a conflict with the Diceyan decree that Parliament cannot bind its successors (see the brief sovereignty vis-à-vis constitutionalism discussion in chapter 1, section 1.2.2). R v Lord Chancellor, ex parte Witham (1997), a case which held that access to the courts is a ‘constitutional right’, is often recognised as one of the first cases to make explicit the significance of the concept through the application of the legality principle. In Witham, this significance was expressed in the terms that such rights ‘cannot be abrogated by the State save by specific provision in an Act of Parliament… [g]eneral words will not suffice’. The then Laws J opined that it would be difficult to conceive of how such specificity could be achieved in the absence of express language to this effect. Maintaining a Parliamentary override in this fashion was for Laws J a nod to the continuing recognition of the legislative supremacy of Parliament. In R v Secretary of State for the Home Department, ex parte Pierson, determined the same year as Witham, Lord Browne-Wilkinson preferred the term ‘basic rights’ and agreed with Laws J principle rationale that such rights ‘are not to be

127 E.g. Moohan and another v The Lord Advocate (n 94) [32-34 (Lord Hodge)]. Lord Hodge applies ‘basic’ and ‘constitutional’ to the statutory based right to vote. Lord Hodge further states: ‘It is not appropriate for the courts to develop the common law in order to supplement or override the statutory rules which determine our democratic franchise’.

128 See, R v Lord Chancellor ex parte Witham (n 122) [12]. Dickson has disputed the existence of constitutional rights in the UK. In a 2013 analysis of Supreme Court case-law he concludes that the term has not, on a whole, been embraced by the Court either pre or post-Thoburn (see below). Dickson (n 94) 26. In light of a potential HRA repeal, Dickson does however assert that the time may be opportune for the Supreme Court to ‘revive the concept of constitutional rights’. See, Brice Dickson, ‘Repeal of the HRA and Rely on the Common Law?’ in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), The UK and European Human Rights: A Strained Relationship? (Hart Publishing 2015). Interestingly in 1Ax, Lord Reed noted but did not comment on counsel’s description that subjecting the Scottish Parliament to review on the basis of the rule of law and fundamental rights was ‘constitutional review, in distinction from administrative review’. This did not however prevent Lord Reed from supporting the proposition. AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland) (n 119) [149].

129 R v Lord Chancellor ex parte Witham (n 122) [24].

130 See however for an earlier case which expressed the rights of prisoners remained apart from those expressly taken away by statute, Raymond v Honey [1983] 1 AC 1; [1982] 2 WLR 465 [10].

131 R v Lord Chancellor ex parte Witham (n 122) [13].


133 Ibid 13.
overridden by the general words of a statute since the presumption is against the impairment of such basic right.’ 134 Two years later in *R v Secretary of State for the Home Department, ex parte Simms*, Lord Hoffmann drew parallels between this approach to what he called ‘fundamental rights’ in the UK and the principles of constitutionality applied in countries that possess a written constitution: noting there to be ‘little differen[ce]’. 135 Lord Hoffman further drew attention to the principle’s importance as a check on unintentional interference with fundamental rights by Parliament:

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost... there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. 136

The significance of this facet of the principle of legality for the UK constitutional order is the recognition by the courts that the rule of law and fundamental rights represent some form of higher constitutional value. However, it is generally not considered that the *Witham* reasoning alone can justify the position that the rule of law has replaced parliamentary sovereignty as our primary constitutional principle. The principle of legality has nevertheless modified Dicey’s classic theory in the sense that it gives effect to a hierarchy of norms; but does so only by a rule of interpretation, which Parliament can explicitly overrule. 137 Indeed, it might be highlighted at this juncture that the suggestion that a constitutional hierarchy of norms is compatible with EVP is a core argument within the thesis. This is discussed in both philosophical

135 *R v Secretary of State for the Home Department, ex parte Simms* (n 119) [131].
136 ibid.
137 See e.g. *A v HM Treasury; HM Treasury v Al-Ghabra; R (Youssef) v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534. The Supreme Court held that the Treasury had made a clear attempt to adversely affect the basic rights of the citizen without the clear authority of Parliament in the *Terrorism (United Nations Measures) Order 2006* and the *Al-Qaida and Taliban (United Nations Measures) Order 2006 art.3(1)[b]*. A decision the effects of which Parliament subsequently overturned in the *Terrorist Asset-Freezing (Temporary Provisions) Act 2010* (repealed); *Terrorist Asset-Freezing Act 2010*. See further on the general point, Elliott, ‘Embracing “Constitutional” Legislation: Towards Fundamental Law?’ (n 73) 31.
and liberal democratic terms in chapter 4, section 4.2 and chapter 5, section 5.2 respectively.

More significantly, certain cases from the UK’s top court have suggested that even in the event of *unambiguous* language there could be Acts of Parliament so egregious that the courts may play a role in limiting parliamentary sovereignty.\(^{138}\) This has been perceived as a further aspect of the principle of legality\(^ {139}\) and one that has driven the common law constitutionalism narrative of a judicial supremacy. Scenarios contemplated include the abolition of judicial review for flagrant abuse of executive power or the role of the courts in standing between the executive and the citizen;\(^ {140}\) as well as a curtailment of the franchise.\(^ {141}\) Writing extra-judicially, a proponent of the idea, Lord Hope, stated,

> [t]he absence of a general power to strike down legislation which it has enacted does not mean that the courts could never fashion a remedy for use in an exceptional case where the survival of the rule of law itself was threatened because their role as the ultimate guardians of it was being removed from them.\(^ {142}\)

For Lord Hodge, speaking in the case of *Moohan v The Lord Advocate* (2014), the court would be informed when taking such an exceptional decision, in addition to the rule of law, by principles of democracy and international norms.\(^ {143}\) It was enough for both Lord Hope and Lord Hodge to consider the possibility of such offending actions to be conceivable, however (un)likely.\(^ {144}\) In this regard, the Conservative’s 2019

\(^ {138}\) *R (Jackson and others) v AG* [2005] UKHL 56; [2006] 1 AC 262 [100-102 (Lord Steyn), 107 (Lord Hope), 159 (Baroness Hale)]; *AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland)* (n 119) [51 (Lord Hope)].  
\(^ {139}\) Dickson (n 128).  
\(^ {140}\) Ibid 107 (Lord Hope). See also, *Anisminic Ltd v Foreign Compensation Commission* (n 119).  
\(^ {141}\) *Moohan and another v The Lord Advocate* (n 94) [35 (Lord Hodge)].  
\(^ {142}\) Craighead (n 106) 97.  
\(^ {143}\) *Moohan and another v The Lord Advocate* (n 94) [35].  
\(^ {144}\) *AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland)* (n 119) [51].
Manifesto promise to establish a Constitution, Democracy and Rights Commission to look at among other issues, judicial review, will be of future interest.145

Comments pertaining to the application of legality in this way are typically obiter and evocative of somewhat far-fetched scenarios where executive dominance of the legislature is so great that the times might equally include a resistance movement and civil war.146 That being the case, the existence of ‘ouster clauses’ in legislation, which are designed to oust the judicial review jurisdiction of the court in certain scenarios, are demonstrative of how the rule of law can be more subtly jettisoned. The courts have taken varying approaches to ouster clauses over the years.147 On one view, ensuring that the courts maintain the ability to judicially review the executive use of powers or an ouster of a judicial body, is a vindication of Parliament’s intention to comply with the rule of law; while on another view, an ouster clause amounts to a question of policy where the legislature has determined that the advantages of finality of decisions outweighs that of judicial review.148 In the most recent ‘ouster’ case judgment of May 2019 (i.e. ‘Privacy International’), the Supreme Court offered a comprehensive overview of the law since the well-known Anisminic case and affirmed ‘the critical importance of the common law presumption against ouster’.149 The Supreme Court found that section 67(8) of the Regulation of Investigatory

145 The Conservative and Unionist Party (n 89) 48.
146 In the context of NI’s consociational system, Gordon Anthony considered it would be a ‘highly improbable circumstance’ for all NI executive parties to jettison the rule of law. See, Gordon Anthony, ‘Axa - A View from Northern Ireland’ U.K. Const. L. Blog 28 Nov 2011. (Note the change to the NI Executive framework after the 2016 election such that NI can now have an opposition. The NI Executive when in situ presently includes only two parties and one independent. This was made possible by the Assembly and Executive Reform (Assembly Opposition) Act (Northern Ireland) 2016.)
147 For two different outcomes, see Anisminic Ltd v Foreign Compensation Commission (n 119); R (on the application of Privacy International) v Investigatory Powers Tribunal [2017] EWHC 114; [2017] 3 All ER 1127. For discussion, see, Mark Elliott, ‘Distinguishing Anisminic? Ouster Clauses, Parliamentary Sovereignty and the Privacy International Case’ Public Law for Everyone 10 February 2017. Note however, that the Supreme Court subsequently overturned the decision of the lower court in Privacy International to align more with Anisminic. Privacy International also laid out an extensive overview of the relevant case law since Anisminic. See, R (on the application of Privacy International) v Investigatory Powers Tribunal and others (n 119) [41–101].
148 This division was apparent in Anisminic where the House of Lords issued a 3/2 opinion in favour of the first view, see Anisminic Ltd v Foreign Compensation Commission (n 119) [208 Lord Wilberforce (majority); (181 Lord Morris [minority]]). See also, Mark Elliott, The Constitutional Foundations of Judicial Review (Hart Publishing 2001) 99.
149 R (on the application of Privacy International) v Investigatory Powers Tribunal and others (n 119) [107].
Powers Act 2000 (RIPA) did not, despite its apparent wording,\textsuperscript{150} oust the jurisdiction of the High Court. Although it was not necessary to decide on the issue, Lord Carnwath, who gave the leading judgment, also commented on the matter of whether a statute can ever wholly oust the High Court’s supervisory jurisdiction. His Lordship expressed the view that it could not. The interpretation of the rule of law was expressed as ultimately a matter for the Courts – a circumstance deemed acceptable to Parliament because of that body’s recognition of the unlimited jurisdiction of the High Court and the existence of the rule of law in statute, along with Parliament’s apparent decision not to define the concept.\textsuperscript{151} The judiciary should therefore consider such issues along a proportionality line, ‘having regard to [the ouster clause’s] purpose and statutory context, and the nature and importance of the legal issue in question’.\textsuperscript{152} Lord Carnwath thereby suggested that the relationship between the legislature and the courts is marked by ‘flexibility’, a circumstance he deemed to be wholly in line with Miller No 1, a case which as noted is typically perceived as a return to a more conservative constitutionalism.\textsuperscript{153}

Somewhere in between the thick and thin conceptions of the rule of law, Jeffrey Jowell has put forward a ‘middle way’ conception, based on the rule of law concept including the four distinct aspects of legality, certainty, equality, and access to justice but taking a more cautious approach to the inclusion of substantive rules.\textsuperscript{154} Nevertheless, Jowell asserts that the need for legal certainty is grounded in the need for substantive fairness, while access to justice requires that a trial must also be fair: entailing that due regard be given to the merits of the parties submissions wherein

\textsuperscript{150} ‘Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.’ See, Regulation of Investigatory Powers Act 2000 s 67(8).
\textsuperscript{151} R (on the application of Privacy International) v Investigatory Powers Tribunal and others (n 119) [120–121, 131]. See again, Constitutional Reform Act (n 105) s 1.
\textsuperscript{152} R (on the application of Privacy International) v Investigatory Powers Tribunal and others (n 119) [144 (see also 130–131)].
\textsuperscript{153} ibid 131. For a dissenting opinion, see Lord Sumption from 169. See also again, R (Miller) v Secretary of State for Exiting the European Union (n 5) [42].
\textsuperscript{154} Jowell (n 111) 20–24. This is Craig’s reading of Jowell, see Craig (n 111) 485–486. See also for a thin conception plus, Discussed further below in Section 5.2 of the thesis.
he includes rights protection. Interestingly, he does not take a position on whether ‘equality’ requires substantive equality of law, concluding instead that it is not necessary to determine the issue since it is a requirement of ‘democratic constitutionalism’, i.e. responsive democracies governed by law, such as operates in the UK. For Jowell, the substantive content of the concept has also been recognised by the courts within the context of judicial review, even if not expressed in rule of law terms. Since 2015 – Jowell’s time of writing – the caselaw on substantive equality has become more nuanced and no longer reflects the most expansive rule of law argument. Most recently in 2018, the Supreme Court made clear that ‘the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law’, only that it is a ‘desirable objective’ emanating out of a commitment to democracy.

Ultimately, the confusion surrounding the parameters of the rule of law concept creates conceptual difficulties. And as the next paragraph sets out, broad definitions can foster a vast array of challenging interpretations. While recognising that the rule of law concept has been the historical grounding for judicial authority and therefore competing sovereignty challenges, it is suggested that the shared authority of the judiciary might be more clearly understood if asserted on rule of law and human rights premises, but with both concepts remaining distinct. Human rights, whether protected by the UK common law or statute law, invoke the concept of universalism,

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155 Jowell (n 111) 21, 23. For a developed discourse on the well-worn related theoretical issue, see post-colonial scholars on equality and global justice generally, or the exercise conception of liberty. For respective examples, see Leela Gandhi, Postcolonial Theory: A Critical Introduction (Columbia University Press 1998); Charles Taylor, ‘What’s Wrong with “Negative Liberty”?’ [1985] Philosophy and the Human Sciences: Philosophical Papers, 2 211.

156 Jowell (n 111) 22.

157 ibid 32–33. Jowell cites the development of doctrine of ‘legitimate expectation’ as one such example, which has evolved from a procedural right to a fair hearing to an expectation of the benefit itself, relying on R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213; [2000] 3 All ER 850. See also Jowell’s discussion on R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36; [2004] 1 AC 604.

158 See, The United Policyholders Group and others v The AG of Trinidad and Tobago (Trinidad and Tobago) [2016] UKPC 17; [2016] 1 WLR 3383 [121 (Lord Carnwath)]. Although note that here, Lord Carnwath, citing Elliott, does still link legitimate expectation to the rule of law, suggesting that its constitutional foundations are derived from the principle of legal certainty.

159 R (on the application of Gallagher Group Ltd and others) v The Competition and Markets Authority [2018] UKSC 25; [2018] 4 All ER 183.
and while the thesis rejects the current commitment within the concept of universalism to abstract essentialist criteria, it embraces universalism when approached from an embedded understanding (see chapters 3 and 4 for the detail). In addition to claiming universal underpinnings, human rights are now fundamental to the discourse of global justice, such that they have overtaken other moral concepts as the dominant ethical discourse in law at the global as well as the national level.\footnote{Conor Gearty, \\textit{Can Human Rights Survive? (The Hamlyn Lectures 2005)} (Cambridge University Press 2006) 20; Linda Hogan, \\textit{Keeping Faith with Human Rights} (Georgetown University Press 2015) 12. Upendra Baxi calls humans rights ‘a new civic religion’. Upendra Baxi, \\textit{The Future of Human Rights} (3rd edn, Oxford University Press 2008) 90. Klug refers to human rights as ‘values for a Godless age’. Francesca Klug, \\textit{Values for a Godless Age. The Story of the United Kingdom’s New Bill of Rights} (Penguin Books 2000). See also, Douglas-Scott, \\textit{Law after Modernity} (n 10) 394; Stephen Hopgood, \\textit{The Endtimes of Human Rights} (Cornell University Press 2015).}

With these two facets in mind, the judiciary might legitimately use the universalism and global relevance of human rights as a source for a certain amount of judicial authority. Of course, as Jowell points out, a corollary of the rule of law principle is that it ‘enhance[s] accountability and promote[s] respect for the dignity of the individual’.\footnote{Jowell (n 111) 33. (nb. Jowell is citing Rawls)} In this way, there are clear shared objectives between both the rule of law and human rights discourse.

That being the case, following on from the state sovereignty discussions outlined above, a series of academics have focused on the anti-democratic charge in the context of which institution should have authority on human rights.\footnote{See generally, Colm O’Cinneide, ‘Rights under Pressure’ (2017) 1 European Human Rights Law Review 43. See also, David Feldman, ‘Democracy, Law, and Human Rights: Politics as Challenge and Opportunity’ in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), \textit{Parliaments and Human Rights: Redressing the Democratic Deficit} (Hart Publishing 2015) 95–96, 113. Feldman identifies the media as promoting this portrayal, especially in relation to issues of combating terrorism and controlling immigration.} One of the clearer manifestations of the argument is that suggested by The Judicial Power Project, an initiative of Policy Exchange and one which has been supported by the well-known scholar John Finnis.\footnote{John Finnis, “‘Judicial Power: Past, Present and Future’ Speech, 20 October’, \textit{Gray’s Inn Hall} (2015).} The Judicial Power Project has welcomed the fact that the EU CFR and the CJEU would likely play a less prominent role in a post-Brexit UK, perhaps not least due to the CFR’s role in further ‘thickening’ the rule of law as mentioned above. In doing so the Project questioned the assumption that supra-
national limits were required for effective rights protection. Such a viewpoint, it warned, ‘downplays the serious damage to the rule of law and democracy that is incurred by allowing such limits to be policed and constantly expanded by an aggressive and largely unaccountable international court such as the CJEU’. 164

The Judicial Power Project statement is a good example of how the offence to democracy is generally alleged to be occurring on two fronts: one concerns the national sphere (overlapping with the state sovereignty discussion above) and one is a separate argument about over-judicialisation which (reading beyond The Judicial Power Project statement), exists within the national sphere as well as outside it. As we have seen, the first concern suggests that the international human rights bodies lack a sufficient national demos. Members of the relevant judicial and treaty bodies are primarily the political appointees of states with no direct responsibility to any national electorate. 165 Since this thesis will evolve to ground sovereignty in EVP, it does not consider the lack of an EU demos to be a determinative criticism of the supranational institution (see chapter 6). The second argument, which underpins the allegation of an aggressive and expansive CJEU, evokes the concern that an increasing expansion of human rights into the legal realm places rights more generally into the hands of the courts over and above the elected representatives. This second anti-democratic charge is better framed by what Conor Gearty has referred to as the ‘crisis of legalism’. 166

As a result of the ethical dominance of the human rights framework, it is often given constitutional recognition and protection. Gearty’s crisis of legalism arises in this context. The conversation of human rights, although not perhaps the law itself, is the primary limitation to the Westphalian state conception which underpins international law – human rights law is state-centred while the idea of human rights

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166 Gearty (n 160) 3. See also, O’Cinneide (n 162) 45.
focuses more freely on the human being irrespective of territorial boundaries.\textsuperscript{167} For Gearty, rights should never have been perceived as originating outside the political realm. While, importantly, his work exempts the UK from the crisis of legalism on the basis that the specific mechanics of the Human Rights Act 1998 require respect for the views of Parliament,\textsuperscript{168} it is enlightening to consider the arguments he outlines as they represent the views of others who do perceive the UK as over-legalising rights.\textsuperscript{169} As suggested in the overview to this section, at its core, the issue falls within the wider discussion as to whether the legislature or the judiciary should have the final say on fundamental matters. Until recently, arguments for each have been put forward within UK public law under the umbrella debate of legal versus political constitutionalism; a debate that was discussed in chapter 1, section 1.4.1\textsuperscript{170} Yet, in developing his argument Gearty goes beyond the law and into the realm of philosophy. As will be seen from the discussion in chapter 3, international human rights law applies a universal perspective on human rights and conceives of them as pre-political or put otherwise, to the extent that they inhere from the individual’s status as a human being, they are ‘natural’ and not man-made.\textsuperscript{171} Gearty disputes this classical position suggesting instead, that rights have their origins in radical discourse and politics – uncertain concepts formulated through hard fought wins. Since they can be perceived in law as unquestionable decrees, the political community is deprived of the opportunity to critically comment or engage with them, which is


\textsuperscript{168} Gearty (n 160) 93.

\textsuperscript{169} This might be observed for example in those scholars who are opposed to the concept of common law constitutionalism. See, e.g. James Allan, ‘Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament’s Clear Intention and You Shake It All About - Doin’ the Sankey Hanky Panky’, The Legal Protection of Human Rights: Sceptical Essays (Oxford University Press 2011).


\textsuperscript{171} This is captured most notably in the reference to the ‘self-evident’ nature of rights in the early rights documents which influenced international human rights law. See e.g., the American Declaration of Independence 1776. See also, Lynn Hunt, Inventing Human Rights: A History (WW Norton & Company 2007) 20.
ultimately debilitating.\(^\text{172}\) (Chapter 3, section 3.3.3 of the thesis engages in a deeper discussion about the different legal conceptions of individual rights, some of which it is noted, do facilitate a basic level of contestation.)

What is striking about the allegations made by The Judicial Power Project is that they are based on both an anti-democratic charge \textit{and} an anti-rule of law charge. This latter assertion that the current framework fails to respect the rule of law appears to be based on the argument that there is a lack of accountability because of an over-exercise of judicial power which ultimately threatens the separation of powers. Essentially, what this serves to show is that many of the same arguments as emerge under the guise of the ‘anti-democratic’ or ‘crisis of legalism’ banners can also be framed under the rule of law as a separation of powers or legality argument. The primary issue is the classic ‘who does what’ in a liberal-democratic system of government. As expected, a key argument in favour of retaining the final say on rights within the political realm concerns the enfranchisement of the popular voice or put otherwise, the institution’s democratic legitimacy.\(^\text{173}\) Since few would argue that there is legitimate disagreement over the meaning of rights, it is more appropriate they argue that determinations on rights are made by the elected body than an elite unelected judiciary – the latter problem has been famously called the ‘counter-majoritarian difficulty’.\(^\text{174}\) Advocates of the juridification of rights retort that the courts better protect individual and minority rights holders against dominant legislative majorities - the so called ‘tyranny of the majority’ argument (see for further

\(^{172}\) Gearty (n 160) 70, 80, 84.
\(^{174}\) Alexander Bickle, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} (Yale University Press 1986) 16–17. See also, The Judicial Power Project (n 164) 1, 7. O’Cinneide points to the Daily Mail headline on 4 November 2016, which described the judges as ‘Enemies of the People’ (in the context of the ‘Miller’ case). O’Cinneide (n 162) 9.
discussion, chapter 3, section 3.3 on liberal universalism in the UK). As mentioned above and developed in chapter 3, this thesis is sympathetic to the views that human rights theory should embrace EVP to a greater degree and so rights should be read, in the first instance, from an embedded rather than an abstract universalism. For now, the central point to be taken from The Judicial Power Project’s creative anti-rule of law charge is the fact that the rule of law in both its thick and thin conceptions has the potential to be composed from a multitude of underpinning values; and can therefore be viewed as a more complex premise than representative democracy.

2.4. Popular Sovereignty, Divided Sovereignty (and perhaps a little Judicial Sovereignty)

2.4.1. Devolution

The advent of devolution in the UK, now incorporating a UK statutory recognition of the permanency of both the Scottish and Welsh legislatures, has given rise to further manifestations of other layers of sovereignty. Indeed, the UK Supreme Court recently described the Scottish Parliament as a ‘legislature of unlimited legislative competence subject to the limitations in sections 28 and 29 of the Scotland Act’.

This is most notably a resurrection of the notion of popular sovereignty, a concept that identifies sovereignty as legitimised solely by the people of the territory in question. In particular, there is a uniquely Scottish view of popular sovereignty considered to be a tradition of constitutional significance dating back to the Declaration of Arbroath in 1320, which refers to the ‘people’ of Scotland frequently, along with their willingness to drive out the King, Lord Bruce, if needed to protect

176 See the Scotland Act 1998 c. 46 and the Government of Wales Act 2006 c. 32 (as amended respectively by the Scotland Act 2016 c. 11 s 1; Wales Act 2017 c. 4 s 1.)
177 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (n 85) [25].
178 William A Galston, Anti-Pluralism: The Populist Threat to Liberal Democracy (Yale University Press 2018) 19–20. Note that Galson also refers to this idea as ‘the republican principle’.
Scotland from the English. On this view, it has been argued that parliamentary sovereignty did not apply in Scotland prior to the 1706-7 Acts of Union; and further, that even after the Acts of Union, Scottish constitutional traditions should be assumed included, along with English traditions, into the UK Parliament.

In addition to the position in Scotland, it has been further argued that the increased use of referenda in the context of devolution has led to an enhanced expectation of self-government via participatory democracy (whereby the people decide directly), as opposed to the representative democracy (where decisions are taken through the elected legislature) for decisions concerning major constitutional change. On Peter Leyland’s view, the ‘role of the Westminster Parliament and the wider democratic process at devolved and local government level is in danger of being redefined’ as referendums substitute traditional politics ‘under the banner of “popular sovereignty”’. This is a not a matter of concern for Leyland as a point of principle, but rather because there is an inconsistent approach to the referendums, made possible he argues, by the absence of UK constitutional rules such as a ‘Constitutional Referendum Act’ to provide consistent and clear regulation. Leyland is of the view that the current legislation governing referendum is not thought sufficient to provide this consistency.

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180 See for a discussion and dismissal that the argument affects the applicability of parliamentary sovereignty to Scotland today, Bingham (n 114) 166.

181 See obiter comments of Lord President in MacCormick v Lord Advocate 1953 SC 396; 1953 SLT 255 (Court of Session).


183 Such as e.g., leaving the EU or important changes for the devolved level. For a general discussion on constitutional referendums and sovereignty, see Stephen Tierney, Constitutional Referendums: The Theory and Practice of Republican Deliberation (Oxford University Press 2012) ch 5.

184 Peter Leyland, ‘Referendums, Popular Sovereignty, and the Territorial Constitution’ in Richard Rawlings, Peter Leyland and Alison L Young (eds), Sovereignty and the Law: Domestic, European and International Perspectives (Oxford University Press 2013) 145.

185 Ibid 148, 156–164.

186 Ibid 145. See the Political Parties, Elections and Referendums Act 2000 c. 41.
Much like with judicial claims to sovereignty, the *Miller No. 1 and 2* assertions that parliamentary sovereignty is a ‘fundamental principle’ of the UK constitution has served to suppress somewhat the rise of popular sovereignty as an influential idea in the UK; even though popular sovereignty and parliamentary sovereignty are not necessarily concepts at odds with one another. The *Miller No. 1* case directly considered referendums, viewing them through this same parliamentary sovereignty lens. According to the Supreme Court, ‘unless and until acted on by Parliament’, the force of referendums remains political rather than legal.\(^{187}\)

Yet, while the event of Brexit might, conceivably, be seen to have reduced the open dissatisfaction expressed against too much incorporation of international legal orders into UK constitutional law, it has not, as mentioned, had a similar effect at the devolved level. Indeed, prior to *Miller No. 1*, many saw the opportunity for the UK to move away from a ‘defunct’ sovereignty paradigm altogether in light of devolution,\(^{188}\) embracing instead a quasi-federalised union concept.\(^{189}\) That said, the nationalist movements in Scotland and NI make this idea difficult to conceive in reality as ultimately a federal arrangement is a more formal and perhaps even more entrenched, establishment of the Union.

Similarly, calls for a written constitution represent one possible way to stabilise sovereignty concepts in the UK.\(^{190}\) (See chapter 6 for further discussion of this

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\(^{187}\) *R (Miller) v Secretary of State for Exiting the European Union* (n 5) [124].

\(^{188}\) Evidence of Professor Colin Harvey, see Constitution Committee (n 29) 255. See also, John Morison, “A Sort of Farewell”: Sovereignty, Transition, and Devolution in the United Kingdom’ in Richard Rawlings, Peter Leyland and Alison L Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013). For discussion on the influence of Brexit in this retreat, see Gordon Anthony, ‘Brexit and the Common Law Constitution’ (2018) 24 European Public Law 673.

\(^{189}\) Note the HL Constitution Committee recently dismissed the notion of a full-form federal UK because it could not accommodate England as a discrete entity. See, Constitution Committee (n 29) 275. Carwyn Jones, ‘Our Future Union - a Perspective from Wales (Speech)’, *Institute for Government* (15 October 2014). See generally for support and analysis, Richard Rawlings, ‘Riders on the Storm: Wales, the Union, and Territorial Constitutional Crisis’ (2015) 42 Journal of Law and Society 471. Finally, see also the Act of Union Bill [HL] 2017-19 introduced into the UK House of Lords. The bill did not make it through the parliamentary procedure.

possibility in light of the commitment to EVP.) As mentioned above, the devolution statutes together with the Human Rights Act currently serve as ‘constitutional statutes’ in the UK,\(^{191}\) such that it is often considered that the UK already has a partially written constitution. Indeed, the President of the UK Supreme Court recently asserted that the advent of the devolution of legislative power has already turned the UK’s supreme judicial body into a ‘genuinely constitutional court’.

What a constitutional court means for sovereignty discourses \textit{per se} remains open, being dependent upon the binding nature of those decisions. In the context of the UK however, judgments on whether or not a devolved action is \textit{ultra vires} the devolution legislation are binding absent any intervention from the Westminster Parliament.\(^{193}\)

In light, however, of the entrenched nature of devolution in the UK today, it might be considered that it represents the more powerful case for the assertion of a judicial sovereignty than that outlined above in the context of the principle of legality. Indeed, many who argue for a fully written constitution undoubtedly envisage a stronger role for the courts.\(^{194}\) One downside however of a written constitution is that identified by Laws LJ, that it could ‘turn a question of substantive principle into a question of construction or interpretation’.

The development of the devolution statutes as ‘constitutional statutes’ is an important part of the arguments which suggest the UK is trending towards federalism

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See also Bingham who perceived a constitutional imbalance due to the diminished role of the Lords and the Crown. Bingham (n 114) 169–170.
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\textit{Thoburn v Sunderland CC} (n 25) [60–62] (Laws LJ); \textit{R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another} [2014] UKSC 3; [2014] 1 WLR 324 [207–208] (Lords Mance and Neuberger); \textit{R (Miller) v Secretary of State for Exiting the European Union} (n 5) [67].
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\textit{For an important discussion and distinction of the basis for assessing the vires of Scottish legislation, see UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland} (n 85) [25]. Note that References from the Advocate General, the Lord Advocate or the Attorney General has a narrower remit under the Scotland Act 1998 section 33 vis-à-vis judicial review on public law grounds.
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\textit{Bingham Centre for the Rule of Law} (n 190); Anthony, ‘Devolution Issues, Legislative Power, and Legal Sovereignty’ (n 190) 114. See also, Leyland (n 184) 164. See also Bingham who perceived a constitutional imbalance due to the diminished role of the Lords and the Crown. Bingham (n 114) 169–170.
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\textit{Laws, ‘Constitutional Guarantees’} (n 106) 3. A common argument also proffered, incidentally, against a written Bill of Rights by those in favour of legislative supremacy. See, Waldron, ‘The Core of the Case against Judicial Review’ (n 173) 222–223.
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and/or a more entrenched view of a written constitution.\textsuperscript{196} The concept of constitutional statutes was initially identified in \textit{Thoburn v Sunderland CC} (2003) to be a natural corollary to the situation of common law rights under the principle of legality,\textsuperscript{197} and was deemed to include the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the Scotland Act 1998, the Government of Wales Act 1998 and specifically in that case, the Human Rights Act. In \textit{R (Jackson) v Attorney General} (2005) furthermore, Lord Steyn suggested that Dicey’s conception of parliamentary sovereignty as pure and absolute was ‘out of place in the modern UK’, partly because the Scotland Act 1998 pointed to a ‘divided sovereignty’.\textsuperscript{198} As was noted above however, in regard to the concept of ‘constitutional rights’, the concept of constitutional statutes has similarly not been fully embraced by the Supreme Court post-\textit{Thoburn}.\textsuperscript{199} Instead, a fluctuating approach to the status of the devolution statutes has been observed,\textsuperscript{200} culminating more recently in a return to the more traditional parliamentary sovereignty paradigms observed in both the \textit{Miller No. 1} and the \textit{EU (Legal Continuity) Bill} cases above.

In this regard, the UK courts can judicially review primary legislation passed by the devolved legislatures for \textit{vires} under the devolution acts; something, that is famously limited for Westminster Acts by the doctrine of Parliamentary sovereignty. In what has been described as ‘high water mark’ of a generally cautious jurisprudence,\textsuperscript{201} two

\begin{itemize}
\item \textsuperscript{196} Evidence received by the House of Lords, Constitution Committee, identified that the devolution statutes undoubtedly embody characteristics of federalism. See, Constitution Committee, \textit{The Union and Devolution} (2015/16, HL 149), para 271.
\item \textsuperscript{197} \textit{Thoburn v Sunderland CC} (n 25) [62]. For a discussion welcoming the \textit{Thoburn} judgment, see, Elliott, ‘Embracing “Constitutional” Legislation: Towards Fundamental Law?’ (n 103).
\item \textsuperscript{198} \textit{R (Jackson and others) v AG} (n 138) [152].
\item \textsuperscript{199} Dickson (n 94) 26. In light of a potential HRA repeal, Dickson does however assert that the time may be opportune for the Supreme Court to ‘revive the concept of constitutional rights’. Dickson (n 128). Interestingly in \textit{Axa}, Lord Reed noted but did not comment on counsel’s description that subjecting the Scottish Parliament to review on the basis of the rule of law and fundamental rights was ‘constitutional review, in distinction from administrative review’. This did not however prevent Lord Reed from supporting the proposition. \textit{AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland)} (n 119) [149].
\item \textsuperscript{200} For example, Lord Neuberger declined to comment on whether the Government of Wales Act 2006 should be approached as a constitutional enactment, see \textit{Local Government Byelaws (Wales) Bill 2012 - Reference by the AG} [2012] UKSC 53; [2013] 1 AC 792 [69].
\item \textsuperscript{201} Anthony regards the case law as ‘central to understanding the nature of legal sovereignty in the contemporary UK constitution’. See, Anthony, ‘Devolution Issues, Legislative Power, and Legal
cases and one minority opinion stand out for, like Jackson, mounting a challenge to
the dominance of parliamentary sovereignty: In the words of Gordon Anthony these
cases create ‘pressure points that hint at the diminishing strength of the
constitutional orthodoxy.’ 202

In Robinson v Secretary of State for Northern Ireland (2002), the Northern Ireland Act
1998 was categorised, ‘in effect’, to be a ‘constitution’ and interpreted purposively in
light of the NI political context to allow for the election of the NI First Minister and
Deputy First Minister by the NI Assembly after the expiration of the express six-week
time period delineated by the statute. 203 In Axa General Insurance Limited v the Lord
Advocate (Scotland) (2011), the Supreme Court was asked (as a secondary question)
whether the Scottish Parliament could be subject to judicial review on common law
grounds of unreasonableness, irrationality and arbitrariness. A unanimous court
determined that it could be subject to judicial review but not on the traditional
grounds, rather only on the basis of the rule of law and fundamental rights. Both
leading judgments pointed to the need for the UK courts to be deferential to the
democratic mandate of the Scottish Parliament. 204 In a rationale that Tomkins
believes put the devolved legislature, at least to some extent on the ‘same
constitutional plane’ as the Westminster Parliament, 205 Lord Hope described the
Scottish Parliament as a ‘self-standing democratically elected legislature’ which
should enjoy the ‘highest legal authority’, albeit simultaneously recognising that
sovereignty ‘remains with the [UK] Parliament’. 206 Lord Reed further distinguished
the plenary powers (within the limits of competence) of the Scottish Parliament - the
exercise of which require no justification other than the will of Parliament - with the

Sovereignty’ (n 190) 114. ‘High-water mark’ is Tomkins term, see also, Adam Tomkins, ‘Confusion
202 Anthony, ‘Devolution Issues, Legislative Power, and Legal Sovereignty’ (n 190) 102. Rawlings has
labelled the devolution case law ‘inconsistent’ and a ‘morass’. See, Rawlings (n 189) 482.
(Lord Bingham)].
204 AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland) (n 119) [49
and 148].
205 Adam Tomkins, ‘Confusion and Retreat: The Supreme Court on Devolution’ U.K. Const. L. Blog (19
Feb 2015) available at (available at: https://ukconstitutionallaw.org/).
206 AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland) (n 119) [46].
limited powers of administrative bodies.\textsuperscript{207} Finally, in *Recovery of Medical Costs for Asbestos Related Diseases (Wales) Bill* (2015), in the context of a proportionality challenge to Article 1 of Protocol 1 of the ECHR, Lord Thomas, for the minority, took an especially deferential approach to the views of the Welsh Assembly, considering that ‘great weight’ should be given to its judgment, particularly on matters of social and economic policy.\textsuperscript{208} For Lord Thomas, there is in fact no difference between the UK Parliament when making choices in relation to England, than any of the other devolved legislatures in relation to their respective devolved jurisdictions.\textsuperscript{209}

However, amidst warnings that it would be both normatively and practically unwise to pursue the suggestion that the devolved legislatures have a sovereignty on par with the Westminster Parliament further,\textsuperscript{210} the Supreme Court has on the whole issued relatively conservative devolution judgments (see most recently *Miller No 1* below).\textsuperscript{211} For example, Lord Mance, speaking for the majority, in the *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* case preferred to accord only ‘weight’ to the views of the Welsh Assembly.\textsuperscript{212} He further suggested that while Article 9 of the Bill of Rights precludes courts questioning the sufficient of debate in the Westminster Parliament, the fact that it does not apply to subordinate legislation might suggest ‘a relevant distinction between cases concerning primary legislation by the UK Parliament and other legislative and executive decisions’.\textsuperscript{213} Indeed, it should not be forgotten that even in *Axa*, Lord Hope juxtaposed his statements on the

\begin{footnotes}
\item[207] ibid 147.
\item[208] *Recovery of Medical Costs for Asbestos Diseases Bill 2015 - Ref by Counsel General for Wales* [2015] UKSC 3; [2015] AC 1016 [118].
\item[209] ibid 122.
\item[210] Anthony, ‘Devolution Issues, Legislative Power, and Legal Sovereignty’ (n 190) 114:“the courts have done as much as they might legitimately do within the given structures and that any tensions around legal sovereignty would better be addressed through a written constitution”.
\item[211] See e.g., *R (Miller) v Secretary of State for Exiting the European Union* (n 5); *The Christian Institute and Others v The Lord Advocate (Scotland)* [2016] UKSC 51; 2016 SLT 805; Agricultural Sector (Wales) Bill - *Ref by the AG* [2014] UKSC 43; [2014] 1 WLR 2622; *Imperial Tobacco Limited v The Lord Advocate (Scotland)* [2012] UKSC 61; 2013 SLT 2; *Local Government Byelaws (Wales) Bill 2012 - Reference by the AG* (n 200). Interestingly, in the *Local Government Byelaws (Wales) Bill 2012* reference, Lord Neuberger chose not to be drawn on the suggestion that the Government of Wales Act 2006 was a constitutional enactment at [69].
\item[212] *Recovery of Medical Costs for Asbestos Diseases Bill 2015 - Ref by Counsel General for Wales* (n 208) [67].
\item[213] ibid 55–56.
\end{footnotes}
democratic legitimacy of the Scottish Parliament with a recognition of its status as a delegated law-making authority, which does not enjoy the sovereignty of the Crown in Parliament. 214

Since 2017, notions of a divided sovereignty or indeed any further elevation of judicial authority by virtue of a constitutional statute discourse, have at least for the time being, been silenced by both the Miller No. 1 and EU (Legal Continuity) Bill cases.215

In Miller, while the central issue, as discussed above, concerned whether the UK Government needed first the explicit statutory power to notify the EU of the UK’s withdrawal, the Supreme Court was also asked to consider whether the consent of the NI Assembly (and by extension all the devolved legislatures) was additionally necessary. Leaving the EU would, after all, remove the statutory rights conferred on residents of NI, Scotland and Wales to challenge actions of the respective executives or legislatures in the courts for compliance with EU law. Further, the observance and implementation of EU law is a devolved matter. Since the Court had already determined that Westminster legislation was needed to trigger Article 50 TEU, the nub of the issue was whether a legislative consent motion was required from the devolved legislatures. In Miller, the Supreme Court determined that the Sewel Convention had no legal force and remained, despite being recently (partly) enshrined in legislation,216 a political convention of which the ‘judges are neither the parents nor the guardians...merely observers’. 217 Instead, the court chose to highlight that in ‘each of the devolution settlements the UK Parliament has preserved its right to legislate on matters which are within the competence of the devolved

214 AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland) (n 119) [46]. See also, Anthony, ‘Devolution Issues, Legislative Power, and Legal Sovereignty’ (n 190) 105–106.
215 For a discussion of divided sovereignty, and the view that while the continued strength of the parliamentary sovereignty paradigm, as fuelled by Brexit, cannot presently accommodate the concept, it could nevertheless prove useful in the event of a constitutional re-write, see Anthony, ‘Brexit and the Common Law Constitution’ (n 188) 694.
216 Scotland Act 2016 c. 11 (n 176). See also, Wales Act 2017 c. 4 (n 176) s 2. Devolution aspect enshrined only, not alteration of competences.
217 R (Miller) v Secretary of State for Exiting the European Union (n 5) [146, 141–149]. For a discussion on the pressure placed on the UK Constitution by the combination of Brexit and devolution, see, Gordon Anthony, Devolution, Brexit, and the Sewel Convention (The Constitution Society 2018).
legislature.'\textsuperscript{218} In the \textit{EU (Legal Continuity) Bill} reference (above), the Supreme Court also asserted that Section 17, which would make UK subordinate legislation conditional on the consent of Scottish Ministers, amounted to an imposition on the UK Parliament’s law-making power which would be ‘inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power.’\textsuperscript{219}

In what has been described as an effort to increase the predictability and consistency of the interpretation of the devolution acts,\textsuperscript{220} there can in fact be said to be three principles emerging out of the more conservative devolution caselaw.\textsuperscript{221} First, competence questions are to be decided according to the rules set out in the competence provisions of the devolution statutes. While the court recognises that the statutory language of the devolution statutes may have been informed by the principles applied in federal systems, the Court warns against looking beyond the devolution statutes for guidance. Second, with a view to ensuring that devolution is coherent, stable and workable, the wording of the devolution statutes is to be interpreted in their ordinary meaning. Finally, the constitutional statute descriptor can be used to inform the purpose of the statute - considered to be a generous settlement of legislative authority - but it cannot be taken in itself as a guide to statutory interpretation. Yet it would be remiss to not end with the post-Brexit reasoning of the UK Supreme Court, which has taken an even more traditional turn, when it emphasised not the above principles as laid out but instead in the \textit{EU (Legal Continuity) Bill} reference that:

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{218} \textit{R (Miller) v Secretary of State for Exiting the European Union} (n 5) [136]. See, Northern Ireland Act 1998 s 5(6); Scotland Act 1998 s 28(7); Government of Wales Act 2006 c. 32 s 107(5).
\item \textsuperscript{219} \textit{UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland} (n 85) [52].
\item \textsuperscript{220} \textit{UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland} (n 85).
\item \textsuperscript{221} The following narrative is based on the principles as synthesised in \textit{Imperial Tobacco Limited v The Lord Advocate (Scotland)} (n 211) [12-15 (Lord Hope)]. See also, \textit{Local Government Byelaws (Wales) Bill 2012 - Reference by the AG} (n 200) [79-80 (Lord Hope)]; \textit{Agricultural Sector (Wales) Bill - Ref by the AG} (n 211) [6 (Lords Reed and Thomas)]. In addition, see \textit{Martin v HM Advocate (Scotland)} [2010] UKSC 10; 2010 SLT 412 [5, 11-15 (Lord Hope), 44 (Lord Walker)].
\end{enumerate}
\end{footnotesize}
[the Scottish Parliament] does not enjoy the sovereignty of the Crown in Parliament; rules delimiting its legislative competence are found in section 29 of and Schedules 4 and 5 to the Scotland Act, to which the courts must give effect. And the UK Parliament also has power to make laws for Scotland, a power which the legislation of the Scottish Parliament cannot affect: section 28(7) of the Scotland Act. The Scotland Act must be interpreted in the same way as any other statute.\footnote{UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (n 85) [12].}

It is somewhat difficult to reconcile the court’s increasing reluctance to recognise the importance of the devolved legislatures as against that of the UK Parliament, with both the strong nationalist pulls (especially in Scotland) and recent devolution statutes (that ascribe permanence to the devolved legislatures and an increased remit of authority). Recognising a greater authority for the devolved legislatures would of course take the internal UK architecture into the realm of constitutional pluralism (see chapter 5, section 5.5) and so a more dispersed sovereignty framework. Perhaps it is not deference to Parliament that is really on the judicial mind here, but rather a reluctance to open up conversations that will help initiate a fundamental rethink of the UK’s constitution, not least matters such as the relationship between the devolved entities and the UK court system (see also chapter 6).

\subsection*{2.4.2. The Populist Executive}

The Prime Ministership of Boris Johnson has also unveiled to a greater degree than his predecessors have, the role of the UK Government as the executive arm of government in representing the popular voice, and therefore pitting the Executive against the UK Parliament (see also the earlier discussion in chapter 1, section 1.2.1). This has been apparent most recently through the emphasis on ‘getting Brexit done’ as a campaign slogan, and as mentioned, a (publicly) perceived justification for
proroguing Parliament in October 2019. In a judicial challenge to that action, *R (Miller) v The Prime Minister* (referred to here as ‘*Miller No. 2*’), the UK Supreme Court interestingly maintained the consistent emphasis it has shown since the Brexit vote on the importance of Parliamentary sovereignty. While commentators emphasised that the Prime Minister’s proroguing of Parliament was anti-democratic, the Supreme Court chose to frame the issue first as against the importance of Parliamentary sovereignty, before leading into the democratic function of Parliament in terms of holding the Executive to account (‘Parliamentary accountability’). In this case, the court declared that, ‘the sovereignty of Parliament would … be undermined as the foundational principle of our constitution if the executive could, through the use of the prerogative, prevent Parliament from exercising its legislative authority for as long as it pleased,’ with the proroguing deemed void. What was further interesting about the case was that the Court explicitly stated that it was looking at the effects of the prorogation rather than any purported intention, unless that intention was express within a statute. Those intentions were of course suggested to be the denial to Parliament of the opportunity to consider more fully the withdrawal arrangements with the EU, and what democracy campaigners were concerned was an abuse of power by the Prime Minister.

### 2.5. Conclusion: Shared Internal Sovereignty and the Complication of the Devolved Nations

The aim of this chapter was to identify and describe the current sovereignty debates as they have arisen in UK law. The chapter started by setting out how the issues of Brexit, a British Bill of Rights and even common law rights, represent a recent turn

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223 The Telegraph, ‘Boris Johnson Tells Tory Conference “Let’s Get Brexit Done” in Key Note Speech (Video) (2 October)’ ([YouTube](https://www.youtube.com), 2019).
224 *R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* (n 107) [42].
225 Ibid.
226 Ibid 49.
227 Ibid 23.
towards traditional state sovereignty vis-à-vis supra-state institutions. The chapter recognised the concept of constitutional pluralism as a helpful descriptor to frame the UK’s relationship with the EU, based on its ability to openly recognise the complexity and competing nature of claims to authority. Although not recognised at the intra-state level, constitutional pluralism might be a helpful tool to inform the shared sovereignty which the chapter believes to exist between Parliament and the courts. Although the ‘Parliamentary sovereignty’ paradigm has been re-emphasised of late and seemingly especially so in reaction to the constitutional upheaval of Brexit, it was argued that the courts currently retain unique claims to authority based on the rule of law and human rights; additionally holding an especially influential role in terms of framing the authority of the devolved legislatures. Furthermore, despite the efforts of the courts to re-establish British constitutional tradition in the wake of Brexit, that event has actually served to increase sovereignty debates at the internal state level, such that there are real concerns about the sustainability of the UK state in its current form. These tensions, along with recent devolution legislation lead the chapter to take the view that despite judicial reticence to expand the authority of the devolved legislatures, the constituent nations should (as opposed to are) more accurately be conceived as possessing independent claims to authority. In this way, the UK Parliament and court system should also be viewed as sharing sovereignty with the devolved legislatures.

In the following chapters, the thesis takes a turn towards the normative underpinnings of these sovereignty discussions. To do so, it turns towards a focus on legal and political theory, rather than statute or doctrinal analysis, since legal reasoning in the UK is known for its practical focus and avoidance of philosophising.229 Judicial pragmatism has not of course prevented academics from engaging in that process. The purpose of enquiring into philosophical normativity as explained in chapter 1, section 1.3 is to seek justifications for sovereignty that are removed from both the internal legal system and political volatility, instead rooted in choices human beings make about valuable forms of living. In doing so, the thesis is not limited by

229 Dickson (n 94) 49.
claims that legal sovereignty is solely a common law construct or indeed the judicial recognition of political power but rather understands that sovereignty is already shaped by ethical positions. In exploring the oughts or justifications for legal authority in the UK, chapter 3 identifies liberal universalism as the most consistent theoretical approach concerning how sovereignty is normatively framed within UK law.

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3. **Normative Underpinnings of Sovereignty Debates: Liberal Universalism and the Concern for Community**

3.1. Introduction

Chapter 2 of this thesis set out a largely positivist account of the constitutional discord presently manifest in United Kingdom (UK) law and explained that the essential objective of the thesis is to reconsider legal sovereignty, otherwise presented as legal authority, from a normative perspective. This chapter of the thesis begins by asking: ‘What values underpin these dominant accounts of sovereignty in UK law?’ This is the second sub-research question posited in the introduction to chapter 1 (section 1.1).

The chapter begins by engaging with notions of ‘national identity’, ‘Britishness’ and ‘democracy’ which have dominated the early Brexit discourse set out in chapters 1 and 2. It suggests that national identity is better understood as an ideal at the constituent nation level despite its relatively frequent appearance alongside ‘Britishness’. That is not to deny the existence of a ‘Union’ identity but rather to recognise the unique history of the UK and the coexistence, at least at the present time, of vague value constellations, i.e. values of a culture or society in light of which they lead their lives,\(^1\) organising around the constituent nations. Prior to Brexit and most recently the COVID-19 global health pandemic,\(^2\) the Scottish Government had for example, demonstrated a greater emphasis on egalitarianism when compared to the austerity programme of (recent) past UK Governments.\(^3\) That being the case,

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when the UK’s sovereign institutions are approached internally, as in section 3.3, a
dominant value constellation appears around liberal universalism. This is a
foundation firmly rooted within the UK’s perceived social contract but also strongly
manifest in international human rights law despite the latter’s greater deference to
socio-economic rights than in UK human rights law (see for discussion section 3.3.3
of the chapter). It is a version of philosophical liberalism grounded in the writings of
John Locke through in part to the Enlightenment ‘age of reason’ and results in
practical terms in the dominance of liberal values over more egalitarian aims such as
observed in socio-economic rights (see further the well-worn liberty versus equality
dichotomy).⁴

The communitarian tradition has however criticised liberal universalism for its lack of
relatability to humans as they are found in their situated context.⁵ This is due to the
philosophy’s reliance on abstract essentialism, which emphasises reason and a
commitment to absolute answers. Section 3.4 of the chapter acknowledges and
appreciates these concerns before engaging in section 3.5 with scholars offering new
foundations, at least in terms of the sovereignty of universalism claimed by human
rights. From chapter 4 on, the thesis will seek to apply these ideas to legal sovereignty
more generally. The most engaging of the new foundations are those reasoned from
an embedded, rather than an abstract, universalism and so too the plurality of
construction that embedded universalism requires. In so doing, the chapter
concludes by pointing towards the potential for the idea of ethical value pluralism
(EVP) accompanied by an internal and embedded essentialism to serve as a more
viable philosophical foundation than presently at play, through which the wielding of
legal authority might be legitimised.

3.2. The United Kingdom as ‘Peoples’ and ‘Value Constellation’

Chapter 1, section 1.2.1 and chapter 2, section 2.2 presented how Brexit and the now less prominent debate about a British Bill of Rights represented the shift towards traditional notions of state sovereignty, especially through the use of language invoking the ideals of ‘nationhood’ and ‘Britishness’. At least at government level, the primary normative justification for invoking a sense of ‘Britishness’ is to secure (perceived or otherwise), more ‘control’ of UK laws by invoking democratic argument. As described above, in advance of the European Union (EU) referendum, the Conservative Manifesto 2015 referred to the ‘wafer-thin consent’ of the British people regarding the EU in recent years. The UK’s system of liberal democracy is discussed in section 3.3.2 below, but for now, it is enough to note that the normative underpinnings of democracy traditionally rest on the notions of self-government and promotion of the common good. The perceived lack of a demos in international institutions has long been an area of concern as decision-making has appeared increasingly removed from the individual in relationship with the expanding remits of supra-national organisations. In tandem to this, the thesis described the increased reliance on a republican conception of democracy, namely that of popular sovereignty whereby all legitimacy comes from the people (again see, section 3.3.2 of this chapter below). This is being embraced at the UK Government level, not just as a justification by the Executive for outmanoeuvring Parliament such as in Miller No. 2 (chapter 2, section 2.4.2), but in the growing reliance on referenda, which are introduced in the form of legislation by the UK Government to Parliament.

Yet, the notions of ‘Britishness’ and ‘nationhood’ also suggest there are other norms at play than just the values underpinning democracy. Historically, the nation state was associated with common identity and culture, and even mono-ethnicity; associations that can only apply in a limited sense to modern liberal democracies such

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as the UK which are poly-ethnic and inclusive of a broad stretch of identities. The closest legitimising concept to nation states in international and human rights law – the latter being an area of law with clear normative underpinnings - is the idea of group rights or ‘peoples’. For example, the United Nations (UN) Charter commitment to ‘respect ... the principle of equal rights and self-determination of peoples’ gives an indication of the normative justifications underpinning this aspect of state sovereignty, namely through the acknowledgment of the strength of group identity in human organisation. However, while the 19th century ideas of nationality and self-determination were perceived as ‘alter-ego’ principles, the modern human rights recognition of group rights, as it appears in the right to self-determination, the prohibition on discrimination and the protection of minorities (as well as the respect accorded to the family unit) is disassociated with its former state links. The right to self-determination is increasingly viewed as limited, associated in the latter half of the 20th century with decolonisation and today with indigenous rights. What is important is that the term ‘peoples’ has remained undefined by the UN but is now understood as a relatively neutral term and preferred in many international law documents to avoid harmful aspects of nationalistic sentiment based on common ethnic, language or other uniform cultural identities. To this end, the ideological concept of ‘nationalism’, which suggests that a person’s ‘loyalty and devotion to the nation state surpass[es] other individual or group interests’, is to be distinguished

11 In addition to above, see International Covenant on Civil and Political Rights 1976 (n 9).
from an attitude of nationalism, which suggests that individual’s care about their national identity.\(^{15}\) In that latter idea, such individuals typically hold a preference for the state identity that coheres the most with their own culture or value system, and is relatable to group identity or the idea of ‘peoples’. Despite the realities that international law is largely organised around the nation state, the former idea is not here recognised as legitimately normative (for more on the axiology of the thesis, see chapter 4).

What is perhaps more appropriate in terms of the 21\(^{st}\) century UK is to conceive of the idea of Britishness or British nationhood as peoples with a value constellation rather than any ethnic homogeneity. As chapter 4, section 4.2 later discusses in the context of EVP, Isaiah Berlin uses the idea of a constellation of values to refer to the ideas of a culture or society in light of which they lead their lives.\(^{16}\) According to John Gray, cultural pluralism is Berlin’s idea that there are ‘goods that have as their matrices social structures that are uncombiable’.\(^{17}\) (The uncombiable nature of these goods or ultimate values is explained later in the context of EVP). In that vein, it is of note that the UK is a union of constituent nations/jurisdictions with unique historical and cultural contexts (see chapter 1, section 1.2.1 and chapter 2, section 2.2 and 2.4). It is also a Union that has embraced the market economics underpinning globalisation, and so embodies an increasingly diverse body of persons, including those with historical and cultural links beyond the geographic territory of the UK.\(^{18}\) At least as it is intended and embraced by the official statements from the UK Government, ‘Britishness’ is often demonstrated by reference to the principles of mutual tolerance and respect as well as political pluralism, all composite parts of UK liberalism.\(^{19}\) Section 3.3 below, sets out in greater detail the commitment of UK law

\(^{15}\) Miscevic Nenad, ‘Nationalism’ in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy*.


\(^{17}\) John Gray, *Berlin* (Fontana Press 1995) 44.


\(^{19}\) See e.g. in the context of intergovernmental relations, references to ‘mutual respect’ in Cabinet Office, ‘Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee’ (2013); Adam Tomkins, ‘Shared Rule: What the UK Could Learn from
to liberal universalism, such that it might be called the core ‘value constellation,’ or indeed the normative meaning of ‘Britishness’ at the law and policy level for the UK.

Yet what is emerging through the political event of Brexit, and alluded to in chapter 1, section 1.2.1, is that the value constellations within the UK’s constituent nations to an extent diverge. In that regard, it might argued that the desire to retreat from a European legal framework towards a more ‘British’ framework is perhaps better expressed as desire for greater Englishness and Welshness by the peoples in those jurisdictions. Yet beyond increasing the regulation of immigration and emphasising freedom of expression over, say, privacy, it is unclear for the present time, to what extent these desired English or Welsh laws will otherwise diverge from those currently in place. The Political Declaration agreed by the UK and EU commits, after all, both parties to ‘respect for and safeguarding of human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation’ and in the trade context, ‘a level playing field for open and fair competition’. Simply understood, going back to the democratic argument, there appears to be a desire to increase the perception of ‘autonomy’ in the form of self-government, even if that autonomy should result in similar legislation. Beyond the fact that Scotland does not appear to have the same democratic reservations as England with the EU - perhaps attributable to their distinct population sizes and the accompanying perception or acclimation to the notion of sharing sovereignty - the primary difference in the value constellation there appears to be a greater emphasis from the present Scottish government on socio-economic justice. Yet it is important not to overemphasise

Federalism’ in Robert Schütze and Stephen Tierney (eds), The United Kingdom and the Federal Idea (Hart Publishing 2018) 96. For more on political pluralism, see section 5.4 of thesis.
20 EU Committee, The UK, the EU and a British Bill of Rights (HL Paper 139, 2016).
21 HM Govt, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (19 October 2019).
this distinction because as section 3.3.3 of this chapter sets out, this orientation has similarly occupied UK Governments in the past century and there further exists a palpable English appetite for the issues that were in the Corbyn agenda. This is cause to wonder whether there are distinct value constellations within the UK’s jurisdictions, or whether the differences at play in fact relate to different interpretations of the one value constellation, such that it is different versions of liberalism that are really at play. The COVID-19 global health pandemic of early 2020 and the current UK Government’s significant package of public support measures to help both individuals and the economy survive that.\textsuperscript{24} may initiate a further seismic policy and value rethink across the nations.

### 3.3. The Liberal Universalism of UK law

Universalism, as chapter 1, section 1.2.3 describes, is predominantly an ethical theory which suggests that there are certain ethical or moral truths for all individuals irrespective of other distinguishing features, such as the protected characteristics. A commitment to universalism suggests a certain objectivity to truth. In order to identify these truths, there is a subsequent commitment to rationalism. Ethical relativism is the opposite of universalism. Gray describes this contrary view as meaning ‘human values are always internal to particular cultural traditions and cannot be objects of any sort of rational assessment or criticism’.\textsuperscript{25} The theory behind the universal human rights movement has today largely subsumed the formerly dominant debate of universalism-relativism.\textsuperscript{26} As this section will seek to demonstrate, the UK manifests a commitment to liberal universalism, which it similarly regards as the dominant version of universalism manifest in international human rights law, despite the latter’s theoretical ambiguity and certain communitarian trends.

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\textsuperscript{24} Department for Business Energy & Industrial Strategy (n 2).
\textsuperscript{25} Gray (n 17) 44.
3.3.1. Classical Theory: Natural Rights and Liberalism

While both ‘natural rights’ and ‘liberalism’ refer to broad traditions and include more modern articulations, it is possible to outline a consistent core of their meaning during the seventeenth and eighteenth centuries to facilitate understanding of the context and ideas from which both UK law and the modern international human rights movement has borrowed. This aspect of the ‘age of reason’ approach is sometimes referred to as ‘classical human rights philosophy’.

Natural rights have their origins in the medieval period and canon law and are considered an implicit part of natural law moral theory. While there are many variations of natural law theory, they posit in common the belief that human beings possess an innate disposition or nature and an ability to reason, from which natural laws and so too natural rights can be identified. While natural law theories often concern as a core purpose the extraction of natural rights, the two concepts are not identical. An early distinction still of application was made by Thomas Hobbes who decreed that natural laws focus on obligatory acts, while natural rights emphasise the discretion of the individual:

The names *lex*, and *jus*, that is to say, law and right, are often confounded; and yet scarce are there any two words of more contrary signification. For right is that liberty which law leaveth us; and laws those restraints by which

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we agree mutually to abridge one another's liberty. Law and right therefore are no less different than restraint and liberty, which are contrary ...

Thomas Aquinas, an influential natural law theorist from the medieval period and a scholar who influenced certain of the Universal Declaration on Human Rights (UDHR) drafters,\textsuperscript{32} believed that God created human beings and placed within them an essential nature and a desire to seek certain goods. Essentialism is the view that, ‘human life has certain central defining features’ and is a key component of universalist ethics (often referred to as ‘anthropological essentialism’).\textsuperscript{33} A key feature of this essential nature was the ability to reason and so search ‘to know the truth about God, and to live in society’ by ‘shun[ing] ignorance’ and ‘avoid[ing] offending those among whom one has to live.’\textsuperscript{34}

The need for a creator in the story of natural law was later rejected by Enlightenment scholars such as Hugo Grotius, who argued for secular justifications of natural rights.\textsuperscript{35} Secular groundings for natural law identify that because humankind possesses an ability to identify certain truths about human nature from reason, a creator is not required. The Enlightenment period is often associated generally with a trend towards such secular thinking and an almost exclusive reliance on critical reason. Immanuel Kant’s writings for example, associated a state of ‘Enlightenment’ with intellectual autonomy or independent thought – the emergence of the human from


E.g. Nederman posits natural rights to be the doctrine that ‘human beings possess a set of powers, freedoms, and/or competencies to the extent that they enjoy complete and exclusive dominion over their mental and bodily facilities – and the fruits thereof – in the form of personal property.’

\textsuperscript{32} Jacques Maritain for example revived Thomism in the 20th century and was a drafter of the UDHR. On Maritain’s role, see Mary Ann Glendon, ‘Knowing the Universal Declaration of Human Rights’ (1998) 73 Notre Dame Law Review 1153.


\textsuperscript{34} Aquinas, *Summa theologiae*, I-II.94.2. The other essential characteristics of human nature included ‘the preservation of his own being’; and ‘sexual intercourse [and] education of offspring and so forth’. For Kainz, Aquinas presents the ‘clearest exposition’ of natural law and natural rights theory. See, Kainz (n 30) 23.

their ‘self-incurred immaturity’, i.e. ‘the ability to use one’s own understanding without the guidance of another’. 36 Gray summarises the core project of the Enlightenment as ‘the construction of ... a critical morality, rationally binding on all human beings, and, as a corollary, the creation of universal civilisation.’ 37 This view therefore saw in humankind a degree of ‘generic humanity’, 38 a fixed essential nature, said to be self-evident through the application of human reason.

In tandem with embracing this notion of pre-existing natural rights, certain Enlightenment thinkers espoused an early form of social contract theory which ‘presents society as the outcome of individual freedom and agreement’. 39 For Thomas Hobbes (1588-1679) and John Locke (1632-1704), for example, social contract thinking purposed government with the task of protecting the pre-existing rights of individuals. 40 Immanent within this thinking are the protean forms of liberalism 41 – the political theory long associated with a ‘rallying cry for individuals desiring space to be free from unjustifiable limitations’. 42 Michael Freeden’s expository on liberalism identifies the first out of his five layers of liberalism to have emerged against the backdrop of the English (1600s), American (1775-1783) and French (1789-1799) revolutions, all of which rejected state power apart from that endorsed with the consent of the people. 43

37 John Gray, Enlightenment’s Wake (Routledge 1995) 123. Makinen has argued that natural rights in medieval discourse were also closely associated with the development of a ‘voluntarist psychology’ which emphasised the individual’s ability to make independent decisions. She also notes that the development of rights to subsistence and self-dominion as derived from the natural law of self-preservation during the Medieval period. See, Makinen (n 29) 80.
42 ibid 1.
43 ibid 3. Freedon’s five layers are complex and said to continuously interact and fluctuate. The five layers are briefly summarised as follows: (1) restraint of rulers and against arbitrary interference with the ruled; (2) Being free to interrelate to others actively for the purpose of self-improvement, material and spiritual through the elevation of the markets; (3) Detached the virtue from greed and focused on fostering the free development of individuality; (4) an emphasis on the close interdependence of individuals in society, and recognition that individual survival depends on...
In Hobbes theory, only one natural right, that of self-preservation, is said to be inalienable:

A LAW OF NATURE, (Lex Naturalis), is a Precept, or generall Rule, found out be reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.44

However, Hobbes also emphasised human emotion and selfishness and believed an unrestrained motive towards self-preservation was the cause of war since it created the circumstance of conflicting natural rights between individuals. To prevent such war Hobbes argued that every human being should be content with the same amount of liberty/freedom they are prepared to accord to others (his ‘second state of nature’). Hobbes argues that individuals should decide to give up this freedom to the sovereign ruler who is to act as a representative in protecting this reciprocal covenant. Hobbes was critical of certain social groups, notably religious groups, claiming specific political rights, and emphasised monarchical rule over a separation of powers.45 This emphasis on state power and the absence of a belief in public rights is very distinct from contemporary human rights law. Hobbes contribution however, lies in his focus on individuals, as they exist apart from society (and as distinct from Aquinas’ portrayal of humankind situated in society), and from whom the law of nature can be derived. The whole point of the legal system for Hobbes is to safeguard individual private rights.46

Locke also argued that the main purpose of government was to protect individual rights through a hypothetical social contract, though his presentation of state relationships and support; and (5) the dispersal of power among society through pluralism whereby the free market represents different social groups vying for influence. See, ibid 37–54.

44 Hobbes (n 40).
45 Otfried Höffe and Nicholas Walker (transl.), Thomas Hobbes (State University of New York Press 2015) 32. (L ch. 18: 93)
46 Douzinas (n 39) 71, 80 (Natural Right in Hobbes and Locke).
authority differed. Locke understands natural law simply as the law of reason and presents conscience as ‘nothing else but our own opinion or judgment of the moral rectitude or pravity of our own actions’.\(^{47}\) Locke emphasises the desire of humankind for happiness, something he calls an ‘innate practical principle’\(^{48}\). The purpose of government is to provide order to this state of nature among humankind, but the authority of government is to be limited. For Locke, the rights which government must preserve are the rights of life (similarly derived from self-preservation), liberty, and property. \(^{49}\) Locke’s identification of the right to property as a natural right is considered one of the most revolutionary features of his theory.\(^{50}\) It is said to have inspired a belief in ‘possessive individualism’ which is the ‘open-ended accumulation of goods by private individuals’.\(^{51}\) Freeden identifies the link between the accumulation of property and human flourishing as integral to the second layer of liberalism. This layer is loosely linked with the 19\(^{th}\) century and marks an enduring link between property and liberalism which has lasted into the present day.\(^{52}\)

In summary then, classical liberal universalism as based on a natural rights rationale posits the concept of anthropologic essentialism whereby human beings are said to have an innate, fixed nature that is independent from the circumstances we find ourselves in life. That nature and therefore the right form of living can be identified by each of us individually through one aspect of our fixed essential nature - the faculty of reason. This faculty identifies a number of natural rights, such as the right to life (otherwise self-preservation), which human beings are said to possess equally in nature. Morally speaking these rights pre-exist their guarantee in law but a core purpose of legal authority is to realise this truth and ensure their legal guarantee to each person on an individual basis. In the next two sections, the thesis maps the modern approach to legal authority and how the philosophy of liberal universalism underpins the authority of our democratic institutions and court system.

\(^{48}\) ibid I, 3, 12.
\(^{49}\) ibid I, 3, 12.
\(^{50}\) Douzinas (n 39) 83.
\(^{51}\) Freeden (n 41) 42 quoting C.B. Macpherson.
\(^{52}\) ibid 41–43.
3.3.2. The UK Parliament and Devolved Legislatures

The UK operates a system of liberal democracy. The democratic institutions are that of the UK Parliament and devolved legislatures; and all present a form of representative democracy. It is in this way that individuals in UK society collectively organise to govern the state through the making of statute law.

Although the term democracy is used to refer to various forms of decision-making institution, the classical viewpoint of democracy is often referenced in relation to the writings of Aristotle (320 BC) and Alexis de Tocqueville (1835-40), and asserts two normative underpinnings. The first is that democracy involves self-government and the second is that democracy is either an expression or a promotion of the common good (at least, as it relates to those exercising self-government). Democracy theorist Frank Cunningham describes how Aristotle in fact preferred royalty as the ideal form of government but accepted democracy to be the most tolerable of the deviant forms. For Aristotle, democracy meant the rule of the many, essentially meaning the rule of the poor (or ‘polity’). Mindful of the tendencies of royalty to become self-serving, Aristotle considered that the three benefits of democracy were: that more people would benefit from democracy’s self-serving rule; that some advantages could be gained from the collective experiences of the many; and that majority discontent would be subdued. Tocqueville’s classification emanates out of his study entitled Democracy in America, which focused its founding documents on giving power to the ‘people’. Cunningham similarly describes the ambivalence of Tocqueville to democracy but further his general impression that the tide of egalitarianism sweeping Europe during the mid-19th century could benefit from

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55 Aristotle (n 54) 44.
56 Cunningham (n 6).
57 Tocqueville (n 54).
viewing how America manifested the vitality of majority rule while avoiding violence.\(^{58}\) Democracy is said to promote the common good because it expresses the will of those exercising self-government. For Aristotle anyway, the common good was not the common individual interests of those exercising power but rather the good of the ‘community’, which he viewed as promoting the well-being of all members.\(^{59}\)

In fact, it is the ‘public interest’ concept found in UK human rights law and which is discussed in the following section that has the potential to realise Aristotle’s conception of the common good more closely than the democratic process; where the latter might be better viewed as an aggregate of individual interests.

To achieve these values – namely, self-government and the promotion of the common good - acceptably in the modern era, this also requires on William Galston’s view (following Robert Dahl), political equality of citizens and an inclusive basis for citizenship, as well as majoritarian rule.\(^{60}\) Majoritarian rule refers to the fact that within democracies decisions are taken by ‘popular majorities whose votes count equally; and secondly, that democratic decision-making extends to a maximally wide range of public matters’: \(^{61}\) ideas compatible with both representative and direct democracy (see below).

The concept of political equality is of course based on the notion of intrinsic (or moral) equality outlined above under the philosophical precepts of natural rights and liberalism; namely that all human beings possess an innate human nature that is of value, and as such are entitled to claim moral equality.\(^{62}\) Political equality seeks to realise this intrinsic equality by instituting a system whereby, broadly speaking, each member of society has an equal opportunity to participate in governing (at least in a procedural sense).\(^{63}\)

\(^{58}\) Cunningham (n 6).
\(^{59}\) ibid. See also, generally and specifically Aristotle (n 54) 51.
\(^{61}\) ibid.
\(^{63}\) For a more general discussion on the advantages of political equality and thus democracy vis-à-vis guardianship rule, see Dahl (n 53).
Yet the approach to democracy within the construct of all the UK legislatures is specifically representative democracy. Representative democracy is a form of indirect democracy whereas referendum, as described earlier, are a form of direct democracy. In his foundational thesis A.V. Dicey proffered the view that within the UK’s representative democracy it is appropriate to regard the electorate as politically sovereign but importantly, not legally sovereign. Dicey, as it is known, held this view on the basis that sovereignty is an absolutist conception. The aforementioned rise in the use of referenda in the modern era, especially concerning major constitutional decisions such as devolution and Brexit undoubtedly call this approach into question (see again chapter 1, section 1.2.1 and chapter 2, section 2.4 and the current pressure to conceive of a more expansive ‘shared sovereignty’). Nevertheless, Dicey’s view of representative democracy believes that because of regular elections, the legal sovereigns, i.e. Parliamentarians, will reflect the views of the electorate through a bottom up transfer of authority – a feature Paul Craig describes as Dicey’s conception of ‘self-correcting majoritarian democracy’.

Speaking roughly, the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors; that which the majority of the House of Commons command, the majority of the English people usually desire.

As many academics and the debates underlying the development of public law have subsequently shown, the UK Parliament cannot be said to represent, at least in the way that Dicey suggests, the direct views of the electorate. Features of the modern legislature such as standing committees, processes surrounding the introduction of


\[67\] Dicey (n 64) 83.
legislation and an increase in delegated legislation, have all increased executive control of the legislative process through the conduit of the political party.68 Dahl refers to the modern version of representative democracy based on universal suffrage as ‘polyarchy democracy’ (based on the recognition that many previously defined democratic systems, even those famously espousing human rights premises denied those very rights to many of their citizens.)69 Dahl asserts that contemporary polyarchy democracy such as that found in the UK has six defining features, namely: elected officials; free, fair and frequent elections; freedom of expression; access to alternative sources of information; associational autonomy; and inclusive citizenship.70

In terms of normative commitments underpinning the devolution of power to the legislatures of Scotland, Wales and Northern Ireland within the past 20 years, there has been a lack of clarity with the process largely perceived as ‘ad hoc’ and ‘reactive’.71 That said, given the process of devolution at the UK constitutional level involves a grant of autonomy72 on a national basis, a combination of both self-government and nationalism are at play.73 At the devolved level, especially important to self-government are the principles of subsidiarity and consent. Subsidiarity, as first discussed in chapter 2, section 2.2.1 is the commitment that ‘power should be exercised at the lowest level possible consistent with good government’.74 Devolution is frequently understood as embodying this principle, which also increases individual autonomy as legal authority is brought into closer relationship with the persons affected, offering them more influence in terms of shaping the legislature.75 (An interesting side note to this reality is the question of whether it is the perception of influencing power or indeed the reality which is at issue for citizens, given the fact

68 Craig (n 66).
69 Dahl (n 53) 37.
70 Dahl (n 53).
71 Constitution Committee, ‘The Union and Devolution (2015-16, HL 149)’ para 155 and 161 (see also generally).
73 Constitution Committee (n 71) 189 (on nationalism).
74 ibid 195.
75 ibid 195–197.
that the public often do not understand the complexities of the devolution settlements on specific issues - a point that extends to the European institutions and is a challenge for multi-level governance generally.\(^{76}\) Equally, the principle of subsidiarity or devolution in the UK is underpinned by the premise of ‘consent’. Perhaps in response to a growing sense of nationalism, the modern devolution settlement initially occurred by way of referendum, such that it was based on the directly ascertained preferences of the regions in question. Although referenda are no longer consistently held for further devolution of powers, there is an understanding that consent exists in such cases.\(^{77}\) Yet, as the Constitution Committee noted in 2016, a more systematic approach to when the consent of the people via referendum should occur in the devolution context within the UK should be made clear.\(^{78}\) This is important to ensure that devolution does not occur merely as a way to relieve administrative burden at Westminster. As chapter 5, section 5.5 will pursue in more detail, while devolution might increase autonomy, there is an absence of trust between the devolved and central organs of UK government on areas of shared power. In terms of moving forward with a stable Union, it is of note that the Constitution Committee considered a need for an increased sense of Union solidarity.\(^{79}\) In that sense, while voices for devolution within the constituent nations have been largely recognised, it may be noted that Unionist voices with greater ties to the Union that the constituent nations have to an extent been under recognised.

On the latter issue, the strongest public voice for the Union tends to come from aspects of the community within NI. Because of conflict in that jurisdiction, the devolution settlement has amended the idea of political equality. Under a power-sharing consociational government established by the Belfast (Good Friday) Agreement 1998, elected representatives are required to designate as ‘nationalist,’ ‘unionist’ or ‘other’\(^{80}\) with certain significant issues requiring cross-community

\(^{76}\) ibid 199–205.
\(^{77}\) Generally on ‘consent’ and ‘responsiveness’ (or demand-led devolution), see ibid 182–194.
\(^{78}\) ibid 186.
\(^{79}\) ibid 164–170.
\(^{80}\) NI Assembly, Standing Order 3(7). See also The Belfast (Good Friday) Agreement 1998 Strand 1, para 5. See also, Northern Ireland Act 1998 c.47 s 4(5).
support. Cross-community consent requires the majority of both unionists and nationalists, leaving persons designated as ‘other’ with less influence on the political landscape and so a reduced autonomy in comparison to unionist and nationalist parties.\(^{81}\) While the rigidity of the devolution settlement may have aided the acceptance of a new normative power-sharing governance in NI, it has ultimately been to the disadvantage of NI citizens, at least theoretically, in terms of autonomy and political equality. This is both as a result of cross-community support arrangements but even more so because the power-sharing government has not been in sufficient agreement to ‘share power’ for almost three years.\(^{82}\) While EVP will later embrace the idea of sharing power within the thesis, NI may be testament to how a rigidly imposed sharing can become unresponsive to the needs of the people.

Returning to the fundamental premises of democracy, in addition to self-government then and the moral equality embedded within democracy, *liberal* democracy is further inclusive of the idea of human rights. John Stuart Mill is traditionally attributed as forming the first systematic defence of liberal democracy.\(^{83}\) In *On Liberty* and *Considerations on Representative Government*, Mill focused on curbing one of democracy’s greatest problems: the potential tyranny of the majority rule. According to Mill, in ‘a representative body actually deliberating, the minority must of course be overruled; and in an equal democracy the majority of the people, through their representatives, will outvote and prevail over the minority and their representatives’.\(^{84}\) To avoid tyranny by legislative majorities, Mill focused in his seminal work on the limitations of government power, and in particular the sphere of freedom which should be accorded to the individual. This idea is further developed


\(^{82}\) For a citizen’s initiative, see https://howlonghasnorthernirelandnothadagovernment.com/ (accessed 15/11/2019).


below through the commitment of UK statute and common law to certain fundamental human rights.

3.3.3. The UK Human Rights System

UK law’s modern moral code is dominated by debate about human rights.\(^85\) This section details how UK common law and statutory human rights protections find their primary philosophical underpinnings in classical human rights theory. As this section will however note, the UK maintains a commitment to a classically liberal value system from which international human rights law partially diverges.

An early formative recognition of concepts corresponding to those of modern-day human rights law can be observed within UK law through the medieval Magna Carta of 1215. The Magna Carta was a charter that sought to limit monarchical power through Parliament and was designed primarily to protect privileged citizens from the monarch by affording certain rights in relation to the justice system.\(^86\) Not until over 400 years later, did a more comprehensively applicable charter become law, when the 1689 Bill of Rights was passed setting out certain civil rights, such as free elections, frequent parliaments, freedom from government interference, and fair treatment by the courts. The 1689 Bill of Rights is said to have been used as a model for the US Bill of Rights drafted a century later in 1789.\(^87\) Indeed, core concepts from both the Magna Carta and the 1689 Bill of Rights remain in force in UK law today.\(^88\) The UK common law also evolved in the 17\(^{th}\) and 18\(^{th}\) centuries to recognise a greater value in individual protection, influenced by the English philosophers of natural rights and liberalism identified above. This was achieved through the recognition of civil

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\(^{86}\) See generally, Anthony Arlidge and Igor Judge, Magna Carta Uncovered (Hart Publishing 2014).


\(^{88}\) Note that the Bill of Rights does not apply to Scotland which has the Claim of Right Act 1689 instead, and that there is ambiguity over its application to Northern Ireland. See, Lucinda Maer and Oonagh Gay, ‘The Bill of Rights 1689’ (HC SN/PC/0293 2009) 3.
rights such as the right to liberty, private property and freedom of assembly. As mentioned in chapter 2, section 2.3.1, the common law does not recognise a substantive right to equality but has more recently espoused further civil rights such as the right to life and access to justice, neither of which come as a surprise considering the self-preservation analysis of Hobbes and Locke and the early emphasis on the justice system within UK charters. Indeed, over the years the UK common law has found occasion to find the views of both Thomas Hobbes and John Locke influential, and the liberal values of the dignity and autonomy of the individual as well as equality between individuals are mainstays. As previously discussed, through the principle of legality, common law rights have been considered fundamental rights and are therefore accorded a higher status in UK constitutional law.

With the elevated status of common law rights in mind, it must yet be considered that the primary constitutional mechanism through which the UK seeks to protect human rights today is the Human Rights Act 1998, a statute that gives domestic effect to (most of) the European Convention on Human Rights (ECHR), a regional treaty agreed under the auspices of the Council of Europe outlining primarily civil and political rights. This remains the case despite the resurgence in the use of common law rights in UK courts noted earlier. (Indeed, the UK Supreme Court has made clear...
in recent years that the advent of the Human Rights Act did not coincide with a cessation in common law rights.\(^{94}\) The ECHR has the explicit intent to ‘take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [on Human Rights]’ 1948\(^{95}\) – a much broader international statement on human rights aspirations which also includes socio-economic rights. Since the enactment of the Human Rights Act therefore, the jurisprudence of the European Court of Human Rights has been influential on the interpretation of rights under that Act (see chapter 2, section 2.2.3 on the Section 2 obligation to ‘take into account’ the jurisprudence of the Strasbourg court). As such, the philosophical underpinnings of international human rights law are also key to understanding the approach of the contemporary UK human rights system and in this regard a significant overlap with the common law approach can be identified.

International human rights law is also most commonly thought to borrow from the philosophy of natural rights and liberalism, especially as those ideas were conceived by the Enlightenment thinkers.\(^{96}\) However, it should also be noted that the link is one of dominant influence and not rigid linear argument and that there are important observations made by scholars who dispute the suggested link. Samuel Moyn for example, sees human rights law as a movement with much more modern origins. For Moyn, human rights law simply filled a void caused by other state-based or universalist utopias in the 1970s.\(^{97}\) He argues that human rights were never truly

\(^{94}\) See for example, \textit{R (Osborn) v The Parole Board; R (Booth) v The Parole Board; Re Reilly} [2013] UKSC 61; 2014 AC 1115 [57 (Lord Reed)].

\(^{95}\) European Convention on Human Rights. See also, UN General Assembly, ‘Universal Declaration of Human Rights’ 10 December 1948 (217 A (III)).

\(^{96}\) E.g. Gearty (n 91) 26, 75; Stephen Sedley, \textit{Ashes and Sparks: Essays on Law and Justice} (Cambridge University Press 2011) 291 (on ECHR); George Letsas, \textit{A Theory of Interpretation of the European Convention on Human Rights} (Oxford University Press 2007) 17 (on ECHR); Griffin (n 27) 13; Langlois (n 38) 80; Onora O’Neill, ‘Response to John Tasioulas’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), \textit{Philosophical Foundations of Human Rights} (Oxford University Press 2015) 71. See also, French Declaration on the Rights of Man and Citizen 1789 which talks of the ‘imprescriptible natural rights’ of all human beings; American Declaration of Independence 1776. In Marie-Bénédicte Dembour’s four schools of human rights thought, she identifies scholars from the ‘natural’ school as those who tend to ‘conflate’ the idea of human rights with human rights law, and also those who tend to celebrate human rights law the most. See, Marie-Bénédicte Dembour, ‘What Are Human Rights? Four Schools of Thought’ (2010) 32 Human Rights Quarterly 1, 10. Dembour’s other schools are entitled, ‘protest’, ‘deliberative’ and ‘discourse’.

universal because the state ‘was their sole and essential crucible’. For David Boucher, the British Idealists are a closer reflection of the UDHR than Enlightenment philosophy. The Idealists rejected the abstract individualism of natural rights theory (though they did not reject natural rights) considering it overly egotistical, preferring to focus on the social nature of human beings and the common good. Although not accepted as the dominant framing of international human rights law, at least in its modern manifestation, the communitarian critiques engaged with in section 3.4 of this chapter have much in common with these Idealist ideas. For others still, the international human rights framework is posited simply as a unique response to the post-war historical context.

There is a clear avoidance of explicit theorising in the treaty texts comprising international human rights law. The UDHR does not specify from where or on what basis humankind can be said to derive the rights contained within, and neither does it seek to. In the 1948 United Nations Educational, Scientific and Cultural Organisation (UNESCO) study which informed the drafters of the UDHR, a select list of global philosophers were surveyed for justifications concerning the individual rights that society should respect. In the final report, committee member Jacques Maritain related the famous comment by one participant of the UNESCO meetings that, ‘we agree about the rights but on condition no one asks us why’. The hope of the Committee was not to eradicate the differences in the philosophical justifications for rights but rather assist in the discovery of common principles that could mitigate

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100 ibid ch 8. Influential Idealists included T.H. Green (1836-1882) and Bernard Bosanquet (1848-1923). See, e.g. TH Green, Lectures on the Principles of Political Observation (Longmans Green 1917); Bernard Bosanquet, The Philosophical Theory of the State (4th edn, Macmillan 1923). Many Idealists were influenced by German philosopher Hegel (1770-1831).


divergences of interpretation caused by the different approaches. Yet as will be demonstrated, although the UDHR does not explicitly commit to any particular philosophical foundation, even the identification of common principles involves a degree of value judgment on which the influence of Enlightenment thinking is clear. A core purpose of the dominant thinking during this era was to find agreement on certain fundamentals, and thereby manage conflict within a socially plural world. As will be increasingly discussed, international human rights law embodies a fundamental and unsustainable confusion in that it tries to simultaneously incorporate and neutralise pluralism, without any clear theoretical framing. That is to say, it attempts to set out universals while recognising some pluralism within those universals, on the basis of a dominant theory which is abstract and essentialist, leaving no room for philosophical pluralism. The reality of human rights law’s universal norms, as the discussion of Christopher McCrudden’s work later in the chapter points out, is that in practice it leads to great plurality of outcomes (see below and further chapter 5, section 5.4); a feature that is exacerbated by constitutional pluralism in the human rights system (see also above, chapter 2, section 2.2.1).

Despite the addition of some socially orientated overlay, the influence of classical liberalism and natural rights theory (otherwise also called classical human rights theory), can be observed in the preamble to the UDHR which states that the Declaration is based on a recognition of the ‘inherent dignity and of the equal and inalienable rights’ of all human beings. Article 1 then posits that:

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103 UNESCO (n 101) Appendix II, 5-6.
104 McCrudden believes that the current human rights system is normatively as well as institutionally pluralistic, see Christopher McCrudden, *Litigating Religions: An Essay on Human Rights, Courts, and Beliefs* (Oxford University Press 2018) 133.
105 Douglas-Scott points to the different rights systems of the EU, ECHR and UK, all of which she notes, have at times advocated a degree of autonomy for their system. Since these systems each hold different ideas about who possess rights and the types of rights possessed, the UK can be said to operate a degree of human rights constitutional pluralism. Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing 2013) 325–327.
106 Inalienable being understood to mean that the rights cannot be given away.
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

This recognition that human beings are born with dignity, freedom and equality as well as conscience and the capacity to reason situates these features in a place which precedes any political or legal recognition. They are, as put elsewhere, taken to be a ‘self-evident’ aspect of the human person which pre-exists their engagement in society. For Linda Hogan, the individualistic nature of the Declaration rights is apparent by the absence of any reference to the situation of persons within groups or communities. Hogan believes that the Declaration reflects:

liberal’s normative conception of the person as an individual, whose attachments are supplementary to her essential nature and whose identity can be articulated apart from her relationships, loyalties, and encumbrances.

It is worth noting at this juncture that liberal philosophy, even in its modern forms, remains highly individualistic with an emphasis on ‘rational individuals capable of realising themselves independently.’ According to Freeden, the philosophical branch of liberalism has not given sufficient recognition to the political evolution of liberalism which has, at times, included a strong social element – see for example, his third and fourth layers, where the fourth includes the British welfare state era and the ‘Beveridge Report’ of 1942. (See also in this regard the earlier comments on the sensitivity of the UK’s value constellation to politics in section 3.2 above.) For Freeden, the ‘decontextualized timelessness of philosophical liberalism, and its

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107 The term ‘self-evident’ is used in the American Declaration of Independence 1776 (n 96). The Declaration was drafted by Thomas Jefferson, often said to be heavily influenced by John Locke. According to Hunt, the US Declaration, French Declaration and UDHR all require three features of human rights, namely: they must be natural; equal; and universal. Hunt, Inventing Human Rights: A History (n 35) 20.
108 Hogan (n 28) 31.
109 Freeden (n 41) 99- against an analysis of Rawls for example.
indifference to history, play down the importance of mutating social relationships in constituting the individual.'\textsuperscript{111} With Freeden’s point in mind, it can therefore be legitimately suggested that although the structure of the Declaration clearly applies a liberal philosophical theory of rights, it also notably goes beyond traditional philosophical liberal values by including socio-economic rights; which as Freeden points out, is in fact a core feature of certain layers of political liberalism. These rights have been further enshrined in the International Covenant on Economic Social and Cultural Rights 1976 (ICESCR), an international treaty ratified by the UK although not incorporated into domestic law (see immediately below).

The UK Government has ratified eleven international human rights treaties, including the International Covenant on Civil and Political Rights 1976 ('ICCPR') and the ICESCR;\textsuperscript{112} two treaties which along with the UDHR represent the core of the international human rights framework, known as the international bill of rights. By virtue of the ‘Ponsonby Rule’ - originally a constitutional convention and now a statutory requirement under the Constitutional Reform and Governance Act 2010\textsuperscript{113} - the UK Government lays international treaties before Parliament for 21 days prior to ratification. As such, despite the UK’s dualist system for incorporating international law - requiring international treaties ratified by the UK Government to be given domestic effect before becoming part of UK law,\textsuperscript{114} - it should be further understood that since the Ponsonby rule was placed on a statutory footing, the UK Parliament has now given at least its implicit consent to all ratified international treaties even if those have not been incorporated into domestic law.\textsuperscript{115} In the 2015 case of \textit{R (SG) v Secretary of State for Work and Pensions}, Lord Kerr in a powerful dissenting judgment

\begin{footnotes}
\footnote{111} ibid 99.
\footnote{112} Note that the dates attributed are those when the treaties came into force.
\footnote{113} Constitutional Reform and Governance Act 2010 c.25 ss 20–22. The Constitutional Convention started in 1924.
\footnote{114} This is done via the prerogative power. For a discussion on the rationale behind the dualist approach of the UK to international obligations, see, Hunt, 8–9.
\footnote{115} The lack of explicit consent from Parliament through law remains the primary rationale for applying a dualist model of international law, even if that consent can now be argued to be implied under the Constitutional Reform and Governance Act 2010. Generally on the rationale, ibid; \textit{R v Secretary of State for the Home Department, Ex parte Brind} [1991] 1 AC 696; [1991] 2 WLR 588, 733; \textit{R v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg} [1994] QB 552; [1994] 2 WLR 115, 567–568 (and 557–558); \textit{JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry} [1990] 2 AC 418; [1989] 3 WLR 969, 499–500.
\end{footnotes}
sought to give an overview of the role of unincorporated treaties in UK domestic law. Lord Kerr considered that unincorporated treaties might have a role in three situations: (i) as an aid to statutory interpretation; (ii) as an aid to development of the common law; and (iii) as a basis for legitimate expectation. Concerning the first, it is a long held principle of UK law that unincorporated treaties can serve as an aid to statutory interpretation where there is an existing ambiguity within domestic law. In SG, Lord Kerr also highlighted that this principle operates in conjunction with a ‘strong presumption’ in favour of interpreting domestic law in a manner that does not breach the UK’s international obligations. Furthermore, although it has also been said that the common law cannot be used to incorporate international treaties ‘through the back door’, it is further assumed that as with statute law, ambiguities in the common law, in addition to its development generally, should ordinarily be resolved in harmony with the UK’s international obligations. Finally, Lord Kerr considered that while the dualist approach to unincorporated treaties should continue to apply, there was a strong argument in favour of excepting from this principle unincorporated human rights treaties. Instead, he argued that such treaties might be said to give rise to a legitimate expectation, ultimately considering in SG that the ‘best interests of the child’ principle under Article 3(1) of the UN Convention on the Rights of the Child was directly enforceable in UK law. In justifying his position, Lord Kerr considered that the rationale for the dualist model which requires Parliament to pass explicit domestic legislation before a treaty is incorporated was to protect citizens from executive abuse. Lord Kerr’s thesis appears to be that since this rationale is essentially the same as that of international human rights treaties, it is reasonable to argue that they form enforceable rights under domestic law.

116 R (SG and others) v Secretary of State for Work and Pensions [2015] UKSC 16; 4 All ER 939 [238].
117 R (SG and others) v Secretary of State for Work and Pensions (n 116). See also, Salomon v Commissioners of Customs and Excise [1967] 2 QB 116; [1966] 3 All ER 871. Salomon established that two criteria must first be met: the legislation in question is ambiguous, and there is evidence to suggest that the legislation was intended to fulfil international obligations. See further the Scottish courts: T Petitioner 1997 SLT 724 (Court of Session); Assange v Swedish Prosecution Authority [2012] UKSC 22; [2012] 2 AC 471 [122].
119 R (SG and others) v Secretary of State for Work and Pensions (n 116).
120 Ibid. Lord Kerr relied upon the obiter of Lord Steyn in JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry (n 115).
Although noting the ‘radical’ and broad nature of the reasoning (and likely unacceptability for UK courts generally), Lord Kerr also appeared open to Bharat Malkani’s suggestion that the effect of international human rights treaties is to amount to ‘the legislation of a universal community of rational beings’. 121 This was by virtue of a shift in the UK constitutional order instigated by the Human Rights Act – resulting in the pre-eminence of the rule of law – should today mean that international human rights treaties do not require transformation into UK law.

The rationale Lord Kerr entertains has echoes of the point made earlier regarding the significance that human rights standards play in arguments toward the elevation of the rule of law and therefore the judiciary as the sovereign legal authority. Yet it cannot be ignored that in the history of UK case law, reference to international human rights treaties has been clearly skewed in favour of certain treaties over others. This was especially noticeable for example, with the ECHR prior to its incorporation, but is similarly evident with the ICCPR, and the civil and political rights provisions of the UDHR; 122 as well as the more recent addition, as SG demonstrates, of the UN Convention on the Rights of the Child. 123 Note also that chapter 2, section 2.3 has determined that the rule of law is not preeminent within the UK but rather continues to share sovereignty with, at least, the UK Parliament.

Further sources of human rights law in the UK are customary international law (provided it does ‘not abrogate a constitutional or common law value’), 124 and for the present time, EU law. As noted, the origins of the EU were centred on economic objectives and to the present day, even with its expansion into a political union and


122 A systematic review of English court cases between 1964 and 1996 revealed that during this period, court references to unincorporated treaties were limited to, predominantly the European Convention on Human Rights, and occasionally the International Covenant on Civil and Political Rights and the UDHR. See, Hunt, Appendix 1.

123 See also, Birmingham City Council v D [2019] UKSC 42; [2019] 1 WLR 5403 [45].

124 Quotation from R v Jones (Margaret) [2006] UKHL 16; [2007] 1 AC 136 [29]. See for a nuanced discussion on the application of customary international law, R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] AC 1355 [142-151 (Lord Mance)]. For a discussion on jus cogens, see chapter 5, section 5.2 of the thesis.
the social sphere, this objective remains a dominant focus. An explicitly EU body of human rights law has been slow to evolve with the status of human rights today in EU law ‘dramatically’ different from the 1950s. For example, although EU law was incorporated into UK law via the European Communities Act 1972, it was not until the Treaty of Lisbon entered into force in 2009 that the EU’s main articulation of human rights found in the EU Charter on Fundamental Rights (CFR) became part of UK law. The first steps towards a body of EU human rights law, or rather, ‘fundamental rights’ as the preferred EU term, were however apparent much earlier in the jurisprudence of the European Union, Court of Justice (EUCJ) in the context of the Union’s economic mandate. Craig and de Búrca describe how the Court initially recognised a body of fundamental economic rights such as the right to property and the freedom to pursue a trade or profession, to mirror those found in the national constitutions of the member states and to alleviate concerns by economic actors that their rights were not as well protected under EU law as in the national system. Since these early fundamental rights were introduced as a restraint on EU institutions as opposed to member states the move was widely supported at national level. Yet, the adoption of human rights into EU law has not been straightforward. Prior to the CFR, human rights were incorporated as part of the ‘general principles of EU law’, which are namely the ‘constitutional traditions common to the Member States’ (Article 6 Treaty on European Union (TEU)). Indeed, it was through the general principles that EU law initially protected a fundamental right of a citizen against a Member State. General principles also include the ECHR to the extent that it meets the Article 6 criterion. However, since the legal traditions of Member States

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126 ibid.
128 Craig and Búrca (n 125) 380.
129 Craig and Búrca (n 125).
131 Case 29/69 Stauder v City of Ulm ECLI:EU:C:1969:57.
132 The EU is now obliged to accede to the ECHR under Article 6(2) TEU. In practice, however, this has proven difficult and stalled. The CJEU issued an opinion which outlined its concerns over how the two courts would work together in Opinion 2/13 on Accession to the ECHR, CJEU, EU:C:2014:2454.
relating to certain human rights vary, this effort has not been without its difficulties.\textsuperscript{133}

Today, in addition to the CFR, Article 2 TEU protects rights at treaty level by outlining the foundational commitments of the EU to the ‘the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’ The Article continues by noting that ‘[t]hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ Further sources can include the human rights provisions found in EU secondary legislation such as Directives, as well as the litany of rights which accompany the status of individuals as citizens of the EU; a status also established by the Treaty of Lisbon in 2009 (Article 20 Treaty on the Functioning of the European Union (TFEU)).\textsuperscript{134}

By according therefore, both treaty status to the Charter of Fundamental Rights and citizenship status to individuals in the EU, the Treaty of Lisbon engendered an elevated status to human rights within EU law, such that EU law could now be said to be a generator of human rights standards and not merely a recogniser of rights held in national constitutions. The influence of the EU Charter of Fundamental Rights post-Lisbon was noticeable. Brice Dickson’s 2013 analysis on the UK Supreme Court indicates that at least until the date of his publication, elements within the UK courts were minded to increasingly adjudicate on the EU Charter in relation to human rights matters,\textsuperscript{135} perhaps giving rise to some of the anti-CJEU rhetoric encountered in chapter 1, section 1.2.1. of this thesis.\textsuperscript{136} Importantly, in terms of the analysis that

\textsuperscript{133} A common example includes the issue of abortion, wherein the right to life in certain EU member states has been interpreted to include the life of the foetus, a position not adopted across the EU as a whole. See e.g. Case C-159/90 The Society for the Protection of Unborn Children Ltd v Stephen Grogan [1991] ECR I-4685 [20]. See further, Paul Craig and Gráinne de Búrca, EU Law: Texts, Cases and Materials (6th edn, Oxford University Press 2015) 390. See also, A, B, C v Ireland ECtHR application no. 25579/05 (16 December 2010).

\textsuperscript{134} Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), OJ C 202/1 47.

\textsuperscript{135} Dickson (n 89) 38.

follows on the liberal philosophical approach of UK law to human rights, the EU Charter includes comprehensive recognition of social rights, though as with all EU law, this only applies when the matter falls within the scope of EU law.\(^{137}\) That said, however, the complicated terminology of the EU Charter which attributes to social rights provisions the designation of ‘principles’ as opposed to formal rights,\(^ {138}\) along with Protocol 30 pertaining to the UK and Poland which attempts to limit the application of the social rights provisions,\(^ {139}\) has ensured that the Charter itself has done little to alter the protection of social rights within the constitutional framework of human rights within UK domestic law.\(^ {140}\) In addition, despite the European ‘domestication’ of human rights law through the CFR, there remain consistent concerns about the CJEU’s ability or willingness to become a viable human rights court. This is not least because of a seeming reluctance of the CJEU’s to accede to the ECHR as required under Article 6(2) TEU,\(^ {141}\) but more generally on issues of economic austerity and refugees.\(^ {142}\) Yet, it is not the EU, but rather the UK’s protection of socio-economic rights that is of core interest to the thesis and it is to this subject, along with communitarian concepts within human rights that it now turns.

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\(^{139}\) Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, [2012] C 326 313. Protocol 30, Article 1(1) states: ‘The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. Protocol 30 Article 1(2) states: ‘In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.’ The CJEU has however made clear that Protocol (No 30), Article 1(1) cannot have the effect that the UK or Poland opts out of their legal obligations. See, Judgment of 21 December 2011, NS v Secretary of State for the Home Department and M E and Others C 411/10; ECLI:EU:C:2011:865 [120–121]. But note that it did not adjudicate specifically on Article 1(2) of Protocol 30.


\(^{141}\) See the opinion of the CJEU which stalled the momentum on this issue, Opinion 2/13 on Accession to the ECHR, CJEU, EU:C:2014:2454 (n 132).

i. **Socio-Economic Rights and the Public Interest**

In recent years there can be observed a growing concern in human rights discourse for social rights provisions. This has been undoubtedly fuelled by the apparent growth in inequality between the world’s wealthiest and poorest persons at a time when human rights as a discourse was and is flourishing. The UK’s approach to human rights through the common law, the Human Rights Act and through EU law including Protocol 30 has resulted in a divergence from international human rights law in terms of the explicit recognition of socio-economic rights. That being said, UK law does demonstrate a commitment to a certain respect for socio-economic rights through ordinary statute law, such as a scheme of social security benefits which includes some housing provision, a national health service, a minimum wage, free secondary education, and the availability of trade union membership. There is a complex and vast array of laws pertaining to these areas, and responsibility has been increasingly devolved. In addition, as the thesis will shortly detail, the ECHR has been considered to extend into the sphere of social economic rights; however, claims on these grounds have on the whole, not amounted to a strong protection for social rights at the UK constitutional level.

The UK’s approach to socio-economic rights can be best understood considering some of the unique challenges which face socio-economic rights at a generic level. Socio-economic rights are a more complex set of human rights concepts to realise in practice because of the added responsibilities they place upon the state in the form

145 In terms of the ECtHR, see e.g. *Stec v UK (Admissibility decision) Application Nos 65731/01 65900/01 (ECHR 6 July 2005)*: which states, ‘Whilst the Convention set forth what are essentially civil and political rights, many of them have implications of a social or economic nature, The mere fact that the interpretation may extend into the sphere of social and economic rights should not be a decisive factor against a decisive interpretation; there is no water-tight division separating that sphere from the field covered by the Convention’. See further, Paul Hunt, *Social Rights Are Human Rights: But the UK System Is Rigged* (Centre for Welfare Reform 2017); Merris Amos, ‘The Second Division in Human Rights Adjudication: Social Rights Claims under the Human Rights Act 1998’ (2015) 15 Human Rights Law Review 549. See generally, Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart Publishing 2007).
of greater resource allocation. The challenges facing the international protection of socio-economic rights which are outlined below include: the disjuncture between the commitment to socio-economic rights as universal and the nature of the legal obligations placed upon states to realise such rights; the inability of socio-economic rights as conceived to address inequality; and the disharmony between a commitment to socio-economic rights and a commitment to neo-globalisation and/or a small state conception.  

In international human rights law, while socio-economic rights are recognised on an equal moral plane as civil and political rights – all human rights are ‘inalienable’ and ‘universal’ - the legal obligations upon states are different under the ICCPR and the ICESCR. Article 2 of the ICCPR places an obligation upon state parties to ‘respect’ and ‘ensure to all individuals within its territory’ the rights set out in the Covenant; this includes the taking of ‘all necessary steps’ such as laws or other measures. In contrast, Article 2(1) ICESCR also requires that state parties ‘undertake to take steps...especially economic and technical’ but this time that obligation is ‘to the maximum of its available resources’ with a view to ‘achieving progressively the full realisation of the rights’. The Committee on Economic, Social and Cultural Rights (CommESCR) – the treaty body which oversees the ICESCR – has emphasised that certain obligations within the ICESCR are nevertheless of immediate effect, such as the prohibition on discrimination concerning the Covenant rights as well as the obligation ‘to take steps’ within a reasonably short period of time which are ‘deliberate, concrete and targeted’. This includes a reading of Article 2(1) which supports that at the least, there exists upon states a ‘minimum core obligation,’ such that states should ensure ‘minimum essential levels of each of the rights’.Were the Covenant not to be read in such a way, the CommESCR considers that ‘it would be largely deprived of its raison d’être’. Examples of the minimum core obligations

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147 International Covenant on Economic, Social and Cultural Rights 1976 (n 9); International Covenant on Civil and Political Rights 1976 (n 9).
148 CommESCR, General comment No. 3: The nature of States parties’ obligations 1990 paras 1–2.
149 Ibid 10.
150 Ibid.
concerning socio-economic rights that therefore exist upon states parties under international law include ensuring that a significant number of individuals are not without essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education.\textsuperscript{151} In addition, the CommESCR’s more recent comments on state obligations emphasise the continuing importance of the Covenant obligations in the contexts of both austerity and business (in the latter context applying the Covenant extraterritorially and in relation to privatised public services).\textsuperscript{152} Yet, despite the equal moral emphasis on the two sets of human rights, sometimes captured by reference to their ‘interdependence’ and ‘indivisibility’,\textsuperscript{153} the different nature of the rights and their legal obligations at an international level has for some scholars undermined the theory which underpins the universality of human rights as being pre-political and something existing as an innate aspect of being human. This is especially the case for those who recognise that the exercise of civil and political rights depends upon a certain socio-economic opportunity.\textsuperscript{154}

Onora O’Neill for example, stresses that ‘[i]f we take rights seriously and see them as normative rather than aspirational’ then ‘we must take obligations seriously’.\textsuperscript{155} The international human rights framework, she believes, does not support rights with such counterpart obligations. Taking just one example, O’Neill argues that in the case of socio-economic rights (what she calls ‘rights to goods and services’), since progressive realisation does not amount to a counterpart obligation, such rights are

\textsuperscript{151} ibid.
\textsuperscript{153} International Covenant on Civil and Political Rights 1976 (n 9); International Covenant on Economic, Social and Cultural Rights 1976 (n 9); CommESCR, General comment No. 3: The nature of States parties’ obligations (n 148).
\textsuperscript{154} As above in chapter 2, section 2.3.1, see, Freeden (n 41): the exercise conception of liberty requires the institution of social goods. For a further prominent example, see the work of TH Marshall (1950) and Tom Bottomore (1992), Citizenship and Social Class (Pluto Press 1992).
better conceived as special or institutional, rather than universal. O’Neill’s point is as follows:

A normative view of human rights cannot view rights to food and medicine as pre-institutional while denying that there are any pre-institutional counterpart obligations or obligation holders; it must make a congruent view of the counterpart obligations. But this suggests that such rights must be special, institutional rights rather than universal human rights.\textsuperscript{156}

As such, O’Neill believes that a view of the Declaration and subsequent Covenants as embodying only aspirational rights would not be ‘wholly a misfortune’ since it would be more normatively sound.\textsuperscript{157}

Samuel Moyn goes a step further by pointing out the incapacity of the nature of the current legal obligations, even if fulfilled in their current form, to address global inequality.\textsuperscript{158} In his most recent contribution on human rights entitled \textit{Not Enough: Human Rights in an Unequal World}, Moyn draws an important distinction between ‘sufficiency’ which he defines as ‘how far an individual is from having nothing’ and how well she is doing \textit{in relation to some minimum of provision}, and ‘equality’, which is defined as ‘how far individuals are from one another.’\textsuperscript{159} As Moyn points out, the focus of human rights law through the minimum core obligation is on the former and not the latter.\textsuperscript{160} If improving equality is considered one of human rights laws greatest successes, it is undoubtedly, as Moyn notes, status equality, as opposed to any form of redistributive equality.\textsuperscript{161} Moyn further considers that a ‘companionship’ has existed between human rights and ‘market fundamentalism’.\textsuperscript{162} According to Moyn, both human rights and market fundamentalism have relied upon the nation state to achieve the intended goals. (As previously mentioned, Moyn is known for detaching

\begin{small}
\begin{enumerate}
\item\textsuperscript{156} ibid 199.
\item\textsuperscript{157} ibid 201.
\item\textsuperscript{158} Moyn, \textit{Not Enough: Human Rights in an Unequal World} (n 143).
\item\textsuperscript{159} ibid 3.
\item\textsuperscript{160} ibid 220.
\item\textsuperscript{161} ibid 3.
\item\textsuperscript{162} ibid 8–9.
\end{enumerate}
\end{small}
human rights law today from mid-20th century statements such as the UDHR and locating it closer to the 1970s, a time when market fundamentalism also began to dominate.) In *Not Enough*, Moyn argues that human rights were located in the post-Communist ‘welfare state crucible’ which focused on the more ambitious objective of relative material equality but subsequently severed from that foundation as the discourse developed, such that human rights discourse is now heavily anti-state in practice. Moyn’s ultimate view on the uncomfortable coexistence of strong human rights and neo-liberal realities is that human rights are ‘unambitious in theory and ineffectual in practice’ in terms of circumventing the unequal outcomes of neoliberalism. The focus of human rights on sufficiency, i.e. through the minimum core obligations, rather than relative material equality being a key reason for this view. Moyn in fact believes that a much stronger state is needed and importantly that human rights advocates must be prepared to embrace the realities of governing. For Moyn it is the state rather than the universality of human rights that is their essential crucible. That said, Moyn is careful to emphasise that a view must be taken of global justice, such that a form of strong global governance is also needed to reduce inequality. Whatever the varieties of influence on the modern day international human rights standards, Moyn makes an important contribution in explicitly challenging the ability of socio-economic rights conceptions in their current form to address growing inequalities between the rich and the poor. It is perhaps however his implied and correlated conceptual challenge, to both states and human rights advocates, to engage seriously with the process and difficulties of governing in a way that clearly diverges from the view of the state presented by market fundamentalists, that could present that first step forward in terms of addressing inequality.

Paul O’Connell – a scholar whose work has been heavily influential in recent years concerning the relationship between globalisation and human rights – shares many

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163 ibid 8, 218.
164 ibid 216.
165 ibid.
166 Moyn, ‘Plural Cosmopolitanisms and the Origins of Human Rights’ (n 98) 211. See also, Moyn, *The Last Utopia: Human Rights in History* (n 97) ch 1; Moyn, ‘Afterword’ (n 98) 258.
of the same concerns as Samuel Moyn but argues more concretely for this severance between human rights and market fundamentalism. O’Connell concludes that taking human rights seriously requires a ‘conscious[] break’ from the neo-liberal approach.\footnote{O’Connell (n 146) 508.} He argues that even domestic courts perceived as friendly to socio-economic rights despite there being some recognition within their respective constitutional frameworks on which they could ground their judgments (e.g. the Irish, Indian and South African courts), are unlikely to advance socio-economic rights protection in a neo-liberal context.\footnote{Generally, Paul O’Connell, ‘The Death of Socio-Economic Rights’ (2011) 74 Modern Law Review 532.} O’Connell’s thesis is that while the separation of powers or judicial deference could explain the reticence of the courts, the juxtaposition of the jurisprudence demonstrates that courts are willing in the context of civil and political rights to cross into legislative territory but not regarding socio-economic rights. This in turn creates judiciaries only able or willing to realise a negative conception of rights, in tune with the overarching normative market framework. O’Connell considers that neo-liberal globalisation (the dominant model) is theoretically ‘inimical’ to human rights, especially social rights because of the different role each attribute to the state.\footnote{O’Connell (n 146) 484.} O’Connell highlights two ways in which each approach differs: ontologically, and in terms of how each conceives the role of the state. Ontologically speaking, the normative concept found within international human rights treaties of the ‘inherent dignity’ of humanity is, he argues, ‘at variance’ with the neo-liberal push towards individualism, small government and the free market. By way of example, he portrays a typical neo-liberal as one who would view a lack of health care for a particular group, as a ‘failure[] by [the] individual consumers to make adequate provision for their own health-care needs (based on the overall push towards commodification and privatisation of social provision)’.\footnote{Ibid 497–498. Note also that associations between this view and the premiership of Thatcher are not uncommon among the discussions. See, ibid 491, 496; Mark Elliott and David Feldman (eds), The Cambridge Companion to Public Law (Cambridge University Press 2015) 5–7.} In terms of the role of the state, O’Connell juxtaposes the small government envisaged by neo-liberals with the view of a stronger state capable of carrying the social responsibilities
necessary in order to fully realise the obligations placed upon it within the international treaties.\textsuperscript{172}

Indeed, O’Connell’s point concerning the perceived role of the state as an important indicator that directs one to the conception of human rights adopted into law, mirrors in some ways Freeden’s identification of the many conceptions of liberalism. A view that embraces conservative government and a small state is logically less likely to embrace the positive obligations upon the state more prevalent in economic, social and cultural rights. As O’Connell points out, neo-liberal approaches to the role of the state are a direct challenge to human rights, and especially socio-economic rights. This clear relationship between human rights and theories of the state may also help to explain why recent UK governments (including Blair’s New Labour) have not sought to develop enforceable social rights,\textsuperscript{173} and why the Scottish first minister, a social democrat, welcomes exploring the possible incorporation of international commitments on social rights into Scot’s law (see again section 3.2 of this chapter).\textsuperscript{174}

Returning then to the UK more concretely, it has international legal obligations pertaining to socio-economic rights by virtue of its ratification of the ICESCR (designed to uphold the socio-economic rights within the declaratory statement of the UDHR) and the 1961 Council of Europe’s European Social Charter.\textsuperscript{175} Within domestic law, however, there is only a limited recognition of socio-economic rights within the explicit human rights framework through, for example, the non-civil and political elements of the ECHR, such as the right to education (Article 2 of Protocol 1), along with the aforementioned social rights ‘principles’ of the EU Charter. Again, as mentioned, the UK has avoided on a whole, bringing socio-economic rights into the elevated legal framework of common law rights or statutory human rights. Social

\textsuperscript{172} O’Connell (n 146) 498–501.
\textsuperscript{173} Elliott and Feldman (n 171) 5–7.
\textsuperscript{175} The UK has signed but not ratified the revised 1996 Charter; it has ratified the 1961 Charter. See generally, Michael Fordham, ‘Social Rights’ (2013) 18 Judicial Review 379.
rights claims have however been brought under the remit of the Human Rights Act within UK courts, most recently to challenge the austerity measures implemented by the Cameron government after the economic crisis in 2007-2009; measures which are only beginning to be conceived as coming to an end.176 Article 8 of the ECHR (right to a private and family life) and Article 3 (prohibition on inhuman or degrading treatment) have both, for instance, been used along with the Article 14 prohibition on discrimination to claim certain positive state action in the name of social rights. This has been to varying success. On the one hand, the UK courts have been open to finding that social rights issues fall within the remit of the Convention rights: for example, pension contributions (within Article 1 of Protocol 1, the right to property),177 housing benefit,178 home based social care179 and care home provision180 (all within the scope of Article 8). On the other hand, the judiciary have been much less willing to consider that interference disproportionate. In R (SG) v Secretary of State for Work and Pensions (2015) for example, the Supreme Court ruled by a 3-2 majority that although the benefits cap discriminated against single parent females, it was not disproportionate and it was not the ‘function of the courts to determine how much public expenditure should be devoted to welfare benefits’.181 The purpose here is not to determine that the courts are the appropriate sphere for social rights claims to be established.182 (Much of the remainder of thesis is focused on approaching legal sovereignty from the basis of EVP, which it suggests invariably means a greater emphasis on the social nature of human beings). The purpose rather, is to identify that notwithstanding the important and valuable nature of the social protections that do exist within domestic law, the higher protection afforded to civil and political rights in terms of an elevated legal enforceability through the UK human

181 R (SG and others) v Secretary of State for Work and Pensions (n 116) [72]. For an example of an earlier successful claim, see Burnip v Birmingham City Council [2012] EWCA Civ 629; [2012] All ER (D) 170.
rights framework, maintains the UK within a heavily liberal paradigm. That said, as these laws and resource allocations evolve (or fail to evolve) with various UK Governments, whether that is through the decision to privatise social concerns or to implement an age of austerity, so the approach of the UK state can be seen over time to vary between that of social liberalism and neo-liberalism. The height of the UK’s social liberalism occurred during the era that followed the Beveridge Report presented to Parliament in 1942 which aimed to present a comprehensive system of social security. This report presented during war time was followed up by the implementation of many of the social policies mentioned above. Since the post-war years however until the modern time there has been a retreat in state provision of social policies and a shift towards more classical conceptions of liberalism (see further chapter 1, section 1.2.1 and section 3.2 of this chapter above).

Yet in attributing a strongly liberal classification to the UK’s human rights approach, one must further engage with elements of UK law which support, or at least have the capacity to support, a more communitarian orientation. Communitarianism, as briefly touched in chapter 1, section 1.2.2 involves three types of claims centred on the importance of community. Daniel Bell describes these claims as: ‘methodological claims about the importance of tradition and social context for moral and political reasoning, ontological or metaphysical claims about the social nature of the self, and normative claims about the value of community.’ The sense that is discussed here is its meaning as a normative claim about the value of community and how that is reflected within human rights law. Communitarian arguments typically arise in the context of socio-economic rights protection and the application of the public interest concept. On one view, greater recognition and realisation of socio-economic rights can be argued for based on the communitarian argument that an individual will

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183 Letzas (n 96) 17.
184 William Beveridge, Social Insurance and Allied Services (HMSO Cm 6404 1942).
185 See e.g., National Assistance Act 1948 c. 29; National Health Service Act 1946 c. 81; Legal Aid and Advice Act 1949 (repealed).
186 See generally, Derek Fraser, The Evolution of the British Welfare State (4th edn, Palgrave Macmillan 2009). See e.g. more recent and controversial legislation such as, Legal Aid, Sentencing and Punishment of Offenders Act 2012 c. 10; Welfare Reform Act 2012 c.5. See also pertaining to NI, Stormont House Agreement.
187 Bell (n 26).
better flourish if the community within which he or she is situated is also flourishing; and so there is an incentive for the individual to ensure that an element of their property via taxation is used for the benefit of other individuals.\textsuperscript{188} The UK could therefore be said to embody a communitarian orientation to the extent that it realises in law, at any one time, the necessity of social security, adequate housing, access to education or food as previously discussed. Yet, this argument is not limited to socio-economic rights, as civil and political rights are also regarded as imposing positive obligations on the state, such as by taking certain preventative measures to protect, for example, a person’s life and bodily integrity through an adequate criminal justice system.\textsuperscript{189} This somewhat circular reading of the relationship between communitarian concepts and human rights law, whereby human rights law is justified to the extent that it emphasises community well-being which in turn helps individual well-being and places both the individual and the community on a justificatory par. This is indeed how Catholic social theory interprets its conception of individual rights as furthering the common good.\textsuperscript{190}

The concept of the common good, or more typically perhaps in human rights legal language, ‘the public interest’, is also often identified as an avenue through which the UK incorporates communitarian elements into law. It should have been noted that despite the preamble to ICESCR recognising that the individual has duties ‘to the community to which he belongs’, socio-economic rights are legally framed in an individualistic manner, as is the case with most human rights.\textsuperscript{191} The communitarian narrative is introduced only as an additional justification for their existence. The public interest on the other hand, is more commonly considered to recognise non-individualistic interests within UK law, and in this way might be more readily associated with an emphasis on the normative value of community.\textsuperscript{192}

\textsuperscript{188} See e.g., International Covenant on Economic, Social and Cultural Rights 1976 (n 9).
\textsuperscript{190} See for discussion, McCrudden (n 104) 103.
\textsuperscript{191} The right to self determination being an example of a non-individualistic right. See above discussion on UN Charter.
\textsuperscript{192} See for just one example of judicial emphasis on the interests of the community when ruling on negligence of public authorities, Brooks v Metropolitan Police Commissioner [2005] UKHL 24; [2005] 1 WLR 1495, 1510 (Lord Steyn). However, more recently, see both Robinson v Chief Constable of
The public interest has many manifestations in administrative, economics, public relations and legal literature but in UK human rights law it arises most commonly as a qualification to certain civil and political rights. In this regard, the law affords the state the ability to ‘interfere’, ‘limit’ or ‘restrict’ individual rights for reasons generally thought to be in to the general welfare of society, i.e. the public interest. The primary qualified rights are the rights to private and family life (Article 8 ECHR), freedom of thought, conscience and religion (Article 9 ECHR), freedom of expression (Article 10 ECHR), freedom of assembly and association (Article 11 ECHR) and the right to property (Article 1 of Protocol 1 ECHR). The grounds upon which these individual rights are qualified include, variously: national security, territorial integrity, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, the protection of the rights and freedoms of others, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. All such interferences must additionally be in accordance with the law and only go so far as is necessary in a democratic society, a proxy term for ‘proportionality’ (for further discussion on the different interpretations permitted by the qualified rights, see chapter 5, section 5.4). Scholars have already written on how the ECtHR’s interpretation of the public interest has lacked conceptual coherence, and its role as a ‘key determinant of the utility of [individual] rights’. As the list demonstrates, the justified exceptions to the rights mostly invoke wider collective interests although some simply refer to competing individual rights. Collective interests is a more communitarian orientated concept


193 For the various terms, see Articles 8-11 of the European Convention on Human Rights (n 95).

194 Article 9 ECHR is partly absolute and partly qualified. The freedom to change a religion or belief is absolute while the freedom to manifest one’s religion or belief is qualified.


196 The role of ‘the public interest’ in human rights should not be confused with its wider use in judicial review, and especially public interest litigation. Despite obvious overlap, in that case,
because it refers to interests of individuals which are shared, such as a clean environment, a functioning economic market and a tolerant society. The language and framing of the legal provisions fall short however, of the public interest exceptions which invoke collective interests reaching the level of collective rights. More typically, the public interest exceptions can be presented as a term of convenience used to shield government preferences, falling short of even a ‘collective interests’ understanding. By associating the public interest exceptions with state interests as opposed to collective interests, the public interest manifests in UK law as representing a collective agent, i.e. the state, as opposed to the collective interests of individuals. This view of the public interest has arguably hindered the ability of the public interest to be used as a justification for more communitarian orientations in UK law. It further shifts the conception of the public interest away from the interpretation of Aristotle when it manifested in the form of the common good as a key value underpinning democracy.

In addition to the challenges posed to the liberal approach by socio-economic rights and communitarian reasoning, there are additional communitarian challenges to the idea of the human being posited in the classical approach. These challenges have emerged most notably within the field of human rights theory, and ultimately, as discussed below, justify the need to embrace more pluralism in our foundational commitments.

3.4. Ontological Critiques of Liberal Universalism

The secular eradication of God and commencement of human rights foundations at the point of an essential human rationality has itself faced strong criticism centred on how human beings and their relationship with ‘society, values, purposes and ends’

scholars have argued that such litigation is heavily linked by the courts to the rule of law concept. See Anthony (n 192) 141.

198 See generally for two different conceptions of collective rights, as that of collective agents and collective interests, and the argument that the latter is more anti-individualistic, Green (n 197).
are defined.\textsuperscript{199} The main criticisms of classical human rights theory outlined above include two common and interrelated components: (1) it is not possible to identify a fixed notion of the human ‘self’; and (2) reason or ‘rationality’, as the process of enquiry into human relationships, cannot be separated from other human attributes and is itself tradition-dependent. These critiques emanate from, among others, communitarian, feminist and post-modern scholars and in the main serve to challenge the idea of the universality of human rights.\textsuperscript{200} A basic overview of these two elements is provided below and an effort to distinguish the two points, with the additional identification that classical theory is more closely associated with ethical monism, than ethical pluralism.

\subsection*{3.4.1. A Rejection of ‘Abstract’ Anthropologic Essentialism}

As referred to in section 3.3.1 above, anthropologic essentialism is the view that, ‘human life has certain central defining features’\textsuperscript{201} and is a key component of the universalism in classical liberal and natural rights theory. Michael Sandel famously referred to the understanding of essentialism in classical theory as depending on the ‘unencumbered self’ – the notion of a separate self that exists prior to any experience the human person might have.\textsuperscript{202} Communitarians, such as the well-known Sandel, Charles Taylor and Alisdair MacIntyre, believe that this understanding of the human self within classical human rights theory is too individualistic.\textsuperscript{203} Taylor for example, portrays Locke’s view of the human self as constitutive of only one feature: self-awareness. This is based on Locke’s seemingly sole emphasis on the human being’s capacity for reason and reflection through his statement:

\begin{quote}
\textcopyright{\textsuperscript{200} Hogan (n 28) 38; Langlois (n 38) 91.}
\textcopyright{\textsuperscript{201} Nussbaum (n 33) 205.}
\textcopyright{\textsuperscript{203} Taylor (n 5) 25–52; MacIntyre (n 5) 31.}
We must consider what Person stands for; which, I think, is a thinking intelligent Being, that has reason and reflection, and can consider it self as it self, the same thinking thing in different times and places.\textsuperscript{204}

Taylor refers to this conception as ‘punctual’ or ‘neutral’ because ‘self is defined in abstraction from any constitutive concerns’.\textsuperscript{205} It is this view incidentally – that liberalism proposes a theory of the self – that has led certain scholars to assert that liberalism is a substantive, as opposed to merely procedural, theory. Taylor corresponds with Locke’s view of the self to his aspiration ‘to a disengaged subject of rational control’\textsuperscript{206} Instead, Taylor and other communitarians argue that human beings are shaped by their experiences and community contexts in a formative way that cannot be artificially separated from the essential self.\textsuperscript{207} For example, Taylor portrays Locke’s disengaged view as an ‘illusion’, and instead suggests that the human self is deeply linked with the human sense of good, as well as being defined in relation to other selves.\textsuperscript{208} MacIntyre emphasises the importance of understanding the self within the context of historical process, and the language with which the self is expressed at any one time. For MacIntyre, moral philosophy and the sociology of morals are inseparable.\textsuperscript{209} In recognising a modern ‘emotivist self’ at play in contemporary moral debates, he notes that construed within its emotive expression are: ‘preferences and choices which are themselves not governed by criterion, principle or value, since they underlie and are prior to all allegiance to criterion, principle or value’.\textsuperscript{210} From this, he suggests, ‘it follow that the emotivist self can have no rational history in its transitions from one state of moral commitment to another’.\textsuperscript{211} These ideas and philosophies are of course varied and complex and include decades, if not centuries of relevant thought. What is important for the thesis is the core concern that classical theory does not take sufficient account of the

\begin{itemize}
\item\textsuperscript{204} Locke, \textit{An Essay Concerning Human Understanding} (n 40) II.27.9; Taylor (n 5) 49 ref 32.
\item\textsuperscript{205} Taylor (n 5) 49.
\item\textsuperscript{206} ibid. See further ch 9.
\item\textsuperscript{207} See for a helpful overview, Hogan (n 28) 32–33.
\item\textsuperscript{208} Taylor (n 5) 172, 32–40 (and generally).
\item\textsuperscript{209} MacIntyre (n 5) 73. This means rejecting the difference between the conceptual and empirical enquiries.
\item\textsuperscript{210} ibid 33.
\item\textsuperscript{211} ibid.
\end{itemize}
situated nature of human beings. Some liberal theorists, such as John Rawls, indeed acknowledge this orientation of the self and suggest it is not the intent of liberalism to engage with human beings as they are found but rather to neutralise them so as to ascertain the ‘good’ life.²¹² While others still, such as Robin Holt, recognise that discourses such as that of human rights which is largely based on classical theory, can only function if they ‘meld with the multifarious practices by which many people conceive integral aspects of their character; the very real and partial reasons for their bothering to exist in the world at all.’²¹³

3.4.2. The Exaggeration of Human Rationality

In addition to the over-reliance of the human rights framework upon an abstracted essentialism, the classical theory similarly overestimates what human reason can achieve.²¹⁴ If humans are even partly constructed, then any essential rationalism will also be subject to their constructed filter. In this sense, rationality is also subject to social context and tradition such that total abstraction of the facet is not possible. There is therefore no truly objective standard on what is reasonable, logical, coherent or self-evident.²¹⁵ Stanley Fish, for example, takes this position when he points out that individual reason does not emanate from a universal vantage point but rather arises out of the particular experiences of the individual – institutional, educational, cultural, philosophical etc. Reason is, for Fish, always a ‘matter of faith’ and, when we try to install a theory of reason from a position beyond our traditions of reason, reason ‘loses its substance and becomes mute’.²¹⁶ For this reason, Fish suggests that liberalism does not in fact exist.²¹⁷ MacIntyre criticised the human rights project for trying to transcend tradition. Since MacIntyre’s study focuses on moral values which he believes cannot be judged apart from an individual’s tradition, and since human

²¹² Rawls, Fairness to Goodness’, Philosophical Review, Vol.84, 1975, 536—54. See also 549.
²¹⁵ Hogan (n 28) 39.
²¹⁷ Ibid.
rights norms represent the primary moral critique of the day, MacIntyre deemed society bereft of a coherent moral framework – an enlightenment legacy. 218 It is an argument that is found among communitarian, feminist and postcolonial literature, which each stem from different initial positions, such as the importance of community to the human being, the subservience of the female or colonised citizens and their consequential absence in accounts of history. The core idea that cuts across these fields is summarised by Hogan as follows:

What counts as evidence, how evidence is evaluated, the relative merits of one piece of evidence over against another, and other evaluative concerns shape the trajectory of reason to such a degree that reason is more appropriately regarded as enmeshed in the historical and social contingencies of each age.219

A further critique of the limits of human reason is the argument that human beings also act on passion and selfishness. Edmund Burke for example, cautions about what can be achieved by human reason when he warned in the eighteenth century that, ‘[m]an acts from adequate motives relative to his interest; and not on metaphysical speculations.’220 Burke’s work exhibits a distrust of liberal attempts to separate the public sphere off from the private allowing only for the faculty of reason in private life, a separation on which liberal theory depends in order to identify ‘moral goods’ and eventually human rights.

3.4.3. The Problematic Presumption of Ethical Monism

A key part of the Enlightenment philosophy which influenced classical liberal universalism is the belief that all questions have one true answer and that by applying scientific technique to human affairs we can conceive of the correct way to live

218 MacIntyre (n 5) ch 6.
219 Hogan (n 28) 39.
220 Quoted in Waldron (n 214) 175. See also David Hume: reason without passion moves nothing, in ibid 181.
founded on the correct understanding of the rules of the universe – a so-called perfect world or ‘final solution’. Ethical monism is typically associated, like most ‘monisms’, with ‘oneness’. It was not until the 20th century that this aspect of Enlightenment thinking was popularly challenged through the work of Isaiah Berlin (set out in section 4.2 of chapter 4). The presumption of ethical monism results from the application of a scientific form of rationality to ethical decisions and the assumption that this will lead to the same ultimate conclusions. This approach has been criticised by scholars for having the potential to devalue human life. Ethical monism also tends toward absolutism in the sense that the ideas presented suggest an inalterability, such as might be said of abstracted essentialist positions on the human self (which in turn posits that rights are pre-political). Berlin is especially critical of ethical monism because it removes in essence free choice. On the monism view, Berlin believes that human beings do not therefore choose their path but rather have their path, in terms of the correct path, chosen for them: ‘the fully rational man does not choose his ends, for his ends are given’. As chapter 4, section 4.2 further discusses, this belief is also considered dangerous by Berlin as individuals committed to ethical monism may discern that their own reasoned path is the correct path, thereby justifying its imposition on others.

In sum, classical theory has been undermined by the above critiques but not, it is suggested, to the extent that it is of no utility. Using the facet of rationality alone, it is possible to observe a great diversity among human beings such that it cannot be said that there is one conception of human self, morality or justice, in all circumstances. Social context does indeed appear heavily influential on evaluative concerns. As such, certain scholars have argued that the only coherent theory of

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226 Hogan (n 28) 40.
human rights is one that returns to theist foundations. Yet as Hogan notes, theist foundations are no more rational than secular foundations. Indeed, it would be a rare apologist that sees human reason argued as the main foundation of faith. Further, if human rights are to be, as they needs to be, broadly embraced universally, foundations located in one or a few faith traditions will not achieve this objective. It is difficult however, to disagree with Hogan’s position when she points to Jeffrey Stout and Michael Walzer’s position that although human beings are dependent on and heavily influenced by social context, it is possible to communicate across these traditions to arrive at a shared account of common values. Instead, Hogan is one of a stream of scholars who are now proposing the need to infuse the universality of human rights – on which of course their moral pre-eminence is grounded - with pluralist foundations.

3.5. Pluralist Foundations for Practical Futures

To address the inherent difficulties presented by human rights foundations, a significant number of human rights scholars have advocated a shift towards pragmatism and away from foundationalism, to the extent that some argue human rights can no longer be said to have any monist foundational theory. However, as explained in the introductory chapter, the pursuit of foundations remains important, even if that endeavour results in the unknown. This is based on a commitment to the adage I know that I don’t know being an important conclusion of itself, in light of the moral elevation of human rights. With that in mind, a preferred way to conceive of the shift is from foundations of certainties to one of uncertainties.

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227 MacIntyre made this point but did not necessarily argue from that position. See, MacIntyre (n 5). For recent theist theories, see Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton University Press 2008); Perry (n 62).

228 Hogan (n 28) 39–40.

229 Gunnar Beck is of the opinion that this is the general view. See, Gunnar Beck, ‘Human Rights Adjudication under the ECHR between Value Pluralism and Essential Contestability’ [2008] European Human Rights Law Review 214, 217.


What unites many of these more pragmatically orientated human rights theories is a retreat from focusing on universal truths towards an emphasis on contingency. One common way this is expressed is through the need for agreement on human rights. Given that such agreement is based on communication, and communication requires an understanding of meaning, contingency works its way into more recent human rights theories because meaning is often recognised to be context-dependent. An added element of this context-dependent nature of meaning, and a general point for contingency, is that it is not only culturally embedded but also time sensitive. Sionaidh Douglas-Scott for example, refers to human rights as ‘apparent invention[s] of legal modernity’ while Hogan sees the underpinning premises of human rights law – that humans are born free and equal in dignity and rights – as a historical development. The need for some broad agreement or ‘practical consensus’ to make human rights workable in practice is of course critical. However, for those in search of more robust foundations, it is the theories which relate contingency more broadly to the ‘why of human rights’ and so the nature of the human being which are of most interest to this thesis.

In McCrudden’s recent book *Litigating Religions*, which examines the relationship between courts and religion, he suggests that we should reimagine our conception of human rights, including its normative foundations, from a bottom-up approach that starts with an examination of human rights practice. McCrudden justifies this approach however on a relatively concise foundational claim of ‘human dignity’, which he defines as the claim that each person ‘possess an intrinsic worth that should be respected’. McCrudden is careful to point out that this is only one of potentially more foundational claims on which human rights can be based, and that the claim

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232 See for example, Gearty (n 91) 33–34; Douglas-Scott (n 105) 389 (as part of her operational theory of justice - ‘critical legal justice’); Hogan (n 28) 3.  
233 See for example, Gearty (n 91) 34.  
234 Douglas-Scott (n 105) 389; Hogan (n 28) 102. Reference to the time sensitive nature of human rights law is increasingly common. See for example the recent conference *The Time(s) and Temporality of International Human Rights Law Workshop, 2 July* (Queen’s University Belfast 2018).  
235 Douglas-Scott (n 105) 389.  
236 McCrudden (n 104) 129. For his theory, see 131-137.  
237 Ibid 131.
should not necessarily be linked to a view that dignity means autonomy, equality, or communitarianism, nor any liberal agenda.238 What his conception of human dignity can be linked with rather is a view that certain forms of treatment between persons are inconsistent with human dignity, and that the state exists for the benefit of the individual.239 That said, human rights practice then becomes the focus of McCrudden’s theory; wherein he observes a substantial pluralism that is under-acknowledged. This is not perceived as a shock, but rather an expected outcome of the diverse narratives around human rights, including on the anthropological matter.240 The path forward is to take a dialogic approach, which is described as an approach which aims at identifying various (i.e. plural) solutions; as opposed to a dialectic approach which aims for only one solution. McCrudden comments that ‘under my preferred approach, the lack of resolution of the contradictions in human rights disputes is not to be regarded as a failure, but rather essential to the system.’241 McCrudden sees human rights in the courts as a site of political temporary accommodation and refutes any relativist criticism. Instead, McCrudden emphasises that this new approach brings hope for the disappointed and leaves open a view of human rights ‘as political and moral and legal and social and religious’ where debate and contestation are encouraged.242

Conor Gearty points to what he calls ‘Darwinian universalism’.243 His theory rejects the classical view that human rights can be ascertained from reasoning as to what one ought to do. For Gearty, this is because Darwin’s theory of evolution has ‘made the mind/body distinction difficult to maintain’.244 Any human capacity to reason, is to be viewed post-Darwin as only a feature of a more progressed version of other organisms and so not unique. Gearty then sets out his view that ‘compassion’, or put

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238 ibid 132 (for first point) 131 (for second point).
239 ibid 132. McCrudden refers to these two elements of human dignity as ‘the relational claim’ and ‘the limited state claim’.
240 ibid 135.
241 ibid.
242 ibid 136. See also, Christopher McCrudden, “Human Rights in an Age of Trump and Brexit” Speech, 22 February, Global Challenges Debates (Queen’s University Belfast 2018).
243 For the argument generally, see Gearty (n 91) 29–33.
244 ibid 31.
otherwise, ‘active concern’, should ground human rights. He describes this as ‘thinking made practical’ because unless the thought process is communicated into something positive it cannot be discovered. Gearty’s ‘compassion’ theory also concludes that in view of our common humanity, we must subscribe to the values of ‘equality of esteem’ which we are told ‘takes us inevitably to the notion of individual human dignity’. Such a programme of rights can only be achieved for Gearty, through a system of representative democracy which he identifies as sharing the human rights foundation of equality of esteem. Therefore, identifying what our rights should be is to be understood partly as an argumentative process. Human rights are a ‘progressive feature of our democratic polity rather than something outside it, bringing in non-negotiable versions of rights and wrong to close discussion down.’

There is much to admire in both McCrudden and Gearty’s theories and in particular their recognition of contingency and their openness to a greater involvement of the polity in setting human rights parameters. However, Gearty’s liberal view of what our humanity entails is somewhat limited; perhaps an unnecessarily restrictive read of what Darwinian underpinnings entail. In addition, his theory says little about the role of the community, other than recognising the contingency of communicated meaning. This thesis ultimately finds more in McCrudden’s attempts to maintain a foundational discourse through human dignity, while simultaneously recognising that it may co-exist with other foundations. In particular, McCrudden approves of multiple possible human rights outcomes through his dialogic, as opposed to dialectic, approach. However, it is the structure and reasoning within the work of Linda Hogan, a professor of ecumenics, which provides the larger platform for the rest of the thesis through her succinct and explicit identification of EVP as the best foundation for

245 ibid 43.
246 ibid 33. Gearty’s theory follows the contingency argument about communication outlined above.
247 ibid 46.
248 ibid 50.
249 ibid 68.
250 The liberal orientation of Gearty’s theory is taken to be evidenced by his description of compassion as focusing on the individual and through his limited expression of the values our common humanity entails. See, ibid 44, 49–50.
moral infusions of the law. Hogan’s synthesis of what these preceding criticisms of classical theory mean for human rights are discussed briefly below, before the idea of EVP and its compatibility with universalism, is developed in chapter 4 using the idea as described by its founding father, Isaiah Berlin.

3.5.1. Linda Hogan’s ‘Constructive Ethical Pluralism’

Hogan’s theory, similar in ways to McCrudden and Gearty, rejects traditional universalist foundations of human rights and argues for foundations based on EVP. Hogan presents alternative readings for three separate ‘pillars’ of the classical approach, namely: (1) the nature of the person; (2) the universality of truth claims; and (3) the role of the community. On the first pillar, Hogan rejects the presumption of sameness and advocates an approach to personhood that is receptive to rearticulation and contestation, ‘cognizant of the manifold ways in which subjectivity is constructed and established’.251 On the second pillar, Hogan invokes Aristotle to assert the inexact nature of ethics. She is critical of abstract universalism, which as observed suggests that personhood can be identified apart from the environment the social context in which it is situated.252 As such, she argues that all universalist convictions are ‘embedded in the cultural values through which they are expressed’253 and that an ‘embedded discourse of value’ is the proper understanding of human rights history.254 She puts it otherwise ‘ethical knowledge is a form of situated knowledge.’255 The universalism that is aspired to in human rights can only transpire she argues, ‘through multiple, inclusive, tradition-thick, cross-cultural conversations.’256 Hogan believes than human dignity as a summative term which holds together fundamental human rights can be understood as ‘a particularly compelling form of embedded universalism’ due to its situation across cultures – rejecting the version of human dignity that depends on essentialism.257 Concerning

251 Hogan (n 28) 95, generally chapter 3.
252 ibid 102, generally chapter 4.
253 ibid 102.
254 ibid 113.
255 ibid 136.
256 ibid 102.
257 ibid 117.
the third pillar, Hogan grants ‘a seminal role’ in developing human rights to moral and religious traditions.\textsuperscript{258} Using Charles Taylor’s assertion that pluralism ‘is the determinative feature of late modernity’ which shapes the individuals understanding,\textsuperscript{259} Hogan investigates the sites of such pluralism. Hogan adopts a nuanced approach to these sites, ultimately arguing for a recognition of the ‘internal diversity’ of communities, the ‘hybridity’ to contemporary community belonging and the dynamism of tradition.\textsuperscript{260} The different traditions are therefore to become partners in developing human rights because human rights does not set progressive norms against static cultural values.\textsuperscript{261} The traditions must engage in discussion; a discussion that relies on persuasiveness. Interactions between the traditions should be characterised by ‘mutual recognition, reiteration, and immanent critique.’\textsuperscript{262}

As chapter 4 will detail, EVP can coincide with universal values to a certain extent, but only when universalism and the human being is understood, as Hogan and the communitarians suggest, from a socially constructed perspective. Hogan’s use of the term ‘embedded universalism’ is an especially helpful concept to carry into chapter 4. Unlike Hogan, it is not considered necessary to reject essentialism, only to reconceive it as responsive to embedded universalism. In this regard Martha Nussbaum’s idea of an internal and embedded essentialism will be taken forward in chapter 4, section 4.3 and chapter 6, section 6.2.\textsuperscript{263}

3.6. Conclusion: The Significance of ‘Community’ and a Receptivity to less ‘Reason-able’ Foundations

The aim of this chapter was to attempt to tease out the underlying norms, especially of an ethical or philosophical nature, which support the sovereignty positions identified in chapter 2. This effort was undertaken to allow the thesis to reflect on

\textsuperscript{258} Ibid 136, generally see chapter 5.
\textsuperscript{259} Ibid 137.
\textsuperscript{260} Ibid 138.
\textsuperscript{261} Ibid.
\textsuperscript{262} Ibid.
\textsuperscript{263} Nussbaum (n 33) 206–208.
the issue of sovereignty within UK law from a more theoretical or even philosophical perspective, removed somewhat from the ebbs and flows of political life, until recently tumultuous in the UK. In summary, the chapter engaged with the UK’s trend towards state sovereignty as representative of the human tendency towards ‘group identities’ whether that be around the notion of ‘peoples’ or perhaps equally around ‘value constellations’. Group identity as recognised within international human rights law for example asserts the importance of commonalities around language, ethnicity and cultural practices. Yet Britishness was recognised as an especially diverse ‘group identity’ such that it might be better framed as a value constellation around liberal universalism. Liberal universalism is in fact presented within the chapter as the common idea on which both the UK’s democratic and judicial institutions claim much of their respective authority. The chapter transits to that philosophy from these institutions through the conduits of social contract theory and classical human rights theory respectively. This philosophy is highly individualistic and relies on a decontextualized timelessness. Yet as the title of the conclusion suggests, the chapter highlighted many concerns around liberal universalism.

At a legal level, these concerns are first identified through the narratives on socio-economic rights. These rights are less obviously framed at the UK constitutional level, but irrespective, their construction in both international human rights law and UK law remains heavily liberal. Samuel Moyn’s distinction between the idea of relative material equality and how far an individual is from having nothing, and his suggestion that socio-economic rights are framed around the latter, was thought provoking when views from the communitarian perspective that an individual will flourish most if situated in a community also flourishing. Addressing this deficit requires the engagement and communitarian commitment of the state. These legal challenges within human rights were understood to have parallel concerns in the philosophical sphere in terms of the approach taken to the human self. The communitarian critiques of Michael Sandel, Charles Taylor and Alisdair MacIntyre were briefly touched upon for their well-known rejection of philosophical liberalism’s reliance on

265 Moyn, Not Enough: Human Rights in an Unequal World (n 143) 216.
what Taylor called the ‘punctual’ self, a self-detached and disengaged from the effects of other human beings and the community within which the individual is embedded.

Following Linda Hogan and others, it was noted that embracing an embedded perspective of the self invariably introduces pluralism to discourses, such as human rights, which rely on some universalism. While the compatibility of the embedded self and EVP with universalism is instinctively more difficult to grapple than a discourse founded on or aiming towards ethical monism, the idea is no less valid for it. In fact, the relationship between an embedded and pluralist conception of the human being and universal ideals is a necessary underpinning for any normatively justified hierarchy of values within a constitutional system. The thesis therefore turns within chapter 4 to establish the relationship between EVP and universal values.

266 Taylor (n 5) 49.
PART C

FROM THE ETHICAL FOUNDATION OF PLURALISM TO LEGAL SOVEREIGNTY THROUGH THE CONDUIT OF UNIVERSALS AND CONSTITUTIONS
4. ETHICAL VALUE PLURALISM AND UNIVERSAL VALUES

4.1. Introduction

This chapter builds upon the criticisms of the classical philosophical approach to liberal universalism identified in chapter 3 through Linda Hogan and others. These criticisms are against the notion of the abstract human being identifiable by reason alone and the ensuing implications this has for the nature of value, namely ethical monism. Being persuaded by communitarian critiques and the potential for a more successful theory to emerge by reasoning from ethical value pluralism (EVP), this chapter enquires further into the nature of this concept and how normative value can be derived from it so as to identify universal values that can underpin legal authority. The chapter sits apart in the thesis for its focus on asserting a normativity and especially universal normativity within EVP. This link is essential for EVP to legitimately serve as a foundation for sovereignty that can be accepted across the diverse demography of the UK. The UK’s constitution as it presently stands and as it might stand are the endeavours of chapters 5 and 6. For now, this chapter simply asks the broader more philosophical question: ‘What is the relationship between EVP and universal values?’

Although formative ideas on the concept of EVP were put forward by earlier scholars such as Max Weber,¹ it is the social and political philosophy of Isaiah Berlin that details the concept in its clearest and most detailed initial form.² As such, Berlin’s writings provide the foundation for this chapter and are discussed in section 4.2 below. Berlin’s espousal of the idea he calls ‘value pluralism’ supports both an ethical/moral pluralism and a political pluralism; which he appears like many (but not all) after him, to link (though not in terms of logical entailment) to the political system

¹ See, e.g. Max Weber, The Methodology of the Social Sciences (Free Press 1949) 14, 57.
of liberalism. Berlin’s development of the concept of EVP is displayed in a slightly piecemeal manner across his work (see Four Essays on Liberty and The Crooked Timber of Humanity for the main articulations). It describes the idea that ultimate values are irreducibly plural, and that they can sometimes conflict and are sometimes incommensurable. Berlin’s idea is primarily conceived as a rejection of ethical monism. Yet, sections 4.2.1 and 4.2.2 of this chapter set out how Berlin perceives that EVP can coexist with the existence of universal values. Berlin rationalises this relationship by distinguishing his pluralism, a concept that encompasses objective values, from that of relativism, which does not. Ultimately the chapter considers, along with theorists such as Alex Zakaras and John Gray, that at least two universal values are fundamental to Berlin’s idea of value pluralism, and crucially his method of finding normativity: namely the human capabilities for self-creation, which is the ability to make free and diverging choices, and for empathy, which is both the emotional ability to experience and a cognitive ability to understand the value choices of others.

In recognition of Berlin’s early articulation of the idea, section 4.3 of the chapter sets out to engage with a contemporary ethical pluralist in the work of Martha Nussbaum. Nussbaum is an influential feminist and development theorist, more explicit in her ‘human capabilities’ approach to universal values than Berlin and sets out a ten-fold list of proposed universal values. Although Nussbaum is most influenced by Aristotle and Karl Marx, much of her approach in terms of its ethically plural underpinnings resonate with that found in Berlin’s work. This chapter seizes on two of her capabilities, that of practical reason and affiliation, to take forward within chapters 5

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5 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2).
6 Martha Nussbaum, Creating Capabilities (Harvard University Press 2011).
and 6. Nussbaum describes these capabilities as ‘architectonic’ due to their role in suffusing all the other capabilities. In particular, the chapter considers that the architectural qualities of practical reason and affiliation, along with Berlin’s self-creation and empathy, can be robustly defended as consistently held universal values alongside a value theory of EVP because they concern the method for identifying other more substantive universal values. In this way, EVP embraces a basic human essentialism but only when understood as embedded and flexible. While this chapter maintains a philosophical and theoretical orientation, the idea of EVP, the importance of universal values for constitutions and the role of the architectonic or rather, process-orientated universal values, is explained and applied in chapters 5 and 6 to the distribution of legal sovereignty in the UK.

4.2. Isaiah Berlin and the Irreducible Plurality of Values

Isaiah Berlin most commonly refers to his idea as simply ‘value pluralism’. However, since his writings attribute to this concept both moral and political elements, this thesis, as mentioned (chapter 1, section 1.3.1), uses the term EVP to reflect only the moral idea. To make sense of the narrative that follows, it is of note that there is no one systematic account of Berlin’s theory. It appears throughout his core works, such as in The Crooked Timber of Humanity and his Four Essays on Liberty as well as in the letters and conversations he continued to exchange on his ideas throughout his life. With that in mind, it is helpful to preface Berlin’s own articulation of his idea with a brief four-part description. First, Berli in EVP is an account of human values

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8 Indeed, there may be intention in this arrangement if one prefers to see Berlin’s idea, as Alex Zakaras does, as a series of ethical and psychological insights from which certain reflections emerge. See, Alex Zakaras, ‘Isaiah Berlin’s Cosmopolitan Ethics’ (2004) 32 Political Theory 495, 515.
9 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2).
10 Berlin, Four Essays Lib. (n 4).
This account believes that human values are: (1) ‘plural’ and irreducibly so; (2) have the potential to conflict; and (3) can be ‘incommensurable’. The last three elements of this description identify Berlin’s idea as focused on the nature or form of human values. Yet, just what those human values are, is less clear.

As identified within the introductory chapter, the term ‘values’ is used by Berlin, seemingly interchangeably, with words and phrases such as, ‘ends’, ‘goods’, ‘moral principles’, ‘forms of life’, ‘goals’ and even occasionally ‘claims’. These values are defined further only insofar as Berlin believes their form to constitute ‘ultimate’, ‘absolute’ or ‘supreme’ human pursuits (see also the earlier discussion on the meaning of value in chapter 1, section 1.3.1). When Berlin describes his idea of value pluralism, he sometimes speaks of the value conflict as occurring within one value system or moral code, such as in a liberal democracy where liberty and equality are of specific import (see for example, the UK at chapter 3, section 3.3), but also within the individual conceptions of values themselves, such as will be seen in his two conceptions of liberty below (section 4.2.2). Furthermore, Berlin writes frequently about a third category of value conflict, when he refers to the different value codes or grouping of different cultures, ever influential on the embedded individual. Berlin’s flexibility regarding the organisation and presentation of values, comes through in a letter he sent in 1991, wherein Berlin expressed that his approach to ethics is based on a desire to know ‘the constellation of values, the – as it were – moral horizon of a given thinker, or a group of thinkers, or indeed of a culture, a society, if one is to understand or evaluate what they believe, in light of which they lead their lives.’ (See for an earlier applied discussion on value constellations in the

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12 See for a similar presentation, Crowder, ‘Value Pluralism, Diversity and Liberalism’ (n 3) 550–551.
13 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 11; Berlin, Four Essays Lib. (n 4) 161, 171; Berlin and Jahanbegloo (n 11) 39.
14 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 8, 11; Berlin, Four Essays Lib. (n 4) 161. John Gray states, ‘[i]t is not obvious what ‘values’ designates - goods, options, virtues, whole conceptions of the good or entire cultural traditions or forms of life, or merely wants and preferences’. John Gray, Berlin (Fontana Press 1995) 49.
15 For a brief identification of all three contexts of value conflict, see Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 12.
Unsurprisingly then, it is difficult to give specificity to Berlin’s definition of a human value beyond noting the various contexts in which they can arise along with their ultimate nature. What might be suggested as slightly clearer, however, is Berlin’s view that moral knowledge is possible. Berlin is in this sense a moral realist (rejecting contemporary trends that deny the availability of moral knowledge). Gray describes how he ‘constantly affirms the reality, validity and human intelligibility of values and forms of life very different from our own’. 17 Certain aspects of value, as we will explore in the sections below, are emphatically ‘objective’, and even at times, ‘universal’. 18 With these foundational issues in mind, Berlinian value pluralism is best understood through the colourful and enlightening expressions of the scholar himself.

Berlin describes his idea as the belief that ‘there are many different ends that [human beings] may seek and still be fully rational, fully [human], capable of understanding each other and sympathising and deriving light from each other...’. 19 This idea, as to the irreducible plurality of values, emerged out of a rejection of the then dominant philosophy of the Enlightenment, something Berlin refers to as the ‘Platonic ideal’. In a retelling of his own ‘history of ideas’, Berlin notes that he was persuaded to alter his thinking away from an earlier faith in the Platonic ideal, towards pluralism, by the works of Niccolo Machiavelli, and subsequently Giambattista Vico and Johann Gottfried von Herder. 20 As discussed in chapter 3, sections 3.3.1 and 3.4.3, the Platonic ideal and dominant philosophy of the 17th and 18th centuries was the belief that all questions have one true answer and that by applying scientific technique to human affairs we can conceive of the correct way to live founded on the correct understanding of the rules of the universe – a so-called perfect world or ‘final

17 Gray (n 14) 3 (see also 49).
18 E.g. Berlin and Jahanbegloo (n 11) 37; Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 11. For detail, see the discussion below in Sections 3.2.1-3.2.2.
19 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 11.
solution’. In essence, Berlin saw the Enlightenment as embracing ethical monism, something he came to reject in favour of pluralism. What impressed upon Berlin about Machiavelli’s works was his juxtaposition of, on the one hand, the ruthless pursuit of power by ‘gifted and resourceful men’ necessary to achieve his preferred Romanic state, against persons espousing Christian virtues of suffering, humility and unworldliness, and in particular the perspective of Machiavelli that the two styles of living (or moralities) were incompatible. Berlin states,

[t]he idea that this planted in my mind was the realisation which came as something of a shock, that not all the supreme values pursued by mankind now and in the past were necessarily compatible with one another. It undermined my earlier assumption, based on the philosophia perennis, that there could be no conflict between true ends, true answers to the central problems of life.

The incompatibility and therefore the conflict between values is exemplified by Berlin between justice and mercy, or liberty and equality. In these two paradigms, where each value is pursued in an absolute way (i.e. for full maximisation), it will conflict with the objective of the other. Concerning liberty and equality, Berlin famously notes that, ‘total liberty for wolves is death to the lambs’ and the ‘artist, in order to create a masterpiece, may lead a life which plunges his family into misery and squalor to which he is indifferent’. The conflict between competing aims, we are told, might even occur within a single human being or as already mentioned, within different conceptions of a singular value.

One of Berlin’s views that has resounded alongside his theory is his conception that the conflict between values is a tragedy. Berlin’s values are not based on any metaphysical claim but are described as equally ultimate and absolute. Human beings

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22 ibid 8.
23 ibid.
24 ibid 12.
25 ibid.
therefore encounter a world in which they must decide between the realisation of one or some of the values, and a sacrifice of the others. It is this circumstance which gives for Berlin the great importance he places on negative liberty in his liberty essays and the freedom of human beings to choose between the competing values:

If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never be wholly eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.  

In terms of moving forward, Berlin believes that these naturally occurring conflicts can be minimised or softened, and an ‘uneasy equilibrium, which is constantly threatened and in need of constant repair’ can be preserved. We must prioritise our values, he says, yielding some principles to others, depending upon the concrete situation we face; activities that necessitate a ‘certain humility’. The trade-offs between values will also partly depend upon the society from which the person emerges. The disposition for compromise cultivated by value pluralism should assist with the avoidance of what he calls ‘desperate situations’. Desperate situations are those that involve extremes of human suffering, and only in such circumstances does Berlin contemplate a shift away from these trade-offs allowing for revolutions, wars and assassinations.

Berlin also identifies that the conflicting values can be incommensurable. It is a concept used only rarely in his writings to mean that it is not possible to measure all values according to a single currency. In his most comprehensive statement, Berlin says:

\[\text{26 Berlin, Four Essays Lib. (n 4) 161. See below on ‘negative liberty’, which Berlin describes as an ‘area of non-interference’ within which a person can do as he or she pleases. Ibid 121–124.}
\[\text{27 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 19.}
\[\text{28 Ibid 17–18.}
\[\text{29 Ibid 18.}
\[\text{30 Ibid 17–18.}\]
...human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that values can be graded on one scale, so that it is mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle perform.31

No doubt due to both the significance and the scarcity of the incommensurability concept within Berlin’s writings, controversy has ensued regarding what exactly it means for the role of rational choice when engaging in the necessary human business of deciding between conflicting values.32 It is difficult to identify within Berlin’s writings which values he regards as incommensurable, such that it might be interpreted that all values could give rise to incommensurability depending on the facts in hand and so require more than rational choice for a determination on the value conflict. The clear point from Berlin is that human beings could and should as free-agents make choices, but that the role of reason has its limitations. As is the case with conflicting values, incommensurable values highlight to an even greater degree the legitimacy and importance of the human capacity to choose freely, otherwise referred to in Berlin’s writings as the ability to self-create (see section 4.2.2. below). This faculty will be used, along with the human faculty of empathy, to generate from within Berlin’s work an outline concept of the human being, and so a partial theory of universalism which does not depend on abstract rationality. Both those discussions, which take place in the following sections, also partly arise out of Berlin’s efforts to distinguish relativism - which he does not support – from his own idea of EVP. Berlin does this by identifying that values can be both objective and universal. (Chapter 5, incidentally, includes the detail of the relationship between these philosophical ideas about the human being with the constitutional concepts of liberalism, human rights and legal pluralism.)

31 Berlin, Four Essays Lib. (n 4) 171.
4.2.1. Universal Values 1: Core, horizon, and the faculty of empathy

A key feature of Berlin’s value pluralism of major relevance to this enquiry is his belief that the irreducibly plural values can also be universal. This is an especially important recognition in terms of identifying and legitimising constitutional values, such as presently exist in the UK’s constitutional framework (for discussion see chapter 2, section 2.3.1 and chapter 5, section 5.2). As with his overall idea, it is again perhaps deliberate, that no comprehensive account is given by Berlin of what the universal values are. He mentions liberty, equality, happiness, security, love, honesty, public order, courage and justice as examples; whereas mindless killing, slavery, Nazi gas chambers and a duty to denounce one’s parents are also identified as acts universally heinous (see again chapter 1, section 1.3.1 on the meaning of value). And while the focus of this section of Berlin’s thinking is on whether we can infer from Berlin’s writings any critical criteria for the identification of universal values, it is of importance to Berlin’s idea as a whole that we first understand that the potential for conflict between values is as much a feature of universal values as it is of any other ultimate values. Indeed, in the opinion of John Gray, this is the heart of the uniqueness of Berlin’s overall idea: ‘[i]t is [Berlin’s] view that the universal content of morality itself generates irresolvable conflicts among its constitutive values that is most distinctive and original, rather than any account he gives of the particular elements of this universal content.’ While the thesis supports the essence of this view, it also suggests below that by discerning (not altogether easy) the ways in which Berlin identifies normativity, at least some content can be applied to universal values.

Relativism, Berlin says, simply states that: ‘We have different tastes. There is no more to be said.’ On this ordinary interpretation, relativism is a purely subjective notion.
that makes moral communication impossible. Yet, relativism constitutes, as with most philosophical ideas, a very broad church. What Berlin appears to reject then is the ‘anything goes’ form of absolute relativism. He observes a degree of difference between cultures, but is also of the view that these differences can be ‘exaggerated’. ‘No culture’, of which he is aware, ‘lacks the notions of good and bad; true and false’. Instead, the values that form part of Berlin’s idea of value pluralism include a degree of objectivity. Berlin writes on the issue:

But, in the end, it is not a matter of purely subjective judgment: it is dictated by the forms of life of the society to which one belongs, a society among other societies, with values held in common, whether or not they are in conflict, by the majority of mankind throughout recorded history. There are, if not universal values, at any rate a minimum without which societies could scarcely survive.

While accepting Berlin’s commitment to the existence of universal values and his empathic rejection that his idea of pluralism equates to relativism, there is nevertheless some ambiguity in Berlin’s writings concerning just how these universal values are to be identified. In fact, Berlin rejects any a priori knowledge of universal values through the faculty of reason, such as appears in classical liberal universalism. Although his intuition guides him regarding certain moral rules that enable individuals to live together, he is keen to emphasise that he himself lacks the faculty of raison or any other faculty which might give him the ‘infallible truth in answer to central questions of life’. That said, it is possible to extract from his

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38 See generally, ibid 4.5.
39 Berlin and Jahanbegloo (n 11) 37.
40 ibid.
41 Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (n 2) 18.
42 See e.g. Crowder and Hardy (n 36); Gray (n 14) 66.
43 Berlin and Jahanbegloo (n 11) 108.
44 ibid 109.
writings and subsequent commentary, two broad lines of thinking that aid our understanding of the relationship between universal values and EVP. Henry Hardy and George Crowder have together written an insightful note on these two threads, appropriately entitled ‘core or horizon’ referring to two ideas within Berlin’s work which centre around identifying, respectively, a minimum core of universal values, and a human horizon outside which there can be no legitimate values.45

The idea of a minimum core of universal values is a common thread throughout Berlin’s writings. The passage quoted in the paragraph above is preceded by Berlin’s observation that there is a ‘great deal of broad agreement’ across different cultures and epochs as to what constitutes right and wrong.46 Berlin identifies a narrow selection of values in the context of this discussion, such as slavery, ritual murder, torture, the denouncing of one’s parents and mindless killing (see above and again chapter 1, section 1.3.1 on the flexible application of the term values used by Berlin).47 One way we can identify these universal values is by their explicit expression or implicitly through human behaviour (others and our own), across societies and across time.48 In this thread, Berlin concludes that universal values are an ‘empirical fact about [human]kind’.49 Yet this empirical anthropology does not of course allow for much by way of critical value – a point that Crowder stresses when he refers to the ‘normatively sterile’ nature of Berlin’s empirically identified universal values.50

In terms of normativity, then, it is Berlin’s second line of thinking on the human horizon which carries more weight; an approach to universal values that similarly emerges in connection with his efforts to distinguish pluralism from relativism. This

45 Crowder and Hardy (n 36).
46 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 18. For confirming views that Berlin focuses on the empirical, see George Crowder, ‘Value Pluralism and Liberalism’ in George Crowder and Henry Hardy (eds), The One and the Many (Prometheus Books 2007) 219.
47 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 18.
48 Berlin and Jahanbegloo (n 11) 37; Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 18.
49 Berlin and Jahanbegloo (n 11) 37.
50 Crowder, ‘Value Pluralism and Liberalism’ (n 46) 215. See also, George Crowder, Liberalism and Value Pluralism (Continuum 2002) 74, fn 1. In the latter, Crowder criticises Berlin’s identification of the existence of objective, universal values as those which the majority of mankind have valued in common as weak and susceptible to value monism due to the vulnerability of the values to being ordered by the ‘act of valuing’. Gray uses the term ‘empirical anthropology’, see Gray (n 14) 65.
idea is the view that human beings share a human horizon within which we can use our shared faculty of empathy to understand the value pursuits of others, even if we do not ourselves agree with those choices. 51 Berlin puts it as follows:

Forms of life differ. Ends, moral principles, are many. But not infinitely many: they must be within the human horizon. If they are not, then they are outside the human sphere. If I find men who worship trees, not because they are symbols of fertility or because they are divine, with a mysterious life and powers of their own, or because this grove is sacred to Athena – but only because they are made of wood; and if when I ask them why they worship wood they say ‘Because it is wood’ and give no other answer; then I do not know what they mean. If they are human, they are not beings with whom I can communicate – there is a real barrier. They are not human for me. I cannot even call their values subjective if I cannot conceive what it would be like to pursue such a life. 52

As is evident throughout Berlin’s writings, it is key to the human horizon concept that we can understand, communicate or otherwise empathise in some way with the ends chosen by others for human flourishing. Elsewhere, he tells us that through ‘imaginative insight’ we can often ‘understand’ these value choices, even if they remain unacceptable to us. 53 That said, the capacity of empathy can require some level of proactivity, whereby one must be prepared to ‘open [one’s] mind sufficiently’ to allow for this understanding. 54 Although we are free to criticise the value choices of others, Berlin argues that we cannot, for the most part, ‘pretend not to understand them at all’. 55 Berlin perceives that a core benefit of this faculty is, as mentioned in the introduction to the thesis, a diminishing of fanaticism:

52 ibid 11–12.
53 ibid 10.
54 ibid.
55 ibid 11.
If you succeed, or even think that you have succeeded, in understanding in what ways individuals, groups, nations, entire civilizations differ from one another and, by an effort of imagination, ‘enter’ into their thoughts and feelings, imagine how you yourself, placed in their circumstances, could view the world, or view yourself in relation to others; then, even if you are repelled by what you find..., this must diminish blind intolerance and fanaticism. Imagination can feed fanaticism, but imaginative insight into situations very different from yours must in the end weaken it.56

This concept of imaginative insight, a process of ‘entering’ into the thoughts and feelings of others, is the human faculty of ‘empathy’, in both its cognitive and emotional forms.57 In one self-identified ‘extreme’ example, Berlin argues that it is possible to understand the actions of the Nazis, if one were to also start from the (‘demonstrable nonsense’) belief that Jewish people were somehow sub-human and therefore poisonous to Germanic or Nordic culture.58 If so believed, then Berlin argues that it is ‘quite rational’ to arrive at a conclusion whereby one should exterminate Jews.59 His point in this exercise is centred on stressing that the process of engaging with the views of others diminishes one’s ability to dismiss others as mere lunatics, which often results in blind intolerance. Instead, Berlin encourages us that the process of first empathising, and then engaging with the intellectual arguments of fanatics, is a more effective path to demonstrating untruths and preventing harm.60

While fascinating in terms of the normative weight introduced through the faculty of empathy, this discussion has yet to make clear the relationship between the human horizon concept and universal values. What has instead been shown is that Berlin designates certain values as illegitimate where there is a failure to be able to

56 Berlin and Jahanbegloo (n 11) 37–38.
57 For a discussion on the significant of empathy in Berlin’s work, see, Zakaras (n 8). For more recent ‘empathy’ scholarship, see Heidi L Maibom (ed), Empathy and Morality (Oxford University Press 2014).
58 Berlin and Jahanbegloo (n 11) 38.
59 ibid.
60 ibid.
communicate these choices in a way that can be understood; such value choices fall outside the human horizon. Yet although Berlin does not make it altogether clear in his example, Crowder argues that we can also extract from the Nazi scenario a shared ‘thin’ universal value of cultural belonging.\textsuperscript{61} This is because it is central to Crowder’s reading of Berlin that we can only understand the specific values of alien cultures because these values are ‘expressions of very general human purposes that we do share’.

Crowder asks, ‘how can we empathise with the values of other cultures without sharing those values?’ His answer is because we ‘interpret the same, universal ‘thin’ values in different ‘thick’ ways.’\textsuperscript{62} On this view, the human horizon concept therefore implies that there are certain overarching thin universal values and it is through this prism that we are enabled to understand the thicker conceptions of these values protected by other cultures, with which we do not agree. In this sense, the shared value of cultural belonging, would enable us to understand the actions of the Nazis, if we were to also believe the false premise that the Jewish people are sub-human.

In a letter exchange dated March/April 1992, Henry Hardy presented Berlin with a diagrammatic representation of his (Hardy’s) interpretation of Berlin’s view on the relationship between universal values and relativism as emerges through the two threads of core and horizon. That diagram is represented in Figure 1 below.\textsuperscript{64}


\textsuperscript{62} Crowder, ‘Value Pluralism and Liberalism’ (n 46) 214.

\textsuperscript{63} Crowder and Hardy (n 36) 296.

\textsuperscript{64} ibid 294–295.
In presenting the figure, Hardy asks of Berlin: ‘...Perhaps you believe that our common humanity both gives rise to a shared core of basic values, and enables us to empathise with the unshared values at the periphery of this core...’ This is essentially the reading presented above, without Crowder’s further interpretation. Berlin’s reply included the following: ‘The basic reason for rejecting relativism is the ‘moral core’, but the reason for pluralism, which is also incompatible with relativism but a separate doctrine, is, as you say, empathy with values that we may or may not share but which belong to other cultures... Your diagram is excellent, and I think does represent my views.’ The psychopath outlier in Figure 1 refers to values that cannot be empathised with and is intended to represent Berlin’s example of the man who enjoys pushing pins into people (the so-called ‘pin-pricker’) contained in an uncollected letter held by Hardy but apparently akin to the wood worshipping example dictated above. In Berlin’s example, he is unable to comprehend the pin-pricking individual because the pin-pricker is indifferent to whether his pin-pushing

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66 ibid (reply dated 13 April 1992).
is into humans or into a tennis ball, despite being aware that the former causes human pain. Berlin continues with his example:

I repeat: ‘You are inflicting pain’; and he says: ‘So what? Why do you mention it?’ This ‘So what?’ means that we do not live in the same world. I call him mad. People in his kind of mental condition are locked up in asylums, not prisons.67

Yet for all Hardy’s endeavours, and despite the endorsement received from the scholar himself, Crowder queries whether Figure 1 does in fact truly represent Berlin’s view on universal values. Instead Crowder argues that it is a space akin to that within the outer ‘human horizon’ periphery that represents universal values and the ‘shared ‘moral core’ should be approximately co-extensive with the human horizon’.68 These universal values are thin but facilitate our ability to empathise with other cultures without sharing their thicker interpretations. As discussed later in the chapter, this viewpoint is said to better facilitate the human capabilities model of universal values put forward by the pluralist Martha Nussbaum.69 Note also the parallels in language between thin and thick conceptions of values and that of the thin and thick conception of the rule of law in chapter 2, section 2.3.1.

It is possible to understand the positions of both Hardy and Crowder depending upon one’s reading of different excerpts from Berlin’s writings. What might offer clarity on the matter is whether there are examples of non-universal ultimate values within Berlin’s work such as would support Hardy’s view. Berlin is clear, of course, that we can understand values that we do not share; yet, the answer to the question posed remains ambiguous given the definitional issues around values. In this vein, there is a reading of Berlin’s work where both Hardy and Crowder are correct. Crowder seems to touch on a certain truth when he queries whether it is possible to empathise with others without sharing some common starting point. But he also has a further point

67 Also dated 1992, see for the extract, ibid 294.
68 ibid 297.
69 ibid 296–297.
that the nature of these agreements is likely to be so thin – so diffuse and abstract - that they are of limited practical utility. They might even be better regarded as common concepts. The minimum core of universal values, on the other hand, could be conceived equally as representing both a thicker version of values and a set of more recognisable and tangible universal values. Certainly, Hardy’s view is the most obvious read of Berlin’s work, and given its support by the scholar himself, one should perhaps rest the enquiry there, not least because it is in fact Berlin’s identification of empathy as a shared human faculty that is considered the most normatively beneficial tool for the identification of universal values in the rest of this thesis. Crucially, this is not just because empathy allows us to identify other ultimate and/or universal values (which it does), but because empathy itself is a universal capacity of human beings.

Both George Kateb and Alex Zakaras have written on the, sometimes overlooked, importance of empathy itself within Berlin’s work. For Zakaras, Berlin’s empathy is a core part of his view of human nature; a view that Zakaras believes is beholden of a ‘deeply cosmopolitan outlook’. Zakaras summarises his reading of Berlin’s empathy as follows:

To be human, then, is to know, or at least to be capable of knowing, the lives of others. Our humanity resides partly in our capacity to identify with other human beings.

This represents for Zakaras a cosmopolitanism approach because it avoids affirming any specific culture in an indiscriminate way. In essence, Zakaras argues that although Berlin is aware of the legitimacy of many competing value choices, his focus is in fact on avoiding cultural particularism, including ‘the self-mutilating, reductive monism of utopian thought’, and instead on developing the human capacity for empathy.

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71 Zakaras (n 8) 497.
72 ibid 504.
73 ibid 506.
Taking this view, one of Berlin’s major contributions is his emphasis on the process by which we determine our value systems, and so too the nature of our political systems, as much as it is on the outputs of those systems.\(^7\) This is because the potential for the faculty of empathy, like the role of reason in classical universalism theory, is part of what it means to be human. A Berlinian read of universal values therefore holds that empathy should be recognised in both form and substance. Where this exists, the potential for discord is reduced, and the disposition for compromise and humility regarding one’s own values preferences is increased.

In addition to the human capacity for empathy, Berlin’s idea of EVP speaks, as mentioned, to a further aspect of human nature, that of self-creation. This capacity is based on the radical free choice that human beings possess when faced with genuinely incommensurable value conflicts. A freedom that also necessitates a measure of political liberty. It is to these writings that the discussion now turns.

4.2.2. Universal Values 2: Incommensurability, the faculty of self-creation and liberty

In addition to an essential capacity for empathy, Berlin insists that human beings have an innate propensity to diverge.\(^5\) This propensity takes its legitimacy from the fact that values can sometimes be incommensurable. By way of reminder, Berlin’s key quote on the issue is as follows:

...human goals are many, not all of them commensurable, and in perpetual rivalry with one another. To assume that values can be graded on one scale, so that it is mere matter of inspection to determine the highest, seems to me to falsify our knowledge that men are free agents, to represent moral decision as an operation which a slide-rule could, in principle perform.\(^6\)

\(^7\) ibid 497.
\(^5\) See for this reading, Gray (n 14) 74–75.
\(^6\) Berlin, *Four Essays Lib.* (n 4) 171.
Elsewhere Berlin uses the term incompatible as synonymous with incommensurable, essentially meaning that there is no common scale for determining the better value choice. Although there is some dispute in post-Berlin literature as to whether incommensurability also means incomparability – Joseph Raz for example argues that it does, Ruth Chang argues that it does not – it appears that Berlin certainly had in mind that, where values are incommensurable, the contribution of reason in the decision-making process must be limited. Writing in the context of explaining the dominant Enlightenment thinking, and the view that the universe had to be cosmos and not chaos, Berlin states his contrary perspective:

For if there [are] two ways of living, both such that no better ways could be conceived, and they proved incompatible with one another, then the conflict between them – and therefore between their adherents – [is] not in principle rationally soluble.  

Crucially for Berlin, ethical monism takes away the freedom of choice so fundamental to EVP. This is because on the monist perspective all human beings are orientated towards one end; an objective end that is discernible only by human reason. Berlin perceives that such a view is a significant compromise on free choice because, ‘the fully rational man does not choose his ends, for his ends are given’. Berlin further emphasises the danger he sees of thinking in perfect world, final solution terms: ‘For if one really believes that such a solution is possible,’ he says, ‘surely no cost would be too high to obtain it’. The problem he sees as ensuing from monist thinking is that the person who believes that they know the one true way will justify removing liberty from those ignorant of this knowledge, on the basis of course, that they are helping them – It leads in essence to totalitarianism: a ‘Pol Pot’, ‘Mao’, ‘Lenin’ or

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78 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 184.

79 ibid 183–184.


81 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 2) 15.
'Trotsky'. 82 Although Enlightenment scholars note that divergent paths are chosen by human beings, they perceive that these are merely variations on a constant nature. For Berlin rather, the nature of human beings is not constant but instead ‘self-transforming’ which represents a propensity to diverge at a constitutive level. Both Alex Zakaras and John Gray have pointed to this feature of Berlin’s writings as the human capacity for self-creation. 83 Gray states:

We might even say…that for Berlin, there is a common human nature, but that it is exhibited only in the divergent natures human beings constitute for themselves, subject to the constraints of their biological and historical inheritances. 84

As such, Berlin believes that EVP truly allows human beings to flourish as self-governing agents, ever capable of transforming themselves and their direction through choice. 85 It is fundamental therefore to the legitimacy and truth of this free choice, that one also accepts that genuineness of Berlin’s primary thesis on the irreducible plurality of values, their conflict and their incommensurability. Zakaras provides the following insight:

Freedom is fully realised in moments of rational indeterminacy – when there are many good reasons to pursue both alternatives but none are decisive.

For Berlin, freedom of this sort presupposes knowledge of ethical truth, that is, of the incommensurable objective values at stake in our life choice…only when we know that these values present us insoluble conflict that cannot be arbitrated rationally, that we come to occupy the position of Berlin’s radical chooser. 86

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82 ibid; Berlin, *Four Essays Lib.* (n 4) 134.
83 Gray (n 14) 110. Gray frames it as Berlin’s ‘historicist conception of human nature’, see ibid 74.
85 See generally, Berlin, *Four Essays Lib.* (n 4). See, Gray (n 14) 66. See also, Chang (n 32) 19.
86 Zakaras (n 8) 509–510.
It is for this crucial reason that Berlin focuses on the importance of political liberty and especially his conception of negative liberty. In his essay on the *Two Concepts of Liberty*, Berlin regards the satisfaction of both negative and as ‘ultimate value[s]...among the deepest interests of mankind’. He associates negative liberty with the classical English political philosophers and refers to it as the *area of non-interference* within which a person is left ‘to do or be what he is able to do or be without interference by other persons’ (see chapter 3, section 3.3.1 for overlaps between this concept and classical theory used in the early UK common law).

Positive liberty in Berlin’s account pertains to the *source* of freedom, not the area. Positive liberty concerns a person’s desire to govern him or herself, to be as Berlin puts it, one’s ‘own master...an instrument of my own, not of other men’s, acts of will’. As such, Berlin outlines a relationship between this positive formulation of the concept of liberty and human reason: ‘I wish to be a subject, not an object; to be moved by reasons, by conscious purposes... This is at least part of what I mean when I say that I am rational...I feel free to the degree that I believe this is true...’ Positive liberty is also linked by Berlin to democracy because of the desire evident in human beings to govern themselves - a link that does not exist with negative liberty. This was a link similarly established by Jowell and O’Cinneide between liberty and representative government in the context of the UK Constitution in chapter 1, section 1.2.2, presumably a more recent infusion to the classical theory. Finally, it should be noted that positive liberty appears to be a slightly different concept from that outlined of the self-creating agent. While both require focus on the exercise of choice, self-creation is realised only where choices are not rationally underpinned.

In his liberty essay, Berlin concludes that while both versions of political liberty are vital, negative liberty is the more humane because it is the version that better allows...

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87 Berlin, *Four Essays Lib.* (n 4) 171.
88 ibid 166.
90 ibid 121–122.
91 ibid 131. Dworkin puts it as the desire to ‘play a role in their own coercive governance’. Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 365.
92 Berlin, *Four Essays Lib.* (n 4) 131. It should not be forgotten that Berlin describes himself as ‘fundamentally’, a ‘liberal rationalist’, see, Berlin and Jahanbegloo (n 11) 70.
individuals the freedom to make the choice between competing and incommensurable value claims, and is, as such, more directly reconcilable with his idea of pluralism.\textsuperscript{93} Berlin further elevates negative liberty, albeit barely, because of a danger he perceives within positive liberty (akin to that he saw in monism); or at least a dangerous manifestation that he felt had been more common throughout history than any danger inherent in negative liberty.\textsuperscript{94} Drawing on the earlier analyses of Mill and Constant, the danger Berlin foresaw was that self-government by the people did not necessarily protect an individual area of freedom but in fact encourages authoritarian structures because of the pursuit of ‘self-mastery’.\textsuperscript{95}

The liberals of the first half of the nineteenth century correctly foresaw that liberty in this ‘positive’ sense could easily destroy too many of the ‘negative’ liberties that they held sacred. They point out that the sovereignty of the people could easily destroy that of individuals. Mill explained, patiently and unanswerably, that government by the people was not, in his sense, necessarily freedom at all. ... Mill and his disciples spoke of the tyranny of the majority and of the tyranny of ‘the prevailing feeling and opinion’, and saw no great difference between that and any other kind of tyranny which encroaches upon [human]’s activities beyond the sacred frontiers of private life.\textsuperscript{96}

Since absolute sovereignty was viewed by many liberal thinkers as ‘a tyrannical doctrine’, it was necessary to conceive of ways to protect the minimum area of freedom that no person or government should be permitted to cross.\textsuperscript{97} Natural rights are identified as one way of trying to establish this frontier (again see chapter 3, section 3.3.1).\textsuperscript{98} Indeed, Berlin is consistently supportive of the idea of human rights, acknowledging it to rest on the belief that ‘there are certain goods – freedom, justice,

\textsuperscript{93} Berlin, \textit{Four Essays Lib.} (n 4) 171.
\textsuperscript{94} ibid; Berlin and Jahanbegloo (n 11) 41.
\textsuperscript{95} Berlin, \textit{Four Essays Lib.} (n 4) 171.
\textsuperscript{96} ibid 163. Note ‘men’ changed to ‘human’.
\textsuperscript{97} ibid 164.
\textsuperscript{98} ibid 165.
pursuit of happiness, honesty, love – that are in the interests of all human beings’ irrespective of social group.\(^9\) He speculates in fact that the main benefit for liberals from participation in government is to use such participation as a means of protecting this ‘individual - ‘negative’ - liberty’, i.e. the right to non-interference.\(^10\) For Berlin, the freedom of a society is to be measured by the strength of these barriers. It is not, in his opinion, the form of such barriers, i.e. legal, moral or constitutional, but rather their effectiveness that will render a society comparatively free. Berlin makes this point with reference to ‘Great Britain’ and the absolute authority of the monarch in Parliament.\(^1\) This is presumably because of the limited role the monarch now has in practice, as perhaps evidenced in the Queen’s recent proroguing of Parliament on advice of the UK Government, later found to be a void action by the courts (see chapter 1, section 1.2.1 and chapter 2, section 2.4.2). Yet, as with all values, Berlin states that negative liberty is not a ‘sacred untouchable value’; but must in practice ‘yield’.\(^12\) What concerns Berlin then in any given society, is the question of what is the minimum area of personal freedom that is untouchable? Berlin refers to this minimum area as a ‘frontier’: ‘shifting, but always recognizable’\(^13\) and advocates a system where compromise and is paramount:

All we can do is to protect choices from being too agonising and that means that what we need is a kind of system which permits pursuit of several values so that, so far as possible, there arises no situation which makes [human beings] do something which is contrary to their deepest moral convictions. In a liberal society of a pluralist kind there is no avoiding compromises; they are bound to be made; the very worst can be averted by trade-offs. So much for this, so much for that.\(^14\)

\(^{9}\) Berlin and Jahanbegloo (n 11) 39.  
\(^{10}\) Berlin, Four Essays Lib. (n 4) 165.  
\(^{11}\) ibid 166, fn 2.  
\(^{12}\) ibid 126.  
\(^{13}\) ibid 127.  
\(^{14}\) Berlin and Jahanbegloo (n 11) 143.
Clearly, whatever the frontier of negative liberty, it must be enough to allow human beings to function in a way that allows them a broad freedom to choose their own balance of ultimate pursuits in life; also avoiding any situation whereby they are deeply harmed by the necessary compromise. In this way, human beings should still be able to demonstrate the common human capacity for self-government and self-transformation and society should represent the inevitable divergence that ensues.

Importantly, self-creation and incommensurability makes clear that whatever the human capacities that can be attributed to Berlin as universal, they cannot be understood as permanent or constant such as would be the case in abstract essentialist human nature theories. Empathy might be an identifiable universal value in terms of how human beings discern the legitimacy of value choices, but due to the further human feature of self-creation, i.e. where human beings take radical free choices between incommensurable values, even empathy itself cannot be conceived as a permanent human faculty.

In addition to outlining the founding idea of EVP, this section has sought to identify the critical value that can be attributed to Isaiah Berlin’s conception of objective universal values. It has found this normativity in a uniquely Berlinian conception of human nature; a conception which holds that human beings are both capable of empathy and of exercising radical free choice. These are described as the human faculty of empathy and self-creation respectively. For EVP to be adopted as a truth about the nature of value, it is necessary that both these faculties are respected and fostered within our governing institutions. Although empathy and self-creation should naturally influence the form of our decision-making process, they should similarly, as universal capacities, be outcomes of it, such that amidst the difficulties for institutions in terms of making final choices, some persuasive value should be given to the ways in which choices have been made, not unlike the operation of much judicial review.¹⁰⁵ In the section that follows, the discussion picks up on two further

capacities that might also be adopted as universal values. These values emerge through the scholarship of ‘human capabilities’ and the EVP of Martha Nussbaum.

4.3. Martha Nussbaum and the Human Capabilities Approach

Martha Nussbaum is among the most well-known advocates of universal values identified by way of what has been called a ‘capabilities’ or ‘human development’ approach. These approaches, which identify a list of certain ‘capabilities’ (also otherwise phrased as ‘opportunities’ or ‘goods’) that are central to human life, have been heavily influential in the development industry where they are used to make quality of life assessments. Although Martha Nussbaum, whom is the focus of this section, makes no identifiable claim to being influenced by the work of Isaiah Berlin, she too, rejects value monism and commits to the distinctive nature of these multiple ends or capabilities necessary for human flourishing. Nussbaum points rather to the influences of Aristotle (and initially, Marx’s reading of the scholar), as well as the political liberalism of Rawls. Yet unlike Berlin, Nussbaum is striking for her willingness as a pluralist to identify universal values, and further to argue that these values should serve as ‘a foundation for basic political principles that should underwrite constitutional guarantees’. The outcome of Nussbaum’s idea is a ten-strong list of universal values that she calls the ‘central human functional capabilities’ (or ‘central capabilities’ for short). The substance of this list will be given further attention in the section below; for now, however, the short form version of the ten central capabilities she identifies are: life; bodily health; bodily integrity; sense, imagination and thought; emotions; practical reason; affiliation; other species; play;

108 Nussbaum, *Women and Human Development: The Capabilities Approach* (n 106); Nussbaum, *Creating Capabilities* (n 6).
110 Ibid 78.
and, control over one’s environment.\textsuperscript{111} Her theory is therefore a substantive conception of the good, at least in terms of good human functioning.\textsuperscript{112} For a discussion on the relationship between EVP and human rights law, see chapter 5, sections 5.2 and 5.4 below, and for discussion on how Nussbaum relates her own approach to human rights law, see chapter 6.

In terms of justification, Nussbaum, like Berlin, is careful not to ascribe any metaphysical explanation for her theory; she does however rely on a sense that the human being has an intrinsic value. Her justification process involves intuiting what capabilities a human being needs to function in a ‘truly human way’; as opposed to an animalistic manner.\textsuperscript{113} The intrinsic value of the human being comes through in Nussbaum’s association of the idea that the threshold level of truly human functioning is akin to what can be considered ‘worthy of a human being’.\textsuperscript{114} Of this activity Nussbaum notes that in any useful assessment of what a human being is, it is necessary to ‘single out some [of what we do and are] as particularly central; of such importance that without those we don’t think that a human life exists any longer.’\textsuperscript{115} In this way, Nussbaum’s concept involves understandings fundamental to the idea of human dignity.\textsuperscript{116} Nussbaum explicitly draws out that her primary justification for identifying the moral claim for certain human abilities is based on ‘intuition.’\textsuperscript{117} These moral intuitions identify certain ‘provisional fixed points’ which represent evaluative

\textsuperscript{111} ibid 78–80.
\textsuperscript{112} Nussbaum notes that it is a partial substantive conception. [Note also however that her political justification incorporates in an ancillary way an ‘intelligently designed informed-desire approach’. This latter approach incorporates substantive ethical norms and is felt necessary for political stability and respect for persons.] See, Martha Nussbaum, ‘Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan’ (2000) 111 Ethics 102, 117–118. See states elsewhere that it is not a complete theory of justice, just a social minimum. See, Martha Nussbaum, ‘In Defense of Universal Values’ (2000) 36 Idaho Law Review 379, 415–416.
\textsuperscript{113} Nussbaum, ‘In Defense of Universal Values’ (n 112) 413. She attributes the ‘truly human’ sentiment to Marx.
\textsuperscript{114} ibid 414.
\textsuperscript{115} Nussbaum, ‘Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan’ (n 112) 119.
\textsuperscript{116} Nussbaum, ‘In Defense of Universal Values’ (n 112) 414. See also Christopher McCrudden on human dignity in chapter 3, section 3.5; Christopher McCrudden, Litigating Religions: An Essay on Human Rights, Courts, and Beliefs (Oxford University Press 2018) 131.
\textsuperscript{117} Nussbaum, ‘In Defense of Universal Values’ (n 112) 423 (see also 416).
or ethical judgments that we hold. Nussbaum describes her philosophical approach as beginning and ending in ethics, which can be taken to mean that it starts from moral premises and ends in moral conclusions about human behaviour.

Yet Nussbaum adds further key material to the idea of the ‘truly human’ nature of functioning beyond just that of functioning in a manner considered worthy of a human being. She also infuses the idea with two of the capabilities identified in her ten-fold list: that of practical reason and affiliation (note that she identifies the latter capacity as similar to Rawls concept of ‘sociability’). Nussbaum identifies these two capabilities as having ‘special importance’ for the reason that ‘they organise and suffuse all the others’. She explains their importance as follows:

To use one’s senses in a way not infused by the characteristically human use of thought and planning is to use them in an incompletely human manner. To plan for one’s own life without being able to do so in a complex form of discourse, concern and reciprocity with other human beings is again to behave in an incompletely human manner. To take just one example, work, to be a truly human mode of functioning must involve the availability of both practical reason and affiliation. It must involve being able to behave as a thinking being, not just a cog in a machine; and it must be capable of being done with and toward others in a way that involves mutual recognition of humanity.

Importantly however, at least from an ethical value pluralist perspective, practical reason and affiliation are not the ends towards which the other capabilities intend. Rather, practical reason and affiliation set ‘constraints’ on the acceptable threshold

118 Nussbaum, ‘Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan’ (n 112) 118.
119 Nussbaum, ‘In Defense of Universal Values’ (n 112) 423.
120 ibid 414. See also for the Rawls comment, Nussbaum, ‘Human Functioning and Social Justice: In Defense of Aristotelian Essentialism’ (n 7) 225.
121 Nussbaum, ‘In Defense of Universal Values’ (n 112) 422.
122 ibid 422–423.
of the other capabilities.\textsuperscript{123} It is in this sense, that they suffuse the other capabilities. Nussbaum provides a further example, using Marx’s illustration of the starving person to note that he or she will ‘grab at the food in order to survive’ and that the scenario is such that the ‘social and rational ingredients of human feeding can’t make their appearance’.\textsuperscript{124} The starving man does not therefore function in a truly human way. In summary, the exercise of our moral intuition to identify the threshold level of truly human functioning leads us to the more substantial idea of ‘the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others’.\textsuperscript{125}

Like Berlin, the emphatically plural approach of Nussbaum to the distinct nature of the ten capabilities, means that she believes that even the absence of one capability should be perceived as ‘tragic’.\textsuperscript{126} This resolute rejection that the capabilities lead towards one single end, forces her to consider that only limited trade-offs in relation to any of the capabilities would be acceptable. As such, she suggests that any application of cost-benefit analysis would also be limited:

One may, of course, always use cost-benefit analysis; but if one does so in connection with this approach, it will be crucial to represent in the weightings the fact that each and every one of a plurality of distinct goods is of central importance, and thus there is a tragic aspect to any choice in which citizens are pushed below the threshold in one of the central areas. That tragic aspect could be represented as simply a huge cost; but it is hard to represent clearly in this way the fact that a distinctive good is being slighted. One should not suppose, for example, that the absence of the political liberties would be made up for by tremendous economic growth, although the use of a single measure might easily make one think in this way.\textsuperscript{127}

\begin{itemize}
  \item \textsuperscript{123} ibid 423.
  \item \textsuperscript{124} ibid 413.
  \item \textsuperscript{125} Nussbaum, \textit{Women and Human Development: The Capabilities Approach} (n 106) 72.
  \item \textsuperscript{126} Nussbaum, ‘In Defense of Universal Values’ (n 112) 421.
  \item \textsuperscript{127} ibid.
\end{itemize}
Nussbaum is also committed to an open-ended discussion concerning her ten universal capabilities. Much like Berlin’s ideas, Nussbaum’s list, we are told, is not closed, nor is it necessarily permanent. It is as it stands based on a cross-cultural ‘intuitive conception’ of the human person that ‘demands continued reflection and testing against our intuitions’\(^{128}\). Yet despite the open-ended nature of the discussion, Nussbaum’s theory does – like Berlin, but much more obviously – offer a partly essentialist conception of the human being. In an early essay on her approach, she herself describes her conception as a ‘historically grounded empirical essentialism’\(^{129}\) in a context where she distinguishes between meta-physical realist essentialism and internalist essentialism (something she considers to be under-distinguished in critiques of essentialism). She describes meta-physical realist essentialism as the view that there is a determinate way that the world is independent from the cognitive functions of human beings, often represented by the existence of a transcendent being. Internal essentialism is described as the view that an account of the human being can instead be generated from within the human being themselves, such as by human understanding and experience.\(^{130}\) By resting her version of internal essentialism on a ‘historically sensitive account of the most basic human needs and human functions’ however, she reveals a more contextually sensitive approach to essentialism than that discussed in section 3.3 underpinning the classical theory.\(^{131}\) It is not solely based on an abstract reason, but it is instead akin to the embedded universalism, which emphasises the importance of the contextualised self, discussed by Hogan in section 3.5. Chapter 6 later describes this adopted approach of the thesis as an internal and embedded essentialism (see section 6.2 of that chapter). Nussbaum also emphasises the teleological nature of her idea: as in opposition to meta-physics, it is concerned with ‘ends’ and the ‘overall shape and content of the human form of life’.\(^{132}\)

\(^{128}\) Nussbaum, *Women and Human Development: The Capabilities Approach* (n 106) 77.

\(^{129}\) Nussbaum, ‘Human Functioning and Social Justice: In Defense of Aristotelian Essentialism’ (n 7) 208.

\(^{130}\) ibid 206–208.

\(^{131}\) ibid 205.

\(^{132}\) ibid 215.
Finally, by way of an ‘ancillary’ justification for her capabilities approach, Nussbaum further asserts that her approach represents a type of Rawlsian ‘overlapping consensus’, which is simply said to mean that people can accept the political conception of her idea, i.e. the ten-fold list, without agreeing on the moral core (which in Nussbaum’s case is human dignity), or indeed any particular view of the human person or of human nature. Indeed, Nussbaum describes how she developed her ten-fold list of capabilities based on ‘years of cross-cultural discussion’; in this way, the list is said to already represent an overlapping consensus.

Although Nussbaum’s moral idea focuses on functioning in a truly human way, she is careful to distinguish the possession of a capability from the use of that capability (i.e. actual functioning). In this way, she believes that no person should be required to use their opportunities to function in the truly human way, only that they possess the opportunity to do so. To do otherwise would be to compromise free choice. Nussbaum’s substantive conception of good human functioning is therefore to be distinguished from the appropriate political goal, which is only the capability to function. The substantive conception of human functioning, serves rather, as the moral guide for our social and political institutions, and constitutional guarantees (see further section 5.2). Borrowing further on the work of Rawls, Nussbaum’s offers a political strategy for justifying additional goods based on his idea of a ‘reflective equilibrium’. This involves ‘lay[ing] out the arguments for a given theoretical position, holding it up against the “fixed points” in our moral intuitions and then observing how “those intuitions both test and are tested by the conceptions we examine.” She identifies for example, that rape or domestic violence might serve as provisional fixed points that we believe are harmful to human dignity. To

133 Nussbaum, ‘In Defense of Universal Values’ (n 112) 416.
134 Ibid.
139 Ibid 439; see also, Nussbaum, ‘Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan’ (n 112) 116–118. See also, Nussbaum, Creating Capabilities (n 6) 77.
assess any given political theory of the good, we test how it holds up to our fixed intuitions.¹⁴⁰

It should also be noted that there is a deliberate and inevitable vagueness to Nussbaum’s expression of her ten capabilities (in early articulations of her idea, she describes it as a ‘thick vague theory of the good’) in order to accommodate a sensitivity to the variety of historical and cultural manifestations each capability can assume.¹⁴¹ Despite this contextually sensitive element of Nussbaum’s conception however, the capabilities themselves are decidedly individualistic. Nussbaum describes her approach as committed to the principle that each person is an end. In this regard, Nussbaum emphasises that women have often been treated as means, or as avenues to support ends of others, rather than ends themselves.¹⁴² Indeed, this important point should also be inferred into Berlin’s notion of self-creation, or human beings as radical chooser (see section immediately above). Despite criticisms of Nussbaum’s approach as overly individualistic, she makes the important point that one can promote individual well-being without compromising the importance of love and care for others, or without ignoring the effect, as we have seen, of the embedded and community situation on a person’s wellbeing.¹⁴³ Instead, Nussbaum simply emphasises that we equally experience life as individuals:

[The principle that each person is an end] arises naturally from the recognition that each person has just one life to live, not more than one; that the food on A’s plate does not magically nourish the stomach of B; that the pleasure felt in C’s body does not make the pain experienced by D less painful; that the income generated by E’s economic activity does not help to feed and shelter

¹⁴⁰ Nussbaum, ‘In Defense of Universal Values’ (n 112) 440.
¹⁴² Nussbaum, Women and Human Development: The Capabilities Approach (n 106); Nussbaum, Creating Capabilities (n 6). This is described as ‘a version of Kant’s idea of the duty to respect humanity as an end’. Further, like Kant, Nussbaum rejects utilitarianism because it does not sufficiently respect each person.
¹⁴³ Nussbaum, Women and Human Development: The Capabilities Approach (n 106) 56. See also for a rejection of this allegation concerning the use of the capabilities approach within the development sector, SR Osmani, The Capability Approach and Human Development: Some Reflections (UNDP 2016) 3–7.
F; in general, that one person’s exceeding happiness and liberty does not magically make another person happy or free.\textsuperscript{144}

Having discussed the parameters of Nussbaum’s approach to universal values, the thesis turns to consider some of the substance of her ten capabilities, yet one should mitigate expectations based on Nussbaum’s own commitment to a ‘vague’ theory of the good – In this regard, there are indeed parallels with Crowder’s earlier suggestion concerning Berlinian ‘thin’ universal values and thicker articulations which are group or culture specific.\textsuperscript{145}

4.3.1. The ‘Suffusing’ Capabilities of Practical Reason and Affiliation

Nussbaum’s ten-fold list has been developed over time: In 2011, she outlined the following list of the capabilities that governments should, where possible, secure to their citizens:

1. \textit{Life}. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.
2. \textit{Bodily health}. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. \textit{Bodily integrity}. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. \textit{Senses, imagination, and thought}. Being able to use the senses, to imagine, think and reason – and to do these things in a ‘truly human’ way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary,
musical, and so forth. Being able to use one’s mind in ways protected by
guarantees of freedom of expression with respect to both political and artistic
speech, and freedom of religious exercise. Being able to have pleasurable
experiences and to avoid nonbeneficial pain.

5. *Emotions.* Being able to have attachments to things and people outside
ourselves; to love those who love and care for us, to grieve at their absence;
in general, to love, to grieve, to experience longing, gratitude, and justified
anger. Not having one’s emotional development blighted by fear and anxiety.
(Supporting this capability means supporting forms of human association that
can be shown to be crucial in their development).

6. *Practical reason.* Being able to form a conception of the good and to engage
in critical reflection about the planning of one’s life. (This entails protection
for the liberty of conscience and religious observance.)

7. *Affiliation.* (A) Being able to live with and toward others, to recognise and
show concern for other human beings, to engage in various forms of social
interaction; to be able to imagine the situation of another. (Protecting this
capability means protecting institutions that constitute and nourish such
forms of affiliation, and also protecting the freedom of assembly and political
speech.) (B) Having the social bases of self-respect and non-humiliation; being
able to be treated as a dignified being whose worth is equal to that of others.
This entails provisions of non-discrimination on the basis of race, sex, sexual
orientation, ethnicity, caste, religion, national origin.

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146 An earlier version was as follows: ‘*Practical reason.* All human beings participate (or try to) in the
planning and managing of their own lives, asking and answering questions about the good and how
one should live it. Moreover, they wish to enact their thought in their lives – to be able to choose
and evaluate and to function accordingly. This general capability has many concrete forms and is
related in complex ways to the other capabilities, emotional, imaginative and intellectual. But a
being who altogether lacks this would not be likely to be regarded as fully human in any society.’
See, Nussbaum, ‘Human Functioning and Social Justice: In Defense of Aristotelian Essentialism’ (n 7)
219.

147 Nussbaum, *Creating Capabilities* (n 6). An earlier version leaving out part B was as follows:
‘*Affiliation with other human beings.* All human beings recognize and feel some sense of affiliation
and concern for other human beings. Moreover, we value the form of life that is constituted by
these recognitions and affiliations. We live for and with others and regard a life not lived in
affiliation with others to be a life not worth living. (Here, I really wish, along with Aristotle, to spell
things out further. We define ourselves in terms of at least two sorts of affiliation: intimate family
and/or personal relations and social or civic relations.)’ See, Nussbaum, ‘Human Functioning and
Social Justice: In Defense of Aristotelian Essentialism’ (n 7) 219.
8. *Other species.* Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. *Play.* Being able to laugh, to play, to enjoy recreational activities.

10. *Control over one’s environment.* *(A) Political.* Being able to participate effectively in political choices that govern one’s life; having the rights of political participation, protections of free speech and association. *(B) Material.* Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.\(^{148}\)

Nussbaum refers to her capabilities as ‘combined capabilities’; a term she uses to reflect the importance of the material and social circumstances that pertain to the individual.\(^{149}\) The concept of combined capabilities refers to the dual importance on government of having cognisance of the ‘internal capabilities’ possessed by individuals - essentially meaning the developed state of the person such that they can exercise the desired functions – as well as any ‘external circumstances’ which foster or facilitate that functioning. By taking account of the embedded nature of human beings in this way, Nussbaum includes the vitally important need to ensure that human beings have the appropriate material and social conditions to allow the capabilities to develop\(^{150}\) (see parallels in the justifications of socio-economic rights discussed in section 3.3.3). By way of example on this latter point, as Nussbaum notes in her list above, the capability of emotion requires ensuring that human beings have the appropriate associations, whether family networks or otherwise, to support their full emotional development.

\(^{148}\) Nussbaum, *Creating Capabilities* (n 6).

\(^{149}\) Nussbaum, ‘In Defense of Universal Values’ (n 112) 425.

\(^{150}\) ibid.
It will be recalled that Nussbaum identifies two of these capabilities as of ‘special importance’, namely practical reason and affiliation, on the basis that they constrain and suffuse all the other capabilities because it is difficult to envisage the operation of the others without these values also being present.\(^{151}\) Since the purpose of this thesis is to focus on the relationship between universal value and legal authority, now approaching value from the perspective of EVP – rather than, for example, a theory of global justice - the ‘architectonic’ nature of practical reason and affiliation present with special utility.\(^{152}\) Since Nussbaum’s approach appears to be more empirically grounded than Berlin’s ‘horizon’ concept (section 4.2.1) and therefore less robust in terms of infusing the law with a universal normativity, practical reason and affiliation are similar to empathy and self-creation in the sense that they concern an aspect of human nature and therefore the ways in which other ultimate, or indeed, universal values might be identified. Furthermore, without wanting to create a false binary between procedural and outcome-orientated values, it is at this stage considered that since the primary objective of the thesis is to examine legal sovereignty based on ethical premises – a deontological rather than a consequentialist approach – the most helpful universal values may also prove to be those of procedural value.\(^{153}\) These ideas are taken forward with specific application to the UK constitution in the final two chapters of the thesis.

As presented, Nussbaum’s conception of practical reason is closely related to free choice and the deliberation that typically precedes such choice, whether regarding individual decisions or one’s overarching trajectory in life.\(^{154}\) It can be said to organise the other capabilities because ‘the opportunity to plan one’s own life is an opportunity to choose and order the functionings corresponding to the various other

\(^{151}\) ibid 413, 422.

\(^{152}\) Nussbaum, ‘Human Functioning and Social Justice: In Defense of Aristotelian Essentialism’ (n 7); Nussbaum, Creating Capabilities (n 6).

\(^{153}\) Since Nussbaum is conceiving of a partial theory of the good, she is naturally outcome orientated. For a short discussion on deontological and consequentialist approaches, see, Nussbaum, Creating Capabilities (n 6).

\(^{154}\) For a wider discussion on practical reason within the capabilities approach, see Annie Austin, ‘Turning Capabilities into Functionings: Practical Reason as an Activation Factor’ (2018) 19 Journal of Human Development and Capabilities 24.
Influenced by Aristotle, Nussbaum elsewhere presents an account of the ‘procedures of rational judgment’. It is an account which emphasises the importance of combining systemic thought with experience, which in turn includes concrete particular cases. In this way Nussbaum also includes emotion into her wider account of good public reasoning. Combining systemic thinking with experience also requires that the free choice supported by the concept of practical reason, pay attention to the material and social conditions which support it. This historical and experiential criteria however does not change Nussbaum’s defence of her account of practical reasoning as at least broadly ‘universal and non-relative’. A distinction should be made here with Berlinian self-creation. While both scholars emphasise the importance of free choice, it will be recalled that for Berlin, the most radical of free choices exemplified in the very idea of EVP, occurs at the point in which reason is of limited value. Indeed, there may be some overlap here with Nussbaum’s willingness to include other factors such as emotion in her broader view of good public reasoning.

As apparent from the section above, affiliation also organises and suffuses the other capabilities; because to respect human dignity in Nussbaum’s view, means to respect the human as a ‘social being’. Consideration must therefore be given to the quality of relationships and interactions a person has with other human beings. Deliberating public policy, we are told is itself a ‘social matter’, where relationships of varying sorts, such as ‘familial, friendly, group-based [and] political’ all play a ‘structuring role’. By concerning oneself with the quality of relationships and interactions

155 Nussbaum, Creating Capabilities (n 6).
157 ibid.
158 ibid. It is of general note that Nussbaum places significance on the value of emotion within social and political structures in her scholarly literature, including the capabilities of love, anger and forgiveness. See, e.g. Martha Nussbaum, Political Emotions: Why Love Matters for Justice (e-Book) (Harvard University Press 2013); Martha Nussbaum, Anger and Forgiveness: Resentment, Generosity, Justice (Oxford University Press 2016).
159 Nussbaum, ‘Human Functioning and Social Justice: In Defense of Aristotelian Essentialism’ (n 7) 225.
160 Nussbaum, ‘Skepticism About Practical Reason in Literature and the Law’ (n 156) 717.
161 Nussbaum, Creating Capabilities (n 6).
162 ibid.
between persons, affiliation is difficult to separate from Nussbaum’s capabilities of emotions, senses, imagination and thought.

It must be said that Berlin’s concepts are narrower than those presented by Nussbaum, and while Berlin was equally a rationalist – ‘fundamentally’ he says, ‘I am a liberal rationalist’ 163 - his idea of value pluralism led him to a greater fascination with the limits of reason. Berlin’s focus on empathy naturally fits into Nussbaum’s sense, imagination and thought capability as well as that of affiliation, though his distinguishing focus is on encouraging the use of this capability, the actual functioning, to appreciate the fact that values are irreducibly plural, and perhaps, ironically even, increase a person’s awareness of available value choices. As demonstrated, Berlin believed that this ability of human beings could in fact de-escalate tensions over right ways of living, such that it is worth the thesis effort of enquiring into its benefits for the discord surrounding legal sovereignty in the UK.

4.4. Conclusion: EVP’s Universal Normativity in Process Values

This thesis is seeking to enquire whether EVP can contribute to the UK’s current legal approach to sovereignty. For it to do so, it was considered necessary that EVP could provide some normative context, or objectivity, such that universal values could be identified (see chapter 1, sections 1.2.3 and 1.3, and section 4.1 of this chapter). In this way, the normative context of EVP can justify a constitutional operation on much the same basis (i.e. universalism) that human rights law presently does (see earlier chapter 3, section 3.3 and below chapter 5, section 5.2). This chapter was therefore dedicated to a predominantly philosophical enquiry on the relationship between EVP and universal value in the accounts of Isaiah Berlin and Martha Nussbaum.

As noted within the chapter, EVP is not, of itself, especially prescriptive as to the content of universal values. Its most effective contribution is instead in setting out parameters for identifying universal values amidst the array of competing and

163 Berlin and Jahanbegloo (n 11) 70.
incommensurable values. It might also be added here that Berlin himself understood a commitment to EVP, and the resulting empathy, humility and compromise that it requires, to serve to de-escalate fanaticism concerning one’s own viewpoint.

Out of Berlin and Nussbaum’s ideas, the chapter ascribes to some tentative aspects of essentialism (i.e. innate human nature), in the form of potential faculties or capabilities of the vast majority of human beings, and in particular capabilities concerning the way in which human beings discern other universal values. Because of their ‘suffusing’ or ‘architectonic’ nature as to how human beings go about existing, the chapter focuses on four, namely: empathy, self-creation, practical reason and affiliation. There are no doubt other process-orientated values that could be added to this list. The identification of the four is by no means intended to be complete or even permanent. ‘Truth’, for example, might legitimately be added as per Berlin’s suggestion that the distinction between true and false is a feature held in common by all societies. Perhaps more importantly, practical reason would appear to be of little value without a significant degree of truth underpinning the reasoning.

What the four values and the rationale behind them serve to offer the thesis is robust normative content of universal application. This content can be used to inform our understanding of sovereignty; an understanding perhaps less susceptible to the ebbs and flows of political life. The procedural nature of these values might also be used to inform institutional decision-making in terms of trade-offs concerning other ultimate values (subsequently identified by way of political agreement when conducted in line with at least, empathy, self-creation, practical reason and affiliation). Indeed, these are the suggestions of chapter 6 of the thesis where the contribution of this idea is more practically suggested.

With the idea of EVP and its compatibility with normative content and universal values firmly established, the thesis must first consider however, how EVP currently appears in UK law, especially in terms of the sites of legal authority. Toward this end, chapter 5 focuses on the current hierarchy of norms within the UK constitution,
political liberalism, human rights law, and constitutional pluralism through devolution.
5. Liberal Democratic Constitutions and Ethical Value Pluralism: Political Liberalism, Human Rights and Constitutional Pluralism

5.1. Introduction

This purpose of this chapter is to place a more explicit focus on the relationships between the key ideas of constitutions, legal sovereignty and ethical value pluralism (EVP) presented so far in the thesis. It does this by answering the final sub research question: ‘To what extent is EVP currently a feature of liberal-democratic constitutions, such as that of the UK?’ This chapter answers that question by considering three key features of modern constitutions, namely political liberalism, human rights law and legal pluralism because of their close relationship with legal sovereignty. It seeks to bridge the gap between the philosophical narrative in chapter 4 and the conclusions as regards the UK in chapter 6. It does this by maintaining a theoretical focus, while engaging UK law where relevant.

The thesis has, to this stage, set out how the sovereignty and constitutionalism narratives overlap and indeed how the constitution plays an important role in liberal democracies by identifying authoritative legal institutions (chapter 1, section 1.2); and hierarchical norms to aid the management of legitimate disagreement (chapter 2, section 2.3 and chapter 3, section 3.3.). Within those discussions is the message that an important ordering component of liberal-democratic constitutions today, including in the UK, is a human rights legal framework. The universalism narrative that underpins human rights law was understood furthermore, to be critical to shifting sovereignty away from exclusively state-focused structures (see chapter 1, section 1.2.3 and chapter 3, section 3.3). Yet it was also observed within chapters 1 and 2 that human rights law has served to buoy at the state level the rule of law narrative because of the courts’ role as the site for protecting unpopular or non-majoritarian interests and the commitment to pre-political norms in classical human
rights theory. Devolution, on the other hand, is understood as trending sovereignty in the opposite direction from human rights law but with related implications for how sovereignty is understood. Devolution and accompanying referendums have further served to enliven debates about popular sovereignty in the UK, as opposed to parliamentary sovereignty, which has in turn increased the focus on how devolution has allowed for the emergence of divergent policy preferences around questions of rights and social and economic opportunity. While this chapter will cover many of the same concepts and those initially established in chapters 1 – 3, its analytical focus is somewhat different because it is the first stage by which the thesis unites these concepts explicitly with the idea of EVP (set out in chapter 4). This work is then continued in chapter 6, which extends the chapter 5 ‘state-of-the-art’ analysis and concludes on how EVP might inform debates about UK legal sovereignty moving forward.

As a philosophical concept about human ends (see section 4.2), it is difficult to make direct relationships between EVP and legal sovereignty. Instead, the focus is on how the idea of EVP might best inform sites of sovereignty within the UK. EVP as interpreted in chapter 4 is presented within this chapter as manifesting within the UK constitution (to varying levels) within the following three areas: (i) political liberalism; (ii) human rights law; and (iii) devolution (through the discourse of constitutional pluralism). Perhaps unsurprisingly, however, given the norms underpinning liberal universalism, the chapter concludes that, despite these areas of overlap, there are clear gaps within which a deeper commitment to EVP could be made manifest. Gaps which are taken forward in Chapter 6 to present a view on what a commitment to EVP could mean for the UK Constitution.

Before turning to the different ways liberal democratic constitutions, such as that of the UK, can be said to embed a degree of EVP, the chapter will first directly address the often-cited concern (already philosophically dismissed of course within chapter 4), as to whether any hierarchy of norms within a constitution can be compatible with EVP.
5.2. Constitutional Hierarchies of Norms and EVP’s Hierarchy of Process-Norms

EVP, as interpreted within this thesis, should not be misunderstood as necessitating the rejection of hierarchies of norms within constitutions simply because the idea espouses the premise that values cannot be *rationally* ordered in one dominant and compelling way.¹ The position taken in this thesis - as should already be apparent from the more philosophical conversation in chapter 4 - is that EVP *can* sit harmoniously with the elevation of certain values within a constitution. This is with the proviso that the elevated values (or norms) are reasoned from an embedded universalism (rather than a rational abstract universalism) and are not presented in a manner that offends the core ideas of EVP. It is a worthwhile reminder at this stage of the thesis that the core ideas can be synthesised to mean that human values are (1) ‘plural’ and irreducibly so; (2) have the potential to conflict; and (3) can be ‘incommensurable’.² Chapter 4 in fact went to some lengths to identify a non-exhaustive list of values that sit comfortably with embedded universalism and so might form part of a constitutional higher order value system. These universal values took the form of predominantly procedural values and were empathy, self-creation, rationality and affiliation.³ These values were chosen as examples for the thesis because of the confidence in how they represent the contextualised *ways* in which human beings universally live and move towards their plural ends, i.e. the human faculties or ‘capabilities’ narrative. The detail of that position as inspired by the writings of Berlin, Nussbaum and others, was set out in chapter 4.

EVP’s embrace of a hierarchy of values aligns with the approach found in modern liberal democratic constitutions. It might even be said that a core purpose of such constitutions is to establish a hierarchy of normative values.\(^4\) After all, the management of different views within a political system to avoid the dominance of any one outlook over others is an age-old concern. Liberal democracies, like the UK, commonly seek to find agreement and social cohesion by establishing constitutions with characteristics such as the presumption of liberty and adherence to human rights law (two features we will compare with EVP later in the chapter). These features presently serve to establish parameters and aid direct determinations in cases of conflict.

Having suggested then that both the current approach and the EVP approach to constitutions support a hierarchy of norms, this section of the chapter seeks to establish two further points. First, the current approach within liberal democratic constitutions includes hierarchies within the hierarchy, through the operation of *jus cogens* at the top, followed by the (qualified)\(^5\) civil and political rights, followed by socio-economic rights. All these rights are conceived as universal. In contrast, EVP as presented in this thesis, puts forward only one type of universal value: the (non-exhaustive list of) process values. While it recognises and supports other substantive values receiving higher order constitutional status, such values only do so by political contestation and agreement. The only values that are excluded from the agreement are those that fall outside the human horizon (see chapter 4, section 4.2.1) and those which offend or infringe the process values. The second point made in this section is that contemporary liberal democratic constitutions conceptualise these higher order norms as permanent (based on an abstract rational universalism), while EVP’s


universal process values cannot be theoretically permanent because of their embedded nature. The distinction however, is argued to be of limited practical relevance. This is because of their foundation is based on an internal and embedded essentialism. EVP’s universal process norms might therefore be considered in real terms as ‘quasi-permanent’. The two points made in this paragraph can be further understood using the example of jus cogens norms.

5.2.1. Hierarch(ies), and the Process Values Approach

The thesis has already observed hierarchies within liberal democracies to some extent within chapter 3 (section 3.3). There, the discrepancy between the common understanding (which is explicit in the United Nations (UN) treaties) that all human rights exist on an equal moral plane, and the different legal obligations regarding socio-economic rights vis-à-vis civil and political rights was noted. It was argued in that chapter that in the UK, this hierarchy is most clearly seen in the UK’s embrace of the primarily civil and political European Convention on Human Rights (ECHR) within its constitution (through the Human Rights Act 1998), without corresponding constitutional recognition of socio-economic rights. Without reiterating that discussion, it might be pointed out that in addition to juxtaposing the legal obligations around socio-economic rights with that of civil and political rights, rights which fall under the purview of jus cogens also present an elevated status in both international human rights law and the UK constitution.

Jus cogens is a term that refers to the concept of ‘peremptory norms’ i.e. norms from which there can be no derogation, and was given legal recognition in the Vienna

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8 For a recent UK Supreme court discussion of the concept, see Belhaj v Straw (n 5).
Convention on the Law of Treaties (VCLT) 1969. Article 53 of the VCLT defines a peremptory norm as a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The Tribunal for the Former Yugoslavia described it as a ‘norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary' customary rules.’ There is no exact list of peremptory norms but the concept typically includes the prohibitions on torture, genocide, slavery, racial discrimination, the use of force between states, and the right to self-determination (most of which are already standards within the international human rights treaties). Actions to prevent a violation of these norms is not subject to state sovereignty and as such requires no prior acceptance by the state in question of their legal validity. Much like international human rights law however, the justification for jus cogens is unclear. Similar to human rights law, the dominant thinking is that jus cogens emerges out of natural law theory. However, a significant body of scholars prefer the view that jus cogens is based on customary international law, or more narrowly within that: the common legal conviction within states, otherwise called opinio juris or state practice. Irrespective of whether the justification for international human rights law

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10 Prosecutor v Furundzija Tribunal for Former Yugoslavia Case No. 17.95.17 [153].

11 Lagerwall (n 5); Belhaj v Straw (n 5) [107 (ii)].

12 For an overview of the different natural law and customary international law positions, along with the presentation of a sociological logic, see Dennis R Schmidt, ‘Peremptory Law, Global Order, and the Normative Boundaries of a Pluralistic World’ (2016) 8 International Theory 262, 268–270; 283–290.


14 Lagerwall (n 5). For the latter view of customary international law generally, see also e.g. Stefan Talmon, ‘How Public International Law Has Been Made, Found and Proven from the 17th to the 21st Century’, 2011 Youard Lecture in Legal History. (University of Oxford Podcasts 2011).
and *jus cogens* is the same or indeed differs, it is apparent that *jus cogens* is placed above other human rights norms within international law and so too human rights laws.\(^\text{15}\)

The EVP approach to higher order norms as suggested by the discussion within chapter 4 is different. As explained in that chapter, EVP derives its objective normativity from the ways in which human beings present in their range of embedded contexts. The focus there is on modes of being or human faculties, rather than predominantly an empirical observation. Self-creation for example, recognises the human disposition to constantly diverge, adapt or progress from one direction toward another. Affiliation identifies the human reality that life is lived in connection with other humans. Empathy and practical reason make human interaction possible. Truth was also identified in chapter 4 as a possible additional value because of its intrinsic role in human existence. There are many untruths expressed by human beings but this rarely manifests as a personal objective at a conscious internal level. Even if we embrace lies toward others, we tend to think we have kept the truth for ourselves. Chapter 4 used Nussbaum’s term of ‘architectonic’ to describe how all these values have a distinctly procedural quality, in addition to their substantive value. The EVP of this thesis therefore considers that these process-focused values serve as robust universal norms.

Taking Berlin’s idea of the human horizon based on empathy a step further, the other process values identified in chapter 4 can additionally be used in their substantive form to exclude (or ‘delegitimise’) certain values from being added to the list (see chapter 6, section 6.2 for a summary of the thesis theory). In terms of ‘other’ values, which might be added as higher order values within a constitution or simply legal values of ordinary standing, the appropriate justification within an EVP context is political agreement (see also chapter 6, section 6.2). In this way, the EVP hierarchy is simpler than that currently at play. It considers the process values to be grounded on an embedded universalism and therefore requiring higher order constitutional

\(^{15}\) See e.g., Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012).
protection, ideally on the same *erga omnes* basis (i.e. obligations owed to the international community as a whole) as *jus cogens* norms presently. It accepts other values being added to the higher order legal protection provided they are compatible with the process values but only to the extent that they are understood as based on political agreement, or indeed the individual value constellation of a particular society. In this sense, while they may be legally equal to the process values within a given constitution, they cannot be theoretically or foundationally equal because they cannot be removed by political agreement.

5.2.2. Permanent Norms, and Quasi-Permanent Norms

The EVP process values may not be moved by political agreement, but they will cease to exist if they can no longer be justified based on a human faculties approach. Since they are fundamentally contextual, they cannot of course be theoretically permanent. That said, the process values come very close to traditional universal concepts and can be considered quasi-permanent. Chapter 4, section 4.3 discussed Nussbaum’s process of ‘intuiting’ the values which allow a human being to function in a ‘truly human way’.\(^\text{16}\) The EVP process values are grounded in an internal and embedded essentialism, and have stood the cross-cultural ‘intuitive’ test of time because they are based on the totality of the human experience. This allows them to constitute universal legal norms. While these universal values should undergo periodic assessment because of their embedded nature,\(^\text{17}\) the very requirements from which they are derived ensure that they would not be subject to rapid change. It will be recalled that Nussbaum referred to the approach as ‘internal essentialism’ because the account of the human being is based on the human being themselves and their understanding and experience.\(^\text{18}\)


\(^{17}\) See again e.g., Nussbaum, *Women and Human Development: TheCapabilities Approach* (n 3) 77.

It might at first be considered that this approach to universal values is less normatively robust simply because of its theoretical impermanence and reliance on process values more than values aimed at substantive ‘ends’. Taking the example of jus cogens rights, the highest of the current higher order constitutional values - and described by Dennis Schmidt as evidence of the ‘quest for safeguarding the moral integrity of international life through law’ — a more complicated normative picture in fact emerges. While this is not an analysis of the operation of jus cogens, it might be noted that the concept has been argued to be relatively ineffective and of limited legal use despite some growth in recent years. Schmidt links the confusion over the definition of jus cogens to the ‘vague theoretical basis’ and identifies an emerging body of work which aims to derive jus cogens from sociological foundations. Schmidt is himself such a scholar and puts forward a view of how peremptory norms are in fact better served by pluralist foundations. Focused on the diversity of human community and the ‘confusion’ in jus cogens theory, Schmidt asks himself ‘What are the most ethically desirable relations between diverse human communities which find themselves entangled in an international society marked by the excitements and tensions of different relations?’ Schmidt’s conclusion, borrowing on the work of William Connolly, is to first place a value on relationships through ‘human dignity’, an element of international society that is not specific to any one community identity. Drawing on that value, Schmidt embraces the social norm of ‘agonistic respect’ because it does not pursue any one specific vision but rather seeks to cultivate a way of interacting. Agonistic respect recognises and gives honour to the diverse ends individuals and social groups pursue.

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19 See, Schmidt (n 12) 266.
20 Robert Kolb, Peremptory International Law - Jus Cogens: An Inventory (Hart Publishing 2015) (generally); Schmidt (n 12) 270; Dinah Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 The American Journal of International Law 291, 292. For a recent discussion in UK courts, see Belhaj v Straw (n 5) [107(ii)].
21 Schmidt (n 12) 268 and 270. There are significant parallels here with the theoretical conversations around human rights mentioned in chapter 3. For one discussion on the theoretical confusion in human rights, see Gunnar Beck, ‘Human Rights Adjudication under the ECHR between Value Pluralism and Essential Contestability’ [2008] European Human Rights Law Review 214.
22 Schmidt (n 12) 287.
23 ibid 287–288.
24 ibid 288.
Most importantly - and not due to the debated utility of the legal concept presently - the existence of pluralist foundations do not entail moral deprivation. Schmidt’s pluralist ideas, as well as the EVP presented in the thesis, contain normativity. For Schmidt, the result may be ‘a more limited inventory’ of *jus cogens* than at present. He identifies for example, the right to self-determination, the prohibitions on slavery and genocide as relatively easy to understand in pluralist terms because they ‘outlaw behaviour that is... destructive of [the] agent’s distinct identities and social environment’. Schmidt’s approach around agonistic respect and the ways of interacting are not dissimilar to the process values outlined. Further, by specifying additional modes of communicating such as through practical reason and empathy, the EVP approach of the thesis arguably has even more normativity than agonistic respect alone. Fears that an EVP approach to issues such as *jus cogens* would undermine the protection of these underpinning rights are therefore likely to find themselves misplaced. Finally, it is also the case that under EVP, a particular society or groups of value constellations decide, through a process of contestation and agreement, on other non-process values to elevate into the higher order constitutional order.

To conclude this section, it might be identified that there are challenges to the law being overly prescriptive in terms of value hierarchies reasoned from an abstract universalism and therefore conceptually permanent. William Galston has made a notable contribution to this area by concerning himself with the reality of EVP in society and how it can be reconciled with political community. Galston’s ideas are distinct from that of embedded universalism and centre more immediately on the practicalities of political community. Nevertheless, the parameters Galston sets for one of his proposed methods for managing political community, i.e. the process of ‘constitutionalism’, apply equally to any constitution which embeds values reasoned from an embedded universalism understanding. According to Galston, a constitution can only ever commit to an authoritative ‘partial’ ordering of values for three key

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25 ibid 285. See also generally for agreement, John Williams, *Ethics, Diversity and World Politics: Saving Pluralism From Itself?* (Oxford University Press 2015).
26 Schmidt (n 12) 289.
reasons. These are as follows: (i) there might be legitimate clashes or inconsistencies between the values required for public order and the values espoused in the constitution (see further on the relationship between public order and ‘agreed’ hierarchical values chapter 6, section 6.3.2); 28 (ii) the individuals that comprise the society will have their own internal ordering of values which will for them be more authoritative on occasion than constitutional values; and (iii) the values espoused within the constitution will inevitably (and legitimately) conflict. 29 For Galston, any ‘winner-take-all decisions [will often] needlessly, and therefore wrongfully, diverge from the balance of underlying values at stake.’ 30

As demonstrated in chapter 4 and in Galston’s writings above, a commitment to EVP accepts the legitimacy of conflicting positions. As such, as Galston aptly points out, caution must be instituted as regards any specific constitutional hierarchy chosen. Building further on the theory of chapter 4, it might be said that part of the attraction of the process values identified as validly universal under EVP is their ability to deescalate the three tensions mentioned by Galston. As predominantly process values, they do not seek to infuse deep substance into other legal values; a society can determine additional values but this time based on agreement. In this way, the challenge to an individual or groups’ internal value constellation is limited. Similarly, process values are by their very nature assistive for reconciling or concluding on competing values in a given case. This is because the process values guide the methods for coming to that determination, ruling some out for failure to respect ‘practical reason’, ‘empathy’ or the legitimacy of the human exercise of ‘affiliation’ or ‘self-creation’. (EVP is intolerant of societal structures that restrict any of these

28 As an alternative formula for thinking about how political life can be organised in a manner compatible with ethical value pluralism – and seemingly presented as an alternative to constitutionalism – Galston also posits in his article the advisability of ‘minimum conditions of public order’, e.g. clear and stable property relations, the rule of law, state capacity to enforce the law etc. Here too, Galston is careful to emphasise that the conditions do not create a hierarchy of goods. These suggested goods may be circumvented if other goods become more morally significant. The point is that as a general rule, such criteria are necessary in modern legal-constitutional orders to promote public order, and that public order ‘increases rather than undermines the ability of individuals to live in accordance with their own conceptions of what gives life meaning and value.’ ibid 806–807.
29 ibid 808.
30 ibid 809.
human capabilities, but limits the discussion here to liberal democratic constitutions.)
Even as regards public order, although EVP might at first be seen as disruptive, as will be shown in this chapter and the next, this thesis in fact views it as ultimately advantageous to deescalating some of the discontent presently manifest.

5.3. Political Liberalism and EVP’s ‘Self-Creation’ and ‘Affiliation’

As discussed (chapter 1, sections 1.2.2 and 1.3.1), in a climate where there are many diffuse laws and conventions, it is difficult to identify with surety the complete list of UK constitutional values.\(^{31}\) This truth is also partly demonstrated by the dynamic sovereignty discussions witnessed in chapters 1-3, whereby each position could be argued to point to a different value basis.\(^{32}\) Nevertheless, it is apparent from the discussions in chapter 3 that liberty is a dominant UK constitutional value.

Isaiah Berlin, as we saw in chapter 4 (section 4.2.2), wrote extensively on the subject of liberty, linking EVP especially with the negative form of liberty, i.e. the area within which a human being can act unobstructed by others.\(^ {33}\) To avoid the removal of liberty (necessary for EVP), Berlin advocates a political system based on balanced compromises, which he refers to as sustaining a precarious equilibrium and constant trade-offs due to the prevailing and unavoidable state of social and political collisions.\(^ {34}\) These comments of Berlin, combined with the doctrine of incommensurability (still chapter 4, section 4.2.2), have led to a significant body of literature debating whether Berlinian value pluralism lends its endorsement to a liberal political framework. A liberal political framework can be understood here in

\(^{31}\) For two notable efforts see, Jeffrey Jowell and Colm O’Cinneide, ‘Values in the UK Constitution’ in Dennis Davis, Alan Richter and Cheryl Saunders (eds), An Inquiry into the Existence of Global Values (Hart Publishing 2015); Dawn Oliver, Common Values and the Public-Private Divide (Butterworths 1999).
\(^{32}\) In Jowell and O’Cinneide’s account for example, liberty is linked with the human rights protections, representative government with parliamentary sovereignty and the rule of law as a mediating authority between the former two values. See, Jowell and O’Cinneide (n 31) 366–368.
\(^{34}\) Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 3) 17–19.
the simple terms of a framework, which emphasises individual freedom elevating the status of the individual.\(^{35}\)

A common argument against arriving at a liberal conclusion is that liberalism prioritises in principle the value of liberty and so runs counter to the core premise of incommensurability.\(^{36}\) The thesis has however already rejected this suggestion by allowing for some normativity alongside the premise that values can be incommensurable. Thus far however, the thesis has identified that EVP requires at least the four process values of empathy, self-creation, affiliation and practical reason as quasi-permanent norms. While not the same concept, the process value that comes closest to liberty is that of ‘self-creation’. It will be recalled that self-creation speaks to the human beings’ ‘propensity to diverge’.\(^{37}\) Berlin appears to be of the view that because values are legitimately plural, it makes sense that humans’ also choose different and diverging life goals and value constellations. This is the case even within a single human life span.\(^{38}\) While Berlin’s idea of self-creation concerns this self-transforming instinct of the human being at a constitutive level, Berlin links the idea closely to the concept of choice; so much so that Zakaras referred to Berlin’s concept of the human being as a ‘radical chooser’.\(^{39}\) The chooser is radical because human self-creation is at its most noticeable in moments of rational indeterminacy.\(^{40}\)

Turning back to political liberalism then, the EVP presented in this thesis does not require a liberal framework because values cannot be timelessly permanent. Indeed John Gray and William Galston (both on opposite sides of the liberalism question)


\(^{37}\) Gray (n 3) 74–75.

\(^{38}\) Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (n 3) 12.

\(^{39}\) See generally, Berlin, *Four Essays Lib.* (n 33). See also, Zakaras (n 3) 509–510.

\(^{40}\) Zakaras (n 3) 509–510.
have each set out types of illiberal frameworks which are compatible with value pluralism. That said, Berlin’s emphasis on self-creation and the eco-system of ‘choice’ in which it will thrive does, however, suggest that EVP can be credibly fostered within a version of political liberalism.41 As further explained in chapter 4, section 4.2.2 Berlin’s views result in his placing a great emphasis on negative liberty, i.e. an area of non-interference with human freedom, thereby ensuring his support for concepts such as liberalism and human rights.42

Two modern day value pluralists, the aforementioned William Galston, and George Crowder, also support a harmonious relationship between EVP (which they refer to simply as ‘value pluralism’) and liberalism and argue from pluralism to liberalism via different versions of the ‘diversity’ argument. Crowder’s argument from value pluralism to liberalism via ‘diversity’ proceeds as follows: ‘pluralists should favour a liberal form of politics because liberalism allows or enables a maximum diversity of goods to be pursued and enjoyed within society.’43 Although Crowder is of the view that the incommensurability of values intrinsic to value pluralism does not hold any one good to be intrinsically more valuable than the other, nor that all values are equal, he believes that the pluralist must endorse all values as having an equal claim until a particular context presents in which a choice between the values must be taken. This is not metric equality, as that would defy the concept of incommensurability44 but rather ‘rough’ equality or ‘parity’.45 The values are equal in this way as they possess the characteristics necessary to be ‘fundamental building

41 See generally, William A Galston, Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice (Cambridge University Press 2002); George Crowder, Liberalism and Value Pluralism (Continuum 2002). Note that many of the most well-known defences of liberalism are based on monist groundings. See e.g. John Rawls, Political Liberalism (Columbia University Press 1993); John Stuart Mill, On Liberty (Virginia Tech 2001). Note also however, the argument of Zakaras that Berlin found pluralism in Mill’s work. See, Zakaras (n 36) 83.
42 Berlin, Four Essays Lib. (n 33) 121–124 and 161.
45 Crowder, ‘Value Pluralism, Diversity and Liberalism’ (n 2) 559.
blocks of alternative ways of life’.46 This is what Berlin meant, Crowder says, when he stated that human values are “‘equally ultimate’: that they occupy the same moral bedrock in the sense that none is intrinsically superior or inferior to any other’.47 Thus unless a person shows an appreciation for the multiplicity of human goods, irrespective of the fact that he or she must choose in a particular situation between certain goods, he or she is not a committed value pluralist.48

Yet the commitment to the promotion of a multiplicity of values in the diversity argument is equally, for Crowder, to be tempered by an acknowledgement that real life circumstances mean that the entire range of goods cannot be pursued to the maximum conceivable extent.49 This aspect of the diversity argument, he continues, relates to Berlin’s ‘conflict’ aspect of value pluralism. Since values often conflict, the principle that more is better would be self-defeating, as the promotion of too many values could actually reduce the overall range of values enjoyed. At a societal level, this could mean a lack of shared norms to unite and identify the group as various values pull in different directions leading to a ‘scattered’ society. Scattered societies, Crowder tells us are ‘self-sabotaging and likely, ultimately, to offer a narrower range of ends than [their] more coherent rivals’.50 As such, Crowder’s diversity argument requires, together with a presumption toward multiplicity, and commitment to ‘coherence’. Multiplicity and coherence presume a liberal political settlement because such a framework allows for conflicts to take place within a ‘tolerably coherent’ constitutional framework.51 Monist political systems, which centre on a singular sovereign or ideology, will not do, because these systems contradict the multiplicity element of the diversity requirement.52 On the other hand, the post-modernism and radical multiculturalism will neither succeed because coherence

47 Crowder, ‘Value Pluralism, Diversity and Liberalism’ (n 2) 559–560.
48 Crowder, ‘Two Value-Pluralist Arguments for Liberalism’ (n 43) 465.
49 Crowder, ‘Value Pluralism, Diversity and Liberalism’ (n 2) 554.
50 ibid.
51 ibid 555–556. Galston similarly believes that ‘coherence’ is an important quality in a constitution. See, Galston, ‘What Value Pluralism Means for Legal-Constitutional Orders’ (n 1) 807.
52 Crowder refers by way of example to fascism, absolutist monarchy, theocracy, state communism, and strong communitarianism. Crowder, ‘Value Pluralism, Diversity and Liberalism’ (n 2) 555–556.
requires the prioritization of some norms over others. It is only a system of liberal governance which seeks to balance competing values that Crowder believes will be necessarily respectful of the realities of EVP. Further, Crowder concedes that liberalism is not unlimited in its capacity to accommodate diversity, only that the liberal system satisfies value pluralist conditions more than any other.

Yet it is not just any form of liberalism that value pluralism endorses but rather, egalitarian liberalism’. This is because classic liberalism, as understood by Crowder, over-emphasizes negative liberty when in contrast, egalitarian liberalism supports balancing negative liberty with other considerations – effective freedom over formal freedom, and so is more reflective of diversity than a classical liberalism which has the potential to lead to totalitarianism. This is of course a view that departs somewhat from Berlin’s own emphasis on negative liberty.

In a second value pluralist argument for liberalism, Crowder takes a different approach, informed by both Joseph Raz and Nussbaum. This approach starts from the perspective of conflicting values and difficult questions. For Crowder, specific questions can only be answered by a value pluralist on the basis of particularist practical reasoning. Particularist practical reasoning is (an idea which he attributes to Aristotle to mean), ‘a skill which depends on the development in those who practise it of certain desirable habits of mind.’ This has been otherwise called ‘practical wisdom’ because it concerns the virtues that a person exhibits. Crowder believes that four virtues are necessary. First there is ‘generosity’: this follows from his concept outlined above that in the context of specific choice, value pluralists

53 ibid.
54 Crowder, ‘Two Value-Pluralist Arguments for Liberalism’ (n 43) 466.
55 Crowder, ‘Value Pluralism, Diversity and Liberalism’ (n 2) 563.
57 Crowder, Liberalism and Value Pluralism (n 41) 204; George Crowder, ‘Two Concepts of Liberal Pluralism’ (2007) 35 Political Theory 122. Though note that Crowder does not believe that Raz made the case for a link between autonomy and value pluralism. This is based on Crowder’s own acceptance, like Raz, of strong value pluralism, but also on the only cursory argument made in The Morality of Freedom of the link between autonomy and strong value pluralism – a link Crowder does not believe is sufficiently justified. Crowder, Liberalism and Value Pluralism (n 41) 202–204.
58 Crowder, ‘Two Value-Pluralist Arguments for Liberalism’ (n 43) 468.
59 ibid.
should still appreciate the great range of values that human beings advocate even if he or she does not pursue those routes. Berlin himself referred to the need for a humble disposition. Second, there is ‘realism’: this corresponds for Crowder to the knowledge that value pluralism will require conflict and loss and avoids the notion of social perfection – it is said to overlap with the liberal acceptance of moderation.

The third virtue a pluralist of practical wisdom will exhibit in decision-making is ‘attentiveness’: this means that he or she should be aware of the context the individual person finds him or herself in. In this regard, Crowder invokes Nussbaum’s emphasis on the situation of the real human person over abstract values. Finally, virtue four is that of ‘flexibility’. This virtue corresponds with the concept of autonomy and is identified on the seeds sewn by Raz. Aware of the particular context, a value pluralist must through their autonomy be allowed to reason flexibly and not be controlled by any insistence upon general rules. Crowder states:

To be autonomous is to deny that value conflicts can be resolved simply by mechanical application of traditional or other rules. Autonomy, in its opposition to unquestioning adherence to custom, is immediately on the side of flexibility against rigidity in ethics. This last connection between pluralist flexibility and liberal autonomy is the most important of the virtue based links, because personal autonomy is the most distinctive of liberal commitments.

By contrast, Galston argues that value pluralism promotes a form of ‘civic liberalism’, which although similar to Crowder, is best conceived as being about ‘the protection of legitimate diversity’. In order to give diversity its due, Galston argues that a liberal society requires ‘public principles, institutions, and practices that afford maximum

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60 ibid.
61 Berlin, The Crooked Timber of Humanity: Chapters in the History of Ideas (n 3) 17–18.
62 Crowder, ‘Two Value-Pluralist Arguments for Liberalism’ (n 43) 468–469. Galston also refers to the notion of ‘realism’ among his qualities in a constitution. He defines this as placing a realistic burden on citizens. See, Galston, ‘What Value Pluralism Means for Legal-Constitutional Orders’ (n 1) 807.
63 Crowder, ‘Two Value-Pluralist Arguments for Liberalism’ (n 43) 469.
64 Crowder, Liberalism and Value Pluralism (n 41) 202–204.
65 Crowder, ‘Two Value-Pluralist Arguments for Liberalism’ (n 43) 469.
66 ibid.
67 Galston, Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice (n 41) 23.
feasible space for the enactment of individual and group differences, constrained only by ineliminable requirements of liberal social unity.’

The liberal state is therefore to be organised around central public purposes to underpin its structure and define its public virtues. In terms of constitutional law, such purposes will be what allows for interference with group practices. Three examples offered by Galston include: the protection of human life; the protection of basic human capacities, such as nutrition for children; and the development of a ‘social rationality’ which he defines as ‘the kind of understanding needed to participate in the society, economy, and polity’. Galston identifies two principles in addition to value pluralism which should underpin his liberal polity. The first is the principle of ‘political pluralism’, which he describes as the view that there are limits to the authority of liberal public institutions (see also Dunleavy and O’Leary’s definition in chapter 1, section 1.3 to the effect that diversity is valued in institutional practices and so individuals should be allowed the maximum freedom). The second principle is ‘expressive liberty’, which is the view that there exists a rebuttable presumption that individuals and groups should lead their lives freely within a broad range of legitimate variation.

Crowder and Galston’s theories possess similarities but notably differ on their relationship with autonomy. Galston’s diversity rejects autonomy – by which he means individual self-direction that is frequently linked to the sustained rational examination of self - because of his understanding that many communities do not in fact view having a great deal of choice to be significant. If liberalism is based on autonomy, Galston argues, then it in fact narrows the range of possibilities available

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68 ibid.
69 ibid 23–24. Galston, does not stop there but proceeds to arrive at his own theory of liberalism by adding to Berlinian value pluralism, two other bodies of theory. The first is the principle of ‘political pluralism’, which is the view that there are limits to the authority of liberal public institutions; and the second is the principle of ‘expressive liberty’, which is the view that there exists a rebuttable presumption that individuals and groups should lead their lives freely within a broad range of legitimate variation.
within liberal societies: ‘In the guise of protecting the capacity for diversity, the autonomy principle in fact exerts a kind of homogenizing pressure on ways of life that do not embrace autonomy.’

Expressive liberty is different from a dominant autonomy value because it allows individuals and groups to live in ways which others may conceive of as ‘unfree’. Galston’s view has been described as a version of liberalism which is instead based on ‘maximum toleration’.

Although the main arguments are presented in different ways, what is common to the above is the plausible view that Berlinian value pluralism supports a political structure that allows for a variety of moral choices regarding how to live one’s life. While it may be true that having a great deal of choice is not a focus of all societies, the desire of the individual to self-direct (where endowed with the faculties to comprehend this option), even if that self-direction involves the choice to live in a manner that is subservient to the wishes of others, is still a form of initial self-direction. As such, the importance of autonomy in the political settlement holds more appeal than Galston’s rejection of it and need not be so strictly linked with human reason. Berlin’s self-creation, it will be remembered, comes fully alive when values are incommensurable, i.e., the point at which reason cannot resolve the value conflict. Furthermore, although it was presented here as a small idea, Crowder’s turn towards egalitarian liberalism as better representing the multiplicity of values is a thread pursued in chapter 6, section 6.3.1, in terms of representing EVP within the political system. In addition to self-creation, Nussbaum’s value of ‘affiliation’ is presented in the thesis as one of the quasi-permanent process norms. Affiliation responds to the importance of the embedded and community based context of human beings, and it will be recalled from chapter 4, section 3 that affiliation encourages institutions that ‘nourish’ human affiliation. It closely relates to the underpinning theory of embedded universalism in EVP as well as Berlin’s value of empathy, in terms of its concern with how we engage as social beings, through a form

73 ibid 23.
74 ibid 29.
75 Crowder, ‘Two Concepts of Liberal Pluralism’ (n 57) 122–123.
76 Nussbaum, Creating Capabilities (n 3).
of discourse, concern and reciprocity. More recent accounts of Nussbaum also relate the idea to ensuring equality and non-discrimination at an institutional level. The importance of community and social goods that emerged in chapter 3 of the thesis, such as might be better realised through ideas such as the ‘exercise conception’ of liberty and Marshall’s model of citizenship, are more responsive to Nussbaum’s affiliation than any focus on negative liberties alone. Crowder’s egalitarian liberalism is therefore the most appropriate conception of liberalism within modern liberal democratic constitutions in terms of respecting EVP.

Finally, political liberalism and the corresponding liberal democratic constitution also importantly seek to embrace pluralism within societies. Pluralism as a pillar of democracy is discussed below within the context of human rights framework.

5.4. Human Rights Law and EVP’s Internal and Embedded Essentialist Foundations

International and European human rights law presently recognises and, at times, supports a ‘pluralism’ narrative. Often however, the relevant institutions do not explicitly state the form of pluralism in question: whether that be the cultural, political or ethical (i.e. philosophical and normative) positions first laid out in section 1.3. As this section will set out, it appears that the dominant meanings of pluralism within international human rights law are political and cultural pluralism. That said, this section will also argue that it is possible to further interpret international human rights law as, at times, embracing to some extent EVP. This general impression, i.e. that human rights law only recognises EVP to a limited extent, is perhaps not a surprising conclusion given the analysis in chapter 3 on classical theory. What might be noted, however, is that the conflicting analysis provides ample evidence to

78 Nussbaum, Creating Capabilities (n 3).
support the suggestions made by the scholars in section 3.5, to the effect that ethically pluralist foundations might provide more theoretical coherence for human rights law.

The following narrative on how EVP appears within human rights law within this section is broken down into two areas. The first concerns the most obvious appearance of pluralism within human rights, which is the frequent assertion made by both the UN Human Rights Committee and the European Court of Human Rights (ECHR) of the importance of maintaining pluralism for democracy. The second manifestation involves the existence of pluralism in the practice of human rights, essentially relating to different interpretations of the broad human rights via the margin of appreciation doctrine. Although not incorporated into UK law, the UN Human Rights Committee which oversees the International Covenant on Civil and Political Rights (ICCPR) is given some consideration below because of its influence as a ratified civil and political rights treaty on the UK courts (see again chapter 3, section 3.3.3).

5.4.1. Pluralism as a Pillar of Democracy

The most obvious way that international human rights law embraces pluralism is through the relatively common assertion that pluralism is an indispensable element of democratic society. The phrase frequently used for example, by the ECtHR in the context of freedom of expression, the right to peaceful assembly (Articles 10 and 11 ECHR) and the right to free elections (Article 3 of Protocol 1) is that there can be ‘no democracy without pluralism’. Similarly, in the the context of the right to freedom of religion (Article 9 ECHR), the ECtHR in the 1993 case of Kokkinakis v Greece stated:

As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the

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80 See e.g. on Articles 10 and 11, Freedom and Democracy Party (ÖZDEP) v Turkey ECtHR Application no. 23885/94 (8 December 1999), para 37. See also for similar comments in the context of Article 3 of Protocol 1, Yumak and Sadak v Turkey ECtHR Application no. 10226/03 (8 July 2008), para 106.
Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.\textsuperscript{81}

A parallel sentiment is also apparent in the case-law around racial and ethnic hate crimes through the language of ‘diversity’. For example, in the 2005 case of \textit{Nachova and Others v Bulgaria}, the Court stated:

[r]acial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment.\textsuperscript{82}

By pointing to pluralism as a basic good in a democratic society, the Court is not only acknowledging the existence of social-fact pluralism but also supporting the manifestation of pluralism within the political system of democracy i.e. political pluralism. In fact, political pluralism has been understood as an important aspect of wider democratic theory for some time. In Dahl’s polyarchy democracy for example, it is an essential element that everyone has access to alternative sources of information (see above section 3.3.2.).\textsuperscript{83} As implied however, underpinning political pluralism is the necessary acceptance of cultural (or social pluralism), i.e. the


\textsuperscript{82} Nachova \textit{and Others v Bulgaria} ECtHR Application No. 43577/98 and 43579/98 (6 Jul, para 160.

recognition of different associations and units within a society pursuing and advocating for different aims, but also that this pluralism should not be harmed. In the case of Yabloko Russian United Democratic Party and Others v Russia for example, the ECtHR quoted as relevant information the views of the Venice Commission that the Court’s own case-law around limiting burdensome requirements on political parties was aimed at ensuring such requirements were ‘not so heavy that [they] may hurt the expression of social pluralism’. 84

What is more obscure within the judgments of the ECtHR and opinions of the human rights treaty bodies and indeed is ill-defined in political theory more generally, is why these institutions consider that the flourishing of different ideas in a society or political system is fundamentally good. The question concerns whether there are any normative underpinnings to this assertion such that these aspects of international human rights law might come closer to engaging with EVP. In his study on media pluralism (a popular manifestation of pluralism which is encouraged by international human rights bodies85), Karl Karppinen helpfully identifies three somewhat overlapping normative arguments pertaining to the benefits of pluralism in democratic theory, which he calls the liberal, deliberative and radical-pluralist approaches respectively.86 Karppinen presents the liberal approach to pluralism as based on John Stuart Mill’s ‘marketplace of ideas’ theory whereby the democratic process is benefited from exposure to multiple ideas because this allows for the refinement and improvement of ideas and for ideas which do not stand up to scrutiny to fall away.87 The deliberative democratic approach to pluralism is in turn grounded on Habermasian reasoning concerning the benefits of multiple views in the ‘public

84 See e.g. the quotation of the Venice Commission which referred to ‘social pluralism’ in Yabloko Russian United Democratic Party and Others v Russia ECtHR Application no. 18860/07 (8 November 2016), para 43.
86 Karl Karppinen, Rethinking Media Pluralism (Fordham University Press 2012) 7-8 and generally chapter 1.
87 ibid 8 and 28. See also, Mill (n 41); John Stuart Mill, Considerations on Representative Government (1861, e-Book) (The Floating Press 2009).
sphere’ as a place for the formation of consensus. The final approach of radical-pluralism is grounded in the more recent discourse championed by scholars such as Chantal Mouffe which advocates for the flourishing of conflict and chaos in the political sphere because they are ineradicable elements of society. While it is Mouffe’s idea that comes closest to engaging with the concept of EVP (because of its embrace of conflict as an eradicable element of society), it is the Millean approach that most likely underpins the normative rationale of the Court. Given both the established place of pluralism within democratic theory and the need for pragmatism in jurisprudence, it is perhaps unsurprising that the ECtHR itself does not set out exactly why it considers pluralism to be so fundamental to democracy. Nevertheless, comments of the Council of Europe – the organisation under whose auspices the ECHR and Court operates - in a fact sheet on democracy states the very Millean idea that, ‘a society without a pluralism of views is not just intolerant; it also limits its own possibilities to develop in new and possibly improved directions.’

In his discussion on freedom of expression within ECtHR case law, Alain Zysset also makes the point that the Court does not explain exactly why democracy benefits from pluralism. Instead, borrowing on the ideas of Thomas Christiano (concerning the inability of persons to fully detach from their bias during public deliberation), Zysset attempts to infuse the reasoning of the court with the normative idea of ‘egalitarian democracy’. Zysset makes the point that the European Court’s pluralist emphasis, at least in the context of freedom of expression, seems to be on ensuring not just a range of ‘palatable’ views in the public sphere but that there is a ‘counterbalancing

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88 Karppinen (n 86) 8–9 and 28–29. See also, Jürgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Polity Press). Karppinen points however to a selective adoption of Habermas’ views and an under-engagement with the scholar’s later work.
89 Karppinen (n 86) 9–10 and 29. See also, Chantal Mouffe, The Return of the Political (Verso 1993); Chantal Mouffe, Democratic Paradox (Verso 2000); Chantal Mouffe, On the Political (Routledge 2005).
of views’. For Zysset, the degree to which the Court will apply the margin of appreciation to States Parties is linked to whether or not views, even extremist, are counterbalanced in the public arena, as well as the degree to which they concern the public interest. Zysset’s view of egalitarian democracy is underpinned by the equal status of human beings which in turn asserts that ‘pluralism requires that individual judgments on issues of public interest should be informed by those of others.’ Zysset explains the perspective as follows: ‘if an individual advances a view regardless of what other individuals think, then she does not treat others as equals within the context of deep pluralism.’ Zysset proceeds to state that pluralism in this way is used to justify the European Court’s authority over national courts. The European Court will limit the margin of appreciation given to the views of national institutions if these institutions are not permitting a plurality of perspectives. The real novelty in Zysset’s argument is to point out that the boundaries between national authority and European authority in the context of the ECHR is directly related to pluralism, and specifically as he calls it ‘moral pluralism’. Overall, Zysset’s article suggests that legal pluralism in the context of the ECHR is premised on moral pluralism. Nevertheless while Zysset succeeds in infusing some normativity into the pluralist arguments of the ECtHR, namely the equal moral status of all persons and the necessity of taking the views of others into account, it remains unclear whether there is enough within Zysset’s argument to truly evidence ‘moral pluralism’. Moral pluralism is EVP which requires the Court to embrace the legitimacy of the multiple and sometimes conflicting views about human ends – by requiring multiple views to be heard there is certainly normative value at play, but based on the evidence that normativity might just as readily be a consequence of the Millean marketplace of ideas theory.

As a final comment on the expression of pluralism as a foundation stone for democracy within human rights law, it is suggested that it has been within the

93 Zysset (n 91) 193.
94 ibid 193–194. Zysset relies on Erdoğan and İnce v Turkey ECtHR Application no 25067/94 (8 July 1999) [51]; Çamyar and Berktaş v Turkey Application no 41959/02 (15 February 2011) [37–38].
95 Zysset (n 91) 196.
96 ibid.
97 ibid 179.
jurisprudence on the right to freedom of religion where the institutions have come closest to embracing as a truth, the plural nature of human values/goods/ends. This is because the very nature of religious belief pertains to the meaning and intention of human ends. Zachary Calo puts it as follows: ‘[r]eligious pluralism reveals the capacity of a social order to permit the flourishing of alternative loci of meaning...’

In Kokkinakis, mentioned at the start of this section, it was made clear that the Court views religious pluralism as beneficial, if not fundamental to society. Yet despite this apparent embrace by the ECtHR on the fundamentality of religious pluralism for a democracy, scholars such as Calo and the ECtHR judge Françoise Tulkens, have asserted the opinion that the Court has in fact failed to actualise its own views and instead introduced conflicting perspectives on pluralism. 99 Calo argues that the conflict with a supposed support for religious pluralism occurs most obviously in the context of the Islamic headscarf cases wherein bans of the Islamic headscarf were consistently upheld by the European Court (see, Dahlab v Switzerland, Şahin v Turkey and Dogru v France). 100 Interestingly, Calo attributes this conflicting narrative within human rights law to a growth in ‘legal secularism’ which he presents as the normative view that the public sphere should be segregated from the religious or sacred sphere. 101 This is to be distinguished from legal secularity, which refers only to the distinct and independent internal logics of law and religion. 102 Calo argues that the human rights movement more generally has trended towards legal secularism, which is evidently a more problematic concept than legal secularity in terms of embracing religious pluralism because it rejects infusions of the public sphere with religious perspectives. Calo states:

The resulting moral order [of modern human rights] does not encourage the flourishing of religious pluralism because the universal and secular nomos of

98 Calo (n 81) 403–404.
99 See generally, Calo (n 81); Tulkens (n 81).
100 Dahlab v Switzerland ECtHR Application No. 42393/98 (15 February 2001); Leyla Şahin v Turkey ECtHR Application No. 44774/98 (10 November 2005); Dogru v France ECtHR Application No. 27058/05 (4 December 2008).
101 Calo (n 81) 404.
102 Ibid 405.
human rights law grants little space to strong expressions of religious particularity. The normative secularity of legal modernity ultimately stands at odds with the cultivation of thick public religiosity... what is at issue is the deep way in which law has been defined against religion within the late modern moral order.\(^\text{103}\)

Legal secularism (which is ‘normative secularity’ within the above quotation) denies religion any import into public decision-making and debate and prohibits any rival source of sovereignty (see further section 2.2.1 on the constitutional and legal pluralism distinction).\(^\text{104}\) In terms of EVP then, Calo’s comments appear to chime with the suggestion made earlier in the thesis that the present human rights movement trends towards a monist ethical perspective. This would now be that of secularism which is based on the abstract, rational human being. As such, there is in fact a tension between how religious pluralism is presented within international human rights law in terms of whether it is a social good that should be allowed to flourish or a public sphere problem that needs to be managed and suppressed (as per the legal secularism view).

The following section turns to a second manifestation of pluralism within international human rights law, partly already touched on above, which is that there is significant pluralism in the ways that human rights provisions are applied in practice. Such pluralism is aided by the operation of the margin of appreciation which permits to states a wide discretion in how they interpret certain rights.

5.4.2. Pluralism in Practice and the Margin of Appreciation

Although the margin of appreciation doctrine is also at play in the above mentioned case law of *Kokkinakis* and the Muslim headscarf cases, this section pays it greater attention because of the significance of its role as an instrument through which the ECtHR permits discretion to member states (thereby maintaining an area of state

\(^{103}\) ibid 406.
\(^{104}\) ibid 404–405.
sovereignty, albeit subject to the review of the European Court, see further the importance of subsidiarity in the ECHR framework in section 3.3.2). Partially in consequence of this, there is significant pluralism in human rights practice. This is a point previously made in section 3.5 of the thesis by Christopher McCrudden concerning religious litigation in human rights courts. In his book *Litigating Religions*, McCrudden identifies a variety of ideological and institutional factors that have resulted in competing conceptions of certain rights in human rights courts which led him to state that, ‘in some ways, it is difficult to speak of the legal understanding of human rights, since there are several competing conceptions’. Unlike the preceding section - which focused on how the Court explicitly expresses pluralism as an objective, i.e. as a social good, fundamental to democratic society - this section focuses on the pluralism (such as that identified by McCrudden) of outcomes that result from the ECtHR’s application of the margin of appreciation in the context of the qualified rights and is a result of the lack of conceptual clarity within these provisions.

The qualified rights (see also section 3.3.2) refer to the rights which are structured in such a way so as to allow for a range of public interest and other factors, such as other rights, to be taken into account when determining a violation. As mentioned above, these rights are typically considered to be civil and political rights such as the right to freedom of religion (Article 18 ICCPR, Article 9 ECHR), freedom of expression (Article 19 ICCPR, Article 10 ECHR), the right to peaceful assembly (Article 21 ICCPR, Article 11 ECHR), the right to freedom of association (Article 22 ICCPR, Article 11 ECHR), the right to privacy (Article 17 ICCPR, Article 8 ECHR) and the right to property (Article 1, Protocol 1 ECHR). The text of these rights expressly provide that the rights can be interfered with for certain legitimate and specified reasons, such as the protection of public health, public morals, national security and importantly the

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105 Christopher McCrudden, “‘Human Rights in an Age of Trump and Brexit’ Speech, 22 February’, *Global Challenges Debates* (Queen’s University Belfast 2018).
107 Beck (n 21).
rights or freedoms of others. If one of these legitimate reasons has been satisfied, the Court will also consider whether the interference was legal, no more than necessary and whether a proper balance between the competing objectives has been struck (i.e. a ‘proportionality’ analysis). In doing so however, the Court can also apply what is known as a ‘margin of appreciation’ to the national authorities. This margin can be wide or narrow, depending on the context. When a wide margin of appreciation is applied, the national court and legislatures have a large amount of discretion on how they interpret the right in question.

McCrudden suggests that the ECtHR has sometimes used this margin of appreciation as an ‘avoidance strategy’ to side-step the difficulties of religious litigation in human rights courts and especially to avoid having to interpret normative religious systems to which the Court itself is not committed.\footnote{McCrudden (n 106) 87–88.} McCrudden gives the example of the \textit{Eweida and Others v UK} case\footnote{Eweida and Others v The United Kingdom ECtHR Applications no 48420/10 (15 January 2013); McCrudden (n 106) 88.} (otherwise known as the ‘Ladele’ case) which involved a Christian registrar of marriages being required to officiate at same-sex civil partnerships; something she regarded as against her genuinely held religious beliefs and which led to disciplinary action and Ladele ultimately deciding to leave her job. The domestic courts had determined that Ladele’s Article 9 and Article 14 ECHR rights could not outweigh the rights of the homosexual community to equal treatment. The ECtHR did not override the decision of the domestic courts but instead relied on the fact that national authorities are allowed ‘a wide margin of appreciation when it comes to striking a balance between competing Convention rights’.\footnote{Eweida and Others v. The United Kingdom (n 109) [106].} In contrast, as McCrudden notes, the margin of appreciation can also be used to uphold religious values such as in the case of \textit{Lautsi v Italy}, which concerned a challenge to the presence of a crucifix on the wall of an Italian school under Article 9 and 14 ECHR, as well as Article 2 of Protocol 1 concerning the right to education.\footnote{Lautsi v Italy ECtHR Application no 30814/06 (18 March 2011); McCrudden (n 106) 88.} The domestic court had held that there was no offence to the principle of the secular nature of the state (under the Italian constitution) or breach of Convention rights. Again, applying a wide
margin of appreciation, the ECtHR upheld the decision of the domestic courts. The ECtHR reasoned that because the crucifix was not implicated in teaching practices which were proselytising and because the Italian school system permitted the manifestation of other religions, such as engaging with the celebration of the beginning and end of Ramadan and allowing the wearing of Islamic headscarves, the national authorities should be left a wide margin of appreciation. In the words of the Court, it has a:

duty in principle to respect the Contracting States’ decisions in these matters, including the place they accord to religion, provided that those decisions do not lead to a form of indoctrination.

... the [Italian] authorities acted within the limits of the margin of appreciation left to the respondent State in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

These cases show that through the operation of a wide margin of appreciation, human rights provisions can result in quite different outcomes depending on the state in question. In Lautsi, the Grand Chamber of the ECtHR distinguished the headscarf cases on the basis that the facts were entirely different i.e. active personal engagement in an obligatory religious act, such as by wearing a headscarf, was distinguished from a passive symbol of a religion, such as the crucifix on the wall. These distinctions have not however prevented Lautsi from being a source of controversy when considered alongside the headscarf cases of Dahlab, Şahin and Dogru above. In any event, the result of applying the margin of appreciation and leaving the individual member states a wide margin allowed the ECtHR to avoid having to conduct a proportionality assessment of the facts itself.
Finally, beyond the pluralism that results between the different member states conceptions of freedom of religion through the application of a wide margin of appreciation, McCrudden also suggests that the concept of proportionality, when applied by domestic courts, is impacted by the way in which the court addresses the question of what it means to be human (which he refers to as the ‘ontological’ question). By this McCrudden is referring to the issue of whether religion is understood as a core component of what it means to be human or is marginal to our conception of the meaning of being human.\textsuperscript{116} For McCrudden ‘the more importance the court places on religion, the more weight it has; the more weight it has, the more those limiting religious practices and beliefs must show that that limitation is justified.’\textsuperscript{117} McCrudden uses the domestic UK case of \textit{Suranyanda v The Welsh Ministers}\textsuperscript{118} to evidence his point. In this case, a cow which was sacred to the Hindu community was required to be slaughtered because of a positive test for bovine tuberculosis. The Hindu community in question argued that such an action would violate their Article 9 ECHR rights. On balance however, the England and Wales Court of Appeal considered that the interference with the Article 9 rights was proportionate and necessary in light of the importance of the slaughter for the agricultural industry in England and Wales.\textsuperscript{119} According to McCrudden, ‘the British court cannot have accorded any significant weight to the religious community’s view that the cow that was to be killed was sacred, given the relative ease with which the court found that the protection of the local economy from the ravages of disease weighed more heavily than the survival of the sacred cow.’\textsuperscript{120}

It is somewhat difficult to interpret the above as enlightening of the judicial human rights perspective on EVP. The clearest take-aways might be similar to those of Calo above, in terms of modern human rights reliance on legal secularism. Certainly, it

\textsuperscript{116} ibid 118–120.
\textsuperscript{117} ibid 120.
\textsuperscript{118} \textit{Suranyanda v the Welsh Ministers} [2007] EWCA Civ 893; [2007] 7 WLUK 662.
\textsuperscript{119} ibid 131.
\textsuperscript{120} McCrudden (n 106) 120–121. See for further interest on Article 9 ECHR, \textit{R (on the application of Begum) v Denbigh High School Governors} [2006] UKHL 15; [2007] 1 AC 100; \textit{R (Williamson) v Secretary of State for Education and Employment} [2005] UKHL 15; [2005] 2 WLR 590.
appears from the McCrudden narratives that the ECtHR avoids normative discussions about religion, which as mentioned, is a subject matter that inherently speaks to the meaning and ends pursued in life, thereby having the potential to address EVP more directly. Although it might be argued that this permits a flourishing of value perspectives, this (tentatively) appears to be the case only as amongst states (in terms of their different approaches to the freedom of religion) rather than within states. McCrudden’s further view that UK domestic courts have devalued freedom of religion relative to protecting the agricultural industry in *Suranyanda*, lends more credence perhaps to the views of Calo that modern human rights are trending towards legal secularism. As mentioned, this view is more monist than pluralist in its ethical perspective. It might also be said that there is a need to distinguish the ECtHR’s approach depending on the human right at play. Zysset’s argument that the ECtHR will narrow the margin of appreciation if a plurality of views is not apparent in the context of freedom of expression can be contrasted with the generally hands-off approach preferred in the context of freedom of religion and the margin of appreciation.

The core of McCrudden’s argument is that such diversity of litigation outcomes is not in fact surprising when the meaning of ‘human’ in human rights is approached from a variety of perspectives, and that this contestation found within human rights should in fact be embraced (see again the philosophical discussions in chapter 3, and also chapter 4).\textsuperscript{121} As the thesis moves forward to apply EVP to legal sovereignty, it is this embrace of the conflict and contestation inevitable with EVP that will be most influential.

5.5. Constitutional Pluralism and EVP’s Internal Constitutional Pluralism

\textsuperscript{121} McCrudden (n 105). See also, McCrudden (n 106).
Chapter 2, section 2.2.1 introduced the concepts of legal and constitutional pluralism and understood the latter as a helpful conceptual and descriptive tool for the UK’s relationship with the European Union (EU) prior to Brexit. Legal pluralism was defined there to refer to the context where ‘two or more legal systems coexist in the same societal field, sometimes in a contradictory way, in which each may have equally plausible claims to authority’. 122 This was presented as a broad definition also inclusive of non-positive law ‘legal systems’ including for example indigenous law, religious law or other custom based orders.123 Constitutional pluralism, was presented as referring to the same broad idea as legal pluralism, i.e. that two or more legal systems coexist in the same societal field but much more specifically then, that the claims to authority (and legal systems) are constitutional in nature.124 That section also noted how Brexit has demonstrated a trend away from the EU constitutional pluralism model towards a more traditional democratic statist approach to sovereignty.

The issue at hand turns first towards the normative merits of legal pluralism (as the wider of the two concepts) and whether that can be linked to EVP. To state the conclusion up front, as a concept about the nature of legitimate human ends in ethics, EVP does not require legal pluralism and respect for the idea can indeed be achieved as many ethical pluralists have argued within a legally monist system that allows for extensive pluralism (see for example, Raz below).125 However, it is suggested in this section that the competing claims to authority offered by constitutional pluralism,

125 Joseph Raz, ‘The Future of State Sovereignty’ in Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), Legitimacy (Oxford University Press 2019). Note also that there has been ‘pluralist theories of the state’ within political science literature dating back to the turn of the twentieth century, which have sought to reject the traditional notion of the state as sovereign in an indivisible and absolutist way. See, e.g. Harold Laski, Studies in the Problem of Sovereignty (Yale University Press 1917); Leon Duguit, Manuel de Droit Constitutionnel (2nd edn, Fontemoing & Cie 1911); Leon Duguit, Les Transformations Du Droit Public (Max Leclerc & H Bourrelier 1913); and for a general discussion, see Francis W Coker, ‘The Technique of the Pluralistic State’ (1921) 15 American Political Science Review 186.
with lessons learned from broader legal pluralism, is the more convincing structure for fostering a commitment to EVP. Chapter 6 will link this narrative into the UK’s internal sovereignty arrangements first discussed within chapter 1, section 1.2.2 and chapter 2 and suggest a constitutional pluralism structure for the devolved nations. Building on the mostly doctrinal devolution narrative in chapter 2 section 2.4.1, chapter 6 will conclude that there are already hints of this approach within the UK throughout pre-Brexit caselaw but most notably in terms of the federalising tendencies of the devolution statutes.

As first discussed in chapter 1, section 1.3, pluralism has its own meaning within the various disciplines of ethics, politics and law and cannot be directly transposed from one to the other. There are however overlaps between some normative accounts of legal pluralism and the idea of EVP which pose interest to the thesis at this juncture. The primary argument for the normative benefits of legal pluralism is that by accepting and engaging with multiple bases of legal positivist and non-positivist authority, political authority will be more inclusive and deliberative, which is the best option for sustainable outcomes.126 Multiple sites of authority, it is argued, will necessitate deliberative spaces which in turn more effectively manage conflict and contestation concerning norms, having the effect of improving governance overall.127 Going a step further, legal pluralist Paul Schiff Berman, for example, suggests that one way to manage and achieve agreement amidst the normative conflict of societal and legal pluralism is to introduce procedural mechanisms with the goal of drawing individuals into these ‘shared social space[s]’.128 Berman argues that the existence of these spaces will increase the opportunities for previously unheard voices to gain traction, which coupled with the general dialogic process supported, will aid consensus building through the opportunities afforded to participants to learn about the concerns of others.129 Berman proposes a number of procedural mechanisms to

foster these interactive spaces such as subsidiarity schemes, preserved spaces for local variation, hybrid participation agreements, and purposeful jurisdictional redundancy.\textsuperscript{130} Furthermore, because legal pluralism accepts various state and non-state sources of authority, it posits a challenge to ‘statism’,\textsuperscript{131} a concept closely aligned to state sovereignty by referring to the substantial control held by the centralised state over societal affairs.\textsuperscript{132}

Before comparing this form of normative argument concerning legal pluralism and EVP, it must be recognised that many have rejected legal pluralism as a full normative theory. They do so because of the ill-defined nature of what constitutes a non-state law-like norm. In essence the argument is that there is no unifying ‘concept of law’ to justify embracing certain types of law-like orders and excluding others. It is therefore unclear which non-positivist forms of law-likeness should be included within legal pluralism. Zysset recounts the debate as an initial search by legal pluralists for a ‘social scientific conception of law’, a search that was ultimately surrendered as futile because a theory of law based on external observation will inevitably fail due to the lack of internal, reasons-giving substance.\textsuperscript{133} Zysset points to sociological pluralists such as Brian Tamanaha who in more recent times embrace a system of normative ordering, a system which Zysset rejects on the basis that by ‘cataloguing normative phenomena [we] already imply some minimal, unifying and therefore monistic content.’\textsuperscript{134} Yet despite the accuracy of Zysset’s assertion, Tamanaha’s suggestion is precisely the approach embraced by chapter 4. In order to distinguish EVP from relativism, chapter 4 embraced the work of Berlin and Nussbaum and infused an internal essentialism with an embedded universality as a basis for EVP. The EVP approach of the thesis is partly reasons-giving through internal essentialism, but also partly empirical through the recognition of the importance of context to this essentialism. By ‘intuiting’ on how we as individuals recognise ourselves and others

\textsuperscript{130} Schiff Berman (n 128) 680–694; Ryan (n 126) 28.
\textsuperscript{131} Walker (n 124) 344; Ryan (n 126) 5.
\textsuperscript{132} Joseph Raz refers to the so-called ‘death of the state’ mostly expressed by legal pluralists. See, Raz (n 125) 70.
\textsuperscript{133} Zysset (n 91) 181–182. Note Zysset attributes this understanding to H.L.A. Hart.
\textsuperscript{134} ibid 182. See also, Brian Tamanaha, ‘Understanding Legl Pluralism: Past to Present, Local to Global’ (2008) 30 Sydney Law Review 375, 396.
as fully human, chapter 4 adopts as an initial commitment the procedural values of empathy, self-creation, affiliation, rationality as examples of universal values. These values were identified in section 5.2 above, as quasi-permanent because of their embedded foundations and because of EVP’s rejection of ethical monism. With this in mind, the EVP of the thesis might better read normative legal pluralism as a theory that rejects the binary between monist and pluralist legal systems, accepting instead a limited area of legal monism around the process values, coupled with an extensive pluralism. The idea taken forward in chapter 6 is described as closer to constitutional pluralism than constitutional monism because of the limited nature of the higher order universal values. This position rejects the view that constitutional pluralism can only occur beyond the state’s boundaries.\textsuperscript{135} While it is considered in chapter 6, section 6.3.3 that norms derived through non-traditional sites of legal authority should be considered for increased access to the constitutional sites of authority within the UK, this broader form of legal pluralism whereby those sites would be equal to constitutional sites is rejected because of theoretical difficulties identified above.

It is undoubtedly the case that the proposed normative benefits of legal pluralism resonate with the idea of EVP presented in chapter 4. In particular, the arguments made by Schiff Berman that legal pluralism ought to encourage shared social spaces where natural contestations should be deliberated. Berlin emphasised the need for individuals to accept the legitimacy of some value conflicts as well as an attitude of humility concerning one’s own value stance vis-à-vis others.\textsuperscript{136} As with liberalism, it is the self-creation aspect of EVP which applies most directly to the context of legal pluralism. It will be recalled from chapter 4, section 4.2.2 that Berlin’s idea of self-creation centres on the propensity of human beings to diverge and as such space should be given to forums where the range of this divergence is apparent. The view of human nature within EVP as self-creating can only be realised where individuals have a range of choice, and where reason plays a limited role between those choices.

\textsuperscript{135} See for further discussion and also a rejection of the idea, Mattias Kumm, ‘The Moral Point of Constitutional Pluralism’ in Julie Dickson and Pavlos Eleftheriadis (eds), \textit{Philosophical Foundations of European Union Law} (Oxford University Press 2012) 218.

\textsuperscript{136} Berlin, \textit{The Crooked Timber of Humanity: Chapters in the History of Ideas} (n 3) 17–18.
This would support the individual’s exposure to a range of normative entry points into the legal system.

Additionally, subsidiarity plays a key role in the promotion of pluralism within both legal pluralist (e.g. EU) and legal monist orders (e.g. ECHR) (for the discussion, see chapter 2, section 2.2.1). In this regard, Berlin’s self-creating agents who require negative liberty (i.e. an area of non-interference), also exercise a form of positive liberty as autonomous agents able to influence the direction of their own lives. The principle of subsidiarity whereby decisions should be taken as close as possible to the electorate while ensuring good government also supports the exercise of individual choice so important to self-creation. Perhaps most significantly however, self-creation can be said to require space for the individual to make choices and arguably, this space is best provided not by subsidiary or central government alone but by positioning the individual within a range of governance mechanisms where they can both have influence and exposure to different value options. This is not unlike the emphasis on informed electoral decision-making which has been growing in popularity since the EU referendum and the responsibility of government to provide that information. The important point here is the facilitation of the diversity of information sources rather than any singular author.

In an interesting speculative on how a future ‘world government’ (and so a legally monist system) might protect ‘value pluralism’, Raz points to subsidiarity as a fundamental requirement due to the fragmentation as well as the checks and balances that it entails. However, neither does Raz consider subsidiarity principles to be sufficient of themselves for the protection of EVP. Instead Raz argues that any new world government would require two mechanisms: strong application of a subsidiarity principle; and receptivity towards ‘simultaneous interpretive pluralism’. Simultaneous interpretive pluralism is an approach to interpretation

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138 HM Cm 9553, Government Response to the Public Administration and Constitutional Affairs Committee Report on Lessons Learned from the EU Referendum (December) (2017) paras 1–6.
139 Raz (n 125) 81.
140 Ibid.
which means, for example, that universal standards such as human rights norms would embrace a plurality of correct interpretations of their meaning: even for the one standard and even within the one court. Raz is careful to distinguish his concept of simultaneous interpretative pluralism from current principles such as the ECtHR’s margin of appreciation doctrine or the exceptions to the qualified rights (both discussed above in section 5.4.2). While both these aspects of ECHR law permit some toleration of interpretation in the application of the different rights (or the different underlying values) in question, Raz’s simultaneous interpretive pluralism concerns a ‘plurality of incompatible interpretations of one value’. In reality, Raz’s observations concerning a potential world government also take account of the fact that ‘institutional fragmentation may be welcome’; as such his speculative may in fact be conceptualised as a blend of legal monism and legal pluralism as suggested above.

In light of the pre-Brexit suggestions that the UK is trending towards federalism or albeit more rarely, already manifests a ‘quasi-federalism’ (taken forward in chapter 6, section 6.3.3), the writings of Erin Ryan who expressed that constitutional federalism is the ‘least controversial and most undeniably …manifest’ form of legal pluralism are of specific interest. The concept of federalism should be understood to refer in one of its looser senses to an arrangement for the dispersal of political power, especially legislative power, in the form of what oft-cited federalism scholar

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141 ibid.
142 ibid (italics added).
145 Ryan (n 126) 5.
Daniel Elazar called, ‘self-rule plus shared rule’. In Ryan’s apt and recent draft chapter on global legal pluralism, she portrays the relationship between federalism and normative legal pluralism as one of ‘simultaneous opposition and overlap’ with the potential for further convergence or divergence. The divergence is (deliberately) given less attention because of the focus of Ryan’s paper but appears to arise mostly in the adherence of many federalist systems to a ‘preemptive hierarchy’: a clear authority which will trump other sites of authority in the case of deep conflict. (Although as discussed, this may not of itself hinder the realisation of EVP within the legal system.) In terms of the convergence, Ryan succinctly captures it through the notion that where pluralism aspires, federalism (in the sense of the ‘dynamic federalism’ described below) enables.

The point of Ryan’s chapter is to examine federalism through the lens of legal pluralism. Within this framework, Ryan identifies parallels in both systems through their inclusive approach to norm generation. In the case of federalism (and so too any existing internal UK constitutional pluralism created by devolution), the norms at play are jurisdictional interests. Ryan notes that individuals within federal structures adopt complex legal identities, which can be both confusing and conflicting, but also enlightening for the individual. The confusion might be summed up through Ryan’s view of the EU (which she naturally perceives to be a federation because of its manifest legal pluralism) and the example she gives of the Scottish public who voted against Brexit but who must be prepared to leave the EU irrespective. The enlightening aspect of Ryan’s perspective on federalism is her sense that exposure to such conflicts encourages a deeper appreciation of the difficult value choices to be made in a policy context. The real synergies between

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146 See, Daniel J Elazar, Exploring Federalism (University of Alabama Press 1987) 12. Note that not all agree that a full theory of federalism exists, and depending on the exact definition used, federalism can manifest in a great variety of forms. Building on the work of other scholars, Tierney suggests that the problem is a ‘lack of analysis of the underlying purposes behind federalism as the genus of a particular constitutional system’. See, Tierney (n 143) 107.
147 Ryan (n 126) 38.
148 ibid.
149 ibid 37.
150 ibid 7–8.
151 ibid 16.
152 ibid.
federalism and legal pluralism, however, occur for Ryan in the context of dynamic federalism, a view of federalism which embraces fluidity and overlap between multiple platforms in governance (and distinguishable from the old American model of dual federalism which is a deliberately more binary endeavour between state and federal government). Dynamic federalism shares space with legal pluralism because of their joint emphasis on dialogic processes and negotiation – a ‘model thick with exchange among multiple stakeholders’. Ryan has touted the benefits of dynamic federalism in the case of the US as generating a ‘more cohesive fabric of vibrant multilevel governance’, diminishing pluralisms’ potential for fragmentation. The scholar evidences this by using the example of ‘negotiated rulemaking’ in the US – a process for developing administrative rules that engages with multiple stakeholders and interest groups early on in the regulation development process. This process stands in contrast to the more traditional administrative rule development of ‘notice-and-comment’ whereby government officials develop the rule and then ask for comment much later in the process. Although there are cautions to the benefits of negotiated rule-making concerning the need for fair representation, transparency and minority rights protection, Ryan reports more subjective satisfaction on the part of both interest groups and rule makers. The literature around negotiated rule-making processes is also said to show stronger relationships, even among divergent interest groups and greater efficiencies, such as from fewer technical errors and the reduced time and money spent on enforcement. In short, Ryan’s point is that the benefits of dynamic federalism are highly similar to the purported benefits of legal pluralism.

In terms of EVP, what is most notable about the above discussions, is that the need for spaces which foster open contestation and dialogue created by constitutional pluralism/dynamic federalism models and its potential to reduce social fragmentation (an early idea also of famous US federalist James Madison)\textsuperscript{157}, is

\textsuperscript{153} Ibid 18.
\textsuperscript{154} Ibid 19; Ryan (n 127) 150, 162–169.
\textsuperscript{155} Ryan (n 126) 24–25.
\textsuperscript{156} Ibid.
\textsuperscript{157} James Madison, \textit{Federalist Paper No. 10} (The Avalon Project, Yale Law School 1787).
supportive of a view of ethical values as legitimately plural. It also sits harmoniously with the corresponding need to increase acceptance around this legitimacy, and the emphasis in the thesis’ EVP on bolstering human faculties around empathy and affiliation. Chapter 6, section 6.3.3 will use the definition of federalism as a model dependent on both self-rule and shared rule and a framework that represents one of the most simple forms of constitutional pluralism, to argue that the UK’s internal devolution structure should move towards the realisation of EVP by embracing to a larger degree shared rule.

5.6. Conclusion: Egalitarian Liberalism, Embedded Foundations and Internal Constitutional Pluralism

The purpose of this chapter was to look at the dominant theoretical ideas within liberal democratic constitutions such as that of the UK, as they presently stand and assess to what degree EVP already manifests itself. The first discussion on the liberal political framework, an unsurprising derivative of a strong commitment to the value of liberty, places significant emphasis on freedom of choice. In section 4.2.2, the thesis discussed Berlin’s ideas of liberty and especially his preference for negative liberty and commitment to the belief that radical free choice is fundamental to the nature of the human being, most evident during incommensurable value choices. Although not required by EVP, many pluralists, including Berlin, emphasise the importance of this freedom for exercising this idea of ‘self-creation’. Yet, Berlin equally emphasised the role of empathy as a human faculty through which human beings simultaneously discern illegitimate value choices and come to understand one another. Taken together, the contextualised grounding of EVP, Berlin’s focus on empathy, and Nussbaum’s value of affiliation, emphasise the importance of social context and social relationship. Although communitarian ideals are by no means absent in liberal democracies, liberalism does dominate communitarianism as demonstrated in chapter 3. Of itself this may not render the UK’s liberal framework beyond the realm of EVP. However, the fact that there is substantial evidence to suggest that the societal ‘value constellation’ in the UK requires deeper political
engagement with social conditions (e.g. see 2019 election promises on housing) suggests that to better realise EVP in the present age within the UK, there is a need for a more egalitarian liberalism.

In terms of human rights law however, there was even less of a commitment to EVP than established with political liberalism. That might be an unsurprising comment given the general avoidance of courts and international and regional human rights law in terms of theorising. The chapter did however identify a significant acceptance of pluralism in public life, and among the societies of Member States. It is common for example, that human rights law will appeal to pluralism as a pillar of democracy, though again there is little information as to why. Indeed, when it comes to normative discussions about the freedom of religion, where the ECtHR might more obviously engage with EVP, it is especially reticent. The reader will recall here the (perhaps) influential classical human rights theory and its relationship to ethical monism outlined in chapter 3. To find any EVP within democracy, it is necessary to instead engage with democratic theory, and to that end, there are ideas which do support significant conflict and contestation in political life as a good in itself.

Finally, the chapter turned towards a further defining feature of contemporary sovereignty debates in the form of constitutional pluralism. In that context, the federalising nature of devolution was noted and the parallels which exist between the earlier thesis concept of constitutional pluralism. Much like liberalism, constitutional pluralism was not considered to be a requirement of EVP, but rather to offer a better structure for EVP than constitutional monism. As such, the trend within the UK toward greater devolution is considered important, along with a need to retain a relative flexibility to the model around a loose ‘shared rule, self rule’ definition; with an emphasis on shared, rather than a more binary framework. Constitutional pluralism, provides greater space and normative entry points to the system of legal authority: a heterarchical rather than a hierarchical system. The final chapter to which the thesis now turns gives the necessary consideration to how a

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greater commitment to EVP might best inform the established framework identified above.
PART D

A PERSPECTIVE ON LEGAL SOVEREIGNTY IN THE UNITED KINGDOM FROM
THE ETHICAL FOUNDATION OF PLURALISM
6. A Perspective on Legal Sovereignty in the United Kingdom from the Ethical Foundation of Pluralism

6.1. Introduction

This chapter aims to draw together the conclusions in the two preceding chapters and apply them to the current UK constitution. In doing so, it aims to answer the thesis’s primary research question: ‘What can ethical value pluralism (EVP) contribute to the current understanding of legal sovereignty in UK constitutional law?’

This chapter is divided into two core sections. The first summarises the theoretical position presented within chapter 4 of the thesis, one of the key contributions of the thesis and translates that position into UK constitutional law in terms of a hierarchy of values (see Table 1 below). The second section applies that finding, along with the individual theoretical findings of chapter 5 to the specific UK constitutional context. What is acknowledged within the previous chapter and this conclusion, is that there is much about the UK’s constitutional framework that is compatible with EVP and the four process values. That said, the focus, for obvious reasons, centres on the contribution a commitment to EVP and the elevated process values might have for UK constitutional law and therefore understandings of legal sovereignty.

Beyond elevating the process values, the chapter argues that an EVP respecting UK constitution should move towards greater egalitarian liberalism, an understanding of other values, including substantive human rights based on agreement and contestation, and an internal constitutional pluralism arrangement.

6.2. The Theoretical Re-positioning of the Hierarchy of Values
It has been a theme of the thesis to identify how EVP can contribute to a hierarchy of norms, such as appears in the constitutional framework of liberal democracies. The thesis discussed in chapter 4, section 4.2.2 how the idea of EVP rejects any one ordering of values as fixed and permanent. This is a necessary conceptual position based on Isaiah Berlin’s idea that it is the nature of human beings to transform themselves and their lives through choice; a choice that need not always be rational.\(^1\) Berlin, it will be recalled, viewed ethical monism as ultimately prohibitive of human choice because it dictates a singular ultimate end for all human beings. To view any value system as fixed or permanent in any timeless way undermines this human capacity for choice.\(^2\) This was Berlin’s idea of ‘self-creation’, the need for choice so fundamental to the human being that John Gray framed Berlin’s value pluralism as a ‘historicist conception of human nature’.\(^3\)

Alongside self-creation, other (non-exhaustive) ‘process’ orientated values have been identified within the thesis as compatible with a commitment to EVP. These additional values are empathy, practical reason and affiliation (see chapter 4, sections 4.2.1 and 4.3.1). While not permanent or timelessly fixed, the thesis does commit to these values being quasi-permanent and universal. Chapter 4 was dedicated to demonstrating how the normativity necessary to generate the universal values is compatible with EVP. To do so, it borrowed heavily from the work of pluralists Berlin and Martha Nussbaum and much like Gray’s attribution to Berlin just above, Nussbaum referred to her own theory as ‘historically grounded empirical essentialism’.\(^4\) It is a position that also resonates with the idea of ‘embedded universalism’ first presented in the thesis through the discussion on the work of Linda Hogan, another pluralist scholar who believes that embedded universalism serves as a more plausible foundation for human rights than classical theory (see chapter 3, section 3.5.1). Although Hogan contrasted embedded universalism with an


essentialist perspective on the human person, the thesis has taken the position that the two ideas can in fact coexist. Nussbaum’s work does the heavy lifting here by articulating the idea of internal essentialism, a position distinct from meta-physical essentialism (see chapter 4, section 4.3). Internal essentialism derives normative value, not from abstract reasoning, but instead from the human being taking an inward perspective and identifying norms around human experience and understanding concerning what makes a human being identifiable as living in a fully human way. This process relies not on reason alone but on individual ‘intuition’, a process mentioned by both Nussbaum and Berlin although the idea is clearer in the work of Nussbaum. There are parallels too between the process of ‘intuiting’ and Berlin’s value of ‘empathy’, which requires human beings to exercise ‘imaginative insight’ in an effort to understand, not ourselves, but this time others. Empathy as discussed in chapter 4, section 4.2.1, is the process of ‘entering into’ the thoughts or feelings of others and plays a significant role in Berlin’s identification of normativity within EVP; it is the process through which certain values are excluded from legitimacy.

While internal essentialism is an individual human process, it coexists with embedded universalism because the determined values are understood as representative of different cultures and time periods. Their articulation, furthermore, can only be achieved by an empirical gathering of these context-sensitive views. Both Berlin and Nussbaum’s theories of EVP present with a large part empiricism and while that does

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8 Berlin (n 1) 10.
9 Berlin and Jahanbegloo (n 7) 37–38.
10 Nussbaum, *Women and Human Development: The Capabilities Approach* (n 7) 77.
not detract from the essentialist elements, it does limit the normativity and mean
that the values identified can only ever be quasi-permanent.\textsuperscript{12}

It can be noted that although Nussbaum presents ten values deemed a ‘vague theory
of the good,’ the commitment within the thesis is less substantive.\textsuperscript{13} Instead of
looking at human capabilities, the thesis merges the ideas of Nussbaum and Berlin to
commit, for the present time, only to a view that focuses on the pervasive ways of
human functioning rather than, what might be considered, a broader human
capabilities approach. The identification by Nussbaum herself that some of her
capabilities, namely ‘practical reason’ and ‘affiliation’ suffuse and constrain the other
capabilities indicate that an approach focused on communication and interaction
presented a more immediately robust set of process values without further analysis
(see chapter 4, section 4.3.1).\textsuperscript{14}

The thesis’ interpretation of EVP contributes then to the hierarchy of norms debate
in two ways. First, it commits to certain quasi-permanent process-orientated
universal values based on the ways human beings function, derived not from abstract
reason but from both an internal and embedded essentialism. The thesis does not
seek to put a limit on the number of these universal faculties but commits to, at least,
self-creation, empathy, practical reason and affiliation because of their pervasive
nature as identified by the eminent pluralist scholars. The thesis speculates
additionally around ‘truth’ but does not develop that potential value further, limiting
the discussion to the values identified by the prominent EVP scholars of Berlin and
Nussbaum. Second, the thesis uses these process values to de-legitimise other values.
This builds most apparently on Hardy and Crowder’s description of Berlin’s ‘empathy’
value as establishing a human horizon of legitimate values, even where those values
are otherwise unacceptable at an individual or societal level (see chapter 4, figure

\textsuperscript{12} Berlin (n 1) 18. Nussbaum, ‘Human Functioning and Social Justice: In Defense of Aristotelian
Essentialism’ (n 4) 205. See also, George Crowder, ‘Value Pluralism and Liberalism’ in George
Crowder and Henry Hardy (eds), \textit{The One and the Many} (Prometheus Books 2007) 219.
\textsuperscript{13} Nussbaum, \textit{Women and Human Development: The Capabilities Approach} (n 7) 56.
1. As mentioned, empathy establishes this human horizon of legitimate values by the human process of ‘entering’ into the thoughts and feelings of others using ‘imaginative insight’. If through this process we can understand the values of another, then they fall within the human horizon as legitimate values; if we cannot, they do not. Due to the ordering of the four process values as higher order values, this idea must be extended, so that if any of the four values can be demonstrated to support the proposed value, it should be deemed legitimate. For example, a value or value constellation may not be supported by practical reason, but it may be supported by the value of empathy. Crucially, these legitimate ‘other values’ are not necessarily constitutional or higher order values but they can be. Whether such values are given recognition in a society at all, is then dictated by agreement.

The potential for a society or group to legitimately agree to ‘other values’, i.e. values not identified by way of internal and embedded essentialism, is necessary to realise the fundamental premise of EVP that there are many different conflicting but legitimate ways for human beings to live. The focus of the thesis has been to derive normativity from EVP and especially normativity that can generate universal values. Values that are ‘agreed’ do not possess the same theoretically justified normativity, although as stated, they can serve as higher order constitutional values. Given the normative underpinnings of the EVP process values however, it is appropriate that they command a more entrenched status.

Table 1 below maps the idea of the thesis into legal values before a fuller discussion of what the thesis presentation of EVP and its universal norms means for UK constitutional law, and ultimately legal sovereignty in sections 6.3 and 6.4 to follow. Since none of the values can be permanent, Table 1 suggests potential timeframes for constitutional entrenchment.

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15 George Crowder and Henry Hardy, ‘Berlin’s Universal Values - Core or Horizon?’ in George Crowder and Henry Hardy (eds), The One and the Many (Prometheus Books 2007) 294–295.
Table 1: EVP's Legitimate and Illegitimate Legal Values

<table>
<thead>
<tr>
<th>Element of the EVP</th>
<th>Type of Value</th>
<th>Legal Status</th>
<th>Permanency</th>
<th>Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Internal &amp; Embedded Essentialism</strong></td>
<td>Process Values</td>
<td>Universal and UK</td>
<td>Quasi-Permanent</td>
<td>Semi-centennial (50 years) or on revolution</td>
</tr>
<tr>
<td><strong>Multiple Legitimate and Conflicting Values - Political Agreement</strong></td>
<td>Any (so long as understood by at least one process value)</td>
<td>UK Constitutional</td>
<td>Quasi-Permanent</td>
<td>Generational (25 years) or on revolution</td>
</tr>
<tr>
<td><strong>Multiple Legitimate and Conflicting Values - Ordinary Law</strong></td>
<td>Any (so long as understood by at least one process value)</td>
<td>Ordinary Law</td>
<td>Not Permanent</td>
<td>Each Parliament</td>
</tr>
<tr>
<td><strong>Internal &amp; Embedded Essentialism</strong></td>
<td>Any that cannot be understood by</td>
<td>No legal status</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>
6.3. More Practical Consequences of the Theoretical Re-positioning

Process focused values when infused into systems and institutions will predominantly concern the broader architecture within which decisions are taken and, at the human level, the ways decisions are taken. These values are also substantively good in the sense that the realisation of the process itself is beneficial for the individual and society. Indeed, a focus on the importance of process values is not something new to liberal democratic legal discussion. In the UK, public authorities, including the courts but not Parliament, are required under section 6 of the Human Rights Act (HRA) 1998 to act in a manner compatible with the European Convention on Human Rights (ECHR) rights that are listed in Schedule 1 of the 1998 Act (a list that includes most but not all ECHR rights). The emphasis of contemporary human rights law is, however, mostly, although by no means exclusively, outcome focused. The growth in the ‘thick’ form of the rule of law (as discussed in chapter 2, section 2.3.1) further shows the influence of the substantive nature of human rights laws on other fundamental UK legal concepts such as judicial review, a traditionally process focused legal action. The judicial review debate over substantive versus procedural equality was raised in chapter 2, section 2.3.1, and there have been recent parallels between procedural

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and substantive fairness. As discussed there, the most recent judgments on these areas have raised questions on the role of substantive fairness in judicial review.

The efforts of scholars discussed in chapter 1, section 1.2.2, towards re-focusing the constitutionalism narrative on process will also be recalled. In shared sovereignty contexts such as that of the UK, the ways in which the sovereignty institutions exchange views and dialogue has taken an increasing hold, whether through Etienne Murienik’s early ‘culture of justification’, or to name a few, David Dyzenhaus, Sandra Fredman and Alison Young’s more recent contributions on ‘justification’, ‘deliberation’ and ‘dialogue’. Yet dialogic processes are not constitutional requirements. While a type of ‘democratic dialogue’ will often occur between the courts and Parliament around declarations of incompatibility under the Human Rights Act 1998 and remedial orders, there is no legal obligation that this must take place. It famously took over ten years for the UK to amend its legislation to the satisfaction of the ECtHR on prisoner voting.

The contribution of the EVP idea to UK constitutional law therefore lies instead in its theoretical aspects, namely the belief that a commitment to EVP more readily justifies process values as quasi-permanent universal norms than other types of value. As stated above, this does not and should not prevent any society from

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19 R (on the application of Gallaher Group Ltd and others) v The Competition and Markets Authority [2018] UKSC 25; [2018] 4 All ER 183; Re. Finucane’s Application for Judicial Review (n 18).
21 Human Rights Act 1998 c.42 s 4 and 10. Under the ECHR, Article 46(1), the UK is however obliged to execute judgments of the ECtHR. See further and more broadly on inter-institutional dialogue within and outside the UK, Young (n 20).
agreeing other substantive values, even as higher order values. Since EVP requires the commitment to process values to be high, the following sections, consider what that might entail for some aspects of the UK’s legal sovereignty framework. It is suggested in the sections to follow that the UK should initiate a move towards a more egalitarian liberalism, a deeper embrace of agonism and a nurturing of empathetic contestation such as to build an EVP character, and finally a view of the territorial constitution as manifesting internal constitutional pluralism.

6.3.1 An EVP Outcome: Egalitarian Liberalism

It will be recalled that chapter 5, section 5.3, took the position that the process values of self-creation and affiliation credibly align with the political structure of egalitarian liberalism. We saw in both that section and in chapter 4, section 4.2.2, that self-creation is not the same as autonomy concepts in terms of meaning reason-based self-direction. Self-creation, as has been discussed, in fact posits a direct challenge to rationality because it is realised to be at its most significant in moments of rational indeterminacy.23 It refers of course to Berlin’s view on the human being as having a propensity to self-transform; a propensity that can be fostered by a political system that accords to the individual a large degree of choice.24 Yet it was also considered in chapter 5 section 5.3, that the form of liberalism supported by EVP is that of egalitarian liberalism because of the importance of the value of affiliation. Affiliation requires the sovereignty infrastructure to demonstrate a high value for the importance of the human as a social being, constantly engaged in complex discourse and concern with other individuals.25 There are undoubtedly individual aspects to recognising fully Nussbaum’s value of ‘affiliation’, in the sense that the idea seems to capture interactive capabilities at an individual level. It is, however, the communitarian idea around the importance and fundamentality of human

23 Berlin (n 1) 184. See also, Zakaras (n 1) 509–510.
24 Berlin (n 2) 171.
relationships that is most important in terms of re-balancing self-creation’s focus on opportunities for radical choice.

It has been a thread throughout the thesis that the current UK constitution elevates individualist concepts more than communitarian ones. This occurs for example through the dominance of human rights law (and the theory of liberal universalism, see chapter 3, sections 3.3 and 3.4). The UK constitution and legal reasoning has also been long underpinned by a presumption of individual liberty. As discussed in chapter 1, section 1.2.2, Jeffrey Jowell and Colm O’Cinneide describe this presumption to mean that ‘individuals are free to do anything not prohibited by law’. Indeed, it is a relatively common maxim of the UK common law that ‘everything which is not forbidden is allowed’. Dawn Oliver also identified that ‘autonomy’ which she described as ‘freedom of action’ is one of five values that pervades UK private and public law. Oliver demonstrates the authority of autonomy when she links this value to dignity because human dignity, we are told, depends on individual autonomies, such as freedom of conscience and religion for its realisation. For Sir John Laws, the presumption of liberty within the UK constitution must also be interpreted to mean that ‘every intrusion by the state upon the freedom of the individual stands in need of objective justification’.

28 PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another [2016] AC 1034; [2016] 2 WLR 1193, 1056. This was considered especially the case in the context of contract law. See also the comments of Lord Keith in the ‘Spycatcher’ litigation around freedom of expression and the duty of confidence, at 256: ‘The general rule is that anyone is entitled to communicate anything he pleases to anyone else, by speech or in writing or in any other way. That rule is limited by the law of defamation and other restrictions similar to these mentioned in article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)’. See, Attorney General v Observer Ltd and Others [1990] 1 AC 109; [1988] 3 WLR 776.
29 Ibid 61.
30 Ibid 61.
31 Laws (n 26) 370.
32 Ibid.
himself an avid supporter of this form of negative liberty because of the choice it provided for the individual.33

Yet as Michael Freeden demonstrated, the UK has adopted variable approaches to liberalism over the years and maintains in the present age some expressly communitarian ideas. Freeden describes how this ‘layer four’ of liberalism began in the mid-20th century UK at the time of post-war construction, with the introduction of the welfare state.34 In this phase Freeden tells us that the ‘liberal groundsheet was slightly decentred as it was made to share prime billing with human welfare and flourishing’.35 It also ‘obscured the message of the pre-social naturalness of rights’.36 Integrating the individual into the social more than any other phase of liberalism, Freeden’s layer four witnessed the emergence of the UK welfare state establishing national insurance, a national health service and various other social entitlements in the field of food and housing to assist the vulnerable.37 While Freeden’s fifth layer of liberalism which emerged in the late 20th century has largely ‘dispensed with the unitary view of society’ found in the fourth layer,38 elements of the welfare state still remain in the modern UK. Writing in the late 1990s, Oliver’s narrative on UK legal values, does point to existing communitarian elements within her other four values of dignity, respect, status and security; communitarian because they require the courts to give a level of protection to the individual in society and in relation to others.39

Yet it was also suggested in chapter 1, section 1.2.1 and in chapter 3, section 3.2, of the thesis that there has been a discernible political growth in the UK in recent years around the need to recognise more communitarian concerns. This can be observed through a growing emphasis on societal inequality and even nationhood, in the sense

33 Berlin (n 2) 171.
35 ibid 48.
36 ibid.
37 See especially, William Beveridge, Social Insurance and Allied Services (HMSO Cm 6404 1942).
38 Freeden (n 34) 48.
39 Oliver (n 29) 64.
of unmet social needs by an internationally integrated economic system. These concerns are, incidentally, relevant to positions on legal sovereignty, as they inevitably engage with human rights and international institutions. As such, it might be suggested that the UK constitution is at this time not sufficiently responsive to the EVP higher order value of affiliation. In support of this idea, is the secondary argument made by George Crowder and William Galston (chapter 5, section 5.3), that a constitution should reflect a degree of congruence with society in order to manifest stability. Affiliation, has of course been derived from the idea of an internal and embedded essentialism, suggesting that where one of the process values is under-realised over a sufficient timespan, this would be discernible also from a socio-political perspective since the notion involves a degree of empiricism.

The perception expressed indeed within chapter 1 section 1.2.1 was that the neoliberal trend brought about in recent years by globalisation and the free market has afforded insufficient mitigating protections for communitarian interests. It was suggested that the large grass-roots support generated for the anti-austerity and socially liberal policies of Jeremy Corbyn has been an indicator of this societal perspective. This is to be recognised despite the relative unpopularity of The Labour Party with the electorate in the December 2019 General Election. The choice of the Conservative Party to campaign in 2019 on the less traditional grounds of increased public expenditure might also be considered a key marker. Reimagining the UK constitution has itself been a keen focus of the past five to ten years, including on

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values. The House of Lords Constitution Committee, universities and a number of public figures such as from faith-based organisations, have published on the need for a renewed vision for either the UK or the human being.\(^4\) It was suggested that the Scottish government has at least the appearance of achieving more congruence between Scottish government values with societal values, namely by establishing more high-level communitarian commitments through socio-economic rights (see chapter 3, section 3.2) than at the UK level.\(^5\) This alignment is, arguably, easier within a unified national framework than a unitary state composed of four or five separate national identities – English, Scottish, Welsh, Northern Irish and Irish. This point does however have its limits when considered against highly divided contexts, such as that of Northern Ireland (NI), and the ability of ‘Britishness’ to sit, for many, harmoniously alongside the separate devolved identities.

It was tentatively suggested within the thesis that one possible way to capture a more egalitarian liberalism within the current constitutional framework is to make more of the public interest concept. Chapter 3, section 3.3.3 included a section on socio-economic rights and the concept of the public interest within the UK constitutional framework. The suggestion within that section is that these aspects of UK law have the potential to support greater communitarianism than presently on display. Socio-economic rights, like most human rights, are primarily individual in their orientation. Yet they also have, as discussed in chapter 3, an underpinning communitarian rationale, such as in the claim that the individual will flourish better if the community within which they are situated is also flourishing. In this sense it is mutually advantageous to elevate the living standards of other individuals. This would involve however elevating socio-economic rights to the same legal level as civil and political rights. Although it never progressed through Parliament, an interesting development was section 2 of the House of Lord initiated ‘Act of Union Bill [HL]’ which identifies as

\(^4\) This is to name just a few examples of a wider impression in recent years. See e.g. Constitution Committee, ‘The Union and Devolution (2015-16, HL 149)’; Justin Welby, Reimagining Britain: Foundations for Hope (Bloomsbury Publishing 2018); Rowan Williams, Being Human: Bodies, Minds, Persons (Society For Promoting Christian Knowledge 2018). See also the UCL Constitution Unit, and ESRC ‘UK in a Changing Europe’ project.

a ‘core purpose’ of the UK, the ‘protection of social and economic rights’ alongside the ‘protection of fundamental rights and freedoms’. The Bill explicitly states in section 2 that the core purposes do not alter the specific provisions of legislation. Arguably, the UK’s current concept of ‘public interest’ could be a better target for the communitarian progression suggested. Reframing the public interest as a driver of decision-making based on a redefinition that ensures it is representative of the wider community interests, rather than for example, narrower reactive interests of individual government. This may mean instituting an inclusive process to gather the views of the public around public goods, whether that includes the environment, public spaces, or other community well-being initiatives. It may be that community orientated initiatives lie under the responsibilities of local authorities such as councils. As section 6.3.3 of this chapter will detail, distributions of authority are welcomed by EVP, but these authorities need the support of ‘affiliation’ as a higher order value to ensure that sufficient resources are allocated to achieving these objectives.

To conclude, an EVP constitution will elevate the process value of affiliation within the UK constitutional framework. It appears that the lack of this value as higher order has disenfranchised many elements of UK society, as manifest in both Brexit and the shift in recent years towards more democratic socialist political rhetoric.

6.3.2 An EVP Process: ‘Other’ Values: Contestation, Dialogue and the EVP ‘Character’

While much of the thesis has been devoted to demonstrating how EVP can produce normativity, it is important to note that a constitutional framework based on EVP is likely to produce less normativity than a monist framework because of its acceptance of the legitimate plurality of values. For this reason, an EVP focused constitution should instead embrace agonism as a positive outcome and facilitate contestation. It is in this way that society should come to agreement about other legal values. As set

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out in section 6.2 above, the legal values founded on ‘agreement’ can be ordinary legal values or higher order constitutional values, as agreed. It must be emphasised that it is through this process, rather than EVP’s normativity based on internal and embedded essentialism, that most legal values in the EVP constitution will come into being. There can be many different reasons for a society to agree additional higher order constitutional values. There are practical reasons, such as that mentioned above, around the need for congruence between societal values and constitutional values so as to ensure legal stability and public order. As demonstrated in chapter 3, section 3.2, societies, such as that of the UK, have dominant value constellations in existence at the individual and group level. It is advisable for the purposes of public order that these orientations are recognised and engaged with. That is of course with the proviso that they do not fall outside the legitimate horizon dictated by the process values (see Berlin’s work on ‘empathy’ in chapter 4, section 4.2.1 and Table 1 in section 6.2 above).

It is within the ‘agreed’ category of values that many more substantive values such as modern human rights laws will arise in an EVP constitution. As should be apparent from chapters 3 and 4 of the thesis, contemporary human rights laws are justified on a basis quite distinct from that of the EVP process values. Indeed, it was the persuasive narratives of many human rights scholars, which introduced the author to the idea of EVP. Yet, as the thesis argued in chapter 5, section 5.2.2 concerning jus cogens, the diminished normativity derived from EVP vis-à-vis a liberal universalism, does not equate to moral depravity. It is expected rather, that for social stability alone, a number of substantive rights such as those already in place in the UK human rights framework would continue to gain agreement from the UK’s public and political elements. In this regard, it might be noted that even the proposed changes to the Human Rights Act 1998 are not radical (chapter 2, section 2.2.3).

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47 Crowder, ‘Value Pluralism, Diversity and Liberalism’ (n 41) 555–556; Galston (n 41) 807.
48 See also, Nussbaum, Women and Human Development: The Capabilities Approach (n 7) 96–101.
49 See e.g., Christopher McCrudden, Litigating Religions: An Essay on Human Rights, Courts, and Beliefs (Oxford University Press 2018); Hogan (n 5).
51 EU Committee, The UK, the EU and a British Bill of Rights (HL Paper 139, 2016) paras 42–49.
the addition of the four process values as higher order constitutional norms, could contribute to a greater realisation of the socio-economic dimensions of the international human rights framework than presently exists, as suggested by the section immediately above.

The outcome of conflicting opinions that result from a fostering of contestation and indeed constitutional pluralism (see section 6.3.3 below) should not be perceived as challenges to EVP but rather a welcome result. Berlin anticipated that in a genuine EVP climate, there will exist an ‘uneasy equilibrium, which is constantly threatened and in need of constant repair’.52 This is indeed the expectation of a system that gives due recognition to the legitimacy of EVP. Yet, although conflict is embraced, the thesis recognises that final answers are ultimately needed in individual cases. The important contribution EVP makes here is not to argue for multiple decisions, but rather to suggest that final decisions should only be taken after a clear process of dialogue and contestation. An emphasis on the worthiness of dialogue was a theme within the EVP sympathetic literature of Christopher McCrudden, Paul Schiff Berman and Erin Ryan observed throughout the thesis.53 The purpose here is to provide the opportunity to foster what might be called the ‘EVP character’. That is, a character not unlike what Crowder referred to in chapter 5, section 5.3 as ‘particularist practical reasoning’ described as ‘a skill which depends on the development in those who practise it of certain desirable habits of mind’.54 These habits must of course, be EVP habits, such as an openness to other understanding other value choices, an engagement with both practical reason but also empathy and an underlying acceptance of the importance of human social networks. If this character is cultivated by dialogic processes, then irrespective of the specific institution with authority over the issue in the specific case, that institution ought to be informed by the knowledge

52 Berlin (n 1) 19.
transfer that occurs in this very human process. In Berlin’s writings, the EVP character requires a ‘certain humility’.55

Practical reason and empathy are the most directly interactive of the four EVP process values. The out-workings of the UK’s constitutional structures most obviously manifest a respect for practical reason. While not a constitutional value in any explicit sense, practical reason suffuses the UK’s legal system, through the exemplar of legal reasoning. Legal reasoning is most obviously based on practical reason, whereby the practitioner and judge lay down their conclusion based on reasoning from legal rules.56 Practical reason as opposed to theoretical reason concerns factual situations to which rationality is applied to determine actions.

Using the related idea of ‘public reason’, well known UK legal theorist, Trevor Allan further identifies the ordinary courts as the ‘exemplar’ of public reason because of their role in testing the current law in light of the accepted conceptions of the common good. According to Allan, a committed proponent of the relationship between morality and the law, this reasoning process enables conformity between the law and justice.57 This judicial reasoning is further perceived to represent a continuing fluidity to the common law because of the public reason that Allan’s believes is also manifest in ordinary political debate.

Allan reconciles the value conflicts of political pluralism (he is not to the author’s knowledge a proponent of EVP) by referring again to his ‘very general idea of public reason’.58 In a relatively receptive value stance, Allan believes that ordinary political debate does and should make appeals to a variety of moral doctrines and religious beliefs, provided that the reasons are intelligible.59 In welcoming a framework which allows for a much broader political debate on morality, Allan lends his support to a

55 Berlin (n 1) 17–18.
58 ibid 284: This is part of his liberal theory on the rule of law, in which he also outlines his ‘fairly abstract account of equality’.
59 ibid 286.
constitutional framework of deliberative democracy (seemingly over and above the views of procedural democrats and constitutionalists). Based on the description of the deliberative democracy framework by Gutmann and Thompson, Allan recognises it as a constitutional approach which ‘seeks a morally justified consensus by stimulating the kinds of debate that enables the relevant values to be clearly identified, allowing the moral seriousness of opposition viewpoints to be better understood’. Since the objective is to reconcile views on conflicting value claims, a person engaging in political debate under a deliberative approach should, where possible, ‘adapt his moral argument to invoke widely accepted principles to support his case, or show why, when properly explained, they do not undermine it.’ According to Allan, proper political argument therefore seeks to identify ‘principles of justice and conceptions of the common good that all can endorse without loss of personal integrity’. This objective is for Allan, essentially the same as that of legal reasoning. While legal reasoning is based on established precedent, this must not, he argues, obscure that reality that questions of law are also questions of justice. Deliberative democracy is therefore a related ideal to the rule of law – this relationship is created for Allan, by the similar role played by reason in both contexts.

From an EVP perspective, there is much to admire within Allan’s writings, such as the willingness to engage seriously with a range of moral viewpoints in political debate through a deliberative process. The main differences, however, concern Allan’s emphasis on both consensus and reason. EVP, while placing significant value on reason, does not do so exclusively as demonstrated by self-creation’s flourishing in moments of incommensurability. One interesting doctoral thesis written by James Bourke and held at Duke University, advocates instead for an EVP approach based on ‘giving incommensurability its due’. In a view which is ultimately similar to that

60 ibid 286–287.
61 ibid 287.
62 ibid 288.
63 ibid 289.
64 ibid.
65 ibid.
66 ibid 290.
espoused by the work of Crowder in chapter 5, section 5.3, Bourke holds that there are ‘compelling reasons, internal to the theory, for both a broadly contextual form of political life, and significant limits to the scope of contextual decision making, supplied by stable, general rules and principle.’ Meeting this tension is for Bourke possible if we give incommensurability its due. Essentially this means, “identify[ing] institutions and practices that promote both the recognition of and engagement with incommensurability and conflict in public life.” By requiring engagement with incommensurability (and not only recognition), Bourke believes that this will require citizens to avoid decision-making on pre-reflective preferences alone. Instead, by engaging, they will at least work towards discerning a proper balance between competing modes of the thinking. Bourke states:

A political order that gives incommensurability its due is one in which citizens come to understand that incommensurability and conflict are important features of our experience of choice and judgment. Furthermore, they actively work to make choices and judgments that, first, are sensitive to incommensurability and conflict and, second, embody good-faith efforts to reason about how best to balance competing considerations.

What is most interesting about Bourke’s thesis however is his description of the types of institutions and form of reasoning which promote this recognition and engagement with incommensurability. In Bourke’s own words, he contributes a new argument for democratic deliberation based on value pluralism that ‘de-privileg[es] consensus as the favoured outcome’ and does not rely on considerations of reciprocity and legitimacy (conventional arguments that justify democratic deliberation). For Bourke, since deliberation is not grounded in the legitimacy of
coercive power, but rather in the recognition of and engagement of incommensurable and conflicting value, deliberation actually aims against consensus. For Bourke, differing conclusions will often be legitimate outcomes of a deliberative process, even after good-faith efforts to work with others through the difficulties. This is because there can be many differing reasons that are equally legitimate. Instead, of focusing on consensus, the ideal of a deliberative process based on a commitment to EVP is to not insist on consensus. Bourke considers that majority voting should not be perceived as a second-best compromise option, but rather a positive outcome based on a general commitment to reaching a conclusion. In a statement at ease with the EVP of the thesis, Bourke believes that, ‘this understanding of the nature of deliberation deepens deliberative democracy’s commitment to the basic provisionality and revisability of deliberative outcomes.’

6.3.3 An EVP Structure: Constitutional Pluralism

The thesis began in chapter 1, section 1.2.2, and in chapter 2 by identifying the current sovereignty debates in UK law. That discussion concluded in chapter 2, section 2.5, that despite judicial affirmations of the Parliamentary sovereignty paradigm in the Brexit-related Miller cases as well as the EU (Legal Continuity) Bill case, the most accurate description of the status quo is of a shared sovereignty between Parliament and the courts. This is because of the enduring emphasis on the rule of law and human rights and the unique claims both accord to the courts. That claim should of course be contextualised against the ‘Independent Review of Administrative Law’, announced by the Government in July 2020, with the presumed

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Bourke (n 67) 227–228.
ibid 228.

74 R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2018] AC 61 [41–43]; R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland [2019] UKSC 41; [2020] AC 373 [58].
objective to curb the potential ‘abuse’ of the process as suggested in the 2019 Manifesto but thereby also curbing the role of the courts. The thesis also suggested that the more unstable element of the legal sovereignty discussions was in fact the role of the devolved legislatures, a scenario made more unstable by Brexit. While the thesis did not suggest in chapter 2 that legal sovereignty should be conceived as currently shared also with the devolved legislatures – this is not the case – the purpose of this section is to tie that debate together with the narrative in chapter 5, section 5.5 and move towards a commitment to sharing sovereignty at the devolved level.

Chapter 5, section 5.5, set out how the normative merits of legal pluralism aligned with EVP and advocated for an internal constitutional pluralism model to be taken forward in UK law. That section also indicated that there are hints towards this model already manifesting within the UK and that commentaries have sometimes conceptualised these hints within the framework of federalism. That chapter defined federalism broadly as ‘self-rule plus shared rule’. Ryan’s work on dynamic federalism, i.e. the view of federalism which embraces fluidity and overlap between multiple platforms in governance, is of note to the thesis because of the parallels the author draws between this form of federalism and constitutional pluralism. Thanks to the ‘thick’ opportunity for exchange among multiple stakeholders, Ryan considered that dynamic federalism diminished pluralisms potential for fragmentation: a potential result aligned with the thesis objective of a less volatile


77 See, Daniel J Elazar, Exploring Federalism (University of Alabama Press 1987) 12. Note that not all agree that a full theory of federalism exists, and depending on the exact definition used, federalism can manifest in a great variety of forms. Building on the work of other scholars, Tierney suggests that the problem is a ‘lack of analysis of the underlying purposes behind federalism as the genus of a particular constitutional system’. See, Stephen Tierney, ‘Drifting Towards Federalism? Appraising the Constitution in Light of the Scotland Act 2016 and Wales Act 2017’ in Robert Schütze and Stephen Tierney (eds), The United Kingdom and the Federal Idea (Hart Publishing 2018) 107.

78 R (Miller) v Secretary of State for Exiting the European Union (n 74) [141–149]; UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (n 75) [12, 52].

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Notably, dynamic federalism supports a weak central government and an emphasis on shared rule. Due to the plausibility that a constitutional pluralism/dynamic federalism model will assist with realising EVP’s fundamental premise around the legitimacy of multiple and conflicting values (a premise also embodied also through the process value of self-creation), it is toward an increase in the shared rule aspect of devolution that the UK constitution should aim. It will be recalled that the primary argument for the normative benefits of legal pluralism is that by accepting and engaging with multiple bases of legal positivist and non-positivist authority, political authority will be more inclusive and deliberative, which is the best option for sustainable outcomes. Similarly with egalitarian liberalism (a thread developed through chapter 3, section 3.3.3(i), chapter 5, section 5.3, and section 6.3.1 of this chapter) and empathetic contestation (a thread discussed through chapter 1, section 1.2.2, chapter 5, section 5.5 and this section 6.3.2 of this chapter), there are already efforts in place to redress this imbalance in the constitutional settlement.

The thesis has argued that the Brexit-related caselaw has presently suppressed most inclinations towards placing the devolved legislatures on a similar sovereign footing as the UK Parliament, but sought to highlight how cases such as Jackson, Robinson and Axan demonstrated pre-Brexit inclinations towards this status among some elements of the judiciary (see chapter 2, section 2.4.1). The shift towards the traditional Parliamentary sovereignty model in the caselaw has not however prevented a body of emerging academic commentary suggesting that the UK is in fact trending towards a federal structure (albeit that some of this literature has preceded the Brexit-related caselaw). These more academic discussions are notably inspired

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80 Ryan (n 53) 3 and 18.
81 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (n 75) [41].
82 R (Jackson and others) v AG [2005] UKHL 56; [2006] 1 AC 262 [152].
84 AXA General Insurance Limited and Others v the Lord Advocate and others (Scotland) [2011] UKSC 46; [2012] 1 AC 868 [49, 148].
85 See a number of essays in the edited collection, Robert Schütze and Stephen Tierney (eds), The United Kingdom and the Federal Idea (Hart Publishing 2018). See also for a variety of views, Richard
by the recent enactment of legislation which ascribes permanent status to the Scottish and Welsh legislatures86 (see chapter 2, section 2.4.1), but also the legislation introducing regional government in England and devolution of limited powers in relation to tax in NI.87 Yet while these devolution developments support a significant advancement in the ‘self-rule’ element of federalism, Stephen Tierney rightly argues that there remains much more scope to improve the ‘shared rule’ component before the UK can be considered a federal arrangement.88 Tierney refers to this as a ‘representation deficit’ on the part of the devolved territories because of their minimal role in central-decision making.89 Interestingly, in the EU (Legal Continuity) Bill Reference, the UK Supreme Court distinguished UK devolution from its interpretation of federalism as follows: ‘in contrast to a federal model, a devolved system preserves the powers of the central legislature of the state in relation to all matters, whether devolved or reserved.’90 This is not of course the more dynamic form of federalism discussed by Erin Ryan in chapter 5, section 5.5 of the thesis, but instead appears to align closer to the hard federalism model.

When an issue concerns overlapping competence of a devolved territory and the UK Government, intergovernmental discussions take place on the basis of a Memorandum of Understanding (MOU) and departmental concordats, as well as the Joint Ministerial Committee (JMC). 91 The MOU underpins inter-governmental

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86 Scotland Act 2016 c. 11 s 1; Wales Act 2017 c. 4 s 1.
88 Tierney (n 77) 119–121.
89 ibid 105.
90 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (n 75) [41].
91 Cabinet Office, ‘Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee’ (2013).
relations in the UK by what Adam Tomkins has called a ‘respect agenda’, namely, a mutual respect being asked of governments especially concerning confidentiality and disclosure; but it is also underpinned by an emphasis on ‘good communication’ and information exchange, as well as parliamentary sovereignty and the Sewel Convention. The Sewel Convention, it will be recalled, is the political convention whereby Parliament will not normally legislate on devolved matters without devolved consent (discussed in chapter 2, sections 2.2.2 and 2.4). The JMC is a consultative quadrilateral forum which includes representatives from the three devolved governments and the UK Government and which is purposed, among others, to consider matters which impinge on the responsibilities of another level of government (i.e. central matters affecting a devolved administration and vice versa), as well as disputes between administrations. However, in a 2015 Inquiry into the system, the House of Lords Constitution Committee found that the devolved entities perceived that they played a subordinate role within the JMC and that in the event of a dispute, the decision was ultimately taken by the UK Government. The Committee made a series of recommendations based on this Inquiry, one of which included the reiteration of the recommendation in the Committee’s earlier report on ‘Proposals for the devolution of further powers to Scotland’ concerning the ‘need to devise and articulate a vision for the future of the state and its devolution settlements.’ According to the Committee, an ‘overarching vision for the future shape of the United Kingdom should be a stabilising force in its own right and would also allow for inter-governmental arrangements to be organised on a more stable basis.’

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93 Cabinet Office, ‘Memorandum of Understanding and Supplementary Agreements: Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee’ (n 91) 24.
95 ibid 60 (para 34).
96 ibid 56 (para 211).
What is interesting here is that, although the Committee could have argued that the inter-governmental relations in the JMC are only a reflection of the ‘Parliamentary sovereignty’ paradigm onto the executive layer, it instead advocated for a clearer vision of the devolution arrangements. This is a demonstration by an organ of the UK Parliament, albeit an unelected one, that parliamentary sovereignty is no longer a sufficient response to frictions in power concerning central and devolved governments. In an article which noted that the changing nature of political authority in the UK should be a sufficient basis for reconceiving sovereignty (a type of ‘manner and form’ argument\(^97\)), Martin Loughlin and Tierney have equally recognised the role of Parliament – through the devolution statutes - in placing limitations on its own power:

Continuing institutional differentiation of governmental responsibilities now indicates that Parliament can no longer claim to be the sole repository of sovereign authority and this development is one in which Parliament itself has acquiesced. Manner and form limitations on Parliament’s authority are the product of political developments, developments in which central governmental institutions – not least Parliament – have played a decisive role.\(^98\)

While Tomkins believes that the UK is moving towards a greater emphasis on shared rule, he is of the view that the opportunity for shared rule is not being maximised.\(^99\) Tomkins rightly points out that devolution in the UK has until recently been conceived of primarily in terms of devolved powers and reserved powers, which vary in substance between the nations (and the third category of excepted powers applying only in NI). The enactment of the Scotland Act 2016 he argues, instead requires us ‘to see devolution in a more sophisticated way than the simple binary divide of

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97 This is defined as ‘an argument that Parliament is able under certain conditions, to bind itself as to the form of subsequent legislation’. See, Martin Loughlin and Stephen Tierney, ‘The Shibboleth of Sovereignty’ (2018) 81 Modern Law Review 989, 107–108.
98 Ibid 1009.
99 Tomkins (n 92) 74. Tomkins does not consider the UK a federation.
Tomkins points to a new category of ‘shared powers’, namely the new concurrent powers and requirements for cooperation between the UK and Scottish Governments within the 2016 Act. Not unlike what the UK has been used to with EU law; these concurrent powers extend over a range of policy issues, including most notably welfare but also information sharing and cross-border bodies. During the passage of 2016 legislation, the Constitution Committee also considered that the concurrent powers feature of the Act would ‘require cooperation between the UK and Scottish Governments across a range of new areas.’

Taking his lead from the application of federalism in a range of other jurisdictions, Tomkins concludes that both the cooperative and uncooperative choices which governments can make in the context of shared rule can be empowering for both central and devolved governments. He notes for example that the UK Government has not taken full advantage of its ability to use its spending power in the context of the devolved regions, such as already occurs through the City Deals, and further, that the respect agenda of the MOU is a political promise rather than constitutional law strictly speaking. Understanding multi-level government in terms of money, and allowing mutual respect to become a legal principle are steps that Tomkins believes will more helpfully move the UK forward in what would be a shared rule understanding of devolution, rather than a less helpful focus on autonomy and dual sovereignty. These ideas provide clear parallels with Ryan’s rejection of the old dual federalism model in the US and her preference for cooperative dynamic federalism outlined in chapter 5, section 5.5. Tomkin’s proposition on ‘mutual respect’ also notably aligns with EVP’s constitutional pluralism which encourages multiple sites of authority to both legitimise different value positions and better maximise

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100 ibid.
101 ibid 76–77 and 88. For a synopsis of these shared powers, see also, Constitution Committee, ‘6th Report (Scotland Bill) (2015-16, HL 59)’ para 17.
104 Tomkins (n 92) 96.
deliberative spaces. Tomkins idea that mutual respect should be elevated to the status of legal principle, is not unlike the outcome that the process value of ‘self-creation’, requiring individuals to recognise the legitimacy of diverging value choices, should engender in an EVP constitution. Indeed, calls to elevate the ‘pseudo-contract’ of inter-institutional Union agreements and modalities into more formal standing have existed for some time.\textsuperscript{105}

Spurred on by the frailties of current intergovernmental working practices outlined by the Constitution Committee and the need to ensure their fitness for purpose after Brexit,\textsuperscript{106} the JMC announced a review of intergovernmental working in March 2018 which has to date resulted in additional draft principles on joint working intended to sit alongside the existing MOU.\textsuperscript{107} In terms of additions to the MOU, this ‘Agreement on Joint Working’ places greater emphasis in the form of principles, on a mutual respect for the ‘shared role’ of governments across the UK as well as the necessity of ‘building and maintaining trust’.\textsuperscript{108} At the time of writing, the draft agreement is awaiting formal adoption by a future plenary of the JMC as well as endorsement by the NI Executive, recently restored in January 2020. Furthermore, pursuant to a JMC communiqué on 16 October 2017, the devolved administrations and the UK Government officials (albeit with more limited involvement from NI), have been working together to establish common approaches in areas governed by EU law that also lie within the devolved competences.\textsuperscript{109} The most recent update was published in July 2019 and using the policy arena of ‘hazardous substances’ offers an example of the content of the developing common frameworks.\textsuperscript{110} In writing at least, the draft common framework conveys a cooperative and collaborative approach to intergovernmental relations, including principles that speak to the need for: ‘administrations [to] respect the ability of other administrations to make decisions

\textsuperscript{106} See for argument that Brexit has greater exposed these frailties, McEwen and others (n 92) 4.
\textsuperscript{107} No 10 Downing Street, ‘Joint Ministerial Committee Communiqué: 14 March 2018’ 2; ‘Draft Agreement on Joint Working’ between the Governments of the UK, Scotland and Wales 2019.
\textsuperscript{108} Italics added. ‘Draft Agreement on Joint Working’ between the Governments of the UK, Scotland and Wales (n 107).
\textsuperscript{109} Cabinet Office, ‘Joint Ministerial Committee (EU Negotiations) Communiqué: 16 October 2017’.
(i.e. allowing for policy divergence); ‘creat[ing] the right conditions for collaboration’; as well as ensuring that different perspectives are present during collaborative meetings.\textsuperscript{111} As though to summarise these more specific provisions, a final principle of the draft common framework on hazardous substances states: ‘Those attending future collaborative meetings recognise the importance of how collaboration is approached’.\textsuperscript{112}

As with many constitutional matters in the UK, separate issues arise for the four constituent nations. Very little has been said here for example, about the different population sizes of the UK’s four nations and the ‘autonomy deficit’ faced by England which does not have a separate legislature,\textsuperscript{113} important features for any comprehensive federalism discussion. The focus here rather, has been how the UK’s territorial constitution has been moving towards constitutional pluralism; a situation embraced by EVP. Yet, of all the many features that could be addressed, it is perhaps most important to add a short word on NI. NI is a uniquely divided region within the UK between Irish nationalism, UK unionism and Northern Irish identities and in the latter case perhaps significant constitutional apathy. The peace process and the Good Friday (Belfast) Agreement 1998 instituted a power-sharing consociational government in NI. This NI Executive was most recently absent between January 2017 and January 2020 due to lack of agreement over, among other issues, an Irish Language Act, between the leading nationalist party of Sinn Féin and the leading unionist party, the Democratic Unionist Party (DUP).\textsuperscript{114} In addition to the broadly entrenched hard-line politics of NI, the complications in trade and identity caused by its unique position outside the UK mainland of Great Britain and its land border with

\begin{footnotes}
\item[111] ibid (section 6 non-legislative arrangements).
\item[112] Cabinet Office, ‘An Update on Progress in Common Frameworks (3 July)’ (n 110) (section 6 non-legislative arrangements).
\item[113] Tierney (n 77) 105. See also, Rawlings (n 85).
\end{footnotes}
Ireland, make it an interesting case study for how EVP might better present in the UK constitutional settlement.

As a first comment, despite the strong overlap between dynamic federalism and constitutional pluralism, the strong nationalist elements in NI (and Scotland) suggest that the connotations federalism evokes towards an entrenched political settlement (rather than Ryan’s cooperative dynamic federalism) are best avoided. Secondly, the especially weak (‘staccato’\(^{115}\)) status of the NI Executive over the previous three years has meant that the relationship between NI and the central UK organs of state have presented a constitutionally monist legal structure of the traditional unitary state (rather than hinting towards any pluralism). This appears to be a consequence of political realities rather than the design of most parties involved. The UK Government has been reluctant to reintroduce direct rule from Westminster when the NI Executive is not sitting, for the most part appearing uncomfortable legislating on devolved matters.\(^{116}\) This affirms that the state sovereignty rhetoric of recent years still very much envisages a devolution settlement, albeit with a sovereign Westminster.

As though to disprove the point, prior to the reconvening of the NI Executive on 13 January 2020, the UK Parliament passed two notable laws to help manage the policy and governance challenges presented by the lack of an NI Executive.\(^{117}\) One of these laws, the Northern Ireland (Executive Formation etc) Act 2019 made provision for changes to the law in NI on both same sex marriage and abortion (both by way of regulations), issues of significant political debate among the political parties within NI.\(^{118}\) The more nuanced case study for the thesis purposes here concerns the laws on abortion. The NI Assembly had in fact voted in favour of same sex marriage in

\(^{115}\) Robinson v Secretary of State for Northern Ireland (n 83) [7] (Lord Bingham).
\(^{116}\) See also the repealed Northern Ireland Act 2000 (repealed); Northern Ireland (St Andrews Agreement) Act 2006 c.53.
\(^{117}\) Northern Ireland (Executive Formation etc) Act 2019 c.22; The Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 c.28.
\(^{118}\) Northern Ireland (Executive Formation etc) Act 2019 c.22 (n 117) s 8 and 9. See also, The Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 No.1514.
NI;\textsuperscript{119} a position that was not enacted due to the use of the ‘petition of concern’ mechanism intended as a safeguard to ensure cross-community support for legislation that might touch on community specific interests rather than cross-community issues.\textsuperscript{120} The New Decade, New Approach deal agreed in January 2020 and which preceded the restoration of the power-sharing NI Executive the same month, contains limitations on the petition of concern to prevent it being used by any one party and to limit it to exceptional circumstances.\textsuperscript{121}

Section 9 then of the Northern Ireland (Executive Formation etc) Act 2019 decriminalised abortion in NI in response to an Inquiry Report of the United Nations (UN) Committee on the Elimination of Discrimination Against Women (‘CEDAW’).\textsuperscript{122} Section 9 also placed a requirement on the Secretary of State for NI to make regulations giving effect to other elements of the CEDAW Inquiry Report before the 31 March 2020. The Northern Ireland (Executive Formation etc) Act 2019 received royal assent on 24 July 2019, with Section 9 of the Act, stipulated as coming into force on 22 October 2019 ‘unless an Executive in Northern Ireland is formed on or before 21 October 2019 (in which case they do not come into force at all)’.\textsuperscript{123} The NI Executive was not restored by this date resulting in the decriminalisation of abortion on 22 October 2019. At the time of writing, a UK Government consultation on a new legal framework for abortion services in NI concluded in December 2019 and awaits analysis and outcome.\textsuperscript{124} In that consultation, the Secretary of State for NI committed

\begin{itemize}
\item\textsuperscript{120} Northern Ireland Act 1998 c.47 s 42; The Belfast (Good Friday) Agreement 1998 para 5 (Strand One).
\item\textsuperscript{121} ‘New Decade, New Approach (January)’ (n 114) 9–13.
\item\textsuperscript{122} CEDAW, ‘Report of the Inquiry Concerning the United Kingdom of Great Britain and Northern Ireland under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women [CEDAW/C/OP.8/GBR/1] Published on 6 March ’. The 2019 Act repealed the Offences Against the Person Act 1861 c.100 s 58 and 59.
\item\textsuperscript{123} Northern Ireland (Executive Formation etc) Act 2019 c.22 (n 117) s 13(4).
\end{itemize}
to engaging ‘closely with a restored Executive, relevant Ministers and the views of the Assembly’ mindful that ‘the provision of abortion services are devolved’ in NI.\textsuperscript{125}

From the perspective of moving the UK constitution towards an EVP based internal constitutional pluralism, the Northern Ireland (Executive Formation etc) Act 2019 presents a timely case study. In an EVP constitution, institutions closer to the electorate should take decisions on substantive values, which do not compromise the process values or any other agreed higher order values. They should do so after extensive dialogue and contestation, that seeks that input of a broad array of perspectives (see for example, Allan’s narrative above). Yet, unlike with same sex marriage, there was no similar form of consent from the NI Assembly to this change in the law,\textsuperscript{126} albeit that surveys have indicated broad societal agreement with the legislative change.\textsuperscript{127}

The issue is, however complex, and it should be noted that in the present constitution, human rights law presents a higher order value. While that law does not extend to the totality of the recommendations within the Inquiry report of the CEDAW Committee, the obligation to decriminalise abortion in NI, at least in some cases, derives from UK constitutional law such as the prohibitions on torture, cruel, inhuman and degrading treatment.\textsuperscript{128} The UK Supreme Court has similarly expressed the opinion that NI abortion law concerning sexual crimes of rape and incest and fatal foetal abnormality contravenes human rights law, namely Articles 3 and 8 of the ECHR.\textsuperscript{129}

It will be recalled that an EVP constitution anticipates a body of substantive higher order values by ‘agreement’ which may take a form similar to that of the present human rights framework. It is in fact this broader obligation on the Secretary of State

\textsuperscript{125} ibid, Foreword.
\textsuperscript{126} NI Assembly, Motion (11 February 2016).
\textsuperscript{127} Ann Marie Gray, ‘NILT Survey: Attitudes to Abortion in Northern Ireland (June)’ (2017).
\textsuperscript{128} ECHR, art. 3.
\textsuperscript{129} \textit{In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)} [2018] UKSC 27; [2019] 1 All ER 173.
to bring forward law on the other elements of the CEDAW Inquiry Report that is of most interest, since not all these aspects of the report will fall under the requirements of UK human rights law. As such, this broader aspect of the 2019 Act is most notable for its potential to usurp the opportunity for the NI public and politicians to work through a sensitive, complex and notably divisive issue along faith and non-faith based lines. In light of restoration of the NI Assembly, an EVP constitution would require that any matters outside the remit of ‘agreed’ human rights law, be presented for dialogue and contestation to realise the complexity of the value choices in play for the people affected most. Prior to the collapse of the NI Executive in 2017, the Department of Justice was engaging in just such a complex dialogue with the political parties in NI, and while it is unlikely that all parties engaged with a listening ear in this process, an EVP constitution does require the facilitation of space for the affected public to fully dialogue on the issue. This process is as significant within an EVP constitution as the end result.

An EVP constitution requires respect for the legitimacy of diversity (‘self-creation’), in substantive matters not otherwise ‘agreed’ as higher order values. As such, it is appropriate to facilitate extensive dialogue and contestation within NI, and between NI and the UK Government, on issues outside the ‘agreed’ higher order values. While that process is likely to take longer to arrive at a similar result, it will at least recognise the legitimacy of opposing value positions and demonstrate respect for the value constellation of the jurisdiction affected. Such an approach is likely to achieve greater constitutional stability over time.

6.4. EVP Interpretations of Thesis Debates

This last section of the thesis takes the EVP consequences discussed above and applies those consequences directly to the debates which opened the thesis. These contemporary debates were presented within chapters 1 and 2 through the political and legal sovereignty paradigms which discussed the perceived and actual institutional distribution of authority in the current constitution. The Brexit and
devolution focused caselaw which also appeared in those chapters demonstrated the judicial perspective, at least for that moment in time, on the nature of sovereignty in the UK constitution. The following two sections close the thesis by looking in turn at how the adoption of an EVP constitution, as described by the thesis, would affect the institutional structures of the UK constitution, as well as the relationship of the UK with supra-national institutions, especially in the context of human rights. The key Brexit caselaw referenced in the thesis, as well as the issues of Scottish Independence and Irish unification provide further context for these two discussions.

6.4.1 The Institutional Structures of the UK Constitution: the devolved institutions, the UK Parliament and the Supreme Court

The constitutional pluralism of the envisaged EVP constitution impacts on the institutional constitutional framework of the devolved institutions, the UK Parliament and the Supreme Court in the following ways. First, the thesis has been clear that the devolved institutions would be understood as a third site of sovereignty alongside the UK Parliament and the Supreme Court. While the EVP constitution does not displace the notion of Parliamentary sovereignty entirely (see the paragraph immediately below), it is a structure generally more aligned with the ‘constitutionalising’ devolution jurisprudence of the UK Supreme Court in Robinson v Secretary of State for Northern Ireland, R (Jackson) v Attorney General, and Axa General insurance Limited v the Lord Advocate (Scotland) (see chapter 2, section 2.4.1 for the discussion). The arrangement would not be explicitly federal, for both the conceptual hard federalism and the political nationalism reasons mentioned in chapter 5, section 5.5, but would instead be presented as a dynamic constitutional pluralism model, where sovereignty is ‘shared’ rather than divided (a comment in contrast to Lord Steyn’s ‘divided sovereignty’ reference in Jackson).

130 Robinson v Secretary of State for Northern Ireland (n 83); R (Jackson and others) v AG (n 82); AXA General insurance Limited and Others v the Lord Advocate and others (Scotland) (n 84).
The UK ‘Parliamentary sovereignty’ principle could be retained within an EVP constitution provided that it is understood to apply only where the matter is outside the competence of the devolved institutions and, in general, the EVP process values. As was suggested by the thesis, this scenario is in practice how the UK currently operates under the dual sovereignty/shared sovereignty paradigm presently a play. (It will be recalled that the Brexit caselaw was conceived as a temporary retreat from the shared sovereignty model in response to the UK constitutional unrest most manifest during 2016-2019.) The ‘Parliamentary sovereignty’ paradigm could additionally be retained - in the sense that the UK Parliament would have the final authority - on matters of overlapping competence. This manifestation of Parliamentary sovereignty comes, however, with the important proviso that the UK Executive and UK Parliament must first evidence serious engagement during the inter-institutional interactive processes (now required by EVP) with any alternative positions of the devolved institutions.

Decision-making on the many overlapping areas of competence would be required under the EVP constitution to follow the procedural values now elevated as the uppermost values in the UK constitution (see chapter 6, section 6.2 above, Table 1). As process values, these values apply first and foremost to engagement between the individuals which represent the sovereign institutions of the UK. Such a constitutional value hierarchy would require an in-depth interaction to attain the requisite levels of empathetic engagement with the alternative value positions presented – it is expected to manifest an ‘agonistic respect’ (using what is perhaps the more familiar scholarly language of Schmidt, see chapter 5, section 5.2.2). 131 This is a version of the contemporary ‘dialogic constitution’ debates among the theorists which have long sought a move away from the legal and political constitutionalism dichotomy of chapter 1, section 1.2.2. 132

The UK Supreme Court would serve as the arbiter of inter-institutional interactions, overseeing the quasi-permanent constitutional process values. It could be configured

131 Schmidt (n 50) 288.
132 See e.g. Young (n 20).
as an explicitly hybrid participation institution among the devolved institutions, something it presently reflects with the sitting Scottish, Northern Irish and Welsh Justices of recent years. (There would be no reason to alter the role of the Scottish High Court of Justiciary as the highest institution on Scottish criminal matters.)

(i) The *Miller No. 1*, the *EU (Legal Continuity) Bill* and *Miller No. 2* cases

If the UK constitution is framed in the EVP manner identified in the section above, it would be arguable that the outcomes of the recent Brexit-inspired caselaw, which also speak to the current UK territorial constitution, would be decided somewhat differently by the UK’s top court. An EVP constitution would be more likely to result in the following views of the Supreme Court in the *R (Miller) v Secretary of State for Exiting the European Union* (‘*Miller No. 1*’), the *EU (Legal Continuity) Bill Reference* and *R (Miller) v The Prime Minister* (‘*Miller No. 2*’) cases.133

As discussed in chapter 1, sections 1.2.1 and 1.2.2 and chapter 2, sections 2.2 and 2.4.1, the question before the Supreme Court in *Miller No. 1* concerned the steps required within UK law to initiate a process of leaving the EU. In particular, the Court was asked whether the UK Parliament had to legislate to authorise Ministerial notification of withdrawal, or whether this was unnecessary on the grounds that the UK Executive had sufficient authority based on its prerogative powers in respect of international relations.134 As detailed in those thesis chapters, the Supreme Court determined that the passage of the European Communities Act 1972 removed the ability to withdraw from the EU treaties from the appropriate exercise of the prerogative powers.135 Adopting a traditional Parliamentary sovereignty narrative throughout, the Supreme Court considered it important that the 1972 Act had allowed for a source of domestic legal rights based on EU law such that required the principle of legality be respected (see chapter 2, section 2.3.1) before such rights

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133 *R (Miller) v Secretary of State for Exiting the European Union* (n 74); *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland* (n 75); *R (on the application of Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* (n 74).

134 *R (Miller) v Secretary of State for Exiting the European Union* (n 74) [4].

135 Ibid 77.
could be removed.\textsuperscript{136} As a secondary issue to the core question, the Supreme Court also noted that the effect of any referendum ‘depend[s] on the statute which authorises it’.\textsuperscript{137} The Court considered that legislation authorising referendum often provide for the consequences of the referendum result. In this case however, the European Union Referendum Act 2015 passed by Parliament did not specify the consequences of the referendum outcome.\textsuperscript{138} The Court further considered that the Explanatory Notes to the 2015 Act demonstrated an expectation that Parliament would enact further legislation to bring the referendum result into effect.\textsuperscript{139} The 2016 referendum vote to leave the EU was therefore firmly held to be of ‘great political significance’ rather than legal force.\textsuperscript{140} While the case did not in any way hang on the fact that the referendum had been described as ‘advisory’ by some Ministers and ‘decisive’ by others, the reasoning of the Court did appear more inclined to the ‘advisory’ descriptor.\textsuperscript{141}

On both these issues, the reimagined EVP UK constitution proposed in the thesis would likely result in a similar outcome. The EVP constitution establishes quasi-permanent higher order process values. It does not, however, predetermine the site or process by which \textit{additional} higher-order values are established beyond the basis of agreement. With this in mind, the fact that the EU withdrawal notification results in the loss of a source of higher-level fundamental rights would similarly in an EVP constitution take the issue outside of the remit of the UK Executive and more legitimately into the remit of the legislature. This is because it is ‘agreement’ that is the fundamental concept for the \textit{additional} higher order values in an EVP constitution. The principle of legality which requires that Parliament ‘squarely confront’ the consequences of a loss of fundamental rights appropriately transfers over to the higher order constitutional values of an EVP constitution.\textsuperscript{142}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{136} ibid 86–87.
\item \textsuperscript{137} ibid 118.
\item \textsuperscript{138} ibid 119.
\item \textsuperscript{139} ibid 120.
\item \textsuperscript{140} ibid 124.
\item \textsuperscript{141} ibid 119 and 125.
\item \textsuperscript{142} \textit{R v Secretary of State for the Home Department, ex parte Simms} [1999] UKHL 33; [2000] 2 AC 115 [131]; \textit{R (Miller) v Secretary of State for Exiting the European Union} (n 74) [87].
\end{itemize}
\end{footnotesize}
generally, the Supreme Court on an EVP interpretation of *Miller No. 1*, would have
good reason to point out that the removal of higher-order rights established by
agreement would additionally require an engaged process of agonistic respect. For
agreement-based higher order values, the process of agonistic respect should take
place between the individuals in the appropriate public space which decided on them
in the first instance, namely, in the appropriate UK legislature. Such a process is not
in evidence in the instance whereby the Executive exercises prerogative powers, not
to mention the additional concerns around oversight and transparency that Executive
decisions engender.

The Supreme Court applying an EVP constitution in *Miller No. 1*, would also be likely
to decide that the 2015 Act does not sufficiently detail the intended consequences of
the referendum and that its nature is advisory. The Court would, however, pay
greater attention to the manner in which the referendum was conducted, since all
legislation must be equally read to comply with the higher-order process values. It is
useful to note that a lack of information and misinformation were common criticisms
of the actual 2016 referendum.\(^\text{143}\) In an EVP constitution, the loss of higher-order EU
rights requires a process whereby the full range of diverse opinions can be heard
against a comprehensive package of accurate information from the UK Government.
This information provision requirement is a necessary step in the facilitation of the
practical reason and empathy process values (not to mention the value of ‘truth’
which the thesis proposes but does not complete).

Despite a greater focus on the process of the referendum, the aspect of the *Miller
No. 1* ruling that would alter with most surety on the application of an EVP
constitution pertains to the second question asked of the Court, namely, whether the
devolved administrations and legislatures must also approve the withdrawal
notification in light of the Sewel Convention given the breadth of devolved matters
affected by EU withdrawal.\(^\text{144}\) It will be recalled that in the actual judgment, the Court

\(^{143}\) The Constitution Unit (UCL), ‘Over 250 Senior Academics Criticise Deliberate Campaign
Misinformation in EU Referendum, 14 June’ (2016).

\(^{144}\) *R (Miller) v Secretary of State for Exiting the European Union* (n 74) [4] (paraphrase).
identified that foreign relations, which includes withdrawal from the EU, remained within the competence of the UK Government\textsuperscript{145} and that the Sewel Convention, despite recent legislative recognition, remained a ‘political convention’ of which the judiciary was a ‘mere observer’.\textsuperscript{146} It is worth initially noting that that latter comment, and the associated remark that the policing of the ‘manner and scope’ of the Sewel Convention are outside the Court’s role to protect the rule of law,\textsuperscript{147} significantly underplays the current (non EVP) status of the Court. That being the case, and focusing instead on how the second question in \textit{Miller No. 1} might be decided in an EVP constitution, it will be recalled from chapter 5, section 5.5 as well as the preceding narrative above (section 6.4.1), that an EVP UK constitution would embrace the sharing of sovereignty between not only the UK Parliament and UK Courts but so too with the devolved legislatures in a form of dynamic constitutional pluralism. The consequences of such an infrastructure would in turn require the Court to accord the Sewel Convention a constitutional status reflective of its place within the constitutional statues of the Scotland Act 1998 (as amended) and the Government of Wales Act 2006 (as amended).\textsuperscript{148} The political consequences of constitutional pluralism would of course have rendered the withdrawal from the EU in the form that occurred in March 2020 unlikely given the sizeable ‘no’ votes that resulted in both Scotland and NI.

Aligned with the narrative above (section 6.4.1 of this chapter), it is important to note that an EVP interpretation of the Brexit caselaw would not require that the strong parliamentary sovereignty narrative be wholeheartedly dismissed. In fact, the points made in \textit{Miller No. 1} and also in the \textit{EU (Legal Continuity) Bill} case (see chapter 2, sections 2.2.2(i) and 2.4.1 of the thesis for a reminder of the ruling), that withdrawal from the EU treaties is a matter of foreign relations lying outside the competence of the devolved legislatures, could be a scenario which continues within the EVP constitution. The reimagined notion of parliamentary sovereignty within the dynamic constitutional pluralism of the new constitution, would only apply to the areas of

\textsuperscript{145} ibid 129.
\textsuperscript{146} ibid 146.
\textsuperscript{147} ibid 151.
\textsuperscript{148} Scotland Act 2016 c. 11 (n 86); Wales Act 2017 c. 4 (n 86) s 2.
competence specifically held by the UK Parliament and in areas of overlapping competences subject to inter-institutional process requirements. A similar notion could be applied to the devolved legislatures in areas where they hold competence, e.g. ‘Scottish sovereignty’ over, for example, matters of education in Scotland. As will be discussed further in section 6.4.2. of this chapter below, an EVP UK constitution is not averse to the devolved institutions engaging or applying international provisions on areas of competence. The devolved institutions as mentioned, should have authority over the additional higher order values that they apply based on agreement. Thus, while the UK Parliament could technically withdraw the whole UK from an EU treaty based on a foreign relations competence, it could not prevent a devolved legislature choosing to apply an international body’s interpretation of a right as a higher order value within domestic law. This authority of the UK Government would also have to be harmonised with the operation of the Sewel Convention for devolved matters, which in practice might be too difficult to separate from non-devolved matters. As such, the statements made by the Supreme Court in the EU (Legal Continuity) Bill case to the effect that Scotland is not a ‘sovereign’ state in terms of international law,149 and '[the Scottish Parliament] does not enjoy the sovereignty of the Crown in Parliament' would require significantly more caveating by the Court in an EVP constitutional framework.150

In terms of the EVP constitutional pluralism model, it may be observed that the shared sovereignty between the UK Parliament, the Supreme Court and the devolved institutions has not been extended to the UK Executive or the ‘popular sovereignty’ conception. The thesis briefly discussed in chapter 2, section 2.4.2 and chapter 3, section 3.2, how the UK Executive under Boris Johnson had sought to utilise the prerogative powers as a potential limit on the UK Parliament’s oversight function. This action was of course found to be void in the Miller No. 2 case discussed in the same sections of the thesis above. The EVP constitution, which emphasises the legitimacy of conflict and contestation, does not flourish in institutions that allow for

149 UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (n 75) [29].
150 ibid 12.
limited public dialogue. Instead, it relies on the process values to ensure a form of sovereignty for the individual; a sovereignty better realised in the public forum of the courts, than in the more majoritarian interests of an elected Executive. This is not unlike the theoretical arguments behind rights-based elements of the current ‘rule of law’ concept.

6.4.2. The Relationship with Supra-National Institutions, including Human Rights Bodies

As discussed, many of the EVP process values overlap with ideas already enshrined in human rights law (see sections 6.3.1 and 6.3.2 of this chapter). Human rights beyond the process values of EVP can constitute higher order values within the UK constitution on the basis of agreement (section 6.3.2). Indeed, the EVP UK constitution is expected to retain at least the current levels of civil and political human rights protections into the hierarchical value framework. This suggestion is based on a number of factors: first, the process values within EVP encompass an expectation of equality for their realisation (this is apparent not least through the worth EVP places on the legitimacy of a large range of different value positions); second, additional substantive values in the form of rights may be preferable for public order reasons (as per Galston’s idea in chapter 5, section 5.2.2), both in terms of value continuity and other reasons of social stability; third, the British Bill of Rights narrative does not propose substantial amendments to these rights diluting the substance behind this particular area of political unrest (see chapter 2, section 2.2.3).

What is perhaps more interesting is how the current monist universalism theory underpinning human rights laws and resultant emphasis towards locating authority in international institutions and the courts would change in an EVP UK constitution. The contrasting theory presented in the thesis, is that the EVP process values are grounded in an embedded and essential universalism. This universalism similarly allows for the core specification of EVP process values, and oversight and enforcement of this core, to occur at an international institution level; but it does not require it. In practice however, this system could not be readily adopted since the
present position of the UN, Council of Europe or EU human rights frameworks does not represent the EVP process values in the manner presented in this thesis (see chapter 3).

What might be more workable in an EVP constitution, is for the devolved legislatures to decide on the basis of agreement that the interpretations of international human rights bodies are integrated into domestic law, e.g. Scotland legislating to apply the International Covenant on Economic, Social and Cultural Rights (ICESCR) and treaty body interpretations into all areas of devolved competence. This integration would either be as the second-tier higher order values, entrenched on a generational basis, or as normal domestic law, which can be overridden by new Parliamentary legislation (see section 6.2 of this chapter, Table 1 above). Such laws would not lead to the interpretation that the international body is ‘sovereign’ in any permanent way. This is because even as second-tier higher order values, the international human rights interpretations would be subject to the EVP process values, which must by necessity be enforced at the domestic level in an EVP UK constitution, at least in the absence of any international framework adopting this process-orientated approach. In this manner, the EVP universalism is balanced against the embedded manifestations of process values and the legitimacy of conflict between all values which is inherent in the idea.

Furthermore, should a devolved UK legislature choose to integrate the international institutions in one of the above manners, the EVP process values would require that those institutions – e.g. UN treaty bodies, ECtHR, ECJ – also engage in forums of agonistic respect with the relevant domestic legislatures when it comes to the interpretation of values under their remit. Whether or not this is agreeable to the international body remains to be seen, but it is not so far removed from the processes that by necessity apply in practice when, for example, States fail to execute the European Court of Human Rights judgments and the Committee of Ministers follows up under the Article 46 ECHR procedure. It is conceivable that this proposal would in fact allow the international courts to provide more authoritative final (case-specific) positions once the requisite exchange process has occurred. This would blur the lines
between the traditional dualism/monism of international law somewhat. The benefit for society being a further greater exposure to the range of ethical positions, and for the domestic institutions, even the ability to ‘contract out’ some of those deliberative obligations for the chosen season.

Extending that idea to the Scottish independence and Irish unification debates, it is worth noting that in an EVP UK constitution, the devolved institutions hold significantly more sway in terms of determining their own value framework. Conceivably, this could generate ‘devolved bills of rights’, which could diverge across the UK, and could be considered higher order law for all areas of devolved institution competence, but not UK legislative competence. The benefits from an EVP perspective, is the inevitably high exposure to the debates which will occur through the UK/devolved institutions consultative forums when the competences overlap. Should Scotland and NI break away from the UK, as things stand, they would be moving towards more traditional monist states. From an EVP supporters’ perspective, the core consideration for individuals facing a Scottish independence or Irish unification referendum should be to what extent the constitutional framework of these newly formed states, respect EVP. Scotland could, of course, seek to re-join the EU thereby re-opening the state to more constitutional pluralism. Ireland remains a member state of the EU, and integration of the ECHR is applied via the European Convention on Human Rights Act 2003, a model not dissimilar in its wording (albeit operational under the Irish Constitution)\textsuperscript{151} to the UK’s Human Rights Act 1998. While both states could eventually benefit from the constitutional pluralism facilitated by EU membership, it is worth remembering that the current value framework of the EU and ECHR is not underpinned by the philosophical or theoretical premise of EVP. As such, respect for EVP within both these relatively traditional monist state models may be better found by similarly adopting an EVP value framework as higher order law, and thereby maximising local rather than international interpretations of other agreed values. Toward this end, Ireland is better positioned than Scotland in the sense that NI has a ready-made sub-state legislature. As should by now be

\textsuperscript{151} Constitution of Ireland 1937.
understood, EVP does not derive its benefits from the traditional ‘sovereign state’ model. Instead, it is concerned to maximise the opportunity for empathetic contestation within a framework that also allows for final decisions.

6.5. Conclusion: A Value Statement

This thesis has sought to respond to the challenge of the current sovereignty unrest within the UK constitution by adopting an approach to sovereignty grounded in EVP. The effort has been rooted in the idea that a normative approach grounded in ethics might provide a less volatile perspective on the otherwise unstable outcomes of recent years. The passing of the first stage of Brexit has apparently only fuelled Scottish National Party efforts towards independence and the full consequences for an already delicate NI political infrastructure remain to be seen. The focus in terms of EVP’s influence on the UK constitution has not, on a whole, been on the relationship with supranational institutions in this thesis. It is clear that the current UK Government aims to retreat towards a greater legal monism. However, the thesis has been clear that to embrace EVP within the UK, it is better to pursue a path towards an internal constitutional pluralism.

Perhaps timed in response to the incumbent Prime Minister’s then determination to leave the EU on 31 October 2019, with or without a deal with the EU, the former Prime Minister Gordon Brown asserted in August 2019 that the UK could not survive a no-deal Brexit as an in-tact Union without first rediscovering virtues such as empathy and cooperation.\(^{152}\) Although the risk of a no-deal Brexit has not yet disappeared, the thesis suggests, along the lines of Gordon Brown (a former Labour Prime Minister) and Adam Tomkins (an academic and leading Scottish Conservative), that the most important EVP directed focus is the need to formalise at the highest constitutional level, process norms that frame institutional and human conduct.

These process norms apply in the context of legal sovereignty most notably to constitutional institutions, their structure and the interactions they facilitate.

While a monist legal system with significant scope for pluralism, such as suggested by Joseph Raz, could also demonstrate some respect for EVP, the thesis has avoided embracing this future due to the perceived risks in play. Monist legal systems tend to exhibit a homogenising force, such as can be seen within the economic liberal tendencies which have dominated the EU. It is also arguably easier to foster solidarity between largely independent systems co-working than singular transnational organisations.

While EVP does not require any particular distribution of sovereign authority in the UK, the existing devolution settlements provide an appropriate and realistic ecosystem for constitutional pluralism of this kind. By placing the devolved legislatures on a similar constitutional footing to Parliament, the UK Supreme Court could take on the role of a type of constitutional court, at least as concerns those EVP process values for the set period of time to which they apply. Yet in advocating an internal constitutional pluralism, the EVP of the thesis supports maintaining the fluidity of the current constitutional settlement.153 There is no need to pursue a deeply codified constitution in the UK. Retaining the flexibility of the UK constitution rather than advocating deep entrenchment does not prevent, as the thesis has discussed, the specification of a hierarchy of norms. It may however, demonstrate a better commitment to the essence of EVP concerning the legitimacy of multiple, sometimes conflicting values, and in turn the necessity of retaining a conceptual openness to the reality that present hierarchies may not be permanent. Instead, the thesis has presented a set of four quasi-permanent process norms, of self-creation, empathy, practical reason and affiliation. The UK may wish to move forward with its sovereignty discussions by elevating these values in a constitutional value statement.

153 See for a view that also supports a fluid a moveable set of relationships, Christopher McCrudden, ‘State Architecture: Subsidiarity, Devolution, Federalism and Independence’ in Mark Elliott and David Feldman (eds), The Cambridge Companion to Public Law (Cambridge University Press 2015) 31. See also McCrudden’s identification of James Bryce element of sympathy.
EVP as noted in chapter 3 has been emerging as an alternative, more cohesive, foundation for human rights theory – a concept that presents as the driving moral force in present day liberal democratic constitutions. The egalitarian liberalism, the welcoming of contestation, and the internal constitutional pluralism suggested by the thesis all have precedents and have been hinted towards already by UK courts and constitutional scholars. The thesis contributes to the literature by uniting the two discussions so as to provide the sovereignty debates with a deeper ethical grounding. Put simply, the thesis suggests EVP should take more prominence in our constitutional values, and that this legal sovereignty arrangement, has the further potential to foster an EVP public character.
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