

Thomas Poole

The constitution and foreign affairs

**Article (Accepted version)
(Refereed)**

Original citation:

Poole, Thomas (2016) The constitution and foreign affairs. Current Legal Problems . ISSN 0070-1998

DOI: [10.1093/clp/cuw002](https://doi.org/10.1093/clp/cuw002)

© 2016 The Author

This version available at: <http://eprints.lse.ac.uk/68488/>

Available in LSE Research Online: December 2016

LSE has developed LSE Research Online so that users may access research output of the School. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LSE Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain. You may freely distribute the URL (<http://eprints.lse.ac.uk>) of the LSE Research Online website.

This document is the author's final accepted version of the journal article. There may be differences between this version and the published version. You are advised to consult the publisher's version if you wish to cite from it.

The Constitution and Foreign Affairs

Thomas Poole
London School of Economics & Political Science

Abstract: This paper examines a dimension of public law which, despite the increased frequency of litigation in this area, remains relatively under-explored: the constitution and foreign affairs. To aid this task, two models are elaborated. The first, the unilateralist or sovereigntist model, assumes a sharp separation between the internal and the external as domains of peace (constitution) and war (reason of state) respectively. The second model assumes that juridical boundaries are contested and permeable, reading the dynamics of constitutional development in terms of a process of mutual recognition. While the former may have had more historical traction, I argue that the latter now provides the better guide, both analytically and normatively. The theoretical argument is developed in relation to the lived tradition of the British constitution. The paper closes with a series of propositions that seek to capture the emerging principles within this complex and fast-moving area of law.

I

Kamachee Boye Sababa, decided in 1859, concerned a seizure of property, the protection of which was traditionally the common law's strongest suit: consider *Entick v Carrington* a century earlier.¹ The British, by then entrenched almost everywhere in India, assumed control of the Raj of Tanjore when the Rajah died without obvious heir. Treaties concluded between the East India Company and successive Rajahs had given the British substantial powers but no *de jure* sovereign rights over the Raj. Nonetheless the Company declared on the Rajah's death that the Raj had lapsed to Britain and seized the late Rajah's property. The Rajah's widow claimed that some of that property was the Rajah's personal property and not the public property of the Raj. The government argued that the seizure of property was an act of state and, as such, non-justiciable.

¹ *Entick v Carrington* (1765) 19 *Howell's State Trials* 1029.

The case found the Privy Council in belligerent mood. The lower court had held that the ascription of sovereign rights gave the Company no right to take personal property. Overturning that decision, the Privy Council ruled that if a court cannot inquire into an act on the basis that it is an Act of State, it could not inquire into any part of that act. The government – acting through its agent, the East India Company – must be taken to be acting according to its own notions of what is just and reasonable, not those of the court. ‘The transactions of independent States between each other’, Lord Kingsdown opined, ‘are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.’²

Juxtaposing this case with *Entick* is instructive. The shift into the register of *public* law in *Boye Sababa* did little for the rights of indigenous rulers and subjects. The ascription to the East India Company of the Crown’s sovereign rights, and the equation of local Indian rulers with European princes, had the effect of pushing the matter outside the courts’ jurisdiction into another realm altogether harder to specify, that of politics, diplomacy, force and grace. The ‘law’ in operation in this zone was paper-thin. It provided no brake on superior force or on the manipulation of legal forms in self-interested ways. This was the world of force and the pact, inhabited by rapacious and all but ungovernable East India Company officials ransacking India under the cover of a veneer of legality.

Boye Sababa reminds us that our courts have always handled questions of foreign affairs, not least in relation to Britain’s global imperial and commercial interests. For most of its history, English public law has been ‘amphibious’, as Lord Hoffmann described it in *Bancoult (No.2)*,³ an imperial case of a more recent vintage, which involved the repatriation of Chagos Islanders in order to make way for a US naval base on Diego Garcia, a process conducted in semi-secret. When it comes to imperial matters, law and strategic interest seem inevitably to collide. *Boye Sababa* itself was decided less than two years after the Indian Rebellion, the putting down of which included some of the most brutal reprisals ever undertaken by the British. This was arguably the most significant event of the mid-Victorian period. It led

² *Secretary of State in Council of India v Kamachee Boye Sababa* (1859) 15 ER 9 at 28-29.

³ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [40].

directly to a change in both the structure and the tenor of rule in Britain's most important imperial possession. It also induced a reevaluation of Britain's imperial role and its understanding of itself as a nation.⁴

Boye Sababa reminds us that the course of English public law has been neither as smooth nor as harmonious as some commentators would have us believe. There are dark patches on our constitutional record, and at least as many grey ones. Even questions of empire have not disappeared altogether from the courts. A recent Supreme Court case on 'historical wrongs', *Keyu v Foreign Secretary*, concerned an alleged massacre by Scots Guards in operations in the Malayan Emergency in 1948.⁵ The claimants, relatives of those killed, asked the court to review the government's decision not to hold a public inquiry into the killings. The Supreme Court rejected the claim on the basis of the time that had elapsed and because the government's reasons for refusing to hold an inquiry could not be said to be unreasonable. The Court was nonetheless critical of the government's failure properly to account for the killings at the time and at various points since. And it was unanimous in deciding that despite the subsequent ceding of sovereignty over the territory to Malaysia the UK retained responsibility in relation to the deaths.

Cases like *Keyu* and *Bancoult* are relatively rare.⁶ But courts are certainly handling more, and more significant, cases involving foreign affairs. These can be speculative, such as a challenge to the legality of the Trident nuclear weapons program,⁷ or to the supply of intelligence to support US drone attacks.⁸ But many raise hard questions about British involvement in dubious acts done in the interests of national security. *Belhaj*, another recent Supreme Court case, considers whether the government can plead Act of State in defence to allegations of

⁴ Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010).

⁵ *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

⁶ Besides the continued post-imperial jurisdiction of the Judicial Committee of the Privy Council, see also the Mau Mau litigation, on the UK's continuing responsibility in respect of operations in colonial Kenya: *Ndiku Mutua v Foreign and Commonwealth Office* [2001] EWHC 1913, a claim subsequently settled out of court.

⁷ *Marchiori v Environment Agency* [2002] EWCA Civ 3.

⁸ *R (Noor Khan) v Secretary of State for Foreign & Commonwealth Affairs* [2014] EWCA Civ 23.

torture and rendition – in collaboration with the US and Gaddafi’s Libya – in relation to which British intelligence agents were actively complicit.⁹

These cases are often legally complex. *Youssef*, another recent Supreme Court case, is the latest in a line of cases concerning targeted sanctions on terrorists and their supporters.¹⁰ It raises profound questions about the shape of the new global legal order and of Britain’s place within it. Yet another recent case, *Serdar Mohammed*, offers a near perfect illustration of the polyphonic texture of contemporary foreign affairs law. The case arose from the war in Afghanistan and involved a challenge to the lawfulness of lengthy periods of detention of those held by the British seemingly without legal warrant. The case involves substantial consideration of the following bodies of law: domestic public law, including the Human Rights Act and the act of state doctrine; the ECHR; private international law; Afghan law; and from the realm of public international law, not just international humanitarian law (as applied to non-international armed conflicts) but also the law relating to both UN Security Council Resolutions and NATO operations. On reading the Court of Appeal’s judgment in the case,¹¹ whatever one thinks of its merits, one’s instinct is to marvel at the capacity of the judges to hold together so many diverse contrapuntal strands of legal argument.

Cases like *Belhaj*, *Serdar Mohamed* and *Youssef*, while especially complex, are not unusual in their recourse to non-national as well as national sources of legal authority. To give a sense of how frequent such recourse actual is, I examined the UK Supreme Court caseload for 2014. The overall caseload broke down into 56% ‘public law’ cases and 44% ‘other’.¹² Of the public law cases, 84% referenced international or transnational or foreign law. And in 87% of those cases, the reference to the non-domestic law was substantial to the reasoning. These

⁹ *Belhaj v Straw* [2013] EWCA Civ 1394. The case is currently on appeal to the UK Supreme Court. See also *Habib v Commonwealth of Australia* [2010] FAAFC 12, [29], where the court held in a similar triangular case concerning torture allegations that it would not allow the act of state doctrine to ‘cripple’ the Australian Constitution and prevent the court from doing its duty; *Canada (Justice) v Khadr* [2008] 2 SCR 125, [18] where the Canadian Supreme Court found that ‘comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada’s international obligations’; and *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44.

¹⁰ *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

¹¹ *Serdar Mohammed and Yunus Rahmatullah v Secretary of State for Defence* [2015] EWCA Civ 843. This case continues before the UK Supreme Court, where the claimant seeks damages in tort and under the Human Rights Act: *Rahmatullah v Ministry of Defence*, UKSC 2015/0002.

¹² For these purposes, the ‘public law’ category includes crime and tax matters but not planning and environment law, competition law, public procurement and general regulatory matters.

figures are startling, even when we take into account that many of those references are to the ECHR. In 59% of public law cases, I found the ECHR to be substantially relevant. In 81% of the public law cases where I found non-domestic law to be substantial, the ECHR was substantial to the reasoning. What happened in respect of the ‘other’ or non-public law category is just as interesting. I found that 52% of those cases referenced international or transnational or foreign law; and in 73% of those cases, the reference was substantial.

These figures are only meant to be indicative. They nonetheless suggest that we might need to reconsider the nature of the law being adjudicated upon, at least within our highest court and especially in public law matters. To the extent that they are robust, Lord Bingham’s observation in his 2010 Hamlyn lectures about international and comparative law widening judicial horizons begins to look tame.¹³ The great Austrian jurist Hans Kelsen’s comment, made many decades ago, seems closer to the mark. ‘Evolution in terms of legal technique’, he wrote, ‘tends in the end to blur the distinction between international law and the state legal system.’¹⁴ We have reached the stage where it is plausible to claim that almost any serious case of English law, especially English public law, is now most likely also to be a conflicts of law case, in the sense that it will involve the reconciliation of two or more distinct bodies of legal authority.

These observations are germane to what follows. But the paper really focuses on an important subset of these cases. Foreign affairs matters, whether in court or before other state institutions, take place within a decision-making framework that is still partly shaped by imperial norms and habits. *Boye Sababa* and similar cases from the heyday of empire are still used as precedents. But these decisions are also taken within a world order where the relationship between law and force is being redefined, albeit partially, and in which international law and human rights play more significant roles. As such, for all their multiplicity foreign affairs cases heard today share a common core. At an abstract level, they involve the reconciliation of the old with the new. There is nothing necessarily distinctive about this. Similar dynamics are present in just about any instance of constitutional

¹³ Sir Thomas Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge: Cambridge University Press, 2010).

¹⁴ Hans Kelsen, *Introduction to the Problems of Legal Theory* [1934] (Oxford: Oxford University Press, 1992), 111.

adjudication, although the scale of the challenge might be more profound in the foreign affairs context. Here, what Michael Oakeshott called the ‘unpurged relic of “lordship”’¹⁵ – that is, the idea of the state as the Prince’s personal fiefdom with which he could direct as he willed – is especially pronounced. Put somewhat less abstractly, the question becomes this: in the absence of wholesale constitutional reform, we have no choice but to work from existing constitutional fundamentals; but is it possible to do this while avoiding those precedents that strike us now as misguided, and through which, were they to be followed, injustice might again be disguised under the banner of law?

II

Constitutions have both an inner and an outer membrane. They face outwards as well as inwards and these two faces are related. How a political order engages with the world outside it impacts on the way it constructs itself internally. This idea, largely lost from the discourse, was elementary to the writers in the great tradition of constitutional thought from Montesquieu and Burke to Carl Schmitt and Hans Kelsen. Boundary questions are largely ignored in public law today. In constitutional theory, writers assume that they are dealing with an all but autonomous structure: the constitution of the nation state. In constitutional history, there is very little consideration of how the external activities of the English or, later, British state related to the development of the constitution – this despite the centrality of colonial and imperial concerns throughout much of its history.¹⁶ As a result, the hidden assumptions at work need to be recovered.

To help me in this task, two models are outlined. I call them the unilateral and the reflexive or mutually constitutive models. They trace what I take to be widely held understandings of the relationship between the constitution’s inner and outer membranes. I suspect that most public lawyers assume that juridical reality corresponds to something like the first model. To the extent that they do, they remain in the grip of Hobbes.

¹⁵ Michael Oakeshott, *On Human Conduct* (Oxford: Oxford University Press, 1975), 268.

¹⁶ Claims I attempt to substantiate in [REDACTED]

Let us take the unilateral model first. The state or commonwealth exists for peace – or as the old colonial formula put it, peace, order and good government. Law is its vehicle. Law’s judgments settle otherwise conflict-pregnant differences of private opinion. Law’s institutions function as makers, adjudicators and enforcers of those public judgments. So that it can perform these tasks, law requires a state structure that is itself constructed through law. The state is formed of offices and office-holders rather than leaders or rulers – an *artificial man*. Law can also be said to require that this state structure be sovereign, in the sense that there must in the end be only one directive voice, one final source of public judgement. Otherwise the potential for conflict is recreated in the operation of the laws, a situation that threatens to reproduce the very conditions that the state is meant to prevent.

This model has its origins in early-modern state theory, in Hobbes perhaps above all. There are distinct echoes of some of Hobbes’s propositions in mainstream work on the British constitution, most obviously in what Blackstone and Dicey have to say about the sovereignty of Parliament. Indeed, we see in Blackstone a fairly clear division between the internal dimensions of the constitution in relation to which Parliament is supreme,¹⁷ and the external, understood as preeminently the sphere of prerogative in which the King ‘is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him’.¹⁸ Less often remarked upon are what we might call the externalities inherent to this theory. Moving from a focus on a constituted order in isolation to one in which that state exists alongside other states produces, on the logic of this model, a dichotomy between the regime of peace and order that inhere to the constituted order on one hand, and the external relations between states, which remain in natural conditions of a-legality or pre-legality. This model trades, in other words, on a binary distinction between the domestic constitution as a realm of law and the international realm as presumptively existing in conditions of war.¹⁹

¹⁷ William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, ed. Stanley Katz, 1979), Vol. I, 160.

¹⁸ *Commentaries*, I, 243.

¹⁹ ‘War’ in Hobbes’s (technical) sense, which ‘consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of *Time*, is to be considered in the nature of Warre; as it is in the nature of Weather.’ Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, ed. Richard Tuck, 1996), 88.

Hobbes himself was just about clear enough on this. States, he says, ‘exist in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another ... which is the posture of War.’²⁰ Hobbes himself was probably not an advocate of imperial expansion.²¹ But we might argue that the model of untamed state sovereignty for which he is justly famous is an inherently imperial one. Played outside its existing territorial confines, the implication of the claim that the state is sovereign in Hobbes’s sense is that it has the capacity, unrestricted by any higher legal system, to extend its jurisdiction territorially and materially.

Locke filled out the foreign affairs dimension of this model. Calling it the ‘federative power’ – essentially the power to make and unmake alliances – he assumed that it was an extra-legal zone, incapable of being ‘directed by antecedent, standing, positive Laws’. As such, he argued, ‘what is to be done in relation to Foreigners, depending much upon their actions, and the variation of designs and interests, must be left in great part to the Prudence of those who have this Power committed to them’.²² The federative power functions in tandem with its domestic analogue, the prerogative. Both powers, which Locke carefully separates, come under the discretion of the executive. The exercise of these powers is to be judged not by reference to standards of earthly law but by an appeal to God. That is, action in this discretionary zone is to be legitimated, or not as the case may be, ultimately through a trial of strength. Taking the legitimating properties of the Almighty out of the equation, the picture that we get from Locke is this. In these two constitutionally peripheral but politically vital zones, both within the jurisdiction and outside it, might makes right.

What, then, about the mutually constitutive model? This model tries to reconfigure what appears in the unilateral model as a stark binary between domestic legality and external a-legality. It builds from the observation that a sovereign state existing in isolation is a

²⁰ *Leviathan*, 90. But see David Dyzenhaus, ‘Hobbes on the International Rule of Law’ (2014) 28 *Ethics & International Affairs* 53.

²¹ See Noel Malcolm, ‘Hobbes’s Theory of International Relations’ in *Aspects of Hobbes* (Oxford: Oxford University Press, 2002).

²² John Locke, *Second Treatise of Government* (Cambridge: Cambridge University Press, ed. Peter Laslett, 1988), Ch. XII, s.147.

contradiction in terms. Sovereignty requires an external community. Timothy Endicott asks us to imagine the people of Iceland waking up to discover that the rest of the globe has been covered by water.²³ Iceland may now be freed, in a sense, from all its international obligations – free now to fish where it likes; even to harpoon a few whales – but in the absence of anyone against whom a claim freedom from external interference might be made, Iceland’s ‘sovereignty’ is meaningless.

The intuition here is that the domestic legal order and international legal order are interrelated. But how? Perhaps we might structure the relationship in terms of a process of mutual recognition, so that the status of the state as sovereign is confirmed – arguably even conferred²⁴ – through its recognition of a legal order external to itself. And the authority of that external or international order is itself confirmed – or conferred – by virtue of its acceptance by the states that constitute it, most crucially in the moment by which those states appeal to that external order for recognition. What this entails schematically is that a sovereign state comprises not just of a unilateral Declaration of Independence, but also a Constitution (in the name of ‘We the People’), *and* a Treaty of Paris (an external validation of the previous two moves). Ideal-typically, you need all three of these phases: an act of collective self-assertion *plus* the instantiation of constituent authority *plus* the recognition of that instantiation by representatives of the external order.²⁵

The obvious objection to this structure of mutual recognition is that it relies on a degree of bootstrapping, the equivalent of being asked ‘which comes first, the chicken or the egg?’ and replying ‘both’. Given international law’s present condition, the objection is not in practice overwhelming, as new states join an established and reasonably coherent international order. Conceptually, we might respond to the objection by saying that almost any act of juridical creation involves a significant element of projection. Focusing for a moment on the more obviously internal phases of constitution forming – so, stages 1 and 2 above – this element

²³ Timothy Endicott, ‘The Logic of Freedom and Power’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010).

²⁴ The alternative formulation points to the debate in the international law literature on state formation, which is dominated by two competing theories: the ‘declaratory’ theory and the ‘constitutive’ theory. See James R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2nd ed., 2007), 17-26.

²⁵ To emphasize: this is a schematic rendering of a historically and empirically complicated phenomenon – or set of phenomena. There are many and diverse pathways to the existence of a state, including dissolution, fusion, cession, retreat of colonial authority etc.

of projection is reasonably clear. A constitution does not exist because some institution says it does. You cannot simply legislate a constitution into being. The deal is sealed, if at all, over time. Future conduct ratifies past decision. We don't know at the moment of constitution-forming whether or not that constitution will succeed. Its success only becomes apparent later on – at which point, its legitimacy is ascribed (or backdated) to the valid act of the collective at the constitution-forming moment. As Hans Lindahl argues, a constituent act only succeeds 'if taken up again and carried forward by further acts' self-consciously understood as authorized in the original exercise of constituent power. It follows from this that 'an act of constitution-making can only be viewed retroactively – and provisionally – as an act *by* the collective'.²⁶ This perspective not only makes conceptual sense, in my view.²⁷ It also alerts us to the dynamic and purposive essence of constitutional development. Action within constitutions is at once ineluctably both a backward- and forward-looking affair.

This idea of mutual recognition may sound complicated but isn't. We can think about how a few individuals – say, a handful of undergraduates new to Law School – become a group of friends. For that to occur, a number of things must happen. 1. An individual holds herself out as a friend to the others. 2. The others as *individuals* recognize her as a friend. 3. The others as a *group* recognize her as a friend. 4. The individual recognizes herself as a friend to the others and a friend within the group. From that point, you have a set of mutual rights and responsibilities that are bound up with what we call 'friendship'.

Admittedly, the analogy takes us only so far. The Court of Appeal in *Belhaj* distinguished between a 'traditional view of public international law as a system of law merely regulating the conduct of states among themselves', and a new view in which you find, superimposed on this old structure,²⁸ what some call global law²⁹ and others international law as

²⁶ Hans Lindahl, 'The Paradox of Constituent Power: The Ambiguous Self-Constitution of the European Union' (2007) 20 *Ratio Juris* 485, 498-99.

²⁷ See also Jacob T. Levy, 'Not So *Novus an Ordo*: Constitutions Without Social Contracts' (2009) 37 *Political Theory* 191.

²⁸ *Belhaj*, [115].

²⁹ See e.g. Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2014).

governance.³⁰ By this, they mean that international law serves as a firmly structured web that makes an increasingly plausible claim to authority and which has developed in some fields in a way that attenuates the link with state consent. The most prominent examples are world trade³¹ and international investment law,³² and international human rights.³³ Given this distinction, one might object that whereas the friends analogy fits the first or traditional view of international law, it only fits the second or newer conception if you accept the appropriateness of stage 3, above, which assumes the collective agency of the group of friends: that is, the recognition of the group itself as a group.

So what about another analogy, this time looking at the way in which a company in the informal sense becomes a company in the formal sense of a ‘corporation’ or business association. I have in mind something like the movie *The Social Network*, which tracks the rise of *Facebook*, with Jesse Eisenberg playing Mark Zuckerberg. At the outset, a group of Harvard College associates have an idea that they run with – a company in the informal sense – which becomes by the end a quite enormous operation – a company in the formal sense. It is idle to think of *Facebook Inc.* now as simply a vehicle for the expression of the will of its founder, despite his continued prominence. The company also has a life of its own, above and beyond the individual desires and interests of its CEO. It has its own rights and duties, its own legal personality. If he dies, the company lives.

The analogy indicates how a venture can spawn normative ties that elude the will of those who created it. In particular, it picks up what we might call the logic of success and the logic of organizational complexity. Both logics are visible in the 20th century growth of domestic administrative law.³⁴ Its growth eludes the capacity of any one institution – usually our concern is with Parliament – to direct and control the administration synoptically. Transposed to international law, the two logics help to explain how we got to where we are.

³⁰ See e.g. Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009).

³¹ See e.g. Andrew Lang, *World Trade Law After Neoliberalism: Re-Imagining the Global Economic Order* (Oxford: Oxford University Press, 2011).

³² See e.g. Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2008).

³³ See e.g. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (Oxford: Oxford University Press, 2nd ed., 2014).

³⁴ Jerry Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012).

The new international law is perhaps an equal-part mix of post-1945 design and post-1989 success, combined with the inevitably dash of unintended consequences.

How far does this get us? Perhaps not all that far. We have unpacked some conceptual assumptions and, while this process may have revealed some problematic questions for those who assume the veracity of something like the unilateral model, it is hard to say that either model has scored a knockout blow. The matter needs to be settled at the level of descriptive and normative plausibility. And here there are reasons for preferring the mutually constitutive model, since the unilateral model is deficient in four key respects. First, it is prone to blindspots, as we have seen, arising directly from the stark distinction it draws between what is within and what is outside constitutional purview. Second, it ignores the external element that I have argued is part of the validation of the authority of a constitution. Third, it has enormous difficulty in understanding international law as authoritative. We will see an example of this in a moment when we turn to a recent paper by John Finnis. Fourth, the unilateral or sovereigntist model, somewhat paradoxically, has a problem with sovereignty. Insofar as it rests on the idea of the sovereign as uncontrolled controller, both part of the law and outside it, there is nothing within the theory that compels that sovereign authority to act through law as opposed to mere force.

Let us pause on this last point. Hobbes himself presented the Sovereign's predicament in terms of a choice between Law and Power, arguing that while it was rational for the sovereign to chose Law it was not strictly compulsory for him or it to do so.³⁵ Schmitt, who considered himself Hobbes's 20th-century representative and has become the totem of modern unilateralists, is even clearer on this point. For him, law rests on a capacity for (political) decision that is pre-legal and extra-legal.³⁶ The corollary of this point in respect of inter-state relations is a simple inversion of the 'friends analogy' I presented a few moments ago. In Schmitt's account, the end product is a society of *enemies*. What is mutually

³⁵ *Leviathan*, 153.

³⁶ Carl Schmitt, *Constitutional Theory* (Durham, NC: Duke University Press, trans. Jeffrey Seitzer, 2008).

recognized is essential political difference and enmity. Those inside the constitutional are friends; those outside, enemies.³⁷

This is sovereignty as a kind of Modernist shriek. Or better yet, a lion's roar of defiance, sent out against all-comers. Of course it is unstable. It also provides a warped and radically reductionist model of legal order, both domestic and international. The hope is that the mutually constitutive model can avoid some of these problems. We tend to think of public laws as limiting or disabling – as curbs on power. But they have an equally important function in enabling and stabilizing the exercise of authority.³⁸ These functions are internally related. States found it easier to extend their capacity if they acted through law and accepted the constraints implicit to the system of rule through law. Applied to the nexus where international and domestic public law meet, we see that the normative content that ensues from the process of mutual recognition can be very thin. This was certainly true historically. It may well still be true of international law today. We might think of domestic law and various modes of international law as nested, imagining the relationship in terms of a series of Russian dolls whose number or size varies over time and place. The relatively thin legal texture of the early-modern state – and indeed some outlier states within the world today – might be reflected in a Russian doll comprising 2 or 3 dolls, say. Whereas an engaged and outward looking state such as a contemporary European state like the UK might be said to be composed of 5 or 6 dolls. We can still understand the source of this obligation in sovereign choice. But while the capacity of the state to interact 'normally' with other states is enhanced as a result of this development,³⁹ its effective choice-set when it comes to 'sovereign' acts is more limited than it once was, when the juridical atmosphere that animated the state was thinner.

There are advantages to this way of thinking about international law and domestic law. First, it does not radically separate domestic law and international law, but sees them as distinct but overlapping – and ideally, mutually reinforcing – bodies of legal authority, two

³⁷ Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, trans. George Schwab, 1996).

³⁸ See e.g. Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1997); Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2012).

³⁹ Compare the operative capacity of a normatively open state such as the UK with a much more closed one such as North Korea.

dimensions perhaps of the new global public law.⁴⁰ Second, it offers some kind of solution to the sovereignty puzzle, noted a few moments ago. As James Crawford writes, for it to work ‘sovereignty does not mean freedom from law but freedom *within* the law.’⁴¹ Third, it offers a direction of travel, towards further cooperation and mutual problem solving externally, and stable legal orders internally. In an important contribution, Ronald Dworkin makes a similar point about two fundamental structuring principles of international law – the duty on states to pursue available means to mitigate the failures and risks of the sovereign-state system and the principle of salience, which requires a state to subscribe to a practice agreed upon by a significant number of states where to do so would improve the legitimacy of the subscribing state and the international order as a whole. To look at international law in this way yields a helpful interpretative strategy, Dworkin concludes, in a way that the sovereigntist conception does not. ‘We should interpret the documents and practices picked out by the principle of salience so as to advance the imputed purpose of mitigating the flaws and dangers of the Westphalian system.’⁴²

III

I want to move away from theory now in order to focus on a series of arguments presented under the aegis of the unilateral model of state sovereignty. The arguments are offered as the reassertion of old-fashioned constitutional principles and democratic values in the face of what its authors regard as judicial subversion. But they amount on examination to the invocation of parliamentary sovereignty as part of a project of constitutional irredentism. That project has two main flaws. First, while ostensibly aimed at shoring up Parliament’s sovereignty, its main effect is to protect *executive* discretionary authority. Second, it seeks to recapture a legal past that never existed – or in as much as it did, a past that has gone and ought not to be recaptured. To take the historical claims of this project seriously would amount to the wholesale resuscitation of *Boye Sababa* and its ilk.

⁴⁰ See e.g. Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefit of the International Rule of Law’ (2011) 22 *European Journal of International Law* 315.

⁴¹ James Crawford, *Chance, Order, Change: The Course of International Law* (Leiden: Brill Nijhoff, 2014).

⁴² Ronald Dworkin, ‘A New Philosophy of International Law’ (2013) 41 *Philosophy & Public Affairs* 2, 22.

I focus on two of the best examples of the genre. The first rests largely on a consideration of – for want a better phrase – purely domestic public law, written by Oxford jurist John Finnis.⁴³ The second focuses on the relationship between English law and international law, written by practicing lawyers Philip Sales and Joanne Clement, the former being at the time of publication First Treasury Counsel.⁴⁴ Both papers argue for a judicial retreat, although in Finnis’s case the retreat covers the whole range of domestic public law while for Sales and Clement the target is more specific. And in both the authors present themselves as protectors of the traditional British constitution, above all the sovereignty of Parliament.

The two papers start from almost diametrically opposed positions. Part of Finnis’s argument for the marginalization of international law is that given its crude and defective state it is hard to treat it as authoritative.⁴⁵ For Sales and Clement, what drives the argument for treating international law as a political question whose interaction with domestic law is suitable for resolution by political bodies and not the court is precisely that international law increasingly generates more substantial legal obligations.⁴⁶ International law, it seems, is damned if it does, and damned if it doesn’t. Either it is too underdeveloped to take seriously, or else it is too developed to be authoritative.

But let us address the key argument shared by both papers: namely, the repeated assertion of constitutional fundamentals. These are presented as principles that have remained essentially unchanged throughout the lifetime of the British constitution, at least until disrupted as the result of recent judicial activism. I have already registered my scepticism about this style of argument, subscribing to the view that the British constitution should be seen as a product of almost permanent construction and disruption and reconstruction, very often masked, an above-average portion of which was the product of exogenous growth.

⁴³ John Finnis, ‘Judicial Power: Past, Present and Future’, Judicial Power Project, 21 Oct 2015.

⁴⁴ Philip Sales and Joanne Clement, ‘International Law in Domestic Courts: The Developing Framework’ (2008) 124 *Law Quarterly Review* 388.

⁴⁵ He talks about lawyers and judges ‘applying commitments made (it is professed) over there in a haze of “global law”, made how or by whom no-one can really say’. This ‘whole style and movement of global juridical discourse and judicial reformism is ... defective [and] inferior’: ‘Judicial Power’, 27.

⁴⁶ ‘International Law in Domestic Courts’, 420-21.

Finnis's constitution has a founding moment: the settlement that accompanied the Glorious Revolution of 1688-89, secured by the Act of Settlement 1701.⁴⁷ Its gift to posterity was the 'complex, balanced constitution' whose central institutional arrangement was that 'respect for historic rights is entrusted to Parliamentary authority, and under that authority to the judges'. Improvising a theory of British constitutional originalism, Finnis suggests that deviation from these settlement principles, understood as restorative rather than revolutionary, amounts to an unconstitutional seizure of power. 'This people, unlike many others, thus resolved that in its constitution that supreme power which inevitably carries the risk that it may be exercised unwisely or unjustly would, for all purposes, unambiguously, be located in the Crown in Parliament.'⁴⁸

The historical dimensions of the argument, pressed with supreme self-assurance, are in fact highly contestable. Even if we accept for the moment the (dubious) premise of 1688 as the British constitution's clear foundation, our analogue to Philadelphia, one obvious flaw is that hardly a single aspect of the constitution that Finnis cites as fundamental is recognizable from that settlement. The 'unambiguous' centrepiece of that constitution, we are told, is the 'Crown in Parliament'. But the type of story Finnis wants to tell about it is historically strained so as to fit his originalist straightjacket. For one thing, this shorthand for sovereign legislative capacity – 'an hieroglyphic of the laws', as Edward Coke called it⁴⁹ – substantially predates the supposed founding moment.⁵⁰ Coke's reference to the phrase a full half-century earlier reminds us that the institutional arrangement it specified was the creation of the Reformation Parliament not the Convention Parliament,⁵¹ an ingenious solution to the

⁴⁷ 'Judicial Power', 18-19.

⁴⁸ 'Judicial Power', 26.

⁴⁹ *Calvin's Case* (1608) 7 Co. Rep. 1a at lib.

⁵⁰ Christopher St German laid out the principles of a parliamentary supremacy in his *New Additions* of 1531, on the basis that 'the kyng in his parlyament' was 'the hyghe soueraygne ouer the people'. It was left to mid-Tudor writers such as Sir Thomas Smith to enshrine the notion of the king-in-parliament, by which law was made not by the monarch in cooperation with the parliament, but by a parliament consisting in king, lords and commons, three equal partners in the legislative process: *De Republica Anglorum: the Maner of Governement or Policie of the Realme of England* (1565, first published 1583).

⁵¹ Centrally, the Ecclesiastical Appeals Act 1532 (24 Hen 8 c 12), more commonly known as the Act in Restraint of Appeals. Henry VIII famously told MPs in 1542 'that we at no tyme stand so highly in our estate royal as in the tyme of Parliament, wherein we as head and you as members are conjoined and knit together into one body politic'. Note, though, that these Tudor assemblies tended to be tame affairs, certainly when compared with their unruly Stuart successors: S.J. Gunn, *Early Tudor Government, 1485-1558* (Basingstoke: Palgrave Macmillan, 1995), 186.

legitimacy crisis that loomed as Henry VIII broke free from Rome.⁵² Its objective was to create or shore up unity, the threat of internal disintegration and external aggression providing the catalyst for the development of an instrument of government that appeared to fuse the key representative institutions of the political nation. There was innovation here, but like almost everything else in our constitution it was not invented *de novo*⁵³ – it would hardly have served its purpose had it been – so much as a creative shuffling of the institutional pack inherited from medieval times.⁵⁴

My point is not to deny the significance of 1688.⁵⁵ The Glorious Revolution came to be seen as the start of a new era. It was the point where many writers on the constitution, especially eighteenth-century moderates like Hume and Smith (but not Blackstone), drew a line between civilized and commercialized modernity and the predicament of the inhabitants of a Gothic world of barbarism and fanaticism.⁵⁶ But from our perspective it is one of a series of constitutional moments or breakpoints,⁵⁷ some more momentous than others, which provide a path, however circumambulatory, from the Tudor constitution to our own. Britain has not *one* constitutional moment, but many. While it suits Finnis's polemic, there is simply no historical warrant for stopping the constitutional clock at 1688.

So what did happen next? The 'Crown in Parliament' gave institutional specification to the bargain struck in – or stumbled upon after – 1688, and reflected the theory of the balanced constitution which came to dominate contemporary thinking about constitutional design, a supposedly beneficial, even organic, reconciliation of the three constituent parts of the body politic: king, nobles and commons. This was not just an institutional (and symbolic)

⁵² See e.g. Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Theory* (Oxford: Oxford University Press, 2001), chapter 4.

⁵³ That Parliament was the means to make statute, recognized as new law able to override common law, from at least the mid-fifteenth century.

⁵⁴ For a less parochial analysis of the relationship between medieval ideas and the modern state, see e.g. Joseph R. Strayer, *On the Medieval Origins of the Modern State* (Princeton: Princeton University Press, 1970).

⁵⁵ See Steve Pincus, *1688: The First Modern Revolution* (New Haven: Yale University Press, 2009) for an important recent historical treatment that emphasizes the dramatic changes within the political structure and policy orientations of what was soon to become the British state.

⁵⁶ Poole, *Reason of State*, chapters 4 & 5.

⁵⁷ My own list would read something like: 1532 – 1603 – 1642 – 1649 – 1653 – 1660 – 1688 – 1707 – 1763 – 1776 – 1789 – 1832 – 1867 – 1911 – 1914 – 1922 – 1932 – 1945 – 1973 – 1998. Others will have their own variation. Mine includes 'external' events (the end of the Seven Years War, which confirmed Britain as the leading imperial power; the American Declaration of Independence; the French Revolution) because I don't see how the British constitution, and the dominant narratives that relate to it, make sense otherwise.

arrangement. It was also a fusion of prudence and representation, of reason of state and natural law, of will and reason. As Parliament checked the ambitions of kings, so too it restrained the unruly passions of the people. Parliamentary propagandist Henry Parker had articulated this distinctively English model of the mixed constitution in the First Civil War.⁵⁸ As he wrote this in his *Observations*, influential in the crises of the 1680s,⁵⁹ the ‘composition of Parliaments ... takes away all jealousies, for it is ... equally, and geometrically proportionable’ to the nation as a whole.⁶⁰

But that theory was displaced by the rise of democracy. The component parts of the 1688 settlement were correspondingly reconfigured. The Crown does not exist in the way William of Orange or the English oligarchs would have recognized. For them, it meant simultaneously (i) the personality of His Majesty, (ii) an institution of governance and (iii) an embodiment, perhaps divinely infused, of political unity and public power.⁶¹ The various trajectories of these elements of the Crown are, contrary to Finnis’s ivory-tower blandishments, fiendishly hard to track. But one might point with a degree of confidence to the way in which the Crown as institution of governance has become divorced from the personality of the monarch and also perhaps from the Crown as symbol of power and unity. Certainly, the power that was bound up with the notion of the Crown has transferred to a government detached from the monarch other than for ceremonial purposes.

Note that these developments were effected much later than Finnis’s effective shut-off date. The office of Prime Minister, the main beneficiary of the process, did not exist in 1688. And if you advocated the sort of political constitution we have now – democratic, republican in all but name, dominated by the Commons – you might, like the republican polemicist

⁵⁸ See Alan Cromartie, ‘Parliamentary Sovereignty, Popular Sovereignty, and Henry Parker’s Adjudicative Standpoint’ in Richard Bourke and Quentin Skinner (eds), *Parliamentary Sovereignty in Historical Perspective* (Cambridge: Cambridge University Press, 2016).

⁵⁹ Alan Houston, ‘Republicanism, The Politics of Necessity and the Rule of Law’ in Alan Houston and Steve Pincus (eds), *A Nation Transformed: England after the Restoration* (Cambridge: Cambridge University Press, 2001), 250-52.

⁶⁰ Henry Parker, *Some few observations upon his Majesties late Answer to the Declaration* (1642), 11, 23.

⁶¹ Ernst H. Kantorowicz, *The King’s Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1997). As far back as Glanvill, the author notes, ‘Crown’ was ‘not simply synonymous with king: Crown referred to the public sphere and to common utility.’ (344)

Algernon Sidney, have found your head on a spike.⁶² Martin Loughlin is much closer to the mark when he writes this of the constitutional trajectory of the Crown:

Through the gradual establishment of a constitutional monarchy (and thus, arguably, the formation of a ‘disguised republic’), a gradual extension of the franchise, the institutionalization of the principle of representative and responsible government, the limitation of the power of the hereditary principle and the emergence in the twentieth century of a system of party government, we now have a system of government in which the executive powers of the Crown are exercised by the party controlling the Commons – what many would label a system of ‘elective dictatorship’.⁶³

The reality that public lawyers have to grapple with is the existence of a governing apparatus (constitution) that has not formally changed all that much since 1688 – and probably earlier – combined with fundamental, very real changes in both the operating dynamics of that apparatus and the normative environment in which it operates and which makes sense of it and sustains it. These are the basic conditions of the British constitution. Its ‘slow, laborious history of adjustment’ has produced a gulf between substance and form, complicated by the fact that reforms ‘have been effected through understandings and practices which are not formally reflected in law.’⁶⁴ Other than in Finnis’s self-serving fantasy, the Crown in Parliament, far from being ‘unambiguous’, is a problem for public lawyers akin to the Trinity for theologians.⁶⁵ Frederic Maitland, perhaps our greatest constitutional historian, wrote back in 1908 about the Crown being ‘a convenient cover for ignorance’ which ‘saves us from asking difficult questions’.⁶⁶ Loughlin scotches the idea that things may have improved on

⁶² Algernon Sidney, *Discourses Concerning Government* (Indianapolis: Liberty Fund, ed. Thomas G. West, 1990). The argument of part of the unpublished manuscript of which, seized on his arrest, was read out at his treason trial in 1683, providing one of the two witnesses necessary for a conviction. Lord Chief Justice Jeffreys summarized the book as ‘fixing the power in the people’.

⁶³ Martin Loughlin, ‘The State, the Crown and the Law’ in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 1999), 44-45.

⁶⁴ Loughlin, ‘The State, the Crown and the Law’, 47.

⁶⁵ The most recent systematic attempt to unravel the mystery concludes, irresolutely but aptly, that ‘[t]he search for the state will continue’: Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012), 310.

⁶⁶ F.W. Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, ed. H.A.L. Fisher, 1980), 418.

this front: ‘Our law [relating to the Crown], it seems, is thoroughly ambiguous on this fundamental issue’.⁶⁷

There is another problem with Finnis’s originalism, which picks up on another aspect of Crown in Parliament: the nature of Parliament and the extent of its constituent power. This takes us to the core of Finnis’s case – that the British people, through the agency of the Convention Parliament, gave itself a constitution with particular features, and that only through a similar exercise of constituent authority can that constitution legitimately be changed. ‘*This* people ... thus resolved that in its constitution that supreme power ... would, for all purposes, unambiguously, be located in the Crown in Parliament.’ The historical case here is especially flimsy. It requires the addition of a pretty thick coat of romantic gloss on 1688 events to transform them into a moment of popular decision. As Stephen Sedley writes, ‘the Glorious Revolution was in reality a *coup d’état*, conducted within the political establishment’.⁶⁸ There is also the problem that contemporaries didn’t tend to understand what they were doing in such terms. As Finnis accepts, they tended to avoid (Lockean or republican) arguments that rested on the constituent capacity of the people, justifying their actions on conservative and restorative grounds.⁶⁹ The effect of this was that while 1688 reinforced constitutionalism in that it left the parliamentary and legal fabric in a position to remedy its own predicament, it was if anything a victory for the ancient constitution.⁷⁰ As J.G.A. Pocock observes, James II’s failure to resort to the weapon of civil war entailed that subjects were never really obliged to choose between competing claimants to sovereignty:

There had been a desertion but not a dissolution; the people had neither declared nor discovered the government to be dissolved, and if they had done anything it had been to

⁶⁷ ‘The State, the Crown and the Law’, 38. The ambiguities of the Crown is a subject that has also been successfully explored in popular culture: see Mike Bartlett’s play in blank verse, *Charles III*, premiered in August 2014 at the Almeida Theatre, London.

⁶⁸ Stephen Sedley, *Lions under the Throne: Essays on the History of English Public Law* (Cambridge: Cambridge University Press, 2015), 188. For a more clear-sighted historical account see Lisa Jardine, *Going Dutch: How England Plundered Holland’s Glory* (London: Harper Perennial, 2009).

⁶⁹ See in particular William of Orange’s *Declaration* ‘of the reasons inducing him to appear in armes in the Kingdome of England’ (10 October 1688), where the future King figures as the ‘Great Restorer’.

⁷⁰ For a recent treatment of this theme see Richard S. Kay, *The Glorious Revolution and the Continuity of Law* (Washington DC: The Catholic University of America Press, 2014).

frustrate the king's ineffective attempts to dissolve it. 'Government' could therefore be defined less as 'sovereignty' than as 'constitution'.⁷¹

This perspective in turn opened the way to belief in the constitution's persistence in the teeth of Stuart and Cromwellian attempts to overthrow it, a persistent and powerful trope within British constitutional discourse. But it is the *conceptual* dimension that is the more interesting, and in the end more damaging to Finnis. He speaks as the defender of the political constitution whose defining institutional feature, settled in 1688, was the sovereignty of Parliament. But this defining feature of the British constitution prevents precisely the sort of originalism that provides the theoretical foundation of Finnis's case. Not only does ambiguity surround the notion of the Crown; it also besets that other central plank of our constitution, Parliament. In particular, and not least due to its role as a constituent assembly of sorts in 1688, we find in the orthodox theory of Parliament's sovereignty a mixture of what in modern constitutional theory we call constituent and constituted authority.⁷² If as Blackstone and Dicey insist, Parliament has legal authority to make or unmake any law, and no other body can override or set aside any such law, does that sovereignty encompass a capacity in Parliament to make or unmake itself? (The answer seems to be 'yes': *Jackson v Attorney General*.⁷³) Does this entail, further, that Parliament is in principle free to unmake or remake the constitutional order? Tocqueville with characteristic perspicience identified this double dimension of Parliamentary authority when he wrote: 'In England, the constitution may change continually, or rather it does not in reality exist; the Parliament is at once a legislature and constituent assembly.'⁷⁴ This is broadly consonant with what John Griffith wrote in his classic account. The British constitution, he said, 'lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also'.⁷⁵

⁷¹ J.G.A. Pocock, 'The Significance of 1688: Some Reflections on Whig History' in *The Discovery of Islands: Essays in British History* (Cambridge: Cambridge University Press, 2005), 119.

⁷² On which see Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2008).

⁷³ *Jackson v Attorney General* [2005] UKHL 56.

⁷⁴ Alexis de Tocqueville, *Democracy in America* (Cambridge: Cambridge University Press,)??.

⁷⁵ J.A.G. Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 19.

This is a passage that has caused confusion among some public lawyers.⁷⁶ But its essence is clear enough. The logic of modern constitutionalism on which all theories of originalism rely is absent from the British constitution.⁷⁷ Anyone who fails to pick up this defining element is entirely tone deaf to this constitutional style. We might want it to be otherwise.⁷⁸ But that is not our reality. Both Tocqueville and Griffith identified Parliament as the central constitutional agent – what Parliamentary authorizes (and continues to authorize) determines the content of the constitution. This claim still basically reflects constitutional reality – although Parliament’s capacity to effect fundamental constitution change appears increasingly buttressed, and thus circumscribed, by the use of the constitutional referendum process.⁷⁹ It is Parliament, imperfectly democratic and still sort of sovereign, which has authorized the changes to which Finnis so violently objects. Through a series of constitutional statutes⁸⁰ spanning decades, Parliament has effected significant changes to the structure of the state (devolution statutes from 1998), the freedom and equality of its citizens (anti-discrimination statutes; Human Rights Act 1998; Equality Act 2010), the relationship with European states (European Communities Act 1972) and the international legal order (United Nations Act 1946; International Criminal Court Act 2001). Almost all these statutes have increased the power and obligations of the court. During a similar period, the court has also substantially increased its judicial review capacity – although we might note that this parallels developments in just about every other liberal democracy.⁸¹

We can reasonably disagree about the result of a particular case or the reasoning within it. But it is decidedly odd given this statutory background for Finnis to suggest that much of the corpus of modern public law constitutes an unauthorized and unjustified seizure of

⁷⁶ See e.g. Graham Gee, ‘The Political Constitutionalism of J.A.G. Griffith’ (2008) 28 *Legal Studies* 20.

⁷⁷ See also Graham Gee and Grégoire C.N. Webber, ‘What is a Political Constitution?’ (2010) 30 *Oxford Journal of Legal Studies* 273, 287-88: ‘A political constitution does not prescribe in any great detail because one of its basic features is its constant liability to the possibility of change effected through the ordinary political process. It would not be coherent for the idea of a political constitution to prescribe that the nature and content of the constitution must always remain liable to change through the ordinary political process and yet also, at the same time, to prescribe that very nature and content.’

⁷⁸ See e.g. Jo Murkens, ‘The Quest for Constitutionalism in UK Public Law Discourse’ (2009) 29 *Oxford Journal of Legal Studies* 427.

⁷⁹ See in particular European Union Act 2011. On the constitutional referendum process see Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012).

⁸⁰ *Thoburn v Sunderland City Council* [2003] QB 161, Laws LJ at [62].

⁸¹ See, e.g., Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

power. The court usually acts directly under Parliament's instructions. If the objection is to rights and their legal application, then, there is little point bleating on about *Belmarsh* – a perfectly reasonable decision given what the Human Rights Act requires and bang in line with the European Court's Article 15 jurisprudence.⁸² The real target should be the Act itself and the demos that seems (just about) to support it.⁸³ Nor I think can judges be blamed for endeavouring to produce juridical coherence out of a series of discrete but seemingly related changes in the political constitution, the most significant features of which have been sanctioned by Parliament. It is as though they have been handed most of the material for a patchwork quilt, together with some but incomplete design instructions. Criticism of this or that bit of stitching might be justified. But they can't really be blamed for seeking to work out how some of the material can be stitched together or, in so doing, for having views on the overall design of the quilt.

The court's constitutional role, while unquestionably enlarged, is still essentially responsive and reactive. Judges act according to the specific instructions given to them by Parliament, a task that often involves the interpretation of vague or incomplete directions (e.g. HRA s.3). But they also act, I suggest, in pursuance to a more general obligation that, while tacitly sanctioned by Parliament perhaps, is probably not Parliament's to give or withhold. This is the obligation wherever possible to seek coherence and rationality in the application of our laws and meaning within our constitutional order.

* * * * *

Finnis defends another element of the post-1688 settlement: the royal prerogative. In a paragraph which starts with breathtaking insouciance – 'Water cascaded under the bridge in the century after 1612' – the prerogative is defended in these terms: 'There are sufficient reasons of institutional competence to reinforce the already sufficient reasons of precedent and basic constitutionality that establish the rules recognizing some judicially unreviewable executive discretionary power.'⁸⁴

⁸² *A v United Kingdom* [2009] ECHR 301.

⁸³ On the complexity of that relationship, however, see Thomas Poole, 'Rights and Opinion: Or, The Progress of Sentiments' (2016) 10 *Law & Ethics of Human Rights* (forthcoming).

⁸⁴ 'Judicial Power', 12.

Let us stay for a moment with Finnis in the land of originalism. Royal prerogative was among the most heavily contested of politico-legal concepts, a continual source of disagreement throughout a particularly troubled period. But we might observe that most 17th century jurists, *pace* Locke the philosopher, understood prerogative not as an open-ended reserve power – in Finnis’s words, ‘some judicially unreviewable executive discretionary power’ – but as a bundle of specific kingly rights and entitlements. The title of Sir Matthew Hale’s seminal treatise, written sometime after 1660, is indicative: the ‘*Prerogatives of the King*’. That there was some residual category or power lurking beneath these legally recognized prerogative powers was hotly contested.⁸⁵ This position is reflected in the Bill of Rights, which for Finnis provides the closest thing we have to a foundational text. The declaration of the illegality of the dispensing and suspending power is a manifestation of supreme disquiet about an open-textured interpretation of king’s prerogative. The alternative, for contemporaries, was tantamount to tyranny.

But we need to escape this looking-glass world of originalism. Fortunately, Finnis also defends prerogative as a discretionary zone of executive power, untouchable by courts, on the basis of precedent and what he calls ‘basic constitutionality’. Well, precedent is against him now. We have *CCSU*,⁸⁶ *Fire Brigades Union*,⁸⁷ *Everett* (on passports),⁸⁸ *Abbasi*,⁸⁹ the first Supreme Court decision in *Rahmatullah* (on diplomatic relations)⁹⁰ and the rest.⁹¹ So too is ‘basic constitutionality’: there is no common law immunity for executive action under prerogative. As Lord Hoffmann observed in *Bancoult (No.2)*, and so not part of a claimant-friendly judgment, since an exercise of the prerogative lacks ‘the unique authority Parliament derives from its representative character ... I see no reason why prerogative legislation

⁸⁵ Other views were available. Civil lawyer Dr John Cowell’s *The Interpreter* (1607) offered a different perspective, conceiving the monarch as ‘above the Law by his absolute power’, dispensing a natural or divine law to his subjects, with the right to ‘alter or suspend any particular lawe’. For this, the book was attacked in Parliament – especially by the common lawyers, led by Edward Coke – and subsequently condemned and suppressed on the order of James I. See Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Historical Thought, 1603-1642* (Basingstoke: Macmillan, 1992), 148-54.

⁸⁶ *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the GCHQ case).

⁸⁷ *R v Secretary of State for the Home Department, ex p Fire Brigades’ Union* [1995] 2 AC 513.

⁸⁸ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1988] EWCA Civ 7.

⁸⁹ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598.

⁹⁰ *Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah* [2012] UKSC 48.

⁹¹ Andrew Blick, ‘Emergency Powers and the Withering of the Royal Prerogative’ (2014) 18 *International Journal of Human Rights* 195.

should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.⁹²

An even more basic constitutional principle underlies Lord Hoffmann's proposition. Or rather two principles, which operate in tandem in the foreign affairs context: first, the assumption that no state action should be outside the rule of law; and second, the assumption that state action is state action wherever it occurs. It was these principles that Burke delineated, juridically but within the Parliamentary context, in relation to the acts of East India Company agents, and which animated Dicey's concern about the use of martial law in the colonies. Their point was the same, albeit that one expressed it in the language of natural law, the other in terms of the common law constitution. It should not matter as a point of constitutional principle whether an act is done at home or abroad, whether it is done under the federative power or the prerogative. In either case, these are acts done by our government, or its agents or associates, in our name. It is hard even to state the alternative as a constitutional principle. It is more along the lines of the on-tour slogan 'what happens in Vegas stays in Vegas', and is just as risible.

This discussion of prerogative brings me to a wider point. Counterintuitive though it may seem, talk of parliamentary sovereignty in this domain tends to result in increased executive discretion. The repeated invocation of 'parliamentary sovereignty', like a mantra, obscures the basic fact that, in foreign affairs, judicial review addresses not legislative but *governmental* acts. Of the cases I read in preparing this lecture, almost none raise any remotely direct questions of the legislative capacity or authority of Parliament. Some do touch on the subject in an *indirect* way. *Abmed v The Treasury*, for instance, concerned the targeted sanctions regime, introduced in the UK as elsewhere to conform with various UN Security Council Resolutions.⁹³ True, in *Abmed*, the courts were prepared to find that the United Nations Act 1946 did not provide the requisite authority to pass the impugned measures. But the central element in that decision was that the Act enables Orders under it to be made by the executive without any kind of Parliamentary scrutiny. In other words, the Supreme Court decision is Parliamentary-sovereignty *supporting* or *enhancing*. It is the executive that loses out –

⁹² *Bancoult (No.2)*, at [35].

⁹³ *Abmed v Her Majesty's Treasury* [2010] UKSC 2.

or, rather, the idea of absolute executive autonomy in this area. Lord Phillips went out of his way to spell this out: ‘Nobody should conclude that the result of these appeals constitutes judicial interference with the will of Parliament. On the contrary it upholds the supremacy of Parliament in deciding whether or not measures should be imposed that affect the fundamental rights of those in this country.’⁹⁴

But what about the new sovereigntists’ trump card: the end of juridical complexity and the possibility of a frictionless law? This is how Sales and Clement put it, the punch-line to their article:

The risk of some degree of dissonance between domestic law and international law is the natural consequence of self-government by states and of parliamentary sovereignty as the primary constitutional principle of government within the state, and its elimination is a matter for the political process. It is not the proper function of the domestic courts to change domestic legal principles to eliminate such dissonance.⁹⁵

There is a lot going on in this short passage, some of it clearly correct. It is tempting to envisage a sovereign Parliament scything its way through this knot of international and transnational law by good clear British statutes. Sometimes this may happen. But it is an idle hope to imagine that there will somehow be an end to the invocation of international and transnational law in British courts. Law just about everywhere now, but certainly within the European legal order, is plural law. Complexity is a matter of juridical fact, as the statistics adduced earlier indicate. And it is here to stay – unless either the UK individually or the world at large were to start to turn its back on the process of securing cooperation through law, an option as unappealing as it is unlikely. The courts, as stewards of the law, must play a role in the reconciliation of these legal authorities. It is not enough for them to point out the dissonance and refer the matter to their political masters. No, they will do what they have generally tried to do in such circumstances, but now more often, which is always to seek consonance, even where it seems fairly implausible to do so. And they will make use of a

⁹⁴ [157].

⁹⁵ ‘International Law in Domestic Courts’, 421.

repertoire of familiar techniques, such as imputing to Parliament the intention not to legislate contrary to our international obligations, and perhaps less familiar techniques too.

The alternative, as presented by Finnis & Co., rests on the use of an imagined constitutional past as a comfort blanket. The better posture towards tradition is to see it as a resource, inspiring and irritating in just about equal measure. The avoidance of friction cannot be an aim in itself. Isn't the general point of cases like *Belhaj* and *Bancoult*, *Youssef*⁹⁶ and *Binyam Mohamed*,⁹⁷ beyond the immediate duty to right legal wrongs, to provide a bit of friction? The danger is that, without them, without the uncharitable light they sometimes throw on the actions of our government, some of the basic commitments we make among ourselves and before others are more likely to become unstable, a matter for sovereign choice rather than legal obligation.

IV

So how does the 'old proud European sovereign state' (Lord Bingham) now present itself juridically? Even to begin to sketch an answer would take us well beyond the confines of the present inquiry. I finish instead with a series of propositions that may hint as to the direction of future travel. As this paper has been concerned with the past as much as the present, older authorities are slotted where possible alongside contemporary examples.

1. I start with an axiom of constitutional morality. You could refer to it, echoing Dworkin, as the constitutional principle of integrity.⁹⁸ It is an idea alluded to earlier, that while the constitution relates to the self-government and self-consciousness of a particular people, this does not entail that what is done at the margins of the constitution is subject to fundamentally different principles of constitutional morality. This idea echoes Burke's juridical attack on geographical morality, the view that law and morality stops at the border.⁹⁹ You see this conviction at work in the impeachment of Warren Hastings, Governor of

⁹⁶ *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3.

⁹⁷ *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65.

⁹⁸ Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

⁹⁹ See e.g. Edmund Burke, 'Speech on the Nabob of Arcot's Debts' in Burke, *Writings and Speeches, Vol. 5* (Oxford: Oxford University Press, ed. P.J. Marshall, 1981).

Bengal.¹⁰⁰ The principle resurfaces in many recent foreign affairs cases, obliquely in Phillips LJ's criticism in *Abbasi* of the legal black hole that Guantanamo Bay seemed to represent,¹⁰¹ squarely in the Law Lords' decision in the torture evidence case, *A v Home Secretary (No. 2)*.¹⁰²

2. This idea of constitutional integrity is embodied in the more concrete principle that the acts of state agents ought to be subject to the law irrespective of where they occur. Historically, this principle was reflected in the extra-territorial reach of the writ of *habeas corpus*,¹⁰³ and in the legal accountability of colonial governors (*Mostyn v Fabrigas*¹⁰⁴). Today, it animates the principle that state agents require legal authority to act, whether the act occurred at home or abroad – or indeed, whether the act was done in collaboration with other states. As Lady Hale and Lord Carnwarth said in their joint speech in *Rahmatullah*, reaffirming the extra-territorial reach of *habeas corpus*: 'It is true ... that in this case the illegality of the detention arose through the actions of the US, rather than the UK, at a time when the UK no longer had actual custody. However, it is difficult to see why this should make a difference in principle.'¹⁰⁵

3. A third principle is this. Mindful of the constitutional division of power, the institutions of state, themselves creatures of law, ought to regard themselves presumptively as under an obligation to internalize international law in their decision-making structures. This duty relates to the more general obligation that falls on each state to try to improve the overall international system.¹⁰⁶ A state that only talks the talk as far as international law is concerned – for instance, by signing up to a treaty in expecting other states to treat

¹⁰⁰ See e.g. Nicholas B. Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (Cambridge, MA: Harvard University Press, 2006).

¹⁰¹ *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, at [64]. See also Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (the 27th FA Mann Lecture, 25 November 2003), reprinted in (2004) 53 *International and Comparative Law Quarterly* 1.

¹⁰² [2005] UKHL 71.

¹⁰³ See e.g. *Somerset v Stewart* (1772) 20 How St Tr 1, 81, 98 ER 499; *Case of the Hottentot Venus* (1810) 13 East 195, 104 ER 344; *R v Earl of Creve, ex p Sekgome* [1910] 2 KB 576. See also Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Harvard University Press, 2010).

¹⁰⁴ (1774) Cowper, 161.

¹⁰⁵ *Rahmatullah*, at [123]. See also *Keyu*, Lord Mance at [198]: 'It is true that the inquiry [is] claimed by persons who are clearly not within the United Kingdom's control [and] in relation to an incident in a place which is now equally clearly outside the United Kingdom's jurisdiction'. But those facts were irrelevant, as the 'inquiry would relate to the deaths of persons who were at the time under United Kingdom control, and to the conduct of the British army which was and is within United Kingdom jurisdiction.'

¹⁰⁶ Dworkin, 'A New Philosophy of International Law', 17.

themselves as bound by its terms while it parades the freedom to pick and choose what terms suit it – refuses to treat fellow states as political equals and displays contempt for the principles of salience and comity which structure and animate this field of law. In the domestic sphere, we do not have to look hard to find instantiations of this principle. In addition to many constitutional statutes, we might turn to Blackstone and Mansfield on the doctrine of incorporation.¹⁰⁷ Or, in a nuanced recent formulation, the speech given by Lord Mance in *Keyu* (with which the Court agreed): ‘Speaking generally, in my opinion, the presumption when considering any such policy issue is that customary international law, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention of consideration.’¹⁰⁸

4. A specific manifestation of this duty is that all institutions of state should seek consonance between domestic and non-domestic sources of legal authority. Jeremy Waldron reminds us that ‘the state is not *just* a subject of international law; it is additionally both a *source* and an *official* of international law.’ Multi-lateral treaty-making in particular is thus a jurisgenerative event more akin to voluntary participation in legislation than striking a commercial bargain.¹⁰⁹ This principle applies to the courts, where it is built into argumentative structures to the extent that deviation becomes jarring and troubling. Witness the intellectual and moral contortions of Lord Hoffmann’s speech in *AF (No.3)* – almost an anti-judgment, in my view, given the gap it opened up between its judgment on the law and the judge’s responsibility for that judgment – to the effect that, while he considered the European Court ruling on control orders in *A v United Kingdom* both wrong and a national security danger, he was still going to follow it.¹¹⁰ But the duty ought also to apply to government, its officials and advisers.¹¹¹ In fact, this has been Parliament’s fairly consistent

¹⁰⁷ Roger O’Keefe, ‘The Doctrine of Incorporation Revisited’ (2008) 79 *British Yearbook of International Law* 7.

¹⁰⁸ At [150].

¹⁰⁹ Jeremy Waldron, ‘The Rule of International Law’ (2006) 30 *Harvard Journal of Law & Public Policy* 15, 23 & 25.

¹¹⁰ *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28.

¹¹¹ Jeremy Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681.

practice,¹¹² otherwise we would not have got to this point. Consider those constitutional statutes discussed above. Most of them deal with the relationship between domestic and international law. They direct institutions, including the court, to treat the non-domestic source as authoritative. For government ministers to act by any other principle risks fostering general disrespect for law. The obvious example is the devious and conniving attitude to international law of the Bush Administration and its lawyers in drafting the ‘torture memos’.¹¹³

5. A corollary of this principle is that far from being law-free areas, constitutionally peripheral spheres, including foreign affairs, emergency powers or martial law, are subject to ordinary legal principles to the greatest extent possible. This goes against Locke on the prerogative and federative power, but is consistent with the mainstream British constitutional tradition, the anti-Schmittian orientation of which is revealed, for instance, in Dicey’s writings on martial law.¹¹⁴ We might even be inclined to say now that claims for exceptional power demand exceptional scrutiny. The general authority for this proposition in recent times is the Belmarsh case, *A v Home Secretary*.¹¹⁵ In the foreign affairs context more specifically, the case of *Binyam Mohamed* is a key authority.¹¹⁶ If these claims are hard to test in open forum, the next best process must be identified. This has been the subject of much legal back-and-forth, including both *Al-Rawi*¹¹⁷ and the *Bank Mellat* litigation¹¹⁸ in the Supreme Court and, on the parliamentary side, the Justice and Security Act 2013 and recent changes to the Intelligence and Security Select Committee.

6. Parliament is sovereign. But sovereignty is a description of the quantum of legal power that an institution at the top of the state legal hierarchy can be said to possess at any one time. Any such calculation must now involve a consideration of the constitutional statutes mentioned a moment ago, understood as nested within the thicker juridical

¹¹² In an important recent study, Campbell McLachlan emphasizes the importance of parliamentary committees in this respect: *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014), 174-78.

¹¹³ Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (London: Allen Lane, 2008).

¹¹⁴ See David Dyzenhaus, ‘The Puzzle of Martial Law’ (2009) 59 *University of Toronto Law Journal* 1; Poole, *Reason of State*, 196-206.

¹¹⁵ *A v Secretary of State for the Home Department* [2004] UKHL 56.

¹¹⁶ Above n. X.

¹¹⁷ *Al Rawi v The Security Service* [2011] UKSC 34.

¹¹⁸ *Bank Mellat v Her Majesty’s Treasury (No. 1)* [2013] UKSC 38; *Bank Mellat v Her Majesty’s Treasury (No. 2)* [2013] UKSC 39.

framework of the modern *ius publicum europaeum*. I have already suggested that Parliament, while in principle unbound, ought to consider itself bound by a body of law that is not within its control. This is simply to rebalance our conception of what Parliament is away from a straightforwardly Benthamite view as an unchallenged and imperial Legislator and somewhere across the spectrum in the direction of the Burkean notion of a Parliamentary assembly as law-declarer. Burke wrote, himself a MP: ‘We do not *make* laws. No; we do not contend for that power. We only *declare* law; and, as we are a tribunal both competent and supreme, what we declare to be law becomes law.’¹¹⁹ Brought into the present, we might deploy Burke as inspiration for the view, heretical in one sense but orthodox in another, that supremacy does not equate to license. Parliament is a legal organ bound by law. Even if we accept that this constraint is largely immanent, that fact alone does not necessarily make the constraint less real. Nor does it exist entirely without external support: see *Jackson v Attorney General*.¹²⁰

7. Only this understanding of Parliament’s supremacy can make it fit with that other constitutional fundamental, the separation of powers, and the old republican idea to which it relates that the exercise of public power must be open to scrutiny and challenge.¹²¹ To take the idea seriously would be to give Parliament a more prominent role in foreign affairs. The gathering constitutional convention that would seem to require government to obtain Parliament’s approval prior to an exercise of armed force is a necessary and long overdue step.¹²² The stronger prerogatives of the German Bundestag in this context might provide comparative inspiration, as evidenced in a recent German Federal Constitutional Court case concerned with the scope of parliamentary approval for military operations in exigent circumstances.¹²³

¹¹⁹ Edmund Burke, ‘Thoughts on the Cause of the Present Discontents’ in Burke, *Pre-Revolutionary Writings* (Cambridge: Cambridge University Press, ed. Ian Harris, 1993), 169.

¹²⁰ *Jackson v Attorney General* [2005] UKHL 56.

¹²¹ For the seminal modern restatement of this position see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 2000).

¹²² See e.g. Blick, ‘Emergency Powers and the Withering of the Royal Prerogative’, 204-5. See also the Constitutional Reform and Governance Act 2010, Part 2 of which gives a much larger role for Parliament in the ratification of treaties, vesting an express veto power in the House of Commons: see McLachlan, *Foreign Affairs Law*, 174.

¹²³ ‘Rescue Operation Pegasus’ Case, German Federal Constitutional Court, 25 September 2015, No. 2 BvE 6/11.

8. What about the courts? On one hand, it is clear that, as Lord Kerr put it in *Lord Carlile v Home Secretary*, while the court must accord to the executive due deference, it is not required to genuflect in its presence.¹²⁴ On the other hand, it is elementary that courts must be especially mindful of the limits of their authority as their influence in this area increases. Their practice has been fairly consistent on this point. The court does not allow itself to be used as trier of policy. Cases construed as such receive short shrift. I mentioned *Noor Khan* (challenge to the supply of intelligence to support US drone strikes) and *Marchiori* (challenge to the Trident nuclear programme) much earlier in the article. *Gentle v Prime Minister* and the *CND* case, both of which amounted in the court's view to a challenge to the legality of the Iraq war, also fit into this category.¹²⁵ Nor does the court allow itself to be converted into a kind of free-floating international law court. In *Al-Haq v Foreign Secretary*, the court was asked for a declaration that the UK was in breach of international law in providing financial and military support for Israel, when the latter was conducting an armed assault on the Gaza Strip. The court at first instance robustly denied permission to apply for judicial review.¹²⁶

9. Finally, the account that I have been given of the nested nature of domestic, transnational and international law requires consideration by all state institutions, including the courts, of a relatively new phenomenon that we might call in the constitutional idiom the 'international separation of powers'. The *Kadi* case¹²⁷ is the *cause célèbre* within European legal space, which although arguably justified in its outcome, rested on a worryingly sharp cleavage between the EU and the international legal orders.¹²⁸ I have already mentioned British cases involving UNSC targeted sanctions, *Bank Mellat* and *Ahmed*. While not immune from *Kadi*-itis, these cases display a willingness to make sense of a new multi-layered legal order of extraordinary legal and political complexity, from the perspective of a national court grounded in a particular constitutional setting. *Youssef* is both the most recent and the clearest example of this trend. In that case, the Supreme Court rejected a challenge to the Secretary of State's decision to lift the hold on his inclusion on the targeted sanctions list,

¹²⁴ R (*Lord Carlile of Berriew*) v *Secretary of State for the Home Department* [2014] UKSC 60, [150].

¹²⁵ R (*Gentle*) v *Prime Minister* [2008] UKHL 20; *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2777 (Admin).

¹²⁶ *Al-Haq v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 1910 (Admin).

¹²⁷ Case C-402/05 P and C-415/05, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

¹²⁸ See e.g. Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard Journal of International Law* 1.

drawing heavily in so doing on the findings and recommendation of the United Nations Ombudsperson, a position established in 2009 to assist the sanctions committee in considering and responding to requests for delisting.¹²⁹ The presence of a credible administrative process, operating in the international sphere and with privileged access to relevant material, including sensitive material, enabled the Court to conclude that there was ‘unchallenged evidence showing that the appellant is at least a strong vocal supporter of Al-Qaida and its objectives’.¹³⁰ This is indicative, perhaps, of a move in the direction of cooperative, even ‘joined-up’, approach to the construction and supervision of regimes of administrative justice that have national and transnational dimensions.

* * * *

A quick coda to finish with. To those who ask, ‘what does this rest on?’, it is tempting to answer ‘history’. That is the gist of Finnis’s case. But it can only be part of the answer. History is not just something that was, but is also something that is constantly being remade. The other part of the answer, and the real ballast in the end, is *belief* of a certain quality. Law rests on belief – on the opinion of the people, as Hume put it. It is the belief system of those who must live together but can’t otherwise agree on how best to. As such, it is perhaps the only belief system available for non-believers, as writers from Hobbes to Habermas have argued. We are asked daily, in our social interactions and as citizens and officials, to affirm this non-believers’ creed. We need to ensure that when the state in any of its guises faces the choice between law and pure force, it doesn’t allow itself to select the latter.

¹²⁹ Devika Hovell, ‘Due Process in the United Nations’ (2016) 110 *American Journal of International Law* (forthcoming).

¹³⁰ *Youssef*, [61]. See also at [5]-[8], [50] & [60].