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Chapter Six

A TALE OF TWO CONSTITUTIONS: WHOSE LEGITIMACY? WHOSE CRISIS?

Chris Thornhill

An Illness with a Cure

Two rather improbably connected lines of theoretical reflection on constitutional crises converged in debates attached to the referendum held in June 2016 that eventually, we assume, will lead to Britain’s withdrawal from the European Union (EU). In fact, although surrounded on a day-to-day basis by a combination of slovenly self-interest and strategic deception, the Brexit referendum has a surprisingly high constitutional pedigree.

First, the decision by David Cameron to call a referendum on the UK’s membership of the EU was shaped, at least rhetorically, by a broad sense, across the whole of Europe (and beyond), that the EU lacked legitimacy, and that it was not supported by a demos able to infuse its laws and institutions with popular authority and grounds for popular recognition. This view has been widely shouted at street level. Over many years prior to the Brexit campaign, however, it also provided good service for academic career building. Indeed, a minor industry had developed around the sceptical analysis of the legitimational foundations of the EU, and around the attempt to show how the EU might lay claim to resources of legitimacy more closely patterned on those of which, it is presumed, classical national states avail themselves.

It is not possible here to canvass all the opinions that feature in these debates. Broadly, however, critical analyses of the legitimational order of the EU follow two distinct lines of argument. On the one hand, many observers place a critical emphasis on the seeming opacity of the institutions involved in the European integration process. In particular, they criticize the committee structures and the judicial institutions that have contributed to the development of the European legal order.¹ On the latter point, many observers argue that the constitutional order of the EU has been created, in essence, by non-mandated judicial actors. For this outlook, the system of public law in the EU has been primarily created by the European Court of Justice (ECJ), acting de facto as a Constitutional Court in comity with national courts.² However, it is also suggested that the European Court of Human Rights (ECtHR) has had some hand in this process. The ECtHR enforces a distinct legal order, but the ECJ borrows and authorizes aspects of its jurisprudence through reference to the ECtHR,³ and it uses the European Convention on Human Rights (ECHR) as a unifying normative parameter for scrutinizing transnational legislation and
policy making. For this critical perspective, the legal order of the EU is marked by a high level of political judicialization and a widespread displacement of political competence to judicial actors. On this account, its reliance on courts of review as agents of transnational integration discloses the core lack of legitimacy that afflicts the EU. Tellingly, in fact, the construction of the EU polity has been described as a process of ‘integration through rights’, in which the ECJ and its doctrine of direct effect has played the most potent role in polity construction and constitutional formation.

Alongside this, on the other hand, a large body of literature has evolved that attaches critical significance to the absence of an original constituent power in the EU, a fact that is reflected in the partly judicial foundations of the European legal order. On one account, the EU is distinguished from other systems of public law because there is ‘no scope for creation ex nihilo of a distinctive constituent power.’ Other observers declare that in the EU constituent power and constituted power cannot be fully separated, such that the ECJ assumes the role of ‘permanent pouvoir constituant’. For the perspective set out in such critiques, broadly, a classical criterion of legitimacy needs to be applied to every order of public law, and, in the spirit of Jean-Jacques Rousseau, Emmanuel Sieyès and Immanuel Kant, all public orders are required to extract legitimacy either from a founding collective act of volition or from a founding collective procedure of rational consensus formation. As a result of such constituent acts, individual persons subject to the public authority of a given polity recognize themselves as constituent authors of the laws applied to them through society. This view is of course not unique to academic debate, and it is replicated in some notable rulings of national courts.

As a result of these diagnoses, many cures have been prescribed for the lack of legitimacy of the European polity.

Many judicial practitioners, of course, have been willing to accept the judicial construction of the EU, and they have endeavoured to instil legitimacy in this system through a complex model of inter-judicial comity. In this analysis, national courts police the competence of the European courts by insisting that they act in accordance with rights prescribed in the ECHR, to which the EU is not actually a signatory, and in so doing they integrate the institutions of the EU within a shared normative-constitutional horizon. The ECJ itself has encouraged this method, and it has actively incorporated ECHR norms in its own rulings in order to stabilize what might be called a multijudicial constitutional system, in which the European polity as a whole is held together by deference between courts, underpinned by an implied universal respect for human rights law. In this method, judges and lawyers have effectively accepted judicialization as a viable mode of constitution making, but they have sought to control this by institutionalizing a Europe-wide commitment to the recognition of human rights law. Through this, a reciprocal auto-constituent relation between judicial actors has come into being: courts are allowed to constitute the legal order of the EU, as long as they are supervised by other courts, which extract their supervisory authority from human rights norms.

Many academics, by contrast, have opted for a more overtly political solution to the problems induced to a lack of constituent power. Of course, some academics have simply advocated a more extensive use of democratic procedure in the EU. Others, with variations, have devised the rather more cunning argument that the EU is in fact already...
founded in democratic sources of legitimacy: it is underpinned and internally legitimated by the constitutional–democratic traditions of the Member States, and, as it remains embedded within these traditions, it can claim to be sustained by a two-level constituent power.\textsuperscript{15} The assumption that the EU has a foundation in a diffuse or multifocal source of popular sovereignty, from which norms established at national level are uploaded to the supranational level, is thus widely perceived as an answer to the implicit weakening of the EU through its lack of a constituent power.

Of course, the European Union Referendum Act passed by the Westminster parliament in London did not show extensive regard for such academic debates. However, there is no categorical bifurcation between the common claim in Westminster that its powers have been illegitimately and non-democratically usurped by Brussels and the academic anxiety about the lack of a constituent power in the EU. In fact, the two levels of debate often intersect.\textsuperscript{16}

Second, the calling of a referendum was also informed by a less compact set of critical debates about the invariable legitimational weakness of parliamentary institutions, especially in the UK. This analysis of itself has a long prehistory. In the 1920s, for example, Carl Schmitt argued most pointedly that parliamentary democracy suffers from a crucial legitimational problem, which can only be resolved through the incorporation of a plebiscitary element in the parliamentary system.\textsuperscript{17} In particular, Schmitt traced the legitimational weakness of parliamentary government to the fact that it is centred around political parties, for which mediation between sectors of their own memberships is usually more important than factual enactment of the will of the people.\textsuperscript{18} Far from reflecting the will of the people, therefore, Schmitt argued that parliamentary systems invariably prevent this will from being formed; they are incapable of performing democratically authorized functions.\textsuperscript{19} Like most contemporary theorists, in fact, Schmitt argued that only the original exercise of a constituent power can bring legitimacy to a political order.\textsuperscript{20} In the UK context, however, the insistence on the holding of a referendum to address the relation between the UK and the EU can be observed as part of a wider set of analyses, which address the deep crisis, within the constitution of the UK, to which the classical supremacy of the Westminster parliament is currently exposed.

The connection between the referendum and the wider crisis of British parliamentarism contains a complex paradox. In recent years, a number of institutional developments have placed increasingly robust restrictions on the classical scope of parliamentary powers in the UK. These restrictions range from obdurate factual–institutional counterweights caused by devolution of powers to subnational parliaments, especially in Scotland, to the direct effect of EU law,\textsuperscript{21} to the sharpened powers of the judiciary to exercise control of legislation, to the assimilation of the ECHR in judicial review, to the growth of proportionality (substantive review) in the UK courts.\textsuperscript{22} As a result of these factors, clearly, the UK legislature can no longer perform legislative functions without encountering normative circumscription or institutional counterbalances, and the classical doctrine of parliamentary sovereignty has lost much of its plausibility. Indeed, it is clear that the UK is no longer a unitary parliamentary state, based in a clear hierarchy of public law, centred around the will of Parliament. Most notably, this weakening of Parliament has been expressed, judicially, in the (albeit
oxymoronic, and enduringly contested) theory that normal parliamentary legislation is no longer the supreme expression of the popular will, and there are certain laws that require especially entrenched constitutional protection above the regular will of Parliament, as constitutional statutes, which can only be altered by clear and unambiguous wording of an act of parliament.\textsuperscript{23}

In many ways, the growing use of referenda in the UK is an intense reflection of this deep lack of constitutional certainty. Both the weakening of Parliament and the attempts to explain the emergent constitution that now frames the functions of Parliament are clearly vital parts of the background to the referendum on EU membership.

At one level, for example, the idea that a referendum is required to bring authority to a constitutional arrangement clearly challenges the notion of constitutional statutes, and it reflects a wide concern with the erosion of the so-called political dimension to the UK constitution.\textsuperscript{24} The doctrine of constitutional statutes originally surfaced as a theory for authorizing the judiciary to show particular attention in safeguarding laws with perceived higher-rank standing. Indeed, it was conceived as a model of de facto constitutionalization, in a polity with no formalized hierarchy of laws.\textsuperscript{25} Self-evidently, this doctrine developed, in particular, as an express means of explaining the relative primacy of the European Communities Act (ECA) (1972) in relation to subsequent pieces of legislation.\textsuperscript{26} At the same time, however, the argument for referenda as sources of higher-order legitimacy calls directly upon the principles that underpin the idea of constitutional statutes. Both positions share the claim that certain questions have such high constitutional importance that they are elevated above normal parliamentary procedure. The insistence that referenda can be deployed as a device for producing higher legitimacy is designed to cut though the penumbra that now surrounds the constitution, and to extract a hard nucleus of legitimacy that Parliament in its regular functions, it seems, cannot produce. Moreover, the enthusiasm for referenda shares with the doctrine of constitutional statutes the claim that the weightiest political questions can only be resolved by a higher articulation of the vox populi. Above all, the doctrine of constitutional statutes expressed a vague search for a constituent power, placed in the custody of the courts, and it fixed attention on EU membership as a question falling in the ambit of constituent agency, demanding authoritative entrenchment. Indeed, it projected an image of UK membership in the EU as a matter that can only be adequately addressed through the expression of higher law-giving will.

In this respect, the judicial doctrine of constitutional statutes and the populist craving for referenda are two consequences of the same constitutional crisis. In the referendum, in fact, the apprehension that created the doctrine of constitutional statutes was translated, implicitly, into a model for plebiscitary constitutionalism. In absence of a clearly identifiable higher law, the doctrine of constitutional statutes invited plebiscitary politics to stand in lieu of higher constitutional provisions. In any case, although advocates of the referendum were often heard to say that it meant a re-establishment of the sovereignty of British political institutions, the use of constitutional referenda to resolve questions of national policy reflects, most paradigmatically, the collapsing sovereignty of the British parliament. In no other recent development in British constitutional law is the marginalization of Parliament as clearly revealed as in the use of referenda.
The background to the EU referendum, both factual and discursive, lies, thus, in two overlapping diagnoses of constitutional crisis, one focused on the EU and one focused on the UK. Indeed, these two discourses are remarkably similar. Both react against a creeping process of constitutionalization, in which the factual source of authority (the author of higher law) is not immediately tangible or visible. Both react against the self-authorization of the judiciary as the holder of a de facto constituent power. In particular, both discourses circle around the claim that the polity that they analyse has lost connection with a popular will, and that the grounds on which the law demands obedience are unclear. In both cases, then, the activation of some originating mode of constituent power presented itself as a solution – in both cases, in a polity where the actual exercise of constituent power is very difficult to find.

The Cure or the Illness?

These lines of reflection on constitutional crisis in the EU and the UK are starkly polarized in their method, in their presuppositions and in their recommendations. Yet, they have clear similarities. Moreover, they make similar analytical mistakes, which ultimately undermine the sustainability of their claims.

For example, the claim amongst academic specialists in EU law, declaring that, in order to obtain adequate levels of legitimacy, the EU requires a recentration in constituent power, appears to repose on a twofold error.

One implication of this claim, clearly, is that the constitutions of classical European nation states, prior to the advent of the EU, brought legitimacy to their polities because they could demonstrate that they had been willed, factually or rationally, by some original constituent power. This purported general attribute of collectively founded constitutional states is then usually contrasted with the nascent constitutional order of the EU, whose constituent foundations lie primarily in the domain of judicial interaction. If we look closely at the factual origins of modern European democracies, however, it is difficult to see how and why the exercise of constituent power might be commonly defined as a recognized standard of political legitimacy. In the decades when the EU gradually began to take its contemporary shape, notably, the model of constitution making through constituent power was clearly losing prominence (in fact, it was never common, even in the era of revolutionary constitution making in Europe). In the major examples of democratic state formation after 1945 (Federal Republic of Germany (FRG), Italy, Japan, Spain, Portugal), the exercise of raw constituent power only played a very marginal role, and the parameters of constitution making were largely defined either by international organizations or by international norm providers. Paradoxically, in fact, in most processes of national constitution making in post-1945 Europe, judicial actors have played a key role. In many such processes, judicial bodies, located either at national or international level, have acted as de facto bearers of constituent power. Ultimately, therefore, the legitimacy of the EU is widely questioned, not for its divergence from salient patterns of public law construction in national societies but for its reproduction of these patterns. Underlying much academic research on EU constitutional law we find a troubling conflation of historical fact and constitutional theory, and much critique of the EU is
based in a rather wide-eyed willingness to take literally the normative claims of classical constitutional doctrine.

One further implication of the academic analysis of the legitimational problems of EU law is that it imputes a stable democratic constitutional tradition to the Member States of the EU, such that the embedded democratic normativity of these states remains, in effect, a live source of constituent power for the laws of the EU polity. If we look at the recent history of most Member States of the EU, however, it is very difficult indeed to imagine how their integration into the EU might be viewed as a process in which an already elaborated democratic culture was locked from below into a transnational constitutional order. In fact, it is unmistakably manifest that few Member States were formed as fully evolved democracies before their integration into the EU, whether this occurred through the Treaty of Rome or through subsequent accession. Older democracies that helped found the EEC or that joined later were hardly structured as consolidated democracies. In 1958, the FRG had not yet emerged as a secure democracy; it was widely and openly questioned in the FRG whether Konrad Adenauer’s government could ever become fully democratic. The French Fourth Republic was collapsing, and a Gaullist constitution was about to be implemented. Moreover, France, the UK and Belgium were involved in acrimonious processes of decolonization until the 1960s, and their democratic credentials were anything but reinforced by the events that accompanied this. Later, then, most states that joined the EEC after the Treaty of Rome were admitted after a process of recent democratic transition. In the majority of these transitions, the conversion to democracy was motivated, at least in part, by a desire amongst inner-societal liberal elites to join the EU and to satisfy threshold criteria for EU membership. In some more extreme cases, the demand for EU membership was the main plank of pretransitional pro-democracy movements. In Spain under Franco, famously, democratic reform was prescribed externally (by other Member States) as a precondition for EU membership. In these societies, a democratic public–legal culture scarcely pre-existed the process of executive integration in the EU. In fact, executive integration in the EU was often in itself of constituent importance for the rise of a democratic legal–political culture in Member State societies.

Overall, the attempt to look for expressions of democratic popular sovereignty beneath the strata of legal and institutional formation that have grown around the EU displays a rather fateful lack of historical reading and realism. Certainly temporally, and probably causally, the EU and the general form of European democracy developed together: the Member States do not provide an originating constituent bedrock of democratic legal culture from which the EU can claim support.

In key respects, academic commentators on the constitution of the EU and its crisis, or crises, have fabricated inaccurate and ultimately damaging theoretical preconditions for their inquiries. Most obviously, in their quest for a constituent power to support the EU, they have measured the legitimacy of the EU against false criteria, and in so doing they contributed to an unfounded construction of the EU as wholly divergent from other constitutional models, or as a completely sui generis political entity. Far worse, however, they have falsified the basic institutional reality of modern European nation states, imagining that beneath the institutional complexity formed by interpenetration between the
EU and its Member States we can always find common democratic premises that will fertilize, stabilize and consolidate democratic legal-political order across Europe. The insistence on finding a common European people, or a common European constituent power, therefore, has led to a projection of democratic agency and democratic culture into historical spaces where such agency and such culture never existed. One danger in this is that it leads to an exaggeration of the democratic robustness of the states that have been integrated into the EU. A further danger in this, in turn, is that it allows people to imagine that there can always be a return to an originating democratic power, and that, in each society, a national democratic subject, which (allegedly) pre-existed the EU, is still present and can be reactivated as an original democratic agent.

It is in this theoretically manufactured illusion of European democracy that theorists of European constitutionalism and advocates of national referenda in the UK now encounter each other. In fact, misinterpretations that reflect the historical fantasies of EU lawyers are clearly visible in debates about the constitutional form of the UK and its relation to the EU. Notably, in the referendum, members of British society were invited to imagine themselves as a sovereign democratic subject, reclaiming a lost democratic authority and expressing a new higher law both, at one and the same time, within their own constitution and in the constitution of the EU as a whole. The primary error underlying the debate about the referendum, however, was that its advocates imagined that it was possible for members of the British people to return to some original and pre-existing democratic form. Moreover, they imagined that, in this form, members of the British people could speak about a polity (the EU) in relation to which their own democratic substance was in some way external.

The UK, supposedly a long-standing democracy, obviously had some kind of democratic tradition before the rise of the EU. However, we should not be deluded in this regard, and a short history lesson is now needed to avert delusion.

Up to 1918, the elected chamber (House of Commons) of the UK parliament was elected by a franchise comprising circa 60 per cent of men and no women (so, about 30 per cent of the adult population). Further, the UK only began regularly to conduct fully competitive elections after 1945, and the 1950 elections were the first elections held without plural voting. In fact, before 1945, the UK had only been governed for a very short period (1929–1931) by a government elected competitively and under conditions of universal suffrage, that is, by a government that, albeit still with certain caveats, we would be inclined by contemporary criteria to define as democratic. In consequence, at the beginning of its integration in the EU in the early 1970s, the UK could not very plausibly present itself as an example of a historically consolidated political democracy, and its inhabitants could certainly not imagine that they possessed a structurally ingrained history of democratic self-determination. The UK had been a full democracy for about 25 years – not very long by the standards of more recent transitions.

Importantly, moreover, before the 1970s, the political system of the UK lacked many constitutional features that would today be taken as definitional prerequisites for a political order claiming to be based in democratic responsibility. For example, up to the 1970s, the basic principles of administrative accountability were defined in uncertain terms in the UK, and legal constraints that checked executive discretion were both very fragile.
and conceptually unclear. A substantively defined body of public-legal norms to challenge public decision making only really began to emerge in the 1970s and 1980s. In fact, this process has not yet ended. Notably, the intensification of governmental accountability that gathered pace after the 1970s was linked, in key respects, to the introduction of principles of European law into domestic public law. This process often occurred in attritional fashion, as the UK courts at times demonstratively refused to apply concepts of judicial scrutiny borrowed from European law. Generally, however, the period 1973 to 1998, when the Human Rights Act hardened the statutory footing for these processes, witnessed a process of far-reaching constitutionalization, which significantly increased the constitutional protection offered to citizens. This occurred mainly through deepening interpenetration between domestic law and the ECHR. However, the assimilation of the UK into the legal order of the EU played an important role in this, and the process of institutional integration in the EU and the process of democratic-constitutional reinforcement coincided temporally.

The democratic form of the UK polity, in sum, is not easily separable from a trajectory of norm production that is tied to European integration. Indeed, this form has been created in part through a tightening alignment between the UK and the EU. The concept of interlegality is commonly used to describe patterns of legal activism, intersectoral interaction and hybridization that are far more glamorous than the formation of a system of enforceable democratic accountability in the UK since the 1970s. But this term could certainly be used to describe the slow process of the UK’s constitutional formation within the EU.

On this basis, it is observable that the attempt to separate out a sovereign democratic people from the process of legal and institutional integration that has given rise to the EU is at once historically misguided and institutionally risk filled. For all the myths of a long tradition of British democracy, this applies to the UK as much as to any other Member State. Like other Member States, the UK contains a democratic people, whose legal form and legal subjectivity are intricately interlaced with the EU, and this people cannot be isolated, as an objective source of agency, from the EU itself. There can, therefore, be no return to a deep-lying democratic constituent power, standing prior to the given form of democracy. For this reason, it is no surprise that the activation of the sovereign demos in the UK in the buildup to the referendum did not look very democratic (it was quickened by a daily pulse of media lies, and it was punctuated by public and private xenophobic outbursts and, of course, a political assassination). Overall, the constitution of the EU and the constitution of the UK converge around a shared crisis. Both are gradually constructed constitutions. Both are plagued by the cure to their crisis – the image of an external sovereign democratic people.

**The Dialectic of Transnational Democracy**

It is always tempting to look for a democratic constituent power. It was tempting to look for constituent power at the beginnings of democratic culture, and this concept provided a simplified point of attribution to unify the diffusely structured new nation states that emerged in France and the United States in the late eighteenth century. It is still tempting to look for it now. It is tempting to look for a national democratic people before or
beneath the institutional forms that characterize transnational society. In the EU, as mentioned, it is tempting to imagine a starting position of national democracy, which either originally authorized the EU or which can revoke this authority.\(^1\) However, the complex, interlinked, often unsatisfactory, and – above all – partial, institutions of democratic governance, centred on a complex mesh of representative and judicial organs, are all we have. Indeed, the fragile and imperfect reality of transnational democracy always risks being unstitched wherever we look for a simple democratic agent, positioned outside or before it, to elevate and intensify its legitimacy. If we wish to find a European constituent power, in fact, we need to look at the political experiments that followed the armistice in 1918, in which many European societies deliberately aligned their governmental order to a comprehensive theory of constituent mobilization.\(^2\) These disastrous experiments in constituent politics were later replaced, in the longer wake of 1945, by more partial, filtered democracies, based in multiple normative sources, some national, some transnational, some participatory, some strictly institutionalized. How can we think that a return to constituent power is the answer to any constitutional crisis that afflicts these democracies?\(^3\)

**Notes**


This process began in the key early case of *Stauder v City of Ulm* (1969), in which the ECJ defined human rights as general principles of European law, implicitly promoting an incorporation of human rights norms in the Union Treaties. Subsequently, in *Internationale Handelsgesellschaft* (1970), the ECJ declared that rights were included in the corpus of constitutional principles common to the Member States, and the ECJ was authorized both to interpret these rights and to apply them as common law across the states in the union. See Andrew Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: Oxford University Press, 2004), p. 145. It is widely agreed that through the cases described above, the ECJ ‘fleshed out’ an effective bill of rights to support its rulings: Henri de Waele, ‘The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment’. *Hanse Law Review* 3 (5) (2010): 3–26.


See Gisela Stuart’s claims in Westminster in January 2008: ‘Indeed, and that leads on to the referendum. When our then Prime Minister promised a referendum in 2004 on the new package of changes to the European Union, he did not do so for constitutional reasons; he did so because
it was the right thing to do. The second point about that is that this Labour Government, more
than any other Government, have used referendums to settle certain questions – we used one
in Scotland and Wales, and we even used one to decide whether Birmingham should have
an elected mayor. The notion that using referendums undermines parliamentary democracy
therefore does not sit easily with those on our Treasury Bench. Given that we had a promise
about the use of a referendum, and given that one of the most fundamental problems in the
European Union is a disengagement and a lack of democratic legitimacy, I cannot for the life
of me understand why our side is reneging on its promise':

http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080121/debtext/80121-0015.htm#08012133000036.

17 Carl Schmitt, Volksentscheid und Volksbegehren: Ein Beitrag zur Auslegung der Weimarer Verfassung und zur
Lehre von der unmittelbaren Demokratie (Berlin and Leipzig: Duncker und Humblot, 1927), p. 34.
18 Carl Schmitt, Die geistesgeschichtliche Lage des heutigen Parlamentarismus (Berlin: Duncker und
Humbolt, 1923), p. 11.
20 Carl Schmitt, Verfassungslehre (Berlin: Duncker und Humbolt, 1928), p. 76.
21 This was triggered by the request for an ECJ preliminary ruling in Factortame Ltd and others v
Secretary of State for Transport – (1989) 2 All ER 692.
22 On both last points, see R v Secretary of State for the Home Department, ex parte Daly – (2001) 3 All
ER 433.
23 This doctrine was spelled out follows by Laws LJ: ‘We should recognise a hierarchy of Acts
of Parliament: as it were “ordinary” statutes and “constitutional” statutes. The two categories
must be distinguished on a principled basis. In my opinion a constitutional statute is one which
(a) conditions the legal relationship between citizen and State in some general, overarching
manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental
constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an
instance of (a) that is not also an instance of (b). The special status of constitutional statutes
follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of
Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise,
the HRA, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA clearly
belongs in this family. It incorporated the whole corpus of substantive Community rights and
obligations, and gave overriding domestic effect to the judicial and administrative machinery
of Community law. It may be there has never been a statute having such profound effects on so
many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional
24 This aspect of the debate links current controversies in UK public law to the Weimar context,
shaped by Schmitt’s ideas. Panu Minkkinen insists on a distinction between British political con
stitutionalism and what he terms Schmittian ‘political constitutional theory’: Panu Minkkinen,
remain.
25 Laws LJ argued further, ‘This development of the common law regarding constitutional rights,
and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits
of a written constitution, in which fundamental rights are accorded special respect. But it
preserves the sovereignty of the legislature and the flexibility of our uncodified constitution.
It accepts the relation between legislative supremacy and fundamental rights is not fixed or
brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more
or less deference to the legislature, or other public decision-maker, according to the subject in
26 See, accordingly, the repeated claim (Laws LJ): ‘Nothing is plainer than that this benign devel
opment involves, as I have said, the recognition of the ECA as a constitutional statute’: Thorburn

28 Constitutions in the FRG and Italy were subject to supervision by occupying forces, and both accorded high standing to international law. Constitutions in post-transitional Portugal and Spain also gave high authority to international law in order to assuage anxieties of external observers.

29 See, for example, the ruling of the Constitutional Court of the FRG, Lüth BVerfGE 7, 198; 1 BvR 400/51 (15 January 1958), which imprinted a rights-based constitutional order on the entire society of the FRG.


32 See the current examples of Hungary and Poland, which are keeping the UK good company.


34 Before the 1929 elections, most women in the UK could not vote. From 1931 until after World War II, occupancy of government office was not strictly correlated with voting outcomes.

35 In 1963, the following view could still be expressed in court (Reid LJ): ‘We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedure are largely inapplicable to cases which they were never designed or intended to deal with’: Ridge v Baldwin and others – (1963) 2 All ER 66. This was partly revised by the early 1970s. See the claim of Denning LJ that ‘there have been important developments in the last 22 years which have transformed the situation. It may truly now be said that we have a developed system of administrative law. These developments have been most marked in the review of decisions of statutory bodies. […] The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law’: Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union) and others (1971) 1 All ER 1148.

36 See debates about this in Bugdaycay v Secretary of State for the Home Department and related appeals – (1987) 1 All ER 940.

37 In some cases, judges rejected the idea that stricter principles of judicial accountability ‘recognised in the administrative law of several members of the European Economic Community’ could be applied in the UK: Brind and others v Secretary of State for the Home Department – (1991) 1 All ER 720. Despite this, however, methods for ensuring heightened substantive control of public agencies had surely taken hold by the 1990s.

38 Diplock LJ linked the solidification of British administrative law to EU law in his famous arguments in the GCHQ case, stating that ‘the possible adoption in the future of the principle of “proportionality” which is recognised in the administrative law of several of our fellow members of the European Economic Community’ might contribute to the more robust constitutionalization of UK public law: Council of Civil Service Unions and others v Minister for the Civil Service – (1984) 3 All ER 935. Just as important as the growing application of proportionality as a principle for assessing executive discretion is the principle of legitimate expectations, which can also be ascribed to notions of legal certainty more common in European law than British public law. For a leading earlier case on this, see R v Home Secretary, ex p Oloniluyi (1989) Imm AR 135.


41 See the paradigmatic expression of this in the *Maastricht-Urteil* of the German Constitutional Court, at note 10.
