

JUSTICE HUMAN RIGHTS CONFERENCE (2017)

Judicial Review Update: Some emerging themes and challenges

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The last twelve to eighteen months have seen the Brexit referendum decision, the publication of the Iraq Inquiry Report, the election of Donald Trump, a surprisingly close result in the surprise UK election, an increase in domestic and global terrorist attacks, international armed conflict in Syria and Iraq, and the Grenfell Tower fire.

These events unavoidably lead to the politicisation of legal issues and the legalisation of political issues. In *Miller*, the majority treated politics and law as hermetically sealed. The dissenting judgments feared their overlap, with Lord Reed warning that “it is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary” (§240).

Brexit may be the most important constitutional event of the year, but it is taking place in the shadow of the most significant disclosure of constitutional failure of the modern era in the findings of the belatedly published Iraq Inquiry Report.

At a moment when the UK will renounce the European Union, and still threatens to do the same with regard to the Treaty of the Council of Europe and its Convention of Human Rights and Fundamental Freedoms, it is important to reflect on the limits and potential of both law and politics and how they interact.

Against this context, this paper considers how the courts have been responding to cases that deal with high politics in terms of **separation of powers**, and an essential underlying feature of all human rights, **respect for human dignity**. In these two values, both of which have UK ‘constitutional’ status, we can consider some emerging themes and challenges for public law.

A. SEPARATION OF POWERS

Brexit – Art. 50 Treaty of Lisbon case

1. *R (Miller) v SS for exiting the EU* [2017] 2 WLR 583 ([2017] UKSC 5) held that the Royal Prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to EU treaties without Parliamentary consent. This was because the effect of invoking Article 50 of the Lisbon Treaty would be to cause an irrevocable change in the domestic law rights contained in the European Communities Act 1972.
2. The judgment provides an updated portmanteau description of the UK’s constitutional arrangements that exist (at §40) as “a combination of statutes, events,

conventions, academic writings and judicial decisions... described by Professor AV Dicey, as "the most flexible polity in existence" - Introduction to the Study of the Law of the Constitution (8th ed, 1915), p 87". The Court does this to resolve a conflict between two constitutional rules:

- Rule 1 is that the executive (government) cannot change law made by Act of Parliament, nor the common law.
 - Rule 2 is that the making and unmaking of treaties is a matter of foreign relations within the competence of government (Lord Hughes at §277).
3. As to Rule 1, the judgment emphasises the constitutional prohibition that was forged during the 17th century that *"the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm"* (*Case of Proclamations* (1610) 12 Co Rep 74). This was thereafter enshrined in the 1688 Bill of Rights, which confirmed that *"the pretended power of suspending of laws or the execution of laws by regall authority without consent of Parlyament is illegall"* and that *"the pretended power of dispensing with laws or the execution of laws by regall authoritie as it hath beene assumed and exercised of late is illegall"* (§44).
 4. As to Rule 2 the judgment recognises that certain prerogative powers, *"such as the conduct of diplomacy and war, are by their very nature at least normally best reserved to ministers just as much in modern times as in the past"* (§49 citing *Burmah Oil* [1965] AC 75, 100). Subject to any restrictions imposed by primary legislation, the power to make or unmake treaties is therefore exercisable without legislative authority and the exercise of that power is not reviewable by the courts (§55). Treaties - agreed on the international plane - not only do not create domestic rights - they also cannot take them away (§56): citing *IH Rayner v DTI* (*International Tin Council case*) [1990] 2 AC 418, 446 and 499-500.
 5. Lord Reed (in agreement with the majority on this issue) identified *"compelling practical reasons"* for the position, citing *Blackstone Bk 1, Ch. 7, pp 242-243*: *"Were it placed in many hands, it would be subject to many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford"*. For his Lordship *"[the] value of unanimity, strength and dispatch in the conduct of foreign affairs are as evident in the 21st century as they were in the 18th."* (§160)
 6. The majority resolved the conflict between the two rules caused by the decision to invoke Article 50 by recourse to the principle of legality. Rather than the Secretary of State being able to rely on the absence in the 1972 Act of any exclusion of the prerogative power to withdraw from the EU Treaties, the majority held (at §86) that the *"proper analysis is that, unless that Act positively*

created such a power in relation to those Treaties, it does not exist". To rule otherwise would have overridden the principle that the executive cannot make treaties that would have the effect of directly changing domestic law.

7. Referring to Lord Hoffmann's speech in *ex parte Simms*, their Lordships could not accept that, in Part I of the 1972 Act, Parliament "*squarely confront[ed]*" the notion that "*it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights*" (§87); adding that "*The fact that a statute says nothing about a particular topic can rarely, if ever, justify inferring a fundamental change in the law...If this is true of general expressions in a statute it must a fortiori be a principle which applies to omissions in a statute*" (§108).
8. The majority's application of the principle of legality turned on the special status of the 1972 statute:

"The EU Treaties as implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications... For the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law...Bearing in mind this unique history and the constitutional principle of Parliamentary sovereignty, it seems most improbable that those two parties had the intention or expectation that ministers, constitutionally the junior partner in that exercise, could subsequently remove the graft without formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament" (§90).

9. The reasoning primarily rest on the difference between foreign policy that has an impact on the application of existing law, and foreign policy that leads to an actual change in the law. The paradigm example cited to test the issue in the judgment is war making. If a Minister can take the UK to war, why do they need Parliamentary consent to invoke Article 50? Although the exercise of a war making power would alter the status of a person, thing or activity (e.g. making previously lawful conduct treasonable, requiring soldiers to be deployed into harm's way or allowing confiscation of the property of enemy aliens), the majority held that in such cases "*the exercise [of the war making power] has not created or changed the law, merely the extent of its application*" (§53). It was on that basis that the Court decided (at §92) that "*[the] fact that ministers are free to issue a declaration of war without first obtaining the sanction of Parliament does not assist the Secretary of State's case. Such a declaration, while plainly of fundamental significance in practice, does not change domestic laws or domestic sources of law, although it will lead to new laws - provided Parliament decides that it should*".

10. The intensity of the norm conflict in *Miller* can be appreciated by the fact that Lord Reed would have ruled to contrary by also relying on the principle of legality. If the conduct of international relations, including the ratification of treaties, falls within the prerogative powers of the Crown as “a basic principle of our constitution”, then it was “that principle” (and not the EU rights) that could “only be overridden by express provision or necessary implication” (§194). Both Lord Reed and Lord Carnworth would have limited judicial intervention to a manifest misuse of the prerogative (for instance, its exercise even if the referendum result had been to ‘remain’) (§§240, 267 responding to the majority at §91).

The legal effect of political conventions

11. *Miller* is also important for its decision about the legal effect of Constitutional conventions or customs of government – in this case the duty under the ‘Sewel Convention’ to consult devolved executives on matters affecting the exercise of devolved power. In dismissing the appeals and interventions involving the governments of Wales, Scotland and Northern Ireland, the Court reviewed the case law and principles, especially the decision of the Canadian Supreme Court in *Re Resolution to Amend the Constitution* [1981] SCR 753 that “It is because the sanctions of convention rest with institutions of government other than courts...or with public opinion and ultimately, the electorate that it is generally said that they are political”.
12. Their Lordships held unanimously that “Judges...are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question (as in the *Crossman diaries case - Attorney General v Jonathan Cape Ltd* [1976] 1 QB 752), but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. As Professor Colin Munro has stated, “the validity of conventions cannot be the subject of proceedings in a court of law” - (1975) 91 LQR 218, 228.” (§146 of the majority judgment, which was agreed with by Lord Reid at §242, Lord Carnworth at §243, and Lord Hughes at §282).¹
13. Looking forward, the judgement in *Miller* could be interpreted as requiring reference to the operation of political conventions when determining a substantive matter of judicial review: e.g. *Re Finucane* [2013] NIQB 45 (disclosure

¹ Referring to the convention that a Governor would not dismiss a premier in the absence of a positive legislative vote to do so, the Privy Council had previously held in *Adegbenro v Akintola* [1963] AC 614, 630 that these “are not legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe”. Before *Miller*, there was no detailed UK common law treatment of the issue.

of Cabinet and Ministerial documents in order to determine whether a refusal to order a public inquiry breached a legitimate expectation).

14. However, breach of political conventions do not give rise to grounds of judicial review in their own right. Prior to *Miller* this had only been noted in two permission decisions: *Hemming v Prime Minister* [2006] EWHC 2831 Admin (concerning a breach of the Ministerial Code in answering questions by an MP) and *Gulf Centre for Human Rights v Prime Minister* [2016] EWHC 2831 Admin (concerning the removal of the reference to international law in the 2015 version of the Ministerial Code).² In *R (ClientEarth) v Secretary of State for the Environment* [2017] EWHC B12 Admin, Garnham J held that ‘purdah’ (the convention by which Ministers must observe discretion in initiating any new action of a continuing or long term character in the immediate period before an election) did not have the force of law; and therefore could not of itself justify further delay in complying with a court order to publish the Minister’s draft consultation on air pollution.

Non-Justiciability as a doctrine of judicial abstention

15. If *Miller* stands as an exception to the rule that it is the exclusive function of the executive to conduct foreign relations, then *Rahmatullah (No 2) v Ministry of Defence* ([2017] UKSC 1) [2017] 2 WLR 287 made it plain that the exercise of prerogative powers in the conduct of foreign policy remain both a defence to private law claims and a terrain of non-justiciability in judicial review. The majority in that case held “*that certain acts committed by a sovereign state are, by their very nature, not susceptible to adjudication in the courts. The obvious examples are ‘making war and peace, making treaties with foreign sovereigns, annexations and cessions of territory’....The decision to go to war in Iraq, and to remain there after the cessation of hostilities between the allied invaders and the state of Iraq in order to bring about internal peace and stability, and the decision to contribute to the International Security Assistance Force in Afghanistan, were of that nature.*” (§§8-9 and see also §§56-57, 80 and 88, 101 and 104).
16. While judges would clearly have the legal tools to examine the legal justification for war, which after all is a legal question (and has been analysed in great detail by eminent jurists including Lord Bingham in the ‘*Rule of Law*’ (Penguin, 2011) and in the inaugural Tom Sargent Justice Lecture delivered by Lord Alexander of Weedon QC, ‘*Iraq: The Pax Americana and the Law*’ (October 2003)), the reason why they will not do so under current constitutional arrangements is essentially to do with the separation of powers and a rule of judicial restraint or avoidance.

² The latter case was subject to permission to appeal to the Court of Appeal, but it understood that the case has not progressed because of lack of funding.

The rule is often referred to as non-justiciability, although that term is apt to confuse. It applies to categories of cases that are “*beyond the constitutional competence assigned to the courts under our conception of the separation of powers*” (so-described in *Shergill v Khaira* [2015] AC 359 ([2014] UKSC 33) §42):

- 16.1. For Lord Mance (at §57) in *Rahmatullah (No 2)* “*the non-justiciability of the royal prerogative of making war and peace or treaties is explained on the basis that the appropriate forum for its control is Parliament (including, in the last resort, as Blackstone notes, by impeachment). In the case of certain foreign activities of the British state, there is in my view an additional parallel aspect at the international level to their non-justiciability in domestic courts. That is that representations and redress in respect of activities involving foreign states and their citizens may be more appropriately pursued at a traditional state-to-state level, rather than by domestic litigation brought by individuals*”.
- 16.2. Lord Sumption (at §88) held that “*It would be incoherent and irrational for the courts to acknowledge the power of the Crown to conduct the United Kingdom's foreign relations and deploy armed force, and at the same time to treat as civil wrongs acts inherent in its exercise of that power*”.
- 16.3. Lord Neuberger (at §104) squarely grounded the issue in separation of powers: “*[T]here are certain acts of the UK government (sc the executive) which, owing to their nature or circumstances, are not susceptible to judicial assessment...the doctrine is ultimately based on the need for consistency or coherence in the distribution of functions between the executive and the judiciary in the United Kingdom's constitutional arrangements*”.
17. These dicta have implications for the ongoing unsuccessful efforts to get the domestic courts to adjudicate on the legality of the 2003 invasion of Iraq:
 - 17.1.1. In *Campaign for Nuclear Disarmament v the Prime Minister* [2002] EWHC 2777, the High Court refused to make a declaration on whether UNSCR 1441 authorised war in Iraq, because “*Foreign policy and the deployment of the armed forces remain non-justiciable.*” (§50). See also Simon Brown LJ (at §47(ii)) (“*The court will in any event decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence*”); and Richards LJ (at §§59-60) (“*[The] claim would take the court into areas of foreign affairs and defence which are the exclusive responsibility of the executive Government.... [There] are rules that, in this context at least, the courts have imposed upon themselves in recognition of the limits of judicial expertise and of the proper demarcation between the role of the courts and the responsibilities of the executive under our constitutional settlement*”).

17.1.2. In *R v Margaret Jones* [2007] 1 AC 136 ([2006] UKHL 16), the House of Lords was asked to determine whether the appellants were entitled, in the course of their prosecution for conspiracy to cause criminal damage, to rely on a defence of preventing the crime of military aggression that exists as a crime under customary international law. The House refused to do so, in part because “*there are well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services...*” (§30), but primarily (on the issue in that case) because the evolution of criminal law was now to be regarded constitutionally as exclusively a matter for Parliament (§§23 and 28-29, 60 and 102). Nevertheless, Lord Bingham (at §30) could not discount that adjudication on an offence of this kind (in the absence of Parliamentary sanction) “*would draw the courts into an area which, in the past, they have entered, if at all, with reluctance and the utmost circumspection*”; and Lord Hoffmann (at §65) underscored “*the practical difficulty that the making of war and peace and the disposition of the armed forces has always been regarded as a discretionary power of the Crown into the exercise of which the courts will not enquire*”, adding (at §66) that “*The decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs*”.

17.1.3. In *R (Gentle) v Prime Minister* [2008] 1 AC 1356 ([2008] UKHL 20), the House of Lords refused an appeal that argued that the State’s obligations under Article 2 ECHR extended to taking proper steps to ascertaining whether participation in the invasion of Iraq would comply with international law. Lord Bingham (at §8(2)) (with whom all of the other Judges agreed) relied on the above cited paragraphs in the *Margaret Jones* case, to conclude that “*the restraint traditionally shown by the courts in ruling on what has been called high policy - peace and war, the making of treaties, the conduct of foreign relations - does tend to militate against the existence of the right [to investigate the legality of the decision to go to war]*”. Of note is also Lord Hope’s speech (at §24) where he held that “*The issue of legality in this area of international law belongs to the area of relations between states...[The] conduct of international relations between states is a matter of political judgment. It is a matter for the conduct of which ministers are answerable to Parliament and, ultimately, to the electorate. It is not part of domestic law reviewable here...*” The fact that the Attorney General had publicly declared that UK conduct was lawful did not concern “*rights or obligations in domestic law*”, such that the Courts could intervene to correct an error. “*The only question he was concerned with was whether the invasion was lawful under international law*” which was “*not reviewable in*

domestic courts" (§26). See also Baroness Hale (at §58), and Lord Carswell (at §62).

17.1.4. In *R (Al Rabbat) v Westminster Magistrates Court* [2017] EWHC 1969 (Admin) an Iraqi citizen failed in his application for permission for judicial review on the basis that the findings of the Iraq Inquiry had disclosed the commission of a crime of aggression contrary to customary international law and in all the circumstances it was proper for the Divisional Court to enable the case to get to the Supreme Court so that the above decision in *Margaret Jones* could be the subject of reconsideration. As with the *Jones case*, the Court identified a primary bar to the claim that the common law courts will no longer recognise crimes when Parliament has not done so. However, the Court (at §§17 (iii) and (iv)) also referred to Lord Bingham and Lord Hoffmann's reliance in *Jones* on broader constitutional principles prohibiting the judicial review of the exercise of war making powers. It also preys in aid the Supreme Court Judgement in *Keyu v SSFCA* [2016] AC 1355 ([2015] UKSC 69), which (at §145) had referred to both parts of the reasoning in *Jones* without criticism. Having formed the view that "*there is no prospect*" of the Supreme Court overturning the decision in *Jones*, the Court described itself as under a duty to refuse permission to bring the proceedings for judicial review.

Human Rights and common law rights exceptions

18. The doctrine of judicial abstention or non-justiciability bears a number of human rights and common law rights exceptions. The scope of the exceptions remain contested. But recent case law adds some clarity:

18.1.1. The private law defence of 'crown act of state' is limited to "*acts which are by their nature sovereign acts, acts which are inherently governmental, committed in the conduct of foreign relations of the Crown*" (e.g. the decision to go to war). It would neither extend to torture, or other maltreatment of prisoners as happened in Baha Mousa's case, which Lady Hale would not characterise as "*inherently governmental*" in the first place. Its application to claims brought by British citizens has also been left open: *Rahmatullah (No 2)* §§36-37. With those caveats, the Court held:

"We are left with a very narrow class of acts: in their nature sovereign acts - the sorts of thing that governments properly do; committed abroad; in the conduct of the foreign policy of the state; so closely connected to that policy to be necessary in pursuing it; and at least extending to the conduct of military operations which are

themselves lawful in international law (which is not the same as saying that the acts themselves are necessarily authorised in international law)” (my emphasis).

On the facts of the SC cases the crown act of state defence would have successfully applied to cover bilateral arrangements for periods of preventative detention that took place during a non-international armed conflict under the authority of United Nations Security Council mandates.

(Note: The Article 5 ECHR implications of the arrangements were dealt with in the separate case of *Al Waheed v MOD* [2017] 2 WLR 327 ([2017] UKSC 2) (which held that the ECHR was modified by the UNSCR mandates concerning imperative needs of security that applied to both post Occupation Iraq and Afghanistan).

- 18.1.2. If limited in that respect, the doctrine of ‘crown act of state’ would not violate Article 6 ECHR, because it would be regarded as a matter of substantive tort law, rather than a procedural immunity. The Grand Chamber of the ECtHR in *Markovic v Italy* (2006) 44 EHRR accepted the right of states to limit the capacity of individuals to challenge war making and foreign policy decisions in domestic courts (adopted in *Rahmatullah (No 2)* §§43-46 76, 97, 106).
- 18.1.3. The private law defence of ‘foreign act of state’ will bear an exception where the claim concerns the fundamental rights of liberty, access to justice and freedom from torture: *Bel Hadj v MOD* [2017] 2 WLR 456 ([2017] UKSC 3)). In order to delineate the scope of such “*fundamental rights*”, the Court will have regard to peremptory norms of international law and the principles of the administration of justice that have been characterised as “*fundamental*” in England since the 17th century (§278).
- 18.1.4. Any restraint of the Administrative Court in relation to matters of foreign relations may yield in the face of both human rights and common law rights: *R (Abassi) v Secretary of State for the FCO* [2003] UKHRR 76 and *R (Rahmatullah) v Secretary of State for Foreign and Commonwealth Affairs* [2013] 1 AC 614). In *R (Barnard) v PSNI*, unreported 28 July 2017, the High Court in Belfast found a substantive breach of legitimate expectation based on undertakings to bereaved families to produce a thematic report on the Glennane gang killings in Northern Ireland in the 1970s. In reaching that decision, the Court took account of statements that had been made by the UK Government to the Committee of Ministers of the Council of Europe as to how the Historical Enquiries

Team policy would contribute to the State's compliance with Article 2 ECHR (§§197-203). Additional reliance was placed on what was said by UK representatives who gave evidence to the House of Oireachtas Joint Committee of Justice, Equality, Defence and Women's Rights in the Republic of Ireland (§§38-40).

Unincorporated Human Rights Treaties and customary international law

19. The above case law has exhibited both the orthodoxy and the exceptions to the so-called dualist theory. *Miller* (at §55) describes the theory as "based on the proposition that international law and domestic law operate in independent spheres". In turn, the prerogative power to make treaties depends on two related propositions: (1) "treaties between sovereign states have effect in international law and are not governed by the domestic law of any state" and (2) "although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law".
20. The majority judgment then counters the allegation of democratic deficit triggered by granting the declaratory relief sought in *Miller*, because "the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers". It then adopts the summary of the position in Campbell McLachlan's *Foreign Relations Law* (2014), para 5.20, "If treaties have no effect within domestic law, Parliament's legislative supremacy within its own polity is secure. If the executive must always seek the sanction of Parliament in the event that a proposed action on the international plane will require domestic implementation, parliamentary sovereignty is reinforced at the very point at which the legislative power is engaged."
21. The dualist system does not prevent the following means by which international law can become sources of domestic law without express Parliamentary approval:

Customary international law

22. In *Keyu* Lord Mance held (with all other Justices in agreement) that "Common law judges on any view retain the power and duty to consider how far customary international law on any point fits with domestic constitutional principles and understandings.....CIL, 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 or consideration (emphasis

added).” (§§146, 150). This stands as an important up to date affirmation of *Trendtex Trading v Central Bank of Nigeria* [1977] QB 529, 553.

23. Example of limits to the principle are as follows:

23.1. In *Keyu* (§118) the adoption under the common law of a CIL duty to investigate extra-judicial killing was deemed to be inconsistent with Parliament’s decision to legislate in the field by enacting regimes to deal with inquests, inquiries and (via the HRA) Article 2 ECHR.

23.2. In *R (Al-Saadoon) v. SSD* [2017] 2 WLR 219 ([2016] EWCA Civ 811) (at §200) the Court adopted similar reasoning with regard to Parliament’s decision to ‘enter the field’ in implementing some features of UNCAT (e.g. creating an offence of torture in accordance with Art 4, but not implementing other parts of UNCAT).

(The Court commented, the “*The principle [of legality] depends for its application on the fundamental rights in question already being part of domestic law. It does not operate by reference to rights and duties between States on the international plane, nor can it transform such rights into domestic law*” (§199)).

23.3. In *Al Rabbat* the DC refused to countenance the prospect of recognising a crime against aggression, which *Jones* had accepted existed under CIL, because of the different constitutional principle that provides that judges will no longer create crimes.

[Note: this is the same reason why Parliament had to enact s. 139 of the CJA 1998 to create a new torture offence in accordance with Art. 4 of UNCAT. It is also why Parliament had to create offences under the Geneva Conventions Act 1957 and the International Criminal Court Act 2001].

24. In other circumstances, the common law should be receptive to CIL, especially when the matter concerns jus cogens peremptory norms (see *Bel Hadj* §§249-280). In other words values that accord with Blackstone’s description of “*the law of nations*” must be adopted into this country’s common law, “*without which it must cease to be part of the civilised world*” (Bk 4, Ch. 5, pp 66-67).

Other international law as a source of ECHR Rights

25. There is a well-established principle that ECHR rights must be construed where possible in conformity with other international human rights treaties: *Al Adsani v UK* (2002) 34 EHRR 11 §55 and *Demir v Turkey* (2008) 48 EHRR 1272 §69. Under

domestic law, the foothold is the HRA, which in turn requires domestic courts to take account of the approach to interpreting Convention rights by the Strasbourg courts.

- 25.1. In LG, IM, JM v SSHD [2017] EWHC 1529 Admin §§74-80, Nicol J held that Article 3.1 of the UNCRC applies to TPIM decisions in terms of acknowledging that the interest of an affected child must be a primary consideration in decision making as to the proportionality of TPIM measures (the issue was relocation of a single parent). Prior to this judgement, the Home Office did not accept that to be the case.
- 25.2. In R (JK) v SSHD [2017] EWCA Civ 433, the Court of Appeal questioned how further the other articles of the CRC and its commentaries can act as viable sources of domestic law. The case concerned weekly payments to children asylum seekers and whether the test for setting their level was concerned with subsistence, or welfare. The Court held it was the former. The provision considered was Art. 27 CRC: "*State Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*" The Court found this and other similar provision to "*operate at too high a level of generality to impact on the true construction of the IAA 1999 and the RCD*". It added: "*If or insofar as it is suggested that this wording requires something other than a minimum subsistence level, I cannot agree. The wording is open-ended (what line, if any, is to be drawn?), aspirational only (there is no reference whatever to the resources of the State) and, hence, of no assistance in defining any standard in the present context*" (§64).
- 25.3. In Al-Saadoon the CA confirmed (§204) that when there is a duty to investigate an allegation of torture or other serious ill-treatment under Article 3 ECHR the circumstances to be investigated will often include the instructions, training and supervision given to those persons to whom the custody of the individual was entrusted. In such an investigation the obligations of the United Kingdom under Articles 10 and 11 UNCAT [regarding the training of personnel and regulation of custodial settings] "*will form a relevant part of the background and the investigator may think it appropriate to examine what steps were taken to comply with those international obligations*".
- 25.4. The majority opinion in the NHS abortion funding case did not regard the CEDAW material concerning the access to pregnancy health services to be of a sufficiently "*vivid hue to put into the balance against the respondent's resolve to stay loyal to the overall scheme for separate provision of free health services within each of our four countries and to the democratic decision reached*

in Northern Ireland in relation to abortion services": R (A & B) v SSH [2017] 1 WLR 2494 ([2017] UKSC 41) §§36-37. Note: in her dissenting judgment, Lady Hale would have got to the same interpretation by reference to "some of the fundamental values underlying our legal system", which she referred to as "autonomy and equality, both of which are aspects of an even more fundamental value, which is respect for human dignity" (§93).

26. If Article 3.1 of the CRC is applicable to the content of the ECHR right, then both the decision maker and then the court must decide whether the interests of the child were afforded sufficient weight as a primary consideration. The UN Committee in its General Comment No 14 has analysed a child's best interests in terms of a threefold concept and this analysis was referred to with approval by Lord Wilson in Mathieson v SSHD [2015] 1 WLR 3250 ([2015] UKSC 47) at §39. As summarised by Lord Wilson, the concept is as follows:

"The first aspect of the concept is the child's substantive right to have his best interests assessed as a primary consideration whenever a decision is made concerning him. The second is an interpretative principle that, where a legal provision is open to more than one interpretation, that which more effectively serves his best interests should be adopted. The third is a 'rule of procedure', described as follows:

'Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned.... Furthermore, the justification of a decision must show that the right has been explicitly taken into account.' "

The Court of Appeal in JK v SSHD emphasised that there is not a mandatory staged structure to how the concept should be applied, "provided that the right matters are taken into account" (§74).

27. What is equally important is that a "decision which is taken without having regard to the need to safeguard and promote the welfare of any children will not be 'in accordance with law' for the purpose of article 8.2": ZH (Tanzania) v SSHD [2011] 2 AC 166 ([2011] UKSC 4) §24. Where this is the case, because the nature of the Article 8 issue meant that it had to be decided through the prism of Article 3.1 CRC, then the flaw in the decision cannot be corrected by the Court conducting the analysis:

27.1. This was accepted to be the case by way of concession in ZH (Tanzania); but all of their Lordships agreed with it. However, in that case the decision was governed by section 55 of the UK Borders Citizenship and Immigration Act 2009 where "the spirit, if not the precise language" had been translated into the statutory provision (§23).

- 27.2. Equally, in *MM (Lebanon) v SSHD* [2017] 1 WLR 771 ([2017] UKSC 10) §92-93), immigration rules that failed to provide proper guidance for entry clearance regarding a family member that would impact on the best interest of the child, were quashed for not being in accordance with law: “This is not simply a defect of form, nor a gap which can be adequately filled by the instructions. The duty imposed by section 55 of the 2009 Act stands on its own feet as a statutory requirement apart from the HRA or the Convention. It applies to the performance of any of Secretary of State’s functions including the making of the rules. While the detailed guidance may be given by instructions, it should be clear from the rules themselves that the statutory duty has been properly taken into account. We would grant a declaration that in this respect both the rules and the instructions are unlawful”.
- 27.3. Does the point go further to all decisions that engage the article 8 rights of children, regardless whether the decision maker is bound by either section 11 of the Children Act 2004 or section 55 of the 2009 Act? Lady Hale thought that it did in her dissenting judgment in *R(JS) v SS for WP* [2015] 1 WLR 1449 ([2015] UKSC 16) §221. As the majority judgement held that the CRC was not applicable to the issues in the case, this feature of the dissent may arguably reflect the law on ‘in accordance with law’ as identified in the earlier *ZH* case.

Policy

28. Government policies can incorporate international human rights and humanitarian law into a public law duty of compliance because the executive has undertaken to act in accordance with the policy: *R (Haider Hussain) v Secretary of State for Defence* [2013] EWHC 95 (Admin) §§20 and 39 (upheld [2014] EWCA Civ 1087 §28). This does not prevent a policy being changed, but changes must be in accordance with the law of substantive legitimate expectation: *Barnard v PSNI* (§§203-209).
29. Equally, if in the exercise of a power that is already the subject of domestic law, a decision maker relies on an erroneous construction of international law as a basis for his decision, then according to ordinary principles of domestic law, the error may be reviewable depending on context: *Gentle* (§26) referring back to the pre HRA extradition decision in *R v SSHD Ex p Launder* [1997] 1 WLR 839, 867. Relevant considerations that will determine whether the Court will intervene is whether the interpretation of international law is not in dispute or otherwise clear; and whether the misdirection would have made a difference to the decision: *R (Corner House) v Director of SFO* [2009] AC 759 ([2008] UKHL 60) §44 and 67. The international law in question may be relevant. If one is dealing with the Geneva Conventions, or other human rights treaty that have CIL status, then

a domestic court would now find it difficult to shy away from judgment. The position may be different, if the Treaty in question is of a specialist nature: see, for example, *ICO Satellite v Ofcom* [2010] EWHC 2010, §§88-97 (concerning the Convention on the International Telecommunications Union, where the international body was created to administer international arrangements for electronic communications).

30. Overall, we have not therefore reached the decision hoped for by Lord Kerr in his dissenting judgment in the ‘benefits cap’ case that the classic doctrine of dualism should incorporate a human rights treaty exception. Only the dissenting judgments would have held that the underlying rationale of the dualist principle is to protect the citizen from abuse; and thus the principle has less justification to prevent the common law incorporation of international human rights protections: *R(JS) v SS for WP* §§255-56.
31. In the *JS* case, the majority did not regard the failure to comply with a statement to Parliament by the Minister of State for Children and Families in 2010 that the UK will always consider the UNCRC, including the recommendations of the CRC Committee, as a basis to quash the benefit cap. The statement had also been repeated in the *Cabinet Office Guide to Making Legislation (July 2013)* [11.30] (§§90-91, 115; Cf. §§216). As Lord Carnworth put it, “Ministerial statements of the government’s “commitment” to giving “due consideration” to the UNCRC articles, may have political consequences but are no substitute for statutory incorporation” (§115).

B. HUMAN DIGNITY

32. What does human dignity have to do with the constitutional arrangements for separation of powers? In the concept of separation of powers, we find the highest unit of politics: the respective division of power between the executive, Parliament and the courts. In the concept of human dignity, we signify the most immediate unit of social life: how we relate to ourselves and how we relate to each other. One answer is that in the fundamental value of human dignity, we have a basic foundation for all law.
33. In *JG*, Lord Kerr appreciated that it would be regarded as “highly radical” in the United Kingdom to accept the analysis of Alan Brudner that a Convention while in origin a Treaty between independent states, is in content “the legislation of a universal community of rational beings” (§252 citing A Brudner, “The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework” (1985) 35 *University of Toronto Law Journal* 219). But a similar thing was said by Sir Hersch Lauterpacht in his *General Theory of International law* (posthumously collected in 1970, but reflective of his life’s work):

“The principle that the rights and duties of States are but the rights and duties of man is of importance in that it lends emphasis to the idea...that the individual human being is the ultimate unit and end of all law, national and international, and that the effective recognition of the dignity and worth of the human person and the development of human personality is the final object of law.” (My emphasis)

By 1935, in his preface as the newly appointed editor to the 5th edition of Oppenheim’s International law, Lauterpacht wrote that. “*The well-being of the individual is the ultimate object of all law*” adding that “*whenever there is a chance of alleviating suffering by means of formulating and adopting legal rules, the law ought not to abdicate its function in deference to objections of apparent cogency and persuasiveness*”. In his paper to the Grotius Society delivered in 1942, Lauterpacht formulated the principle that underpinned his then embryonic work on human rights, that the “*the individual human being – his welfare and the freedom of his personality in its manifold manifestations – is the ultimate unit of all law*”: see Sir Elihu Lauterpacht, “*The Life of Sir Hersch Lauterpacht*” (Cambridge 2012), pp 75-76 and 252.

34. Brexit will lead to the renunciation, amongst other things of Article 2 of the Treaty of European Union that declares human dignity to be the EU’s foremost ‘foundational value’, followed by freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Part I of the European Charter of Fundamental Rights is headed ‘Dignity’ and its first Article enshrines human dignity as “inviolable” and creates positive obligations to respect and protect it. See Catherine Dupré, “*The Age of Dignity, Human Rights and Constitutionalism in Europe*”, (Bloomsbury 2015). The ECJ held in the C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, First Chamber, 14 October 2004 at §34 that “*the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law*”.
35. Recognition of human dignity as a fundamental value of the common law is still a work in progress:
 - 35.1. Human dignity has been described as “*a core value of the common law, long pre-dating the [European] Convention [of Human Rights] and the [European] Charter [of Fundamental Rights]*”: *R (A, B, C, X and Y) v East Sussex County Council* [2003] EWHC 167 (Admin) §86.
 - 35.2. There are features of the human condition that are so basic as to be unnecessary to resort to the ECHR to require protection, applying instead the “*the law of humanity*”: *R v Secretary of State for Social Security ex p Joint*

Council for the Welfare of Immigrants [1997] 1 W.L.R. 275, 292F-G. See also *The King v Inhabitants of Eastborne* (1803) 4 East. 103 (1803) 102 ER 769 per Lord Ellenborough CJ (“As to there being no obligation to maintaining poor foreigners [in the relevant Poor Law statutes]...the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving...”).

- 35.3. The common law commitment to natural justice has always had an implicit commitment to human dignity. The right to be heard, to be judged with independence and impartiality, and to know and publicise the reasons for the outcome of litigation, treats the parties with equal respect regardless of the merits of their cases. The importance of the judgement in *Osborn v Parole Board* [2014] AC 1115 at §68 is to make a more explicit link between human dignity and procedural justice: see the citation by Lord Reed of Jeremy Waldron, “*How the Law Protects Dignity*” (2012) Cambridge Law Journal 200. Waldron describes the change that has taken place since 1945 as involving the upward equalization of rank, so that we now try to accord to every human being something of the dignity, rank and expectation of respect that was formally accorded only to nobility.
- 35.4. However, outside the context of common law assault, a direct violation of human dignity has not been recognised as a basis for tort law (*Wainwright v Home Office* [2004] 2 AC 406). Indeed, the major innovation of dignitarian law in the HRA era has been the forging of the tort of misuse of private information, which has caused the law of confidentiality to alter from “*a cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike,*” to “*the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people*” (*Campbell v MGN* [2004] 2 AC 457 ([2004] UKHL 22) §§46-51, 53 and 56). Although not expressly referred to in *PJS v Newsgroup Newspapers Ltd* [2016] AC 1081 ([2016] UKSC 26) the outcome is dependent upon the protection of human dignity always being worthwhile, because it can never entirely be depleted of its value (§§25-26 and 35).
36. Human dignity now finds protection in statute:
- 36.1. Section 1(2)(a) of the *Care Act 2014*, section 1(2)(a) creates a statutory duty on local authorities in the context of adult social care to promote the well-being of individuals, by having regard, inter alia, to “*personal dignity (including treatment of the individual with respect)*”: *R (Davey) v Oxfordshire*

County Council [2017] EWCA Civ 1308 (recognising at §§60-63 that the provision should be read in accordance with the commitment to facilitating independent living with the community in accordance with Article 19 of the United Nations Convention on the Rights of Persons with Disabilities).

- 36.2. Section 26(1)(b)(i) of the Equality Act 2010 defines harassment to include if 'A' engages in unwanted conduct related to a relevant protected characteristic of 'B', with the purpose of "*violating ['B'] dignity*". (The origins of this wording was in EU Directives that originally led to amendments of the statutory predecessors of the 2010 Act). This is a separate basis for harassment, to be distinguished from "*creating an intimidating, hostile, degrading, humiliating or offensive environment for B*" (s. 26(1)(ii)). So the wrong done, is something other than that, but there is little case law (Dhaliwal v Richmond Pharmacology Ltd [2009] IRLR 336).
37. The Human Rights Act also continues to be the primary portal through which the concept of human dignity develops in UK law:
 - 37.1. The ECHR case law has repeatedly affirmed that respect for human dignity "*forms part of the very essence*" of the Convention: Pretty v United Kingdom (2002) 35 EHRR 1 §65.
 - 37.2. The duty to prevent destitution has been articulated through ECHR and EU rights: see R (Limbuella) v SSHD [2006] 1 AC.396 §76 (the ECHR expresses "*the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be*"); and R (Refugee Action) v SSHD [2014] EWHC 1033 Admin (§§113, 115), (citing German Basic Law authority, that a minimum dignified standard of living encompasses the "*physical existence of the human being, i.e food, clothing, household items, shelter, heating, sanitation and health*").
 - 37.3. The interpretation of Convention rights, especially Articles 3 and 8, is informed by the emphasis given to respect for human dignity in almost every other significant human rights treaty. See Bouyid v Belgium (2016) 62 EHRR 32 (the Art. 3 slapping case) in which the positive duty to protect human dignity - especially for those who are detained - gets its most emphatic endorsement yet by the Grand Chamber through extensive reference to the coverage of human dignity in international Treaty law since 1945: from the Preamble to the United Nations Charter and Universal Declaration of Human Rights to Article 1 of the EU Charter of Fundamental Rights (§§ 45-47).

- 37.4. The developing common law right to personal information (for which see *Kennedy v Charity Commission*) chimes with the Article 8 case law on access to information being relevant to “*highly personal information about ... past and informative years*” (*Gaskin v UK* (1990) 12 EHRR 36 §36) and “*the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one’s personal identity*” (*Odievre v France* (2004) 38 EHRR 43, §29).
38. Meanwhile British judges are developing a discourse of human dignity that fills this sometimes contested and under-defined concept with meaning:
- 38.1. Through the prism of Convention rights, we “*respect people’s moral worth by taking account of their need for security*” (*Razgar v SSHD* [2004] 2 AC 368 ([2004] UKHL 27) §27).
- 38.2. We are not “*isolated, lonely and abstract figure(s) possessing a disembodied and socially disconnected self*”, but people who “*live in their bodies, their communities, their cultures, their places and their times*” (*Hall v Bull* [2013] [2013] WLR 3741 (UKSC 73) §52 adopting *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999 (1) SA 6, §117).
- 38.3. We are “*formed for society...neither capable of living alone, nor indeed having the courage to do it*” (*Blackstone Bk 1, Ch. 2, p 43*), such that it is “*fundamental to our human condition, to our dignity as human beings*” that we should be able to communicate about ourselves and about our lives (*Re Roddy* [2004] 1 FCR 481 ([2003] EWHC 292) §35).
- 38.4. It is out of respect for human dignity that we do not have to pretend we are something that we are not in order to protect ourselves from persecution: *HJ (Iran) v SSHD* [2011] 1 AC 596 ([2010] UKSC 31) at §§ 14–15; and *RT (Zimbabwe) v SSHD* [2013] 1 A.C. 152 ([2012] UKSC 38) §§29-30 and 39.
- 38.5. Yet as much as dignity enables us to be ourselves, our commitment to it is premised on respecting our differences as well: “*If we were all the same, we would not need to guarantee that individual differences should be respected. ... Every person is a world in himself. Society is based on people who are different from one another. Only the worst dictatorships try to eradicate these differences*” (*Christian Institute v Lord Advocate* [2016] UKSC 51 §73; see also *El-Al Israeli Airlines Ltd v Danielowitz* [1992-4] IsrLR 478, §14).
- 38.6. The negative psychological effect of discrimination is grounded in its cause of “*loss of dignity and self-esteem*”. Damage to dignity damages

society. It produces a “*sense of alienation,....mistrust of institutions,*”, is “*detrimental to social cohesion*” and hinders “*social and economic progress*”. Society “*loses the benefits of the talents of these individuals and the different perspectives that they can bring to the solution of the problems facing business or society.*” We all benefit “*when each individual realises his or her potential*”: R (Elias) v SSD [2006] WLR 3213 ([2006] EWCA Civ 1293) §§270-271.

C. CONCLUSION: ARE HUMAN RIGHTS ENOUGH?

39. This past year has seen some strong case law statements about the judicialisation of political, social and economic issues. Aside from Miller, expressions of restraint have informed the judicial review of housing services (Poshteh v RBKC [2017] 2 WLR 1417 ([2017] UKSC 36) §22), welfare services (JK v SSHD §87), and minimum income requirements for immigration spousal and partner reunion (MM (Lebanon) v SSHD). None of these judgements contested that the Claimants who brought the cases were not living in states of insecurity.
40. Poshteh is notable for again resisting a submission that the common law should recognise a ground of proportionality review, citing Lord Neuberger’s comments in Keyu about “*the potentially profound constitutional implications of a decision to replace the traditional Wednesbury tests for administrative decisions in general*” (§42). A salient argument against proportionality review is that it could recalibrate the relationship between judicial and executive power. Another way in which the relationship would be recalibrated would be to bring into force section 1 of the Equality Act 2010, which requires public authorities “*when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage*”.
41. It is not surprising that cases like JG, JK and Poshteh stand as limits to what can be achieved under the HRA. These cases remind us of the differences between the Universal Declaration of Human Rights and other UN human rights treaties that expressly protect social and economic rights and not just the right to property, as is the case with the ECHR. The UDHR protects “*the right to own property*” and that “*No one shall be arbitrarily deprived of his property*” (Art. 17). But it also grants “*a right to social security...indispensable for his dignity and the free development of ...personality*” (Art. 22), “*the right to work*” in “*just and favorable conditions*” for “*just and favorable remuneration*” (Article 23), “*the right to leisure*” (Article 24) and “*the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment,*

sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (Article 25).

42. As long as the HRA exists, the scope of the *Al Adsani* principle will continue to act as a portal for unincorporated human rights treaties informing the content of Convention rights. One of the sticking points is the distinction between human rights law embodying negative duties to prevent a certain level of insecurity, destitution, or ill-treatment, as opposed to positive duties, such as "*the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*" (Art. 27 CRC), or the "*right to social security...indispensable for his dignity and the free development of ...personality*" (Art. 22 UDHR).
43. Social and economic rights aside, the fundamental value of human dignity is slowly becoming the foundation for all human rights, that neither the HRA nor the common law of human rights initially imagined. Indeed, one of the flaws in the HRA is that it began life as "*a rights document without a proper foundation and, if the importance of the basis of rights is not recognised, the position of those rights will remain precarious*": Benedict Douglas, '*Undignified Rights: The Importance of a basis in Dignity for the Possession of Human Rights in the United Kingdom. Public Law 2015(2): 241-257, 242.*
44. If the Human Rights Act were to go and/or the UK were to enact its own Bill of Rights, the question would arise as to how far the Courts could develop the common law in line with customary international law and broader international human rights law. Whether we have the HRA or some alternative, Judges will have to decide whether they are dignitarians "*applying a constitutional instrument that affirms and protects the intrinsic worth of the human person*", or positivists approaching "*enacted legislation that embodies nothing more than ordinary norms, and serves only the practical purpose of expediting redress*" (Daniel Bedford, '*Human Dignity in Great Britain and Northern Ireland*' in Paolo Becchi and Klaus Mathis (ed), *Handbook of Human Dignity in Europe*, Springer 2018 (forthcoming)).

(See Benedict Douglas, '*Undignified Rights: The Importance of a basis in Dignity for the Possession of Human Rights in the United Kingdom*' (above) p. 246, who describes how the HRA has become the unintended victim of the historical rights critiques of Edmund Burke and Jeremy Bentham, which have inoculated Britain against the acceptance of non-positivist rights. Bentham regarded human rights as nonsense, while Burke feared their power if they meant anything more than norms enacted by Parliament).

45. If a Labour government was elected on a platform to renationalise various parts of industry and impose more concerted control on the free market economy, then

it is foreseeable that some parts of the Conservative Party would fall back in love with the European Convention of Human Rights. After all, it was Winston Churchill and David Maxwell-Fyfe who championed both the Council of Europe and its Human Rights Convention. They wanted to create a bulwark to operate at the regional international law level against the potential socialist and secular legislative agendas of post-war democratic domestic politics: see Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (OUP, 2017) and Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard, forthcoming 2018).

46. It is these themes and challenges that make the judgment in *Unison v Lord Chancellor* [2017] UKSC 51 so stimulating; and not simply a digest of Magna Carta onwards. Something new is being said about how no claim is “a purely private activity” (§67) and that the work of courts is never aloof from everyday economic and social relations, but something that “underpins” them (§71). Which begs the question: if “the courts do not merely provide a public service like any other” (§68), are they sufficiently equipped in their administrative law function to carry out that service properly?

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