The UK Approach to the Emergence of European Constitutionalism
Repositioning the Debate: Departure from Constitutional Ontology and the Introduction of the Typological Discussion
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1. Introduction

In the seminal decision in *Les Verts* the European Court of Justice (ECJ) stated that the European Community (EC) “is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”. Nonetheless, the preceding confirmation of the existence of a constitutional charter at the EC level only served the purpose of generating a persistent and intense debate within the European legal academia that focuses on whether the EC constitutes a constitutional order that conforms to the national constitutional models. The theme

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of the debate proved to be popular, yet perplexed, due to the gradual introduction of different parameters that constantly reposition the discussion. Therefore, the issue of whether the EU can have a constitution has been supplemented with questions pondering whether there is actually a need for such a constitution, whether there are alternative constitutional models that exist beyond the State paradigm and finally what is the relationship between different constitutional models that practically coexist in Europe.

Within the preceding analytical context, the task of a reporter on the emergence of a European constitutional law as perceived from the national level is bound to be performed in an idiosyncratic manner that reflects deeply rooted national constitutional theories. The crucial matter is to balance those pre-existing perceptions with the experiences gained from participating in the legal development of different supranational systems (EU and the ECHR) that operate in parallel with national legal orders.

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The starting point for reaching a balanced approach about European constitutionalism\textsuperscript{11} is the realisation that a stage of maturity has been reached enabling the acknowledgement of the realities of constitutional pluralism\textsuperscript{12} and constitutional coexistence in Europe.\textsuperscript{13} Our experience with the rather different English and UK constitution has helped to form the argument stating that it is time to consider whether the discussion about European constitutionalism needs modification.

The nature of the proposed alteration is founded on the idea that the discussion about the ontology of European constitutionalism is outdated and simplistic. For purposes of terminological clarity, ontology is defined as the discussion focusing on whether a post-national European constitutional law has emerged, either in the form of the EU or the ECHR or something broader. It is accepted that the ontological discussion operated as a bridge enabling the constitutional lawyer to move from the national side to the post-national side.\textsuperscript{14} The growing familiarity with both sides makes the exclusive projection of municipal constitutional stereotypes on our perceptions of supranational constitutional phenomena mono-dimensional. Therefore, it is submitted that the attention should turn beyond ontology and towards typology that is defined as the systematic study of types of constitutions that share functional characteristics.\textsuperscript{15}

From the perspective of typological analysis, the report concentrates on different types of constitutions in Europe that are united by the fact that they share that basic feature of being non-static and evolving.\textsuperscript{16} In American constitutional theory this characteristic has been accurately described as ‘living constitution’\textsuperscript{17} that implies the constant evolution of constitutional law in order to ensure its responsiveness to the altering social needs. From that starting point, it can be concluded that a second common characteristic is shared by European constitutions and it refers to the integral role of the judiciary construing constitutional texts and principles. Therefore, the judicial role can be perceived as that of a catalyst that maintains the living element of constitutions.


\textsuperscript{15} On functionality see Tsatsos, D., Die Europäische Unionsgrundordnung, 2002, at p. 29.


\textsuperscript{17} See Rehnquist, W., “The Notion of a Living Constitution,” (1976) 54 Tex. L. Rev. 693.
Addressed from the aforementioned perspective, the task of this paper is to offer an account of those constitutional developments taking place in the United Kingdom that have an impact on the perceptions about European constitutionalism. At the same time, the methodological approach is to reflect on those national constitutional developments based on the influence that European constitutional law has had on domestic constitutional law.

2. Different Types of Constitutions and Constitutional Essentials: A European Constitution and European Constitutional Law

2.1 The EU’s Constitution: A Ghost Constitution?

Much of the UK rapporteur’s work over the last fifteen years has centred on the emergence of European Public Law. The authors take this to mean the influence of European legal thought (EC, EU, CHR and ECHR) on domestic law. But the process works the other way. Domestic law can influence European law. This may then mean that European law, as influenced, can itself influence domestic systems so that separate domestic systems may influence legal development in other domestic systems. It is not likely to occur through direct influence of one domestic system on another domestic system, although there may be odd examples of this. Indeed, the great historian of the common law, Professor Plucknett, wrote about the European influence on the English Magna Carta. Clearly, droit administratif has had an enormous influence on systems of public law throughout Europe through invasion and conquest and further afield, but the likelihood today of such direct dramatic influence is less than likely. The opportunity for decisions in one jurisdiction to influence decisions on points of law in another is extremely limited. Rather, the analysis concentrates on the cross fertilisation of ideas and concepts. Compared with continental jurisdictions, English law (and one may add Scottish and Northern Irish law) is idiosyncratic. Public law involves both constitutional and administrative law in the English common law system. These fields are not as differentiated as they may be in some continental traditions. Public law itself is a recent addition to the lexicon of English law.

The concentration of European Public Law in its early years was on judicial principles of review and liability. The next development was on European influence on domestic constitutional law: specifically, to what extent was national constitutional law influenced by European legal orders? The approach remained fairly general: it is easy

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20 See e.g. R (Pretty) v DPP [2002] 1 AC 800 HL and Cf. with Pretty v UK (2002) 35 EHRR 1 (decision by ECtHR).
22 See for example the decision A-G v Ibrahim [1964] Cyprus L Rep 195 (Cyprus Supreme Court) and the therein extensive reliance on other jurisdictions and academic writings in relation to the doctrine of necessity in constitutional law.
23 See op. cit., note 14.
to exaggerate the claims for convergence, mutual influence and overspill, while it is also common to exaggerate the impenetrability of divergence.\textsuperscript{26}

The present questionnaire directs its attention towards a Constitution for Europe. It reasons that because the ECJ has referred to the Treaties as a constitution or a constitutional charter\textsuperscript{27} we now have a European constitution.\textsuperscript{28} The literature is replete with arguments to similar effect,\textsuperscript{29} while there are even examples of national courts accepting the constitutional character of the Community.\textsuperscript{30} Moreover, the ECHR and the jurisprudence of the ECtHR are further referred to as constitutional law.\textsuperscript{31} Nonetheless, these judicial statements attributing to their respective legal systems a constitutional status have been countered on the basis of a line of reasoning based on the ‘constitutional fundamentals’.\textsuperscript{32}

There is always a danger of falling into the traps of nominalism and essentialism here. A constitution may be described as the product of essentialism when it takes the form of one binding written document that is given special -usually a higher and entrenched - status within a legal system. Therefore, it has been argued that without such a document, no constitution can exist\textsuperscript{33} especially in the absence of a state entity and a people.\textsuperscript{34} On this basis, those constitutions that possess the fundamental elements, according to orthodox constitutional theory, of statehood, people and a written document, may be referred to as formal constitutions. A constitution may be accused of being the product of nominalism when it refers to laws, practices and conventions that are not in one document but which nonetheless represent basic standards of behaviour that are respected and followed by governments and actors within government to govern both their own relationships and those over whom they exercise their powers.
This is not a formal but a functional constitution. The latter may be referred to as a self referential constitution following the explanation offered by Neil MacCormick. What MacCormick means by this phrase is that one cannot look to a single document but one can glean what constitutional rules are by examining laws, conventions and practices that help to determine what should be done constitutionally. A set of rules exists, either legislative or precedent based, that establishes a sense of unity and fit and which guide and constrain the actions of officials such as judges or administrators in the governance of the institutions of government.

In the UK we have no constitution in the formal sense. But we nonetheless have a constitution -- a functional and self referential one. The reason for this is that in the UK, the following inherently constitutional questions would be resolved by an examination of legislation, precedent or convention. What happens if the Queen fails to assent to a Bill passed by Parliament? Or no one party achieves a majority in Parliament after an election? What happens if there is a clash between a directly effective EU Treaty provision and domestic legislation, or a clash between Westminster and Holyrood (Scottish Assembly) on matters of devolved government? In the UK we possess ways of dealing with such matters and coming to a legal and authoritative answer even though we possess no single written constitutional document. It would be preposterous to argue that we have no constitution in the UK. But locating its sources may require more patience than where it is contained in one single document. It may superficially appear messy but we know where to turn for authoritative and determinative answers. Conversely, many have pointed out that in a written constitution a great deal of constitutional practice and living law are not contained within the written document.

In this looser sense of a self referential constitution it may be argued that by analogy there is a European constitution for the EU as represented by the treaties and the acquis. But not every item within the treaties and acquis. A European constitution would cover those treaty articles and case law that deal with essential organisational, structural and relational arrangements. Further similarities to the British constitution reside in the fact that, like the British constitution, there is no developed separation of powers within the EU. It may also be seen that the ECJ has engaged in exercises akin to constitutional adjudication when it has given expression to the powers of the treaties which the treaties’ existence presupposes. A very recent example comes from case law where the ECJ decided that the EU has power under the first pillar to require MSs to establish criminal sanctions for breaches of EU requirements. As this competence was in the first pillar, it was unlawful to invoke the third pillar to make a Framework Directive in this area.

39 Case C-176/03, Commission v Council, [2005] All ER (D) 62.
More important in a way than written constitutions and unwritten constitutions is the question of constitutionalism - the concept that informs constitutions and which involves features such as institutional balance, separation of powers and personnel, control and accountability for the exercise of power in the process of governance, equality, liberty, protection of human rights, collective welfare. Our belief is that this concept underlies the real interest of this report. How is the question of collective power dealt with within an institutional framework?

It has been forcefully argued that we possess constitutional statutes in the UK (although the emphasis was English) that are of a higher order than ordinary statutes and this status has legal consequences.\(^\text{40}\) Justice Laws held that:

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.\(^\text{41}\)

Therefore, according to the ruling in *Thoburn* the European Communities Act 1972 is one such constitutional statute. The question of whether such measures enjoy a higher *legal* status is not conclusively decided yet. The judicial engagement on this question is an example of common law development. Although some statutes are clearly constitutional in nature and have long been accorded a special respect technically they were seen to be of no higher status legally than the Bees Act. Arguments that the Bill of Rights 1689 or Act of Settlement 1701 could be impliedly repealed by a later contradictory statute (a standard rule of statutory interpretation in English common law) would meet with short shrift because of the respect those measures command.\(^\text{42}\)

In the very recent House of Lords judgment in *Jackson*\(^\text{43}\) the question was asked whether Parliament could override the constitution by, for instance, abolishing the House of Lords without the consent of the Lords and specifically whether this could be done under the provisions of the Parliament Act 1911 as amended. This Act allowed bills to go forward for Royal assent even though the House of Lords had not agreed to the measure. The 1911 Act removed the veto power of the House of Lords. For present purposes, several of the judges had difficulty accepting that the pristine doctrine of Parliamentary sovereignty had not been modified by the realities of political and legal development. Parliamentary sovereignty means the sovereignty of the Crown in Parliament as a legislator; there is no superior legislator and no one Parliament can entrench laws binding on a future Parliament.

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\(^\text{40}\) *Thoburn v Sunderland City Council* [2002] 4 All ER 156, at para. 62.

\(^\text{41}\) Ibid.


\(^\text{43}\) *R (Jackson) v Attorney General* [2005] UKHL 56.
The former - the political development - refers to the fact that Parliament represents, most importantly the electorate as well as historically the other estates of the realm and must not abuse that representative position. The latter - the legal - had to take on board the membership of the EU where the ECJ had spelt out the implications of membership in several cases and where our sovereignty in relation to membership meant that Acts of Parliament were no longer inviolable where they clashed with Community law.\textsuperscript{44} Consistent with ECJ case law this modification of sovereignty would apply to those measures identified as constitutional within the UK.

Furthermore, our membership of the ECHR was not like any other traditional multi-lateral treaty, believed Lord Steyn in the same case who stated that the Convention had created “a new legal order”.\textsuperscript{45} Devolution of powers within the UK had probably modified the doctrine in terms of political reality. Sovereignty was a product of the common law. It was subject to judicial interpretation. On abuse of power through Parliament, Lord Steyn added: “It may be that such an issue would test the relative merits of strict legal with constitutional legal principle in the courts at the most fundamental level.”\textsuperscript{46} It was “[n]ot unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.”\textsuperscript{47} “Parliamentary sovereignty is no longer, if it ever was, absolute” said Lord Hope.\textsuperscript{48} The ‘English theory’ is being qualified. “The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.”\textsuperscript{49} The House of Lords differed from the Court of Appeal, however, insofar as the latter believed that constitutional bills seeking fundamental change could not be affected by the Parliament Act. Such bills would require the consent of both Houses, the Court of Appeal believed. The fluid nature of an unwritten common law constitution and how it can develop, quite profoundly, are both illustrated by this case.

The point is that neither the UK nor the EU contains a document that is formally described as a constitution. But the UK has a constitution, of that there is no doubt. To a British eye, the description of the EU treaties and acquis as a constitution may well appear little more surprising than the description of our own self referential experience as a constitution. The ECJ has also engaged in decision-making which is akin to the nature of constitutional decision-making. This is clear in its judgments in Costa v ENEL\textsuperscript{50} and Van Gend en Loos\textsuperscript{51} often referred to in the Marbury v Madison\textsuperscript{52} lineage of constitutional case law.

\textsuperscript{44} Factortame (No 2) [1991] 1 All ER 70 (ECJ & HL) and EOC v Secretary of State [1994] 1 All ER 910 (HL).
\textsuperscript{45} R (Jackson) v Attorney General [2005] UKHL 56, at para. 102.
\textsuperscript{46} Ibid., per Lord Steyn para. 101.
\textsuperscript{47} R (Jackson) v Attorney General [2005] UKHL 56, at para.102.
\textsuperscript{48} Ibid., at para. 104.
\textsuperscript{49} Ibid., per Lord Hope at para. 108.
\textsuperscript{50} Case 6/64, Costa v. ENEL [1964] ECR 585.
\textsuperscript{52} 5 US 137 (1803). 5 US 137 (Cranch).
Furthermore, we cannot speak with authority on what the experience has been on the continent but in the UK we refer to all sorts of rule-books setting out rules for an institution as ‘constitutions’. It is not restricted to the rules of state institutions’ behaviour and the term covers clubs, trade unions and private societies. However there is a clear dichotomy between those types of constitutions and constitutions of political bodies. In relation to the EU, the description of existing treaties as a constitution may well be received by those who are opposed to the expansion of i) the union or ii) the powers of the union, as a complete misnomer. It will assume an immediate spectre of a federal relationship within a federal state -- the very thing the DTC was at pains to avoid. Powers are conferred by the states and not by the Union, they will remind us.

In this wider sense a ‘constitution’ is a basic set of rules about governance and the institutions of governance within a society. That society does not have to be formally identified as a state. More usually constitution is the term used to identify the basic law of the state. It is generally a reasonably short and concise document. Different traditions may regard the expression more jealously and exclusively, as something which should only be used for the nation state. This seems unavoidably associated with nationalism or perhaps national consciousness and understandings of political concordats that are determined to embrace and encapsulate -- and give meaning to -- the state.

As an interim conclusion, the different objections raised by the supporters of orthodox constitutional theory aiming to establish that the EU does not have a constitution and could never have one on the basis of current arrangements, must be countered as outdated obsessions with rigidness and formalism. It is submitted that these arguments are rooted in the ontological reasoning and are heavily influenced by projections of national constitutional stereotypes on the understanding of constitutional theory. The key for balancing the traditional constitutional theories with the pragmatic existence of legal entities that do not fit in the state paradigm is to acknowledge the existence of types of constitutions that share certain basic characteristics. The functional approach is one component of the process of identification of those fundamental criteria that must be present in constitutional phenomena and it can be concluded that the EU clearly passes the functional yardstick. Moreover, the identification of the constitutional criteria extends beyond functionalism to include sources of legitimisation and elements of origins of the legal system under scrutiny. In other words, the fact that a legal system provides for the organisation, distribution and legal scrutiny of powers is not a conclusive piece of evidence that the system is a constitutional one. What is also needed is an interpretation of the essence of that system that points to the existence of a prevailing element of legitimacy associated with constitutions. In other words, the legal system needs to be, and needs to be seen to be, legitimate in the sense that it is associated with national expressions of the fundamental principle of the Rule of Law. Therefore, in terms of legitimisation what is the main rule of recognition for a constitution is whether it can be perceived to be establishing a Rechtsstaat or a system under the Rule of Law.

54 Supra, note 34.
2.2 The Draft Constitution: A Treaty, a Constitution or Both?

We turn now to the Draft Treaty establishing a Constitution for Europe (DTC) and whether it provides support for the argument that the Union has a constitution that is going to be strengthened when the DTC is ratified. The question of a constitution for Europe was deferred when the French and Dutch rejected the draft EU Constitution in the spring of 2005. Many commentators believe that the term constitution was misplaced in that document. That it was not a constitution but a treaty, they argue, as witness the fact that it had to be formally agreed by all member states of the union unlike a constitution which normally is agreed by a majority of constituent parties or bodies. The remark has been made that had the term constitution not been used in the DTC the chances of approval in France and Netherlands would have improved immeasurably. We leave others to comment.

In a way it is possible to argue that the rejection by two member states of the DTC and the period of reflection that has been forced upon the Union has weakened the case for referring to the existing treaties as a constitution and to its laws, and the case law of the ECJ, as constitutional law. If we needed to agree a ‘constitution’ then can it be said that we have one now? This is clear from the fact that the DTC spelt out relationships of a constitutional nature between the Union and MSs according to the principles of conferral of powers, subsidiarity and proportionality. Powers and their divisions were set out reasonably coherently; the law-making processes were clarified and simplified. The legal structure of the Union was simplified. The institutions were all spelt out as legal entities including the European Council, the existence and present operation of which bore some striking similarities to the UK Cabinet in its informality and complete lack of legal or formal constitutional recognition/identity. Many of the aims and objectives (rhetoric as some would have it) in Part I of the DTC can be found in the TEU Title I and Part I of Title II but legal primacy is established by the DTC (Art I-5a). Fundamental rights are recognised in Part I (Art I-7). This provides for recognition of the rights in Part II under the EU Charter for Fundamental Rights (CFR) incorporated as fully binding rights within the EU. Furthermore, the DTC must seek accession to the ECHR binding its institutions to the Convention and the CFR within international law. Fundamental rights, as guaranteed by the ECHR and ‘as they result from the constitutional traditions common to the MSs, shall constitute general principles of the Union’s law.’ (I-7(3)) Part II of the DTC includes the EU Charter of Fundamental Rights— a much broader framework for rights than in the ECHR. Access to justice, both within the EU courts and member state courts is addressed in Parts I and II as constitutional and fundamental rights. Finally, as well as matters relating to the budget, Freedom, Security and Justice and foreign affairs and defence policy, the

democratic life of the Union is addressed in Part I and includes transparency and openness within its provisions. These are also contained within Part II as fundamental rights and also within Part III. Under the treaties, human rights have had a chequered history within the EC/EU. The story is well known and need not be repeated. The position of such rights would be immeasurably strengthened by the EU constitution and the EU Charter of Fundamental Rights.

We make a personal statement. The DTC strengthened the case for constitutionalism and the rule of law within the EU. The existing provisions pale by comparison. The DTC builds significantly upon the existing edifice and adds considerably to it. In addition to the features in the preceding paragraph, consider the DTC’s protocols on the role of national parliaments and on subsidiarity and proportionality. A significant development is inevitable, given that the present structures are fifty years old, have developed from an economic community with limited aspirations and have acquired an ever increasing range of competences incrementally and sometimes haphazardly. The structure has many -- but not all -- the powers of a nation state. It is a surprise that the EC/EU has been as successful as it has. Nonetheless, to call the existing treaties a constitutional charter creating a self referential body of constitutional law is understandable.

We mention objections to the DTC very briefly. That it is badly drafted – that is a matter of opinion. That it is far too large and cumbersome—there is something in this, perhaps. Should Part III be within the constitution. These are the operative laws of the Union; they are subservient within the framework of the constitution. Free-marketeers would like to see a huge evisceration of everything that is not economic -- assuming one can limit ‘economic’ in that fashion. How feasible, one might ask, is that? The objective of such individuals is to remove all that would denote a constitution; but to repeat, the seeds of much of the EU’s constitution are in the existing treaties.

Moreover, if the DTC is approached from the perspective of the debate examining whether it establishes a constitution (ontological discussion), the same indeterminacy that characterises the comparable discussion about the Treaty structure would be present. The issues of legitimisation and of the sources of that legitimacy would be exactly the same, even if the process of ratification through referenda in some member States could partly counter the traditional theory’s argument of pouvoir constituent originaire. The added complication in relation to the DTC is to be found in the chosen title that triggers the question whether the document is a Treaty or a Constitution. The proponents of the orthodox constitutional theory that supported the view that the existing system does not qualify as a constitution and the supporters of the opposite view, would maintain their claims in relation to the DTC. The submission is that the DTC is just another type of a constitution (typological discussion) because it contains undeniable functional constitutional elements and the necessary legitimacy in the form of the Rule of Law. It could be seen as exactly what its title states: both a Treaty and a

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Constitution because both terms and their features are present but without having a mutually exclusive effect. Finally, if the title is the problem, one can refer to the German constitution that is labelled the Basic Law (Grundgesetz) and not constitution (Verfassung); is there anyone who can justifiably claim that it is not a constitution?

3. The ECHR as a Constitution: Constitutional Exaggeration or Just Another Type?

The Strasbourg court and the Convention would not in traditional terms be regarded as a constitution or constitutional court. Contrariwise, the ECtHR has described the Convention’s role as a ‘constitutional instrument of European public order’. The Convention and the jurisprudence would be regarded as an internationally accepted bench-mark of standards on human rights protection. They are stated to march ‘hand in hand’ with the rights on civil and political matters within the common law and they echo back to Magna Carta officials are quick to claim. The British are very quick to assert a profound influence on the ECHR. But all of these benedictions could not conceal the fact that there was often deep resentment to the decisions of the ECtHR by government and by judges within the UK. More recently Lord Steyn described the ECHR as creating a new legal order, language reminiscent of the ECJ and the EC in its famous jurisprudence.

Within the UK the dialogue with the Convention has been dominated by the incorporation of the Convention within UK laws under the terms of the HRA 1998. The ECHR itself is not a part of our domestic law but remains a part of our international obligations. The HRA does not incorporate the whole of the Convention but it does incorporate the major rights’ provisions. Breaches of Convention rights by public authorities (or those exercising functions of a public nature) are unlawful leading to remedies within domestic law. This has led to some interesting case law concerning the effect of convention rights under the HRA and their relation to other norms of international law. But the impact of the HRA and convention rights is determined by the constitutional constraints and restraints of the UK.

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Convention rights are those set out in s.1 and Sched 1. The Act under section 2 makes it unlawful for public authorities to act in a way which is incompatible with the ‘Convention rights’ as scheduled. Under section 3 (1) HRA 1998 when determining any question in relation to a Convention right, the domestic court ‘must take into account’ any jurisprudence of the ECtHR (and decisions or opinions of the former Commission and the Committee of Ministers). The instruction is to take it into account -- not to regard it as binding. 69 ‘Public authorities’ is defined widely in section 6 to include all agents of central and local government and the police, while the definition includes courts and tribunals themselves. This is very important where those bodies fail to protect human rights and in the case of Articles 8 and 10 ECHR has been responsible for the courts applying the articles horizontally between private parties, i.e. the press and individuals. 70 The question of human rights law may be raised in any court. The Government preferred the rights to be invoked as they arose ‘rather than confining their consideration to some kind of constitutional court’. This was because there was no constitutional court as such.

The Constitutional Reform Act 2005 has now established a “Supreme Court” which will replace the Appellate Committee of the House of Lords. There has been a trend towards a more law based constitution in the UK and the 2005 Act is the latest example.

If an individual wishes to bring a breach of a Convention right directly to the courts, s/he will be able to do so; it creates a discrete right of action. Where Convention points are raised on judicial review applications, locus standi will have to be established. The test of standing in all cases is whether the person seeking relief is a ‘victim’ of a breach of a convention right. 71 Courts or tribunals will be able to award whatever remedies lie within their normal powers: crucially here in the case of the courts damages and awards of injunctions, but breaches of convention rights will not be criminal offences. 72 Awards of damages on Convention grounds will take account of principles developed by the ECtHR in awarding compensation so that domestic awards will be ‘equivalent’. 73

The HRA does not allow courts to set aside acts of Parliament where there is a breach of the Convention by a legislative provision, either in primary or secondary legislation. The Consultation Paper on a new Supreme Court in 2003 clearly distinguished the jurisdiction of the proposed new UK Supreme Court from the powers of the US Supreme Court and the German Federal Constitutional Court. 74 Higher courts will be able to make a ‘formal declaration’ that a provision in a statute is incompatible with Convention rights under section 4. In Ghaidan v Mendoza Lord Steyn noted that fifteen declarations of incompatibility had been awarded although five had been overturned on appeal. 75 The number is now seventeen. Their subject matter has very often been of the highest importance. One of the most dramatic concerned the declaration by the House


70 Douglas v Hello! Ltd (No. 1) [2001] 2 All E.R. 289 (CA); Campbell v Mirror Group Newspapers Ltd [2004] 2 All E.R. 995(HL).

71 Under section 7 HRA 1998.

72 Under section 8 HRA 1998.

73 This has prompted a great deal of discussion. See e.g. R v Secretary of State for the Home Department ex p Greenfield [2005] UKHL 14.

74 Constitutional Reform: “A Supreme Court for the United Kingdom”, CP11/03 (July 2003), para 20.

of Lords in December 2004 that the derogation and provisions allowing detention without trial of foreign nationals who were certified as being suspected by the Secretary of State of being terrorists under the Anti-terrorism, Crime and Security Act 2001 section 23 were incompatible with Convention rights. The measures were disproportionate and discriminatory. Specifically, they were in breach of Arts 5 and 14 ECHR.76 To the argument of the Attorney General on behalf of the government that the judges were acting contrary to the exigencies of democratic government, Lord Bingham said ‘The 1998 Act gives the courts a very specific, wholly democratic, mandate.’77 No direct effect will be given to Convention rights over domestic laws as in the case of the EU and the ECHR as incorporated by the HRA will not be entrenched. Under section 3 legislation will be interpreted so as to be compatible with the Convention ‘so far as possible to do so’. If compatibility is clearly impossible, then consistent interpretation cannot be achieved and a statute’s meaning must not be distorted.78 But where more than one interpretation is possible, the interpretation which is consistent with the Convention should be adopted. This rule of construction, which applies to past and future legislation, has been used with extraordinary flexibility by the courts.79

The reason why the Government did not wish to give a power to the judiciary to strike down primary legislation was because the government wished to maintain the overarching practice and theory of Parliamentary Sovereignty:

To make provision in the Bill for the courts to set aside Acts of Parliament would confer on the judiciary a general power over the decisions of Parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with Parliament. There is no evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this Government has no mandate for any such change.80

The HRA allows for a ‘fast track’ procedure in section 10 and schedule 2 to amend legislation by Order approved by both Houses to ensure it conforms with the Human Rights Act as enacted. Where there is a case of emergency then both Houses will be notified but they do not give its approval. By this means Parliamentary Sovereignty is maintained.

Acts of the Scottish Assembly will have to conform with the Convention otherwise they will be incompetent and invalid; disputes will be referred to the Judicial Committee of the Privy Council where the matter is not resolved by Scottish courts and draft bills of the Scottish Parliament may be referred to the Privy Council for preliminary rulings on compliance with the Convention as well as EU law. In future they will go to the new Supreme Court. One court and not two will deal with devolution matters.81

Ministers must provide a statement on Bills presented to the UK Parliament stating that the Bill complies with obligations under the Convention. Where this might not be possible, Ministers would explain the position in Parliamentary proceedings of the Bill.

76 A (FC) and Others (FC) v Secretary of State [2004] UKHL 56. There was also a violation of Art 15.
77 Ibid., at para. 42.
78 Wilson v First County Trust [2001] 3 All ER 229.
79 See eg R v A No 2 [2001] UKHL 25.
80 Bringing Rights Home White Paper Cm 3782 para. 2.13.
Guidance on compliance with the Human Rights Act obligations will be revised to assist departments and drafters of Bills and regulations on the Convention’s requirements. There was a delay in the HRA coming into effect for two years while all UK judges at every level underwent human rights training. The HRA is within the responsibility of the Department for Constitutional Affairs which is headed by the Lord Chancellor.\textsuperscript{82} The Act makes provision for derogations and reservations from the Convention and its Protocols.

In the 1997 White Paper the Government explained why the model of incorporation introduced by section 2(1) European Communities Act 1972 (ECA) was not going to be employed. ECA was the product of a treaty requirement involving membership of the then EEC under which Member States must ‘give priority to directly effective EC law in their own legal systems.’\textsuperscript{83} The government emphasised the problems experienced with the ECHR. There was considerable delay. The ‘foreign’ quality of the ECHR was also emphasised in so far as its provisions were not enforced through British courts. More constructively, the government indicated that incorporation would confer a distinct benefit. The HRA would enable British judges to ‘make a distinctively British contribution to the development of the human rights of Europe’.\textsuperscript{84} It may even come to pass that their example of human rights jurisprudence may be drawn upon and followed by other judges in other jurisdictions. The influence of the House of Lords judgment in what became \textit{Pretty v UK}\textsuperscript{85} has been openly acknowledged by the Irish judge on the ECtHR. There is ample evidence to show that the Charter of Fundamental Rights has been used by English and other MS courts to influence, not dictate, domestic decisions.\textsuperscript{86} The Government accepted that the manner in which the Convention had been treated by UK laws in the past had not afforded appropriate emphasis to the contribution it should make in protecting human rights.

The HRA has invigorated the human rights debate in the UK. But incorporation has not been without critics who have argued that the HRA will encourage the judges to move into the overtly political arena and has encouraged them to pronounce political decisions on controversial subjects as if they were elected. Lord Bingham’s comments were referred to above. The Act was given by Parliament and provides a legitimate and proper role for judicial protection of human rights in a democratic framework. It has strengthened the judicial role in an enterprise in which Parliament and the government also have vital roles to perform. Stories of the HRA’s excesses in protecting the worthless, the self-centred, the querulous abound in the anti European press. In 2006 David Cameron, the Leader of the Opposition, spoke of a review of the HRA 1998 if he came to power and the adoption of a new Bill of Rights that would be reflective of the values of the British people similar to the manner the German Basic Law reflects national values.\textsuperscript{87} Nonetheless, repeal of the measure would probably prove virtually

\textsuperscript{82} This department, to all intents and purposes, is a Ministry of Justice.
\textsuperscript{83} Para 2.12.
\textsuperscript{84} WP para. 1.14.
\textsuperscript{85} (2002) EHR 1.
\textsuperscript{86} See e.g. \textit{R v Secretary of State HD ex p Howard League} [2002] EWHC (Admin) 2497.
\textsuperscript{87} Morris, N., “Cameron Pledges to Scrap the Human Rights Act in Constitutional Review”, \textit{The Independent}, 26\textsuperscript{th} June 2006, p. 26, available at <http://news.independent.co.uk/uk/politics/article1096457.ece>. Cameron’s analysis was criticised by German lawyers for inaccuracy.
impossible. And British judges under European influence have developed a human rights consciousness. The jurisprudence has become a part of the common law.\textsuperscript{88}

The Convention, it is argued, is unlike any traditional multi-lateral international treaty where governments’ agree to respect human rights. The most recent suggestion concerning such treaties arose in relation to agreements between the UK and receiving states who undertook not to torture or subject to inhumane treatment those deported by the UK to those states. This was to circumvent the limitations imposed by Art 3 ECHR -- limitations which the UK government in its war on terror virulently opposes. The ECHR gives rights to individuals although states have to agree to individual rights of petition. But as Lord Steyn implies, the Convention by itself, remained a part of our international obligations. The UK traditionally has a fairly rigid approach to international law based on dualism. But the rigidity of this approach is subject to change. By itself, the Convention would set an impressive and international standard of human rights protection which had an influence on British public life and governance, an influence that was increasing and considerably so. The UK government would not wish to be seen in open defiance of the ECtHR’s rulings. But these rulings were not binding on UK judges. They were having an increasing influence on judicial decision-making; and legislation increasingly had to introduce necessary reforms in e.g. privacy protection and judicial protection under the ECHR’s influence. Before 2000, there were increasing signs that the common law was developing a human rights consciousness where new common law philosophy was inspiring a greater sensitivity to human rights.\textsuperscript{89} Signs of this come from the 1980s as we have indicated above.

But without any doubt it was the incorporation of the Convention by the Human Rights Act 1998 that cemented the Convention as a part of the UK’s functioning constitution. How the Act is interpreted, has been outlined above. The Act has helped to develop that dialogue between domestic judges and judges of the CHR. In developing the jurisprudence of the Convention in a British context the courts at first were anxious to give a British patina to the rights.\textsuperscript{90} The case law of Strasbourg is not, as shown above, strictly binding on British judges. Nonetheless, British courts should, ‘in the absence of some special circumstances, follow any clear and constant judgments’ of the ECtHR.\textsuperscript{91} More recently the courts have stated that the ECHR is an international instrument the correct interpretation of which can only be expounded by the Strasbourg court:\textsuperscript{92}

\begin{quote}
It is of course open to MSs to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.\textsuperscript{93}
\end{quote}

\textsuperscript{88} The ECHR has also been incorporated into Irish law by statute but Irish commentators are not as impressed by the incorporation as are UK lawyers in the case of the UK. One of the reasons for this is because the rights in the ECHR are in the Irish constitution and this gives individual rights in the event of breaches: \textit{JM Kelly The Irish Constitution} 4\textsuperscript{th} ed 2003 eds G Hogan and G Whyte.

\textsuperscript{89} \textit{Derbyshire CC v Sunday Times} [1993] AC 534; \textit{ex p Leech} [1993] 4 549; \textit{Simms} [1999] 3 All ER 400.

\textsuperscript{90} \textit{Saadi} [2001] 4 All ER 961 para 36; \textit{R (ProLife Alliance) v BBC} [2002] 756 paras 33-34.


\textsuperscript{92} \textit{R (Ullah) v Special Adjudicator etc} [2004] UKHL 26 para 20 per Lord Bingham

\textsuperscript{93} \textit{Ibid.}
In formulating its decisions the ECtHR considers ‘the spectrum of attitudes across the contracting states in order to determine the contemporary content of rights under the Convention.’\(^{94}\) The House of Lords disagreed with the Court of Appeal and in the absence of special circumstances cultural differences should not allow a variation in protection under Art 8(1) as the latter had suggested. According to Lord Steyn, such differences may be relevant for objective justification for interference by the state under Art 8(2) with the right.\(^{95}\) However, although the House of Lords has followed the lead of the ECtHR on questions such as the nature of a ‘public body’ which may be the perpetrator of a breach under the Convention, more elastic interpretations may be given in the future when government is effected more pervasively by private contractors.\(^{96}\) There may be differences in approach on items such as the fairness of procedures and protection under Art 6 where the common law may take a broader view of the nature of rights that need to be protected by fair procedure than would the ECtHR in interpreting ‘civil rights and obligations’.

This reasoning constitutes a clear statement of the central position that the ECtHR is seen to possess under the terms of incorporation. It is achieved not through obedience but rather by compliance. It is not hierarchical but cooperative. To that extent it has constitutionalised the position of the ECtHR and its jurisprudence. One must repeat, that while the ECtHR and its judges have influenced the manner in which UK judges determine substantive rights under the HRA 1998 and the Convention, there has also been an influence exercised by British judges over the Strasbourg judiciary.\(^{97}\)

We believe there is an emergent European constitutionalism and the argument has been supported elsewhere.\(^{98}\) The concept of human rights is taking an increasingly European dimension and would be assisted enormously by the acceptance of the DTC and the Charter of Fundamental Rights. The concept of the ‘Rule of Law’ must be treated with caution. It means different things in different traditions. In the common law world, for instance, the American tradition has no place for the supremacy of ordinary law. That resides in the constitution. In the English tradition the constitution comes from the law and from the rights of individuals guaranteed by independent courts. This used to be seen as a way of privatising the constitution -- of arguing that the constitution was based on private law concepts rooted in property and liberty. But the common law has changed, not least through European influence, and this influence has enhanced legal and constitutional sensitivities. Norms of constitutionality inform the common law under the influence of more than thirty years of judicial decision making and statutes such as the Human Rights Act, and the devolution legislation. There is a more robust protection against government abuses and a greater substantive content to the rule of law. But the English lawyer’s rule of law may not be the same as État de Droit or the Rechtsstaatlichkeit to French or German lawyers. Nonetheless, the ECtHR can be seen as forming a different type of constitution that is mono-dimensional, contained and limited. The main problems are in effect functional since the ECHR is focusing solely on the protection of human rights thus not covering the matters of division of powers, while the enforcement element at the Convention level is weaker than at the EU level. On the other hand, it can be argued that the focus on human rights alone has a spill-over

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\(^{95}\) Per Lord Steyn op. cit. note 36 para 27.  
\(^{96}\) \textit{Aston Cantlow etc v Wallbank} [2003] 3 All ER 1213 (HL).  
\(^{97}\) Most famously in the area of public liability for fault and Arts 6, 3 and to a lesser extent 8.  
\(^{98}\) See note 16 above.
effect in the sense that the standards established through the Convention and the ECtHR’s jurisprudence have practical repercussions for the organisational operation of a State. Therefore, there a an indirect fulfilment of that functionality element, while there is no doubt that the process of standard setting by the ECtHR corresponds to the legitimisation element and the Rule of Law component of a constitution. It is submitted that the ECtHR is forming a different type of constitution, albeit thin and thematically self-limited, that must not be compared with national or post-national constitutions; its role is partly complementary and partly autonomous.

4. The Relationship between Types of Constitutions in the UK

In a loose sense one could address the Treaty of the European Community as a constitution. This has been alluded to already. But it would meet with the objections already discussed. The term constitution would signify for some an unacceptable notion of supremacy in a supranational entity. Nations never signed up to a superior constitution. However, if the federalist tendencies in the term supranational constitution were exposed as exaggerated, or false, then a constitution would be an appropriate expression for parts of the existing Treaties. This would cover those parts contained in Title I, Parts I and II of Title II and those parts dealing with institutions and some of the provisions in Part VI, the Protocols on subsidiarity and proportionality and national parliaments. Parts of Titles V and VI would fall within international affairs and security and could fall within constitutional law, even though not legally binding within domestic systems. But, it appears somewhat chaotic or messy from a constitutional perspective: a constitution of bits and pieces.

But whether it would be correct to describe the law of the EC as constitutional law is another matter. If confined to the areas that might be called a ‘constitution’ as above, because it covers basic constitutional subjects, then logically such a description would be proper. If used to include case law that develops EC principles then this would be in the form of a self referential exercise described above. Much of the law in the treaties has nothing to do with constitutional matters. By this it is meant institutional relationships, or Union/member state relationship, or Union citizen relationship. Is anything gained by referring to trade law, or competition law or Environmental law as constitutional? If one is not careful one will be in the position as once described in the UK: everything that happens is constitutional and even when nothing happens that also is constitutional. The Charter on Fundamental Rights is not presently a legally binding document and one has to look to case law to establish human rights and their protection. Even then, the protection is qualified and has often been criticised by commentators as tepid compared with the ECtHR in Strasbourg. Human rights have not been treated as things of overriding significance and are respected to the extent that they do not remove

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the fundamental basic freedoms on which the Union is based.100 The ECJ was reluctant to refer to the ECtHR and its judgments even after it referred to the Convention. This criticism is looking a little dated. Now the “ECJ refers extensively to Convention provisions and to [the ECtHR’s] jurisprudence,”101 while recently the ECJ made its first reference to the EU Charter of Fundamental rights in Parliament v Council.102 There have been crucial differences in detail in the treatment of rights by the ECJ and ECtHR but the overall relationship is one of cooperation. It could be no other.

To sum up in the experience of our domestic legal development in the UK, there are three levels of constitutional law: European, national and possibly regional. The latter has emerged with devolution within the UK. There is a context of constitutional pluralism to borrow a well worn phrase. Union law takes primacy even over constitutional law where the measures of constitutional law fall within accepted Union competence. But that leaves much of national constitutional law untouched. The argument from Thoburn is that it also leaves untouched that part of national UK constitutional law that gives the Union its primacy or supremacy, namely Parliamentary Sovereignty.

What is novel in Thoburn, and controversial, is the differentiation in legal status of statutes; that constitutional measures are of a higher order legally than other measures. They are recognised by ‘our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided.’103 There is, Sir John claims, a ‘hierarchy of statutes’ and constitutional measures are those which ‘condition the legal relationship between citizen and state in some general overarching manner’ or which enlarge or diminish the scope of what we would now regard as fundamental constitutional rights’.104 Sir John produced a fourfold argument: Community law is incorporated by the ECA and is ‘supreme’; the ECA is a constitutional statute as explained above; it is so by virtue of English law (sic) and the common law recognises a category of constitutional statutes; the fundamental legal basis of the UK’s relationship with the EU rests with the domestic not the European legal powers. The matrix of that relationship, as it were, is common law, and the common law defines ultimate sovereignty, and again according to Sir John, places limits on that sovereignty:

In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law … I consider that the balance struck by [the fourfold argument above] gives full weight both to the proper supremacy of Community law and to the proper supremacy of the United Kingdom Parliament. By the former I mean the supremacy of substantive community law’ and by the latter ‘the supremacy of the legal foundation within which those substantive provisions enjoy their primacy. If this

102 Case C-540/03, Parliament v Council, at para. 38.
103 Thoburn at para 60.
104 Thoburn at para 62.
balance is properly understood, it will be seen that these two supremacies are in harmony and not in conflict.\textsuperscript{105}

We have then multi-layered constitutions the relationship between which is constantly evolving and adapting to mutual accommodation. The \textit{Bosphorus} decision on the ‘equivalent’ and ‘comparable’ protection of human rights under EU law and under the Convention is a striking example of that cooperation between courts.\textsuperscript{106} \textit{Comparable not identical} was the key. ‘Any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in human rights protection.’ The presumption could be rebutted if protection of human rights within the EU proved ‘manifestly deficient’. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a “constitutional instruments of European public order” in the field of human rights.\textsuperscript{107} The statement is analogous to that made in the case of \textit{Loizidou v Turkey}\textsuperscript{108} and it creates the same situation as the ECJ’s judgment in \textit{Les Verts}: the court declaring the system that it serves has constitutional status, thus focusing attention on the accuracy of that point.

We end with a reference to the future. The accommodation and dialogue achieved by the preliminary reference procedure and the ECJ and CFI’s relationship with the ECtHR and national courts is likely to be continued in the operation of DTC Arts I-7, I-28(1) second line, II-51(1),(3),(4) and (6), II-53, III-337(ii) and (iii). Furthermore, the fear of a strict hierarchical division brought about by the judgment in \textit{Costa v ENEL} in which transfers of sovereignty involved ‘a permanent limitation of sovereign rights’ in areas subject to the transfer must be seen in the light of the right to withdraw from the Union in Art I-59.

\textsuperscript{105} Thoburn at para 70.
\textsuperscript{107} \textit{Bosphorus Hava Yollari Turizm v Ireland} (2006) 42 EHRR 1, at para. 156.

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5. The ‘New’ Phenomenon of European Constitutionalism: Concluding Comments

The realisation of the realities of constitutional pluralism\textsuperscript{109} and constitutional coexistence in Europe\textsuperscript{110} leads to the question whether it is time to consider that the discussion about European constitutionalism needs modification. The methodological approach of this paper has been structured on the idea that the attention should turn beyond ontology and towards typology, i.e. the systematic study of types of constitutions that share functional characteristics.\textsuperscript{111} From the perspective of typological analysis, the report concentrates on different types of constitutions in Europe that share the following characteristics: living/evolving constitutions, with the judiciary performing an integral role in ensuring the responsiveness of constitutions, with certain basic functional characteristics and the necessary legitimising element of operating under the Rule of Law.

Certain preliminary observations can be made about the different types of constitutions. Firstly, all the different types of constitutions are not autonomous, since a process of constitutional blending is in operation and it is in this way that constitutionalism is defined and refined.\textsuperscript{112} Within the process of blending of constitutions, which we describe as the process of European Public Law (EPL),\textsuperscript{113} a constant exchange of influences between the different types of constitutions takes place and is evident at a macro level that observes systems as a whole and at the micro level of examining the development of specific legal principles.\textsuperscript{114} Secondly, there is a constitutional spectrum comprised by different constitutional shades and formed through the process of constitutionalism. Therefore, the European constitutional spectrum is created by a state of synergy where the final item is greater than the sum of the individual constituent parts.

The European constitutional spectrum has certain essential characteristics. The main feature is the exchange of influences that in the United Kingdom has been identifiable in recent years in a number of fields.\textsuperscript{115} For instance, the decisions in Jackson\textsuperscript{116}


\textsuperscript{111}On functionality see Tsatsos, D., Die Europäische Unionsgrundordnung, 2002, at p. 29.


\textsuperscript{113}Birkinshaw, op. cit., note 10, at pp. 3-4.

\textsuperscript{114}Birkinshaw, op. cit., note 10, at pp. 327-71.

Thoburn illustrate a turn in the judicial approach that is now willing to consider subjecting statutes to the demanding scrutiny of constitutional review and to elaborate on the theoretical foundations that could underpin it, while at the same time the emphasis is placed on the rule of law as the underlying value of the constitutional theory. In the past, the development of a constitutional theory by judges was simply a matter of understanding a mechanical constitution, but with the introduction of the Human Rights Act 1998 and the cases that followed, there is a shift in the judicial reasoning towards the creation of an articulated justification for scrutinising governmental action. However, it must be noted that despite the apparent change in the judicial mentality and approach, there are still constraints imposed by the basic rules of the common law system. In the recent case of Leeds City Council v Price the issue was whether the Court of Appeal had to follow in accordance with precedent the decision of the House of Lords in Harrow London Borough Council v Qazi that was in direct conflict with the jurisprudence of the ECtHR concerning property/possession claims as explained in Connors v UK. A seven-member appellate committee of the House of Lords agreeing with Lord Bingham on this point further endorsed Leeds’ submission that lower courts remain bound by domestic authority notwithstanding later ECtHR decisions which appear to conflict with that authority. It was stated that the ECtHR accords a margin of appreciation to national courts to decide the manner in which the principles of the Convention are to be applied domestically and “It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply”. Therefore, the changes in judicial approach that can be partly attributed to the European influence have taken place within the existing constitutional framework and subject to its basic constraints.

116 R (Jackson) v Attorney General [2005] UKHL 56.
117 Thoburn v Sunderland City Council [2002] 4 All ER 156.
120 See for example R. v DPP Ex p. Kebilene [2000] 2 A.C. 326 (on reversal of burden of proof); R v Lambert [2001] 3 All ER 577 (consistent interpretation); R (H) v Mental Health Review Tribunal [2002] QB 1 (burden of proof on patient in breach of Art. 5 ECHR);Wilson v First County Trust [2001] 3 All ER 229 (limits of interpretative obligation); Daly [2001] 3 All ER 433 (correspondence control and cell searches are anxiously scrutinised by courts); R. (on the application of Mahmood (Amjad)) v Secretary of State for the HD [2001] 1 W.L.R. 840 (interference with fundamental rights requires a higher degree of scrutiny and justification); Farrukhan [2002] Q.B. 1391(on freedom of expression and protection of public order); Ex p. Rehman [1999] WL 477367 (on access to legal aid); Venables v News Group Newspapers Ltd [2001] H.R.L.R. 19 (freedom of expression against right to life).
121 R v. Secretary of State for the Home Department, ex parte Daly [2001] UKHL 26; A v Secretary of State for the Home Department [2004] UKHL 56; A v SSHD (No 2) (HL) [2005] 3 WLR 1249.
On this basis, there is a surfacing of common principles at the micro level of constitutionalism that is founded on the rule of law and human dignity. The human rights cases in the English context are evidence of that and are developed in parallel with similar approaches at the Union level as the decision in \textit{Omega} illustrates.\footnote{Kombos, C., “Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity”, (2006) 12 (3) \textit{EPL} 433.} In addition, the process of influencing is evidently multidirectional since there is the example of the \textit{Pretty}\footnote{\textit{R (Pretty) v DPP} [2002] 1 AC 800 HL and Cf. with \textit{Pretty v UK} (2002) 35 \textit{EHRR} 1 (decision by \textit{ECtHR}).} decision operating as the guide for the \textit{ECtHR} in relation to the right to die. Finally, there are also important diverging elements within European constitutionalism that provide elasticity and control tension, thus operating as safeguards of the system that is in effect endothermic in the sense that conflicts are constructive and useful as long as they remain controlled. Examples of such controlled tension can be found in the areas of supremacy of EC law,\footnote{See Kumm, M., “Who is the Arbiter of Constitutionality in Europe?”, (1999) 36 \textit{CMLRev.} 351; De Witte, B., “Direct Effect, Supremacy and the Nature of the Legal Order”, in Craig, P. and De Burca, G., (ed.), \textit{The Evolution of EU Law} (Oxford: OUP, 1999), p. 177.} Kompetenz-Kompetenz\footnote{Herdegen, M., “Maastricht and the German Constitutional Court: Constitutional Restraints for an Ever Closer Union”, (1994) 31 \textit{CMLRev.} 235; Weiler, J., “The Reformulation of German Constitutionalism”, (1997) 35 \textit{JCMS} 597; Reich, N., “Judge- Made ‘Europe à la Carte’: Some Remarks on Recent Conflicts between European and German Constitutional Law”, (1996) 7 \textit{EJIL} 103; Elbers, U. and Urban, N., “The Order of the German Federal Constitutional Court of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System”, (2001) 7 \textit{EPL} 21.} and the diverging meanings of human dignity in different legal systems that warrant the application of a margin of appreciation.\footnote{Harlow, C., “Voices of Difference in a Plural Community”, in Beaumont, P., Lyons, C. and Walker, N. (eds.), \textit{Convergence and Divergence in European Public Law}, (Oxford; Hart, 2002), p. 199; Birkinshaw, \textit{op. cit.}, note 10, at pp. 7-26.}

Therefore, the process of constitutionalism that creates the constitutional spectrum that incorporates different types of constitutions has both diverging and converging effects, with the significance of both being of equal weight for the system. Moreover, it must be stated that the stepping stone for the preceding analysis is the realisation of the limits of the ontological discussion and of the advantages of the typological analysis. In other words, in the quest for understanding the nature of European constitutionalism it is essential to consider that system a paradigm of constitutional polymorphism. On this basis, it is submitted that the theme of the session titled ‘the emergence of a European constitutional law’ could be more inclusive and challenging if it is approached in terms of ‘the emergence of European constitutional laws’.