CONSTITUTIONAL STATUTES – ROOTS AND RECOGNITION

Sir John Laws, the originator of the principle of constitutional statutes, suggests that the protection accorded to them has its roots in the protection from implied repeal given to the European Communities Act 1972 and to constitutional fundamentals. We argue that this suggestion is more convincing with regard to the latter than it is with the former. Further, we contend that founding constitutional statutes on the protection afforded to constitutional fundamentals rather than the 1972 Act may provide a stronger basis for the principle of such statutes if the UK leaves the European Union. We then provide evidence that the idea of constitutional statutes has been accepted across the three arms of state and argue that, as a consequence, the rule of recognition may be taken to have changed to encompass the amendment to the implied repeal rule that such statutes represent.

1. INTRODUCTION

The claim that there is a category of constitutional statutes protected from implied amendment was first made by Laws LJ (Sir John Laws) in *Thoburn v Sunderland CC*.[1] His assertion conflicts with what we might call the traditional, orthodox view which holds that there is no higher order constitutional legislation in the UK, that all Acts of Parliament are equal and that each may be altered or repealed as easily as any other.

While Sir John's proposed departure from the traditional view is novel, he suggests that the protection afforded to constitutional statutes has evolved from the immunity from implied repeal inherent in the European Communities Act 1972 (ECA) and the common law protection given to constitutional fundamentals. We examine this suggestion and argue that it is more convincing with regard to constitutional fundamentals than with regard to the 1972 Act. We further argue that, assuming constitutional statutes are founded on the protection of constitutional fundamentals, rather than on the ECA 1972, places them on a stronger footing post-Brexit. Next, we offer evidence that the principle of constitutional statutes has been accepted by the wider judiciary, by members of the legislature and by members of the

[1] [2002] EWHC 195 (Admin).

executive. We argue that, as a consequence of this acceptance, the rule of recognition can be taken to have altered to incorporate the amended implied repeal rule suggested by Laws LJ.

2. THE ANTECEDENTS OF CONSTITUTIONAL STATUTES

In *Thoburn*, Laws LJ stated 'We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes'.[2] He gave some examples of constitutional statutes:

> Magna Carta 1297 (25 Edw 1), the Bill of Rights 1689 (1 Will & Mary sess 2 c 2), the Union with Scotland Act 1706 (6 Anne c 11), the Reform Acts which distributed and enlarged the franchise (Representation of the People Acts 1832 (2 & 3 Will 4 c 45), 1867 (30 & 31 Vict c 102) and 1884 (48 & 49 Vict c 3)), the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The 1972 [European Communities] Act clearly belongs in this family.[3]

He argued that the traditional implied repeal rule does not apply to such statutes:

> Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act … the court would apply this test: is it shown that the legislature's *actual* — not imputed, constructive or presumed —intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes.[4]

That is, where an earlier Act is a constitutional statute, it will not be taken to be impliedly repealed by a later Act. The repeal or amendment of a constitutional statute may only be achieved by express legislative language or where the legislature's intention to achieve this outcome is indisputable.

[2] ibid [62].
[3] ibid.
[4] ibid [63].

This proposed amendment to the implied repeal rule represents a notable departure[5] from what was previously taken to be the orthodox position: that in the UK, there is no distinction between constitutional and non-constitutional legislation and that each Act of Parliament may be altered or repealed as easily as any other, by express words or by implication. This orthodox position may be found in Dicey's assertion:

> These … are the … traits of Parliamentary sovereignty … first, the power of the legislature to alter any law, fundamental or otherwise, as freely and in the same manner as other laws; secondly, the absence of any legal distinction between constitutional and other laws …[6]

In *Ellen St Estates v Minister of Health*, Scrutton LJ said that the 'constitutional position' is that Parliament may alter an earlier statute simply 'by enacting a provision which is clearly inconsistent with the previous Act'.[7]

So, Laws LJ's assertion was novel. Adam Tomkins has said 'The expression "constitutional statute" was, for these purposes, invented by Lord Justice Laws in his judgment in the *Thoburn* case'.[8] And Feldman writes that Sir John cites no authority in his judgment for his assertion that we should recognise a hierarchy of Acts of Parliament comprising ordinary and constitutional statutes.[9] Indeed, it may be that no direct authority exists for the principle of constitutional statutes. Laws LJ has, though, suggested antecedents from which the principle

[5] Though Professor Trevor Allan has said Law's proposal represents 'a very modest change to the general rule permitting implied repeal', evidence given: House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty* (2010-11, HC 633-I) 11.
[6] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 39.
[7] [1934] 1 KB 590 (CA) 595-96. Similarly, Maughan LJ said: 'The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature', ibid 597.
[8] Adam Tomkins evidence to HC European Scrutiny Committee on the European Union Bill 25 November 2010 HC (633-ii) (available at <https://www.parliament.uk/documents/commons-committees/european-scrutiny/Uncorrected-Transcript-Allan-Bradley-Tomkins-2010-11-25-v1-0.pdf> accessed 25 July 2018) 24. The transcript of this evidence is uncorrected. It is worth noting here, though, Lord Wilberforce's statement in 1966 '… I confess to some reluctance to holding that an Act of such constitutional significance as the Union with Ireland Act is subject to the doctrine of implied repeal …', *Petition of the Earl of Antrim* [1967] 1 AC 691 (HL) 724.
[9] D Feldman, 'The Nature and Significance of "Constitutional" Legislation' (2013) 129 LQR 343, 345 (fn 5).

has evolved. These are the ECA 1972 and the protection accorded to common law constitutional fundamentals.

Laws LJ associates the idea of constitutional statutes with the judgment in *Factortame*. In that case, the House of Lords disapplied the relevant provisions of the Merchant Shipping Act 1988 because they were held to be inconsistent with EC (now EU) law as incorporated by the ECA 1972.[10] This was contrary to the requirements of the traditional rule whereby the 1988 Act would have been taken to impliedly repeal the earlier 1972 Act to the degree necessary to resolve any inconsistency between them. In *Thoburn*, Sir John identified the ECA 1972 as a constitutional statute;[11] extra judicially, he writes of this:

> This acknowledgement [in *Thoburn*] of the European Communities Act 1972 as a constitutional statute sought to reconcile Parliament's power of repeal with the House of Lords' decision in *Factortame* … On conventional doctrine, the Merchant Shipping Act would by implication have repealed the European Communities Act *pro tanto* … [The judgment in *Thoburn*] shows that the Act of 1972 could only be repealed by express provision, which the Merchant Shipping Act certainly did not purport to do.[12]

This is why the ECA 1972 seems to be one of the evolutionary lines for Laws LJ's development of the principle of constitutional statutes – because the *Thoburn* judgment in which the principle was developed attempts to rationalise the decision in *Factortame* whereby the 1972 Act was not impliedly repealed by the later Merchant Shipping Act 1988 as 'conventional doctrine' would have required.

In fact, the idea that the ECA 1972 possesses this primary practical characteristic of constitutional statutes – protection from implied repeal – pre-dates *Factortame*. In *Maccarthys Ltd v Smith*, Lord Denning said:

> If on close investigation it should appear that our legislation is deficient — or is inconsistent with Community law — by some oversight of our draftsmen — then it is

[10] *R v Secretary of State for Transport, ex parte Factortame Ltd and Others (No 2)* [1991] 1 AC 603 (HL).
[11] Above n 3.
[12] Sir John Laws, *The Common Law Constitution* (Cambridge University Press 2014) 69.

> our bounden duty to give priority to Community law. Such is the result of section 2(1) and (4) of the European Communities Act 1972.
> I pause here, however, to make one observation on a constitutional point. Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the [EC] Treaty. If the time should come when our Parliament deliberately passes an Act — with the intention of repudiating the Treaty or any provision in it — or intentionally of acting inconsistently with it — and says so in express terms — then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.[13]

So, the priority given to Community (now EU) law is because of the ECA 1972, and that priority may only be overridden by express terms in a subsequent Act. This is, in effect, an early statement that the 1972 Act may not be impliedly amended – EU law, as incorporated by ss 2(1) and 2(4) of the ECA 1972, may only be departed from by legislation which makes clear 'in express terms' that this is Parliament's intention.

It may, though, be a mistake to infer – as Laws LJ appears to do – that because the ECA 1972 cannot be impliedly repealed, there is a whole category of constitutional statutes that are similarly protected. As Ahmed and Perry write, the ECA 1972's protection from implied repeal may be for reasons that are specific to it.[14] Himsworth has similarly said: 'Although a different status was achieved for the European Communities Act 1972, the case for asserting an enhanced status for any other legislation is profoundly weaker'.[15]

In fact, the ECA 1972 is unlike any other statute, including those commonly identified as constitutional statutes: it is the only one which provides the courts with the authority to disapply primary legislation.[16] To be sure, we might ask whether the protection from implied

[13] *Macarthys Ltd v Smith* [1979] ICR 785 (CA) 789.
[14] 'Since *Factortame*, it may have been accepted that Parliament cannot impliedly repeal the ECA, but that is for reasons specific to that statute', F Ahmed and A Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (2014) 73 CLJ 514, 532.
[15] Professor Chris Himsworth, written evidence submitted to the Political and Constitutional Reform Committee, 17 December 2010 <https://publications.parliament.uk/pa/cm201213/cmselect/cmpolcon/656/656ivvw23.htm> accessed 9 July 2019, para 6.
[16] *Factortame* (n 10).

repeal afforded to the Act is simply an essential corollary of the statute – necessary to give effect to the supremacy of EU law – rather than something that should be considered characteristic of a class of constitutional statutes.

A similar point may be made with regard to the HRA 1998, an Act which, as we have noted, is also said to be a constitutional statute.[17] It was enacted to fulfil a 'Manifesto commitment to introduce legislation to incorporate the European Convention on Human Rights into United Kingdom law'.[18] It achieves this in a number of ways. One of these is the s 3 obligation imposed on the courts to interpret and give effect to legislation in a way which is compatible with the Convention rights, 'so far as it is possible to do so.' Crucially for present purposes, s 3 applies to legislation enacted both before and after the 1998 Act and it is this interpretive obligation which means that the HRA 1998 is protected from implied repeal:

> the obligation to interpret all legislation, including future legislation, compatibly with Convention rights … has been interpreted by the courts as a strong obligation which effectively prevents any later Act of Parliament from impliedly repealing the HRA to the extent that the later Act is inconsistent with a Convention right.[19]

That is, the protection from implied repeal given to the HRA 1998 is a corollary of the statute's objective to make the Convention rights an inherent part of UK law. But, as with the ECA 1972, the fact that the 1998 Act cannot be impliedly repealed does not necessarily mean that there is a whole category of statutes similarly immune from implied repeal.

Likewise, it does not automatically follow that, because there are provisions in the ECA 1972 and the HRA 1998 that are protected from implied repeal, these statutes as a whole are

[17] Above n 3.
[18] Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782 1997) Introduction and Summary.
[19] Joint Committee on Human Rights, *A Bill of Rights for the UK?* (2007-08, HL 165-I, HC 150-I) 64. Lord Lester has said: '… it is clear with the Human Rights Act that Parliament intended that there should be no implied repeal …' Lord Lester, House of Commons Select Committee on the Constitution, Wednesday 8 July 2015 <https://www.parliament.uk/documents/lords-committees/constitution/union-and-devolution/CC080715-supreme-court.pdf!docid=2493633!.pdf> accessed 9 July 2019, 2.

also protected. As Feldman writes: 'Is the whole of [a constitutional statute] protected against implied repeal, or only the particular provision which has constitutional importance?'[20] So, for instance, the fact that the HRA 1998 cannot be abrogated by a later statute 'to the extent that the later Act is inconsistent with a Convention right', does not necessarily mean that the entirety of the 1998 Act is protected in the same way. Similarly, the idea that some clauses of the ECA 1972 may only be displaced by express words – so that the primacy of EU law is not altered by implication – does not inevitably entail that the whole of the statute is immune from implied repeal. It is worth noting here the remarks of the House of Lords Constitution Committee that 'many bills can incorporate issues of constitutional significance whilst primarily being concerned with non-constitutional or technical matters'.[21] With regard to Acts which are primarily 'non-constitutional', the question is whether the idea of constitutional statutes requires that the whole of the Act is protected or simply the constitutional provisions.

In brief, while both the ECA 1972 and the HRA 1998 are protected from implied repeal, such protection may not extend beyond these statutes; it does not necessarily follow that because the 1972 and 1998 Acts may be immune from amendment by implication, there is a category of statutes which are similarly protected. And, even with regard to the 1972 and 1998 statutes, it may be that protection from implied repeal does not necessarily extend to the whole Act. In addition, and a fortiori, the fact that the ECA 1972 is unique – because it is the only statute which provides the courts with the authority to disapply other statutes – might mean that it should not be considered as the basis for a distinct class of constitutional statutes.

[20] Feldman (n 9) 353.
[21] House of Lords Select Committee on the Constitution, *The Process of Constitutional Change* (2010-12, HL paper 177) 10 (fn 16). Samuels writes: 'Procedural and tactical considerations in Parliament lead to many Bills containing a disparate collection of barely related topics. So a statute can be partially and not wholly constitutional', A Samuels 'A Constitutional Statute?' (2018) *Statute Law Review* <https://academic-oup-com.ezproxy.bolton.ac.uk/slr/advance-article/doi/10.1093/slr/hmy002/4850671> accessed 8 July 2019, 3.

In addition to the ECA 1972, Laws LJ also identifies the protection afforded by the common law to constitutional fundamentals as another antecedent for the idea of constitutional statutes. The courts have developed the principle that such fundamentals will only be taken to be displaced by clear statutory language. The protection of constitutional fundamentals is often referred to as 'the principle of legality, ie the presumption that Parliament does not intend to legislate in a way which would defeat fundamental human rights …'[22]

We employ the phrase 'constitutional fundamentals' here, rather than 'fundamental rights' or 'human rights'. This is because it is possible to have a fundamental principle which is not a right in the commonly used constitutional sense of the word: as a principle or rule which limits the power of the state with regard to individuals or private organisations.[23] So, for example, in *Miller*, in the Supreme Court, Lord Reed identified the power of the executive to conduct foreign relations, including the ratification of treaties, as being 'so fundamental that it can only be overridden by express provision or necessary implication …'[24] The protection of this executive power would be a constitutional fundamental but would not normally be thought of as a constitutional right affording protection against the state. Other examples of constitutional fundamentals include: that access to the courts is not to be denied;[25] that justice should be administered publicly in the courts;[26] that citizens should be allowed freedom of

[22] *R (Miller) v Secretary of State for Exiting the EU* [2016] EWHC 2768 (Admin) [83] (Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR and Sales LJ). See, also, Lady Hale, 'The United Kingdom Constitution on the Move' (The Canadian Institute for Advanced Legal Studies' Cambridge Lectures, 7 July 2017) <https://www.supremecourt.uk/docs/speech-170707.pdf> accessed 23 July 2018, 9

[23] This understanding of 'fundamental rights' as being rights protected against the state is implicit, for example, in Lord Bingham's statement that fundamental rights 'elevate the rights of the individual over the rights of the community to which he belongs', T Bingham, *The Rule of Law* (Allen Lane 2010) 68.

[24] *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5 [194]

[25] Held to be a 'constitutional right' in *R v Lord Chancellor, ex p Witham* [1998] QB 575 (QB) 585 and 586 (Laws J). See, also, *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [66]-[85] (Lord Reed); and *Pyx Granite Co v Ministry of Housing and Local Government* [1960] AC 260 (HL) 286 (Viscount Simmonds).

[26] *A v British Broadcasting Corporation* [2014] UKSC 25.

movement;[27] that general liberty is protected;[28] and, indeed, that fundamental values of the rule of law[29] are respected.[30]

In *Thoburn*, Laws LJ explicitly connects the protection accorded to constitutional fundamentals to his idea of constitutional statutes:

> … the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental … And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes …The special status of constitutional statutes follows the special status of constitutional rights.[31]

So, the principle of constitutional statutes has developed from the protection given to fundamental or constitutional rights – the special status of constitutional statutes 'follows' that of constitutional rights.

It seems to us that there is good reason to conclude, as Laws LJ does, that the protection of constitutional statutes does indeed follow that of constitutional fundamentals. In brief, if it is justifiable to safeguard fundamentals of the constitution, then it is surely the case that they are deserving of protection whether derived from common law or from statute. This consequently means that the principle of legality applies to all constitutional fundamentals, whatever their source.

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[27] Said to be a 'fundamental value of the common law' in *R v Secretary of State for the Home Department, ex p McQuillan* [1995] 4 All ER 400 (QB) 421 (Sedley J).
[28] *Khawaja v Home Secretary* [1984] AC 74 (HL) 111.
[29] *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [207] (Neuberger and Mance). See, also, Hale (n 22) 10.
[30] Bowen writes: '…recent judgments have identified common law rights of access to a court, access to a lawyer, freedom of expression, the right to silence, freedom of association, the right to jury trial, access to information, the right of autonomy, the right to life, the right to vote, the prohibition on torture and "cruel and unusual punishment" and property rights', P Bowen, 'Does the renaissance of common law rights mean that the Human Rights Act 1998 is now unnecessary?' (2016) 4 EHRLR 361, 365 (citations omitted).
[31] *Thoburn* (n 1) [62].

In summary, it does not necessarily follow that, because the ECA 1972 – and, indeed, the HRA 1998 – is protected from implied repeal, there is a whole category of statutes that are similarly protected. There is, though, a stronger and more convincing connection between the protection of constitutional fundamentals and that of constitutional statutes: that important constitutional principles should be protected whatever their source, common law or statute.

This conclusion leads to another: the ECA 1972 and the HRA 1998 are protected from implied amendment or repeal for two reasons. First, as noted above, that such protection is necessary to secure the aims of these statutes: to give effect to EU law and the Convention rights within the UK. Second, because they are a source of constitutional fundamentals in the UK: respectively, the primacy of EU law[32] and the Convention rights.

This contention – that we should consider the protection of constitutional fundamentals, rather than the ECA 1972, as the basis of the principle of constitutional statutes – also provides a stronger foundation for such statutes after Brexit. At the time of writing, we do not know what the future legal relationship between the UK and the EU will be. It is very possible that the current priority given to EU law by virtue of the 1972 Act will not be replicated and, consequently, there will no longer be the same rationale for protecting any replacement or alternative legislation from implied repeal. In such a situation, the disappearance of the ECA 1972 may, over time, weaken any claim that it should be considered as a basis for constitutional statutes. If we assume, however, the idea of constitutional statutes is founded on a broader principle – that constitutional fundamentals should be protected from implied amendment or repeal whatever their source, statute or common law – then they are more likely to continue as

[32] In *Miller*, in the Supreme Court, the majority adopted the metaphor of Professor John Finnis that the ECA 1972 is not the 'originating source' of EU law in the UK but is, rather, the 'conduit pipe' through which that law is introduced in the UK; (n 24) [65], [80], [84] and [98].

a feature of the UK's constitutional landscape no matter what happens between the EU and the UK.

This stronger evolutionary root for the principle of constitutional statutes goes hand in hand with the greater acceptance of them which, we argue in the next section, may be found among the three arms of state.

3. ACCEPTANCE AND RECOGNITION

Sir John Laws' claims in *Thoburn* were obiter dicta. His fellow judge in the case, Crane J, agreed with his judgment. Yet, without wider judicial support, particularly from the higher courts, Sir John's assertions might have been considered the thoughts of a lone judge, interesting but insufficient to indicate that there had been any change to the implied repeal rule. Ahmed and Perry write: 'As time went on … and no higher court gave its approval, *Thoburn* began to seem like an outlier, not a forerunner'.[33] Gradually, though, the *Thoburn* judgment began to permeate other cases. Furthermore, and significantly, there now appears to be acceptance by members of both the legislature and the executive of the idea of constitutional statutes. This acceptance among the three arms of state indicates, we argue, that the rule of recognition has now changed so that it incorporates Laws LJ's amendment to the implied repeal rule.

(i) Judicial acceptance of constitutional statutes

Soon after it was decided, *Thoburn* was occasionally cited in arguments made to the courts but not in the judgments themselves.[34] Where *Thoburn* was cited in judgments, it was not in a way

[33] Ahmed and Perry (n 14) 514.
[34] For example: *Regina (Junttan Oy) v Bristol Magistrates' Court* [2003] UKHL 55.

which necessarily supported Laws LJ's proposition that the implied repeal rule operated differently with regard to constitutional statutes.[35] The case was mentioned in the opinion of Lord Hope in the 2006 case of *Watkins v Secretary of State for the Home Department* but only to say that he doubted whether a breach of a constitutional right or a right arising under a constitutional statute could give rise to a cause of action in tort without proof of damage.[36] His Lordship also questioned whether the terms 'constitutional rights' and 'constitutional statutes' are sufficiently precise to define a category of rights or statutes.[37]

Some later judgments gave Sir John's claims more positive treatment. In the Scottish case, *Imperial Tobacco Ltd v Lord Advocate*, Lord Bracadale quotes Sir John's comments in *Thoburn*, that there is a class of constitutional statutes, and states that such statutes should be interpreted generously.[38] In *R (on the application of Brynmawr Foundation School Governors) v Welsh Ministers*, Beatson J said '… "constitutional" statutes, unlike "ordinary" statutes, have been stated not to be susceptible to implied repeal: see Laws LJ in *Thoburn v Sunderland City Council* …'.[39] He does not, though, explicitly endorse this claim.

Judgments in other cases seemed to concur more definitely with the idea that the ordinary implied repeal rule does not apply to constitutional statutes. In the Northern Irish case *Re Northern Ireland Commissioner for Children and Young People's Application for Judicial Review*, Gillen J stated that permitting the HRA 1998 to be impliedly repealed 'would be

[35] So, for example, in *Oakley Inc. v Animal Limited and Others* [2005] EWHC 210 and [2005] EWCA Civ 1191, it was cited to support the claim that Parliament had not, and could not, entrench the ECA 1972 or set permanent limits on its own sovereignty.
[36] [2006] UKHL 17 [62].
[37] ibid.
[38] [2010] CSOH 134 [3]. It is also worth noting that the distinction between constitutionally important and ordinary statutes with regard to their interpretation pre-dates *Thoburn*. So, for example, in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL) 638, Lord Browne-Wilkinson said: 'Article 9 [of the Bill of Rights 1689] is a provision of the highest constitutional importance and should not be narrowly construed'.
[39] [2011] EWHC 519 (Admin) [72].

inconsistent with its status as a constitutional statute setting out in one place the legal regime for the vindication of fundamental rights'.[40] In *AXA General Insurance v Lord Advocate*, Lord Emslie stated in the Court of Session (Outer House) that 'the sovereignty of the UK Parliament was modified by a series of constitutional statutes which could not be repealed by implication'.[41] Though, when the case reached the Supreme Court,[42] *Thoburn* and the principle of constitutional statutes was cited in argument but not in the judgments.

Indeed, it was not until a decade after *Thoburn* that the idea that the ordinary implied repeal rule does not apply to constitutional Acts seemed to play a part in a Supreme Court (or House of Lords) judgment. In *H v Lord Advocate*, Lord Hope stated that the Scotland Act 1998 could not be repealed by implication because of 'the fundamental constitutional nature of the settlement' that the Act achieved which 'render[ed] it incapable of being altered otherwise than by an express enactment'.[43] However, neither he, nor any of the other Justices, mentioned the *Thoburn* case (though it was cited in argument) or that there might be a group of constitutional statutes that are protected from implied repeal.

Thoburn is cited in the joint judgment of Lords Neuberger and Mance in the *HS2* case in the Supreme Court. They state that there are a number of constitutional instruments including:

> Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list.[44]

[40] [2007] NIQB 115 [16]
[41] 2010 SLT 179 (OH) [119]
[42] [2011] UKSC 46.
[43] [2012] UKSC 24 [30].
[44] *HS2* (n 29) [207].

These examples are obviously similar to, and overlap, those provided by Laws LJ in *Thoburn*.[45] Their Lordships do not directly express approval for the proposition that constitutional instruments may only be expressly repealed;[46] they simply state that Laws LJ's judgment in *Thoburn* provides 'Important insights into potential issues in this area …'[47]

In addition, Neuberger and Mance contemplate the question of a possible conflict – not simply between ordinary and constitutional instruments – but also between different constitutional instruments which they say 'raises further considerations';[48] they do not, though, offer an answer as to how such a conflict between two constitutional statutes may be resolved.[49] Moreover, their reference to constitutional *instruments* rather than constitutional *statutes* potentially broadens the category suggesting that it is not only constitutional Acts of Parliament that are immune from implied repeal, other types of legislation may also be protected. For example, it may be that statutory instruments or Orders in Council are considered to be constitutional instruments and so protected from implied repeal. Indeed, Feldman suggests this for other forms of legislation which have a constitutional element:

> If it is right to say … that Orders in Council under the Royal Prerogative and subordinate legislation may sometimes contain constitutional provisions, there seems to be no reason to treat them differently from constitutional legislation taking the form of an Act of Parliament. It is equally objectionable to change them or repeal them without proper parliamentary consideration.[50]

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[45] Above n 3.
[46] Elliot writes that Lords Neuberger and Mance 'signalled a degree of approval of - whilst stopping short of straightforwardly adopting - the judgment of Laws LJ in *Thoburn* …', MC Elliott, 'Constitutional legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014) 10(3) ECLR 379, 385. In *Thoburn,* Laws LJ also seems to recognise the possibility of a clash between a constitutional statute (or a scheme which takes effect via that statute) and a constitutional right: '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', *Thoburn* (n 1) [69].
[47] *HS2* (n 29) [208].
[48] ibid.
[49] Elliott suggests that such a conflict may be resolved by reference to the respective 'fundamentality' of the two constitutional statutes that are in conflict, or by reference to the date of their enactment (n 46) 387-388.
[50] Feldman (n 9) 353.

This seems to be consistent with our argument above that constitutional fundamentals – whatever their source – should not be taken to be abrogated except by statute and that, usually, express language will be required.

Support for the idea of constitutional statutes may also be found in *Miller*. In the High Court, Lord Thomas, Lord Etherton MR and Sales LJ, in a joint judgment, and making reference to the judgment in *Thoburn*, talk approvingly of the principle of constitutional statutes. They identify the ECA 1972 as a constitutional statute and that, as such, it is immune from amendment by implication:

> … the status of the ECA 1972 as a constitutional statute is such that Parliament is taken to have made it exempt from the operation of the usual doctrine of implied repeal by enactment of later inconsistent legislation: see *Thoburn's case [2003] QB 151*, paras 60–64, and section 2(4) of the ECA 1972. It can only be repealed in any respect if Parliament makes it especially clear in the later repealing legislation that this is what it wishes to do.[51]

Similarly, in the Supreme Court, the majority make reference to the judgment of Laws LJ in *Thoburn*, and of Neuberger and Mance in *HS2*, and note the 'constitutional character' of the ECA 1972[52] and that the protection of EU law from implied repeal is derived from the 1972 Act.[53]

Moreover, in the *Privacy International* case, Lord Carnworth (with whom Baroness Hale and Lord Kerr agreed) noted that the Supreme Court has acknowledged the principle of constitutional statutes: 'This court has recognised the special status of such "constitutional statutes", in particular their immunity from "implied repeal" …'[54]

[51] *Miller* (n 22) [88]; see, also, [44]. Their Lordships also note that Lords Neuberger and Mance in *HS2* categorise the ECA 1972 as a constitutional instrument, ibid.
[52] *Miller* (n 24) [67].
[53] ibid [66].
[54] *Regina (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [120]

Thus, it is fair to say that the contention that the implied repeal rule has been amended with regard to constitutional statutes – so that such statutes may only be amended by express words in, or as a necessary implication of, a later Act of Parliament – has been accepted by the judicial branch of government.

(ii) Legislative and executive acceptance of constitutional statutes

Following the EU referendum on 23 June 2016 – in which a majority voted that the UK should leave the EU – the Government announced that it would give notice under Article 50 of the Treaty on European Union[55] of the UK's intention to withdraw from the EU. The Government claimed that it was entitled to give this notice using the royal prerogative, and that Parliament's consent was not needed.[56] This claim was challenged in the *Miller* case where both the High Court[57] (unanimously) and the Supreme Court[58] (by a majority) ruled against the Government.[59] The majority in the Supreme Court stated: 'ministers require the authority of primary legislation before they can [give notice under Article 50]'.[60]

Parliament consequently enacted the European Union (Notification of Withdrawal) Act 2017. Section 1(1) of the Act provides the necessary authority to trigger Article 50: 'The Prime

[55] Article 50 states that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements' and that a Member state that wishes to withdraw 'shall notify the European Council of its intention'.
[56] Lord Bridges of Headley (Parliamentary Under-Secretary of State for Exiting the European Union): 'The Government's position is that there is no legal obligation to consult Parliament on triggering Article 50', HL Deb 18 July 2016, vol 774, col 430. See, also, the Prime Minister's, Theresa May's, speech to the Conservative Party Conference: '… it is not up to the House of Commons to invoke Article 50, and it is not up to the House of Lords. It is up to the Government to trigger Article 50 and the Government alone', Theresa May, 'Britain after Brexit: A Vision of a Global Britain' (Conservative Party Conference, 2 October 2016) <www.politicshome.com/news/uk/political-parties/conservative-party/news/79517/read-full-theresa-mays-conservative> accessed 24 July 2019.
[57] *Miller* (n 22).
[58] *Miller* (n 24).
[59] Section 12 of the Administration of Justice Act 1969 allows the Court of Appeal to be bypassed so that the High Court's decision could be appealed directly to the Supreme Court.
[60] *Miller* (n 24) [101].

Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU'.

Of interest here, though, is s 1(2) of the 2017 Act which states: 'This section [ie: section 1] has effect despite any provision made by or under the European Communities Act 1972 or any other enactment'. At first glance, this provision seems superfluous. Section 1(1) appears sufficient to supply the Government with the requisite imprimatur to give notice under Article 50. Indeed, as Lang *et al* write in a House of Commons Library briefing paper on the Bill 'it is not normally necessary to state that a statutory power, such as this one [the power conferred by s 1(1)], takes precedence over earlier enactments'.[61]

The Government's explanation for the inclusion of s 1(2), as articulated by the then Secretary of State for Exiting the European Union, David Davis, during the second reading of the Bill, is simply that the provision 'is included to make it clear that the power to trigger article 50 may be conferred on the Prime Minister regardless of any restrictions in other legislation, including the European Communities Act 1972.'[62] Yet, given the result of the 2016 referendum, and the judgments of the High Court and the Supreme Court in *Miller*, such clarity seems unnecessary: it cannot be doubted that the intention of Parliament in enacting s 1(1) of the 2017 Act was to supply the Prime Minister with the unfettered authority to trigger Article 50 regardless of the ECA 1972 or any other statutory provision. Indeed, the long title of the Act is unambiguous: 'An Act to confer power on the Prime Minister to notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU'.

[61] Arabella Lang, Vaughne Miller and Jack Simson Caird 'European Union (Notification of Withdrawal) Bill' (House of Commons Library Briefing Paper Number 7884, 30 January) 10.
[62] HC Deb 31 January 2017, vol 620, col 818. See, also, European Union (Notification of Withdrawal) Bill Explanatory Notes HL Bill 103, 4.

The reason for the inclusion of s 1(2) becomes apparent, though, when considered in the context of constitutional statutes – the idea that such statutes may only be repealed or amended by express words or necessary implication. The application of this here is as follows: s 1(1) of the 2017 Act authorises the Government to begin the process of withdrawing from the EU; such withdrawal will alter the application of EU law in the UK and EU law was incorporated into UK law by the ECA 1972. In short, notification of withdrawal will have the consequence of effectively abrogating the ECA 1972[63] and, as the ECA is a constitutional statute, such abrogation must be realised expressly rather than by implication. Section 1(2) of the 2017 statute represents the necessary express abrogation.

We recognise that this might be to claim too much. Following our argument above, the insertion of s 1(2) in the 2017 Act may merely recognise that the ECA 1972 – rather than *all* so-called constitutional statutes – cannot be amended or repealed by implication. In addition, the presence of s 1(2) does not necessarily mean that Parliament accepts the principle of constitutional statutes (or the narrower principle that the 1972 statute cannot be impliedly repealed); s 1(2) may simply be present to pre-empt a potential legal challenge to the 2017 Act on the basis that it effectively attempts to impliedly, rather than expressly, amend the ECA 1972. Lang *et al* write:

> The words in Clause 1(2) … appear to be designed to limit the possibility of a judicial review challenge to the use of the power in clause 1(1) … Clause 1(2) would prevent a court reading any statutory restrictions into the Prime Minister's power to give the notice.[64]

[63] This is the view of the majority of the Supreme Court in *Miller*: that withdrawal from the EU, as initiated by giving notice under Article 50, would be inconsistent with the ECA because the scheme the Act introduced – whereby the EU becomes a new source of UK law – would inevitably be lost by the triggering of Article 50. Lord Reed, one of the dissenting judges, disagrees on this point: 'Withdrawal under article 50EU alters the application of the 1972 Act, but is not inconsistent with it', (n 24) [204].

[64] Lang, Miller, and Simson Caird (n 61) 10. During the Committee Stage of the Bill, Sir William Cash MP suggested that s 1(2) 'put[s] this matter to bed, in case anybody tries to argue that, somehow or other, [s 1(1)] could be overridden by some other European Union gambit …', HC Deb 7 February 2017, vol 621, col 207.

Nevertheless, even if the presence of s 1(2) in the Act does not mean that Parliament accepts the idea of constitutional statutes, its inclusion in the Act is still noteworthy and indicates, at the very least, an acknowledgement of the principle of such statutes.

Moreover, there is evidence in Hansard and various parliamentary reports that individual and groups of parliamentarians do accept the principle of constitutional statutes. In 2005, almost three years after the judgment in *Thoburn*, in a debate on the Constitutional Reform Bill, Oliver Heald QC MP seemed to endorse the idea that there is a hierarchy of statutes and that constitutional statutes cannot be impliedly repealed.[65] The principle also appeared to be accepted by Lord Waddington in the House of Lords Committee stage of the European Union (Amendment) Bill[66] and by Sir William Cash in the House of Commons Committee stage of the same legislation.[67] In 2013, the Clerk to the House of Commons, Sir Robert Rogers, stated that a new statute on parliamentary privilege 'would undoubtedly fall to be recognised as a constitutional statute and would therefore be protected to a considerable extent from unwitting interference by the application of earlier or later statutes' because of the rule in *Thoburn*.[68]

In 2014, the House of Commons Political and Constitutional Reform Committee acknowledged the contention that the implied repeal rule has been amended: 'there is recent case law to the effect that statutes of major constitutional importance are no longer subject to

[65] HC Debates 31 January 2005, vol 430, col. 603.
[66] HL Debates 14 May 2008, vol 701, cols 1087-1088.
[67] HC Debates 5 February 2008, vol. 471, col. 887.
[68] Written evidence to the Joint Committee on Parliamentary Privilege, 13 February 2013 <https://www.parliament.uk/documents/joint-committees/Parliamentary-Privilege/Virtual%20Volume%20II%20-%20All%20evidence.pdf> accessed 9 July 2019, 147.

this doctrine of implied repeal'.[69] Similarly, in 2015, the House of Lords Select Committee on the Constitution recognised the Scotland Act 1998 as a 'constitutional statute, cited in significant court judgments as not being liable to implied repeal'.[70]

Executive acknowledgement of the idea of constitutional statutes seems to have occurred shortly after Laws LJ's judgment in *Thoburn*. In the 2003-2004 parliamentary session, the Joint Committee on Human Rights expressed some concern about the power, under the Civil Contingencies Bill, by which the Monarch – by Order in Council – or a senior Minister may make emergency regulations. They questioned whether such regulations might be used to disapply provisions of the HRA 1998. The Committee noted that the Government's own Explanatory Notes to the Bill indicated that this could not happen because of the status of the 1998 Act as a 'constitutional enactment':

> The Government took the view that such regulations would be invalid. The Explanatory Notes to the Bill say— "Clause 21(3)(j) enables regulations to 'disapply or modify an enactment or a provision made under or by virtue of an enactment'….Having taken Parliamentary Counsel's advice on how the normal principles of the construction of delegated powers would apply to this particular provision, it is not possible to envisage circumstances in which this power would lawfully enable regulations to make a substantive amendment to a 'constitutional enactment', such as the Human Rights Act".[71]

The Committee also noted that the responsible Minister, Douglas Alexander MP, Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, responded to questions raised by the Chair to the effect that 'the clause does not contain an express power to disapply or modify what Laws LJ in *Thoburn v. Sunderland City Council* called a "constitutional statute"'.[72]

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[69] House of Commons Political and Constitutional Reform Committee, *Political and Constitutional Reform - Second Report: A new Magna Carta?* (2014-15, HC 463) 387-388. See, also, House of Commons European Scrutiny Committee, *The EU Bill and Parliamentary Sovereignty*, (n 5) and the House of Commons Political and Constitutional Reform Committee, *Constitutional role of the judiciary if there were a codified constitution* (2013-14, HC 802) 10.

[70] House of Lords Select Committee on the Constitution, *Proposals for the devolution of further powers to Scotland* (2014-15, HL 145) 21.

[71] Joint Committee on Human Rights, *Scrutiny of Bills: Second Progress Report* (2003-04, HL 34, HC 304) para. 119.

[72] ibid para 120.

Theresa May, when Prime Minister, also explicitly acknowledged the principle of constitutional statutes. In a 2018 letter to Sir William Cash MP, she stated: 'The Divisional Court … explained in *Thoburn* that the ECA was a "constitutional statute" which cannot be impliedly repealed'.[73] Indeed, the inclusion of s 1(2) in the 2017 Act, a Government Bill, also indicates that the executive – as well as the legislature – recognises the principle of constitutional statutes. Though we can only presume here, it was no doubt included by parliamentary counsel in line with ministerial instructions. Indeed, both legislative and executive acceptance of the principle of constitutional statutes may be present in the suggestion of one MP that the executive find them beneficial. In a 2011 debate in the House of Commons, Jacob Rees-Mogg MP suggested that the proposition that constitutional statutes could only be 'specifically repealed' to be one that 'Governments have found useful, because it eases their path when changing other laws' (though he did not provide examples).[74]

(iii) The rule of recognition

The seeming acceptance of the principle of constitutional statutes by officials of the three arms of the state – the judiciary, the legislature and the executive – suggests that the rule of recognition may itself have been amended.

The rule of recognition was identified by Hart as the means by which legal rules of a system may be identified as such: 'We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition'.[75] The

[73] Letter from the Prime Minister, Theresa May MP, to Sir William Cash MP (9 January 2018) <https://www.parliament.uk/documents/commons-committees/european-scrutiny/2018-01-09%20PM%20response%20Bill%20Cash.pdf> accessed 23 July 2018.
[74] HC Deb 18 January 2011, vol 521, col 711.
[75] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 103.

majority of the Supreme Court in *Miller* state that the rule of recognition is 'the fundamental rule by reference to which all other rules are validated'.[76] In his dissenting judgment, Lord Reed stated that the rule of recognition is 'the rule which identifies the sources of law in our legal system and imposes a duty to give effect to laws emanating from those sources'.[77]

The doctrine of parliamentary sovereignty is an element of the rule of recognition in the UK. It specifies that 'whatever the Queen in Parliament enacts' is law;[78] that is, it supplies a criterion by which we may recognise a law as valid: that it was enacted by the Queen in Parliament. Alternatively, adopting Lord Reed's definition of the rule of recognition, parliamentary sovereignty identifies Acts of Parliament as a source of law in the UK and imposes a duty on the courts to give them effect.

Hart also recognised that in complex systems the rule of recognition will specify priorities among different laws:

> where more than one of such general characteristics are treated as identifying criteria [so that we may have laws derived from different sources], provision may be made for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a 'superior source' of law.[79]

Thus, the implied repeal rule – governing when a later Act of Parliament will amend or repeal an earlier one in the absence of express words to that effect – is part of the rule of recognition in the UK. Accordingly, if this rule has been altered in the way that Laws LJ claims, then this is also a change to the rule of recognition.

[76] *Miller* (n 24) [60].
[77] ibid [173].
[78] Hart (n 75) 102. At times, Hart seems to suggest that this formula – whatever the Queen in Parliament enacts is law – is the whole of the rule of recognition for the UK (see for instance, ibid 107). We suggest, though, that the rule of recognition in the UK must be wider than this because it must also encompass, for example, common law and law derived from custom.
[79] ibid 95; see, also, 101.

Being the ultimate rule of a legal system, the rule of recognition acquires its validity, not from any higher rule, but from its acceptance by officials of the system. Hart memorably compared the rule of recognition to the metre bar in Paris which is the standard against which all other measures of metres are evaluated but which does not itself rely on any other measure beyond its acceptance as the standard.[80] And the rule of recognition derives its content from consensus, from the agreement of the officials of a legal system. This suggests that if the officials collectively change their minds about what the rule of recognition specifies – if their consensus about its content alters – then the rule itself may be taken to have changed.

Goldsworthy agrees. He states that it would be a mistake to assume 'that the rule of recognition is constituted by the practices and convictions of the judiciary alone'.[81] Rather, a consensus is required 'among the most senior officials of the legal system, in all three branches of government, legislative, executive, and judicial'.[82] This, in turn, indicates that the rule of recognition cannot be altered by the judiciary alone – the consensus needed to effect such change must extend beyond the courts: 'the courts can initiate change, provided that the other branches of government are willing to accept it'.[83]

We have shown above that the change to the implied repeal rule appears to be accepted by senior officials in the three arms of state. It has been accepted by the most senior judges. It has been accepted by MPs, peers and officers of Parliament including parliamentary counsel and the former Clerk to the House of Commons, Sir Robert Rogers. And, it has been accepted

[80] ibid 109.
[81] J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999) 240-241
[82] ibid 240.
[83] ibid 245. Likewise, Ahmed and Perry write: 'the Supreme Court, and even judges as a whole, cannot unilaterally alter the rule of recognition. They need the cooperation, or at least the acquiescence, of other law-applying officials', (n 14) 531.

by Ministers of Governments formed by the two main parties, including Theresa May when Prime Minister. In brief, this consensus of acceptance among the legislature, executive and judiciary suggests that the rule of recognition has indeed changed to now incorporate the amendment to the implied repeal rule as proposed by Laws LJ in *Thoburn*. It is worth recalling, here, Hart's dictum that, when it comes to determining the most fundamental constitutional rules 'all that succeeds is success';[84] if, as we have argued, it is widely accepted by officials across the legal system that the rule of recognition has altered, then we can surely say that the implied repeal rule has been successfully amended.

As a final point, we acknowledge but leave open the question of whether, if we are correct to assume that the rule of recognition may be amended by a change in consensus among officials, such alteration is encompassed within the rules of change. The rules of change were introduced by Hart as those rules which allow the legal rules to be altered and which also facilitate the ability of individuals to modify their legal relationships with each other.[85] It seems to us that there are two broad views here. On the one hand, it may be argued that a change to any of the rules of a particular legal system – including the rule of recognition – must be accounted for, and be an element of, the rules of change. On the other hand, one might claim that an alteration to the rule of recognition – which, as the ultimate legal rule does not depend for its validity on other legal rules – cannot be explained by the rules of that legal system; rather, the account of such an amendment sits outside the legal system and is, correspondingly, outwith the rules of change.

[84] Hart (n 75) 153.
[85] ibid 95-96.

4. CONCLUSION

Sir John Laws, the originator of the principle of constitutional statutes, has associated their development with the protection afforded to the ECA 1972 and to constitutional fundamentals. We have argued that this is more persuasive with regard to latter than the former. This is because the protection from implied repeal enjoyed by the 1972 statute – and, indeed, the HRA 1998 – is a necessary corollary of that Act; this is not true for, and so does not necessarily extend to, other constitutional statutes. Considering the principle of legality as the root on which the idea of constitutional statutes may be founded is, we contend, more convincing. As we have proposed, if constitutional fundamentals are worthy of protection then this is surely the case whatever their source, whether common law, statute, Orders in Council or the Royal Prerogative.

Moreover, assuming that constitutional statutes are based on the principle of legality, rather than the ECA 1972, may give them a post-Brexit longevity which they might not otherwise have. In short, if the idea of constitutional statutes were assumed to be based on the protection from implied repeal inherent in the ECA 1972, then the case for them as a distinct category of statute may weaken following the UK's exit from the EU and the possible faded juristic memories of why it was necessary for the 1972 Act to be protected

Finally, we have demonstrated that the idea of constitutional statutes seems to be accepted across the three arms of state. We have argued that the extent of this acceptance is such that the rule of recognition can now be taken to have changed so that it now incorporates the idea that such Acts – and constitutional fundamentals – may only be changed by statute where the legislature's intention to effect such change is clear; usually express words will be required.

The principle of constitutional statutes is still in its infancy and its contours need to be more fully developed. Whether the principle protects the whole of a statute or simply particular provisions is not yet certain. Nor is it certain how a conflict between two constitutional statutes should be resolved. These, and other uncertainties, will no doubt be determined through argument on a case by case basis. What does appear certain, though, is that the protection of constitutional statutes has moved from novel proposition to accepted orthodoxy.