Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

West of the Landstrasse: Searching for the *Grundnormen* in UK and Irish Constitutional Law

Delivered by Mr. Justice Gerard Hogan at the Society of Legal Scholars (SLS) Annual Hale Lecture on 24th October 2023

I.

In his memoir, *The Family Story*, Lord Denning candidly confessed that Jurisprudence was not his favourite subject at Oxford:

> "Jurisprudence was too abstract a subject for my liking. All about ideologies, legal norms and basic norms, 'ought' and 'is', realism and behaviourism, and goodness knows what else."[1]

In his elegant and classic essay on Denning written in the early 1980s, Heuston poured a little cold water on the accuracy of these recollections:

> "Although this may be true of Oxford jurisprudence today, it can hardly be true of 1921, when the terminology of Kelsen was unknown west of the Landstrasse."[2]

Whatever about Oxford of the early 1920s, Kelsen was, however, a staple of the Jurisprudence course at University College, Dublin in my undergraduate years in the late 1970s. Somehow his *Pure Theory of Law* "spoke" to me in a way that few other legal theorists – with the exception perhaps of HLA Hart – managed to do. And so to that extent I sympathise with Denning because I confess that I struggle with later theorists such as Raz, Rawls and Finnis. (I gather, incidentally, that Oxford has moved on; that Kelsen is now *passé* and no longer features in Jurisprudence classes.)

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[1] *The Family Story* (Butterworths, 1980) at 38.
[2] Heuston, "Lord Denning: The Man and his Times", in Jowell and MacAuslan eds., *Lord Denning: The Judge and the Law* (London, 1984) at 3.

Yet until I made this personal confession to you just now, I had, I think, successfully managed to camouflage my struggles with modern jurisprudence. Just as in the eponymous television series, when Fr. Ted managed to cajole a recalcitrant Fr. Jack into saying "that would be an ecumenical matter" in order to impress visiting ecclesiastics, in much the same vein I can remark at academic conferences that Jeremy Waldron is in favour of weak form judicial review and that Adrian Vermeule supports common good constitutionalism without being very sure what any of this means, save that it sounds good and I know that this is what I am supposed to say. Yet, to be truthful, so far as modern Jurisprudence is concerned, I am still stuck in the Landstrasse unable to find my way home. I would nevertheless still maintain that a Kelsenian analysis can help us to understand what is really happening in the great modern UK constitutional law cases.

II.

Whatever about anything the intrinsic merits of their case, there is no doubt but that the three great legal positivists - Holmes, Kelsen and Hart – were each elegant legal writers who each spoke with analytical directness which in itself is very useful, not least in the sphere of constitutional law. And while there are clear differences between them, for the purposes of my argument their respective analyses rather meld into one. Irrespective of whether it is Holmes' "bad man" predictive law theory[3] or Hart's rule of recognition[4] or pure Kelsenian analysis, the question I wish to pose this evening is to inquire as to what the ultimate *Grundnorm* or *Grundnormen* is or are in UK constitutional law and how this is illustrated by a series of hugely important recent decisions of the UK Supreme Court. Let us start with a consideration of what on any view is one of the most significant judgments in UK constitutional law in the last hundred years or so.

Before doing so, let us acknowledge that in the perfect Kelsenian world there would be only one Grundnorm – not, Grundnormen, plural. This after all is one of

[3] "But if we take the view of our friend the bad man, we shall find that he does not care for the axioms or deductions, but that he does want to know what the…courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law…" "*The Path of the Law* "10 *Harvard. Law Review* (1897).

[4] *The Concept of Law* (Oxford, 1961) at Chp. VI.

the fundamental axioms on which the General Theory (*Allgemeine Staatslehre*) is constructed, an axiom which Kelsen thought was so obvious that he did not really need to defend it. For this he has been criticized by Raz among others.[5] I am not sure that it is really necessary to get into this conceptual debate. I have used the plural and, if necessary, one could probably meld these *Grundnormen* into one. In the General Theory Kelsen admitted that customary law (i.e., including – presumably – for this purpose judge-made, precedent-based law typical of a common law system) could be a *Grundnorm*[6] and this is enough for my present purposes.

Has *Gina Miller (No.2)* changed a *Grundnorm* of English constitutional law?

For those brought up in the belief that the sovereignty of Parliament, *Stockdale v. Hansard* and Article 9 of the Bill of Rights all formed core elements of the English/British constitutional tradition, the decision of the UK Supreme Court in *Gina Miller (No.2)*[7] came possibly as a something of a surprise This was the great case where the purported prorogation of Parliament was held to be invalid on the basis that it frustrated the right of Parliament to hold the Government to account. Perhaps we were not looking closely enough, and we had forgotten what potentially far-reaching decisions such as *GCHQ*[8] in 1984 or the *Fire Brigades Union* case[9] in 1995 portended for the development of judicial review of prerogative powers. Yet given the historical embedded unwillingness of the English judiciary even to entertain challenges to decisions concerning parliamentary affairs, the decision to review the exercise of prerogative powers relating to prorogation of parliament seems striking, so not least given that it relates to a feature of the relationship between the Government and the Crown.

So likewise, is the actual basis of the decision: the by now famous "of course it did" passage from the joint judgment of Baroness Hale PSC and Lord Reed DPSC in *Gina Miller (No.2)*. In their joint judgment for the Court, they ruled that the

[5] Raz, "Kelsen's Theory of the Basic Norm" (1974) *American Journal of Jurisprudence* 94.
[6] *General Theory of Law and State* (New York, 1945) at 126.
[7] [2019] UKSC 41, [2020] AC 373.
[8] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374
[9] *R. v. Home Secretary, ex p. Fire Brigades Union* [1995] 2 AC 513.

Prime Minister's decision to advise the Sovereign to prorogue Parliament from July 2019 to October 2019 was unlawful, in essence because it frustrated the right of Parliament to hold the Government to account, not only in relation to Brexit, but also more generally[10]. As Baroness Hale PSC and Lord Reed DPSC explained:

> "Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts. The first question, therefore, is whether the Prime Minister's action had the effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account.
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> The answer is that of course it did. This was not a normal prorogation in the run-up to a Queen's Speech. It prevented Parliament from carrying out its constitutional role for five out of a possible eight weeks between the end of the summer recess and exit day on the 31st October. Parliament might have decided to go into recess for the party conferences during some of that period but, given the extraordinary situation in which the United Kingdom finds itself, its members might have thought that parliamentary scrutiny of government activity in the run-up to exit day was more important and declined to do so, or at least they might have curtailed the normal conference season recess because of that. Even if they had agreed to go into recess for the usual three-week period, they would still have been able to perform their function of holding the government to account. Prorogation means that they cannot do that."[11]

[10] "But the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model": [2020] AC 373 at 406.
[11] [2020] AC 373 at 408-409.

At the same time, it is impossible to deny that *Gina Miller (No.2)* is a remarkable decision which has the potential entirely to re-set many traditional assumptions. Of course, one swallow does not make a summer: it may be that *Gina Miller (No.2)* will prove to be like a judicial equivalent of Halley's comet: a marvelous spectacle which thrilled and amazed observers at the time while it blazed through the sky, the likes of which will not be seen again for another century. At this point it is too early to say, but if *Gina Miller (No.2)* does take hold then I contend that it will effectively have changed one *Grundnorm* of British constitutional law and tradition. Perhaps then - rather like Judge Brack in Ibsen's *Hedda Gabler* - we may therefore ask what all of this might tell us about the law of the future.

Starting with the past, I suspect that if we could consult the shades of the great jurists of English constitutional law from Blackstone to Wheare and Jennings and beyond in order to ask them why they thought (or assumed) that advice to the Crown from the Prime Minister of the day regarding the prorogation of Parliament could not be judicially challenged the answers given would probably be explained in terms relating to the separation of powers, the sovereignty of Parliament and an embedded constitutional tradition amounting almost to a rule. Perhaps the deeper reason would have been that the issue presented a non-justiciable controversy in that the judges of the day considered there were no judicially manageable standards whereby the validity of any such advice could have been assessed. This would certainly have been true in the past: who now remembers the decisions to prorogue Parliament in October 1949 in quick succession in a series of moves designed to facilitate the passage of the Parliament Act 1949? The Judicial Committee of the House of Lords of the late 1940s would doubtless have been astonished if it had been told at the time to hear that the courts might have had jurisdiction to prevent a series of multiple prorogations designed to circumvent the strictures of the Parliament Act 1911 and to facilitate new legislation further designed to reduce the power of the House of Lords itself to delay legislation from two years to one.

If, however, *Gina Miller (No.2)* proves to be more than one swallow it will, as I have just said, potentially introduce a new *Grundnorm* into English constitutional law, namely, that executive decisions which challenge or threaten in a

fundamental way the accountability of the Government to Parliament can be subjected to judicial review against this (new) benchmark of democratic accountability. Speaking for myself I (respectfully) have some doubts about whether *Gina Miller (No.2)* will have this long-term impact because for this principle to be applied evenly a court might have to over-ride other traditional *Grundnormen* of the English Constitution. There is one further aspect of *Gina Miller (No.2)* which, speaking with the respectful eye of an outsider, perhaps calls for comment. If internal congruence - or, if you like, a sort of systemic legal coherence - vis-á-vis the separation of powers is a desirable hallmark of constitutional law, then is it not curious that the courts should enjoy such an elevated power of review benchmarked against an abstract principle in respect of *executive* decisions *only* whereas *no* such power of review exists in relation to *legislative* decisions? Of course, you might say that the English courts have long enjoyed such a power of review in respect of executive powers on grounds of reasonableness. Yet this traditional power is somewhat different: it is grounded on the theory of giving effect to the legislative intent on the basis that it was assumed that Parliament never intended to give the executive or administration a power to act in this fashion in the first instance.

III.

Privacy International, the Scottish Independence Bill **and** ***Allister and Preeble's Application***

Viewed against this background, three more recent decisions of the UK Supreme Court may be thought to re-assert the more traditional understanding of the *Grundnormen* in UK constitutional law, namely, the sovereignty of the Crown in Parliament and rejecting the idea of a higher law source. This, after all, is what the Divisional Court had said in *Gina Miller (No.1)*[12]:

> "… the most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign, and that legislation enacted by the Crown with the consent of both Houses of

[12] [2018] AC 61.

> Parliament is supreme … Parliament can, by enactment of primary legislation, change the law of the land in any way it chooses. There is no superior form of law than primary legislation, save only where Parliament has itself made provision to allow that to happen."[13]

How, then, has this principle fared in the latest trilogy of cases? The first of these cases, *R. (Privacy International) v. Investigatory Powers Tribunal*[14], is a fascinating decision because it raised the question of whether Parliament could ever legislate to oust the supervisory jurisdiction of the High Court. The Tribunal is designed to regulate the actions of the UK security services and s. 67(8) of the Regulation of Investigatory Powers Act 2000 provides:

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

On the face of it this section might appear broad enough to exclude judicial review. But the majority judgment of Lord Carnwarth applied standard constitutional principles to conclude that Parliament did not in fact intend to go so far as to exclude judicial review. The reference to a "determination" was only to a legal valid determination and, relying on the famous authority of *Anisminic Ltd. v. Foreign Compensation Compensation*[15], he held that a decision vitiated by error of law was not a valid "determination" for this purpose. Section 1 of the Constitutional Reform Act 2005 had expressly preserved "the existing constitutional principle of the rule of law." This in turn amounted to a reognition that Parliament intended with this constitutional statute that the judiciary should

13 [2018] AC 61 at 74.
14 [2019] UKSC 19, [2020] AC 491.
15 [1969] 2 AC 147.

ensure that those key aspects of the rule of law, such as the right to challenge the legality of administrative decisions, were properly upheld.

The dissenting judgment of Lord Sumption is of particular interest because he squarely confronted the question of whether there were limits to parliamentary sovereignty. He first rejected the idea that there were some higher law principles which precluded this.

> "In its more radical form, the argument limits the sovereignty of Parliament in the name of a higher law, ascertained and applied by the court. What is said is that the rule of law is the foundation of the constitution and the source of the legitimacy of all legislation and that judicial review is its procedural embodiment. For this reason, Parliament is not competent to legislate contrary to the rule of law. This was the view tentatively expressed in an obiter dictum of Lord Steyn in *R. (Jackson) v Attorney General*[16] and less tentatively by Lord Hope in his observations, also obiter, in the same case…[17]. It was robustly rejected by Lord Bingham in the same case (para 9) and more fully in Chapter 12 of his book *The Rule of Law* (2010)….. In its less radical form, the argument is that judicial review is necessary to sustain Parliamentary sovereignty. This is because Parliament can express its will only by written texts, to which effect can be given only if there is a supreme interpretative and enforcing authority. That authority by its nature resides in courts of law. This is the view suggested by Laws LJ in the Court of Appeal in *R. (Cart) v Upper Tribunal* [2011] QB 120, paras 34-38. Like the principle that Parliament cannot bind itself, Parliament's lack of competence to oust judicial review is on this view conceptual rather than normative. The point was well put by Farwell LJ in *R v Shoreditch Assessment Committee, Ex p. Morgan* [1910] 2 KB 859 when he observed, at p 880, that "it is a contradiction in terms to create a tribunal with limited

[16] [2006] 1 AC 262 at para. 102

[17] At paras. 104-108.

> jurisdiction and unlimited power to determine such limit at its own will and pleasure - such a tribunal would be autocratic, not limited."[18]

Lord Sumption then continued:

> " The rule of law applies as much to the courts as it does to anyone else, and under our constitution, that requires that effect must be given to Parliamentary legislation. In the absence of a written constitution capable of serving as a higher source of law, the status of Parliamentary legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The alternative would be to treat the courts as being entitled on their own initiative to create a higher source of law than statute, namely their own decisions." [19]

Noting that this proposition had been rejected by both the Divisional Court and the Supreme Court in *Gina Miller (No.1),* Lord Sumption went on to say:

> "Ms Rose would therefore have had a mountain to climb if she had based her alternative case on the more radical form of the argument. In fact, she was wise enough not to do this. Her case was firmly based on the conceptual inconsistency between an ouster clause and the existence of limits on the jurisdiction of the Investigatory Powers Tribunal. I therefore turn to the less radical version of the argument as it was addressed to us.
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> I would accept it up to a point. In reality, it is a variant of the appellant's primary case about Parliamentary intention. If Parliament on the true construction of an enactment has created a tribunal of legally limited jurisdiction, then it must have intended that those limits should have effect in law. The only way in which a proposition can have effect in law, is for it to be recognised and applied by the courts. Parliament's intention that there should be legal limits to the tribunal's jurisdiction is not therefore consistent

[18] [2020] AC 491 at 580-581.
[19] [2020] AC 491 at 582.

with the courts lacking the capacity to enforce the limits. Ms Rose, correctly to my mind, described this as giving effect to the sovereignty of Parliament, not limiting it. In order to escape this conceptual difficulty, Parliament would have to create a tribunal of unlimited jurisdiction or one with unlimited discretionary power to determine its own jurisdiction. A sufficiently clear and all-embracing ouster clause might demonstrate that Parliament had indeed intended to do that. But it would be a strange thing for Parliament to intend, and although conceptually possible, it has never been done.

These theoretical considerations are, however, a long way from the problem presently before us. No one contends that section 67(8) of Act makes Investigatory Powers Tribunal a tribunal of unlimited jurisdiction or that it has an unlimited discretionary power to determine its own jurisdiction. The question is how to reconcile the limited character of its jurisdiction with the language of section 67(8). For the reasons which I have given, the reconciliation is that section 67(8) does no more than exclude review by the High Court of the merits of decisions made by a tribunal performing, within its prescribed area of competence, the same functions as the High Court. It is in substance an exclusion of appeals on the merits and other proceedings tantamount to an appeal on the merits. The bracketed words referring to jurisdiction have been added because the draftsman intended that the decisions of the tribunal on the merits should be treated as within its jurisdiction notwithstanding that it was erroneous. The intention was that the exclusion of appeals on the merits and equivalent proceedings should apply notwithstanding that *Anisminic* had categorised some errors going to the merits as excesses of jurisdiction. None of this gives rise to the conceptual problem described above. Section 67(8) does not exclude or limit the jurisdiction of the High Court to enforce the statutory limits on the Tribunal's powers or subject-matter competence, or the statutory and other rules of law regarding its constitution. In my opinion, Parliament does not contradict itself by enacting that notwithstanding *Anisminic* a decision on the merits by a judicial tribunal of limited jurisdiction exercising the same review function as the High Court is to be conclusive. As Baroness Hale put it in *Cart* (para 40), adopting the approach of Lord Wilberforce in *Anisminic*:

> "… it does of course lie within the power of Parliament to provide that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it has to administer: 'the position may be reached, as the result of statutory provisions, that even if they make what the courts might regard as decisions wrong in law, these are to stand.' But there is no such provision in the 2007 Act. There is no clear and explicit recognition that the Upper Tribunal is to be permitted to make errors of law."[20]

What does this tell us about the *Privacy Intentional* tell us about the UK *Grundnormen?* At a superficial level one could say that it re-affirms the traditional, orthodox view because it rejects the idea that there is no "higher law" principle against which the legality of legislative actions could be measured. You might also say that this is inherent in an unwritten constitution but, for my part, I suggest that it is a little more complex than that. The long course of English/British political and legal history over the last 350 years or so aside, there is no particular reason *as such* why a power of judicial review in respect of legislation could not have been asserted by the English/British courts in much the same way as the power exists in relation to executive decisions. While the context is admittedly quite different, *Marbury v. Madison*[21] was, after all, not inevitable: it is often overlooked that the US Constitution does not *expressly* provide for judicial review of legislation.

Indeed, as I read Hart he more or less implicitly acknowledges this: his point rather is that parliamentary sovereignty *is* the supreme rule of recognition within the UK constitutional system, but not that it inevitably *had* to be such.[22] Here in a sense Holmes, Kelsen and Hart all merge into each other. The reason why UK courts give effect to the sovereignty of parliament is because of that long-

[20] [2020] 491 at 482-583. Lord Wilson also dissented separately, but for different reasons than Lord Sumption. He was alone in disagreeing with the reasoning in *Anisminic.* He concluded that in its ordinary language the statute had been effective to exclude judicial review in respect of what he described as "any ordinary errors of law" made by Investigatory Powers Tribunal.

[21] 5 US 137 (1803).

[22] "For where there is a legislature subject to no constitutional limitations and competent by its enactment to deprive all other rules of law emanating from other sources of their status as law, it is part of the rule of recognition in such a system that enactment by that legislature is the supreme criterion of validity. This is, accordingly to constitutional theory, the position in the United Kingdom" *The Concept of Law* at 103.

embedded tradition, history and precedent they essentially choose to do so: Holmes' "bad man" can thus be told that the UK courts will indeed apply Hart's rule of recognition to give effect to parliamentary sovereignty and this is the ultimate Grundnorm of the UK system which Kelsen would recognise.

There is, however, I suggest a qualification to this. *Privacy International* shows that in practice the UK courts will not permit the exclusion of judicial review so that the supervisory jurisdiction of the High Court remains inviolable, irrespective - again in practice - of what Parliament actually said or, perhaps, it might be more correct to say, even subjectively intended. Parliament can certainly attempt to do so, but Holmes' "bad man" can nonetheless safely be told that no matter what happens and irrespective of any statutory language, his right to apply for judicial review will nonetheless be preserved. Hart might say that what is really happening here is that the UK courts will ultimately refine or qualify their ordinary rule of recognition by refusing to give effect to an attempt to oust this supervisory jurisdiction, if necessary, by not giving effect to the ordinary meaning of the purportedly ousting legislative words.

Kelsen would probably acknowledge this as a qualification of the ultimate UK *Grundnorm* because in his strict theory there has to be an ultimate law authorising this state of affairs. The "law" in essence here is the customary common law of the British Constitution as applied by a conscious judicial decision not to permit the ouster of judicial review. Using the language of modern constitutional law, you could instead say: here is the UK's ultimate constitutional identity: while recognizing the supremacy of the Crown in Parliament, the common law constitutional principles designed to safeguard the rule of law itself are nonetheless preserved and are, in practice, inviolable.

If one turns to the next case, *In re Scottish Independence Referendum Bill*[23]*,* the question was whether it was lawful for the Scottish Parliament unilaterally to hold a Catalan-style referendum on whether Scotland should be independent. The UK Supreme Court held that it was not.

[23] [2022] UKSC 31, [2022] 1 WLR 5435.

Section 29 of the Scotland Act 1998 imposed certain restrictions on the legislative sovereignty of the Scottish Parliament. One of these restrictions was that the legislation could not deal with matters which refer to reserved matters. One of these reserved matters related to matters touching on the United Kingdom and it was clear that the holding of such a referendum would impact on the United Kingdom as a whole. It is plain from the joint judgment of all members of the five judge panel - Lords Reed, Lloyd-Jones, Sales, Stephens and Lady Rose - that as the holding of such a referendum was a matter which a matter which obviously affected the United Kingdom because, quite obviously, if Scotland became independent this would terminate the existing Union. While the actual outcome of the reference can scarcely have been a surprise, Hans Kelsen would surely not have wasted much time in looking for the Grundnorm identified in that case. It is quite obviously that of the Crown in Parliament. While Parliament provided for a large measure of devolution to the Scottish Parliament, the legislative competence of that latter Parliament is not omnipotent. Quite the contrary: it is plain that it in key respects it remains subordinate to Westminster. Inasmuch as there was any doubt about it, it is clear from the *Scottish Independence Reference* that the UK courts will acknowledge and give effect to that Grundnorm.

This is all surely put beyond argument by the UK Supreme Court's decision in February 2023 in *Re Allister and Preebles' Application*[24]*.* the applicants challenged the validity of the Northern Protocol on the grounds that it was inconsistent with Article VI of the Act of Union 1800. As Article VI had guaranteed free trade between Ireland and Great Britain in the then United Kingdom of Great Britian and Ireland, the applicants maintained that the new Protocol had violated Article VI of the Act of Union by creating (they said) a new border on the Irish Sea - as distinct from a border on the island of Ireland.

In fairness, it would in fact not be difficult to point out some inconsistency between the Protocol and the earlier Act of Union. The Protocol after all requires, for example, the payment of tariffs on goods coming from Great Britain to Northern Ireland which are ultimately destined for the EU. This point was accepted by Colton

[24] [2023] UKSC 5. [2023] 2 WLR 457.

J. at first instance in the Northern Irish High Court[25] and as the case progressed through the Northern Irish Court of Appeal up to the UK Supreme Court this issue was never thereafter seriously in doubt. This, however, was not in any sense dispositive for any of the judges who dealt with this. They all pointed out that s. 7A of the EU (Withdrawal) Act 2018[26] expressly provided for the disapplication of all domestic legislation which was inconsistent with the terms of the Withdrawal Agreement (including the Protocol).

Lord Stephens was, however, emphatic on the point:

> "The debate as to whether Article VI created fundamental rights in relation to trade, whether the Acts of Union are statutes of a constitutional character, whether the 2018 and 2020 Acts are also statutes of a constitutional character, and as to the correct interpretative approach when considering such statutes or any fundamental rights, is academic. Even if it is engaged in this case, the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. The most fundamental rule of UK constitutional law is that Parliament, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme. A clear answer has been expressly provided by Parliament in relation to any conflict between the Protocol and the rights in the trade limb of Article VI. The answer to any conflict between the Protocol and any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations which are to be recognised and available in domestic law by virtue of section 7A(2).The modification of Article VI of the Acts of Union does not amount to a repeal

[25] [2021] NIQB 64. Thus Colton J could say (at 62):

> "Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland are unclear and the subject matter of ongoing discussions it cannot be said that the two jurisdictions are on "*equal footing*" in relation to trade. Compliance with certain EU standards; the bureaucracy and associated costs of complying with customs documentation and checks; the payment of tariffs for goods "at risk" and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the "*equal footing*" described in Article VI."

[26] As inserted by s. 5 of the EU (Withdrawal Agreement) Act 2020.

> of that article. The Acts of Union and Article VI remain on the statute book but are modified to the extent and for the period during which the Protocol applies."

I would contend that these two decisions prove, as it were, my point in reverse. They show that i*n all other circumstances* the UK courts will treat parliamentary sovereignty as the ultimate *Grundnorm*. There may of course be cases where they will insist that fundamental constitutional statutes – such as the Act of Union or the Scotland Act - cannot be the subject of merely implied repeal and will look for this purpose to Parliament for express language. Yet the *Scottish Referendum* case and *Allister and Prebbles* show – in contrast to the position in *Privacy International* - that where clear language is used even in relation to these constitutional statutes, the courts will give effect to it. All of this tends to show that parliamentary sovereignty is the ultimate UK *Grundnorm* which is otherwise inviolate *save* where the judicial review powers of the High Court would otherwise be overridden by legislation. Here the lesson of *Privacy International* is that there is here de facto a form of unwritten, judge-made higher law, the consequence of which is that - again, de facto - the courts will not give effect to such a law. *Privacy International* also shows that in the UK, it is possible that *Grundnormen* can be created or recognised by judicial decision. Indeed, *Privacy International* represents the type of what Kelsen described as a form of customary law of a kind which was capable of creating a *Grundnorm*. This phenomenon is, however, confined to cases which are quite wholly exceptional, and this is why in time it may be recognised that *Gina Miller (No.2)* may have created a new *Grundnorm*.

IV.

The situation in Ireland is quite different but in its own way equally interesting. I do not propose to dwell on the situation between 1921-1922 or in the then Irish Free State between 1922-1937, but they provide empirical proof of orthodox Kelsenian theory which holds, in effect, that a society with no clear *Grundnorm* or which does not possess a court system with authority and status to determine such a *Grundnorm* is liable to internal collapse. In 1921-1922 the issue was whether the 2nd Dáil had the authority under its own parallel legal system to ratify

the Anglo-Irish Treaty which had been signed in December 1921.[27] Elements of the losing side to that vote thereafter repudiated the authority of the Dáil and resorted to war. While the presence of an effective judicial body which could authoritatively have ruled on that fundamental dispute might not have prevented Civil War – one thinks here of the disastrous failings of the US Supreme Court in the *Dred Scott*[28] case in 1857 – the absence of such a body certainly did not help. The intricacies of the Irish Free State Constitution between 1922 and 1937 are too complex to admit of even the shortest summary. It is perhaps sufficient to state that that Constitution collapsed because there was in effect no clear hierarchy of norms as between ordinary legislation, the Constitution itself and the Anglo-Irish Treaty of 1921 (which had been originally scheduled to that document by s. 2 of the Irish Free State (Saorstat Éireann) Constitution Act 1922).[29] In this respect of the Constitution of the Irish Free State suffered the same problem as the Weimar Constitution of 1919 on which it had been partially modelled. Speaking later of the Weimar experience, Kelsen had a word for this: "Verfassungsdurchbruch." This is a portmanteau German word for which there is really no precise English translation. It literally means "Constitution break-through", but "breakthrough" is not here used in the positive sense of, e.g., a political breakthrough, but rather in its negative sense.

Again, the Irish experience since 1937 is too complex to merit anything more than a few superficial comments. Whatever about its other failings, the Constitution of 1937 is as thoroughly Kelsenian in its approach as it is possible for a written

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[27] The essence of the argument here was that following the results of (all-island) General Election held in December 1918, the Sinn Féin party won the majority of the seats. As a result the Sinn Féin deputies took their seats in the new Dáil Éireann and pledged an oath of allegiance to an Irish Republic. It was said that the Dáil therefore had no authority to vote for the 1921 Treaty under its legal system since it had provided simply for dominion status for the newly established Irish Free State.

[28] 60 US 393 (1857).

[29] See*, e.g., R. (Cooney) v. Clinton* [1935] IR 245 at 247, per O'Connor MR (decided in May 1924) (holding that because Article 50 of the 1922 Constitution had allowed the Constitution to be amended for an initial eight year period by ordinary legislation so long as it did not conflict with the 1921 Treaty, "it is difficult to see how, during the eight years, any Act passed by the Oireachtas [Irish Parliament] so long as it is within the terms of the Scheduled Treaty." O'Connor MR also sanctioned what came to be known as implied amendments, saying

> "It was urged that any Act of Parliament purporting to amend the Constitution should declare that it was so intended, but I cannot accede to that argument in view of the express provision that any amendment made within that period may be made by ordinary legislation."

constitution in a common law country to be. Drawing on the experience of both 1921-1922 and 1922-1937, there is at every point a very clear hierarchy of norms together with a system for resolving conflicts of norms through the declaration of unconstitutionality mechanism which, unlike the United States Constitution, is expressly provided for. All organs of State – executive, legislative and judicial – are expressly subordinated to the Constitution as a higher law. Article 15.4 expressly provides that a law which infringes the Constitution is to that extent invalid and, indeed, it obliges the Oireachtas not to enact such a law. The Constitution cannot be indirectly amended[30] and, save for a brief transitory period which expired in June 1941, it can only be amended expressly by popular vote.[31] A strict Kelsenite would of course insist on only one court with authority to rule on the question of norm validity. In fairness, the drafters in 1937 seriously explored the idea of a specialist Constitutional Court modelled on continental lines right up to the end of the drafting process. It was abandoned only because they knew that the legal profession would be up in arms at the prospect of so radical a suggestion. De Valera later grumbled to the Dáil that as he could not come up with anything better, the Supreme Court would have to be given that power of constitutional review.[32] Talk about back-handed compliments!

It is clear, therefore, that the referendum mechanism and popular sovereignty represents the ultimate *Grundnorm* in the Irish constitutional system. This has been long recognised and understood, but it has been graphically illustrated by two important recent decisions. In *Costello v. Ireland*[33] the Irish Supreme Court held in a hugely complex judgment that the ratification of the EU-Canada Trade Agreement ("CETA") in its present form was unconstitutional as it could potentially jeopardise key aspects of Irish juridical sovereignty and constitutional identity because it provided for investor panels whose judgments against Ireland in respect of legislative, executive or even judicial actions would be made more or less

[30] Article 46.3, Article 46.4.
[31] Article 46, Article 47.1.
[32] Noting that some counties had Constitutional Courts which "took a broader view", Mr. de Valera continued by saying that while he did not "wish to be hurtful", nonetheless:

> "If I could get from anybody any suggestion of some court to deal with such [constitutional] matters other than the Supreme Court, I would be willing to consider it. I confess now that I have not been able to get anything better than the Supreme Court to fulfill this function": see 67 *Dáil Debates* at Cols. 53-54 (111 May 1937).

[33] [2022] IESC 44.

automatically binding. (The contrast between the reasoning and outcome in the *Costello/CETA* case on the one hand and that in *Allister and Preebles* on the other tells you all you need to know about the by now quite profound differences between UK and Irish constitutional law). In the second, *Heneghan v. Minister for Housing*[34], the Court held that the Oireachtas was obliged to give effect to an almost forgotten constitutional amendment from 1979 dealing with the revision and expansion of the franchise for university seats in the Seanad, the Irish Upper House, so that the existing legislation providing for such elections was unconstitutional. The Court later set a time limit for enacting such legislation[35]. Here again the Court stressed that popular sovereignty via the referendum process was the ultimate *Grundnorm* in the Irish constitutional system, so that the courts were obliged to give effect to the will of the People even where the legislative branch had failed to act.

V.

If you head north west of the Landstrasse as the crow flies as you will ultimately come across two neighbouring islands with close ties of history, culture and language. Their paths have diverged in the last 100 years, with that divergence clearly marked in the field of constitutional law. One has opted for parliamentary sovereignty as its ultimate Grundnorm, the other for popular sovereignty. Yet, as I hope I have just shown, they also share a common Grundnorm, namely, the commitment to access to the courts so that the protection of the rule of law represents inviolable constitutional fundamentals in each jurisdiction. Perhaps this lecture has also shown that there is much about each system that we each need to learn from.

I started with Lord Denning, so allow me to close with Lady Hale. I cannot pay any finer tribute to the dedicatee of tonight's lecture than to say that Lady Hale's judicial output represents the most distinctive and visionary English legal voice since Denning himself. It has been a great honour to have been asked this evening to pay tribute to that voice.

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[34] [2023] IESC 7, [2023] 2 ILRM 1.

[35] *Heneghan v. Minister for Housing (No.2)* [2023] IESC 18, [2023] 2 ILRM 97.