

Political Constitutionalism and the Human Rights Act

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Many commentators portray the Human Rights Act (HRA) as marking the demise of Britain's 'Political Constitution'. This article argues otherwise. The HRA need not hand over supremacy for rights adjudication from the legislature to the courts. First, the HRA brings 'rights home', strengthening in certain respects domestic rights instruments vis-à-vis the ECHR. Second, sections 19 and 4 of the Act maintain and potentially enhance Parliament's scrutiny of rights and its sovereignty over the courts in defining and upholding them. Finally, section 3 and rights-based judicial review more generally can be assimilated to a system of 'weak' review whereby courts defer to the legislative 'scope' determined by Parliament and are restricted in their independent determinations to the judicial 'sphere' of the fair conduct of the case at hand. Such 'weak review' has always been necessary. However, the HRA potentially reinforces judicial deference by giving it a stronger statutory basis. That the HRA could strengthen rather than undermine political constitutionalism need not mean it does or will do. However, the implication of this article is that it ought to be regarded as so doing, with the judiciary acting accordingly.

The UK has long presented scholars of constitutionalism with a puzzle.¹ Despite never having had an entrenched written constitution, it can claim to be the inspirer and originator of two key elements of modern 'legal constitutionalism': the separation of powers and a bill of rights. Book XI Chapter 6 of Montesquieu's *De l'Esprit des Loix*, which drew on English sources and took the English constitution as its model, is commonly regarded as the urtext of the former, while the 1689 Act Declaring the Rights and Liberties of the Subject and Settling

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¹ Some of the most salient features of the UK/British constitution derive from Scotland, Northern Ireland and most recently Wales possessing distinctive legal and political arrangements. However, the aspects discussed here can largely be captured by talking of the UK as a whole, although certain commentators cited in this paragraph were writing before the Act of Union with Scotland of 1707 or incorrectly employ 'England' as a synonym for the UK.

the Succession of the Crown offered the template for the latter. Yet, from more or less the same period, ‘parliamentary sovereignty’ emerged as the distinctive constitutional feature of the UK – a characteristic that commentators from the late eighteenth century onwards have believed negated, or at least trumped, both of these attributes of a legal constitution. As Dicey, who became this doctrine’s chief ideologist, famously (and approvingly) noted, there is ‘in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists’.² With the highest court part of the House of Lords and the Lord Chancellor a member of the executive, judicial separation was also partial. True, some commentators – notably Tom Paine – considered these British peculiarities effectively meant that the UK had no constitution at all.³ On this account, the paradigm of constitutionalism had passed from Britain to the United States. But from Edmund Burke onwards, a host of defenders of the Westminster system have regarded it as offering a distinct and superior model of ‘political constitutionalism’ that protects British liberties far more effectively than the paper parchment of a ‘legal constitution’ might.

Has this all changed with the Human Rights Act (HRA) and the subsequent creation of a Supreme Court separate from Parliament and government, which to some degree it prompted? Passed in 1998, the HRA empowers courts to review legislation for compliance with the rights enshrined in the European Convention on Human Rights (ECHR) – albeit in what has been called a ‘weak’ form that does not allow courts to disapply the law, but does require them to either interpret legislation in complaint ways or declare it to be incompatible.⁴ Many scholars have regarded this development as the most significant of the various constitutional reforms carried out in the UK over the past decade.⁵ However, the precise nature of that significance remains a matter for dispute. Some have regarded it as ‘an unprecedented transfer of political power from the executive and legislature to the judiciary’, that for either good or ill has undermined parliamentary sovereignty, the capstone of the

² A V DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 197-8, 10th edition (MACMILLAN 1959)

³ T. PAINE, ‘THE RIGHTS OF MAN, PART I’ IN *POLITICAL WRITINGS*, ED. B KUKLICK, 81, 131 (CAMBRIDGE UNIVERSITY PRESS 1989)

⁴ On ‘weak’ versus ‘strong’ judicial review, see J. Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L. J.* 1346, 1355-6 (2006), who assigns the HRA to the first. This term is also used by Mark Tushnet, *Alternative Forms of Judicial Review*, 101 *MICH. L. REV.* (2003). As we shall see, others dispute this distinction.

⁵ The other, equally significant, developments are devolution, membership of the EU and the changes to local government. So far, no scholar has adequately assessed all four and the interesting and complex ways they interrelate, though at least one scholar – V. BOGDANOR, *THE NEW BRITISH CONSTITUTION* (HART 2009) 62 – has argued that the HRA can be seen as the ‘cornerstone’ of all these diverse developments – something most reviewers of his book have doubted. As I share this scepticism, apart from a few remarks on both the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ), I shall be restricting my analysis to the HRA.

UK's political constitution, and replaced it with a legal constitution.⁶ Others, though, have seen it as either compatible with – even an extension of – the UK's political constitution,⁷ or at least as a typical British compromise between political and legal constitutionalism.⁸ Meanwhile, a few – among them members of both these camps – have wondered, albeit for different reasons – whether any of it matters.⁹ A number even maintain that despite appearances legal constitutionalism always has played a crucial and, in many respects, ineliminable role within the British constitution. These developments simply formalise that fact.¹⁰

In what follows, I shall attempt to assess these various points of view. The assessment is not so much descriptive as analytical and normative. My aim is less to assess if current judicial practice suggests the HRA *is* compatible with a distinctively political conception of the constitution and more to explore if it *could* be so. Such an exercise seems worthwhile for the following reason: if such an account could not be given, then the political constitution would be dead - if, indeed, it had ever been alive¹¹ - and could only be revived by repealing or considerably amending the HRA (something, as we shall see, that is dismissed as impossible by some, though advocated at the last election by the Conservative Party).¹² Like other proponents of political constitutionalism, I would find such a conclusion disturbing given that our objections to legal constitutionalism arise not from opposition to human rights

⁶ K. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MODERN LAW REVIEW 79 (1999). For a parallel view from a legal constitutionalist see BOGDANOR *supra* note 5, ch. 3, and his approval of Lord Steyn's opinion (quoted at 64) that the HRA turned the UK into 'a true constitutional state' that 'made the judiciary the guardians of the ethical values of our bill of rights'.

⁷ E.g. Waldron, *supra* note 4, and – from a rather different perspective – A. YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT (HART 2009).

⁸ E.g. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001) and J. Hiebert, *Parliamentary Bills of Rights: An Alternative Model*, 69 MODERN LAW REVIEW, though the latter is guarded as to whether it has been successful..

⁹ E.g. K. Ewing, *The Futility of the Human Rights Act* PUBLIC LAW 829 (2004), from the political constitutionalist side, and D. Dyzenhaus, *Are Legislatures Good at Morality? Or Better at it than the Courts?* 7 I-CON 46, 47-50, from the legal constitutionalist.

¹⁰ That will be the case for those who take either a Dworkinian or a natural law perspective on the nature of the judge's role - see for example T. R. S. ALLAN, LAW, LIBERTY AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM (CLARENDON PRESS 1993) and DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY (CAMBRIDGE UNIVERSITY PRESS 2006).

¹¹ The Liberal Democrats opposed any change. The coalition agreement now pledges to explore a British Bill of Rights – previously code for strengthening the guarantees of Parliamentary sovereignty and, it is now thought if it happens at all it would be ECHR plus rather than minus. The coalition agreement also modifies the Conservative proposal for a Sovereignty Bill to an exploration of its possibility. For details see 'The Coalition: Our Programme for Government', sections 3 and 13 at http://www.cabinetoffice.gov.uk/media/409088/pfg_coalition.pdf

¹² See note 8 and Allan's and Dyzenhaus's reviews of my book RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM (CAMBRIDGE UNIVERSITY PRESS 2007) in T. R. S. Allan *Book Review*, 67 CLJ 423, 425-6 (2008) and D. Dyzenhaus, *How Hobbes Met the 'Hobbes Challenge'*, 72 MLR 488, 490-91, 505-506

but because we regard political means as offering securer safeguards for them. Consequently, it ought to be possible to reconcile political constitutionalism with something like the HRA's attempt to enumerate them in an ordinary statute and offer qualified protection by the courts.

I should note that some have seen the HRA and parallel developments in other commonwealth countries as giving rise to a new model of constitutionalism that balances legal and political constitutionalism in a novel way that offers an alternative to both.¹³ By contrast, I believe it is more accurate to say that just as different forms of legal constitutionalism give greater or lesser weight to the legislature and popular sovereignty in amending or deciding constitutional questions, so different forms of political constitutionalism have allowed greater or lesser degrees of judicial independence and discretion. Both kinds of constitutionalism allow for some balance and there is nothing new in that.¹⁴ The crux is where supremacy lies – with the legislature, as political constitutionalists desire, or the judiciary, as legal constitutionalists wish, and how far does that make judicial deference to Parliament a central feature of how judges conceive of their role. On this account, therefore, the crucial test with regard to the HRA from a political constitutionalist perspective is whether or not it renders legislative supremacy redundant.¹⁵ My central claim is that it need not do so.

I start with a brief outline of political constitutionalism. Subsequent sections then argue that the HRA need not, as a matter of either logical or practical necessity, replace it with legal constitutionalism – indeed, it potentially buttresses the role of Parliament. First, the HRA brings 'rights home', strengthening in certain respects domestic rights instruments vis-à-vis the ECHR. Second, sections 19 and 4 of the Act maintain and even enhance Parliament's scrutiny of rights and its sovereignty over the courts in defining and upholding them. Finally, section 3 and rights-based judicial review more generally can be assimilated to a system of 'weak' review whereby courts defer to the legislative 'scope' determined by Parliament and are restricted in their independent determinations to the judicial 'sphere' of the fair conduct of the case at hand. Such 'weak review' has always been necessary.

¹³ E.g. Gardbaum, *supra* note 8 and *Reassessing the New Commonwealth Model of Constitutionalism* 8 I-CON 167 (2010).

¹⁴ See BELLAMY *supra* note 12, 5-6, 10.

¹⁵ For example, it is the belief that it does that leads Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOR. L. REV. 813, 814 (2003) sorrowfully to conclude that the HRA and parallel developments elsewhere has simply withdrawn the Westminster model from sale, a view shared more positively by BOGDANOR *supra* note 5, among others.

However, the HRA arguably reinforces judicial deference by giving it a stronger statutory basis.

Political Constitutionalism

Within the British context, political constitutionalism has hitherto been associated with the seminal article of J. G. A. Griffith¹⁶ and seen mainly as a description of the UK political system.¹⁷ More recently, a number of scholars have sought to stress its normative aspects and deeper historical roots and to offer it as a more generally applicable jurisprudential model rather than just a defence of the peculiarities of the British constitution.¹⁸ Although there are significant differences between these various accounts in terms both of focus and starting point, these divergences can largely be put to one side for the purposes of this article. My primary objective here is to consider the plausibility of political constitutionalism in practice and only secondarily to defend its normative attractions.¹⁹ To this end, I shall offer an ‘ideal type’ of political constitutionalism that draws together the convergent descriptive and normative elements of the various versions on offer and briefly indicate how this model could be presented as offering a plausible view of the constitutional potential of the UK political system pre-HRA.

Five key and related features characterise the ‘ideal type’ of political constitutionalism. First, political constitutionalists contend there are reasonable disagreements about constitutional essentials, including rights. Among other matters, we disagree about the sources of rights – their philosophical foundations; the subjects of rights, or who possess them, where and when; their status with regard to other values, such as utility; their scope – how far given rights might extend and create obligations on others; the ways

¹⁶ J.A.G. Griffith, *The Political Constitution* 42 MLR 1 (1979)

¹⁷ E.g. D. OLIVER, *CONSTITUTIONAL REFORM IN THE UK* (OXFORD UNIVERSITY PRESS 2003) 21

¹⁸ BELLAMY *supra* note 12 and ADAM TOMKINS, *OUR REPUBLICAN CONSTITUTION* (HART 2005) have, along with Griffith *supra* note 16, come to be seen as prime normative statements of political constitutionalism as applied to the UK – see G. Gee and G. C. N. Webber, *What Is a Political Constitution?*, OJLS, advance access April 14 2010. Also highly important on the more descriptive side is the work of Keith Ewing, e.g. *supra* notes 3 and 7. However, though none of them uses the term, I think one can also include among normative theorists of political constitutionalism J. WALDRON, *LAW AND DISAGREEMENT* (OXFORD UNIVERSITY PRESS 1999), who at various points associates his argument with a ‘commonwealth’ model of constitutionalism, T. CAMPBELL, *LEGAL THEORY OF ETHICAL POSITIVISM* (DARTMOUTH 1996), and M. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (PRINCETON UNIVERSITY PRESS, 1999). A useful collection that gathers together many of these names in a discussion of the HRA is the somewhat mistitled volume edited by T CAMPBELL, K. EWING AND A. TOMKINS (EDS) *SCEPTICAL ESSAYS ON HUMAN RIGHTS* (OXFORD UNIVERSITY PRESS 2001).

¹⁹ See BELLAMY *supra* note 12 for such a defence.

they might be best secured; how they might be set and balanced against each other; and so on.²⁰

Second, as a result political constitutionalists maintain there can be no ‘higher’, rights-based constitutional law that sits ‘above’ or ‘beyond’ politics. We necessarily frame and apply rights-based judgments within the ‘circumstances of politics’. We may need rights to coordinate our collective behaviour and offer forms of protection to individuals and groups from the uncertainties and injustices that arise within social life, yet we differ considerably over what the most appropriate system of rights might be. So any system of rights has to be politically negotiated and will be the product of the institutional arrangements that exist to arbitrate these debates.²¹

Third, and as a consequence of these first two points, they contend judicial review is politics by legal means. Within the UK, a prime influence on the development of what might be called ‘strong’ legal constitutionalism has been the work of Ronald Dworkin and his followers.²² Political constitutionalists have been particularly critical of the Dworkinian account of courts as a forum of principle, developing the critiques of those who have challenged the policy/principle distinction on which this thesis relies. They have also criticised Dworkin’s claim that there is a ‘right’ answer as a matter of law in ‘hard cases’ and his apparent inability to distinguish invocations of morality that are supposed to be legally binding from those that are simply cases of judges exercising discretion.²³ By contrast, political constitutionalists can be broadly placed within the fold of legal positivism. Obviously, it is possible to be a legal positivist and still advocate a form of legal constitutionalism. However, political constitutionalists, as Jeremy Waldron has noted,²⁴ give the legal positivist’s focus on the institutional sources of law an important twist. For them, the democratic provenance of a law forms an essential feature of its political legitimacy. Unlike Hobbes, for whom the kind of authority he associated with sovereignty defines law regardless of who that sovereign might be, the political constitutionalist believes that law-

²⁰ See e.g. Griffith *supra* note 16, 17-18, 20; BELLAMY *supra* note 12, 20-23, Waldron, *supra* note 4, 1366-69 and WALDRON *supra* note 18, 11-12.

²¹ Griffith *supra* note 16, 16-18; WALDRON *supra* note 18, 159-60; BELLAMY *supra* note 12, 20-26;

²² See inter alia RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (DUCKWORTH 1977), *A MATTER OF PRINCIPLE* (HARVARD UNIVERSITY PRESS 1985) and *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (HARVARD UNIVERSITY PRESS 1996). See too T R S ALLAN *supra* note 8.

²³ Griffith *supra* note 16 takes off in part from a critique of DWORKIN 1977 *supra* note 18, while much of WALDRON *supra* note 18 is focussed on his writings, e.g. ch. 13, as is BELLAMY *supra* note 12 e.g. 74-79, 93-100.

²⁴ See J. Waldron, *Can There Be a Democratic Jurisprudence?* 58 EMORY L.J. 675, 684-91 (2008-2009)

making, sovereign power must reside in democratic institutions that embody a plausible conception of political equality. Moreover, as Waldron also notes,²⁵ it is important for the political constitutionalist not just that the source of law be democratic but also that the business of recognising laws by courts and lawyers be reasonably clear and open to lay people, not simply an arcane endeavour of the legal profession. For a democrat, the criteria of legal validity need to be understandable by the citizens whose property the law is. This concern applies particularly to the notion of judge made law – not least because of potential mystifications that arise when the law seems to be a creature of judicial discretion and gets defined through judges exercising their private judgments about the merits of particular cases rather than via settled parliamentary processes.

Fourth, political constitutionalists regard courts as being both less legitimate and less effective mechanisms than legislatures within working democracies, such as the UK, for reasoning about the most appropriate constitutional scheme of rights. They insist that it is important to ensure not only that the outcomes of any decision procedure embody the equal concern and respect for all individuals as autonomous agents that motivates contemporary theories of rights, but also that the process whereby such decisions get made exemplifies such a commitment to the equal status of citizens. Indeed, they are inclined to believe that only such an equality regarding process will secure appropriately equitable outcomes – or could legitimately resolve disagreements about what such an outcome (or process) could be. When it comes to both process and outcome, they claim democratic legislatures prove superior to courts. Two features figure particularly strongly in the comparisons political constitutionalists draw between the two: the deliberative qualities of legislatures compared to courts, and the accountability of legislators to citizens. In both cases, political constitutionalists challenge the legal constitutionalist's claims that the legal context and independence of courts are advantages rather than disadvantages for fair and impartial reasoning about rights.²⁶ On the one hand, they argue that the need for courts to accommodate both extant law and to consider only those parties with legal standing in the particular case, tends to make them less apt than legislatures to take into consideration all the moral and practical considerations relevant for collective decisions. On the other hand, they see the electoral accountability of legislators as giving citizens political equality as autonomous reasoners and sources of information about rights, strengthening their sense of ownership of rights decisions and enabling them to ensure

²⁵ Waldron, *supra* note 24, 691-97.

²⁶ See Griffith *supra* note 16, 16, 20; Waldron *supra* note 4, TOMKINS *supra* note 18, 27-30, 64-5 and BELLAMY *supra* note 12, especially Part 2.

the full range of concerns are taken into account and appropriately weighed. In both cases, the electoral incentive of parties to build a coalition of voters capable of commanding a majority, and either to criticise and offer an alternative to the incumbent parties or defend themselves against such criticisms, means that a continuous balance of power exists between government and opposition. This balance serves to aid consideration of alternatives and curb abuses of power. By contrast, courts fail to offer as equal a chance to all citizens for their views and concerns about the collective provision and protection of rights to be counted, weighed and challenged. Indeed, because the law is a more restricted forum than legislatures, with entrenched bills of rights favouring the *status quo*, strong constitutional review has a tendency to favour the privileged over the unprivileged. As the few large n studies that have been carried out in this area indicate, within established democracies rights-based judicial review by constitutional courts has invariably been a means for blocking rather than promoting progressive social reform. Hegemonic groups have successfully argued that such measures impose coercive restrictions on individual civil rights.²⁷ Indeed, the record of such courts as defenders of civil rights has overall proved no better and on occasion far worse than legislatures for similar reasons – they allow powerful interests an unequal chance to ‘trump’ collective decisions in the name of constitutional rights.²⁸ But, as political constitutionalists note, if rights claims have already been ‘played’ in the legislative process, then such judicial ‘trumping’ is an illegitimate form of double-counting. There are no trumps left to play if they have already been duly considered by the legislature.²⁹

Fifth, as a result of all the above, political constitutionalists affirm that the rights determined by legislators within legislation should be superior to the decisions of courts. Judicial decisions should be guided by legislation and courts should not have the power to strike down legislation on substantive as opposed to procedural grounds. The Supreme Court on constitutional issues, including rights, should be parliament.

Two important clarifications need to be entered and underlined at this point. Both are crucial to the analysis of the sections that follow and the assessment of whether the HRA and political constitutionalism are compatible. First, as noted above, although political constitutionalists are sometimes dubbed ‘rights-sceptics’ none – so far as I am aware – deny that individuals possess rights (even if they offer different accounts of the moral and other

²⁷ See R. HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (HARVARD UNIVERSITY PRESS, 2004).

²⁸ G. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?*, (UNIVERSITY OF CHICAGO PRESS, 1991); TUSHNET *supra* note 18, Ch. 6.

²⁹ WALDRON *supra* note 18, 12; BELLAMY *supra* note 12, 37-8.

sources of such rights).³⁰ Rather, they are sceptical about rights-based constitutional review by courts. In fact, their position is grounded in at least one right – what Waldron calls ‘the right of rights’ - that of participating as an equal claimer of rights in collective decision-making.³¹ The argument is premised on the view that among those who take rights and justice seriously, the very grounding theorists of a liberal or social democratic persuasion normally give for such rights – namely, that they support equal concern and respect for autonomous individuals – point towards prioritising their right to participate as an equal in collective decision making about the shape of rights in their society.

Second, political constitutionalists do not deny that all legislation will be subject to an element of judicial review when applied by courts to particular cases. No law can be drawn up in such a detailed way that it anticipates all possible cases that might be decided with reference to it. Nor can judges avoid deploying what might be regarded as principles of natural justice in their interpretation of how the law applies. However, the decision as to whether legislation might be regarded *per se* as rights compliant, and how such compliance might best be achieved, ought, on their view, ultimately to rest with the legislature.³²

These five features of political constitutionalism all point towards something like the doctrine of parliamentary sovereignty – the view, in Dicey’s words, that Parliament possesses ‘the right to make or unmake any law whatever; and, further, that no person or body is recognised ... as having a right to override or set aside the legislation of Parliament.’³³ They need not go any further than that.³⁴ For example, they do not entail popular sovereignty if that is taken to mean a radical form of democratic self-rule, such as direct democracy. Nor do they point to constitutional referenda or what might be called popular constitutionalism. Not only do these tend to be super-majoritarian, thereby favouring what may be an unjust *status quo*,

³⁰ Griffith *supra* note 16, 17 perhaps comes closest in dubbing ‘rights’ simply ‘political claims by individuals and groups’. However, he certainly believed that the claims of the relatively powerless in society deserved being taken very seriously indeed and offered a more equal hearing than he thought likely by the judiciary.

³¹ WALDRON *supra* note 18, ch. 11 and R. Bellamy, *Constitutive Citizenship vs. Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act*, in CAMPBELL ET AL *supra* note 15, 15-39 and BELLAMY *supra* note 12, ch. 4.

³² Perhaps the only theorist I’ve associated with this camp who might disagree is CAMPBELL but see BELLAMY *supra* note 12, 83-88 for a comment on this view, and J. Waldron, *Judges as Moral Reasoners*, 7 I-CON, 2 (2009).

³³ DICEY *supra* note 2, 39-40.

³⁴ YOUNG *supra* note 7 offers a doctrinal analysis of parliamentary sovereignty that she believes renders it consistent with entrenchment of the HRA. As becomes clear in the second part of her book, this argument is then placed at the service of a ‘dialogic’ model of human rights review that places courts and the legislature on an equal basis. Whatever the merits of Young’s reading of parliamentary sovereignty in its own terms, it is incompatible with the account of political constitutionalism given here which requires legislative supremacy. Therefore, in what follows I shall take parliamentary sovereignty as precluding such entrenchment.

they also fail to motivate citizens and legislators to look at rights in the round, as part of a programme of government that takes into account the full range of preferences on a given issue and the way it relates to other important issues. That purpose is best achieved via a system of representative democracy where all citizens can participate as equals in public processes that select and can hold accountable the prime power holders. As a result, the key decision-makers have incentives to treat the views and concerns of those who elect them with equal concern and respect. The claim of political constitutionalism is that parliamentary democracy possesses constitutional qualities that make the fear of a populist government giving rise to a tyrannous majority highly tendentious. The objection to judicial review is at its heart an objection to the lack of such constitutional qualities within legal constitutionalism. These are wanting because of the absence of accountability and responsiveness by the judiciary, combined with the narrowness and unrepresentative nature of the considerations they view as relevant. These may be good qualities in ensuring consistency in the application of the law, but are poor qualities for making laws. Much of the recent debate between political and legal constitutionalists turns on how realistic as well as legitimate it is to see the judiciary as ultimately the servants of parliament – either ever, or post-HRA. It is to this issue that I now turn.

The HRA: From Political to Legal Constitutionalism?

What might be termed the basic case for regarding the HRA as an extension of political constitutionalism is, in formal terms, relatively straightforward. Indeed, most commentators - including those who believe it *de facto* marks a shift towards legal constitutionalism - accept that the drafters of the HRA went to considerable lengths to render the judicial protection of Convention rights compatible with the Diceyan view of parliamentary sovereignty cited above,³⁵ which we have seen forms the key aspect of Britain's political constitution. This doctrine is usually identified with two main features: first, that Parliament can legislate in any way or area it pleases, including if necessary amending and repealing any existing legislation, and, second, that no other institution may 'disapply' parliamentary legislation. At the simplest level, the HRA appears to meet the first criteria in being an ordinary piece of

³⁵ See Nicholas Bamforth, *Understanding the Impact and Status of the Human Rights Act 1998 within English Law*, Global Law Working Paper 10/04, http://www.law.nyu.edu/global/workingpapers/2004/ECM_DLX_015806, xxii, on the one side, and A. KAVANAGH, *CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT* (CAMBRIDGE UNIVERSITY PRESS, 2009), 310-13, on the other.

parliamentary legislation – it has no special, entrenched status – and, as such, can be revised or withdrawn on the basis of a parliamentary majority. Meanwhile, as we shall see, section 4 of the Act, which allows the court to issue a ‘declaration of incompatibility’ with convention rights, has been drafted so as to maintain the second criteria. For such declarations do not in themselves disapply the offending legislation – only Parliament can do that. Needless to say, though, many commentators have found the basic position a little too simple and formal. I shall begin by looking at the relationship between the HRA and the ECHR and the European Court of Human Rights (ECtHR) to see if it offers a strengthening of domestic control over rights congenial to a political constitutionalist. I then turn to the other main provisions of the HRA and explore how far a ‘weak’ form of judicial review that preserves legislative supremacy on rights questions is plausible.

Bringing Rights Home? The HRA and the ECHR

Some have objected that repeal of the HRA would be tantamount to withdrawal from the ECHR.³⁶ However, although Article 1 of the Convention requires contracting states to secure Convention rights within their jurisdictions, it does not specify how this might best be done. The primary domestic mechanism need not be judicial – indeed, was not in either the UK or several Nordic countries for over 50 years. Of course, it might be argued that the ECHR itself undermines the political constitutionalist position, with the HRA simply building on that concession. However, formally the Convention is an international agreement between sovereign states from which they can withdraw or could potentially seek to renegotiate, as has periodically occurred when adding protocols or changing the composition and working of the ECtHR. This status has also allowed the UK not to sign up to all protocols to the Convention and to hold reservations with regard to particular Articles. Few would deny that withdrawal from the ECHR would have such grave consequences as to be highly unlikely – adversely affecting the UK’s international standing and moral legitimacy and arguably involving leaving the EU as well, for which adherence to the ECHR is a requirement. But although those advocating this position tend to be on the margins of British political life, the constraints on parliamentary sovereignty are political not legal and such as to leave the first criterion identified above intact.³⁷

³⁶ G. Phillipson, *Deference, Discretion and Democracy in the Human Rights Act Era*, CURRENT LEGAL PROBLEMS, 40, 62 (2006).

³⁷ As remarked *supra* note 9, a strong faction within the Conservative Party – including both the current Foreign Minister and the Prime Minister - have long advocated formally entrenching UK sovereignty vis-à-vis the EU,

The second criterion might seem trickier given that the ECtHR can pass judgment on parliamentary legislation or administrative acts. True, there is a certain intergovernmental logic in the membership and organisation of the ECtHR. Their decisions also provide for a ‘margin of appreciation’ in the interpretation of rights – thereby conceding that while national governments and legislatures must all value Convention rights, their valuations of them may diverge to reflect local circumstances and traditions. Indeed, many clauses of the Convention allow the protection of individual rights to be balanced against other collective concerns such as public order, health and security. States may even temporarily derogate from certain provisions when these countervailing considerations are deemed to make it necessary to do so. Though the ECtHR can rule that laws or executive actions that have the sanction of parliament breach the ECHR, and British governments have invariably complied with such rulings, unlike EC Law the ECHR contains no principles of supremacy and direct effect and unlike the ECJ the ECtHR cannot instruct British courts to disapply rules of national law or interpret them in a particular way. The ECtHR can only award remedies against signatories as a matter of international, not domestic, law. It might be argued that even pre-HRA, though, the courts had begun to cite the ECHR of their own accord and risk going beyond what was officially permitted.³⁸ However, the courts still deferred to Parliament’s explicit repudiations, as where the Court of Appeal judgment in the *Joint Council for the Welfare of Immigrants* case was overruled by primary legislation the following day.³⁹ So the second criterion is also met.

Nevertheless, despite compliance of the ECHR regime with parliamentary sovereignty, there is no denying that the growing number of cases against the UK being brought before the ECtHR was felt to be an embarrassment that the HRA was in part designed to rectify. In this regard, many viewed the HRA as reinforcing political constitutionalism. The HRA would ‘bring rights home’ by offering domestic remedies that would reduce the need for recourse to the ECtHR.⁴⁰ The decisions of a domestic court would be both less embarrassing than adverse judgments by a ‘foreign’ court and, most important, more in tune with the particular circumstances and traditions of the UK, including its political constitution. Certainly, there is good reason to believe that a national court will be more

although they now seek to do this via a referendum on any further expansion of EU competencies, and to strengthen the power of UK courts and Parliament to challenge both ECJ and ECtHR decisions in the manner of the German Federal Constitutional Court, especially its Lisbon judgment on 30 June 2009, *Bundesverfassungsgericht*, BVerfG, 2 BvE 2/08. via a British Bill of Rights and a Sovereignty Act.

³⁸ *R. v. Secretary of State for the Home Department, ex p. Brind*, [1991] 1 AC 696, 748 (Lord Bridge).

³⁹ *R. v. Secretary of State for Social Security, ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

⁴⁰ White Paper, *Rights Brought Home: the Human Rights Bill*, cm.3782.

subject to indirect domestic democratic pressures than an international court is likely to be. Even if formally independent, national courts form part of the domestic political system. Their membership draws on the same broad ‘political class’ as national politicians – a significant number of whom may even have practiced law alongside them, and the selection of judges is subject to various forms of direct or indirect political control and influence. Moreover, a far thicker public sphere exists at the national compared to the international level. Consequently, domestic courts come under greater scrutiny by the media and a broad range of interest groups, and so are more aware of public opinion than international courts. As a result, they tend to feel more obliged than their international counterparts to legitimise themselves and gain acceptance for their decisions among the wider public. As research on the US Supreme Court indicates, courts follow the polls – or at least sustained, national electoral trends.⁴¹

That said, the ECtHR continues to cast its shadow over the HRA. In particular, section 2 (1) of the HRA requires domestic courts to ‘take into account’ any relevant Strasbourg jurisprudence relating to a judgment involving a Convention right. That could be quite a weak instruction, strictly applying only to cases where the UK was a party. In fact, the courts have accorded Strasbourg jurisprudence a binding status more generally.⁴² Arguably, that policy follows from the aim of avoiding litigation before the ECtHR. Moreover, domestic courts have deferred to Strasbourg as defining what Convention rights require.⁴³ Since their role under the HRA is simply to ensure compliance with these rights, they have deemed it inappropriate for them to challenge or outstrip the ECtHR rulings on what an acceptable standard of observance involves. However, that has not meant that Parliament need treat ECtHR as a ‘ceiling’ rather than a ‘floor’, even if domestic courts have done so. Judges have simply felt (and, *pace* certain legal constitutionalist commentators,⁴⁴ from a political constitutionalist position rightly so) that it is for Parliament rather than them to decide whether it wishes to elaborate legislation that goes beyond what the ECtHR deems necessary to protect rights. So, while the HRA does not weaken the necessity of the British parliament to stay compliant with ECtHR decisions, the deference of domestic courts to

⁴¹ See R. A. Dahl, *Decision-making in a Democracy: The Supreme Court as National Policymaker*, 6 JOURNAL OF PUBLIC LAW 279 (1957); W. Mishler and R. S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AMERICAN POLITICAL SCIENCE REVIEW, 87 (1993)

⁴² *R. v. Special Adjudicator, ex parte Ullah* [2004] UKHL 26.

⁴³ *Ibid* at 20.

⁴⁴ E.g. J. Lewis, *The European Ceiling on Human Rights*, PUBLIC LAW 720 (“007)

Strasbourg also creates a potential break on their judicial activism and has arguably encouraged them to develop a domestic deference principle giving Parliament lee way as to how it might secure a given right. Though some argue such deference hinders the development of distinctive British human rights jurisprudence,⁴⁵ to a degree that can reinforce political constitutionalism.

However, even where the court does not go beyond the UK's commitments under the ECHR, its role is to make that commitment more present and continuous. As we shall see, a key issue has been the recognition, in part mandated by a Strasbourg decision,⁴⁶ that proportionality rather than a looser norm of reasonableness now be applied when Convention rights are at stake.⁴⁷ Meanwhile, the court has acknowledged that not all ECtHR jurisprudence necessarily applies to the UK, having been formulated with regard to cases involving circumstances that do not obtain in Britain, or is always sufficiently clear or well-reasoned as to be followable.⁴⁸ There are also cases where as yet there is no relevant Strasbourg case law. For the reasons noted above, it may still remain not just symbolically or formally but also in many ways substantively more in line with political constitutionalism for such judgments to be made by a domestic rather than an international court. Even in cases where the court sees itself as doing no more than acting as Strasbourg would at one remove, it will be doing so as the agent of a UK political order and be subject to the pressures from Parliament and British public opinion from which, to a large extent, it derives its authority and legitimacy.⁴⁹ And when it acts in cases where Strasbourg either has yet to go or has done so in ways that seem unclear or inappropriate, the court can give a steer that reflects the British context, including those circumstances that reflect its distinctive political processes. For example, at least some Law Lords have stressed that the HRA does not 'authorise the judges to stand in the shoes of Parliament's delegates, who are decision makers'⁵⁰ The possibility does exist, therefore, for the HRA to 'bring rights home' in ways that could potentially strengthen political constitutionalism vis-à-vis the ECtHR. The crux is whether in doing so the HRA must necessarily weaken political constitutionalism in other ways and

⁴⁵ E.g. R. Masterman, *Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the "Convention Rights" in Domestic law*, in H. FENWICK, G. PHILLIPSON AND R. MASTERMAN (EDS) *JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT*. (CAMBRIDGE UNIVERSITY PRESS 2007)

⁴⁶ *Smith v United Kingdom* (2000) 29 EHRR 493.

⁴⁷ *R. (Daly) v. Secretary of State for the Home Department* [2001] UKHL 27.

⁴⁸ *Kay v. Lambeth London Borough Council* [2006] UKHL 28, 44, *Brown v. Stott* [2003] 1 A.C. 733.

⁴⁹ E.g. Lord Hoffmann in *R. (Alconbury) v. Secretary of State for the Environment, Transport and the Regions* [2001] WLR 1389, para 76, though compare the more cautious Lord Slynn para 26.

⁵⁰ *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840, para. 33.

move the UK ineluctably towards a legal constitutionalism, as some claim has occurred.⁵¹ Or can the Act more coherently be read as offering a way for bringing legal within political constitutionalism, as is generally thought its drafters intended?

Parliamentary Supremacy and Weak Review

The crucial provisions for assessing the respective roles of Parliament and the courts under the HRA are sections 3, 4 and 19 of the Act, and the interplay between them. Section 19 (1) requires the Minister in charge of a Bill to make ‘a statement of compatibility’ before the Second Reading ‘to the effect that in his view the provisions of the Bill are compatible with Convention rights’ or explicitly remark ‘that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.’ Section 3 (1) obliges the courts to read primary and subordinate legislation, whenever enacted, in a way which is compatible with Convention rights ‘so far as it is possible to do so’. However, 3 (2) specifies ‘this article does not affect the validity, continuing operation or enforcement of any incompatible’ primary or subordinate legislation. In these cases, where both a provision is deemed incompatible and the primary legislation concerned prevents the removal of any incompatibility, then – as I noted above - section 4 allows the highest relevant courts to ‘make a declaration of incompatibility’. However, such declarations do not strike down offending provisions, which remain in force, operable and valid, and are not binding on the parties against whom they are made. The decision on whether to remedy the incompatibility by amending the legislation rests with the government and ultimately parliament, although provision is made in section 10 for a fast track legislative procedure to provide such remedial action. Let’s explore each of these provisions in turn.

Sections 19 and 4: Upholding Parliamentary Supremacy?

On the surface, sections 19 and 4 might appear to be straightforwardly instruments of a political constitutionalism. The first could be taken as offering the courts a clear indication that the legislation should be regarded as compatible, the second gives the last word on whether to revise legislation or not to Parliament. However, once again matters are not clear cut. With regard to section 19, courts initially paid little attention to these declarations of compatibility – in great part for reasons a political constitutionalist ought to approve. By and large, courts have been wary of according too much weight to statements by Ministers or

⁵¹ E.g. KAVANAGH *supra* note 35.

others as to what they intend by any piece of legislation.⁵² The standard case for paying attention to such statements is that the intentions of those who author a legislative text should be regarded as informing its authority. Yet, it is part of the political constitutionalist case that parliament and its committees allow many voices to enter into the legislative process, with the results the product of a dialogue between them involving the mutual modification of many individual positions. Therefore, the authors of legislation are not individual members so much as the legislative body as a whole. Given that Parliament is not a coherent, unitary actor, it is doubtful that it makes any sense to talk of its intentions. Least ways, the only sensible way we can access those intentions is by paying attention to the plain meaning of the legislative text itself rather by attending to individual interventions in parliamentary debates. A similar problem arises with the offering of reasons by legislatures. Legal constitutionalists sometimes contrast courts and legislators in this regard and argue as if legislation is thereby unreasoned. Again, the reasoning occurs in the legislative process, but the reasons of the legislature as a whole can only be those embodied in the legislation itself. For the reasoning of the individual members of the legislature may well have differed as to why the legislation represents an appropriate reading of rights on this matter. Like multimember courts, their agreements are likely to be ‘incompletely theorised’,⁵³ the product of a convergence on a policy that can seem reasonable from a number of points of view.⁵⁴

Some of these difficulties have potentially been addressed by the establishment of a Joint Committee on Human Rights (JCHR) two years after the HRA. The JCHR reports to both Houses on the compatibility question, taking evidence from Ministers, government departments, NGOs and legal experts, suggests amendments where it deems them necessary and has pushed the government towards outlining its views on this issue in the Explanatory Notes published with every government Bill. The reports have ensured rights considerations get raised in parliamentary debates and are often referred to in that context. As a result, it cannot be denied that the rights enumerated in the HRA have been given due consideration in the framing of legislation. So, there are good grounds for regarding the legislative text as embodying the legislature’s due view of the balance of rights considerations with regard to a

⁵² Though since *Pepper v. Hart* [1993] A.C. 593 courts have accepted they can refer to the parliamentary record in *Hansard* as an aid to statutory construction, subsequent decisions have given Ministerial statements less weight than the text itself. See *Wilson v. First Country Trust* [2003] 3 W.L.R. 568.

⁵³ C. R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (OXFORD UNIVERSITY PRESS, 1996) 48-50.

⁵⁴ WALDRON *supra* note 18, ch. 6.

given policy. Legislation is not, as some have characterised it,⁵⁵ simply the product of the unprincipled trading and aggregation of interests to promote public utility regardless of its impact on rights. Rights and interests have both played a role in the legislative process.

Nevertheless, two problems remain in regarding this feature of legislation as rendering the HRA fully compliant with political constitutionalism. First, a legal advisor plays a crucial role in the JCHR's deliberations. Their advice consists largely of second-guessing the likely judgments of the courts, be they domestic or the ECtHR. In this way, as Alec Stone Sweet pithily put it, 'governing with judges' all too often 'means governing like judges.'⁵⁶ Yet, as we saw, a strong part of the political constitutionalist case lies in asserting the superiority of legislative over judicial decision-making on the moral and political questions surrounding rights. To the extent parliament feels constrained by legalistic reasoning in its rights deliberations, this alleged advantage of political over legal constitutionalism is diminished.⁵⁷ However, arguably this point proves over stated. For example, the *Communications Act 2003*,⁵⁸ which banned political advertising in the broadcast media except for specially regulated party political broadcasts and party election broadcasts, was the subject of two reports by the JCHR, as well as being scrutinised by a specially appointed Joint Committee of both Houses of Parliament. As a result, Parliament believed that though the legislation potentially breached ECHR art. 10 concerning freedom of expression, they would proceed nonetheless, as permitted under section 19. Indeed, it could be considered that Parliament's deliberation of the issue proved important in persuading the House of Lords to unanimously rule that courts should regard the law as compatible with ECHR art. 10 in a subsequent case.⁵⁹ As Adam Tomkin's has remarked, this example shows how Parliament can use the new procedures to influence the courts rather than the other way round, with the HRA promoting precisely the sort of legislative deliberation about rights political constitutionalists advocate.⁶⁰

Some commentators still feel, though, that a second and more intractable problem remains. For no matter how thorough and independent Parliament's deliberations of rights

⁵⁵ DWORKIN 1996 *supra* note 22

⁵⁶ A. STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (OXFORD UNIVERSITY PRESS, 2000) 204.

⁵⁷ See Hiebert *supra* note 8; D. Nicol, *The Human Rights Act and the Politicians*, 24 LEG. STUD. 451 (2004).

⁵⁸ *Communications Act 2003* (U.K.), 2003, c. 21, ss 319-21.

⁵⁹ *R. (Animal Defenders International) v. Secretary for Culture, Media and Sport* [2008] UKHL 15, especially Lord Bingham at paras. 7-21.

⁶⁰ A. Tomkins, *The Role of Courts in the Political Constitution*, XL UNIVERSITY OF TORONTO L. J. 1, 5, 19 (2010).

may be, its ability to control the judicial process remains limited. Resolving this question turns on how deferential the courts are or can be made to be to what Parliament decides on the rights question. Section 4 potentially supplies a solution in this respect, and has been regarded as the key provision in maintaining the political constitutionalist *status quo*. Thus, Jeremy Waldron regards the inability of courts to refuse to apply or moderate the application of a given law notwithstanding their view that it is incompatible with human rights as the hallmark of what he and others term ‘weak judicial review’.⁶¹ Waldron sees the UK as at the stronger end of a continuum,⁶² given that judicial declarations of incompatibility can trigger a legislative process of remedial action, that has New Zealand, where similar declarations have no such effect, at the weakest end, with Canada, where courts can disapply the law but legislatures can pass laws with a ‘notwithstanding’ clause that insulate them from judicial scrutiny, occupying a middle position – albeit one we saw is also occupied by the UK in that under section 19 a Minister can propose legislation that he believes to be incompatible with Convention rights, a power that has been employed only once thus far.⁶³

Section 4 was heralded as a core provision of the HRA. It was seen by many advocates of the measure as inaugurating a new model of judicial review that lay mid-way between political and legal constitutionalism.⁶⁴ However, others – both legal and political constitutionalists – have argued that in practice there is little difference between ‘weak’ and ‘strong’ judicial review – indeed, that the former is a chimera.⁶⁵ They note that so far Parliament has always complied with such rulings and amended the offending legislation accordingly. The key point, though, is why. Four sets of reasons have been given, none of which is inherently incompatible with political constitutionalism.

The first is that Parliament has exercised its prerogative. That it does so only rarely is neither here nor there, it remains its to exercise.⁶⁶ Indeed, if one takes the highest profile instance of a declaration of incompatibility, that of *Belmarsh Prison*,⁶⁷ Parliament can hardly be regarded as supinely accepting the court’s decision. Though it granted the court’s

⁶¹ Waldron *supra* note 4, 1355. See too Gardbaum *supra* note 8, 14.

⁶² Waldron *supra* note 4, 1356.

⁶³ As was discussed above, this mechanism was used in the Communications Act 2003

⁶⁴ E.g. Gardbaum *supra* note 8; F. Klug, *The Human Rights Act – a “Third Way” or “Third Wave” Bill of Rights*’ EUROPEAN HUMAN RIGHTS LAW REVIEW 361 (2001).

⁶⁵ E.g. D. Dyzenhaus, *The Incoherence of Constitutional Positivism*, in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 138-60 (Grant Huscroft ed., Cambridge University Press 2008) and KAVANAGH *supra* note 35, 282-92, 417-18..

⁶⁶ Waldron *supra* note 4, 1357 note 34 and and Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOREST L. REV. 451, 454-59 (2003).

⁶⁷ *A and others v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 WRL 87, HL.

judgment that the current detention scheme involved unreasonable discrimination against non-UK citizens, it took several months to respond, adopting the new control order scheme following one of the longest ever Parliamentary debates. Meanwhile, the prisoners were only released once the new legislation was enacted so that they could be immediately re-arrested. Rightly or wrongly, Parliament can hardly be viewed as conceding judicial supremacy, therefore.

A second reason is political culture – that any government would simply find it politically inexpedient to go against such a court ruling unless they were sure of overwhelming political support in doing so, as was the case when Roosevelt stood up to the Lochner era reasoning of the US Supreme Court.⁶⁸ However, to the extent that is true – which given the pre-election commitment of the Conservative Party to repeal the HRA is perhaps highly disputable - this reasoning also is not *per se* incompatible with political constitutionalism. After all, political constitutionalists value responsiveness to public opinion and if a lack of popular legitimacy explains their compliance rather than a binding constitutional measure that literally gives them no choice in law but to comply, then Parliament's deference to judicial declarations of incompatibility is in line with the political constitutionalist position.

A third reason holds that where such declarations have been issued it was likely that the ECtHR would have made a similar ruling. A failure to comply with a declaration of incompatibility would give *prima facie* weight to any appeal to Strasbourg and increase the likelihood of the case going against the government.⁶⁹ Though some have argued that where there is no existing case law the ECtHR might apply a wider 'margin of appreciation' than the domestic court, this is not probable. Not only, as we saw, have the domestic courts been guided by ECtHR standards in their judgments, but also the fact the highest domestic court had ruled the legislation as contravening a Convention right would almost certainly be taken as evidence by the ECtHR that it had done so. Nevertheless, we have seen the ECHR regime *per se* is not incompatible with political constitutionalism.

More troubling from the political constitutionalist perspective, though, is the fourth reason that the court has only issued declarations of incompatibility in those cases where the judges concerned felt certain the government would comply. In other cases, they have used their power of interpretation under section 3 (1) to render legislation compatible with

⁶⁸ M. Elliott, *Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention*, 22 LEGAL STUDIES 348, 340-XXX (2002).

⁶⁹ KAVANAGH *supra* note 35, 284-87.

Convention rights.⁷⁰ Indeed, the use of section 3 (1) has been seen by legal and political constitutionalists alike as the aspect of the HRA that poses the greatest potential challenge to parliamentary sovereignty. Many have argued that it largely undermines whatever powers may have been reserved to Parliament under sections 19 and especially 4.⁷¹ Consequently, it proves crucial for the political constitutionalist case to defend a plausible account of judicial deference and weak review in the use of section 3.

Weak Review and Section 3: the Judicial 'Sphere' and Deference to the 'Scope' of Legislation

There are three main concerns with the use of section 3 by the courts.⁷² First, some have worried that the injunction that all subsequent as well as preceding legislation be read as Convention compatible goes against the view that no Act of Parliament can bind later Parliaments, with later legislation involving an 'implied repeal' of any prior legislation with which it was inconsistent. Second, the ability of the judiciary to interpret legislation in a way they feel is Convention compatible has been seen as allowing them to effectively amend legislation in ways that are contrary to the clear intention of Parliament. Third, as a result, use of section 3 makes sections 19 and 4 largely redundant.

With regard to the first concern, the doctrine of 'implied repeal', courts have always assumed that in the absence of an explicit repeal of, or challenge to, prior legislation, then it is reasonable to suppose that Parliament wished to legislate in a way that was compatible with existing law. As a result, they have interpreted all new laws 'so far as it is possible' as if that were so. Moreover, under the HRA, the declaration of compatibility under section 19 gives the courts explicit grounds for holding that view. Of course, where they find legislation to be 'incompatible' they now have to say so explicitly. It might be argued this still replaces 'implied' repeal with 'explicit' repeal.⁷³ But as we saw, such declarations do not of themselves disapply the law – that remains Parliament's prerogative. The court must continue to apply the disputed legislative provisions, suggesting that until such time as Parliament decrees otherwise Convention rights do not apply in the area covered by the new

⁷⁰ KAVANAGH *supra* note 35, 119.

⁷¹ KAVANAGH *supra* note 35, 318-19, 332-36, 416-20

⁷² For contrasting accounts of these issues, see Bamforth,, *supra* note 28 and KAVANAGH *supra* note 35, ch. 11.

⁷³ D. Feldman, *The Human Rights Act 1998 and Constitutional Principles* 19 LEGAL STUDIES 165-xxx, 178-80 (1999)

legislation. As Nicholas Bamforth has argued, the HRA protection of Convention rights does not need to be repealed implicitly or explicitly in this case, because it is limited by the Act to those cases that do not fall within section 4 as being incompatible with it.⁷⁴

The second concern appears more problematic, for it involves the fear that section 3 (1) will lead the courts to depart from the conventional meaning of the legislative text in ways that had previously been deemed inappropriate, thereby challenging the rights-based judgments of Parliament. Yet, here too the departure from traditional forms of ‘statutory interpretation’ may be less than is assumed, with judicial discretion in certain respects reduced rather than increased. Some commentators make it seem that any failure not to follow the literal letter of the law must involve the undermining of legislative supremacy and with it political constitutionalism.⁷⁵ However, as I noted in section 1, it has always been the case that ‘statutory interpretation’ has involved courts in clarifying unclear or ambiguous terms, correcting drafting errors, and overcoming incoherent or unintelligible provisions that are irreconcilable with the rest of the statute. With the best will in the world, one cannot hope to eradicate all such linguistic problems. Nor can legislators be expected to foresee all the potential cases and circumstances their legislation may be applied to. As a result, they often use language, such as ‘reasonable’, and employ general rules rather than specific standards with the intention of giving judges a degree of discretion that will enable them to tailor legislation to the peculiarities and particular or special features of a given case. It would be impossible to rule out such discretion and replace it with a mechanical application of the law except in the crudest imaginable way, such as a two strikes and you’re out rule, that excludes drawing the various distinctions between cases that are generally seen as necessary to avoid unjust and dysfunctional outcomes.⁷⁶ Any attempt to overcome this problem by writing all these distinctions into the law would necessarily give judges discretion to choose which ones applied. Even then, it would be hard to imagine that every eventuality could be anticipated.⁷⁷

However, none of the above need mean judicial discretion is totally unconstrained. Any type of constitutionalist must believe it possible for one reason or another that judges can be bound by law – at least in the sense that they feel an obligation to justify what they do

⁷⁴ Bamforth, *supra* note 28, xxxv-xxxvii.

⁷⁵ Dyzenhaus *supra* note 64 has a tendency to slip into this view. See too his review of my *Political Constitutionalism*, *supra* note 12.

⁷⁶ Modified in *R. v Offen* [2001] 2 All E.R. 154 to apply only to offenders within the specified range of offences who were a danger to the public.

⁷⁷ BELLAMY *supra* note 12, 83-4 and N. MacCormick, *Argumentation and Interpretation in Law*, 6 *RATIO JURIS* 16-29 (1993).

by reference to it. A political constitutionalist need simply ask if it is possible to have a concept of law that conjoins Convention rights with parliamentary sovereignty in a coherent way that might constrain the sorts of legal reasons judges can offer for their decisions. In particular, can there be legal norms that constrain judges from simply interpreting the law so that it accords with an outcome that they personally believe best realises human rights in the case at hand.⁷⁸ I think a broadly legal positivist view, of the democratic kind outlined earlier,⁷⁹ holds there can be.⁸⁰ Both the HRA and the other pieces of legislation which are to be read alongside it have a common source that renders them legally valid – namely, Parliament. Therefore, the grounds of compatibility – or incompatibility – must be those stemming from this source within the legislation itself. Under section 19 Parliament will only have supplied a limited set of reasons for regarding a given piece of legislation as Convention compatible, or possibly none at all, and it is to these that the judge must defer. I shall call this a limitation of interpretative ‘scope’. Alongside it is a limitation of interpretative ‘sphere’ that is related to the activity of judging itself. Judges have a legally constituted role. They are not armchair moral philosophers but sit in courts constituted by certain rules and procedures that they have a duty to oversee to ensure the trial is conducted fairly and provides justice for the litigant. These include such formal rule of law notions as treating like cases alike, acting impartially, ensuring all sides have an equal chance to present their case and so on. A political constitutionalist holds that it is appropriate for Parliament to decide general substantive issues of rights, and to offer legislative resolutions of the disagreements that attend them. However, that is compatible with regarding courts as entitled to ensure the procedures for passing the law were duly followed and that the judicial process remains fair when it comes to applying such rights in practice. The due process, particularly in the court room, is their domain, where they can legitimately claim more expertise and authority than Parliament.⁸¹

Naturally, there are discretionary elements in deciding how the law applies. My point is simply that these need not be arbitrary but legally sanctioned to be deployed with regard to a certain set of moral principles, those enumerated in the HRA, and in conformity with the

⁷⁸ Obviously, saying that on this account of law judges would not be legally justified in deciding cases solely in this way is different to saying that it prevents them from doing so in reality or denying that on occasion they might be morally bound to do so.

⁷⁹ Following Waldron, *supra* note 24.

⁸⁰ Natural lawyers, Dworkinian ‘interpretative constructivists’ and, though I think with less reason, legal realists will not find this account congenial, but theirs are not the only games in town. It suffices for my purposes to argue that a coherent account could be offered.

⁸¹ See Tomkins, *supra* note 58, 6.

rationale of existing law (its 'scope') and the norms of the judicial role (as applying to the 'sphere' of the court and related procedural issues) – with a legal duty to say when these options cease to be at all plausible because further reasons are needed to resolve the case in a rights compatible fashion. To the extent such legal guidance has Parliament as its source, then it will not be the case that section 3 (1) HRA undermines the very notion of parliamentary sovereignty by offering a distinct moral test for the existence of law.⁸² Indeed, as Sandra Fredman has suggested,⁸³ the HRA arguably strengthens Parliament in this regard because it directs judges to be guided in their decisions not by vague, permissive social sources of morality – such as notions of 'natural justice' or an apparently ever expandable 'common law' - but by a specific and democratically enacted list of rights. In fact, the court has consistently argued that their post-HRA rights-based review of legislation has legitimacy because it accords with the express will of Parliament that they interpret the law with regard to these norms.⁸⁴ In itself, however, simply listing a certain set of rights will not be enough to constrain judicial discretion. For these rights still allow for pretty broad and widely differing interpretations, and it is the basic claim of political constitutionalists that a democratically elected legislature ought to be ultimately responsible for justifying which interpretation applies in legislation. The notions of 'scope' and 'sphere' enter here, offering crucial guidelines. The one constrains the allowable breadth of legislative interpretation to those purposes proposed by, or that can be plausibly attributed to, Parliament – the implications of which for rights are now spelled out under section 19, the other the domain where judicial independence holds sway.

By implication, these criteria also provide guidelines for addressing the third concern noted above. For, they can help determine when interpretation under section 3 should give way to a declaration of incompatibility under section 4: namely, on those occasions where the court cannot render the law compatible with its reading of Convention rights within the judicial 'sphere' without going beyond or altering the 'scope' of the legislation, thereby trespassing on the legislative 'sphere' that properly belongs to Parliament. Crucially, this division of labour also relates to the application of the doctrine of proportionality, which has

⁸² Note, I am adopting an 'exclusive' rather than 'inclusive' form of legal positivism here. I am not saying the incorporation of moral principles into the law make them criteria of legal validity, but rather that they are legally valid to the extent they have been incorporated into law by Parliament.

⁸³ S. Fredman, *Scepticism under Scrutiny: Labour Law and Human Rights*, in CAMPBELL ET AL *supra* note 15, 197ff.

⁸⁴ E.g. Laws L.J. *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] 3 W.L.R., 344, at 71.

been regarded as one of the main innovations introduced by the HRA. Whereas courts may legitimately question whether a measure that restricts an individual's rights within the judicial sphere is proportionate to the legislative goal to be achieved, they should avoid judging whether the 'scope' *per se* is proportionate in its effect on Convention rights in cases where precisely that issue has been determined by Parliament under section 19. At most, they should employ section 4 to request Parliament reconsider. That leaves the 'constitutional' determination of rights where a political constitutionalist believes it properly resides – with the legislature. Indeed, even advocates of constitutional judicial review under the HRA appear to accept that the more a court's decision touches on matters of legislative 'scope', the greater their deference to the executive and legislature should be, allowing at the very least for a wider 'margin of appreciation' as to what the upholding of rights might require.⁸⁵ For such judgements necessarily involve courts determining the relative weight different interests and values contribute to the public good – a matter that, for the political constitutionalist, the limitations of the judicial sphere, not least their isolation from the public, however warranted for the impartial application of the law, makes them ill-suited to do.

To see how these criteria might work in practice, let's consider their implications for two leading cases under the HRA - *R v. A*⁸⁶ and *Ghaidan v. Mendoza*.⁸⁷ As I noted at the outset, my intention is not to show that these and other cases were decided in ways compatible with political constitutionalism, but rather to ask if they could have been and if so what that would have involved. All three concerns were potentially at issue, with a number of commentators arguing that these cases reveal how the use of section 3 (1) effectively undermines the apparent safeguard of parliamentary sovereignty provided by Section 4.⁸⁸ By contrast, I shall argue the foregoing analysis suggests section 3 can be regarded as a justified use of judicial discretion within the court's 'sphere'. However, *R v. A* also involved a challenge to the legislative 'scope' of the law in question, albeit with attempts by certain members of the court to argue otherwise, and so ought to have led at most to a declaration of incompatibility under section 4. Instead, *Ghaidan* can be read as being consistent with a reasonable understanding of Parliament's determination of the relevant law's 'scope' when

⁸⁵ KAVANAGH *supra* note 35, 182-3 – although Kavanagh adopts a 'contextual' approach that in practice allows courts to interfere with the scope of legislation whenever they feel the measure is disproportionate in its impact on rights (239) - effectively removing all limits to constitutional review other than 'prudence' and 'courtesy'.

⁸⁶ *R v. A (No 2)* [2002] 1 A.C. 45.

⁸⁷ *Ghaidan v. Mendoza* [2004] 3 W.L.R 113

⁸⁸ C. Gearty, *Revisiting Section 3 (1) of the Human Rights Act* 119 LAW QUARTERLY REVIEW 551 (2003); D. Nicol, *Law and Politics After the Human Rights Act*, PUBLIC LAW 722 (2006).

applied to this case, and as such provides an example of the use of section 3 to address rights in the judicial 'sphere' that is consistent with a political constitutionalist perspective.

In *R v. A* the legislative provision at issue was section 41 of the Youth Justice and Criminal Evidence Act of 1999 (YJCEA). Known as the 'rape shield' provision, it prohibited the admissibility of sexual history evidence except in certain narrowly defined exceptions. The intention was to overcome the much criticised section 2 of the Sexual Offences (Amendment) Act of 1976, which had left the question of admissibility largely to the discretion of the trial judge with the perceived result that the position of complainants had frequently been prejudiced by irrelevant and humiliating evidence that had come to deter many woman from even bringing rape cases. The point at issue in *R v. A* was whether this provision breached the defendant's right to a fair trial under Article 6 ECHR by blocking evidence of an alleged prior consensual sexual relationship. The House of Lords ruled that though *prima facie* it appeared that the statute offered a reading of the balance between the rights of complainants and defendants that was heavily weighted towards the former, it was allowed – indeed, incumbent on them 'in accordance with the will of Parliament' - to employ section 3 (1) HRA to read section 41 (3) (c) YJCEA in such a way as to include an 'implied provision' that evidence necessary to make the trial compatible with Article 6 ECHR was admissible. However, this 'reading in' goes beyond the removal of a linguistic confusion or error of the kind adverted to above. As such, it appears to trespass on the 'scope' of the legislation, given that there can be no doubting that Parliament had sought to block the use of the very evidence the court now sought to allow. That said, the heart of the case was a 'sphere' that could be regarded as rightfully that of the judiciary: namely, the fair conduct of a trial. The difficulty lay in the court's being unable to rectify its perception that injustice might arise in this 'sphere' without altering the 'scope' of the legislation. True, the court did attempt to justify its decision by arguing that the 'reading in' was to give effect to what it believed was the main purpose of the legislation: namely, to ensure rape trials were not biased. The court claimed this case had merely revealed that in particular circumstances - either unanticipated or not fully considered by the legislature – the laudable desire to protect the rights of complainants found in the express wording of the statute had undermined its central 'implicit' purpose by jeopardizing the equally compelling rights of defendants.. So, it could be said the court's argument was that their decision had the limited 'scope' of better realising the legislature's purpose, in a 'sphere' where they possessed a competence that has always been reserved to them, and doing so in terms that the legislature had itself ordained in

the HRA. Certainly, it is significant that the court felt it necessary to legitimatise itself in this way. Yet, even if purposive construction has long formed part of statutory interpretation,⁸⁹ many commentators feel – rightly in my view - that in this case the ‘scope’ argument was overstretched.⁹⁰ Given the court’s justified worries with regard to their ‘sphere’, it would have been better to issue a declaration of incompatibility. Indeed, those who defend the judgment, do so as part of a more general defence of ‘strong’ forms of constitutional review.⁹¹

By contrast, *Ghaidan*, which became the leading case of HRA interpretative adjudication, arguably represents a weaker form of review. This case centred on whether paragraph 2 (2) of the Rent Act 1977, which allowed a person who had lived with a tenant ‘as his or her wife or husband’ to be treated as the tenant’s ‘spouse’ and hence to be entitled to a secure tenancy on the death of their partner, could be read as including ‘same-sex’ couples, as was believed was required to avoid discrimination on impermissible grounds ‘under Article 14 taken together with Article 8’ ECHR. The court decided that Section 3 (1) allowed it to do so, thereby overturning a ruling in a pre-HRA case, *Fitzpatrick*,⁹² that had deemed the express wording of ‘husband’ and ‘wife’, to be gender-specific and so rule out homosexual couples. Again, at least one Law Lord argued that behind the explicit wording lay a more abstract legislative purpose of protecting the interests of people ‘living together in a close and stable relationship, and it was this ‘underlying thrust of the legislation’ that made a rights compatible interpretation possible.’⁹³ Others likewise argued, also apparently stepping back from Lord Steyn’s more radical position in *R v. A*, that a rights-compatible interpretation should (and in this case did) reflect the ‘fundamental features of the legislative scheme’ and ‘go with the grain’ of the law.⁹⁴ Given Parliament itself had amended the 1977 Act in 1998 to make provision for unmarried heterosexual couples, thereby implying a change of legislative focus from ‘official marriage’ to cohabitation, these arguments that the interpretation fell within the ‘scope’ of the legislation seem well founded. Even in *Fitzpatrick* the court might have decided otherwise. After all, courts had departed from the express wording of statutes in

⁸⁹ KAVANAGH *supra* note 35, 102-3.

⁹⁰ E.g. D. Nichol, *Statutory Interpretation and Human Rights After Anderson*, PUBLIC LAW 273 (2004)

⁹¹ E.g. KAVANAGH *supra* note 35, 20-22.

⁹² *Fitzpatrick v. Sterling Housing Association Ltd* [2001] 1 A.C. 27

⁹³ Lord Nicholls in *Ghaidan* at para 35, 33.

⁹⁴ Lords Millet and Rodger in *Ghaidan* at para 67, 110, 111, 116. NB Millett offered a dissenting opinion that section 4 should have been used because the express terms of the Act made a compatible interpretation impossible.

other pre-HRA cases in order to reflect changes in social morality.⁹⁵ Here, the passage of the Civil Partnership Bill through Parliament at the time of the case, which would prevent future discrimination against same sex couples, and the fact the government did not contest the case, further reinforced the acceptability of seeing the interpretation as being compatible in scope with Parliament's underlying purpose. This approach conforms to a standard pattern within the HRA case law, whereby even if courts depart from the enacted intention of Parliament found in the express terms of a statute, they will refer to its unenacted legislative purpose and the more general Parliamentary intention that they use 3 (1) to make legislation Convention compatible. As such, their interpretations remain consistent with political constitutionalism.⁹⁶

It might be objected that even so *Ghaidan* involved sufficient creativity with regard to the reinterpretation of 'scope' as to render a declaration of incompatibility more appropriate. . The contrast with *Bellinger* – a case involving the recognition of a marriage by a transsexual woman as valid, where a declaration of incompatibility was issued - proves instructive in this regard.⁹⁷ Here, the government had accepted a recent ECtHR decision holding the UK to be in breach for Articles 8 and 12 for denying legal recognition of gender reassignment;⁹⁸ was exploring the many issues to do with its recognition that went beyond the case; and had announced new legislation would be available offering a remedy to the plaintiff. As a result, interpretation by the Court was unnecessary to get justice for the litigant and would pre-empt the work of the legislature. Invoking section 4 did little more than confirm the view that Parliament had already taken of the issue. Instead, in *Ghaidan* interpretation was the only way to find justice for the litigant – whose partner, being dead, would not benefit from legislative change. So there were strong reasons related to its 'sphere' for the court to adopt the interpretative route. Moreover, it could do so, as we saw, by following existing legislative developments as to the law's 'scope'. A parallel point emerges in *Re S*,⁹⁹ where the court overrode a 'reading in' of the Court of Appeal on the grounds it went against a 'fundamental feature' of the legislation in question, in this case the implementation of care orders by local authorities under the Children Act 1989. Here interpretation can be viewed as going beyond both the court's 'sphere' and the law's 'scope' by essentially proposing a

⁹⁵ E.g. *R v. R* [1992] 1 A C 599, which expanded the law of rape to include husbands who raped their wives, which had hitherto been explicitly excluded by the relevant statute.

⁹⁶ For a parallel account, see J. Goldsworthy, *Parliamentary Sovereignty and Statutory Interpretation*, R. BIGWOOD, ED., THE STATUTE: MAKING AND MEANING (LEXISNEXIS, 2004), 187-210

⁹⁷ *Bellinger v. Bellinger* [2003] 2 A.C. 467.

⁹⁸ *Godwin v. United Kingdom* (2002) 35 E.H.R.R. 447.

⁹⁹ *Re S, Re W* [2002] 2 A.C. 291

whole new procedure for dealing with care orders to that proposed by Parliament. The amendment could be neither catered for within the existing terms of the Act nor related to its underlying purpose.

Of course, notions such as the ‘sphere’ and ‘scope’ of decisions do not provide hard and fast rules. A number of judges have also felt uneasy about using section 3 (1) to depart from what they see as the ‘mandatory language used by Parliament’ in order to attribute to it a ‘presumed’ intention.¹⁰⁰ However, to a degree Parliament has always looked to the courts to use their discretion effectively to interpret legislation in ways that seem suited to the case and extend or amend it to fill gaps or avoid injustices. Does that make the ritual deference to Parliament mere window dressing? Some arguments along these lines suggest that because courts are the end users of legislation, and the law cannot prescribe entirely how it should be applied, Parliamentary sovereignty is a myth.¹⁰¹ I do not believe that need be so. One can regard Parliament as the valid source of law in the UK, but accept that judges have always had to employ a range of tools - logical, linguistic and moral among them – to make reasonable decisions. Some of these tools are needed to make sense of the law in a given case, others to indicate where the law fails to make sense and needs supplementing from other, less binding, sources, such as positive morality or the exercise of judicial moral and political judgment. What judges are doing in referring back to Parliament is recognising the need to validate their views in a given way. They can distinguish good or bad laws from good or bad judgments about laws, and appropriately see Parliament as the forum where, despite our disagreement about rights, we can seek to resolve them in authoritative ways. Having law based criteria for determining the merits of law will naturally strengthen the confidence with which judges use them. Effectively that is what the HRA does by making the ECHR part of domestic law. Yet it is perfectly coherent for judges to say they acknowledge the force of Convention rights as legal standards because Parliament has authorised them to do so, and ~~that to~~ see Parliament as the ultimate arbitrator of whether or not they apply, and to the degree that is possible through general laws, of how.¹⁰² So conceived, judicial interpretation post-HRA would be more solidly in line with Parliamentary sovereignty than it was before.

Conclusion

¹⁰⁰ E.g. Lord Bingham in *Secretary of State for the Home Department v. MB* [2007] UKHL 46 at para 44.

¹⁰¹ E.g. Dyzenhaus, *supra* note 64.

The HRA contains a number of explicit provisions designed to protect Parliamentary sovereignty and the UK's political constitution. Legal constitutionalists have argued not only that these provisions ought not to apply – that they are illegitimate and in certain ways unconstitutional, but also that they are implausible and impossible to operate in practice. My prime aim has not been to show that they do operate, so much as that they could. As I noted, legal constitutionalist critics of parliamentary sovereignty regard the court's deference to this doctrine with great scepticism – as either deluded or purely formal and possibly cynical.¹⁰³ It is sometimes assumed that political constitutionalists embrace a similar scepticism regarding notions of rights, the rule of law or judicial impartiality. However, at its heart political constitutionalism can be regarded as providing a defence against just such scepticism.

On the one hand, political constitutionalism offers a way of identifying law and explaining its authority by associating its source in a democratically elected legislature.¹⁰⁴ On this account, the assurance we have that law reflects our interests and secures our rights and that we have good reason to obey it come from its being promulgated and debated by our representatives. Far from being sceptical of rights or law, political constitutionalists defend both. They merely regard the legislature as the most appropriate forum for seeing rights in the round and ensuring their specification in legislation takes into account the full range of considerations necessary to promote the public interest. They also see the need for a large number of accountable representatives to agree on a settled law as a means for preventing arbitrary rule by any one person or persons.

On the other hand, that does not involve any scepticism about courts – merely that legislation and adjudication involve different qualities. Judges have responsibility for and expertise in issues of fair process that form part of their 'sphere' and in assuring the law is appropriate to its 'scope' or purpose with regard to a given litigant. These are issues that cannot be fully addressed at the legislative level, which is too remote from the peculiar circumstances that surround a particular case. But by the same token, courts are in their nature too narrow in focus and as forums to deal adequately with the issue of deciding a collective policy on rights that looks at the myriad ways different rights interact. They lack the informational and legitimacy advantages that come from decision-making by large numbers of representatives responsive to the views of millions of electors.

¹⁰³ E.g. KAVANAGH *supra* note 35, 82, 336

¹⁰⁴ See Waldron, *supra* note 24, 696-7.

The HRA arguably should be read as reinforcing both these features of political constitutionalism. Section 19 and the processes that have developed around it reinforce the conscientiousness with which Parliament deliberates about rights. Section 3 (1) reinforces the rights-based aspects of adjudication. However, courts also have the ability to further reinforce Parliament's responsibilities through section 4 – using this both to signal when they feel Parliament might, in the light of a given case, be advised to think again, or where they believe the executive may have overstepped their authority and should be subjected to further parliamentary scrutiny.

The division of labour here accords with that Locke gave for moving from the state of nature to civil society and that lies at the heart of the 'separation of powers' that he first began to theorise. Namely, that civil society provides the lack of a known and settled law 'allowed by common consent to be the Standard of Right and Wrong and the common measure to decide all controversies between them', and 'a known and indifferent Judge, with Authority to determine all differences according to the established Law.'¹⁰⁵ Parliament offers the mechanism for establishing a settled law through common consent, the judiciary an indifferent Judge. By contrast, the legal constitutionalist risks conflating rights, law and legislation with judicial adjudication. Meanwhile, they offer no clear mechanism of a kind equivalent to electoral accountability to explain why we should not see their assurances that judges are not deciding in arbitrary ways but according to the higher constitutional law offered by rights as anything but formal pieties. After all, judges disagree on what these rights require yet need not seek to reconcile their disagreements in ways that might obtain 'common consent', and the higher courts allow no challenge to their decisions. Rights-based constitutional review by courts thereby replaces the sovereignty of Parliament with the sovereignty of judicial monarchs, returning us to what Locke regarded as worse than the state of nature – a condition where the Ruling Power governed by 'extemporary Dictates and undetermined Resolutions', the 'unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills.' In this way, scepticism about the possibility of a political constitution turns into scepticism about constitutionalism itself. And so we come back to the opening apparent paradox, the resolution of which arises in the British Constitution remaining true to its history in successfully combining both the separation of powers and a bill of rights not despite but *because* of parliamentary sovereignty.

¹⁰⁵ JOHN LOCKE, TWO TREATISES OF GOVERNMENT (CAMBRIDGE UNIVERSITY PRESS 1988) 350-1.

