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# The Political Constitution No More?

**Robert Brett Taylor**

## **Abstract**

The British constitution has recently undergone some dramatic changes which, according to leading constitutional scholar Vernon Bogdanor, signals the demise of the 'old' political constitution and its replacement with a 'new' more legal constitution. The aim of this thesis is to challenge the assertion that the British constitution is undergoing a fundamental transformation from a political to a legal constitution by conducting a thorough analysis of the extent to which the contemporary British constitution can still be said to resemble a political constitution. This will be achieved through an exhaustive examination of three key areas of the constitution: the Royal Prerogative; Constitutional Conventions; and the Human Rights Act 1998. In so doing, however, it is not the aim of this thesis to produce a simple either/or account of the British constitution, but instead to advance and provide evidence of a middle-ground between the two opposing schools of constitutionalism: complementary constitutionalism. It will be argued that both the legal and the political constitutions share many common characteristics and disagree with one another primarily, although not exclusively, on emphasis. No real world constitution, therefore, was or ever will be solely legal or solely political in character. A real world constitution is instead a complementary mixture of elements from both the legal and political schools which can be either primarily legal or primarily political in character. As a result, it will be shown that the British constitution, although undisputedly more legal, nevertheless remains primarily political.

# **The Political Constitution No More?**

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**2013**



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## Chapter One

# INTRODUCTION

### 1. Where is the British Constitution Heading?

In the absence of a codified constitution, constitutional lawyers have long been interested, not only with unearthing the British constitution, but in charting its future course. Contemporary public law discourse, however, has become dominated by an ongoing debate between two broad and seemingly opposed schools of constitutionalism – the legal and the political – both of which purport to provide the best framework from which compliance with constitutionalism can be achieved. Broadly speaking, the legal school makes the case for greater judicial oversight of constitutional issues, advocating constitutional review of primary legislation and powers of judicial strike down, whilst the political school reinterprets the traditional tenets of the British constitution in light of civil republicanism to make the case for greater reliance upon political forms of accountability. Determining the future course of the British constitution, therefore, has become increasingly polarised, with constitutional scholars seemingly fighting an ongoing battle for the very heart and soul of the British constitution.

The British constitution has over the last half a century undergone some dramatic changes which, because they have ushered in greater reliance upon judicial forms of accountability, appears to signal the demise of the 'old' political constitution and its imminent replacement with a 'new' more legal constitution. The aim of this thesis is to challenge the assertion that the British constitution is undergoing a fundamental transformation from a political to a legal constitution. In so doing, however, this thesis will not produce a simple either/or account of the British constitution, but instead make the case for a middle-ground between the two opposing schools of constitutionalism: complementary constitutionalism. Before discussing these aims in detail, along with the approach the thesis will take in order to achieve them, this chapter will first chart the various interpretations of and challenges to the British constitution since the late nineteenth century.

## 2. The Traditional British Constitution

As Vernon Bogdanor and Stefan Vogenauer argue, '[c]onstitutions are generally enacted when a constitutional moment arrives, following war, revolution, or colonial independence.'<sup>1</sup> By contrast, it has often been said that evolution and not revolution, is the hallmark of the British constitution.<sup>2</sup>

As Sir Ivor Jennings explains:

The building has been constantly added to, patched, and partially re-constructed, so that it has been renewed from century to century; but it has never been razed to the ground and rebuilt on new foundations. If a constitution consists of institutions and not of paper that describes them, the British Constitution has not been made but has grown – and there is no paper.<sup>3</sup>

This is not to say, however, that the long road taken to reach the contemporary British constitution was an easy one. As this quote by Leslie Wolf-Phillips illustrates, the British constitution could be seen as the end result of many constitutional battles:

The course of British constitutional developments has seen a sequence of invasions and foreign overlords, the squabbling of petty monarchs, the struggle between the nobility and the king for supremacy, the later struggle for domination between the king and parliament, the recognition of the supremacy of parliament over the king, the decline in the influence of the monarch, the rise of the middle classes in terms of constitutional recognition, and, finally, the decline of the power of the House of Lords and the central place of a House of Commons elected on a basis of universal adult suffrage.<sup>4</sup>

From the Norman Conquest, the Wars of the Roses, and the Reformation, to the Civil War, the Restoration, and the Glorious Revolution, the British constitution is unmistakably the culmination of many wars and revolutions. Despite this, however, it is true to say that the British constitution from the Glorious Revolution of 1688, at least in comparison to its development prior, has been one of '[c]ontinuity rather than discontinuity.'<sup>5</sup> Consequently, whereas the constitutional moments of other nations happened primarily during or after the Enlightenment, Britain's occurred almost a century earlier.<sup>6</sup> Therefore, as Adam Tomkins argues, many of the key 'institutional structures and arrangements of what after 1707 became the British constitution

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<sup>1</sup> Bogdanor, V. and Vogenauer, S. 'Enacting a British Constitution: Some Problems' (2008) *PL* 38, 41.

<sup>2</sup> Bradley, A.W. and Ewing, K.D. *Constitutional and Administrative Law* (15<sup>th</sup> edn, Harlow: Pearson Education Limited, 2011), 31-32.

<sup>3</sup> Jennings, Sir W.I. *The Law and the Constitution* [1933] (5<sup>th</sup> edn, London: University of London Press, 1960), 8. See also King, A. *The British Constitution* (Oxford: Oxford University Press, 2007), 1.

<sup>4</sup> Woolf-Phillips, L. 'A long look at the British Constitution' (1964) 37(4) *Parliamentary Affairs* 385, 392.

<sup>5</sup> King, n 3, 2.

<sup>6</sup> For a comprehensive study of the Glorious Revolution see Harris, T. *Revolution: The Great Crisis of the British Monarchy, 1685-1720* (London: Penguin Books, 2006).

were already largely in place by the end of the seventeenth century,<sup>7</sup> decades before many of the ideas encapsulated by other countries' constitutions were conceived, yet alone implemented.<sup>8</sup> Consequently, by comparison to other nations, and regardless of any subsequent changes, the formal and substantive character of the British constitution remains strikingly different.<sup>9</sup>

In the late nineteenth century, as a result of A.V. Dicey's attempts to give an account of the British constitution's formal and substantive characteristics, a new consensus on the constitution was eventually reached – what this thesis dubs the 'traditional' British constitution – that ultimately came to dominate political and judicial thinking during the first half of the twentieth century.<sup>10</sup> In Dicey's account of the constitution in an *Introduction to the Study of the Law of the Constitution*, he proclaimed that 'the dominant characteristic of our political institutions' was the doctrine of parliamentary sovereignty:<sup>11</sup>

[T]hat Parliament ... has, under the English constitution [*sic*] the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.<sup>12</sup>

Because of the '*Unlimited Legislative Authority of Parliament*,<sup>13</sup> there exists 'no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional.'<sup>14</sup> As a consequence of this, the role of the courts under the traditional constitution is necessarily subservient. As Dicey explained:

The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of parliament, or any part of an Act of Parliament, which makes new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle, looked at from its negative side, may be thus stated: there is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament.<sup>15</sup>

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<sup>7</sup> Tomkins, A. 'Of constitutional spectres' (1999) *PL* 525, 532-33.

<sup>8</sup> *Ibid*, 533: '[I]t was in the blood of the seventeenth century, and not in the enlightenment idealism of the eighteenth, that the English constitution was forged.'

<sup>9</sup> King, n 3, 2.

<sup>10</sup> See Stevens, R. *The English Judges: Their Role in the Changing Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2002).

<sup>11</sup> Dicey, A.V. *Introduction to the Study of the Law of the Constitution* [1885] (Indianapolis: Liberty Fund, 1982), 3.

<sup>12</sup> *Ibid*, 3-4.

<sup>13</sup> *Ibid*, 4.

<sup>14</sup> *Ibid*, 37.

<sup>15</sup> *Ibid*, 4.

This did not mean, however, that individual rights and freedoms were of little importance to the British constitution. According to Dicey, the Rule of Law – ‘the security given under the English constitution to the rights of individuals’ – formed the second feature of the constitution alongside legislative supremacy.<sup>16</sup> ‘[T]he right to individual freedom is part of the constitution,’ he claimed, ‘because it is inherent in the ordinary law of the land.’<sup>17</sup> The Rule of Law – which Dicey took to mean the predominance of regular law over arbitrary power, equality before the law, and the constitution being the result of the ordinary law<sup>18</sup> – pervaded the constitution, however, not because of legislation, but because of judicial decisions over many centuries. Unlike with other world constitutions, the rules of the British constitution, Dicey argued, ‘are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts,’<sup>19</sup> thereby leading Dicey to declare that ‘[o]ur constitution, in short, is a judge-made constitution.’<sup>20</sup> The courts, however, although responsible for the evolution of the constitution into a bastion of individual freedom, do not play an active role in protecting individuals against the legislative actions of Parliament. According to Dicey, the right to individual freedom, because it is so ingrained within the constitution, ‘can hardly be destroyed without a thorough revolution in the institutions and manners of the nation.’<sup>21</sup>

### 3. The Constitutional Challenge

Despite the dominance of Dicey, however, the desirability of the traditional British constitution, and its reliability as an accurate description of the contemporary British constitution, has been subject to sustained intellectual challenge. Even during the height of the traditional British constitution, critics of Dicey were not difficult to find. Dicey’s most notable critic, Sir Ivor Jennings, wrote extensively on the flaws of Dicey’s exposition, although Jennings himself was nevertheless a supporter of legislative supremacy.<sup>22</sup> By the mid-twentieth century, however, criticism of the traditional British constitution took on a new dimension. This was, it is submitted, as a result of the growth in world constitutionalism.

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<sup>16</sup> *Ibid*, 107.

<sup>17</sup> *Ibid*, 120.

<sup>18</sup> *Ibid*, Chapter Four.

<sup>19</sup> *Ibid*, 121.

<sup>20</sup> *Ibid*, 116

<sup>21</sup> *Ibid*, 120.

<sup>22</sup> See Jennings, n 3, 117.

In the late seventeenth century, the term 'constitution' 'applied only to the substantive principles to be deduced from a nation's actual institutions and their development.'<sup>23</sup> Over the last four hundred years this definition appears to have, for the most part, been widely accepted in Britain. In the late eighteenth century, however, both the newly-created United States of America and France adopted a new definition of a constitution that was strikingly different. Under this new definition, a constitution was no longer descriptive but prescriptive; the constitution created government, defined its authority, set limits to its powers, and was contained in a single written document.<sup>24</sup> Following the adoption of such constitutions in Italy, West Germany and Japan following the atrocities of the Second World War, British lawyers and lay persons alike increasingly came to view such constitutional arrangements as essential for securing limited government, the very essence of what has become to be known as constitutionalism: a normative political doctrine that 'denotes a type of political regime constructed in accordance with certain principles or ideals, which principles or ideals are judged to be good in themselves and against which a given constitutional regime's performance can be, and ought to be, judged.'<sup>25</sup>

As a result, academic works on the British constitution have become increasingly critical of its key tenets,<sup>26</sup> primarily the doctrine of parliamentary sovereignty and the fusion of powers, on the grounds that such institutional arrangements invite what Lord Hailsham in 1976 described as 'elective dictatorship.' Although Dicey asserted that individual liberty was guaranteed under the constitution by virtue of the Rule of Law, the dominance of Dicey's reading of the constitution throughout the first half of the twentieth century – a supposed 'golden age of liberty'<sup>27</sup> – is now widely seen to have instilled a culture of judicial deference towards executive discretion that was maintained even at the expense of personal liberty.<sup>28</sup> The human rights of individuals, therefore, as well as the entire structure of governance, are seen to be at risk from tyrannical governments, which may exercise wide and discretionary powers free from legal accountability and thus consequence. As Anthony W. Bradley *et al* therefore note, '[e]ver since the American and French revolutions, it has become clear that a parliamentary majority may not be a bulwark of

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<sup>23</sup> McIlwain, C.H. *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947), 3.

<sup>24</sup> See Ridley, F.F. 'There is no British constitution: A dangerous case of the Emperor's clothes' (1988) 41 *Parliamentary Affairs* 340.

<sup>25</sup> King, n 3, 10-11. See also Sajó, A. *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European Press, 1999), 9. As he notes, constitutionalism is a concept which people did not refer to until the nineteenth century.

<sup>26</sup> For a particularly scathing attack on the British constitution as a whole see Ridley, n 24.

<sup>27</sup> Ewing, K.D. and Gearty, C.A. *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914-1945* (Oxford: Oxford University Press, 2000), v.

<sup>28</sup> See *ibid*, in general.

constitutionalism so much as a challenge to it.<sup>29</sup> As a consequence of this, a significant portion of academic writing on the British constitution has focused on re-interpreting its existing characteristics in the hope of satisfying the requirements of constitutionalism.<sup>30</sup> The most striking example of this tendency has been with the exposition of common law constitutionalism, whereby the common law, because it embodies a substantive notion of the Rule of Law, transforms it into a *de facto* higher law for Britain, thereby legitimately empowering judges to grant protection to fundamental human rights against both the government and Parliament.<sup>31</sup>

#### 4. The Political Defence

Not everyone, however, has been willing to accept the demise of the traditional conception of the British constitution. In 1979, J.A.G. Griffith, in an attempt to challenge the then emerging change in attitude towards the traditional British constitution, made a renewed defence of what he dubbed the 'political constitution.'<sup>32</sup> In making his *de facto* case for the compatibility of the British constitution and its traditional tenets with constitutionalism, Griffith did not rely solely upon the Rule of Law as Dicey did,<sup>33</sup> but also on democracy, arguing that accountable government can be better facilitated by leaving questions as to rights, not to judges under a Bill of Rights, but instead to democratically-elected politicians. As Griffith noted:

A further advantage in treating what others call rights as political claims is that their acceptance or rejection will be in the hands of politicians rather than judges and the advantage of *that* is not that politicians are more likely to come up with the right answer but that, as I have said, they are so much more vulnerable than judges and can be dismissed or at least made to suffer in their reputation.<sup>34</sup>

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<sup>29</sup> Ziegler, K.S., Baranger, D. and Bradley, A.W. (eds) *Constitutionalism and the Role of Parliaments* (Oxford and Portland, Oregon: Hart Publishing, 2007), 7.

<sup>30</sup> For example, Barendt, E.M. *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998).

<sup>31</sup> See primarily Allan, T.R.S. *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993).

<sup>32</sup> Griffith, J.A.G. 'The Political Constitution' (1979) 42(1) *MLR* 1.

<sup>33</sup> *Ibid*, 15. Griffith argues that, at the heart of the constitution, 'Governments of the United Kingdom may take any action necessary for the proper government of the United Kingdom, as they see it, subject to two limitations. The first limitation is that they may not infringe the legal rights of others unless expressly authorised to do so under statute or the prerogative. The second limitation is that if they wish to change the law, whether by adding to their existing legal powers or otherwise, they must obtain the assent of Parliament.' In other words, Griffith believes in the need for the existence of prior legal authority for any and all actions of the executive as established in *Entick v Carrington* (1765) 19 *St Tr* 1029, a commonly accepted principle of the Rule of Law. For the Rule of Law in general see Fenwick, H.M. and Phillipson, G. *Text, Cases and Materials on Public Law and Human Rights* (3<sup>rd</sup> edn, London and New York: Routledge, 2011), Chapter Three.

<sup>34</sup> Griffith, n 32, 19.

Since then, writers such as Adam Tomkins and Richard Bellamy have adopted a normative account of the political constitution, couching their reading of the political constitution in terms of civic republicanism.<sup>35</sup> Civic republicanism contends that the common good of citizens is best realised through democratic self-government, civic virtue, deliberation, and popular participation in politics.<sup>36</sup> At the heart of civic republicanism is Phillip Pettit's notion of 'freedom as non-domination'<sup>37</sup> which stipulates that 'we are not free if there is another who possesses the capacity arbitrarily to interfere with our interests or to restrain us.'<sup>38</sup> For Tomkins and Bellamy, this distinctively republican-brand of freedom is best achieved – as it is under the British constitution – when government is held to account by political institutions, and when democratically-elected politicians, not judges, have the final say.<sup>39</sup> Although Griffith did not go as far as to say that Britain had always been a political constitution, instead producing a largely descriptive account of the constitution,<sup>40</sup> Tomkins' work on the political constitution appears to suggest just that. For Tomkins, traditional English public law, the period between 1870 and 1970, was based on the political constitution,<sup>41</sup> the height of Diceyan thinking. The accuracy of this claim, however, appears dubious. Although Dicey's reading of parliamentary sovereignty remains intact under this new political paradigm, his essentially liberal justifications for it have now been replaced with republican ones.<sup>42</sup> The political constitution, if anything, appears nothing more than a republican reinterpretation of the traditional constitution. Regardless of this, however, it is now accepted that, defending the 'traditional' British constitution and its many tenets, now means defending, not Dicey's constitution *per se*, but the 'political' or 'republican' constitution.

## 5. The Political Constitution No More?

During the ongoing war of attrition between legal, common law, and political constitutionalists, the British constitution has undergone some significant constitutional changes. The last forty years of British history have been witness in particular to unprecedented judicial expansionism.

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<sup>35</sup> See Bellamy, R. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Bellamy, R. 'Republicanism, Democracy, and Constitutionalism' in Laborde, C. and Maynor, J. (eds) *Republicanism and Political Theory* (Oxford: Blackwell Publishing, 2008); Tomkins, A. *Public Law* (Oxford: Oxford University Press, 2003); and Tomkins, A. *Our Republican Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2005).

<sup>36</sup> See Tomkins, *Our Republican Constitution*, *ibid*, 44 and Honohan, I. *Civic Republicanism* (London and New York: Routledge, 2002), 1.

<sup>37</sup> Pettit, P. *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997).

<sup>38</sup> Tomkins, *Our Republican Constitution*, n 35, 47.

<sup>39</sup> See Chapter Two, 38-44.

<sup>40</sup> Griffith, n 32, 19: '[T]he constitution is no more and no less than what happens.'

<sup>41</sup> Tomkins, *Public Law*, n 35, 21.

<sup>42</sup> On criticisms of Dicey's liberal conception of the Rule of Law see Ewing and Gearty, n 27, 7-10.



Although their role in constitutional matters was marginalised from 1900,<sup>43</sup> the judges since the 1970s have undergone what Robert Stevens describes as a 'practical and psychological transformation.'<sup>44</sup> As Stevens observes, litigation was revived, legal aid was expanded, English judicial review was rediscovered in order to hold the executive to account,<sup>45</sup> and judicial responsibility for adapting the common law to meet the needs of society was reclaimed.<sup>46</sup> This renewed judicial vigour reached unprecedented heights in *R (on the application of Jackson) v Attorney-General*,<sup>47</sup> when several Law Lords openly questioned the relevance of parliamentary sovereignty, stating *obiter* that the doctrine was no longer without limits. Lord Steyn, for example, argued that:

The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.<sup>48</sup>

Similarly, Lord Hope noted that '[p]arliamentary sovereignty is no longer, if it ever was, absolute ... It is no longer right to say that its freedom to legislate admits of no qualification whatever,<sup>49</sup> whilst Baroness Hale went as far as to say that '[t]he courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.<sup>50</sup>

Despite this, however, much of the judiciary's increasing prominence within the constitution in recent decades has been fuelled, not by the courts, but instead by Parliament. This can be seen most strikingly with Britain's entry into the now European Union. Following the decision of the House of Lords in *Factortame (No. 2)*,<sup>51</sup> s 2(4) of the European Communities Act 1972 (ECA), now

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<sup>43</sup> See Stevens, n 10, Chapter 2.

<sup>44</sup> *Ibid*, xiii.

<sup>45</sup> *Ibid*, xiv.

<sup>46</sup> *Ibid*, 44.

<sup>47</sup> [2005] UKHL 56.

<sup>48</sup> *Ibid*, [102].

<sup>49</sup> *Ibid*, [104].

<sup>50</sup> *Ibid*, [159].

<sup>51</sup> *R v Secretary of State for Transport, ex parte Factortame (No. 2)* [1991] 1 AC 603.

amended by the European Union Act 2011, gives EU law, not only direct effect,<sup>52</sup> but also precedence over domestic law, even in the face of inconsistent parliamentary legislation, irrespective of when it is passed.<sup>53</sup> As a result, judges may now disapply any Act of Parliament they deem to be in conflict with EU law, ‘their own British version of American judicial review.’<sup>54</sup> The New Labour reform package of 1997, which included legislation to affect greater human rights protection<sup>55</sup> and for the devolution of power from Westminster to Scotland, Northern Ireland, and Wales,<sup>56</sup> can also be seen to further expand the role of the judiciary within the constitution. The Human Rights Act 1998 (HRA), for instance, ascribed a new role for the judiciary under ss 3-4 in reviewing the compatibility of legislation to the Convention Rights, albeit without the ability to declare incompatible legislation invalid, as well as a new ground for the judicial review of executive action under s 6. In addition to this, devolution appears to have established a sub-national constitutional framework that departs significantly from the traditional Westminster model. None of the devolved assemblies are accorded the unlimited sovereignty enjoyed by the Westminster Parliament because their authority, as well as its limits, is derived from each Act of Parliament that created them, making them *de facto* written constitutions.<sup>57</sup> This is reaffirmed by that fact that the Supreme Court, whose general duty it is to enforce the will of Parliament as expressed in statute, has the power to strike down legislation passed by the devolved assemblies, regardless of the fact that the devolved assemblies are democratically-elected and the Supreme Court is not;<sup>58</sup> thereby arguably elevating the status of the Court to *de facto* guardian of the Rule of Law and the constitutional settlement within those devolved jurisdictions.<sup>59</sup>

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<sup>52</sup> The European Communities Act 1972, s 2(1): ‘All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.’

<sup>53</sup> Section 2(4): ‘[A]ny enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section.’

<sup>54</sup> Stevens, n 10, xiv.

<sup>55</sup> The Human Rights Act 1998.

<sup>56</sup> The Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 1998 respectively.

<sup>57</sup> See Bradley and Ewing, n 2, 47: ‘[I]t might be said that three of the four countries that make up the United Kingdom each now has a written constitution.’

<sup>58</sup> This power is prescribed for by s 33 of the Scotland Act 1998, s 149 and Schedule 9 of the Government of Wales Act 2006, and s 79 and Schedule 10 of the Northern Ireland Act 1998.

<sup>59</sup> See *AXA General Insurance Limited and others v The Lord Advocate and others* [2011] UKSC 46, [51] (Lord Hope): ‘[T]he rule of law does not have to compete with the principle of sovereignty ... We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial

The cumulative impact of these changes has persuaded leading constitutional scholar Vernon Bogdanor to proclaim that the traditional constitution is now in the process of being replaced by a new and more legal constitution. As Bogdanor notes in his 2009 book *The New British Constitution*:

*The New British Constitution* has a large but limited theme – the creation of a new British constitution and the demise of the old, the replacement of one constitutional order by another ... We have been living through an unprecedented period of constitutional change, an era of constitutional reform which began in 1997 and shows no sign of coming to an end ...

*The New British Constitution* suggests ... that Dicey's analysis, which perhaps offered a reasonably accurate account of Britain's constitutional arrangements in the past, has been made irrelevant by the constitutional reforms since 1997, and by Britain's entry into the European Communities in 1973. We are now in transition from a system based on parliamentary sovereignty to one based on the sovereignty of a constitution, albeit a constitution that is inchoate, indistinct and still in large part uncodified.<sup>60</sup>

Judicial expansionism, where it results in greater protection of human rights and more accountable government, is a welcome development for legal and common law constitutionalists that has the potential to make up for the perceived shortcomings of the traditional British constitution's attachment to parliamentary sovereignty. For political constitutionalists, however, judicial expansionism, regardless of whether it is spearheaded by the courts or by Parliament, is cause for concern. Adam Tomkins, for example, would contend that political accountability is not only more democratic than legal accountability, but also more effective at preventing governments from abusing their power.<sup>61</sup> Greater reliance on the courts, therefore, 'endangers both democracy and effectiveness.'<sup>62</sup> In light of these ideological differences, therefore, can the changes which have occurred over the past forty years really be seen to signal the replacement of the 'old' political constitution with a 'new' more legal one?

Janet Hiebert certainly believes that although political constitutionalists continue to defend their model of constitutionalism over the claims of their legal rivals,<sup>63</sup> they have nevertheless 'had to

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review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.'

<sup>60</sup> Bogdanor, V. *The New British Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2009), xi-xiii.

<sup>61</sup> Tomkins, *Our Republican Constitution*, n 35, 3.

<sup>62</sup> *Ibid.*

<sup>63</sup> Hiebert, J.L. 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69(1) *MLR* 7,8.

resign themselves to the popularity of this juridical form of constitutionalism<sup>64</sup> and to 'their inability to transform constitutional paths already taken.'<sup>65</sup> Although this suggests that political constitutionalists may now believe the political constitution to be lost, political constitutionalists have in fact remained steadfast in their belief that the political constitution remains. Keith Ewing, for example, has recently argued that '[f]ar from being eclipsed by recent constitutional reforms, the British species of political constitutionalism remains in rude health, in part because this recent period of re-balancing the constitution in the direction of the legal has been a conspicuous failure,<sup>66</sup> whilst Colin Turpin and Adam Tomkins' have observed that 'there is a very great deal of the 'old' constitution that remains.'<sup>67</sup> Indeed, when one examines the constitution more closely, one can see that Turpin and Tomkins' rebuttal to Bogdanor's claim is not without cause. Many of the reforms have been piecemeal, with much of the constitution remaining untouched by reform altogether.<sup>68</sup> Many of the above mentioned reforms have sought also to complement the 'old' constitution, not to challenge it. Parliamentary sovereignty, for example, is expressly preserved under the HRA,<sup>69</sup> as well as in relation to EU law as a result of s 18 of the European Union Act 2011,<sup>70</sup> whilst the devolved assemblies of Scotland, Northern Ireland, and Wales remain formally subordinate to the sovereignty of the Westminster Parliament.<sup>71</sup> Lord Neuberger, the President of the Supreme Court, has also challenged the rhetoric of the House of Lords in *Jackson*, arguing that Parliament, because it is democratically elected, remains sovereign.<sup>72</sup> Consequently, despite the unprecedented growth in judicial authority over the past forty years, the British constitution has yet to experience an American-style *Marbury v Madison* moment.<sup>73</sup> As a result, it is submitted that Bogdanor's claim that Britain is in the process of attaining a 'new' and more legal constitution

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Ewing, K.D. 'The Resilience of the Political Constitution' (2013) 14(12) *German Law Journal* 2111, 2113.

<sup>67</sup> Turpin, C. and Tomkins, A. *British Government and the Constitution: Text and Materials* (8th edn, Cambridge: Cambridge University Press, 2011), 24.

<sup>68</sup> Tomkins, A. 'The Rule of Law in Blair's Britain' (2007) 26 *U. Queensland L.J.* 255: '[O]nly bits of the British constitution have been reformed: much remains largely as it was before.'

<sup>69</sup> Sections 3-6.

<sup>70</sup> Section 18: 'Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.'

<sup>71</sup> Fenwick and Phillipson, n 33, 234.

<sup>72</sup> Lord Neuberger of Abbotsbury, Master of the Rolls, *Who Are the Masters Now?*, Second Lord Alexander Of Weedon Lecture, 6 April 2011, [18]: 'Parliamentary sovereignty is absolute, because the only true master is the electorate.' Lord Neuberger was appointed president of the Supreme Court of the United Kingdom on 1st October 2012.

<sup>73</sup> 5 U.S. (1 Cranch) 137 (1803). On a similar point see *ibid*, [74]: 'We are not, I think, currently enjoying what has been called a 'constitutional moment,' as Germany enjoyed after the last World War and South Africa enjoyed with the end of apartheid.'

at the expense of its 'old' political is unduly premature. In order to give precision and force to this claim, however, one must conduct a closer and more thorough examination of the contemporary British constitution.

## 6. Aims and Objectives

The aim of thesis, therefore, is to challenge the assertion by Bogdanor that the British constitution is undergoing a fundamental transformation from a political to a legal constitution by conducting a theoretically-informed analysis of the extent to which the contemporary British constitution can still be said to resemble a predominantly political constitution. This will be achieved by examining the British constitution with reference to the substantive and formal characteristics of the two broad schools of thought on constitutionalism – the legal (including common law constitutionalism) and the political – which will be outlined in detail in Chapter Two. The benefits of such an approach are explained in full by Graham Gee and Grégoire Webber. As they note:<sup>74</sup>

[W]e employ models to help make sense of real world constitutions. The explanatory framework supplied by a constitutional model involves an appeal to some idea or group of ideas ... it enables us to adopt a critical stance with respect to the subject matter of analysis – here, the practices and institutions of a real world constitution. We are then equipped to understand and evaluate this subject matter from the perspective supplied by the model. But note that a constitutional model should never be wholly abstracted from that which it seeks to explain. After all, constitutional theory, properly conceived, 'does not involve an inquiry into ideal forms' but rather 'must aim to identify the character of actually existing constitutional arrangements.'<sup>75</sup>

In adopting this approach, however, it is not the aim of this thesis to produce a simple either/or account of the British constitution, but instead to provide the first lengthy demonstration of a new middle-ground between the two opposing schools of constitutionalism: complementary constitutionalism.

It is argued that elements of both the legal and the political schools, most notably their respective mechanism of accountability, are utilised under real world constitutions, and that the fusion of these legal and political elements is not necessarily haphazard or contradictory, but instead complementary. Both legal and political methods of accountability support and sustain each other in order to achieve better government accountability than either methods could achieve on their own and thus a more balanced constitution. This is made possible, it is argued, by the fact that

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<sup>74</sup> Gee, G. and Webber, G.C.N. 'What Is a Political Constitution?' (2010) 30(2) *OJLS* 1, 19.

<sup>75</sup> Loughlin, M. *Swords & Scales: An Examination of the Relationship Between Law and Politics* (Oxford and Portland, Oregon: Hart Publishing, 2000), 186.

both the legal and the political constitutions share many common characteristics and disagree with one another primarily, although not exclusively, on emphasis. No real world constitution, therefore, was, or ever will be, solely legal or solely political in character. A real world constitution is instead a complementary mixture of elements from both the legal and political schools which can be either primarily legal or primarily political in character.

In considering the extent to which the British constitution can still be seen to resemble a political constitution, therefore, this thesis is in fact engaging in a quantitative and a qualitative exercise<sup>76</sup> to determine whether, on the whole, the constitution remains primarily, but not exclusively, political. It depends, not only upon whether the constitution relies more upon political as opposed to legal methods of accountability, but also upon the effectiveness of such methods and the extent to which the legal methods of accountability used complement, rather than contradict, the underlying principles of the political school.

## **7. Areas of Assessment**

Due to the space constraints of this thesis, it plainly cannot consider every aspect of the British constitution. Instead, three specific areas of the British constitution have been identified for evaluation that, although each selected for different reasons, nevertheless collectively provide the clearest framework from which the claims of this thesis may be advanced and vindicated. The chosen areas of discussion, considered in Chapters Three, Four, and Five respectively, are as follows: the royal prerogative, constitutional conventions, and the Human Rights Act 1998. Given the multi-faceted nature of Britain's uncodified and largely unwritten constitution, it is conceded that different areas of the constitution may yield different results from those advanced by this thesis. If, for example, judicial review were selected, one may find the judiciary's gradual expansion of judicial review over the last half-century as indicative of a firm shift away from political constitutionalism. It is submitted however, that whilst different examples may produce different conclusions, the choice of the above three areas combined warrant the conclusion of complementary constitutionalism, and that this conclusion provides highly persuasive authority as to the general character of the British constitution.

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<sup>76</sup> Please note non-technical usage of terms 'quantitative' and 'qualitative.'

## *I. The Royal Prerogative*

The royal prerogative is considered as part of this thesis because it constitutes a gap in accountability at the very centre of the British constitution that, until very recently, constitutionalism has failed to bring under control. Despite the prerogative constituting an essential component of the constitution without which democratic government could neither exist nor function, it has historically operated free from effective scrutiny. The existence of the prerogative, therefore, is an affront to both legal and political schools of constitutionalism. As a consequence, the prerogative has increasingly found itself a target for reform. Political constitutionalists wish to bolster Parliament's controls over the prerogative, whilst legal and common law constitutionalists, although in support of strengthening political controls, wish also to expand judicial controls. However, despite this renewed interest in bringing the prerogative under control, even the most recent attempts at doing so have failed to completely plug the gap in accountability. Through an assessment of both parliamentary and judicial attempts at bringing the royal prerogative under control, however, strong evidence of the British constitution's prevailing principles may be provided.

## *II. Constitutional Conventions*

This thesis will include constitutional conventions – broadly defined as non-legal but nevertheless politically-binding rules of conduct – in its analysis for two reasons: firstly, because constitutional conventions remain the source of many of the most important rules of the British constitution;<sup>77</sup> secondly, because, despite the fact that constitutional conventions are the paradigmatic means of political controls upon government, they have never until now been thoroughly examined through the lens of political constitutionalism in academic literature. This thesis will argue that, because their existence precludes the need for judicial controls, conventions act as a political substitute for legally-enforceable rules. When used in order to regulate the behaviour of democratically elected actors, therefore, conventions are of normative value to political constitutionalists because they are a means of achieving limited government without judicial interference in the political process. Through an assessment of British conventions in light of their normative value to the political constitution, therefore, the constitutional significance of Britain's heavy reliance upon

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<sup>77</sup> It is only by constitutional convention, for example, that the Queen must exercise the majority of her prerogative powers on the advice of government Ministers, that the party leader capable of commanding a majority in the House of Commons must be appointed Prime Minister, that the executive must be made accountable to Parliament for its actions, and that the House of Commons has primacy over the House of Lords.

convention can be properly determined and persuasive conclusions drawn as to what extent the British constitution can still be said to remain predominantly political.

### *III. The Human Rights Act 1998*

The HRA is included as part of this thesis because it is a deliberate instance of complementary constitutionalism which aims to strike a balance between parliamentary sovereignty and the judicial protection of rights. It seeks to achieve this by encouraging Parliament to engage more with human rights and play an active role in their protection, thereby fostering a culture of rights within Parliament. Section 19, therefore, obliges a minister, when introducing a bill, to issue a statement indicating whether or not it is incompatible with the Convention rights, thereby encouraging governments to consider compatibility at the pre-legislative stage, as well as providing a platform from which Parliament may then scrutinise the government on human rights grounds. In order to assist Parliament in this task, the Joint Committee on Human Rights (JCHR) was also created, which, as part of its broad mandate to consider human rights, routinely scrutinises Government Bills for compliance with human rights. In order to provide further incentive for political compliance with rights, however, the HRA also empowers the courts to review the compatibility of legislation with the Convention rights, albeit in a manner which is not supposed to undermine either Parliament's role in the protection of rights, nor its right to the final say. Under ss 3 and 4, therefore, Acts of Parliament are subject to review by the courts on human rights grounds but without the power to declare incompatible legislation null and void. Instead, s 3 empowers the courts to interpret legislation compatibly with the Convention rights '[s]o far as is possible to do so.'<sup>78</sup> Where a compatible interpretation is not possible, the courts are then empowered under s 4 to issue a declaration of incompatibility which 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given.'<sup>79</sup> Determining the extent to which these political and legal mechanisms of the HRA have struck a complementary balance, therefore, should provide some significant insight into the extent to which the British constitution, despite its greater reliance upon legal methods of accountability, can still be said to resemble a primarily political one.

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<sup>78</sup> Section 3(1): 'So far as it possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

<sup>79</sup> Section 4(6)(b).



## 8. Membership of the European Union

British membership of the European Union is one of the major constitutional developments over the last half a century that appeared to signal the demise of the 'old' political constitution and its replacement with a 'new' more legal constitution. Adam Tomkins even describes it as '[t]he biggest challenge to the doctrine of legislative supremacy in recent years.'<sup>80</sup> Whether or not British membership of the European Union can be reconciled with parliamentary sovereignty, therefore, is significant to whether the British constitution can be seen to remain primarily political as claimed by this thesis. Despite this, membership of the European Union and its impact on the British constitution has been excluded from the main analysis on the grounds that it is an area of legal research which has already been extensively analysed. Because of its obvious importance to this inquiry, however, the main issues will nevertheless be briefly addressed.

By the time Britain finally became a member of the then European Economic Community (EEC) in 1972, it was already an accepted fact that Community law should prevail over national law. As the European Court of Justice in *Costa v ENEL* made clear:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves ... The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights.<sup>81</sup>

In order to facilitate Britain's accession to the EEC, Parliament passed the ECA which, under s 2(1), gave direct effect to Community law.<sup>82</sup> The courts were made chiefly responsible for the determination of the meaning and effect of Community law under s 3.<sup>83</sup> Section 2(4), however,

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<sup>80</sup> Tomkins, *Public Law*, n 35, 108.

<sup>81</sup> *Costa v ENEL* (Case 6/64) [1964] ECR 585, 586 (ECJ).

<sup>82</sup> See n 52.

<sup>83</sup> Section 3(1): 'For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any [EU instrument], shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decisions of [the European Court]).'

stated also that 'any enactment passed or to be passed ... shall be construed and have effect subject to the foregoing provisions of this section.' As Helen Fenwick and Gavin Phillipson therefore observe, in enacting s 2(4):

Parliament seemed to be suggesting that the courts must allow Community law to prevail over subsequent Acts of Parliament. This was evidently an attempt to suspend the normal doctrine of implied repeal – instead of any later statute which conflicted with EC law impliedly repealing it, such a later statute would have to be either 'construed,' that is, interpreted so that it did not conflict with EC law, or if it could not be so interpreted, simply set aside ... In other words, Parliament was quite clearly seeking to bind its successors.<sup>84</sup>

This reading of the ECA was confirmed in the decision of the House of Lords in *Factortame (No. 2)*, where, as noted above, it was held that s 2(4) gave Community law precedence over domestic law, even in the face of inconsistent parliamentary legislation, irrespective of when it is passed. As a result, judges may now disapply any Act of Parliament they deem to be in conflict with directly effective EU law. Although it had long been held that Parliament was incapable of binding its successors,<sup>85</sup> Lord Bridge nevertheless justified his reading of s 2(4) on the grounds that Parliament had voluntarily limited its own sovereignty. As his Lordship noted:

[W]hatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act it has always been clear that it was the duty of the UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.<sup>86</sup>

Because 'the established rule about conflicting Acts of Parliament, namely that the later Act must prevail, was evidently violated,'<sup>87</sup> Wade has accordingly characterised the decision in *Factortame (No. 2)*, 'at least in a technical sense, as a constitutional revolution.'<sup>88</sup>

The extent to which the ECA, as interpreted in *Factortame (No. 2)*, can be seen to signal an 'extra-legal shift in the constitutional order,'<sup>89</sup> however, is debatable.<sup>90</sup> Although the supremacy of EU

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<sup>84</sup> Fenwick and Phillipson, n 33, 214-215. See also Tomkins, *Public Law*, n 35, 110: 'Given that section 2(4) applies not only to legislation made before 1973, but also apparently to legislation to be made after that date, this appears on one reading to constitute an attempt by the Parliament of 1972 to bind its successors – something that ... Parliament is not generally free to do.'

<sup>85</sup> See in particular *Vauxhall Estates v Liverpool Corporation* [1932] 1 KB 733 and *Ellen Street Estates v Ministry of Health* [1934] 1 KB 590 (CA).

<sup>86</sup> *Factortame (No. 2)*, n 51, 659.

<sup>87</sup> Wade, H.W.R. 'Sovereignty – revolution or evolution?' (1996) 112(Oct) *LQR* 568.

<sup>88</sup> *Ibid.*

<sup>89</sup> Fenwick and Phillipson, n 33, 223.

<sup>90</sup> See Allan, T.R.S. 'Parliamentary sovereignty: law, politics and revolution' (1997) 113(Jul) *LQR* 443

law may be seen to contradict the underlying values of the political school, it nevertheless remains a contradiction endorsed by Parliament. In disapplying incompatible legislation, therefore, the courts are merely enforcing Parliament's will, thereby upholding the doctrine of Parliamentary sovereignty. This argument has resonated amongst some political constitutionalists seeking to reconcile the decision in *Factortame (No. 2)* with the doctrine of parliamentary sovereignty. As Tomkins argues:

[T]he conferment on domestic courts in the United Kingdom of a jurisdiction to hear and to decide cases concerning Community Law ... is not a jurisdiction that the courts have conferred on themselves. Rather, courts in the United Kingdom possess this power for one reason and for one reason only: namely, because parliament legislated it, in section 3(1) of the ECA 1972.<sup>91</sup>

Building on this, Tomkins makes the argument that, in disapplying an Act of Parliament, a court is merely enforcing Community Law in their capacity as an enforcer of Community Law under s 3 ECA, and not 'in its capacity as a court of English Law.'<sup>92</sup> Because the doctrine of parliamentary sovereignty 'has never been a doctrine of Community Law, only of English law,'<sup>93</sup> parliamentary sovereignty is neither a barrier to the disapplication of an Act of Parliament, nor evidence of the doctrine's demise. As Tomkins therefore concludes:

[I]t remains the case that under English law nobody has the power to override or to set aside a statute, but it is no longer the case that English law is the only law that is applicable in England. Since 1 January 1973 there have been two legal systems operating in this country, not one, and the doctrine of the legislative supremacy of statute is a doctrine known only to one of those two systems. This is not a revolution: it is rather the incorporation of a new legal order into a very old country.<sup>94</sup>

If supremacy of EU law within Britain is indeed derived from Parliament and not from Community Law itself – a claim later reaffirmed by s 18 of the European Union Act 2011<sup>95</sup> – it appears likely

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and *ibid*: 'TRS Allan offers an alternative view [to Wade's argument that the decision in *Factortame (No. 2)* amounted to a 'constitutional revolution'], arguing that *Factortame* rather represents an evolutionary adaption of a legal principle, itself based on deeper political values, in legitimate response to changing political circumstances.'

<sup>91</sup> Tomkins, *Public Law*, n 35, 111. See also at 117: '[A]ll the House of Lords did in *Factortame II* was to enforce the will of Parliament as laid down in statute.'

<sup>92</sup> *Ibid*, 116.

<sup>93</sup> *Ibid*, 117.

<sup>94</sup> *Ibid*, 118.

<sup>95</sup> Section 18: 'Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.' For a detailed critique of the European Union Act, see Gordon, M. and Douglas, M. 'The United Kingdom's European Union Act

that the courts would follow clear and express words by Parliament indicating a desire for any incompatible legislation to prevail over EU law.<sup>96</sup> As a result, the supremacy of EU law over domestic law, despite any contradiction with the political school, must be taken as yet another example of complementary constitutionalism.

However, although Parliament may theoretically be able to override Community law with express words, it has never to date passed legislation with the intention of expressly overriding Community Law in favour of national law. As a result, Community law may be seen to have supremacy in practice. As Fenwick and Phillipson note:

[S]ince in practice it is highly improbable that such express words would be used, it appears to be impossible for Parliament to depart from the principle of the primacy of Community law unless it decides to withdraw from the Community.<sup>97</sup>

Although the likelihood of Britain leaving the EU may have once appeared remote, recent developments within Parliament suggest that a referendum on British membership may be held within the next few years.<sup>98</sup> This therefore demonstrates that Parliament, even if it has lost the final say on matters of Community law, 'still retains its ultimate sovereignty.'<sup>99</sup> As Fenwick and Phillipson therefore conclude:

[W]here Community law conflicts with domestic law, the traditional doctrine of implied repeal will not be applied but, although the doctrine of parliamentary sovereignty has been greatly affected, it is arguable that it would revive in its original form if the UK withdrew from the EU.<sup>100</sup>

Even if Britain were to remain a member of the EU, however, Parliament would retain the final say on every other matter not related to Community Law. The judicial enforcement of Community Law would also fail to render the use of political methods of accountability within the constitution

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2011: "who won the bloody war anyway?" (2012) 37(1) *E.L. Rev.* 3. See also recent decision of the Supreme Court in *R (on the application of HS2 Action Alliance Limited and others) v Secretary of State for Transport* [2014] UKSC 3, where Lord Reed (at [79]) stated that the application of the doctrine of the supremacy of EU Law developed by the Court of Justice 'in our law ... depends upon the 1972 Act.'

<sup>96</sup> In support of the argument that Parliament may override Community Law with express words see Sir John Laws' judgment in *Thoburn v Sunderland City Council* [2003] QB 151. Laws disputes the claim that Parliament, in enacting the ECA, actually bound itself. He instead argues that the ECA was made immune from implied repeal by virtue of its status as what he defines as a 'constitutional statute' which derives its authority from the common law.

<sup>97</sup> Fenwick and Phillipson, n 33, 220.

<sup>98</sup> See European Union (Referendum) Bill (HC Bill 11). The private members' bill recently put before the House of Commons by James Wharton MP calls for a referendum on British membership of the European Union to be held in 2017.

<sup>99</sup> Fenwick and Phillipson, n 33, 230.

<sup>100</sup> *Ibid.*

unnecessary. Britain can continue to exhibit a preference for political as opposed to legal methods of accountability irrespective of judicial supremacy in relation to Community Law. As a result, the British constitution, despite its membership of the EU, could still be said to remain primarily, but not exclusively, political in nature.

## **9. A Primarily Political Constitution**

Although there has been an increased reliance upon legal methods of control under the British constitution, the analysis of the above three areas will demonstrate that the constitution nevertheless continues to rely primarily upon political as opposed to legal methods of accountability and guarantees of democracy. It will show also that, even where there has been an increased reliance upon legal methods of accountability, such reliance can often be seen to be in conformity with the underlying values of the political constitution, and thus evidence of complementary constitutionalism. As a result, this thesis will argue that the British constitution, although undisputedly more legal, nevertheless remains primarily political.

## Chapter Two

# COMPLEMENTARY CONSTITUTIONALISM

### 1. The Dichotomy of Law and Politics

Constitutionalism as a concept has been the topic of extensive academic discussion for centuries, crossing several academic disciplines.<sup>1</sup> Although the meaning of the term remains contested,<sup>2</sup> its main aim appears relatively uncontroversial: limited government. Eric Barendt, for example, notes that '[a]dherence to the principles of limited constitutional government is often referred to as *constitutionalism*,<sup>3</sup> whilst Gordon J. Schochet identifies 'limited government' as being one of the fundamental principles of constitutionalism,<sup>4</sup> along with Anthony King.<sup>5</sup> Unsurprisingly, however, the meaning of limited government is itself subject to various interpretations, all of which turn on what is meant by the term 'government.' In the literal and most narrow sense, government refers only to the executive branch. In the broader meaning of the term, it refers not only to the executive branch but also the legislative (if not also the judicial). As a result, the term limited government always means a limited executive, but sometimes also implies a limited lawmaker. Regardless of which meaning of government is adopted, however, its power must nevertheless be 'limited.' Although the term 'limited' implies that government power must be restricted, it is submitted that such a narrow definition fails to capture the broader underlying thrust of limited government, namely that government power should not be arbitrary but controlled. By controlling government, one limits government.

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<sup>1</sup> See Murkens, J.E.K. 'The quest for constitutionalism in UK public law discourse' (2009) 29(3) *OJLS* 427, 428-429. Murkens notes that constitutionalism has been discussed academically under the following headings: public international law, global constitutionalism, European constitutionalism, post-national constitutionalism, transnational constitutionalism, common law constitutionalism, the history of constitutionalism, the philosophy of constitutionalism, constitutionalism as a framework of analysis, constitutionalism as a method of legal reasoning, and the paradox of constitutionalism.

<sup>2</sup> See Henkin, L. 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' (1992-1993) 14 *Cardozo L. Rev.* 533, 534 and Tsagourias, N. (ed) *Transnational Constitutionalism: International and European Perspectives* (Cambridge: Cambridge University Press, 2007), 2.

<sup>3</sup> Barendt, E.M. *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998), 4.

<sup>4</sup> Schochet, G.J. 'Introduction: Constitutionalism, Liberalism, and the Study of Politics' in Pennock, J.R. and Chapman, J.W. (eds) *Constitutionalism* (New York: New York University Press, 1979), 1.

<sup>5</sup> See King, A. *The British Constitution* (Oxford: Oxford University Press, 2007), 12. Although King does not use the phrase 'limited government' *per se*, he does state that under constitutionalism, 'one of the principle purposes of any country's constitution should be to ensure that individuals and organizations are protected against arbitrary and intrusive action by the state.'

Many different forms of constitutionalism have accordingly been proposed,<sup>6</sup> all of which claim to be the best manifestation of the concept both substantially and formally. The two most prominent models of constitutionalism are the legal and the political respectively. Although the legal and the political constitutions can be seen to have much in common as a result of their shared belief that government power should be controlled – in particular an acceptance of at least a formal reading of the Rule of law<sup>7</sup> and the partial separation of powers doctrine<sup>8</sup> – the two nevertheless differ over the best way in which the institutions of state should be organised in order to achieve their shared goal. The legal constitution holds that government power is antecedent to and therefore limited by a justiciable 'higher law' constitution, including entrenched rights. The political constitution, by contrast, holds that, because we all reasonably disagree about substantive issues, including questions of rights, democratic participation in politics allows government power to be harnessed for 'good' ends, with government power kept in check by political rather than legal methods of accountability.

The dichotomy of law and politics, as discussed in the previous chapter, has come to shape and inform much of contemporary public law discourse in Britain. The debate has thus often taken the form of a choice between one of two seemingly irreconcilable positions: government controlled by law or government controlled by politics. It is the aim of this chapter, however, to make the case for the existence of a middle-ground between the two opposing schools of constitutionalism: complementary constitutionalism. It is argued that much overlap exists between the legal and the political constitutions with the two schools differing from one another primarily, although not exclusively, on emphasis. As a result, a real world constitution can be seen to be a complementary mixture of elements from both the legal and political schools which can be either primarily legal or

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<sup>6</sup> Sunstein, C.R. 'Constitutions and democracies: an epilogue' Elster, J. and Slagstad, R. (eds) *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988), 328.

<sup>7</sup> Craig, P.P. 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) *PL* 467: 'Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met.'

<sup>8</sup> Also known as the system of checks and balances, the partial separation of powers theory does not advocate for the functions of government – executive, legislative, and judicial – to be restricted exclusively to a specific branch, but instead for them to be shared amongst two or more branches. This allows each branch to check the powers of the others, thereby preventing arbitrary government. For more on this see Barendt, n 3, 14-17. Adoption of the separation of powers doctrine generally under both the legal and the political constitutions may also be justified on grounds that it promotes 'efficient state action.' See Barber, N.W. 'Prelude to the separation of powers' (2001) *60(1) CLJ* 59, 63.

primarily political in character. The first half of this chapter, therefore, will discuss in greater detail the substantive claims of both the legal and the political constitutions. The second half will then make the case for complementary constitutionalism by exploring in detail the overlap which occurs in real world constitutions between the legal and the political schools.

## 2. The Legal Constitution

### 2.1 Higher Law, Human Rights, and Constitutional Review

The origins of legal constitutionalism can be traced back to seventeenth-century social contract theory. Although contractarianism is subject to much theoretical variation, the core idea, as advanced by Thomas Hobbes,<sup>9</sup> John Locke,<sup>10</sup> and Jean-Jacques Rousseau,<sup>11</sup> is that the people, in exchange for certain collective benefits, agree to give up some of their power in order to form government and ensure public order.<sup>12</sup> For John Locke, obedience by citizens to the laws of a state was conditional on the state not interfering with three natural laws or fundamental rights: Life, Liberty and Estate. If the state infringes these rights, the contract is voided and the people can then revolt.<sup>13</sup> Although these constraints upon the state envisaged by Locke were largely moral in character, they were translated by Thomas Paine into the language of law.

Basing his hypothesis upon the recently enacted constitution of the United States of America – one of the first to be produced in light of John Locke’s liberal theory<sup>14</sup> – and rejecting the descriptive definition of a constitution utilised in late seventeenth-century England, Paine, in his book *Rights of Man*, argued that ‘[i]t is not sufficient that we adopt the word [constitution]; we must fix also a standard significance to it.’<sup>15</sup> For Paine, this ‘standard significance’ consisted of a number of requirements that a constitution must satisfy in order to justify it being called a

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<sup>9</sup> Hobbes, T. *Leviathan* [1651] (Cambridge: Cambridge University Press, 1992).

<sup>10</sup> Locke, J. *Two Treatises of Government* [1690] (Cambridge: Cambridge University Press, 1988).

<sup>11</sup> Rousseau, J.J. *The Social Contract and Discourses* [1762] (London: J.M. Dent & Sons Ltd., Everyman’s Library, 1963).

<sup>12</sup> Hardin, R. *Liberalism, Constitutionalism, and Democracy* (Oxford: Oxford University Press, 1999), 146.

<sup>13</sup> See Stanton, T. ‘Authority and Freedom in the Interpretation of Locke’s Political Theory’ (2011) 39(1) *Political Theory* 6 and Tate, J.W. ‘Locke, God, and Civil Society: Response to Stanton’ (2012) 40(2) *Political Theory* 222.

<sup>14</sup> It should be noted that the Causican Constitution of 1755, which was also drafted as a result of Enlightenment thinking, actually predates both the American and the French constitutions.

<sup>15</sup> Paine, T. *Rights of Man, Common Sense and Other Political Writings* (Oxford: Oxford University Press, 1998), 122. See also Vile, M.J.C. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), 8: ‘“Constitutionalism’ consists in the *advocacy* of certain types of institutional arrangement, on the grounds that certain ends will be achieved in this way, and there is therefore introduced into the discussion a normative element but it is a normative element based upon the belief that there are certain demonstrable arrangements and the safeguarding of important values.’



constitution.<sup>16</sup> Crucially, he contended that a 'constitution of a country is not the act of its government, but of a people constituting a government.'<sup>17</sup> Paine also proposed that a constitution must be prescriptive in nature,<sup>18</sup> asserting that, in creating government, a constitution also defined its authority, thereby imposing limits upon it.<sup>19</sup> In order to fulfil such aims, it was also implied that the constitution must be contained within a single written document.<sup>20</sup> As Paine noted, '[a] constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and whenever it cannot be produced in a visible form, there is none.'<sup>21</sup> As a result, the social contract became the written constitution – a high-status contract between the government and the governed<sup>22</sup> – and natural rights became legal civil rights.<sup>23</sup>

The constitution is therefore entrenched 'higher law' that is 'superior to other laws'<sup>24</sup> and incapable of change other than by constitutional amendment, with constitutional rights acting as substantive constraints upon the powers of the legislature and the executive.<sup>25</sup> In the centuries that followed the Enlightenment, the rights commonly protected by such legal constitutions have steadily evolved and expanded and now overlap with human rights, although other rights may also be included. The protection of human rights is now a widely accepted cornerstone of the legal constitution, as well as of the substantive theory of the Rule of Law discussed below. Fundamental to the identity of both, however, is not merely the inclusion of human rights as part of the 'higher law' of the constitution, but their protection and enforcement by an empowered judiciary. Interestingly, however, one of the earliest examples of a legal constitution – the Constitution of the United States of America – makes no reference to the judiciary's power of

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<sup>16</sup> See also Ridley, F.F. 'There is no British constitution: a dangerous case of the Emperor's clothes' (1988) 41(3) *Parliamentary Affairs* 340, 342-343. Ridley identifies four fundamental characteristics of a constitution that are consistent with those identified by Paine. They are as follows: (1) a constitution establishes government and is thus necessarily prior to it; (2) a constitution is established by a power that is 'outside and above the order it establishes;' (3) a constitution, as a result of (2), is a superior form of law which binds the legislature and generally permits judicial review of legislation; and (4) a constitution, because its purpose is to limit government, is entrenched and cannot be changed other than by special procedures 'requiring reference back to the constituent power.'

<sup>17</sup> Paine, n 15.

<sup>18</sup> McIlwain, C.H. *Constitutionalism: Ancient and Modern* (Ithaca: Cornell University Press, 1947), 1-2: 'In 1792 Arthur Young mentions with contempt the French notion of a constitution, which he says, "is a new term they have adopted; and which they use as if a constitution was a pudding to be made by a receipt."'

<sup>19</sup> Paine, n 15, 122-123.

<sup>20</sup> McIlwain, n 18, 2.

<sup>21</sup> Paine, n 15, 122.

<sup>22</sup> See Tomkins, A. *Public Law* (Oxford: Oxford University Press, 2003), 5-6.

<sup>23</sup> Paine, n 15, 119.

<sup>24</sup> Ridley, n 16, 343.

<sup>25</sup> Murkens, n 1, 451: 'Constitutionalism has traditionally been about limiting state power through fundamental rights.'

constitutional review: to declare null and void acts of the executive or the legislature which they deem to be inconsistent with the provisions of the constitution. The power of constitutional review was given to the American judiciary by themselves in the case *Marbury v Madison*.<sup>26</sup> In a landmark decision, Chief Justice Marshall, relying heavily on the academic works of Alexander Hamilton, interpreted Article Six of the Constitution of the United States, which declares the constitution to be supreme law, as giving the judiciary a corresponding duty to uphold the supreme laws of the constitution and hence a power to annul laws inconsistent with it.<sup>27</sup> Since then, the need for an empowered judiciary has become one of the most significant mechanisms for the protection of fundamental rights around the world,<sup>28</sup> especially after the Second World War.<sup>29</sup>

As a result, therefore, it is submitted that legal constitutionalism can be seen to advance three claims. Firstly, that the constitution is entrenched 'higher law' that is antecedent to government and which imposes formal and substantive limits upon its power.<sup>30</sup> Secondly, that the substantive constraints upon government power should take the form primarily, but not exclusively, of human rights guarantees.<sup>31</sup> Thirdly, that the court must have the power to review the constitutionality of both executive and legislative acts.<sup>32</sup> Although constitutional review will normally necessitate a power of judicial strike down in order to make its enforcement of the constitution effective, it must be noted that some legal constitutionalists have accepted a compromise in the form of a dialogical Bill of Rights as discussed in Chapter Five. A written codified constitution, although generally accepted, is not strictly necessary for a legal constitution. As will be shown below, a

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<sup>26</sup> 5 U.S. (1 cranch) 137 (1803).

<sup>27</sup> Article 6, Clause 2 states that: 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

<sup>28</sup> Fenwick, H.M. *Civil Liberties and Human Rights* (London: Routledge-Cavendish, 2007), 115: 'Democracies across the world that have adopted a Bill or Charter of Rights have entrusted its application largely to the judiciary on the basis that among such sources of power, they are best placed to ensure the delivery of the rights to the citizens.'

<sup>29</sup> Barendt, n 3, 19.

<sup>30</sup> This first claim corresponds with all four characteristics of a constitution identified by Ridley, n 16.

<sup>31</sup> *Ibid.* It must be noted that Ridley does not expressly identify the protection of human rights in manner suggested above as one of his four fundamental characteristics of a constitution. Ridely's proceeding discussion, however, suggests a strong affinity for the protection of human rights under an entrenched Bill of Rights (especially at 345 and 353). As Ridley notes at 353: 'A Bill of Rights serves as a touchstone of what is involved in a proper constitution according to the criteria listed at the start of this article.'

<sup>32</sup> *Ibid.*, 343. The third claim corresponds with the third characteristic of a constitution (a constitution is a superior form of law) identified by Ridley. Ridley notes that judicial review of ordinary legislation generally, but not always, results from having a 'hierarchy of laws.'

common law constitution could theoretically satisfy all three requirements without resort to a written codified constitution.

## 2.2 Common Law Constitutionalism

Developed over a number of years by Trevor Allan, Paul Craig, Sir John Laws, Dawn Oliver, and Jeffrey Jowell, common law constitutionalism is a British variant of the legal constitution. It views the common law as both the 'foundation-stone and lodestar of the political community: that is, it both constitutes the political community and contains the fundamental principles that ought to guide its political and legal decision-making.'<sup>33</sup> The motivation behind this is to make the British constitution compliant with not merely a formal reading of the Rule of Law, but a substantive one also.<sup>34</sup> As Craig notes, the substantive theory of the Rule of Law:

[A]ssumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish ... between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights.<sup>35</sup>

As Thomas Poole argues, the common law constitution can therefore be seen to be underpinned by what he dubs 'essentialist philosophy,'<sup>36</sup> the protection of rights that are, as Oliver notes, 'fundamental to the human condition.'<sup>37</sup> Although common law constitutionalists differ as to what these fundamental rights are, they all identify essentially liberal values. Laws, for example, argues that '[t]he true starting point in the quest for the good constitution consists in ... the autonomy of every individual, in his sovereignty,<sup>38</sup> which, he notes, 'cannot be defined in terms of rights, though it gives rise to them.'<sup>39</sup> Oliver identifies autonomy as one of the five fundamental 'common values' alongside dignity, respect, status and security,<sup>40</sup> whilst Allan recognises the

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<sup>33</sup> Poole, T. 'Back to the future? Unearthing the theory of common law constitutionalism' (2003) 23(3) *OJLS* 435, 453.

<sup>34</sup> See Craig, n 7, in general.

<sup>35</sup> Craig, P. 'Constitutional foundations, the rule of law and supremacy' (2003) *PL* 92, 96.

<sup>36</sup> Poole, n 33, 440-442.

<sup>37</sup> Oliver, D. *Common Values and the Public-Private Divide* (London: Butterworths, 2000), 59.

<sup>38</sup> Sir John Laws 'The constitution: morals and rights' (1996) *PL* 622, 623.

<sup>39</sup> *Ibid*, 624.

<sup>40</sup> Oliver, n 37, 60-70.

'traditions of liberty and tolerance.'<sup>41</sup> In any event, such rights, Laws argues, are 'logically prior to the institution of democratic government.'<sup>42</sup> Parliament, however, cannot be trusted to uphold the rights which underpin its legitimacy. As Allan argues, '[i]mportant freedoms are at the mercy of a temporary majority of the House of Commons, generally manipulated by the executive government which cannot even claim the support of a clear majority of the electorate.'<sup>43</sup> The courts, as a result of the fact that they 'have no programme, no mandate, no popular vote,'<sup>44</sup> are therefore better suited to upholding the fundamental rights of the constitution, and should be able to do so even in the face of legislative intention to the contrary.<sup>45</sup> In Britain, however, the substantive reading of the Rule of Law and its accompanying rights cannot find the legal force necessary to do this from a written 'higher law' constitution. Common law constitutionalists, therefore, look to the common law. As Allan explains:

In the absence of a higher 'constitutional' law, proclaimed in a written constitution and venerated as a source of unique legal authority, the rule of law serves in Britain as a form of constitution. It is in this fundamental sense that Britain has a common law constitution: the ideas and values of which the rule of law consists are reflected and embedded in the ordinary common law.<sup>46</sup>

The effect of the Rule of Law, therefore, is to transform the common law into a *de facto* higher law for Britain, thereby providing the basis from which the courts may legitimately enforce fundamental human rights against both the executive and Parliament. As Poole observes, common law constitutionalists can be seen to advance three arguments in support of their claim that the common law *is* the constitution. The first argument is that the common law 'necessarily connects with basic moral principles in a way that is not true of statute.'<sup>47</sup> This is because the courts are under a duty to give precedence to autonomy in order to establish the moral

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<sup>41</sup> Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2005), 19. See also at 18.

<sup>42</sup> Laws, n 38, 629. See also Jowell, J. 'Beyond the rule of law: towards constitutional judicial review' (2000) *PL* 671, 675: '[W]e have ... seen that our courts have begun to shift the boundaries of administrative law into the constitutional realm by explicitly endorsing a higher order of rights inherent in our constitutional democracy. These rights emanate not from any implied Parliamentary intent but from the framework of modern democracy within which Parliament legislates.'

<sup>43</sup> Allan, T.R.S. 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1986) 44 *CLJ* 111, 116.

<sup>44</sup> Sir John Laws 'Wednesbury' in Forsyth, C. and Hare, I. (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law on Honour of Sir William Wade* (Oxford: Clarendon Press, 1998), 190.

<sup>45</sup> See Allan, T.R.S. *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), 282.

<sup>46</sup> *Ibid*, 4.

<sup>47</sup> Poole, n 33.

foundation needed to justify their use of power without electoral support,<sup>48</sup> whilst political institutions like the legislature by contrast 'cannot be trusted to consistently respect autonomy since it is their function to decide upon and implement policies which further particular ends.'<sup>49</sup> The second argument is that common law, when compared with the majoritarian nature of parliamentary politics noted above, 'represents a superior site for public reason on account of the necessarily rational and individual-respecting nature of its decision-making processes.'<sup>50</sup> The third argument is that common law is 'unique in that it embodies a matrix of principles which, on account of their evolutionary nature, necessarily connect with society's deep-rooted moral/political principles.'<sup>51</sup> As Poole elaborates:

The argument emphasizes ... the continuity of the common law as a opposed to the transience of legislation ... [C]ommon law constitutionalists attempt to use history to demonstrate how judge-made law, by virtue of its evolutionary and rational method, is capable of acting as the guarantor of liberty in a way that cannot be true of legislation, vulnerable as it is to the whim of those who happen to wield power.<sup>52</sup>

As a result, the notion of a common law constitution, although still an untested theory, nevertheless demonstrates that the three principal characteristics of a legal constitution identified above – higher law, human rights, and constitutional review – are not necessarily dependent upon the existence of a written 'higher law' constitution. A legal constitution, therefore, may be either formal or informal. Consequently, any distinction between the legal constitution and the political constitution must be drawn in relation, not to their formal requirements, but to their substantive ones.

### **3. The Political Constitution**

#### *3.1 J.A.G. Griffith*

The pioneer behind the development of this peculiarly British theory of constitutionalism was J.A.G. Griffith. In an attempt to counteract calls for the legal reform of the constitution prevalent in the 1970s, Griffith expounded what he saw as the virtues of the British constitution, thereby providing the first real blueprint of what he called the political constitution.<sup>53</sup> He argued that

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<sup>48</sup> *Ibid*, 441.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*, 453.

<sup>51</sup> *Ibid*.

<sup>52</sup> *Ibid*, 450.

<sup>53</sup> Griffith, J.A.G. 'The Political Constitution' (1979) 42(1) *MLR* 1.

there were two fundamental objections to the reform of the British constitution: the political and the philosophical.<sup>54</sup> For the former, Griffith made the following famous declaration:

The fundamental political objection is this: that law is not and cannot be a substitute for politics. This is a hard truth, perhaps an unpleasant truth. For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.<sup>55</sup>

Griffith was a moral relativist who argued, not only that people disagree over substantive questions of principle,<sup>56</sup> but that no moral value could ever be objectively proven to be better than any other and thus more deserving of legal protection and enforcement by the courts. He rejected the idea of the law as an inherently moral concept,<sup>57</sup> and thus the notion of universal human rights<sup>58</sup> – his philosophical objection to reform of the British constitution<sup>59</sup> – characterising them instead as 'political claims.'<sup>60</sup> As he noted:

[A]rguments advanced avowedly for the protection of human rights are often concealed political propaganda. Those for a written constitution, a Bill of Rights, a supreme court, and the rest are attempts to resolve political conflicts in our society a particular way, to minimise change, to maintain (so far as possible) the existing distribution of political and economic power ...

It seems to me that to call political claims "inherent rights" is to mythologise and confuse the matter. The struggle is political throughout and moral only in the purely subjective sense that I may think I ought to be granted what I claim. Those in authority may think I ought not to be granted my claim. And there is no logic which says that their view is more based on their self-advancement (rather than, say, the public good) than mine is.<sup>61</sup>

Because the law is made by those in authority – 'men and women who happen to exercise political power but without any right to that power which could give them a superior moral position'<sup>62</sup> –

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<sup>54</sup> *Ibid*, 12.

<sup>55</sup> *Ibid*, 16.

<sup>56</sup> *Ibid*, 19: '[A]society is endemically in a state of conflict between warring interest groups, having no consensus or unifying principles sufficiently precise to be the basis of a theory of legislation.'

<sup>57</sup> *Ibid*: 'I do not believe that the concept of law is a moral concept.'

<sup>58</sup> See Allan, J. 'Bills of Rights and Judicial Power – A Liberal's Quandary' (1996) 16(2) *OJLS* 337, 345, and Bellamy, R. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), 16.

<sup>59</sup> Griffith, n 53, 16.

<sup>60</sup> *Ibid*, 17.

<sup>61</sup> *Ibid*, 17-18

<sup>62</sup> *Ibid*, 19.

they accordingly 'impose no moral obligation of obedience on others.'<sup>63</sup> Laws, Griffith argues, 'are merely statements of a power relationship and nothing more.'<sup>64</sup> As a result, Griffith argued that the acceptance or rejection of 'political claims' was better left to politicians rather than judges because politicians 'are so much more vulnerable than judges and can be dismissed or at least made to suffer in their reputation.'<sup>65</sup> In so doing, Griffith expressed his doubts over the effectiveness of judicially-enforced constitutions and Bills of Rights at curtailing authoritarianism, arguing that 'the responsibility and accountability of our rulers should be real and not fictitious.'<sup>66</sup>

In the decades since Griffith's initial defence of the political constitution, the legacy of his work has been the subject of renewed academic debate,<sup>67</sup> with several writers, most notably Adam Tomkins and Richard Bellamy, having taken up his mantle. Whereas Griffith's account of Britain's political constitution is largely descriptive in nature – 'the constitution is no more and no less than what happens'<sup>68</sup> – both Tomkins and Bellamy's account of the political constitution is rooted firmly in the traditions of civic republicanism and the idea of 'freedom as non-domination.'

### *3.2 Civic Republicanism and Freedom as Non-domination*

Civic Republicanism is a school of thought which believes that the common good of citizens is best realised through democratic self-government, civic virtue, deliberation, and popular participation in politics.<sup>69</sup> At the heart of civic republicanism is the idea of 'freedom as non-domination.' The architect of this distinctively republican-brand of freedom was Philip Pettit,<sup>70</sup> who contrasts it with the liberal view of 'freedom as non-interference,' which he describes as 'the negative conception of freedom as the absence of interference ... the assumption that there is nothing inherently oppressive about some people having dominating power over others, provided they do not

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*, 18.

<sup>66</sup> *Ibid.*, 16.

<sup>67</sup> See, for example, Harlow, C. and Rawlings, R. 'Administrative law in context: restoring a lost connection' (2014) *PL* 28; Leigh, I. 'Local government and political constitutionalism' (2014) *PL* 43; McEldowney, J. 'J.A.G. Griffith: parliament and legislation' (2014) *PL* 85; and Webber, G. 'Parliament and the management of conflict' (2014) *PL* 101.

<sup>68</sup> Griffith, n 53, 19. See also Webber, *ibid.*: 'Griffith sought to describe the constitution as the present-day "set up," to be understood in the light of the historical set-up and to be no more immune from change than had any part of the constitution in its long march to the present.'

<sup>69</sup> See Tomkins, A. *Our Republican Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2005), 44 and Honohan, I. *Civic Republicanism* (London and New York: Routledge, 2002), 1.

<sup>70</sup> Pettit, P. *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997).

exercise that power and are not likely to exercise it.<sup>71</sup> Pettit argues that, when one considers the plights of those individuals in society who live subject to another's will, it becomes clear that:

[U]nder an older, republican way of thinking about freedom, individuals in such a dominated position are straightforwardly unfree. No domination without unfreedom, even if the dominating agent stays their hand. Being unfree does not consist in being constrained; on the contrary, the restraint of a fair system of law – a non-arbitrary regime – does not make you unfree. Being unfree consists rather in being subject to arbitrary sway; being subject to the potentially capricious will or the potentially idiosyncratic judgment of another. Freedom involves emancipation from any such subordination, liberation from any such dependency. It requires the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you have a power of arbitrary interference over another.<sup>72</sup>

Fundamental to this, Pettit claims, is 'a conception of democracy under which contestability takes the place of consent; what is of primary importance is not that government does what the people tell it but, on pain of arbitrariness, that people can always contest whatever it is that government does.'<sup>73</sup> Although emphasising the importance of democratic mechanisms of accountability in securing 'freedom as non-domination',<sup>74</sup> Pettit nevertheless argues that such mechanisms are not on their own sufficient. They must be accompanied also by constitutional constraints in the form of rights-based constitutional review.<sup>75</sup>

As will be seen below, although both Adam Tomkins and Richard Bellamy frame their normative readings of the political constitution in terms of republicanism – especially Pettit's notion of 'freedom as non-domination' – each nevertheless does so differently, although not incompatibly, to one another, and both in a way which departs from Pettit's original thesis.

### 3.3 Adam Tomkins

Adam Tomkins' account of the political constitution echoes clearly Griffith's belief that Parliament is the preferred forum for the contestability of political claims by virtue of the fact that politicians are more accountable than judges for their actions. In the opening remarks of his 2005 book entitled *Our Republican Constitution*, Adam Tomkins boldly proclaims the British constitution to be 'a remarkable creation' and that '[i]t is no exaggeration to say that there is nothing quite like it

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<sup>71</sup> *Ibid*, 9.

<sup>72</sup> *Ibid*, 5.

<sup>73</sup> *Ibid*, ix.

<sup>74</sup> *Ibid*, 183-205.

<sup>75</sup> *Ibid*, 171-183, especially at 181-182.



anywhere else in the world.<sup>76</sup> The constitution is unique and remarkable, he claims, because '[i]t uses politics as the vehicle through which the purpose of the constitution (that is, to check the government) may be accomplished.'<sup>77</sup> As he notes:

At its core [the British constitution] lies a simple – and beautiful – rule. It is a rule that has formed the foundation of the constitution since the seventeenth century. It is that the government of the day may continue in office for only as long as it continues to enjoy the majority support of the House of Commons. The moment such support is withdrawn is the very moment that the government is required to resign. By this one rule is democracy in Britain secured ... The rule is known as the convention of ministerial responsibility or as the doctrine of responsible government ... [I]t stipulates that the government is constitutionally responsible *to Parliament*.<sup>78</sup>

The majority of western society's constitutions, Tomkins claims, 'are not founded on the ideal of making government responsible to a political institution such as Parliament,<sup>79</sup> but instead rely upon judges 'to provide the lead role in securing checks on government.'<sup>80</sup> Unlike Pettit, therefore, Tomkins objects to the courts being used in order to hold the government to account on the grounds that it 'endangers both democracy and effectiveness.'<sup>81</sup> It is undemocratic because participation and access to the courts is expensive and limited, and because judges, being both unelected and unrepresentative, are not as accountable for their actions as democratically-elected parliamentarians.<sup>82</sup> Legal accountability is also ineffective, he argues, because the judicial forum – the court – is limited by comparison to Parliament. According to Tomkins, Parliament 'may legislate on any issue, for any reason and at any time.'<sup>83</sup> Judges, by contrast, have no say in what cases they decide. The role of the judge is to hear the two sides of a dispute and then to 'adjudicate between the arguments of the two parties and to give a judgment that will, ultimately, hold either that the claimant's case is made out or that it is not.'<sup>84</sup> Judges accordingly 'have limited room for manoeuvre in terms of the arguments on which their judgments are based. Judges are generally required to decide cases on the basis only of the submissions made to them by counsel,<sup>85</sup> thereby allowing 'precious little room for compromise or negotiated settlement.'<sup>86</sup>

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<sup>76</sup> Tomkins, n 69, 1.

<sup>77</sup> *Ibid*, 3.

<sup>78</sup> *Ibid*, 1.

<sup>79</sup> *Ibid*, 3.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid*.

<sup>82</sup> *Ibid*, 25-27.

<sup>83</sup> *Ibid*, 27.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid*, 28.

Tomkins points also to what he sees as the poor judicial record at holding the government to account as evidence of their further ineffectiveness.<sup>87</sup>

In relaying his account of the political constitution, however, Tomkins distances himself from Griffith's descriptive account by making it normative. The adoption of a legal constitution in Britain would not only be unwise, undemocratic, and politically undesirable, he argues, but also unconstitutional.<sup>88</sup> This is the case, so he claims, because the political constitution is founded upon republican values,<sup>89</sup> in particular Pettit's understanding of 'freedom as non-domination' outlined above.<sup>90</sup> As Tomkins notes:

The point of our freedom is not that it should never be interfered with but that, when it is interfered with, the interference comes from a source whose authority over us is legitimate rather than illegitimate. Legitimate authority, for a republican, is authority without domination. This means authority that is neither arbitrary nor capricious, but which is reasoned and is contestable at the instigation of those who are subject to it.<sup>91</sup>

In order to protect the people from being arbitrarily interfered with by the government, therefore, Tomkins looks to democracy and political accountability as found under the British constitution.

As he notes:

In the British system, we (Pettit's 'ordinary people') contest government policies and decisions by insisting that the government of the day is fully and openly accountable to our elected representatives in Parliament. As contestability may be grounded in a republican theory of freedom so too, in turn, may political accountability be grounded in a normative account of constitutionalism. In this way, responsible government ceases to be merely a descriptive practice and becomes instead an essential component in a constitutional structure designed to secure our non-domination ... It is through republican political philosophy that we can obtain a normative foundation for our practices of responsible government and political accountability.<sup>92</sup>

For Tomkins, therefore, '[a] political constitution is one in which those who exercise political power (let us say the government) are held to constitutional account through political means, and through political institutions (for example, Parliament).'<sup>93</sup> Consequently, Tomkins' political constitution can be seen to share Griffith's preference for politicians instead of judges on the grounds of accountability. By couching the political constitution in the republican idea of 'freedom

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<sup>87</sup> *Ibid*, 30-31.

<sup>88</sup> *Ibid*, 40.

<sup>89</sup> *Ibid*.

<sup>90</sup> *Ibid*, 46-52.

<sup>91</sup> *Ibid*, 49.

<sup>92</sup> *Ibid*, 51.

<sup>93</sup> Tomkins, n 22, 18.

as non-domination,' however, Tomkins is nevertheless able to distinguish his account from Griffith's by giving his preference for political accountability normative force.

### 3.4 Richard Bellamy

Echoing Tomkins' departure from Pettit's original thesis, Bellamy's conception of the political constitution is also structured in opposition to what he views as the hallmark of the legal constitution: the legal entrenchment of human rights within a justiciable 'higher law' constitution.<sup>94</sup> Legal constitutionalists protect rights this way, he claims, because they are perceived to be 'central to a democratic society.'<sup>95</sup> Such constitutionalists are therefore motivated by two related claims which Bellamy rejects:

The first is that we can come to a rational consensus on the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve. These outcomes are best expressed in terms of human rights and should form the fundamental law of a democratic society. The second is that the judicial process is more reliable than the democratic process at identifying these outcomes.<sup>96</sup>

Echoing Griffith, Bellamy dismisses the first claim on the grounds that 'we reasonably disagree about the substantive outcomes that a society committed to the democratic ideals of equality of concern and respect should achieve.'<sup>97</sup> Bellamy is keen to stress that '[t]he fact of disagreement does not indicate that no theories of justice are true. Nor does it mean that a democratic society does not involve a commitment to rights and equality.'<sup>98</sup> However, such disagreement, he claims, nevertheless demonstrates that 'there are limitations to our ability to identify a true theory of rights and equality and to convince others of its truth.'<sup>99</sup> Even where broad agreement exists, he argues, such a compact is nevertheless void of universal acceptance.<sup>100</sup> In Bellamy's view, therefore, not everyone can agree on what set of substantive outcomes a democratic society committed to the democratic ideals of equality of concern and respect should achieve. No substantive values whatsoever, therefore, should be granted supremacy over ordinary legislation.

The second claim is rejected on the grounds that, if we all reasonably disagree on the substantive outcomes of a democratic society, 'it becomes implausible to regard judges as basing their

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<sup>94</sup> Bellamy, n 58, 1 and 15.

<sup>95</sup> *Ibid*, 1.

<sup>96</sup> *Ibid*, 3.

<sup>97</sup> *Ibid*, 4.

<sup>98</sup> *Ibid*, 3.

<sup>99</sup> *Ibid*.

<sup>100</sup> *Ibid*, 16. He claims that bills of rights represent only a broad agreement at the level of abstract principle, and are therefore still subject to dissent.

decisions on the 'correct' view of what a democratic society demands in particular circumstances.<sup>101</sup> As a result, the judicial enforcement of such substantive outcomes, Bellamy argues, does not guarantee Pettit's republican understanding of 'freedom as non-domination,' but instead undermines it. As Bellamy notes:

Domination arises not only from a person or group possessing superior power of various kinds, and hence the potential to interfere, but also from social, legal and political hierarchies of formal and informal kinds – which may not be linked to greater resources and power, though they usually are – through which certain individuals acquire the assumed or actual right to lord over it over others. In either case, it operates less through actual interference than deference and the acceptance by the dominated of the dominator's entitlement to impose duties upon them. Thus, non-domination issues from a condition of political and legal equality in which such deference no longer obtains.

To the extent government action emanates from arrangements that are consistent with this condition of equality, it will not dominate.<sup>102</sup>

Legal constitutionalism, therefore, is unable to satisfy the 'intrinsic political egalitarianism of freedom as non-domination,'<sup>103</sup> Bellamy claims, because judges are given leave to impose their particular view of rights on everyone else. As he notes:

Given their freedom to interpret the law in diverse and inconsistent ways, according to the moral and legal positions they hold, with no more authority than any other legal interpreter apart from the mere fact that they are in a position to impose their opinion, their rule cannot be other than arbitrary and hence dominating.<sup>104</sup>

The public can only ever 'be regarded as equals and their multifarious rights and interests accorded equal concern and respect,'<sup>105</sup> Bellamy argues, 'when the public themselves reason within the democratic process.'<sup>106</sup> Through such democratic participation and deliberation, people's disagreements are not only acknowledged, but also resolved without resulting in domination. As Bellamy notes, 'the test of a political process is not so much that it generates outcomes we agree *with* as that it produces outcomes that all can agree *to*, on the grounds they are legitimate.'<sup>107</sup> Bellamy accordingly proposes three ways by which this is achieved.<sup>108</sup> The first is the system of 'one person, one vote,' that, unlike the enforcement of 'higher law' by judges,

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<sup>101</sup> *Ibid*, 4.

<sup>102</sup> *Ibid*, 160.

<sup>103</sup> *Ibid*.

<sup>104</sup> *Ibid*, 166-167.

<sup>105</sup> *Ibid*, 4-5.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*, 164.

<sup>108</sup> *Ibid*, 5.

'provides citizens with roughly equal political resources,<sup>109</sup> because '[i]t allows everyone to be counted equally and to accept the legitimacy of the view that prevails – even if they disagree with it.<sup>110</sup> The second is decisions by majority rule that Bellamy asserts is the fairest method by which to resolve disputes between equally valid opinions.<sup>111</sup> Although a democratically-elected legislature acknowledges the disagreement surrounding many different issues held by the people in the form of elected representatives, such disagreements are unlikely to produce unanimous agreement on any and all issues brought before the legislature. Therefore, 'the need for majority decision-making arises because everybody believes they hold trumps, so that nobody does ... [M]ajority rule is the closure device for reaching a decision when all trumps have been played.'<sup>112</sup> The third is the 'balance of power' principle, that consists of 'either rival aspirants for power, as in competing [political] parties, or rival centres of power, as in competing governments in certain aspects of federal arrangements.'<sup>113</sup> Bellamy contends that the rivalry of such competing parties promotes mutual recognition through the construction of compromises.<sup>114</sup> As a result of such compromises, legislation can be said to reflect the wishes and concerns of more than just the supporters of the governing party. As Bellamy asserts, the division of power between rival centres of power forces such centres to 'recruit the support of the majority of people to govern,'<sup>115</sup> ensuring that all sides are heard,<sup>116</sup> and thus preventing tyrannical majority rule.

Whereas Griffith's and Tomkins' account of the political constitution can therefore be seen to emphasise its ability to prevent the abuse of power through political means of accountability, Richard Bellamy's account, though not precluding the possibility of this negative check on power, instead focuses on the political constitution's ability, through democracy, to harness power in order to achieve goals desired by the masses.<sup>117</sup> In this sense, as Bellamy himself asserts, 'the democratic process *is* the constitution.'<sup>118</sup>

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, 165.

<sup>111</sup> *Ibid.*, 38.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, 200.

<sup>114</sup> *Ibid.*, 5.

<sup>115</sup> *Ibid.*, 200.

<sup>116</sup> *Ibid.*, 178.

<sup>117</sup> Gee, G. and Webber, G.C.N. 'What Is a Political Constitution?' (2010) 30(2) *OJLS* 1, 12.

<sup>118</sup> Bellamy, n 58, 5.

### *3.5 Disagreement, Participation, and Accountability*

From the above, the political constitution – as conceived by Griffith, Tomkins, and Bellamy – can be seen to make three closely-related claims.

The first claim is that people disagree over what the substantive outcomes of a democratic society should be. As a consequence of this, political constitutionalists dispute the existence of rights that are necessarily antecedent to democracy and thus deserving of legal entrenchment as part of a 'higher law.' Unlike with the legal constitution, therefore, the political constitution does not permit the constitutional review of legislation. The second claim is that democratic participation in politics forms the basis of legitimate government because it best satisfies the egalitarian requirements of 'freedom as non-domination.' The implication of these two claims combined, it is submitted, is the doctrine of legislative supremacy or, as it is known under the British constitution, parliamentary sovereignty. If democratic participation in politics forms the basis of legitimate government, and in the absence of a 'higher law' from which the courts may review the constitutionality of legislative decisions, it stands to reason, therefore, that the legislature under the political constitution retains the final say on any and all matters. The third is that political accountability is more effective than the courts at preventing authoritarianism because politicians, unlike judges, can be removed by the electorate at the ballot box, and because the survival of the government is dependent upon the support of Parliament. As a result, the political constitution can be said to have a clear preference for political mechanisms of control over legal ones.<sup>119</sup>

The next part of the chapter will discuss in detail the extent to which both the legal and the political constitutions can actually be seen to differ from one another. As part of this analysis, it will be shown that although the two constitutions can be seen to sharply disagree on some issues, they nevertheless share many characteristics, often differing only on the question of degree or emphasis. It will therefore be argued that no constitution is only legal or political in character but is instead a mixture of the two that is either primarily legal or primarily political. In so doing, a new reconciliatory theory of constitutionalism will be advanced called 'complementary constitutionalism.'<sup>120</sup> It will be shown that much of the overlap between the elements of each

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<sup>119</sup> These three claims can be compared and contrasted with the five key features of political constitutionalism identified in Bellamy, R. 'Political constitutionalism and the Human Rights Act' (2011) 9(1) *International Journal of Constitutional Law* 86, 89-94.

<sup>120</sup> Inspiration for the term 'complementary constitutionalism' came from Allan, T.R.S. 'The constitutional foundations of judicial review: conceptual conundrum or interpretative inquiry?' (2002) 61(1) *CLJ* 87, 96:

constitutional model within a real world constitution can be seen to complement rather than contradict the underlying values of the constitutional model which has primacy.

## 4. Complementary Constitutionalism

### 4.1 *The Mixed Constitution*

Because of the conceptual differences between them, both the legal and the political constitutions are frequently presented as polar opposites which are difficult to reconcile. No one is more guilty of this than the architects and advocates of both the legal or the political constitutions who, in defence of their viewpoint, have tended to present 'a stark choice between *either* a legal constitution *or* a political constitution – but not both,'<sup>121</sup> thereby presenting the debate on constitutionalism in an 'all-encompassing' manner.<sup>122</sup> Despite this, however, there is increasing recognition by academic commentators that a constitution can be, and more often than not is, a mixture of both constitutions. Graham Gee and Grégoire Webber, for example, have noted that 'Britain's constitution today embraces, perhaps in uncertain ways and to an uncertain extent, *both* a political model *and* a legal model.'<sup>123</sup> Trevor Allan and Tom Hickman have expressed a clear desire to reconcile the differences between the two schools,<sup>124</sup> whilst Adam Tomkins and Richard Bellamy have conceded that elements of both the legal and the political schools do exist under the same constitution.<sup>125</sup>

Recognition aside, however, very few commentators have sought to offer a full account of the 'mixed constitution.' Admittedly, given the fact that many accounts of either the legal or the political constitution are normative and therefore seek, not to offer an account of the constitution as it *is*, but instead of what the constitution *should be*, their reluctance to articulate a full account of the 'mixed constitution' comes as no surprise. Such accounts are by their very nature more 'idealized and stylized' than they are realistic.<sup>126</sup> Tomkins' and Bellamy's arguments in favour of

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'[T]he "legal" and "political" constitutions must be brought into harmony, as complementary rather than contradictory viewpoints.'

<sup>121</sup> Gee and Webber, n 117, 20.

<sup>122</sup> *Ibid.* See also Loughlin, M. *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Oxford and Portland, Oregon: Hart Publishing, 2000).

<sup>123</sup> Gee and Webber, n 117, 20.

<sup>124</sup> See Allan, n 120 and Hickman, T.R. 'In Defence of the Legal Constitution' (2005) 55(4) *University of Toronto Law Journal* 981.

<sup>125</sup> See Tomkins, A. 'What's Left of the Political Constitution?' (2013) 14(12) *German Law Journal* 2275, 2276: 'The British constitution is indeed now a "mixed constitution."' See also Tomkins, n 69, vii and Bellamy, n 58, 5.

<sup>126</sup> Gee and Webber, n 117, 19.

political forms of accountability in particular ignore almost completely the fact that it is often a single-party government with a majority in the House of Commons that controls Parliament and not the reverse.<sup>127</sup> Even where a partial account is offered, it is submitted that they are likely to provide an unreliable picture of Britain's mixed constitution. This is because, as Gee and Webber note, 'when trying to make sense of a real world constitution's dual embrace of both the political and the legal models, political and legal constitutionalists alike will tend to supply an account of the constitution that is itself shaped, more or less explicitly, in the image of their favoured model.'<sup>128</sup> As a result, 'one of these two models will tend to supply a dominant frame within which to accommodate elements drawn from the other,<sup>129</sup> thus making it 'difficult to offer an account which is thoroughly faithful to the basic claims of – or possibly even the animating spirit of - both constitutional models.'<sup>130</sup>

To illustrate this point, Gee and Webber rely upon Tom Hickman's account of 'the legal constitution *plus* political constitution, rather than the legal constitution *versus* political constitution.'<sup>131</sup> If we are to view the legal and political constitutions 'not as competitors but as partners,' Hickman claims, '[w]e need to understand modern public law in terms of a harmonious and mutually reinforcing matrix of interacting, and frequently overlapping, remedial channels that together facilitate and control governance of the state.'<sup>132</sup> Consequently, Hickman concedes that not all decisions are best left to judges,<sup>133</sup> and that the courts should not be the 'first remedial port of call.'<sup>134</sup> Despite this concession, however, Hickman maintains that the legal school necessarily strengthens political accountability,<sup>135</sup> and that, despite the role played by political accountability within the constitution, '[m]ore often than might be expected, it is judicial precedents, and particularly recent ones, that hold the solutions to matters of contemporary dispute.'<sup>136</sup> As a result, he makes the argument that 'the constitution must guarantee that everyone and every office is ultimately subject to the rule of law ... We must have a legal

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<sup>127</sup> Although Tomkins does acknowledge some of the shortcomings of Parliament in its ability to hold the government to account, he nevertheless makes an impassioned defence of Parliament's record on this in Tomkins, n 69, 124-131.

<sup>128</sup> Gee and Webber, n 117, 22.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Hickman, n 124, 1016.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, 1016-17.

<sup>134</sup> *Ibid.*, 1017.

<sup>135</sup> *Ibid.*, 1016 and 1019.

<sup>136</sup> *Ibid.*, 990.



constitution, but it must be a balanced one.<sup>137</sup> In response to criticisms of legal constitutionalism by political constitutionalists, Hickman thus argues that 'there is widespread agreement that subjection to law is one of the most basic principles of modern constitutionalism ... The objection to liberal legalism,' he claims, 'is therefore not its major premises and foundational principles, as such, but to the fact that law's empire, and liberalism, must be constrained and that, in certain forms, liberalism presents a partial picture of the constitutional order.'<sup>138</sup> In his account of Britain's mixed constitution, therefore, Hickman can be seen to depict the constitution as a fundamentally legal one which, in recognising a role for politics within it, denounces the political constitution as a freestanding model of constitutionalism. As he notes:

In my view, the English constitution should not be conceived as founded upon political discretion or upon the remnants of a bygone monarchical age. It should be understood as founded upon law that is enforceable in the courts. In this sense, therefore, I argue against a political constitution. However, this is not to say that we should wipe out those political checks and balances that operate to restrain political discretion. Far from it: understood as a complex and vitally important set of structures of political accountability (such as the various ombudsmen, inspectorates, complaints procedures, auditors, and channels of ministerial responsibility, as well as many more), the political constitution is simply brought within a frame of law.<sup>139</sup>

In adopting such a narrow view of the political constitution, Hickman ultimately fails to reconcile the legal and the political constitutions in a balanced and realistic manner, thereby producing a one-sided account of Britain's mixed constitution. As Gee and Webber conclude, Hickman:

[E]xplicitly rejects the possibility that the model of a political constitution might serve as an important explanatory model in clarifying either the theoretical foundations of Britain's constitution or the character of its prevailing institutions – and, in this, Hickman's account comes close to making the sort of all-encompassing claims that he purports to eschew.<sup>140</sup>

It is submitted that this difficulty in formulating an account of Britain's mixed constitution which is free from normative influence can be seen also with Tomkins' brief account of Britain's mixed constitution published in the *German Law Journal*. Here, Tomkins adopts an argument supported by this thesis; namely that Britain remains predominantly political in nature. As he notes:

Ours is no longer an entirely political constitution – the model of the political constitution taken alone no longer makes full sense of our contemporary constitutional experience –

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<sup>137</sup> *Ibid*, 1017.

<sup>138</sup> *Ibid*, 1016.

<sup>139</sup> *Ibid*, 987.

<sup>140</sup> Gee and Webber, n 117, 24.

but the political constitution remains vibrant and vital as a core component of our increasingly rich constitutional order.<sup>141</sup>

In conceding that the constitution is indeed a mixture of both legal and political elements, however, Tomkins also notes that:

To say that the British – or, for that matter, any other – constitution is a mixed constitution, that brings together and relies on elements of both politics and law, does not take us very far ... It matters less that the constitution is mixed than what the balance of the mix is, and should be.<sup>142</sup>

As result, Tomkins argues that 'the political and the legal constitution can and should be mixed ... so long as it continues to value and to invest in the constitutional goods that the political model of constitutionalism as rightly taught us to cherish.'<sup>143</sup> Building on his previous work,<sup>144</sup> Tomkins therefore articulates a constitutional role for the courts which, in his view, protects civil liberties whilst preserving the political constitution. In so doing, he makes the following claims:

- (i) The courts should ensure that the government acts within the scope of, and not beyond, its legal power;
- (ii) The courts should ensure that the government's decision-making is procedurally fair;
- (iii) The protection of civil liberties should be privileged, so that the courts should ensure that government interference with civil liberties may occur only when justified as being necessary on the basis of evidence;
- (iv) Some protections of civil liberties are so important that they may be articulated in the form of absolute rights – such as the rule that no-one may be subjected to torture; such rights should be rigorously enforced by the courts; and
- (v) The courts should have a role in nourishing and supporting the political constitution; when the government acts in a manner that undercuts or circumvents effective parliamentary scrutiny, the courts should refer the matter back to Parliament for reconsideration of the matter ...
- (vi) that where the protection of civil liberties ... [is] ... qualified rather than absolute, the task of balancing the needs of the public interest against the civil liberty in question ... [is]

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<sup>141</sup> Tomkins, n 125, 2290.

<sup>142</sup> *Ibid*, 2276.

<sup>143</sup> *Ibid*, 2292.

<sup>144</sup> Tomkins, A. 'The role of the courts in the political constitution' (2010) 60(1) *University of Toronto Law Journal* 1.

... appropriately seen as a political question for Parliament rather than as a legal question for the courts.<sup>145</sup>

In articulating this vision, Tomkins clearly seeks to curtail the potential for judicial creativity in the legal protection of rights. Ensuring that government acts in accordance with the law as stipulated by statute is, as argued below, an important function of the courts under both legal and political schools which controls government power in conformity with a formal reading of the Rule of Law. Although ensuring that the government's decisions are both procedurally fair and supported by evidence are similarly important in controlling the executive, and are not necessarily catered for by the enabling legislation at issue, they nevertheless envisage only a narrow process-oriented<sup>146</sup> and fact-finding<sup>147</sup> role for the courts. They are, as Tomkins argues, functions which the courts 'ought to be good at, given their training, their professional experience, and the modes and forms of argument with which they are most familiar.'<sup>148</sup> In order to provide greater protection to rights without inviting the courts to engage with what Tomkins views as political, not legal, questions, therefore, he argues that only narrowly-defined absolute rights should be enforced by the courts, with decisions regarding government interference with qualified rights best left to Parliament. As a result, Tomkins believes that proportionality is a matter best left to Parliament. In determining whether an infringement with a qualified rights is proportionate or not, the courts, Tomkins argues, should take into account a range of 'constitutional goods' in addition to rational government – that the government should be allowed to govern; accountability; and that the government is democratically chosen.<sup>149</sup> As Tomkins argues:

When it comes to review on grounds of reasonableness or proportionality, we need a judicial review that is appropriately responsive to, and respectful of, these other constitutional goods and accords them due weight. A reasonable and proportionate government is itself a constitutional good, but judicial review which that over-invests in this one constitutional good at the expense of the others would make for an unbalanced constitutional order. Likewise, over-investment in any of the other constitutional goods at the expense of securing reasonable and proportionate government would be unbalanced.<sup>150</sup>

Despite Tomkins claim to the contrary, however, the fact that rational government is outnumbered three to one by constitutional goods which appear to invite judicial deference

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<sup>145</sup> Tomkins, n 125, 2281.

<sup>146</sup> Tomkins, n 144, 6.

<sup>147</sup> *Ibid*, 14.

<sup>148</sup> *Ibid*, 6.

<sup>149</sup> Tomkins, n 125, 2285.

<sup>150</sup> *Ibid*, 2287.

makes it unlikely, it is submitted, that a court would ever rule against the government under Tomkins' model. Tomkins, in clarifying that the role of the courts should not be '*ruling* on whether the government has sufficient democratic mandate for its actions, or whether scrutiny is sufficiently effective, but that the courts should be taking these matters into account,'<sup>151</sup> it is submitted, reinforces this perception as it appears to suggest that the courts can only presume that the government has a democratic mandate and that parliamentary scrutiny has been effective. Tomkins' unwillingness to permit the courts to show any initiative in the protection of rights is most visible, however, by his submission that the courts, when they are unsure of the scope or meaning of government power<sup>152</sup> or think the government has circumvented parliamentary scrutiny,<sup>153</sup> should refer the matter back to Parliament.

Hickman and Tomkins, therefore, can be seen to offer two very different visions of the mixed constitution, both of which present one school of constitutionalism as dominant over the other and, as a result, heavily skew the elements of the other school in favour of the dominant. As a legal and a political constitutionalist respectively, both Hickman and Tomkins produce accounts of the mixed constitution that privilege their preferred schools, thereby failing to fully recognise the claims of their rivals. They instead treat their rival school with a degree of disdain as something secondary and perhaps even unnecessary to the fulfilment of constitutionalism. Elements from of it may be accommodated within their account of the constitution, but not at the expense of their preferred school. Consequently, they accord such elements only a limited role within the constitution which ultimately subjugates them to their model of choice at the expense of both their utility and normative underpinnings. This is especially the case with Tomkins, who, in conceding that Britain possesses a 'mixed' constitution, nevertheless believes that Britain was, until relatively recently, *only* a political constitution.<sup>154</sup> Both Hickman and Tomkins make normative presumptions about the foundational values of the British constitution and thus present their respective accounts of the mixed constitution as the only viable reconciliation of the legal and the political schools possible. The result is not merely an incomplete view of Britain's mixed constitution, but a wholly inaccurate one which is more normative than analytical.

In response to the inability of both legal and political constitutionalists to articulate a vision of Britain's mixed constitution which is faithful to the normative claims of both models, Gee and

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<sup>151</sup> *Ibid*, 2288.

<sup>152</sup> Tomkins, n 144, 21.

<sup>153</sup> *Ibid*.

<sup>154</sup> Tomkins, n 125, 2276, 2290, and 2292.

Webber reject the idea that the complex reality of a constitution's relationship between its legal and political elements can be successfully encompassed within a single all-embracing constitutional model. Instead, they argue that 'it can be true *both* that a real world constitution will embrace both models and that a political model and a legal model are, at least in some significant respects, at odds.'<sup>155</sup> Under a real world constitution, therefore, they conclude that 'the interface of a legal constitution and a political constitution is in fact messy, uncertain and contested.'<sup>156</sup>

This thesis, however, advances a new and alternative reconciliatory theory of constitutionalism – complementary constitutionalism. It argues that a real world constitution may be characterised as either primarily legal or primarily political in nature, but that the predominance of one school's normative preferences does not negate the importance of its rival's preferences under the constitution, nor do they necessary operate in contradiction to one another, thereby achieving a more balanced constitutional order. In so doing, this thesis refrains from making normative assumptions about the basis of a mixed constitution beyond the aim of securing 'limited' or 'controlled' government – the cornerstone of constitutionalism as noted above.<sup>157</sup>

It is argued that elements of both the legal and the political schools, most notably their respective mechanism of accountability, are indeed utilised under real world constitutions. It is also conceded that a constitution's mixture of legal and political elements can, in some circumstances, be untidy and haphazard, thereby resulting in some degree of contention. Because the British constitution, for example, 'has not been made but has grown',<sup>158</sup> and remains in a state of flux, areas of contention between its legal and political elements may prove inevitable. Despite Gee and Webber's suggestion to the contrary, however, it is submitted that the fusion of a constitution's legal and political elements is not necessarily nor inevitably haphazard or contradictory, but instead complementary. Both legal and political methods of accountability can in fact be seen to support and sustain each other in order to achieve better government accountability than either methods could achieve on their own, thus resulting in a more balanced constitution. This is made possible by the fact that, although the two schools remain distinct from one another, the experiences of real world constitutions reveals that much overlap exists between the two in practice, thereby suggesting that the differences have been largely exaggerated.

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<sup>155</sup> Gee and Webber, n 117, 20.

<sup>156</sup> Gee and Webber, n 117, 25.

<sup>157</sup> See above, 29-30.

<sup>158</sup> Jennings, n 3. See also King, n 3.

Despite being preferred by the legal and political schools of constitutionalism respectively, both legal and political mechanisms of accountability, along with their normative underpinnings, do in fact form a necessary and integral part of each school. The two schools differ from one another primarily, although not exclusively, on the emphasis attached to them. Politics, for example, may be relied upon to regulate executive behaviour under the political school in areas normally governed by law under the legal school, and vice versa.

Admittedly, disagreement exists between the legal and the political schools of thought on specific matters which are often irreconcilable and thus, as a result, must be considered hallmarks of their respective schools. A key example of this would be the political school's attachment to the doctrine of parliamentary sovereignty which, in its orthodox understanding, rejects outright the legal school's belief in a higher order of law which is antecedent to and thus capable of overruling a democratically-elected legislature. It is conceded, therefore, that the presence of such a hallmark ultimately affects the balance between a constitution's legal and political elements in terms of the frequency and limits of their use when holding the government to account, and is thus a strong indicator of a real world constitution's predominant character. When parliamentary sovereignty forms the basis of a constitutional order, for example, legal methods of accountability may have to operate subject to parliamentary supremacy, thus precluding specific actions such as judicial strike down of primary legislation. It is submitted, however, that the presence of such hallmarks do not necessitate the complete subjugation of rival elements as it does under the accounts offered by Hickman and Tomkins. Parliamentary sovereignty, therefore, does not negate the value of and necessity for legal forms of accountability under the political school, nor does it mean that the courts may only legitimately operate within the narrow confines of Tomkins' model as outlined above.

It is submitted that the presence of a hallmark can be seen to demonstrate an attachment to specific normative ideals or principles. The doctrine of parliamentary sovereignty under the political school, for example, reveals an overriding belief in democratic legitimacy and freedom as non-domination. By contrast, judicially-enforceable higher law under the legal school suggests an overriding belief in human rights and freedom as non-interference. It is submitted, however, that whilst each school of constitutionalism gives priority to different normative principles, this does not exclude other normative principles from their remit, including those preferred by their rival. Human rights and freedom as non-interference, therefore, although often given priority over freedom as non-domination under the legal school in the form of judicially enforceable higher law, can nevertheless receive protection under the political school. So long as courts respect and

support Parliament's right to the final say, the courts may be utilised in order to hold the executive to account and protect both procedural and substantive values without explicit parliamentary authorisation but nevertheless in a manner which is complementary, not contradictory, to the underlying values of the political school. These legal methods of accountability may also have the effect of strengthening political controls as suggested by Hickman above. It is argued, however, that the potential for legal methods to do so, as discussed below, is very much context-dependent and is therefore neither an indicator of a predominantly legal constitution as suggested by Hickman, nor necessary in order for any legal action to be considered complementary as suggested by Tomkins. Because human rights form an integral part of the political school, their protection by the courts short of either judicial strike down or extensive statutory construction can already be seen to complement the underlying values of the political school.

Consequently, the requirements of one constitutional school should not necessarily be at the exclusion of all the requirements of another. The 'all-encompassing' claims of both legal and political constitutionalists, therefore, should not be treated as absolutes when considering their application under a real world constitution such as that of Britain. It is submitted that both schools of constitutionalism are a composite of shared legal and political elements – including methods of accountability and normative principles – which are given different levels of emphasis by each school. This difference in the level of emphasis manifests itself in the form of 'hallmarks' which ultimately shape and inform the constitutions and thus the balance between its legal and political elements. Real world constitutions, therefore, are similarly a mixture of legal and political elements and, depending upon the emphasis attached to them, can be either primarily legal or primarily political in character. In either case, both legal and political elements are used in a complementary manner in order to achieve better government accountability, and thus, in turn, a more balanced constitutional order.

The following analysis will therefore demonstrate some of the overlap which occurs between real world constitutions of both supposedly legal and political persuasions and in particular how such overlap can be complementary rather than contradictory.

## *4.2 Democratic Participation and Political Accountability under the Legal Constitution*

Under the legal constitution, Tomkins argues that 'the principal institution, through which the government is held to account is the law and the court-room.'<sup>159</sup> By contrast, he identifies politics and Parliament as being chiefly responsible for holding government to account under the political constitution.<sup>160</sup> Although political rather than legal methods of control is a distinguishing characteristic of the political constitution, Tomkins is wrong to assume that legal accountability acts as a substitute for political accountability under the legal constitution.

'Higher law' constitutions primarily establish only the general framework from which government may operate, including the limits on government power such as human rights guarantees. It does not, therefore, give any direction on what government should or should not do on a daily basis on the overwhelming majority of issues that confront the modern state, for example, on health care, social security, housing, education, transport, policing, defence, taxation, and government debt.<sup>161</sup> Although constitutional challenges can still occur in these areas, they are less likely to succeed. Real world legal constitutions, therefore, make provisions also for democratic government, which seeks to ensure that the day-to-day decisions of government correspond as much as possible to the wishes of the general public. Because only a very limited number of legislative decisions will ever be subject to judicial reversal, therefore, Tomkins is mistaken in identifying the court-room as the principal institution through which government is held to account under the legal constitution. Under legal constitutions, therefore, democratic mechanisms of accountability exercised by political institutions are chiefly responsible for holding government to account. This is true of both parliamentary and presidential systems, although more so under the former. Whereas parliamentary systems have a fusion of powers between the executive and the legislature,<sup>162</sup> thereby making the executive theoretically dependent upon and thus accountable to the legislature,<sup>163</sup> presidential systems separate the executive and legislative branches. As a result of this separation, each branch is often empowered to check one another's power with the aim of

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<sup>159</sup> Tomkins, n 22, 19.

<sup>160</sup> *Ibid*, 18: 'A political constitution is one in which those who exercise political power (let us say the government) are held to constitutional account through political means, and through political institutions (for example, Parliament).'

<sup>161</sup> The exception to this would be socio-economic rights.

<sup>162</sup> See Bagehot, W. *The English Constitution* [1867] (Oxford: Oxford University Press, 2001), 11: 'The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion of the executive and legislative powers.'

<sup>163</sup> See Tomkins, n 69, 1.



preventing an over concentration of power within any single branch.<sup>164</sup> Under the Constitution of the United States of America, for example, the President may veto congressional bills,<sup>165</sup> whilst Congress can refuse to give its consent to congressional bills endorsed by the President. Despite the prominence of checks and balances, however, many presidential systems will also seek to make the executive accountable to the legislature for its decisions. This occurs under the United States Constitution in the form of congressional oversight and investigative hearings, whereby congressional committees are given the power to invite and, if necessary, subpoena members of the executive to give evidence.<sup>166</sup> Congress may also impeach both the Vice-President and the President,<sup>167</sup> although this power has seldom been used.<sup>168</sup>

Bellamy's above claim that legal constitutions, by empowering judges to enforce 'higher law' against democratically-elected politicians, constitutes a form of domination, is therefore similarly exaggerated. Politicians can only realistically be seen to be subject to domination in relation to constitutional matters. The vast majority of political decisions are therefore not subject to domination by the courts. In addition to this, the benefits of democratic participation Bellamy outlines above as being essential to the political constitution's legitimacy over the legal constitution – one man, one vote, decisions by majority rule, and the balance of power principle – apply also to the legal constitution. As a result, legal constitutions can be seen to embrace, not only 'freedom as non-interference,' but also 'freedom as non-domination.'

### *4.3 Legal Accountability under the Political Constitution*

Correspondingly, it is submitted that the political constitution's preference for political accountability does not necessarily exclude legal accountability under a political constitution. Although Tomkins, as noted above, objects to the government being held to account by the courts

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<sup>164</sup> This is commonly referred to as the partial separation of powers theory. See discussion at n 8.

<sup>165</sup> The American Congress can overturn a presidential veto, but only if two-thirds of both the House of Representatives and the Senate vote to do so.

<sup>166</sup> Congress' power of oversight is implied, rather than enumerated, by its other constitutional powers and responsibilities. See Tribe, L.H. *American Constitutional Law* (2nd edn, Mineola, New York: The Foundation Press, Inc., 1988), 375. On the effectiveness of congressional oversight hearings see also Tushnet, M. *The Constitution of the United States of America: A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing, 2009), 47-48.

<sup>167</sup> Article I.

<sup>168</sup> To date, impeachment proceedings have only been brought against two presidents – Andrew Johnson and Bill Clinton – both of which resulted in acquittal.

on the grounds that it is both ineffective and undemocratic,<sup>169</sup> he nevertheless accords the courts a limited but important role within the political constitution. As he notes:

A core function of the courts in constitutional law is to declare what legal powers the government has. It is a fundamental rule of constitutional law that the government has only such powers as are clearly conferred upon it by the law. Where the government has acted without legal authority, the courts should be robust in declaring such action unlawful ... Parliament must consider with great care the powers its legislation confers on the government; and the courts must be fearless in ruling where the government has overstepped the line or, indeed, in ruling where the line is too blurred to be meaningful.<sup>170</sup>

Resort to legal forms of accountability, therefore, is not merely unavoidable under a political constitution, but necessary. This can be seen, it is submitted, under the British constitution, where the courts have a long history of holding the government to account via judicial review in a way which complements rather than undermines its key tenets.

As Helen Fenwick and Gavin Phillipson note:

Judicial review is the procedure whereby the High Court is able to review the legality of decisions made by a wide variety of bodies which affect the public, ranging from Government Ministers exercising prerogative or statutory powers, to the actions of certain powerful self-regulatory bodies.<sup>171</sup>

Political constitutionalists may understandably view judicial review with a degree of suspicion and hostility, therefore, because it invites judges to cross over from the legal sphere into the political sphere. As Fenwick and Phillipson remark, '[t]he system of judicial review allows judges to interfere in the decisions made by central and local government and a vast range of other public bodies.'<sup>172</sup> In Britain, however, judicial review has been traditionally conducted on the grounds that the administrative decision of a public body is *ultra vires* i.e. 'beyond the powers granted by Parliament.'<sup>173</sup> As Sir William Wade and Christopher Forsyth explain:

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<sup>169</sup> Tomkins, n 69, 3.

<sup>170</sup> Tomkins, n 144. Tomkins goes on to say that where a court finds that the government has overstepped its authority, the court should refer the matter back to Parliament as under s 4 of the Human Rights Act 1998 (at 20-22). See also Tomkins, A. 'National security and the role of the court: a changed landscape?' (2010) 126(Oct) *LQR* 543.

<sup>171</sup> Fenwick, H.M. and Phillipson, G. *Text, Cases and Materials on Public Law and Human Rights* (3<sup>rd</sup> edn, London and New York: Routledge, 2011), 733.

<sup>172</sup> *Ibid*, 777.

<sup>173</sup> Elliott, M. *The Constitutional Foundations of Judicial Review* (Oxford and Portland, Oregon: Hart Publishing, 2001), 23.

Having no written constitution on which he can fall back, the [English] judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of *ultra vires*.<sup>174</sup>

Judicial interference with the decisions of public bodies, therefore, has been justified on the grounds that the courts are merely enforcing the will of Parliament. Consequently, the *ultra vires* model of judicial review appears to have what Mark Elliott describes as '*structural coherence*.'<sup>175</sup> As he notes, 'it furnishes a theoretical model of judicial review which is consistent with the structure of the constitutional order generally and with the principle of parliamentary sovereignty in particular.'<sup>176</sup> It is as a consequence of this structural coherence that the *ultra vires* model of judicial review can be seen to be an example of complementary constitutionalism. Legal methods of accountability are used in order to ensure that power is exercised in accordance with Parliament's will, thereby bolstering, not undermining, the democratic process.<sup>177</sup>

The compatibility of the *ultra vires* model of review with the political school, however, is dependent upon the courts interpreting statutory provisions consistently with Parliament's intention. As seen with the decision of the House of Lords in the *Fire Brigades Union* case, the courts can construct statutory provisions in a manner which arguably blurs the distinction between interpreting and legislating, thereby pushing the boundaries of complementary constitutionalism to its limits.<sup>178</sup>

It is submitted that judicial review can also be seen to be necessary under the political school on the grounds that it enables the people to contest government action as required under Pettit's republican view of 'freedom as non-domination.'<sup>179</sup> The courts can be seen to provide a forum from which individuals, whose interests may not be sufficiently represented in Parliament, may challenge the legality of government decisions. Therefore, although Tomkins may prefer political accountability over legal accountability because it is more effective at contesting government actions, judicial review of executive action is nevertheless in conformity with the republican notion

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<sup>174</sup> Wade, H.W.R. and Forsyth, C. *Administrative Law* (Oxford: Oxford University Press, 2000), 37.

<sup>175</sup> Elliott, n 173, 24.

<sup>176</sup> *Ibid.*

<sup>177</sup> However, as discussed in greater detail below and in Chapter Three, the *ultra vires* model of judicial review fails to provide coherent justification for the judicial review of non-statutory powers.

<sup>178</sup> *Secretary of State for the Home Department, ex parte Fire Brigades Union and Others* [1995] 2 AC 513. For a detailed discussion of the case, see Chapter Three, 102-107.

<sup>179</sup> Pettit, n 70, ix.

of 'freedom as non-domination.' It can therefore be seen to complement rather than contradict the underlying themes of the political constitution.

#### *4.4 Constitutional Democracy*

Distinguishing between a primarily legal constitution and a primarily political constitution in light of this complementary overlap of legal and political methods of accountability, as noted above, is ultimately one of degree. A primarily political constitution, for example, may prioritise political control over legal control – the British constitution's dependency upon constitutional conventions in particular may prove a testament to this fact. Although the legal and the political constitutions can be seen to disagree most vehemently on the issue of constitutional review, it is submitted that the difference between a primarily legal and a primarily political constitution on this issue is similarly one of degree. The political constitution's seemingly blanket prohibition of constitutional review, therefore, should not be seen to completely debar the courts from protecting and enforcing the fundamental values of the political constitution.

Constitutional review of 'higher law' is frequently justified under the legal constitution on the grounds that it protects rights that are essential to democratic society. Because democracy is constituted by rights, they claim, these rights should be protected and insulated from democracy itself: a 'constitutional democracy.' One of the forerunners to such a theory was John Hart Ely, who argued that the American constitution was primarily concerned, not with specific substantive values, but with process and structure;<sup>180</sup> to frame a system of representative democracy designed to preserve, not undermine, liberty.<sup>181</sup> He argued that the courts should thus be concerned, not with promoting substantive values, but in facilitating greater democratic representation.<sup>182</sup>

Although political constitutionalists contend that the substantive outcomes of a democratic society are subject to reasonable disagreement, it is clear that the political constitution, like its legal rival, possesses a number of fundamental prerequisites without which a political constitution would neither function nor exist. As Gee and Webber have observed:

The idea of a political constitution is prescriptive, but it does not purport to prescribe the nature and content of the constitution in great detail. By design, a political constitution

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<sup>180</sup> Ely, J.H. *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Massachusetts: Harvard University Press, 1980), 92.

<sup>181</sup> *Ibid*, 100.

<sup>182</sup> *Ibid*, 135-179.

leaves it to political actors, operating through the ordinary political process, to prescribe the nature and content of the constitution. At its simplest, it directs political actors to design an electoral process based on some notion of equal votes and to ensure that the political process is based on some notion of holding those in power to account. In this, the idea of a political constitution prescribes no more than the bare minimal conditions for political equality and accountability and non-domination.<sup>183</sup>

Democracy is one such minimal condition that can be best expressed in the language of rights. This includes not only the right to vote, but also freedom of expression and the right to assembly and non-discrimination to name but a few. Although Trevor Allan therefore argues that judges in Britain should express their commitment to democracy by rightly adhering to the sovereignty of Parliament in the laws that it passes, he argues also that such respect cannot be a limitless one:

A parliamentary enactment whose effect would be the destruction of any recognizable form of democracy ... could not consistently be applied by the courts of law. Judicial obedience to the statute in such (unlikely) circumstances could not coherently be justified in terms of the doctrine of parliamentary sovereignty, since the statute would violate the political principle which the doctrine itself enshrines.<sup>184</sup>

Given the fact that constitutional review, as discussed above, does not threaten the overwhelming majority of political decisions, the objections by political constitutionalists to its use appear greatly exaggerated. Despite this, however, it is conceded that the retention of Parliament's right to the final say is one of the hallmarks of a political constitution. It is for this reason that the theory of bi-polar sovereignty fails to achieve a complementary balance which is respectful of Britain's constitutional traditions.

The most widely quoted proponent of bi-polar sovereignty is easily Sir Stephen Sedley, who argued in 1995 that:

[W]e have today ... a new and still emerging constitutional paradigm, no longer of Dicey's supreme parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable – politically to Parliament, legally to the courts.<sup>185</sup>

The implications of Sedley's new constitutional paradigm are difficult to ascertain with any certainty. This is in large part due to the fact that, as a result of Sedley's subsequent writings, bi-polar sovereignty can be seen to advocate for only one of two things – the sovereignty of

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<sup>183</sup> Gee and Webber, n 117, 15.

<sup>184</sup> Allan, n 45.

<sup>185</sup> Sedley, S. 'Human rights: a twenty-first century agenda' (1995) *PL* 386, 389.

Parliament or the *de facto* sovereignty of the courts, but not both – therefore demonstrating, it is submitted, the inherent inability of the model to live up to its name.

In one of his more recent articles, for example, Sedley elaborated upon the role of the courts in relation to the executive further in such a way as to suggest that his above separation of powers is still, despite its use of terminology, structured around the sovereignty of Parliament:

The courts go to considerable lengths to respect the constitutional supremacy of Parliament ... It is the executive – the departments of state over which ministers preside, along with quangos and local government – which is subject to public law controls. That is because executive government exercises public powers which are created or recognised by law and have legal limits that it is the courts' constitutional task to patrol. When I argued the leading case of *M v Home Office* in the Court of Appeal (the case went on to the House of Lords, which confirmed the liability of ministers for contempt of court in the discharge of their offices), I proposed a formulation which Lord Justice Nolan adopted in his judgment and which has been accepted as correct by our unreflective and atheoretical profession: 'The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is.'<sup>186</sup>

If what Sedley states is a true account of his view of the judicial role, his earlier claim that ministers are legally accountable to the courts must be seen as nothing more than a statement in support of the complementary role the courts have traditionally played under the British constitution as advanced above.

Despite this, however, earlier comments by Sedley appear to suggest that bi-polar sovereignty, far from preserving Parliament's sovereignty, instead gives the final say on matters of law to the courts, offering in place of a working theory of bi-polar sovereignty a theory of constitutionalism which is not too dissimilar from the common law model. As he once noted, '[i]t is conventional wisdom, at least among lawyers, that the constitution of the United Kingdom is in its essentials the creation of the common law – an accretion of legal principles derived from judicial decisions which determine for the most part how the country is to be run from day to day.'<sup>187</sup> The supremacy of the courts under this reading of Sedley's hypothesis is evidenced further by his belief in the importance of judges in upholding human rights which are, he argues, historically derived from the liberal values of the Enlightenment,<sup>188</sup> but which he believes are far from universal or fixed,<sup>189</sup>

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<sup>186</sup> Sedley, S. 'Judicial Politics,' *London Review of Books*, Vol. 34, No. 4, 23 February 2012.

<sup>187</sup> Sedley, S. 'The Common Law and the Constitution' in Nolan, Lord M.P. and Sedley, S. (eds) *The Making and Remaking of the British Constitution* (London: Blackstone Press Limited, 1997) 15 as cited in Griffith, J.A.G. 'The common law and the political constitution' (2001) 117(Jan) *LQR* 42.

<sup>188</sup> Sedley, n 185, 386.

advocating also for the courts to play a more active role in making human rights 'real' and meaningful.<sup>190</sup>

Acknowledging the similarities between Sedley's position and common law constitutionalism, Christopher Knight has recently attempted a vindication of the bi-polar thesis. It is submitted, however, that despite such recognition on Knight's behalf, his hypothesis can also be seen to collapse into common law constitutionalism.

Knight argues that the English constitution, and thus by necessary implication the British constitution, is characterized primarily by its long history of institutional pragmatism, which he defines as a 'readiness to use one institution to compensate for perceived or actual weaknesses in another, or to take on new functions as the institution develops.'<sup>191</sup> Building on this, he argues that the courts are the most apt at evolving to meet the nation's constitutional needs, namely to protect human rights against encroachments by the executive in light of Parliament's failure to do so.<sup>192</sup> However, unlike common law constitutionalism, Knight asserts that bi-polar sovereignty does not advocate higher-order law. Instead, he argues that the courts, like Parliament, have law-making powers. Likewise, he emphasises the fact that Parliament can act, and in fact has acted, as a higher court.<sup>193</sup> Consequently, he contends that there is an overlapping of legislative and judicial functions between the two branches. It is here that Knight incorporates into his thesis the work of W.J. Rees, who argued in the 1950s that there exists two sovereigns: the legal sovereign and the coercive (or enforcement) sovereign.<sup>194</sup> Building on this distinction, Knight argues that, despite the overlapping of functions between Parliament and the courts, Parliament's primary role is legal

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<sup>189</sup> *Ibid*, 391: '[I]f in our society the rule of law is to mean much, it must at least mean that it is the obligation of the courts to articulate and uphold the ground rules of ethical social existence which we dignify as fundamental human rights, temporary and local that they are in the grand scheme of things.'

<sup>190</sup> *Ibid*, 400: 'The path I hope we shall follow in this country is therefore not simply that of the European Convention with its inevitable historical limitations, but that of a juridical culture which does not imagine that the poorest citizen is made equal to the richest corporation simply by according both the same rights; which does not co-opt the powerless into the opposition of the powerful to the state; which perceives the role of power in determining who gets to drink first and longest at the well; and which understands above all that in every society fundamental human rights, to be real, have to steer towards outcomes which invert those inequalities of power that mock the principles of equality before the law.' See also Sedley, S. 'The common law and the political constitution: a reply' (2001) 117(Jan) *LQR* 68. Sedley briefly revisits many of his main arguments expressed over the years, including his belief in the need for positive obligations on the state which are not typical of Enlightenment-style human rights instruments.

<sup>191</sup> Knight, C.J.S. 'Bi-polar sovereignty restated' (2009) 68(2) *CLJ* 361, 362.

<sup>192</sup> *Ibid*, 364-365.

<sup>193</sup> *Ibid*, 372.

<sup>194</sup> Rees, W.J. 'The Theory of Sovereignty Restated' (1950) 59 *Mind* 495.

and that the court's primary role is enforcement.<sup>195</sup> As Knight himself concludes, the former is the power to make the law and the latter is the power to enforce the law.<sup>196</sup>

Although this separation of sovereign functions suggests that bi-polar sovereignty is nothing more than a re-packaging of Britain's tradition of parliamentary sovereignty, Knight rejects this, arguing instead that under his model of dual sovereignty 'the courts retain a certain amount of "legal supremacy"...in very specialized circumstances the courts would have the power to bind the legislature using their legal sovereignty.'<sup>197</sup> Such 'legal supremacy' manifests itself in the form of a judicial power to strike down primary legislation. As Knight categorically states, '[t]he purpose of bi-polar sovereignty is to provide the courts with the kind of "nuclear" option of striking down an Act of Parliament which existing jurisprudence does not generally afford them, but which is derived from their role as the primary enforcement sovereign.'<sup>198</sup> The circumstances Knight identifies as being capable of justifying this nuclear option are where common law constitutional rights have been infringed, circumstances which Knight also finds well suited to the institutional pragmatism of the British constitution because of the freedom it gives the courts to use the common law to develop both existing and future constitutional rights.<sup>199</sup>

Despite his claim to the contrary, therefore, Knight's theory of bi-polar sovereignty instead appears to give judges the final say on issues of fundamental rights. As a result, his theory, far from offering a cohesive theory of reconciliation between the legal and political schools, instead collapses into common law constitutionalism where Parliament is made subordinate to a judicially-enforceable higher law, albeit only in a handful of instances. This is illustrated best by one of his concluding remarks in his most recent paper:

The common law can resist the will of Parliament, where that will is manifested in an unjustified interference with rights recognised by the common law as constitutional. The unique bi-polar sovereignty of the constitution places the courts and the legislature on an equal footing because there is an overlap between their legislative and enforcement functions.<sup>200</sup>

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<sup>195</sup> Knight, n 191, 373.

<sup>196</sup> *Ibid*, 368-371

<sup>197</sup> *Ibid*, 373.

<sup>198</sup> Knight, C.J.S. 'Striking down legislation under bi-polar sovereignty' (2011) *PL* 90.

<sup>199</sup> *Ibid*, 109-110.

<sup>200</sup> *Ibid*, 112.



Adherence to the doctrine of parliamentary sovereignty, however, has not prevented British courts from protecting the underlying values of the political constitution short of declaring void and incompatible Acts of Parliament. This has been achieved by way of statutory presumptions.

Despite the *structural coherence* of the *ultra vires* model of judicial review outlined above, the model has nevertheless been criticised for lacking what Elliott describes as '*internal coherence*: that is, it is not capable of providing a convincing explanation of the source of the principle which the courts apply on review.'<sup>201</sup> According to Elliott, the *ultra vires* model lacks *internal cohesion* because of both '*passive artificiality*' and '*active artificiality*.'<sup>202</sup>

*Passive artificiality* refers to the development by the courts of principles or standards of good administration – usually in the form of presumptions as to Parliament's intention – by which the executive, in utilising discretionary powers granted to them by Parliament, must be judged, although such standards do not appear in the enabling statute itself. The application of such standards, therefore, cannot readily be justified as emanating from Parliament.<sup>203</sup> They would appear instead to emanate from the judges themselves under the common law, thereby suggesting that judicial review operates independently of parliamentary intention. As Colin Turpin and Adam Tomkins notes:

Presumptions ... derive from the common law, which is to say that the courts have developed them, and so we see that judicially created principles may be applied by the courts in deciding what a statute permits to be done. It has been questioned whether ... the courts are really giving effect to the unexpressed but presumed intention of Parliament or are rather simply requiring statutory powers to be exercised in conformity with principles which the court see it as their responsibility to uphold, and which have their source in a judicial conception of the rule of law. If this is so, it would seem that the judges are not acting – or at all events are not acting exclusively – on a principle of *ultra vires*. Rather, they are enforcing the rule of law, taken to mean not only that precisely limited statutory powers must not be exceeded, but that powers must not be used – we should say abused – in ways or for purposes that run counter to the principles of justice and fair dealing evolved by the courts in the long experience of judging and developing the common law.<sup>204</sup>

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<sup>201</sup> Elliott, n 173, 27.

<sup>202</sup> *Ibid*, 27-34.

<sup>203</sup> *Ibid* 28-30.

<sup>204</sup> Turpin, C., and Tomkins, A. *British Government and the Constitution, Text and Materials* (7<sup>th</sup> edn, Cambridge: Cambridge University Press, 2012), 664-665. *cf.* Bellamy, n 119, 93: '[P]olitical constitutionalists do not deny that all legislation will be subject to an element of judicial review when applied by the courts in a particular case. 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.'

This problem with the *ultra vires* model of judicial review is further exacerbated by the fact that the exercise of non-statutory powers – prerogative and *de facto* powers – are also subject to judicial review.<sup>205</sup> As a result, the courts in such cases clearly cannot be seen to be enforcing parliament's will.

*Active artificiality* refers to those instances where the courts effectively ignore the express words of an Act of Parliament and apply their own independent standards. This is seen most typically in instances where the courts are faced with an ouster clause prohibiting judicial review as in *Anisminic Ltd v Foreign Compensation Commission*.<sup>206</sup> Consequently, as Elliott observes, the artificiality of the *ultra vires* model is fully exposed: 'it purports to explain judicial review *in terms of* the enforcement of legislative intention, yet the courts at least appear to effect review *in spite of* parliament's will.'<sup>207</sup>

Such artificiality may appear to put in jeopardy the use of the *ultra vires* model of judicial review as evidence of complementary constitutionalism. For common law constitutionalists, the artificiality of the *ultra vires* model of judicial review demonstrates beyond all doubt that the grounds for judicial review exist independently of Parliament's intention, emanating instead from the common law as developed by judges. Once this common law constitution is accepted, both the development of standards of good administration and the refusal by courts to apply ouster clauses can be readily explained.<sup>208</sup> The *passive* and *active* artificiality of the *ultra vires* model of judicial review, however, should not be seen to be necessarily incompatible with the political constitution. Although the standards of good administration applied by the courts have not emanated from Parliament, they may nevertheless be seen to give expression to some of the underlying values of both the legal constitution *and* the political constitution.

Elliott contends, for example, that the artificiality of the *ultra vires* model can be overcome, not by completely denying the relevance of parliamentary intention, but by accepting that the chief purpose of judicial review is ultimately to uphold the Rule of Law. The purpose of judicial review, therefore, is to ensure that Parliament acts in accordance with the Rule of Law. This is to be achieved 'by means of deploying the well-established presumption that Parliament is taken to legislate with the intention that its enactment should be consistent with constitutional

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<sup>205</sup> See in particular *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815.

<sup>206</sup> [1969] 2 AC 147. Elliott, n 173, 30-34.

<sup>207</sup> *Ibid*, 30.

<sup>208</sup> *Ibid*, 37.

principle.<sup>209</sup> Elliott justifies the use of such a presumption by identifying as the Rule of Law the key values of the constitutional order within which the legislature is based, thereby distinguishing his model from the common law model. As he notes:

It [the common law model] postulates that constitutional principle is something which is created by judges and with which the judges are exclusively concerned; thus the courts are viewed as imposing the rule of law on the other parts of government. Meanwhile, the modified ultra vires principle treats the rule of law as a pervasive constitutional principle which influences the contexts within which legislation is both enacted by Parliament and interpreted by the courts. This captures much more accurately the way in which we think about the values on which the constitutional order is founded given that, by definition, constitutional values (such as those to which judicial review give expression) are shared values which possess an overarching resonance. To regard them as uniquely judicial constructs is ultimately to deny their constitutional status.<sup>210</sup>

Consequently, because the legislature is located within a constitutional order founded on the Rule of Law, *passive artificiality* can be avoided because the courts can legitimately presume that Parliament intends to act in accordance with the Rule of Law.<sup>211</sup> *Active artificiality* is also overcome, Elliott claims, by identifying, for example, the rule against depriving an individual of his right to access to the courts, as nothing more than a presumption which can be rebutted by express parliamentary words to the contrary. As he notes:

[S]o long as the British constitution continues to accord legislative supremacy to Parliament, any irreconcilable conflict between the intention of Parliament and the rule of law must ultimately be resolved in favour of the former, and judicial decisions which fail to respect this axiom must be rejected as lacking constitutional legitimacy.<sup>212</sup>

Under this reasoning, all rules of construction are treated as nothing more than presumptions, albeit apparently strong ones which should only be capable of rebuttal where expressed clearly and unequivocally.

Elliott's understanding of the Rule of Law is essentially one which is largely formal in nature.<sup>213</sup> If taken to mean only the basic requirements of law,<sup>214</sup> the use of statutory presumptions to bring Acts of Parliament into conformity with the Rule of Law is therefore more than compatible with the political constitution. After all, if the duty of the courts is to enforce the law (whether

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<sup>209</sup> *Ibid*, 113.

<sup>210</sup> *Ibid*, 133.

<sup>211</sup> *Ibid*, 115: 'It is central to the modified ultra vires principle that the constitutional order embodies a number of key values which, collectively, may be termed the rule of law.'

<sup>212</sup> *Ibid*, 124.

<sup>213</sup> *Ibid*, 100-104.

<sup>214</sup> See Craig, n 7.

statutory or common law), what they enforce must, one would presume, conform with the formal requirements of the law. It is submitted, however, that even a more substantive reading of the Rule of Law which requires conformity with fundamental human rights may also find expression via statutory presumptions without contradicting Parliament's ultimate sovereignty.

This can be seen with the recognition of fundamental common law constitutional rights, beginning with the decision of the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Leech*.<sup>215</sup> The case concerned an action for judicial review against the power of prison governors under the Prison Rules 1964 to intercept and block prisoner correspondence on the grounds that it included letters to and from a solicitor where legal proceedings were not imminent.<sup>216</sup> The Court of Appeal held that, in interfering with correspondence between a prisoner and a solicitor, the wider common law right of access to the courts was infringed which, 'even in our unwritten constitution,' Steyn L.J. claimed, 'must rank as a constitutional right.'<sup>217</sup> The constitutional right of access to the courts was later recognised by Laws L.J. in *R v Lord Chancellor, ex parte Witham*,<sup>218</sup> with the added caveat, however, that such a right 'cannot be abrogated by the State save by specific provision in an Act of Parliament,'<sup>219</sup> as well as by the House of Lords in *R v Secretary of State for the Home Department, ex parte Simms*, where the court also recognised the existence of further fundamental constitutional rights, such as the right to freedom of expression.<sup>220</sup>

Such rights were similarly accorded recognition, albeit *obiter*, in *Thoburn v Sunderland City Council*.<sup>221</sup> Laws L.J. went further than in *Leech*, *Witham*, and *Simms*, however, by arguing that '[w]e should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes,' whereby '[t]he special status of constitutional statutes follows the special status of constitutional rights.'<sup>222</sup> In other words, '[o]rdinary statutes may be impliedly

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<sup>215</sup> [1994] QB 198.

<sup>216</sup> See Prison Rules 1964, Rules 33(3) and 37A.

<sup>217</sup> *Leech*, n 215, 210.

<sup>218</sup> [1998] QB 575, especially at 580-587.

<sup>219</sup> *Ibid*, 581.

<sup>220</sup> *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, especially at 131-132 (Lord Hoffmann): '[M]uch of the Convention [European Convention on Human Rights 1950] reflects the common law ... That is why the United Kingdom government felt able in 1950 to accede to the Convention without domestic legislative change. So the adoption of the text as part of domestic law [in the form of the Human Rights Act 1998] is unlikely to involve radical change in our notions of fundamental human rights.'

<sup>221</sup> [2003] QB 151, 186 (Laws L.J.): 'In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental.'

<sup>222</sup> *Ibid*.

repealed. Constitutional statutes may not.<sup>223</sup> The only way a constitutional statute could be repealed, so he claimed, was by express words in a later statute.<sup>224</sup>

*Thoburn*, along with *Leech*, *Witham*, and *Simms*, could be seen as evidence of a relatively modest step away from a political constitution towards a common law constitution. Because fundamental rights can only be abrogated by way of express words in an Act of Parliament, an unprecedented restriction as to form on Acts of Parliament has arisen, emanating not from Parliament itself, but instead from the common law.<sup>225</sup> Undeniably, this appears to have been the intention in at least some of these cases. In outlining his new constitutional framework, for instance, Laws L.J. praised it on the grounds that '[i]t gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect.'<sup>226</sup> Although this sentiment was also shared by Lord Hoffmann in *Simms*, it is submitted that his Lordship's reasoning demonstrates that a requirement for express words has the potential to strengthen political accountability for the protection of fundamental rights. As Lord Hoffmann noted:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.<sup>227</sup>

A requirement of express words, as noted above, is in effect a requirement of clear intention. Both Parliament and the government, therefore, are being forced to be more open about the true extent of their legislative intentions in relation to human rights, thereby exposing them to greater political scrutiny from members of Parliament, the media, and the general public. As a result, Parliament is compelled to think twice about pursuing legislative aims which require the abrogation of human rights, although its success depends greatly upon whether human rights are held in the same high regard by members of Parliament, the media, and the general public as they

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<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid*, 186-187.

<sup>225</sup> No doubt this restriction as to form remains subject to reversal by Parliament.

<sup>226</sup> *Thoburn*, n 221, 187.

<sup>227</sup> *Simms*, n 220, 131.

are by judges like Lord Hoffmann. In either event, the constraints upon Parliament, as Lord Hoffmann himself notes, remain 'ultimately political, not legal.'<sup>228</sup>

## 5. Conclusion

Both the legal and the political constitutions share many common characteristics and disagree with one another primarily on emphasis. A real world constitution, therefore, can be seen to be a complementary mixture of elements from both the legal and political schools which can be either primarily legal or primarily political in character. Whether Britain's mixed constitution can be seen to remain primarily political is ultimately a question of degree and context. It depends, not only upon whether it relies more upon political as opposed to legal methods of accountability, but also upon effectiveness of such methods and the extent to which the legal methods of accountability used complement, rather than contradict, the underlying principles of the political school.

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<sup>228</sup> *Ibid.*

## Chapter Three

# THE ROYAL PREROGATIVE

### 1. Constitutionalism and the Crown

One of the earliest definitions of the royal prerogative was supplied by William Blackstone. He noted that the term signifies ‘something that is required or demanded before, or in preference to, all others. And hence it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the King enjoys alone, in contradistinction to others, and not to those he enjoys in common with any of his subjects.’<sup>1</sup> However, the most widely accepted definition of the prerogative is that of A.V. Dicey,<sup>2</sup> who famously described the prerogative as ‘the remaining portion of the Crown’s original authority, and it is therefore ... the name for the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.’<sup>3</sup>

Despite its residual nature, as well as the difficulty in defining it,<sup>4</sup> the prerogative is nevertheless fundamental to the operation of the constitution, acting as the source of authority for many of the constitution’s most important rules. As Maurice Sunkin and Sebastian Payne explain:

[T]he Crown is widely defined as possessing wide ranging powers, some of which may be crucially important to the running of the constitutional and political system. These include powers relating to the appointment of the government ... and enactment of primary legislation; the conducting of international relations, including the making of Treaties, the declaration of war and the disposition of armed forces abroad; as well as a range of executive powers which are used by ministers in the day-to-day government of the United Kingdom.<sup>5</sup>

This reliance by the executive on the prerogative has been the subject of widespread dissatisfaction as a consequence of the fact that its exercise has historically been largely immune

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<sup>1</sup> Blackstone, W. *Commentaries on the Laws of England*, a facsimile of the first edition of 1765-1769 (University of Chicago Press, 1979), 232, as cited in Payne, S. ‘The Royal Prerogative’ in Sunkin, M. and Payne, S. (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 2003), 83.

<sup>2</sup> See Markesinis, B.S. ‘The Royal Prerogative Re-Visited’ (1973) 32(2) *CLJ* 287.

<sup>3</sup> Dicey, A.V. *An Introduction to the Study of the Law of the Constitution* (10th edn, London: Macmillan, 1959), 424.

<sup>4</sup> Payne, n 1, 78.

<sup>5</sup> Sunkin, M. and Payne, S. ‘The Nature of the Crown: An Overview’ in Sunkin, M. and Payne, S. (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press, 2003), 2.

from both legal and political scrutiny.<sup>6</sup> As a result, the prerogative occupies the 'dead ground' of the constitution; 'a vacuum in which the citizen would be left without protection against a misuse of executive powers.'<sup>7</sup> The potential for its abuse is obviously apparent. As Helen Fenwick and Gavin Phillipson note, the existence of the prerogative 'allows powers of ... great breadth, magnitude and importance to be wielded by the executive alone.'<sup>8</sup>

Because the prerogative's prominence within the British constitution is therefore an affront to constitutionalism and the principle of limited government, calls for the prerogative to be brought under control have become increasingly common amongst legal and political constitutionalists alike. Political constitutionalists wish to bolster Parliament's controls over the prerogative, whilst legal and common law constitutionalists, although in support of strengthening political controls, wish also to expand judicial controls. Recent efforts both by Parliament and the courts to bring the prerogative under control suggests also that the gap in accountability caused by the prerogative, if not yet completely plugged, is certainly smaller than it has ever been.

The aim of this chapter, therefore, will be to assess the effect of these judicial and parliamentary developments on the balance within the constitution between its legal and political elements. As noted in the previous chapters, real world constitutions are in fact a mixture of both legal and political schools to varying degrees. Both legal and political controls may be relied upon in order to bring the prerogative under control, therefore, without necessarily altering the fact that the constitution remains primarily political in nature. With this in mind, two arguments will be advanced in relation to the most recent attempts to bring the exercise of the prerogative under control: firstly, that the Fixed-term Parliaments Act 2011, although a legal means of change, nevertheless strengthens parliamentary, rather than judicial, controls; secondly, that the recent extension of judicial review in *Bancoult (No. 2)*<sup>9</sup> to include Orders in Council issued under the royal prerogative, although not a solution necessarily preferred by political constitutionalists, nevertheless complements, rather than contradicts, the underlying values of the political constitution. Before engaging with the main analysis, however, it is important to first fully understand the reasons behind the prerogative's historic immunity from scrutiny.

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<sup>6</sup> *Ibid* and House of Commons Public Administration Select Committee, Fourth Report of Session 2003-04, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*, HC 422, March 2004, 3 and 5 [1].

<sup>7</sup> *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, 567 (Lord Mustill).

<sup>8</sup> Fenwick, H.M. and Phillipson, G. *Text, Cases and Materials on Public Law and Human Rights* (3<sup>rd</sup> edn, London and New York: Routledge, 2011), 551.

<sup>9</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61.



## 2. Failure to Control the Prerogative

### 2.1 *The Glorious Revolution 1688: Parliament's Victory over the Crown*

Historically, the English constitution recognised the Crown as being sovereign; the monarch made the law, and the monarch executed the law. However, in order to remain sovereign, the early monarchs required the support of the nobility and of the clergy, a fact made most apparent with the signing of the Magna Carta in 1215. From this necessity of consent emerged the concept of Parliament.<sup>10</sup> Because it was utilised primarily as a vessel through which the King could raise revenue via taxation, and because it could only be summoned and dissolved by the King whenever he so chose,<sup>11</sup> Parliament was not always in session. When King Charles I came to the throne in 1625, for example, he dissolved Parliament in 1629 and reigned for eleven years relying solely on the royal prerogative. Known as the 'Eleven Years' Tyranny' or the 'Personal Rule,' Charles was eventually forced to call a new Parliament in 1640 in order to raise funds for his war against Scotland, which had begun the year before. However, instead of raising money, Parliament insisted on addressing grievances which had arisen during Charles' eleven years of rule. Frustrated with Parliament's refusal to supply the King with the funds he required, Charles dissolved Parliament after it had sat for less than a month.<sup>12</sup> However, due to the defeat of the English Army by the Scottish in the North of England, Charles once again had to summon Parliament.<sup>13</sup> However, as with the Parliament summoned earlier that year, the new Parliament was keen to address grievances ahead of supply. Becoming increasingly frustrated with Parliament's attempts to dismantle the personnel and machinery responsible for Charles' eleven years of personal rule, as well as calls for Parliament to sit on a regular basis,<sup>14</sup> Charles, in addition to being involved in an army plot to overthrow Parliament,<sup>15</sup> attempted to impeach five MPs for treason. When Parliament refused, Charles entered the House of Commons accompanied with armed guards with the intention of arresting the men, leaving empty handed because the men had already fled. In March 1642, outright civil war between the King and Parliament ensued,<sup>16</sup> ultimately concluding

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<sup>10</sup> Lyon, A. *Constitutional History of the United Kingdom* (London: Cavendish Publishing, 2003), 53-54.

<sup>11</sup> *Ibid*, 105.

<sup>12</sup> Bennett, M. *The English Civil War 1640-1649* (London and New York: Longman, 1995), 2-3.

<sup>13</sup> *Ibid*, 6-7.

<sup>14</sup> *Ibid*, 8-16.

<sup>15</sup> *Ibid*, 11-16.

<sup>16</sup> *Ibid*, 21-23.

with the execution of Charles I in January 1649, and the establishment of an English republic following the abolition of the monarchy and the House of Lords.<sup>17</sup>

The Commonwealth, and later the Protectorate,<sup>18</sup> were not to last however. As John Western notes, '[t]he victorious parliamentarians were unable to establish a workable and durable system of government.'<sup>19</sup> This was made abundantly clear after the death of its Lord Protector Oliver Cromwell in September 1658 and the resignation of his son and successor Richard in May 1659.<sup>20</sup> Because of the civil unrest which followed – in no small part due to the unpopularity of the republic amongst the populace – the Stuarts were returned to the throne of England in May 1660.<sup>21</sup> Under King Charles II, monarchy reigned once again in England, albeit with the consent of Parliament and with diluted powers. However, relations between the Crown and Parliament eventually began to sour; Parliament became increasingly concerned by Charles II's close friendship with catholic France,<sup>22</sup> and, as Tim Harris notes, Charles II did much to strengthen the position of the Crown during his final years on the throne, including:

[U]sing the law to defeat the political and religious enemies of the crown, enhancing royal control over the judiciary and local government through a series of purges, and making the crown more independent of parliament thanks to a combination of improved royal finances and subsidies from the French king, Louis XIV.<sup>23</sup>

This tension would come to a head under the reign of Charles II's successor King James II, who caused anxiety amongst parliamentarians – who were united in their opposition to Catholicism<sup>24</sup> – because he was 'England's first Catholic ruler since Queen Mary (r. 1553-8),' and because he 'pursued an ambitious policy of trying to increase the religious and civil liberties of his co-religionists across his three kingdoms.'<sup>25</sup> Because of the Test Acts of 1673 and 1678, Catholics in England were denied the same religious, political, and social freedoms enjoyed by Anglicans. James II therefore sought to nullify the effects of these Parliamentary laws via the royal prerogative. In April 1687, James issued the Declaration of Indulgence, which granted everyone

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<sup>17</sup> *Ibid*, 94-97.

<sup>18</sup> See Woolrych, A. *Commonwealth to Protectorate* (Oxford: Clarendon Press, 1982).

<sup>19</sup> Western, J.R. *Monarchy and Revolution: The English State in the 1680s* (London: Blandford Press, 1972), 5.

<sup>20</sup> Harris, T. *Restoration: Charles II and his Kingdoms 1660-1685* (London: Penguin Books, 2006), 43.

<sup>21</sup> *Ibid*, 43-44.

<sup>22</sup> Miller, J. *The Glorious Revolution* (London and New York: Longman, 1983), 1.

<sup>23</sup> Harris, T. *Revolution: The Great Crisis of the British Monarchy, 1685-1720* (London: Penguin Books, 2006), 8.

<sup>24</sup> Miller, n 22, 5.

<sup>25</sup> Harris, n 23, 2.

dispensation from the Test Acts;<sup>26</sup> threatening to ‘destroy both the laws and the independence of Parliament, the very foundations of the traditional constitution.’<sup>27</sup> As Harris notes, ‘[w]hat safeguards were there for subjects’ legal liberties if a reigning monarch could decide at will to dispense with or suspend laws that had been passed by parliament?’<sup>28</sup> With the birth of James II’s son in June 1688, and a new royal Catholic dynasty all but certain, Parliament was once again forced to assert its supremacy over the monarchy in the 1688 Glorious Revolution. Fearing an alliance between the Catholic kings of England and France, William of Orange invaded England, causing James II to flee to Ireland.

However, this time the monarchy was not abolished following Parliament’s ‘victory,’ which was only made possible thanks to foreign intervention on the behalf of Holland. Instead, the Crown was retained, albeit at the behest and mercy of Parliament. Declaring James II to have forfeited his right to the throne (and rejecting completely his new-born son’s right to succession), Parliament offered the Crown instead to James’ sister Mary and her husband William of Orange, creating the ‘unique phenomenon’ of a dual monarchy: Queen Mary II and King William III of England.<sup>29</sup>

As Payne notes, ‘[t]he events of 1688 re-established the duality of the King governing in conjunction with Parliament, but the King still governed.’<sup>30</sup> The King, albeit the King-in-Parliament, was still the Head of State, and still took the ‘administrative initiative.’<sup>31</sup> For efficiency, therefore, much of the royal prerogative was retained.<sup>32</sup> The Bill of Rights 1688, for example, while abolishing King James II’s claimed power of suspension,<sup>33</sup> nevertheless left much of the royal prerogative intact.<sup>34</sup> Despite this, however, the Bill of Rights nevertheless limited the Crown’s authority by subjecting it to modification or abolition by statute. As a result, ‘it would no longer be sufficient for the Crown (or its Ministers) to invoke the prerogative to justify its actions. It would have to show that at common law there was such a power and that it had not been affected by

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<sup>26</sup> *Ibid*, 211-14, and Miller, n 22, 8.

<sup>27</sup> Miller, *ibid*, 9.

<sup>28</sup> Harris, n 23, 3.

<sup>29</sup> Vallance, E. *The Glorious Revolution: 1688 – Britain’s Fight for Liberty* (London: Abacus, 2007), 225.

<sup>30</sup> Payne, n 1, 98.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*, 87: ‘[W]hat may appear as a bizarre leftover from antiquity, ceases to be so strange when the most significant powers continue to have a functional role to play in government.’ It stands to reason also that the replacement of all of the Crown’s prerogative powers with statute would have been a lengthy and burdensome process.

<sup>33</sup> For the debate surrounding the legality of King James II’s actions and the suspension/dispensation debate see Harris, n 23, 211-216.

<sup>34</sup> For a summary of the Bill of Rights 1688 see Miller, n 22, 36-38.

legislation.<sup>35</sup> As Diplock L.J. famously declared in *BBC v Johns*: '[i]t is 350 years and a civil war too late for the Queen's courts to broaden the prerogative. The limits within which the executive government may impose obligations or restraints on the citizens of the United Kingdom without any statutory authority are now well settled and incapable of extension.'<sup>36</sup> The effect of the 1688 Revolution and subsequent constitutional settlement, therefore, was to secure the *de facto* supremacy of Parliament, whereby the monarchy was made subordinate to the legislature.<sup>37</sup>

Despite its subordination to Parliament, however, the royal prerogative has historically operated largely free from scrutiny, thereby placing Parliament in a less privileged position than the executive. The historic inability of both Parliament and the courts to effectively control the exercise of the prerogative can be attributed, firstly to the fact that prerogative powers do not require parliamentary approval in order to be used; secondly to the absence of positive authority in determining the existence and scope of prerogative powers; and thirdly to the prerogative's immunity, until recently, from judicial review.

## 2.2 No Parliamentary Approval

Although the royal prerogative was retained following the 1688 Revolution and subsequent constitutional settlement by the grace of Parliament, and therefore subordinate to Acts of Parliament, political control over the exercise of the prerogative nevertheless remained weak. Despite the subsequent emergence of constitutional conventions stipulating that many of the Crown's prerogative powers were in practice to be exercised by ministers drawn from both Houses of Parliament<sup>38</sup> – one of the hallmarks of political control – virtually no conventions emerged regulating ministerial exercise of the prerogative themselves.<sup>39</sup> As a result, governments need not secure the approval of Parliament before making decisions in relation some of the most important areas of government activity, most notably in relation to foreign affairs, where prerogative powers continue to operate in relation to signing of treaties, declaring war, deploying armed forces

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<sup>35</sup> House of Lords Select Committee on the Constitution, Fifteenth Report of Session 2005-06, *Waging War: Parliament's role and responsibility*, HL Paper 236-I, July 2006, 5-6 [4].

<sup>36</sup> [1964] 1 ALL ER 923, 941.

<sup>37</sup> See Judge, D. *The Parliamentary State* (Sage Publications Ltd., 1993) 20, as cited in Payne, n 1, 96. See also Leyland, P. *The Constitution of the United Kingdom: A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing, 2007), 20: 'Since the Bill of Rights of 1689 the courts have recognised Acts of Parliament as the highest source of law.'

<sup>38</sup> It must be noted that the monarch still possesses powers of a constitutional significance which are still exercised by the monarch personally, and not by ministers, albeit often on the advice of ministers.

<sup>39</sup> Constitutional Conventions will be discussed in detail in Chapter Four.

abroad, recognising foreign states, and governing overseas territories.<sup>40</sup> In addition to the absence of prior parliamentary approval, Parliament has also proven ineffective at holding the government to account *ex post facto* due to the predominance of single-party majority governments.<sup>41</sup>

### 2.3 No Positive Authority

In the seventeenth-century decision in *Case of Proclamations*, Sir Edward Coke (in)famously declared that '[t]he King hath no prerogative, but that which the law of the land allows him.'<sup>42</sup> In the landmark case, the court considered the legality of two proclamations made by King James I: the first prohibited new buildings in London; the second made it a criminal offence for starch to be made from wheat. As the above quote suggests, the court ultimately found the proclamations to be illegal; it was not within the remit of the King's power for him to change the common law or create a new criminal offence. It is submitted that the effect of this decision should have been the strengthening Parliament's position against the Crown. Paul Craig, agrees, arguing that the significance of the *Case of Proclamations* is as follows: firstly that 'it clearly established that the prerogative was bounded and not unlimited;' secondly that it firmly established that it was for the courts and not the Crown to determine the boundaries of the royal prerogative; and thirdly that 'the principal beneficiary of the court's judgment was, of course, Parliament.'<sup>43</sup>

In the centuries that followed the decision in *Case of Proclamations*, however, the courts have in fact shown reluctance in relying upon their power to determine both the existence and scope of prerogative powers.<sup>44</sup> Far from curtailing the powers of the Crown, the courts have instead shown consistent deference towards the executive. In some cases the courts have even extended existing prerogative powers, sometimes to the point where a new *de facto* power has been

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<sup>40</sup> Following the decision of Prime Minister David Cameron to seek parliamentary approval for potential military action in Syria on 29 August 2013, the existence of a convention requiring prior parliamentary approval for the deployment of armed forces may have been strengthened due to precedent. See *Hansard*, HC Deb, vol. 566, col. 1425-1556 (29 August 2013). As discussed below, although the Ponsonby Rule, now no longer a convention but instead a legal obligation, requires a proposed treaty to be placed before Parliament for a minimum of twenty-one days before being officially ratified by the government, parliamentary approval of the treaty is not a prerequisite for ratification. For a discussion on the range of prerogative powers in relation to both domestic and foreign affairs see Fenwick and Phillipson, n 8, 559-561.

<sup>41</sup> Reforms aimed at improving Parliament's ability to hold the government politically accountable for its actions will be discussed in detail, not as part of this chapter, but as part of the next chapter on constitutional conventions.

<sup>42</sup> (1611) 12 Co. Rep. 74, 76.

<sup>43</sup> Craig, P.P. 'Prerogative, Precedent and Power,' in Forsyth, C. and Hare, I. (eds) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (Oxford: Clarendon Press, 1998), 68. For Adam Tomkins' rebuttal of this claim see Tomkins, A. *Our Republican Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2005), 70-74.

<sup>44</sup> In agreement with this argument see Markesinis, n 2, 293.

created, and in others upholding the executive's claim as to the existence of prerogative powers despite the absence of evidence as to its existence. As a result, the courts have failed to uphold 'a very basic aspect of the rule of law.'<sup>45</sup> In *R v Secretary of State for the Home Department ex parte Northumbria Police Authority*,<sup>46</sup> for example, the Court of Appeal agreed with the then Home Secretary that the power to supply equipment to the police fell within the broad prerogative power of the Crown to preserve the peace. As Nourse L.J. noted, '[t]he scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does.'<sup>47</sup> In *Malone v Commissioner for the Metropolitan Police (No. 2)*, the Government argued successfully that phone tapping was legal because there was no law prohibiting it.<sup>48</sup> The courts have also given recognition to the Ram Doctrine, which identifies a 'third source' of non-prerogative, non-statutory powers that may be exercised by the government 'except so far as he [a minister] is precluded from doing so by statute.'<sup>49</sup> The scope of the Ram Doctrine, however, is uncertain and hotly disputed. At its narrowest, the Ram Doctrine stipulates merely that the Crown 'has all the powers of a natural or legal person'<sup>50</sup> – the power to enter into contracts, employ staff, convey property etc. The courts, however, have recognised a much wider reading of the Ram Doctrine whereby the Crown possesses, not only 'ancillary powers, necessary for the carrying out of any substantive governmental (or indeed non-governmental) function',<sup>51</sup> but substantive governmental powers also. As argued by the High Court in *Shrewsbury & Atcham Borough Council, Congleton Borough Council v The Secretary of State for Communities and Local Government*, 'the fact that the Crown enjoys legal personality means that it is *prima facie* entitled – so far as *vires* in the strict sense are concerned – to do any lawful act, even if the act in question is plainly governmental.'<sup>52</sup> In the

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<sup>45</sup> Fenwick and Phillipson, n 8, 577.

<sup>46</sup> [1988] 2 WLR 590; [1989] QB 26.

<sup>47</sup> *Ibid*, 58.

<sup>48</sup> [1979] Ch. 344. It must be noted, however, that no power to tap phones under the royal prerogative was actually made in *Malone*. See the remarks of Sir Robert Megarry V.-C. at 356: '[A]lthough the royal prerogative was mentioned from time to time, no claim was made that there was any prerogative power to tap telephones, and so I need say nothing of that.' It should also be noted that the decision in *Malone* was subsequently overturned by the European Court of Human Rights in *Malone v UK* (1984) 7 EHRR 14.

<sup>49</sup> See Joint Committee on Statutory Instruments, Eighth Report of Session 2007-08, HL Paper 47, HC 38-viii, January 2008, Annex to Appendix 3. For a detailed discussion of 'third source' powers, see Harris, B.V. 'The "third source" of authority for government action' (1992) 108(Oct) *LQR* 626 and 'The "third source" of authority for government action revisited' (2007) 123(Apr) *LQR* 225.

<sup>50</sup> Fenwick and Phillipson, n 8, 556.

<sup>51</sup> *Shrewsbury & Atcham Borough Council, Congleton Borough Council v The Secretary of State for Communities and Local Government* [2008] EWCA Civ 148, [45] (Carnwath L.J.).

<sup>52</sup> *Shrewsbury & Atcham Borough Council, Congleton Borough Council v The Secretary of State for Communities and Local Government* [2007] All ER (D) 124 (Oct), [17] (Underhill, J.). In making his judgment, Underhill J. felt bound, at [16], to follow the previous decision of the Court of Appeal regarding 'third source'

recent decision of the Supreme Court in the *New London College* case, however, Lord Sumption, although acknowledging the existence of and necessity for 'third source' powers, nevertheless expressed grave doubts over the wide scope accorded to them in previous judgments:

[I]t is open to question whether the analogy with a natural person is really apt in the case of public or governmental action, as opposed to purely managerial acts of a kind that any natural person could do, such as making contracts, acquiring or disposing of property, hiring and firing staff and the like.<sup>53</sup>

Despite this concerns, Lord Sumption decided that the uncertainty surrounding the scope of 'third source' powers did not need to be resolved in the present case. This was because there was little doubt, he argued, that the statutory power of Home Secretary at issue in the case 'must necessarily extend to a range of ancillary and incidental administrative powers not expressly spelt out in the Act,<sup>54</sup> thereby leaving the question open.

Given the residual nature of the royal prerogative, this approach by the courts is not entirely without merit. As Fenwick and Phillipson note, '[b]ecause it is accepted that prerogative powers are residual – that is, recognised rather than created by the common law – it can therefore be plausibly argued by the Crown that the absence of prior positive recognition by the courts of a particular prerogative is not necessarily fatal to a claim that it exists.'<sup>55</sup> In order for the courts to hold that a prerogative power exists, therefore, the government has to prove, not that the power has been previously exercised or positively recognised by either the courts or Parliament, but only that neither statute nor court decision expressly prohibited the power that they claim. As Sir Robert Megarry V.-C. in *Malone v Metropolitan Police Commissioner* once observed, England 'is not a country where everything is expressly permitted; it is a country where everything is permitted except what is expressly forbidden.'<sup>56</sup>

Admittedly, because the prerogative survived the 1688 Revolution and constitutional settlement subject to Parliament, the prerogative is theoretically exercised with the tacit consent of Parliament. Because Parliament did not expressly or impliedly abolish many of the powers the executive claims to possess, Parliament must therefore be taken to have not objected to their existence and thus their use. It is submitted, however, that this is an untenable position which

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powers in *R v Secretary of State for Health, ex parte C* [2000] 1 FLR 627. This ruling was reluctantly reaffirmed by the Court of Appeal in *Shrewsbury & Atcham Borough Council, ibid.*

<sup>53</sup> *R (on the application of New London College Limited) v Secretary of State for the Home Department* [2013] UKSC 51, [28].

<sup>54</sup> *Ibid.*

<sup>55</sup> Fenwick and Phillipson, n 8, 576.

<sup>56</sup> *Malone*, n 48, 357.

invites arbitrariness. Central to the concept of consent, whether express or implied, is knowledge of what one is consenting to. Without such knowledge, consent cannot be said to be informed and valid. As noted by the Public Administration Select Committee, Parliament has no right to know what the powers of the prerogative are.<sup>57</sup> There exists no comprehensive, authoritative list or record of all the powers, privileges, and immunities that constitute the royal prerogative. Parliament, therefore, although undeniably aware of what the main prerogative powers are, cannot be said to be making an informed decision in not abolishing any of the prerogative powers claimed by the government. Any presumed consent is often fictitious, therefore, resulting in potential arbitrariness.

## *2.4 Immunity from Judicial Review*

The courts historically treated the exercise of the royal prerogative as being immune from judicial review. This classic stance can be traced as far back as the decision in *Darnel's Case*.<sup>58</sup> Known also as the *Case of the Five Knights*, the court declared that they could determine only the existence and scope of a prerogative power; they could not review the manner in which it had been exercised. The justification for such immunity can be attributed to the prerogative's status as original kingly authority. The prerogative, because it is derived from the King and not an Act of Parliament, constitutes original, not subordinate, authority.<sup>59</sup> It is accordingly a source of law which is separate and distinct from Parliament. Judicial review of the prerogative could not be justified by recourse to the *ultra vires* model of review as the courts would not be enforcing Parliament's will as expressed in statute. In contrast to either legislation or delegated legislation (which has its origins in an enabling statute), therefore, the prerogative has been treated with a degree of legal reverence despite its subordination to Parliament. As Colin Munro argues, following the 1688 Revolution, 'something survived of the notion that the king's discretionary powers were 'absolute' ... that courts lacked jurisdiction to review the manner of exercise of prerogative powers, or the adequacy of grounds upon which they had been exercised.'<sup>60</sup> Governments, therefore, have historically been able to draw upon a wide array of discretionary

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<sup>57</sup> House of Commons Public Administration Select Committee, n 6, 7 [12].

<sup>58</sup> (1627) 3 St. Tr. 1.

<sup>59</sup> See *Bancoult (No. 2)* (House of Lords), n 9, [34] (Lord Hoffmann): 'It is true that a prerogative Order in Council is primarily legislation in the sense that the legislative power of the Crown is original and not subordinate. It is classified as primary legislation for the purposes of the Human Rights Act 1998: see paragraph (f)(i) of the definition in section 21(1). That means that it cannot be overridden by Convention rights. The court can only make a declaration of incompatibility under section 4.'

<sup>60</sup> Munro, C. *Studies in Constitutional Law* (2<sup>nd</sup> edn, London: Butterworths, 1999), 279.



powers free from judicial interference because of the fact that such power is derived, not from a democratically-elected legislature, but instead from the Crown.

### **3. Bringing the Prerogative under Control**

#### *3.1 Plugging the Gap in Accountability*

In an attempt to plug this gap in accountability, both Parliament and the courts have recently sought to rectify some of the shortcomings in political and legal controls noted above – the former by placing some prerogative powers or conventional controls on a statutory footing and the latter by extending the scope of judicial review. The remainder of this chapter will therefore discuss in detail the most recent parliamentary and judicial efforts at doing so and consider, firstly the extent to which they can be seen to effectively plug the gap in accountability, and secondly their effect on the balance within the constitution between its legal and political elements. This chapter will focus in particular on the recently enacted Fixed-term Parliaments Act 2011, which placed the once prerogative power of the Crown to dissolve Parliament on a statutory footing, along with the controversial decision of the House of Lords in *Bancoult (No. 2)*, which extended judicial review to include Orders in Council issues under the prerogative.

#### *3.2 Placing the Prerogative, or Controls on it, on a Statutory Footing*

As noted above, the historic failure of Parliament and the courts to control the prerogative stems from the absence of a requirement for prior parliamentary approval for the use of prerogative powers, from the fact that positive authority is not needed for the court to rule in favour of the existence of a claimed prerogative power, and from the prerogative's historic immunity from judicial review.

The first two problems can to an extent be overcome by constitutional conventions. Prerogative powers could be subject to conventions which place constraints upon its exercise, including a requirement of prior-parliamentary approval in some instances. When such conventions are codified as part of an 'authoritative statement',<sup>61</sup> the prerogative powers they regulate may also be accorded a degree of positive authority, thereby enabling the courts, where appropriate, to

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<sup>61</sup> See Joint Committee on Conventions, Report of Session 2005-06, *Conventions of the UK Parliament*, HL Paper 265-I, HC 1212-I, October 2006, 68 [253]. The Committee note that an authoritative statements can take the form of an Act of Parliament, a resolution of one or more Houses of Parliament, and a Standing Order, to name but a few. For more detailed discussion on the codification of conventions, see Chapter Four, 140-144.

determine the existence and scope of prerogative powers more firmly in line with Parliament's wishes. As will be discussed in greater detail in the next chapter, conventions of this kind, because it is a political as opposed to a legal method of controlling the exercise of the prerogative, would be of particular normative value to political constitutionalism. Despite Britain's heavy dependency upon conventions, however, few conventions exist which actually regulate the executive's exercise of the Crown's prerogative powers.<sup>62</sup>

A solution to all three problems would be to place the prerogative powers themselves on a statutory footing. As Adam Tomkins argues, '[t]he starting principle for executive power should be the same for central government as it is for local government: namely, that the government may exercise only those powers which are expressly (or by necessary implication) conferred upon it by statute.'<sup>63</sup> By placing prerogative powers on a statutory footing, the prerogative powers are replaced with a statutory equivalent and accorded positive authority. Crucially, when passing the legislation, Parliament is also able to determine the limits of the powers that the courts may then enforce in conformity with the *ultra vires* model of review. Parliament may also stipulate that specific powers may only be used upon securing Parliament's prior approval, thereby further strengthening political, rather than judicial, controls. Legislative reform, therefore, can demonstrate that Parliament, not the prerogative, is the source of executive power, thereby reaffirming the executive's subservience to Parliament and bolstering the doctrine of Parliamentary sovereignty.

Strengthening Parliamentary controls over the prerogative in this manner, however, should not be assumed to be the exclusive preference of political constitutionalists. As noted above, there is a degree of overlap between the two schools of constitutionalism and both want to see effective controls over government. Although political constitutionalists prefer political rather than judicial controls, legal constitutionalists would nevertheless find any extension of political controls unproblematic. Legal constitutionalists call for enhanced judicial controls, but only where they are appropriate and effective. Subjecting the exercise of specific prerogative powers to prior parliamentary approval, therefore, is a development which would almost certainly receive widespread support.

Although enthusiastic about placing all prerogative powers of the Crown on a statutory footing, Tomkins has nevertheless expressed doubts over the likelihood of any prerogative powers being

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<sup>62</sup> See Chapter Four, 131-133.

<sup>63</sup> Tomkins, n 43, 132.

voluntary relinquished by the government. As he notes, '[n]o government can realistically be expected to volunteer to surrender such powers: this is not the way politics works ... If the prerogative is going to be wrested away from the government it is going to be as a result of parliamentary insistence, not government self-sacrifice.'<sup>64</sup> Despite his scepticism, however, the legislative reform of the prerogative can be seen to have a long history, with some of Parliament's most recent attempts proving to among the most dramatic.

Although the Bill of Rights 1688 was an Act of Parliament which abolished some prerogative powers whilst restricting others, legislative reform of the prerogative has been sporadic, pragmatic, and piecemeal, having been initiated for a variety of 'different reasons and motivations.'<sup>65</sup> Some prerogative powers have been abolished, as seen with the Wild Creatures and Forest Laws Act 1971 (the right of the Crown to all wild animals except royal fish and swans), placed on a statutory footing, as seen with the Interception of Communications Act 1985 (the power exercised by the Home Secretary to issue warrants authorising the interception of communications) and the Treasure Act 1996 (the Crown's right to treasure trove), or retained but regulated by statute, as seen with the Royal Assent Act 1967 (the power to convert a Bill into an Act of Parliament). Executive agencies that were established under the prerogative for the Defence of the Realm have also been subsequently placed on a statutory footing, as seen with the Security Service Act 1989 (the Security Service) and the Intelligence Services Act 1994 (the GCHQ and the SIS). More importantly, many of the Crown's most significant and controversial powers have been left untouched, such as the power of the Crown to declare war and deploy armed forces.

Despite the ambitious reform agenda of the 1997, New Labour under Tony Blair likewise made no attempt to reform the prerogative powers of the Crown.<sup>66</sup> Although some have sought to argue that the enactment of the Human Rights Act 1998 removed the prerogative's remaining immunity from judicial review,<sup>67</sup> at least in situations where Convention rights were engaged, its effect has

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<sup>64</sup> *Ibid*, 134.

<sup>65</sup> Munro, n 60, 291.

<sup>66</sup> In support of this claim see Fenwick and Phillipson, n 8: 'Ironically enough, this area [the royal prerogative], which most concerned Labour in 1993, remained untouched by the great wave of constitutional reform enacted by the Blair administration from 1997 on, save for the impact of the Human Rights Act 1998 on judicial control of the prerogative.'

<sup>67</sup> The main prerogative powers excluded from judicial review were listed (*obiter*) in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418 (Lord Roskill): 'Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review.'

been incidental at best, and non-existent at worst.<sup>68</sup> However, in an attempt to distinguish his premiership from that of his predecessor, Gordon Brown, on becoming Prime Minister in 2007, expressed the ambition for large-scale reform of government. Contained within the green paper *The Governance of Britain*<sup>69</sup> were reform proposals, later developed in white paper *The Governance of Britain – Constitutional Renewal*,<sup>70</sup> which the then Government claimed were designed to re-invigorate British democracy by limiting the power of the executive and making it more accountable to Parliament<sup>71</sup> – to ‘begin the journey towards a new constitutional settlement – a settlement that entrusts Parliament and the People with more power.’<sup>72</sup> This therefore required reform of arguably the most significant and most controversial prerogative powers of the Crown: the power to declare war and deploy the armed forces, ratify treaties, manage the Civil Service, and dissolve Parliament. Compared with New Labour’s 1997 reform package, the Brown reforms had a distinctive republican or political flavour about them. Instead of adopting largely legal mechanisms for holding the executive to account, in order to compensate for but in no way repair the perceived weaknesses and failure of Parliament to do so, the Brown reforms sought instead to strengthen political control over the executive. Although the Brown reforms marked an improvement on the previous situation, they ultimately failed to readdress the balance between Parliament and the executive in favour of the former in relation to the prerogative for two reasons: firstly, because only two of the four prerogative powers were successfully reformed; secondly, because the reforms sought suffered from critical weaknesses that undermined their effectiveness.

The two reforms that were successfully implemented were in relation to the management of the Civil Service and the ratification of treaties. Proposals for the reform of the management of the Civil Service were by far the most bold and ambitious of those sought. Up until the Constitutional Reform and Governance Act 2010, the Civil Service was managed by the Prime Minister (in his capacity as Minister for the Civil Service) via Orders in Council issued under the royal prerogative.<sup>73</sup> Labour successfully proposed to remove these prerogative powers and place the management of the Civil Service on a statutory footing instead, which eventually became Part 1 of the

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<sup>68</sup> Fenwick and Phillipson, n 8, 598-599.

<sup>69</sup> Cm.7170 (2007).

<sup>70</sup> Cm.7342-1 (2008).

<sup>71</sup> *The Governance of Britain*, n 69, 6-8. For a breakdown and critique of green paper see Blackburn, R. ‘The prerogative power of dissolution of Parliament: law, practice and reform’ (2009) *PL* 766.

<sup>72</sup> *The Governance of Britain*, *ibid*, 5.

<sup>73</sup> See *Ibid*, 22 [41] and Fenwick and Phillipson, n 8, 619.

Constitutional Reform and Governance Act 2010.<sup>74</sup> Statute, not the prerogative, should now be the source of executive power, thereby strengthening the ability of both Parliament and the courts to hold the executive to account. Despite its boldness, however, the statutory powers conferred by the 2010 Act do not apply to national security vetting;<sup>75</sup> this instead continues to be managed by prerogative power,<sup>76</sup> thereby maintaining a gap in accountability.

In addition to this, the reform successfully sought in relation to the ratification of treaties was much weaker. The Government did not place the prerogative power of the Crown to ratify treaties on a statutory footing, but instead decided to codify as part of a statute the Ponsonby Rule – the constitutional convention whereby a treaty must be laid before both the House of Commons and the House of Lords for a minimum of twenty-one sitting days before it is officially ratified by the government.<sup>77</sup> The reform, however, suffers from a number of weaknesses which ultimately undermine its aim of strengthening Parliament's control over the exercise of the prerogative. Under s 20(1) of the Constitutional Reform and Governance Act 2010, the House of Commons may, if it chooses, reject the ratification of a treaty within twenty-one sitting days of the treaty being laid before Parliament. However, even if the House of Commons passes a motion opposing ratification, a Minister may nevertheless lay the same treaty before Parliament again, thereby giving the Commons a further twenty-one sitting days to decide whether it still wishes to reject it. This process may be repeated as many times as the government wishes.<sup>78</sup> Moreover, the government is permitted to forgo s 20(1) altogether and ratify a treaty without giving the House of Commons the opportunity to reject it.<sup>79</sup> As the Public Administration Select Committee therefore noted:

It certainly does not seem right to us that it should be for the Government alone to decide whether to circumvent its obligations to Parliament. A safeguard that can be ignored at will is no safeguard at all. Other leading democracies do not allow their Governments to avoid their obligations to Parliament at their sole discretion.<sup>80</sup>

On the reform of the Crown's war powers and power of dissolution, the proposals put forward were never implemented. Despite placing the Civil Service on a statutory footing, Labour rejected

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<sup>74</sup> *The Governance of Britain*, n 69, 6-8 [40]-[48].

<sup>75</sup> Section 3(4).

<sup>76</sup> See *The Governance of Britain – Draft Constitutional Renewal Bill*, Cm.7342-II (2008), 60 [15].

<sup>77</sup> The Constitutional Reform and Governance Act 2010, Part 2.

<sup>78</sup> *Ibid*, s 20(3)-(6).

<sup>79</sup> *Ibid*, s 22.

<sup>80</sup> House of Commons Public Administration Select Committee, Tenth Report of Session 2007-08, *Constitutional Renewal: Draft Bill and White Paper*, HC 499, June 2008, 28 [87].

the idea of doing the same for the Crown's war powers, and instead proposed to pass a House of Commons resolution declaring a convention that the House of Commons must give their approval for the use of armed forces. The proposed resolution, however, was drafted in such a way that the Prime Minister retained considerable discretionary power on the issue of going to war. As the Public Administration Select Committee observed:

A Prime Minister should not be able to choose whether or not to seek the support of Parliament based on political expediency; nor should he be able to present information to Parliament in a way which is partial or subjective, leading members of the Commons perhaps to support a conflict which they might not support if more information was available to them.<sup>81</sup>

The green paper proposal to reform the Crown's power of dissolution – a power Hilaire Barnett describes as 'perhaps the most important residual prerogative exercised personally by the sovereign'<sup>82</sup> – was not even included in the white paper at all, but sought only to alter current convention so that the Prime Minister would in future be required to seek the approval of the House of Commons before asking the Monarch to dissolve Parliament, thereby triggering a general election.<sup>83</sup> However, following the defeat of Labour in the May 2010 elections to Westminster, the newly-formed Conservative-Liberal Coalition Government carried on their predecessor's goal of strengthening Parliament's control over the exercise of the prerogative in the form of the Fixed-term Parliaments Act 2011, which makes statutory provisions for elections to Parliament to be held every five years on the first Thursday of May.<sup>84</sup> Consequently, the Act puts into statute the automatic dissolution of Parliament seventeen working days in advance of a general election, thus abolishing the prerogative power of the Crown, exercised by the Prime Minister, to dissolve Parliament whenever he or she so chooses.<sup>85</sup>

Before the passage of the Fixed-term Parliaments Act, s 7 of the Parliament Act 1911 set the maximum life of a Parliament to five years from the day it was summoned following a general

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<sup>81</sup> *Ibid*, 25 [73]. Although the reform failed to be implemented, the existence of a convention requiring prior parliamentary approval for the deployment of armed forces, as noted at n 40, may have been strengthened by the decision of Prime Minister David Cameron to seek prior parliamentary approval for potential military action in Syria.

<sup>82</sup> Barnett, H. *Constitutional & Administrative Law* (7<sup>th</sup> edn, London: Routledge-Cavendish, 2009), 106.

<sup>83</sup> *The Governance of Britain*, n 69, 20 [35].

<sup>84</sup> Section 1(3).

<sup>85</sup> Section 3(1).

election, the expiry of which would automatically trigger Parliament's dissolution.<sup>86</sup> As Rodney Brazier has noted, however, 'Parliament never ends in that way: it is ... dissolved by the Sovereign on the Prime Minister's advice.'<sup>87</sup>

The constitutional significance of the power of the Crown to dissolve Parliament cannot be understated. As B.S. Markesinis noted, '[a] dissolution of Parliament, on the Prime Minister's advice, is a very serious and important decision ... [D]issolution shortens the life of the existing Parliament and plunges the country into the tumult and turmoil of elections which are bound to disrupt its normal activities.'<sup>88</sup> Not only this, but an election also brings with it the prospect of a new Prime Minister. Although the power to appoint the Prime Minister rests again with the Crown under the prerogative, such power is heavily regulated by convention. As Rodney Brazier explains:

In theory the Queen could commission anyone she pleased to form a government. But in practice such a notion is entirely removed from reality, because of course today the royal discretion is subject to several limiting factors, the most important of which is that in making an appointment she should commission that person who seems able to command a majority in the House of Commons. The other restraints are that the person chosen must be a Member of Parliament (or be about to occupy his seat as an MP after a general election), must not be a peer (unless he can disclaim his peerage under the Peerage Act 1963 and seek a seat in the House of Commons), and must usually be the elected Leader of his party.<sup>89</sup>

Because all the major political parties in Westminster now have their own rules and procedures for selecting their Leader,<sup>90</sup> the Crown no longer has to become actively involved in deciding who can best command a majority of the House of Commons when there is no clear successor to the leadership of the party forming government as was the case in 1957 and 1963.<sup>91</sup> Because to these party mechanisms for selecting a leader, Markesinis, with one minor reservation,<sup>92</sup> has suggested that '[n]owadays it is doubtful ... whether the Queen still possesses this prerogative.'<sup>93</sup> Brazier,

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<sup>86</sup> Brazier, R. *Constitutional Practice: The Foundations of British Government* (3rd edn, Oxford: Oxford University Press, 1999), 205.

<sup>87</sup> *Ibid.*

<sup>88</sup> Markesinis, B.S. *The Theory and Practice of Dissolution of Parliament: A comparative study with special reference to the United Kingdom and Greek experience* (Cambridge: Cambridge University Press, 1972), 55.

<sup>89</sup> Brazier, n 86, 11.

<sup>90</sup> *Ibid.*

<sup>91</sup> For further details of these two events see *ibid.*, 11-12 n 2.

<sup>92</sup> Markesinis, n 88, 60 n 2. On noting that the Crown's power to appoint a Prime Minister is today redundant, Markesinis notes that: 'This, of course, is assuming that one party commands the majority in the Commons. In the unlikely event, however, of no party having an overall majority in the House, the situation may differ.'

<sup>93</sup> *Ibid.*, 60.

however, has argued that the Crown's power to appoint a Prime Minister is not yet redundant, and identifies several situations when the Crown would be unable to leave the choice to political parties. Although the majority of situations he identifies involve the complexity of the Labour Party's electoral college system for choosing its leader, he crucially includes the situation when 'a coalition is needed, either as a matter of extreme urgency (so that there is no time for any party election), or when Parliament is dissolved.'<sup>94</sup> As Brazier therefore concludes:

[A]lthough there has undoubtedly been a shift of constitutional responsibility from the Sovereign to the political parties, enhancing the dignity of the head of state while, where possible, making the choice of a head of government more democratic, there remains sufficient possible circumstances in which the Queen would have to exercise her prerogative of choice unaided by the parties. It is much too soon to consign that part of the royal prerogative to the lumber room wherein lie discarded bits of constitutional law and practice.<sup>95</sup>

Given the potentially widespread and costly consequences of a dissolution of Parliament, therefore, the power of the unelected Crown to interfere directly with the everyday functions of the democratically-elected legislature has proven controversial. The limits of the Crown's power to dissolve Parliament, therefore, have been hotly debated in the twentieth century, most notably by Markesinis and then later by Brazier.

As with all prerogative powers, the decision when or whether to dissolve Parliament rested solely with the Crown's discretion. As Markesinis observed, however, this was never strictly the case:

Technically speaking, in the United Kingdom a dissolution necessitates an Order in Council, the Lord President accepting responsibility for summoning the Council. It also necessitates a Proclamation and writs of summons under the Great Seal, for which the Lord Chancellor is held responsible. It is therefore obvious that dissolution cannot originate only from the King.

From the constitutional and political angle it also appears to be universally accepted that the Monarch may never use the prerogative power relating to a dissolution of Parliament in an arbitrary way, entirely on his own responsibility. There must always be a Minister willing and prepared to assume responsibility for the Monarch's act and thus shield him from attack, should there be any.<sup>96</sup>

Up until the early twentieth century, it was clear that the Monarch could force a dissolution regardless of whether the Prime Minister agreed or not.<sup>97</sup> In order to further bring the Crown's

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<sup>94</sup> Brazier, n 86, 29.

<sup>95</sup> *Ibid.*

<sup>96</sup> Markesinis, n 88, 56. See also *ibid*, 206.

<sup>97</sup> Markesinis, *ibid*, 115.



power of dissolution under Parliament's control, a convention eventually emerged whereby the Monarch could only exercise her prerogative powers upon the advice of Ministers. In the case of the Crown's power to dissolve Parliament, this was the advice of the Prime Minister. As Markesinis observed in 1972, therefore, the Crown's power of dissolution shifted in the twentieth century from the Crown to the Prime Minister. The key constitutional question thus became, not whether the Monarch could enforce a dissolution, but whether the Monarch could refuse a request for dissolution from the Prime Minister.<sup>98</sup>

Markesinis was of the opinion that the Crown could still refuse a dissolution under specific circumstances.<sup>99</sup> Although Markesinis observed that the conventions regulating the Crown's exercise of the power to dissolve Parliament were in serious doubt,<sup>100</sup> he nevertheless identified the following rules regulating the Crown's exercise of its power to dissolve Parliament which had emerged in practice:

(i) The Crown cannot force a dissolution upon a Government; this would also imply its dismissal.

(ii) The Crown, in the vast majority of cases, must act on the advice of the Prime Minister of the time.

(iii) The Crown cannot refuse a dissolution to a majority Prime Minister. The size of his party's majority is irrelevant.

(iv) The timing of and reason for dissolution is left to the Prime Minister's discretion.

(v) The Crown may, under certain circumstances, refuse a dissolution to a majority Government (whether defeated or undefeated) provided an alternative Government is possible and able to carry on with the existing House. If the Government is censured it is advisable that the Crown recall its predecessor and grant its request to dissolve.

(vi) Though an appeal to the electorate is always proper a series of dissolutions, particularly if they are based on the same reason, might represent a triumph over and not a triumph of the electorate.

(vii) A Government which has been granted a dissolution may not proceed to a second dissolution until the new Parliament proves unworkable and no other Government is likely and willing to carry on with the existing House.

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<sup>98</sup> *Ibid*, 116.

<sup>99</sup> *Ibid*, 121.

<sup>100</sup> *Ibid*, 116.

(viii) The question as to which party was granted the previous dissolution and the timing of dissolution (first or last of the Parliament) are matters which may be taken into account but are not in themselves decisive.<sup>101</sup>

Although the Crown's right to dissolve Parliament was thus limited by convention to such an extent that it prevented granting a Prime Minister a completely free hand at deciding when to dissolve Parliament, it remained the case that no conventions existed regulating the Prime Minister's right to do so.<sup>102</sup> It is submitted, however, that the Prime Minister may nevertheless have been obliged to request a dissolution in the event of either a successful vote of no confidence in his government or, as the case may be, an unsuccessful vote of confidence in his government, thereby suggesting that his discretion, although unquestionably wide, was not completely unlimited. As Brazier observed, '[d]efeats on an unambiguous motion of confidence or of no confidence has been treated as fatal by all governments since 1832.'<sup>103</sup>

As discussed in greater detail in Chapter Four, there are two types of constitutional conventions under the British constitution: regulatory and foundational. Regulatory conventions influence the behaviour of democratically-elected politicians, whilst foundational conventions serve to establish the political framework from which the political behaviour of such politicians may then be regulated.<sup>104</sup> Conventions regulating the Crown's power to dissolve Parliament, it is submitted, fall into the latter category and thus, in the absence of any conventions regulating the Prime Minister's right to request a dissolution of Parliament, do not make the executive more accountable to Parliament. As a result of this accountability deficit, the Prime Minister was accorded a political advantage over his opponents.<sup>105</sup> As Brazier has noted:

The Prime Minister will usually bring about a dissolution in good time before the maximum duration of Parliament and at the best moment as he can judge it for his party to win: this is an unfair advantage for him, but one which the Leaders of the opposition parties in the main hope to enjoy themselves one fine day.<sup>106</sup>

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<sup>101</sup> *Ibid*, 120. See also Brazier, n 86, 47-48 and Brazier, R. *Constitutional Reform* (2nd edn, Oxford: Oxford University Press, 1998), 137-138. Brazier suggests three further instances whereby the Crown may be able to refuse a request for dissolution by the Prime Minister, two of which are specific to a Hung Parliament.

<sup>102</sup> Markesinis, n 88, 121: 'As far as dissolution is concerned one must observe that though it is relatively easy to find rules regulating the exercise of the right by the Crown, no such rules exist, for the time being at least, limiting the Prime Minister's right to dissolve.'

<sup>103</sup> Brazier, n 86, 217.

<sup>104</sup> See Chapter Four, 131-133.

<sup>105</sup> Markesinis, n 88, 121: '[T]he particular danger lies in the fact that the Prime Minister alone is ultimately responsible for the timing and reason of dissolution and ... is free to use his power against his opponents, whether in the Opposition or his own party.'

<sup>106</sup> Brazier, n 86, 205.

This advantage extends also to members of the Prime Minister's own party, thereby making the power to dissolve power a powerful tool in enforcing party discipline as MPs seldom enjoy fighting elections and the risk of defeat that goes with them.<sup>107</sup> Prime Minister John Major in particular, during his turbulent administration, resorted to tabling motions of confidence in his own government in order to compel his own MPs to support his initiatives.<sup>108</sup>

Following this, it can be seen that the green paper proposals for reform of the power of the Crown to dissolve Parliament, had they been implemented, would have subjected the Prime Minister's use of the prerogative to prior parliamentary approval, thereby strengthening Parliament's control over the executive. The Fixed-term Parliaments Act, therefore, can be seen to be of far greater constitutional significance to that of the Brown proposals in two important respects.

Firstly, *The Governance of Britain* green paper, as noted above, sought only to alter the current convention. Because of the non-legal nature of conventions, their success at strengthening the position of Parliament is necessarily a relative one. It is in many ways the least one could do to strengthen the accountability of the executive to Parliament. Conversely, introducing fixed-terms is the most one could do. As Robert Blackburn argues:

The principal argument behind fixed term Parliaments is to remove this unfair advantage to the party in government, and lay down politically neutral constitutional rules imposed by law and known to all parties in advance. This would go further to distribute the balance of power away from the Executive towards Parliament, as aspired to in Labour's constitutional renewal programme.<sup>109</sup>

Secondly, and closely related to the first, the change is significant for the simple reason that it was deemed extremely unlikely to occur. As Blackburn also notes on the prospect of introducing fixed-term parliaments:

The prerogative power of dissolution of Parliament is a potent political tool, and its relinquishment by the Executive in favour of fixed intervals between elections will require considerable strength of character and will-power on the part of whichever future Prime Minister decides to adopt and implement the reform. It will be a rare example of political self-sacrifice, even greater than Herbert Asquith's decision to reduce the maximum parliamentary (and therefore governmental) term of office from seven to five years in the Parliament Act 1911.<sup>110</sup>

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<sup>107</sup> Markesinis, n 88, 121.

<sup>108</sup> Brazier, n 86, 219.

<sup>109</sup> Blackburn, n 71, 785.

<sup>110</sup> *Ibid*, 789.

The Government therefore boasted that the reform was ‘a significant and unprecedented surrender of Executive power,’<sup>111</sup> which, as the Deputy Prime Minister Nick Clegg MP stated, was ‘fundamental to this House [of Commons] and our democracy.’<sup>112</sup>

However, despite the fact that the prerogative power to dissolve Parliament has now been abolished, it was generally recognised that a power to dissolve Parliament in certain circumstances was still needed. As the Deputy Prime Minister argued, ‘there are circumstances in which the desire for a general election to press the reset button, is so great that something needs to happen.’<sup>113</sup> Such circumstances could include where a Prime Minister dies or resigns,<sup>114</sup> or either where a split in a coalition occurs, or where a government with a small working majority loses bye-elections or undergoes a backbench revolt, resulting in unworkable government. As a result, the power to dissolve Parliament and trigger an early election has been transferred from the Prime Minister to Parliament, albeit in a largely diluted form. As the Government categorically stated, ‘[t]he ... [Fixed-term Parliaments Act] ... provides that the power to trigger an early general election will rest with Parliament.’<sup>115</sup> Although a number of potential weaknesses with the Act have been identified, it will be shown below that these weaknesses are theoretical and unlikely to ever materialise.

The Act provides two ‘safety valves’<sup>116</sup> by which an early general election can be initiated. The first method for triggering an early general election is through the passing of a motion in the House of Commons which states that there should be one.<sup>117</sup> However, the Act qualifies this new parliamentary power in the form of a procedural limitation. Originally, it was intended that Parliament could be dissolved prematurely if 55 per cent of all MPs voted in favour of doing so.<sup>118</sup>

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<sup>111</sup> *Government response to the report of the Political and Constitutional Reform Committee on the Fixed-term Parliaments Bill*, Cm.7951 (2010), [4].

<sup>112</sup> House of Commons Political and Constitutional Reform Committee, First Report of Session 2010-11, *Parliamentary Voting System and Constituencies Bill, Report for Second Reading*, HC 422, August 2010, Appendix 2.

<sup>113</sup> House of Lords Select Committee on the Constitution, Eighth Report of Session 2010-11, *Fixed-term Parliaments Bill*, HL 69, December 2010, 24 [90].

<sup>114</sup> When one considers the general public’s overwhelmingly negative reaction to Gordon Brown’s refusal to hold a general election in 2007 following his appointment as Prime Minister, the ability for Parliament to trigger an election following a change in Prime Minister seems more than sensible. For more information on the ‘phoney election’ of 2007 see Blackburn, n 71.

<sup>115</sup> *Government response*, n 111, [9].

<sup>116</sup> This is the terminology used by the House of Lords Select Committee on the Constitution, n 113, 5-6 [6].

<sup>117</sup> Section 2(1)-(2).

<sup>118</sup> *The Coalition: our programme for government* (HM Government, 2010), 26.

Under the Act, this was changed to two-thirds of all MPs.<sup>119</sup> This provision means that early elections cannot be called for the benefit of the ruling party, as no post-war government has ever secured two-thirds of all seats in the Commons. It means also that Parliament is less likely to be dissolved prematurely<sup>120</sup> – this is, after all, the purpose behind of the Act. As the Minister for Political and Constitutional Reform Mark Harper MP explained:

[T]he logic was to set a number that was sufficiently high that it was unlikely that a government could reach it ... it would have to be a cross-party decision with broad support across the House, which means that it would not be being done for partisan reasons but because of the general sense that an early election was in the interests of the country.<sup>121</sup>

As the Political and Constitutional Reform Committee observed, the requirement for a super-majority in the House of Commons is a novelty.<sup>122</sup> It does not, however, shift the balance within the constitution away from the political and towards the legal. Super-majorities are indeed more commonly associated with primarily legal constitutions, but the adoption of them under the Act in no way constitutes a limitation on the power of Parliament 'to make and unmake any law whatever.'<sup>123</sup> Any procedural limitation remains subject to repeal or amendment by legislation passed with a simple majority.

Despite this, however, some have nevertheless argued that the requirement for a super-majority will dilute the ability of parliamentarians to hold the government to account. As George Howarth MP has argued:

We are sent here [the House of Commons] to exercise a judgment about many things, one of which is the performance of any Government at any given time. One of the devices that we have at our disposal in such circumstances is a vote of no confidence. Normally, a vote of no confidence can trigger an election process, subject to the monarch and all the procedures that have to take place in those circumstances. I do not believe that our constituents want us to be in a position where we retain the right to pass a vote of no

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<sup>119</sup> Section 2(1)(b). See also House of Lords Select Committee on the Constitution, n 113, 26 [99]: 'This proposal [of a 55 per cent threshold] was subject to significant criticism ... particularly with regard to the suspicion that the percentage chosen was designed to enable the coalition Government, but not the opposition parties, to dissolve Parliament. These concerns led to the Government raising the bar to a two-thirds majority vote when the Bill was introduced.'

<sup>120</sup> *cf.* House of Lords Select Committee on the Constitution, *ibid*, 26 [101]. The committee notes the concern of Professor Vernon Bogdanor that the two-thirds requirement gives a government with a landslide majority a potentially unfair advantage. Indeed, although no government since the Second World War has had a two-thirds majority, this does not mean that such a majority is impossible to achieve.

<sup>121</sup> *Ibid*, 26 [100].

<sup>122</sup> House of Commons Political and Constitutional Reform Committee, Second Report of Session 2010-11, *Fixed-term Parliaments Bill*, HC 436, September 2010, 12 [35].

<sup>123</sup> Dicey, n 3, xxxiv-xxxv.

confidence if the effect of that vote is dependent on the proportion of members who voted for it ...

I was sent here to make sure that whatever the political composition of the Government of the day, I had the ability on behalf of my constituents to say, "Enough is enough. Go!" That ability, which I have had for 20-odd years that I have been a Member of the House, is circumscribed by the terms of the ... [Fixed-term Parliaments Act] ...<sup>124</sup>

It is submitted, however, that this argument fails to draw a distinction between dissolving Parliament and dismissing government. As seen with the second method for triggering an early election discussed below, Parliament can still pass a motion of no confidence by simple majority against the government. The necessity for being able to call a general election in the above manner arises, not out of a need to hold the government to account, but out of a need to have an effective and legitimate government. In other words, it is a procedure designed to allow an election to be called where an incumbent government needs to win the support of a newly appointed Prime Minister, or where government has proved to be unworkable.<sup>125</sup> This is evidenced by that fact that a two-thirds majority most likely requires cross-party support. As the Government asserted, 'the proposals set out in the...[Fixed-term Parliaments Act]...already require cross-party agreement for the passing of a dissolution motion, since the threshold has been set at a level which no post-war Government has been able to achieve on its own.'<sup>126</sup> The provision, therefore, was drafted to prevent not only the government from calling a general election for its own benefit, but the opposition also.

The second method for triggering an early election is through the sitting government losing a vote of no confidence by simple majority with no motion of confidence in the government being issued within the following fourteen days.<sup>127</sup> Although the wording of the enacted provision strongly implies that a motion of confidence can only be passed in order to reconstitute the sitting government,<sup>128</sup> it is clear that the intention behind the fourteen day period was to allow ample

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<sup>124</sup> *Hansard*, HC Deb, vol. 515, col. 652 (13 September 2010).

<sup>125</sup> Amendments were in fact proposed to the Act during its passage through the House of Lords which, if they had been successful, would have expressly stated this as a ground for the automatic dissolution of Parliament and the triggering an early general election if a workable government could not be formed after a specified period of time.

<sup>126</sup> *Government response*, n 111, [44].

<sup>127</sup> Section 2(3)-(5).

<sup>128</sup> Section 2(5) of the Fixed-term Parliaments Act 2011 states that: 'The form of motion for the purposes of subsection 3(b) is – "That this House has confidence in Her Majesty's Government."' This original draft proposal, however, instead stated that 'the period of 14 days after the specified day has ended without the House passing *any* motion of confidence in any Government of Her Majesty' (Bill 64 2010-11, clause 2(2)(b)) (emphasis added). On a bare reading, the enacted provision appears to exclude the possibility of alternative governments from being formed, whilst the original provision does not.

time for alternative governments to be formed as well.<sup>129</sup> The threat of an election can be used, not only as a tool from which an incumbent government may theoretically be held to account, but also as a means by which an incumbent government may reassert its authority.

However, because a general election will automatically take place if no alternative government can be formed within fourteen days, and because a vote of no confidence requires only a simple majority to succeed, the second safety-valve does not prevent an incumbent government from forcing a general election, a potential weakness of the provision that risks undermining the legislative intention behind the Act. As Chris Bryant MP noted on an early draft:

[A] Prime Minister who wanted to ensure an early general election at a time of his or her own choosing would simply engineer a motion of no confidence or, for that matter – as there is no determinant for what counts as a motion of no confidence – table a motion of confidence in which the Government then chose not to vote. The Opposition would almost certainly vote against the motion of confidence, and an early general election would follow.<sup>130</sup>

Although an early election can now only be triggered under the second safety-valve where there is a successful motion of no confidence in the form stipulated under s 2(4), the government, because it has a majority, could still engineer an early election by voting in favour of, or abstaining from, a motion of no confidence in itself. It would then need only to sit-out the fourteen days allocated for forming a working government, as the opposition parties, even if they all decided to band together against the incumbent government, would assumedly not have enough MPs to secure the competence of the House. The opposition, however, would most likely see this coming and, if they wished to prevent an election from being called, would most likely vote against the motion of no confidence.

Therefore, despite the Prime Minister retaining a *de facto* power to call a general election almost whenever he or she likes, it is submitted that its exercise is theoretical and highly unlikely. Although recent experiences of Canada suggests that the public are not always willing to condemn blatant abuses of power,<sup>131</sup> passing a motion of no confidence in oneself is akin to political suicide. After all, if a government cannot trust itself, how can they expect the people to trust it and vote for it in the election? As the Deputy Prime Minister Nick Clegg MP noted:

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<sup>129</sup> On the intention behind the inclusion of the 14 day period in the original provision see House of Lords Select Committee on the Constitution, n 113, 30-32 [120]-[130]. On the retention of this intention under the enacted provision see *Hansard*, HC Deb, vol. 531, col. 385 (13 July 2011) (Mr Harper).

<sup>130</sup> *Hansard*, HC Deb, vol. 519, col. 325 (24 November 2010).

<sup>131</sup> House of Lords Select Committee on the Constitution, n 113, 33 [133]-[135].

[I]f a government sought to do that it would be so transparent and so self-evidently grubby and self-serving that it would not do that government any good at all. The final court of opinion, of course, is what the electorate would do, and I think they would be very unforgiving...can you exclude that theoretical possibility? I think it is pretty difficult to do that. Can you exclude it in practical political terms? I think you pretty well nigh can.<sup>132</sup>

Another potential weakness of the Fixed-term Parliaments Act is that it fails to abolish every prerogative power associated with the dissolution of Parliament. Despite abolishing the Crown's power to dissolve Parliament, the Act fails to abolish the power of the Crown to appoint the Prime Minister, and even expressly retains the Crown's power, exercised on the advice of the Prime Minister, to prorogue Parliament, that is, bring to an end a parliamentary session and therefore all of the business before the House of Commons.<sup>133</sup> The retention of this prerogative power caused concern within the Political and Constitutional Reform Committee that an incumbent Prime Minister, after losing a vote of no confidence, could compel an early general election in order to prevent the government's rivals in Parliament forming a working government.<sup>134</sup> If the House of Commons is unable to sit, the opportunities for an alternative government to gain the confidence needed to govern could be removed. Although not denying the legal possibility for the power to suspend Parliament being used in such a way, the Government nevertheless asserts that it is politically impossible. As the Government noted:

[T]he provisions of the ... [Fixed-term Parliaments Act] ... mean that proroguing Parliament in these circumstances would not stop the clock on the 14-day government formation period, and an election would therefore result. Political gamesmanship of the kind envisaged by the Committee would be a very public matter, and we believe it would result only in a damning verdict from the electorate at the subsequent general election. We therefore see no need legally to limit the prerogative further to deal with such an eventuality. The Government considers that such political safeguards in our constitution should not be underestimated.<sup>135</sup>

The Select Committee on the Constitution seemed to side with the Government on this issue, concluding that the power to prorogue Parliament should be retained due to the very small risk of it being abused.<sup>136</sup> Although this is not disputed by this thesis, it is nevertheless submitted that the retention of this power, along with the power to appoint the Prime Minister, sits uncomfortably with the abolition of the power to dissolve Parliament. All of the prerogative

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<sup>132</sup> *Ibid*, 33 [132].

<sup>133</sup> Section 4.

<sup>134</sup> House of Commons Political and Constitutional Reform Committee, n 122, 15 [48].

<sup>135</sup> *Government response*, n 111, [50].

<sup>136</sup> House of Lords Select Committee on the Constitution, n 113, 36 [149].



powers associated with the dissolution of Parliament should have been abolished and placed on a statutory footing in order to fill the gap in accountability.

Because the Fixed-term Parliaments Act places the power to dissolve Parliament on a statutory footing, concerns were also raised during the Act's passage through Parliament by the Clerk of the House that the courts would be invited to scrutinise the internal proceedings of Parliament. As the Clerk noted:

[E]mbodiment of these internal proceedings in statute radically changes their status since, by reason of being embodied in statute law, they become questions which are ultimately to be determined by the judiciary rather than by members of the legislature accountable to the electorate whom they serve.

The history of the courts' involvement in interpreting the meaning of words in the Bill of Rights and the implications of human rights aspects of European law, provide no basis for concluding that the courts will keep out of this new statutory territory. Indeed, it is the purpose of the courts to interpret and apply the law to individual cases.<sup>137</sup>

Political constitutionalists would almost certainly object to judicial interference in the internal workings of Parliament, especially where the outcome could effectively decide who gets to form government. Tomkins, for example, raises objections to the court reviewing what he considers to be political questions, 'such as whether a government minister has acted as is required in a democratic society in the interests of national security or public health.'<sup>138</sup> According to Tomkins, 'in a democracy, those who are empowered for the time being to resolve political disputes are required to be politically accountable. Judges are not, which makes the transferring to the courts of responsibility for answering political questions objectionable.'<sup>139</sup> Legal constitutionalists would also most likely view judicial interference with the internal proceedings of Parliament as unnecessary.<sup>140</sup>

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<sup>137</sup> House of Commons Political and Constitutional Reform Committee, n 122, 10 [26]. Under the Government's original proposals, the triggers for an early election required a Speaker's certificate which would be 'conclusive for all purposes' (see Bill 64 2010-11, clause 2 ). Due to the concerns raised by the House of the Clerk that the certificates may be open to challenge by the courts, the requirement for a Speaker's certificate were eventually dropped. The Government accordingly defined with greater precision the wording required of both motions of no confidence and motions of confidence in order to prevent the need for certification by the Speaker. See Hansard, HC Deb, vol. 531, cols. 386-387 (13 July 2011) (Mr Harper).

<sup>138</sup> Tomkins, n 43, 26.

<sup>139</sup> *Ibid.*

<sup>140</sup> For arguments in favour of judicial oversight of the Fixed-term Parliaments Act, however, see Youngs, R. and Thomas-Symonds, N. 'The Problem of the 'Lame Duck' Government: A Critique of the Fixed-term Parliaments Act' (2013) 66(3) *Parliamentary Affairs* 540.

It is submitted, however, that the concerns raised by the Clerk of the House were, for reasons shared by the Government, completely unfounded.<sup>141</sup> Firstly, there is a legal precedent forbidding the courts to intervene on issues of parliamentary procedure. As Article 9 of the Bill of Rights 1688 states: 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.'<sup>142</sup> Secondly, it is highly unlikely that the courts themselves would even want to discuss and decide upon political issues relating to the internal proceedings of Parliament.<sup>143</sup> As Robert Hazell noted on the matter, 'the probability is that they [the courts] would consider the issue to be non-justiciable; an obligation to be enforced in the political but not the legal sphere.'<sup>144</sup> As a result, it appears all but certain that the Fixed-term Parliaments Act is non-justiciable.

Although a legal means of change, the Fixed-term Parliaments Act has successfully strengthened parliamentary rather than judicial controls over the executive's use of the royal prerogative in a way which commands broad support. A highly controversial power which the executive was using to its own advantage has been removed and given instead to Parliament. Parliament, not the government, may now decide if there should be an early election, thereby loosening the executive's grip over Parliament whilst also giving Parliament control over its own dissolution. Although the impact of fixed terms upon party discipline, and thus the government's hold over Parliament, is not yet known,<sup>145</sup> knowledge of when the next general election is to be held may yet result in a loosening of party discipline, thereby further strengthening Parliament's ability to hold the government to account.

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<sup>141</sup> See *Government response*, n 111, [28]-[33]. The Government also provided two further reasons specific to clause 2.

<sup>142</sup> *Ibid*, [32].

<sup>143</sup> *Ibid*, [31].

<sup>144</sup> House of Commons Political and Constitutional Reform Committee, n 122, 11 [30].

<sup>145</sup> The House of Commons Political and Constitutional reform Committee has not examined this issue yet, although it has examined the impact of fixed terms on government departments. See House of Commons Political and Constitutional Reform Committee, Fourth Report of Session 2013-14, *The role and powers of the Prime Minister: The impact of the Fixed-term Parliaments Act 2011 on Government*, HC 440, July 2013.

### 3.3 Extending Judicial Review

It was noted in the previous chapter that judicial review under the British constitution is an example of complementary constitutionalism where the legal elements of the constitution support the political elements. This is because of the *ultra vires* model of review, whereby the courts hold the executive to account by ensuring that it abides by the law as expressed chiefly by Acts of Parliament. The royal prerogative, however, has historically been granted immunity from judicial review because it falls outside of the scope of the *ultra vires* model of review. If the purpose of judicial review is to enforce the limits of statutory intention, judicial review would not logically apply to the prerogative because it is not derived from an Act of Parliament, but is instead a separate and distinct source of authority. As Mark Elliott notes:

In the absence of a Judicial Review Act providing for supervision of non-statutory powers, an immovable obstacle would block the application of the principles of good administration to powers which do not owe their existence to the will of Parliament, however significant those powers and however desirable judicial oversight of them may be.<sup>146</sup>

As noted in the previous section, placing the prerogative powers of the Crown, or controls on them, on a statutory footing would resolve this issue, and would most likely be a solution supported by both political and legal constitutionalists. It is submitted, however, that despite falling outside of the *ultra vires* model of review, the recent extension of judicial review to include prerogative powers, far from contradicting the underlying values of the political constitution, can instead be seen to complement them, thereby providing further evidence of complementary constitutionalism.

The move towards expanding judicial review, however, was not a sudden occurrence after centuries of judicial inactivity. It was instead a gradual process whereby the courts, little by little, chipped away at the prerogative's immunity to judicial scrutiny in an effort to bring its exercise under control, sometimes in creative ways which arguably push the boundaries of complementary constitutionalism.

Although, as noted above, the courts have shown reluctance in determining the existence and scope of claimed prerogative powers, the courts have nevertheless actively sought to subjugate the executive's use of the prerogative to the will of Parliament, thereby bringing it under greater

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<sup>146</sup> Elliott, M. *The Constitutional Foundations of Judicial Review* (Oxford and Portland, Oregon: Hart Publishing, 2001), 165.

control. This is precisely what happened in *Attorney-General v De Keyser's Royal Hotel Ltd*.<sup>147</sup> Here, a hotel owner claimed compensation under the Defence Act 1842 for the occupation by the armed forces of his establishment during the Great War. The Crown, however, refused compensation on the grounds that the hotel was requisitioned, not under the Defence Act, but instead under the royal prerogative. The House of Lords unanimously held that the requisition of the hotel had occurred under the Defence Act and not the royal prerogative. The hotel owner, therefore, was entitled to compensation as stipulated under the Defence Act. In reaching this conclusion, they argued that, where a subject matter is governed both by the prerogative and by statute, the latter takes precedence over the former. As Lord Atkinson noted:

It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative to do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which might therefore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same – namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may therefore have been.<sup>148</sup>

Their Lordships, therefore, managed to avoid reviewing the executive's exercise of the royal prerogative, along with the controversy it would inevitably have brought, by focusing instead upon the proper construction of the Defence Act 1842 and the implications they believed it had upon the existence and scope of the executive's claimed prerogative power. By reasserting the supremacy of statute over the prerogative, however, it is submitted that Parliament, not the courts, were the ultimate beneficiary. Legal methods of accountability were used, not to undermine the underlying values of the political school, but instead to enforce them against an executive all too eager to use the prerogative to subvert Parliament's clear intention.

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<sup>147</sup> *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

<sup>148</sup> *Ibid*, 539-540. See also 526 (Lord Dunedin); 554 (Lord Moulton); 561 (Lord Sumner); 575 (Lord Parmoor).

Another major development in the judicial review of prerogative powers occurred in the 1967 case of *R v Criminal Injuries Compensation Board, ex parte Lain*.<sup>149</sup> Here, the widow of a police officer killed in the line of duty sought to challenge the refusal of the Criminal Injuries Compensation Board to award her compensation for her husband's death. The Board was not a creature of statute, however, but instead of the royal prerogative, and it was intended that their decisions would not be subject to either judicial or ministerial scrutiny.<sup>150</sup> The question before the High Court, therefore, was whether they had the power to review the decisions of a non-statutory body. The High Court unanimously held that they did have jurisdiction to review acts of the Board, regardless of the fact that it did not have its origins in an Act of Parliament. As Diplock L.J. noted:

I see no reason in principle why the fact that no authority from Parliament is required by the executive government to entitle it to decide what shall be the form of the administrative process under which compensation for crimes of violence is paid, should exempt the board from the supervisory control by the High Court over that part of its functions which are judicial in character. No authority has been cited which in my view compels us to decline jurisdiction. Certainly, applicants have an interest in the proper performance by the board of its judicial functions. And ... so has the public, whose money the board distributes to the tune of nearly a million pounds a year.<sup>151</sup>

The Board, despite lacking a statutory basis, was nevertheless empowered to 'take decisions affecting individual rights and interests.'<sup>152</sup> By extending judicial review to include public bodies created under the prerogative, therefore, a significant gap in accountability was closed. Despite this, however, the High Court failed to seriously consider whether the Crown possessed the power under the prerogative to create such a powerful body without express parliamentary approval in the first place.<sup>153</sup> Greater legal control over the prerogative was achieved, therefore, but in a manner which subjugated the executive to the courts rather than to Parliament.

The major breakthrough in the judicial review of prerogative powers, however, occurred in 1985 with the *GCHQ* case.<sup>154</sup> The case was centred on the legality of an instrument made under an Order in Council, which had in turn been made under the royal prerogative, which prevented members of a British intelligence agency – the Government Communications Headquarters (GCHQ) – from joining a trade union. Although their Lordships found that the GCHQ members

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<sup>149</sup> *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864.

<sup>150</sup> *Ibid*, 876.

<sup>151</sup> *Ibid*, 888. See also 881 (Lord Parker C.J.) and 891 (Ashworth J.).

<sup>152</sup> Sunkin and Payne, n 5, 12.

<sup>153</sup> In reaching his decision, however, Lord Parker C.J. attached some significance to the fact that the Board had been recognised in parliamentary debate, and that Parliament had provided the money that the Board was charged with paying out to victims of violent crime. See *Lain*, n 149, 881.

<sup>154</sup> *Council of Civil Service Unions*, n 67.

were entitled to legitimately expect to be consulted prior to any changes in the terms of their employment, they nevertheless concluded that the actions of the Government were legal on the grounds of national security.

The constitutional significance of the decision rests in the fact that three of their Lordships – Lord Diplock, Lord Scarman, and Lord Roskill – found that the instrument in question, despite being made under an Order in Council, was nevertheless in principle subject to judicial review. The constitutional significance of this to the history of the royal prerogative was, and perhaps still is, unrivalled; the blanket immunity enjoyed by the royal prerogative by virtue of that fact that it is derived from an original and not a secondary source was finally rejected. As Lord Scarman famously remarked:

I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power ... Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.<sup>155</sup>

Subject matter and not source now determines reviewability, although there remains some areas of executive competence which the courts cannot or will not review. In the *GCHQ* case itself, their Lordship's clearly felt that national security was one such area of executive competence which fell outside the scope of review. As Lord Diplock noted; '[n]ational security is the responsibility of the executive government ... It is *par excellence* a non-justiciable question. The judicial process is totally inept to deal with the sort of problems it involves.'<sup>156</sup> Although their Lordships' exclusion of national security from the remit of judicial review has not been condemned by everyone,<sup>157</sup> Lord Roskill's subsequent *dicta* on what government activities he felt were and were not excluded from

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<sup>155</sup> *Ibid*, 407.

<sup>156</sup> *Ibid*, 412.

<sup>157</sup> In support of the exclusion of matter of national security from the scope of judicial review see the comments of Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [62]: 'In matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons to whom the people have elected and to whom they can remove.'

judicial review prevented the decision from completely plugging the gap in accountability caused by the prerogative. As Lord Roskill noted:

I do not think that the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.<sup>158</sup>

The result of Lord Roskill's open list of excluded competences was inevitably the continuing immunity of much of the royal prerogative from judicial review. Moreover, as Thomas Poole remarks, even in relation to areas that are not excluded from judicial review, 'the courts tend still to approach the prerogative with a caution bordering on outright deference.'<sup>159</sup> Also, because the case involved the reviewability of *de facto* secondary legislation issued under the royal prerogative, and not the reviewability of primary prerogative legislation, doubts over whether the comments by both Lord Scarman and Lord Roskill applied to the reviewability of the royal prerogative as a whole arose and persisted until, that is, the decision of the House of Lords in *Bancoult (No. 2)*<sup>160</sup> twenty-three years later.

During the intermediate period between the *GCHQ* case and *Bancoult (No. 2)*, however, another major extension in the judicial control of the prerogative occurred in *Secretary of State for the Home Department, ex parte Fire Brigades Union and Others*.<sup>161</sup> The case concerned an action for judicial review of the Home Secretary's powers under s 171(1) of the Criminal Justice Act 1988 (CJA) to appoint the day when the new criminal injuries compensation scheme, contained primarily within sections 108 to 117, would come into force and replace the existing compensation scheme which operated under the royal prerogative. Section 171(1) stated that:

Subject to the following provisions of this section, this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint and

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<sup>158</sup> *Council of Civil Service Unions*, n 67, 418.

<sup>159</sup> Poole, T. 'United Kingdom: The royal prerogative' (2010) 8(1) *International Journal of Constitutional Law* 146, 149.

<sup>160</sup> *Bancoult (No. 2)* (House of Lords), n 9.

<sup>161</sup> *Fire Brigades Union*, n 7.

different days may be appointed in pursuance of this subsection for different provisions or different purposes of the same provision.

Instead of implementing the statutory scheme, the then Home Secretary decided to put into force an alternative tariff system under the royal prerogative, a compensation scheme which was fundamentally different to the one outlined in the CJA. Both the Court of Appeal and the House of Lords therefore had to answer two questions: firstly, whether the Home Secretary had a legal duty to implement the statutory scheme under s 171; secondly, whether he had acted unlawfully in deciding to implement the non-statutory scheme instead of the statutory one.

By a majority of two to one, the Court of Appeal held that the Home Secretary had abused his powers, although their reasoning was far from unanimous. In response to the first question, Sir Thomas Bingham held that the Home Secretary was under a legal duty to implement the statutory scheme 'as soon as he might properly judge it to be appropriate to do so' and, as a result, 'would be entitled to have regard to all relevant factors ... [including] ... the time needed to make preparations and prepare subordinate legislation.'<sup>162</sup> On the facts, however, he held that the Home Secretary had not breached this duty. Both Hobhouse L.J. and Morritt L.J., by contrast, disagreed with Bingham's conclusion that the Secretary of State was under a legal duty to implement the statutory scheme. As Hobhouse L.J. argued:

Parliament in the present case has chosen by section 171(1) to provide that the relevant provisions shall not come into force until the minister decides that they should. It has done so in unqualified terms and in words which expressly allow him to appoint different dates for different provisions and even to appoint different dates for different purposes for the same provision. Parliament has chosen, despite the alternatives open to it, not to impose any restriction upon the Secretary of State. In these circumstances, in my judgment, it is not possible, or proper, to imply into section 171(1) any requirement whatsoever as to the time scale within which the minister may or must appoint a day. It follows that the Secretary of State cannot be required at any stage to appoint a day and is at liberty to put off the appointment indefinitely.<sup>163</sup>

Although Morritt L.J. agreed that the Home Secretary was under no legal duty to implement the statutory scheme,<sup>164</sup> he nevertheless argued that the Home Secretary was under a political duty to do so. As a result, Parliament, not the courts, was the appropriate forum for holding the Home Secretary to account. As he noted:

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<sup>162</sup> *R v Secretary of State for the Home Department, ex parte Fire Brigades Union and Others* [1995] 2 WLR 1, 8.

<sup>163</sup> *Ibid*, 14.

<sup>164</sup> *Ibid*, 22: 'I conclude ... that there is no duty imposed on the Secretary of State by section 171(1) Criminal Justice Act 1988 to implement sections 108 to 117 of and Schedules 6 and 7 to the Act.'



If Parliament considers that the Secretary of State has failed to perform his duty to Parliament then there are, no doubt, adequate parliamentary means by which to compel him to do so or to secure his replacement.<sup>165</sup>

On the second question, Hobhouse L.J., applying the principle in *De Keyser's Royal Hotel* strictly, found that there had been no abuse of power. Because sections 108 to 117 were not yet in force, he argued, they were not yet law.<sup>166</sup> Consequently, '[i]f the statutory provisions were not in force ... [t]he executive's powers would not have been abridged or qualified by any law nor would the executive be acting contrary to any law.'<sup>167</sup> Sir Thomas Bingham and Morritt L.J., however, found that the Home Secretary had abused his powers under the royal prerogative.<sup>168</sup> In reaching this conclusion, both attached significance to the fact that the tariff scheme was inconsistent with the compensation scheme legislated for by Parliament, regardless of the fact that the relevant provisions were not yet in force, thereby extending the principle in *De Keyser's Royal Hotel*. As Sir Thomas Bingham argued:

[Parliament] ... has approved detailed provisions governing the form which, underpinned by statute, the scheme should take ... It was, of course, open to the Secretary of State to invite Parliament to repeal those provisions ... He could have sought enactment of provisions giving effect to the tariff scheme in substitution for the 1988 provisions; or if the 1988 provisions were simply repealed he could have exercised his prerogative powers to introduce the tariff scheme, the field then being once more unoccupied by statute. What in my judgment he could not lawfully do, so long as the 1988 provisions stood unrepealed as an enduring statement of Parliament's will, was to exercise prerogative powers to introduce a scheme radically different from what Parliament had approved.<sup>169</sup>

By extending the principle in *De Keyser's Royal Hotel*, Sir Thomas Bingham and Morritt L.J. arguably increased judicial control over the executive's control of the prerogative without resorting to creative methods of statutory construction to justify their conclusions. It is true that both interpreted s 171(1) as imposing a duty upon the Home Secretary despite the absence of any express statutory limitations, but Morritt L.J. classified it a purely political one owed to Parliament, and thus beyond legal enforcement by the courts, whilst Sir Thomas Bingham was unconvinced that the duty had in fact been breached. The majority's decision, therefore, turned completely on the relationship between statute and the prerogative, specifically the superiority of statute to the prerogative whether in force or not. As a result, the Court of Appeal's decision can be seen to

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<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*, 16.

<sup>167</sup> *Ibid.*, 19.

<sup>168</sup> *Ibid.*, 10 (Sir Thomas Bingham); 24-25 (Morritt L.J.).

<sup>169</sup> *Ibid.*, 10. See also 24-25 (Morritt L.J.).

respect and reinforce the democratic legitimacy of Parliament, and is thus an example of complementary constitutionalism.

On appeal to the House of Lords, their Lordships, by a majority of three to two, Lord Keith and Lord Mustill dissenting, upheld the Court of Appeal's ruling that the Home Secretary had abused his powers. Their Lordships reasoning, however, was just as disparate as it was in the Court of Appeal, and although it is submitted that the decision remains an example of complementary constitutionalism, it is arguably less respectful to the political school than the Court of Appeal's.

Both Lord Browne-Wilkinson and Lord Nicholls, forming the bulk of the majority judgment, held that, despite the absence of any express limitations on his powers under s 171(1), the Home Secretary was nevertheless under a legal duty to consider from time to time the question of when to bring into force the statutory scheme,<sup>170</sup> a duty which they also held had been breached by the Home Secretary in introducing the tariff scheme under the royal prerogative which was inconsistent with the statutory one.<sup>171</sup> As Lord Nicholls argued:

This statutory duty is not devoid of practical consequence. By definition, the continuing existence of this duty has an impact on the Secretary of State's freedom of action. Since the legislature has imposed the duty on him, it necessarily follows that the executive cannot exercise the prerogative in a manner, or for a purpose, inconsistent with the Secretary of State continuing to perform this duty. The executive cannot exercise the prerogative power in a way which would derogate from the due fulfilment of a statutory duty. To that extent, the exercise of the prerogative power is curtailed so long as the statutory duty continues to exist. Any exercise of the prerogative power in an inconsistent manner, or for an inconsistent purpose, would be an abuse of power and subject to the remedies afforded by judicial review.<sup>172</sup>

Although he did not comment on whether or not the Home Secretary was under a continuing duty to review the implementation of the statutory scheme, Lord Lloyd nevertheless agreed with his colleagues in the majority that the Home Secretary could not decide whether to introduce the statutory scheme, only when to introduce it. As he noted:

The mistake which, if I may say so, underlies the dissenting judgment of Hobhouse L.J. is to treat these sections [sections 108 to 117 of CJA] as if they did not exist. True, they do not have statutory force. But that does not mean that they are writ in water. They contain a statement of Parliamentary intention, even though they create no enforceable rights. Approaching the matter in that way, I would read section 171 as providing that sections 108 to 117 *shall* come into force *when* the Home Secretary chooses, and not that they

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<sup>170</sup> *Fire Brigades Union*, n 7, 551. See also 575 (Lord Nicholls).

<sup>171</sup> *Ibid*, 554. See also 575-576 (Lord Nicholls).

<sup>172</sup> *Ibid*, 575-576.

*may* come into force *if* he chooses. In other words, section 171 confers a power to say when but not whether.<sup>173</sup>

In implementing the tariff scheme, therefore, Lord Lloyd reached the conclusion that the Home Secretary had acted inconsistently with his continuing power to bring the statutory power into force under s 171, and thus, as a result, unlawfully.<sup>174</sup> As he noted:

I can find nothing in section 171 which, on its true construction, justifies the Home Secretary's refusal to implement the statutory scheme. Whether that refusal should be regarded as an abuse of the power which he was given under section 171, or as the exercise of a power which he has not been given, does not matter. The result is the same either way. By renouncing the statutory scheme, the Home Secretary has exceeded his powers, and thereby acted unlawfully.<sup>175</sup>

Although he was of the opinion that the Home Secretary was under a continuing duty under s 171(1) to appoint a day for the statutory scheme to come into force,<sup>176</sup> Lord Mustill, dissenting, concluded that the implementation of the tariff scheme did not, in his opinion, frustrate this duty.<sup>177</sup> As he noted:

Nothing is certain in politics. Who is to say that a successor in office, under the present or some future administration, with wholly different ideas on social policy and financial means and priorities, might not decide that the present Secretary of State has taken a completely wrong turning and that after all the Parliamentary scheme is best? If he did so, and made an order under section 171(1), accompanied by the necessary regulations and by executive action to wind up the new scheme, there is nothing in what the present Secretary of State has done that could stand in his way. His words have no lasting effect; he has not put an end to the statutory scheme; only Parliament can do that. So long as he and his successors in office perform in good faith the duty to keep the implementation of Part VII under review there is in my opinion no ground for the court to interfere.<sup>178</sup>

Lord Keith, by contrast, agreed with Morritt L.J. that the duty upon the Home Secretary to review the implementation of the statutory scheme was political rather than legal in nature. As Lord Keith stated:

[T]he terms of section 171(1) are not apt to create any duty in the Secretary of State owed to members of the public ... any decision by the Secretary of State as to whether or not

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<sup>173</sup> *Ibid*, 570-571.

<sup>174</sup> *Ibid*, 572: 'The introduction of the tariff scheme, which is to be put on a statutory basis as soon as it has had time to settle down, is plainly inconsistent with a continuing power under section 171 to bring the statutory scheme into force.'

<sup>175</sup> *Ibid*, 571.

<sup>176</sup> *Ibid*, 565.

<sup>177</sup> *Ibid*, 563 (Lord Mustill): 'I would reject the argument that the continuing omission to implement the statutory scheme was a breach of any duty arising from section 171(1).'

<sup>178</sup> *Ibid*, 566-567.

sections 108 to 117 should be brought into effect at any particular time is a decision of a political and administrative character quite unsuitable to be the subject of review by a court of law. The fact that the decision is of a political and administrative character means that any interference by a court of law would be a most improper intrusion into a field which lies peculiarly within the province of Parliament. The Secretary of State is unquestionably answerable to Parliament for any failure in his responsibilities, and that is the proper place, and the only proper place, for any possible failure in the present respect to be called in question.<sup>179</sup>

In making their dissenting judgments, both sought to highlight the political nature of the Home Secretary's power under s 171, with Lord Keith emphasising the desirability of political forms of accountability as a result. In so doing, however, both failed to bring the prerogative under control and readdress the imbalance between Parliament and the executive. By contrast, the majority of the House of Lords, despite the differences between Lord Lloyd's reasoning and that of both Lord Browne-Wilkinson and Lord Nicholls, successfully brought the executive's exercise of the royal prerogative under control by reasserting the prerogative's subservience to statute, and thus of Parliament's supremacy over the executive. As Lord Browne-Wilkinson argued:

My Lords, it would be most surprising if, at the present day, prerogative powers could be validly exercised by the executive so as to frustrate the will of Parliament expressed in a statute and, to an extent, to pre-empt the decision of Parliament whether or not to continue with the statutory scheme even though the old scheme has been abandoned ... It is for Parliament, not the executive, to repeal legislation. The constitutional history of this country is the history of the prerogative powers of the Crown being made subject to the overriding powers of the democratically elected legislature as the sovereign body.<sup>180</sup>

This was achieved, however, by implying a limitation upon the Home Secretary's otherwise unlimited discretionary power to decide both when and whether to introduce the statutory scheme, thereby blurring the distinction between judicial interpretation and legislative lawmaking in a manner arguably more akin to legal constitutionalism. Compared with the majority judgment in the Court of Appeal, therefore, the decision of the House of Lords, despite its effect, arguably frustrates, rather than upholds, Parliament's enacted intention. Because it readdresses the balance between Parliament and the executive in favour of the former, however, it is submitted that their Lordships ruling remains an example of complementary constitutionalism, albeit one which is less complementary than the Court of Appeal's decision to extend the principle in *De Keyser's Royal Hotel* to include statutory provisions not yet in force. The decision, therefore, illustrates the fine and often imperfect line complementary constitutionalism treads.

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<sup>179</sup> *Ibid*, 544.

<sup>180</sup> *Ibid*, 552.

Although the history behind and the facts of *Bancoult (No. 2)* are perhaps too complex to recount in full for the purposes of this thesis, it can nevertheless be summarised as follows:

In 1965 the many islands of the Chagos Archipelago, located in the Indian Ocean and owned by Britain, were transformed into an overseas colony separate and distinct from Mauritius called the British Indian Overseas Territory (BIOT). This change was enacted via the British Indian Ocean Territory Order 1965, an Order in Council issued under the royal prerogative. The Order granted the BIOT commissioner powers to 'make laws for the peace, order and good government of the territory.' In 1971, the BIOT commissioner accordingly issued the Immigration Ordinance 1971, which forcibly relocated the entire population of BIOT to Mauritius. This was done in order to establish a US military base on the principal island of the Chagos Archipelago – Diego Garcia – which was formalised in the form of a treaty between Britain and America following the forced exile of the Chagossians or Ilois.

Unsurprisingly, the exiled Chagossians launched a series of legal actions against their removal, beginning in 1975, and culminating in 1998 with a judicial review challenge against s 4 of the Immigration Ordinance 1971.<sup>181</sup> In *Bancoult (No. 1)*, the High Court found that the removal and relocation of the native population to Mauritius under the Immigration Ordinance 1971 was unlawful and that the power of the BIOT commissioner to 'make laws for the peace, order, and good government of the territory' was broad but not unlimited. As Laws L.J. noted, the islanders 'are to be *governed*; not removed.'<sup>182</sup> Initially, the Government promised to abide by the judgment of the High Court and allow the Chagossians to return to their native islands, apart from Diego Garcia.<sup>183</sup> In 2002, however, a feasibility study on Chagossian resettlement was published which found that long-term resettlement, due to the effects of global warming on seas levels, would be both 'precarious and costly.'<sup>184</sup> The findings of this report, along with 'concerns about the effect of re-settlement of the other islands on the security of US bases on Diego Garcia,' persuaded the Government to unexpectedly withdraw its support for resettlement in 2004.<sup>185</sup> As a result, the Government, in order to reinstate control over immigration and prevent Chagossian resettlement, used its powers under the royal prerogative to replace the 1965 BIOT Order with the

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<sup>181</sup> For a summary of the events between 1971 and 1998 see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2006] EWHC 1038 (Admin), [70]-[74] (Hooper L.J.).

<sup>182</sup> *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2001] QB 1067, [57].

<sup>183</sup> See the press release issued by the Foreign Secretary as replicated in *Bancoult (No. 2)* (House of Lords), n 9, [17] (Lord Hoffmann).

<sup>184</sup> See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2007] EWCA Civ. 498; [2008] QB 365 (CA (Civ Div)), 388 [10] (Sedley L.J.) and Fenwick and Phillipson, n 8, 577.

<sup>185</sup> Fenwick and Phillipson, *ibid.* See also *Bancoult (No. 2)* (House of Lords), n 9, [26]-[27] (Lord Hoffmann).

BIOT (Constitution) Order 2004 and issue a new BIOT (Immigration) Order. Section 9 of the Constitution Order 2004 stated clearly that 'no person has a right to abode in the territory,' and that 'no person is entitled to enter or be present in the territory except as authorised by or under this Order.'

In *Bancoult (No. 2)*, the legality of the two new Orders in Council was challenged. The suspicion was that the British Government had opted to 'legislate around'<sup>186</sup> *Bancoult (No. 1)* by implementing these new measures, not through reviewable secondary prerogative legislation, but through primary and (it was thought) un-reviewable prerogative legislation.<sup>187</sup> As Sedley L.J. in the Court of Appeal noted:

The unannounced withdrawal of the Chagossians' right to return by the two Orders in Council in 2004 has been defended in court not on the ground of an ineluctable change of circumstances and policy but on the ground that, by using Orders in Council, ministers could do with impunity something which was known to be unlawful when done by Ordinance.<sup>188</sup>

The Court of Appeal upheld the decision of the Divisional Court<sup>189</sup> to quash the Orders in Council on the grounds that they constituted an 'abuse of power on the part of the executive government.'<sup>190</sup> This was because the Orders in Council, not only 'frustrated the legitimate expectation ... that the Chagossians would be vouchsafed a right to return,<sup>191</sup> but negated also 'one of the most fundamental liberties known to human beings, the freedom to return to one's homeland ... for reasons unconnected with the well-being of the people affected.'<sup>192</sup>

On appeal, the House of Lords, by a majority of three to two, overruled the Court of Appeal's decision that the Constitution and Immigration Orders were unlawful abuses of power.<sup>193</sup> In making their judgments, their Lordships had to answer four fundamental questions, the second of which is of particular importance to this thesis: (1) Did the Crown have the power under the royal prerogative to legislate in order to exile an entire population from its native homeland? (2) Were Orders in Council issued under the royal prerogative subject to review by the courts? (3) If so,

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<sup>186</sup> Poole, n 159, 150.

<sup>187</sup> *Ibid.* See also Allen, S. *International Law and Resettlement of the (Outer) Chagos Islands* (2008) 8 *Hum, Rts. L. Rev.* 683.

<sup>188</sup> *Bancoult (No. 2)* (Court of Appeal), n 184, 408 [78].

<sup>189</sup> *Bancoult (No. 2)* (Divisional Court), n 181.

<sup>190</sup> *Bancoult (No. 2)* (Court of Appeal), n 184, 408 [78] (Steyn, L.J.).

<sup>191</sup> *Ibid.*, 407 [72] (Steyn, L.J.).

<sup>192</sup> *Ibid.*, 407 [71] (Steyn, L.J.).

<sup>193</sup> The majority judgment was given by Lord Hoffmann, Lord Rodger, and Lord Carswell, with Lord Bingham and Lord Mance dissenting.

what standard of review should be applied to the Crown's exercise of its prerogative powers in this instance? And (4) Did the Chagossians have a legitimate expectation that they would be resettled?<sup>194</sup>

On the first question, the majority of the House of Lords held that the Crown, despite '[t]he absence of any precedent for the exercise of the royal prerogative to exclude the inhabitants of a colony,<sup>195</sup> did have the power under the royal prerogative to deny the right of abode to an entire population. As Lord Hoffmann declared:

In a ceded colony ... the Crown has plenary legislative authority. It can make or unmake the law of the land.

... [T]he right to abode is a creature of the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right. The constitution of BIOT denies the existence of such a right.<sup>196</sup>

On the second question, their Lordships unanimously agreed with their colleagues in the Court of Appeal that all Orders in Council were open in principle to review by the courts. As Lord Rodger noted, '[n]owadays, a broader form of review of prerogative acts is established ... Therefore ... I see no reason in principle why, today, prerogative legislation, too, should not be subject to judicial review on ordinary principles of legality, rationality and procedural impropriety.'<sup>197</sup> On the third question, however, the majority, despite ruling that Orders in Council were subject to review by the court, held that their decision to exile the Chagossians was not irrational. In reaching this conclusion, the majority showed particular deference to the Government on matters of colonial governance and national security. As Lord Hoffmann stated plainly and unambiguously:

Policy as to the expenditure of public resources and the security and diplomatic interests of the Crown are peculiarly within the competence of the executive and it seems to me quite impossible to say, taking fully into account the practical interests of the Chagossians, that the decision to reimpose immigration control on the islands was unreasonable or an abuse of power.<sup>198</sup>

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<sup>194</sup> These four questions are implied by the way in which the judgment is divided up and discussed in Fenwick and Phillipson, n 8, 577-582, 593-598, and 865-870.

<sup>195</sup> *Bancoult (No. 2)* (House of Lords), n 9, [157] (Lord Mance). See also Lord Bingham at [70]: 'The House was referred to no instance in which the royal prerogative had been exercised to exile an indigenous population from its homeland.'

<sup>196</sup> *Ibid*, [44]-[45].

<sup>197</sup> *Ibid*, [105]. See also [35] (Lord Hoffmann), [71] (Lord Bingham), [122] (Lord Carswell), and [141] (Lord Mance).

<sup>198</sup> *Ibid*, [58]. For statements in agreement with Lord Hoffmann see [109] (Lord Rodger), and [130] (Lord Carswell).

On the fourth and final question, the majority rejected the claim that the Chagossians had a legitimate expectation that they would be resettled following the press release by the Foreign Secretary following *Bancoult (No. 1)* that the Government then denied in 2004 by issuing the Constitution and Immigration Orders.<sup>199</sup>

Despite unanimously deciding to extend judicial review to include Orders in Council issued under the royal prerogative, the House of Lords' decision in *Bancoult (No. 2)* has nevertheless been widely criticised for failing to bring the Crown's exercise of the prerogative under control. By extending judicial review, their Lordships did close one gap in reviewability left by the *GCHQ* case, thereby contributing towards the demystification of the royal prerogative as an immutable source of primary and thus unreviewable legislation. As Richard Moules concluded following the decision of the Court of Appeal, '[t]he decision represents an important vindication of the rule of law by denying the executive a sphere of action, defined merely by mode of enactment, that is free from both parliamentary and judicial scrutiny.'<sup>200</sup> Likewise, Mark Elliott and Amanda Perreau-Saussine have argued that 'the House of Lords' decision in *Bancoult* is the first decision to establish clearly that the prerogative itself – as distinct from secondary powers derived from exercises of the prerogative – exist in the shadow of the rule of law.'<sup>201</sup> The significance of this development on the control of the prerogative, however, was undermined in two important respects. Firstly, in finding that the Crown could deny the right of abode to an entire population by virtue of a broad and seemingly unlimited prerogative power to legislate for overseas territories;<sup>202</sup> the majority in the House of Lords failed to curtail both the existence and scope of the Crown's prerogative powers in line with a key requirement of the Rule of Law, thereby continuing the trend established by previous case law.<sup>203</sup> In so doing, it was harder for the majority to say that the power of the Crown to legislate for colonies had been used irrationally, thereby resulting in deference being shown to the Government's exercise of it. Secondly, in also showing deference to the Government on matters of colonial governance and national security, the majority accorded it *de facto* immunity from judicial scrutiny, thereby failing to close a major gap in accountability left by the

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<sup>199</sup> *Ibid*, [61] (Lord Hoffmann), [115] (Lord Rodger), [134] (Lord Carswell). Dissenting, see [73] (Lord Bingham) and [186] (Lord Mance).

<sup>200</sup> Moules, R. 'Judicial Review of prerogative orders in council: recognising the constitutional reality of executive action' (2008) 67(1) *CLJ* 12, 15.

<sup>201</sup> Elliott, M. and Perreau-Saussine, A. 'Pyrrhic public law: Bancoult and the sources, status and content of common law limitations on prerogative power' (2009) *PL* 697, 717-718.

<sup>202</sup> See in particular *Bancoult (No. 2)* (House of Lords), n 9, [109] (Lord Rodger): 'Assuming, then, that Her Majesty's constituent power can properly be described as a power to "laws for the peace, order and good government of the territory," such a power is equal in equal in scope to the legislative power of Parliament.'

<sup>203</sup> See above, 76-79.



*GCHQ* case. As a result, Elliott and Perreau-Saussine have concluded that the decision constitutes only a pyrrhic victory for the Rule of Law,<sup>204</sup> with Margit Cohn arguing that ‘their Lordships’ deference fails to reflect a judicial commitment to substantive legality.’<sup>205</sup>

Despite this, however, it is submitted that the decision in *Bancoult (No. 2)* to extend judicial review to all Orders in Council complements rather than contradicts the underlying values of the political constitution, thereby providing further evidence of complementary constitutionalism. This is because judicial review was extended in order to protect Parliament's authority, with some of their Lordships’ reasoning reflecting in part an argument put forward by Waller L.J. in the Court of Appeal that Orders in Council should be subject to review by the courts because they lack the democratic legitimacy of Acts of Parliament. As Waller L.J. noted:

The question is where in the spectrum should an Order in Council fall in the modern era? Should it be categorised with primary legislation passed through Parliament or with secondary legislation subject to a negative resolution or in some other category? So far as legislation passed in Parliament is concerned, there is an opportunity for debate and scrutiny. So far as subsidiary legislation in the form of regulations is concerned there is little opportunity for debate but at least there is the negative resolution procedure. So far as Orders in Council are concerned there is simply no opportunity for debate at all and no opportunity for scrutiny. It involves a minister acting without any constraint. Indeed the Crown may be doing something that, if she only knew the true position, she would prefer not to do, and yet it is then said that the Government can hide behind the “Crown’s prerogative.”

In the modern era I do not believe that position is tenable. If regulations can be set aside for procedural impropriety then the more so should decisions to act by Order in Council. Since the power of the Crown to legislate by Order in Council flows from the common law, it should if anything be clearer that the court has the power to interfere for procedural impropriety in that context than in the context where regulations have been placed before Parliament and passed by virtue of the negative resolution procedure.<sup>206</sup>

This argument by Waller L.J. found its way into the judgment of the House of Lords. In giving the leading judgment of the majority, Lord Hoffmann stated clearly that primary legislation made under the royal prerogative, unlike Acts of Parliament, should be subject to review by virtue of them lacking the necessary democratic credentials. As he noted:

It is true that a prerogative Order in Council is primary legislation in the sense that the legislative power of the Crown is original and not subordinate ...

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<sup>204</sup> Elliott and Perreau-Saussine, n 201, 718.

<sup>205</sup> Cohn, M. ‘Judicial review of non-statutory executive powers after *Bancoult*: a unified anxious model’ (2009) *PL* 260, 267.

<sup>206</sup> *Bancoult (No. 2)* (Court of Appeal), n 184, 417 [196]-[107].

But the fact that ... Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone. Until the decision of this House in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, it may have been assumed that the exercise of prerogative powers was, as such, immune from judicial review. This objection has been removed, I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.<sup>207</sup>

Although the other two members of the majority – Lord Rodger and Lord Carswell – did not mention this argument, one of the dissenting judges – Lord Mance – nevertheless endorsed Lord Hoffmann’s democratic justification for reviewing legislation passed under the royal prerogative in the belief that the interests of the Chagossians affected, though denied consideration under the royal prerogative, would have been taken into account if subject to debate by Parliament. As Lord Mance noted:

No doubt it is true, and I accept, that Parliament could by statute achieve the result at which the BIOT Order 2004 was aimed. But that is not ... a reason for holding that the Queen in Council can or must “logically” be able to do the same. On the contrary ... there are fundamental differences between legislation enacted by the executive through Her Majesty in Council and legislation subject to democratic debate in Parliament. In the present case, the process adopted affected basic common law rights without any form of consultation whatever with the Chagossians affected.<sup>208</sup>

As with their decision in the *Fire Brigades Union* case, therefore, their Lordships' decision in *Bancoult (No. 2)* to extend judicial review can be seen to have been motivated largely by a desire to protect Parliament's democratic authority against the executive. This was also arguably achieved in a manner less ambivalent to that employed by the House of Lords in the *Fire Brigades Union* case, as the decision did not turn upon the construction of a statutory provision, thereby providing no opportunity for creative and expansive judicial interpretation. Despite this, however, it is conceded that some of their Lordships were also driven by a desire to protect fundamental common law rights as well as customary international law rights.

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<sup>207</sup> *Bancoult (No. 2)* (House of Lords), n 9, [34]-[35].

<sup>208</sup> *Ibid*, [159].

In the case, Lord Hoffmann, Lord Bingham, and Lord Mance gave recognition to the existence of fundamental common law constitutional rights to varying degrees.<sup>209</sup> Both Lord Bingham and Lord Mance in dissent recognised the existence of a common law right to abode, albeit less explicitly in the former instance, which had, in their view, been breached by the British Government.<sup>210</sup> Lord Bingham also recognised the existence of a right to abode in international law,<sup>211</sup> whilst Lord Mance noted the obligations of the United Kingdom under international law concerning the well-being of inhabitants in territories under its control.<sup>212</sup> Leading the majority judgment, Lord Hoffmann recognised also a fundamental common law right not to be tortured, noting that '[t]he idea that such conduct on British territory, touching the honour of the United Kingdom, could be legitimated by executive fiat, is not something which I would find acceptable.'<sup>213</sup> On the specific issue of a fundamental common law right to abode, however, Lord Hoffmann is adamant of its non-existence. As his Lordship stated categorically, 'there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it.'<sup>214</sup> Both Lord Rodger and Lord Carswell were also doubtful as to the existence of fundamental common law rights.<sup>215</sup> Although Elliott and Perrineau-Saussine argue that Lord Carswell, in considering the question of whether the right of abode is near to becoming 'an inalienable constitutional right,'<sup>216</sup> by inference acknowledges the existence and validity of fundamental common law rights – as such a discussion 'is senseless if there exist no such things'<sup>217</sup> – it could just as easily be said that Lord Carswell was merely engaging with a question at issue in the case and nothing more.

Common law rights, therefore, appear to have had little to no impact on the majority's decision. Their limited recognition in the case, therefore, cannot be seen as evidence of a move towards legal constitutionalism. In fact, as argued in the previous chapter, the recognition of fundamental common law rights can be seen to provide further evidence of the complementary overlap between the legal and the political schools within the British constitution. This is because of the

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<sup>209</sup> On their Lordships recognition of fundamental common law rights see Elliott and Perreau-Saussine, n 201, 705-706.

<sup>210</sup> *Bancoult (No. 2)* (House of Lords), n 9, [70] (Lord Bingham) and [183] (Lord Mance). Although Lord Bingham does not explicitly state that a fundamental common law right to abode exists he relies heavily upon the words of Laws L.J. to that effect as cited in *Bancoult (No. 1)*, n 182, [39].

<sup>211</sup> *Bancoult (No. 2)* (House of Lords), n 9, [70].

<sup>212</sup> *Ibid*, [169].

<sup>213</sup> *Ibid*, [35].

<sup>214</sup> *Ibid*, [45].

<sup>215</sup> *Ibid*, [89]-[102] (Lord Rodger) and [125] (Lord Carswell).

<sup>216</sup> *Ibid*, [123].

<sup>217</sup> Elliott and Perreau-Saussine, n 201, 706.

fact that common law rights are ones which are fundamental to a democratic society and which cannot be abrogated save by express words in an Act of Parliament, thereby facilitating greater political accountability. By giving recognition to such rights in their judgments, Lord Hoffmann, Lord Bingham, and Lord Mance were essentially engaging in a form of constitutional democracy which is respectful to both the hallmarks of the political constitution as well as to the underlying rights which give it its legitimacy. Despite this, however, the majority's decision not to enforce such rights against the executive negates the impact of such complementary constitutionalism.

The expansion of judicial controls over the executive's exercise of the prerogative, as seen above, was a long and gradual process which, in some instances, has arguably pushed the boundaries of complementary constitutionalism to its limits. In so doing, however, control over the prerogative has been unquestionably strengthened. Although the decision in *Bancoult (No. 2)* to subject the prerogative to judicial review should have been the crowning achievement of this age-old struggle to bring the Crown's powers under control, the progress made is ultimately undermined by the unwillingness of the court to interpret prerogative powers narrowly and abandon deference to the executive on matters of colonial governance and national security. In this regard, the decision in *Bancoult (No. 2)* fails to practice what it preaches. The executive is accorded unwarranted reverence which results in the executive's *de facto* immunity from legal scrutiny, thereby preventing the executive from being made subservient to Parliament.

#### **4. Conclusion**

The royal prerogative is an archaic relic of government which, because of its historic immunity from both legal and political scrutiny, is incompatible with both the legal and the political schools constitutionalism. Because of the prerogative's continued unsatisfactory prominence within the British constitution, therefore, real efforts have been made by both Parliament and the courts to close the gap in accountability it causes. Although an improvement on the previous situation, their respective efforts do not completely fill the gap in accountability caused by the prerogative.

Parliament has sought to strengthen parliamentary control over the exercise of some of the Crown's most significant prerogative powers by placing such powers, or controls on them, on a statutory footing. Although earlier attempts suffered from critical weaknesses that ultimately undermined their effectiveness, the Fixed-term Parliaments Act 2011, by abolishing the Crown's power of dissolution and transferring it to Parliament, represents a significant strengthening of parliamentary controls over the executive. Though some significant prerogative powers remain

unregulated by either statute or convention, the Fixed-term Parliament's extension of parliamentary controls is still more successful in bringing the prerogative under control than the extension of judicial controls following *Bancoult (No. 2)*. Whilst the extension of judicial review to include Orders in Council issued under the prerogative in *Bancoult (No. 2)* is a welcome development which marks the culmination of judicial efforts over many decades to bring the prerogative under control, its significance is ultimately undermined by courts' unwillingness to interpret prerogative powers narrowly and abandon deference to the executive on matters of colonial governance and national security. The majority in *Bancoult (No. 2)*, far from plugging a gap in accountability, instead preserved it.

On a bare reading, these two developments may also appear to pull in opposite directions. The Fixed-term Parliaments Act strengthens parliamentary controls, whilst the extension of judicial review in *Bancoult (No. 2)*, by its very nature, strengthens judicial controls. The above analysis has revealed, however, that although these developments strengthen opposing methods of control, the extension of judicial review can protect, rather than contradict, the democratic authority of Parliament and the underlying values of the political constitution. Therefore, although the decision in the *Fire Brigades Union* case illustrates the fine line complementary constitutionalism straddles between legal and political constitutionalism, the extension of judicial review to include the royal prerogative can nevertheless be seen to provide further evidence of complementary constitutionalism.

## Chapter Four

# CONSTITUTIONAL CONVENTIONS

### 1. The British Constitutional Dependency on Conventions

It is often said that the British constitution can be found in an array of diverse sources from statute law, the common law, European Union law, the European Convention on Human Rights, legal treatises, the law and customs of parliament and, as discussed in the previous chapter, the royal prerogative.<sup>1</sup> However, as any undergraduate student in law will be well aware, any analysis of the sources of the British constitution is incomplete without considering constitutional conventions.<sup>2</sup> A.V. Dicey famously argued that conventions formed the morality of the constitution,<sup>3</sup> whilst Trevor Allan has come to characterise conventions as constituting mere political practice.<sup>4</sup> However, despite Allan's use of the term 'practice,' conventions, despite being incapable of judicial enforcement, should not be confused with mere constitutional habit whereby 'certain governmental situations are dealt with in a particular way.'<sup>5</sup> Instead, conventions can be seen to be chiefly regulatory in character, 'a rule of behaviour'<sup>6</sup> designed to influence the conduct of political actors. As Helen Fenwick and Gavin Phillipson state, conventions are 'non-legal, generally agreed rules about how government should be conducted and, in particular, governing the relations between different organs of government.'<sup>7</sup> The significance here is in their use of the

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<sup>1</sup> See Leyland, P. *The Constitution of the United Kingdom: A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing, 2007), 20-24.

<sup>2</sup> See Dicey, A.V. *An Introduction to the Study of the Law of the Constitution* [1885] (10th edn, London: Macmillan, 1959), 417. On constitutional conventions Dicey notes that 'a lawyer cannot master even the legal side of the constitution without paying some attention to the nature of those constitutional understandings.'

<sup>3</sup> Dicey, A.V. *Introduction to the Study of the Law of the Constitution* [1885] (Indianapolis: Liberty Fund, 1982), cxli. Dicey uses the phrase 'constitutional morality.'

<sup>4</sup> Allan, T.R.S. *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), 239.

<sup>5</sup> Jaconelli, J. 'The nature of constitutional convention' (1999) 19 *Legal Studies* 24, 30-31.

<sup>6</sup> Sir Kenneth Wheare, *Modern Constitutions* (1951), 179, as cited in Marshall, G. *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984), 7. Geoffrey Marshall challenges Wheare's argument on the basis that 'conventions, as a body of constitutional morality, deal not just with obligations or duties but confer rights or entitlements ... it is useful therefore to separate duty-imposing conventions from entitlement-conferring conventions' (at 7-8). Despite this, however, Marshall nevertheless goes on to say that the 'the major purpose of the domestic conventions is to give effect to the principles of governmental accountability that constitute the structure of responsible government' (at 18).

<sup>7</sup> See Fenwick, H.M. and Phillipson, G. *Text, Cases and Materials on Public Law and Human Rights* (3<sup>rd</sup> edn, London and New York: Routledge, 2011), 49.

term 'rule,' a term also used by Dicey.<sup>8</sup> As Joseph Jaconelli notes, '[t]he important word is "rule." "Rule" does not mean merely an observed uniformity in the past; the notion includes the expectation that the uniformity will continue in the future. It is not simply a description, it is a prescription. It has a compulsive force.'<sup>9</sup>

Conventions can be found under many real world constitutions, including ones which have their foundations in law, such as the Constitution of the United States of America. James G. Wilson has identified congressional powers and responsibilities, the presidency, judicial powers, and federalism, for example, as aspects of the Constitution of the United States of America where constitutional conventions operate, the most important of which concern the distribution of powers and their scope.<sup>10</sup> As Anthony King has argued, 'constitutions ... are never – repeat, *never* – written down in their entirety.'<sup>11</sup> Despite this, however, it is apparent from even the barest of examinations that the un-codified British constitution relies upon conventions more so than most other constitutions.<sup>12</sup> Despite having an elected Parliament, Britain would have no democratic government but for conventions. Conventions are used in order to govern the behaviour of the Queen regarding the exercise of her prerogative powers. It is accordingly by convention that Her Majesty must exercise her prerogatives (excluding personal prerogatives) on the advice of Ministers, appoint as Prime Minister the party leader capable of commanding a majority in the House of Commons, and give Royal Assent to Bills passed by both the House of Commons and the House of Lords. Conventions are used also to govern the behaviour of the government and to regulate the relationship between the elected House of Commons and the unelected House of Lords. The government cannot legislate on devolved matters without the consent of the relevant devolved bodies (the Sewell Convention), and government ministers are responsible to Parliament for their decisions (the Convention of Ministerial Responsibility) and expected to publically toe the government line or else resign (Collective Cabinet Responsibility). The House of Lords, when faced

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<sup>8</sup> Dicey, n 3, cxl: 'Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state...Observe the use of the term "rules," not "laws." This employment of terms is intentional. Its object is to call attention to the fact that the rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.' Dicey then goes on to identify the two sets of principles or maxims as law and convention respectively.

<sup>9</sup> Jaconelli, n 5, 31.

<sup>10</sup> See Wilson, J.G. 'American Constitutional Conventions: The Judicially Unenforceable Rules that Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior' (1992) 40 *Buffalo Law Review* 645, 671-675.

<sup>11</sup> King, A. *The British Constitution* (Oxford: Oxford University Press, 2007), 5.

<sup>12</sup> See Bogdanor, V. and Vogenauer, S. 'Enacting a British Constitution: Some Problems' (2008) *PL* 38, 44, Bradley, A.W. and Ewing, K.D. *Constitutional and Administrative Law* (15<sup>th</sup> edn, Harlow: Pearson Education Limited, 2011), 19-22, and Fenwick and Phillipson, n 7, 49-53.

with a government bill implementing a manifesto promise, will not be struck down at either Second or Third Reading, or introduce 'wrecking amendments' which have the effect of changing its meaning and purpose (the Salisbury Convention).<sup>13</sup> The House of Lords are also expected under convention to consider government business in a 'reasonable time',<sup>14</sup> and to give reasonable notice of the consideration of amendments from the House of Commons during 'ping-pong'.<sup>15</sup>

Despite substituting legal rules for political ones, conventions have not to date been examined critically through the lens of political constitutionalism by either its proponents or opponents. The aim of this chapter, therefore, is to explore the constitutional significance of Britain's heavy reliance upon conventions. It will be argued that the British constitution's continuing dependency upon convention is indicative of it remaining primarily political in nature. This will be shown through a detailed examination of the key characteristics of conventions and, crucially, how they differ from laws. It will be shown that, although laws and conventions perform the same role, conventions may be distinguished from laws on the grounds that they are judicially unenforceable, a trait which will also be shown to be of particular normative value to the political school of constitutionalism. Although Britain's dependency upon convention is therefore indicative of the constitution remaining primarily political, it will also be argued that not all instances of British dependency on convention is of normative value to the political constitution. This will be demonstrated through the identification of two distinct types of convention under the British constitution: regulatory and foundational. Regulatory conventions influence the behaviour of democratically-elected politicians, whilst foundational conventions serve to establish the political framework from which the political behaviour of such politicians may then be regulated. Dependency upon convention is meaningless, however, where it is ineffective at controlling governmental behaviour. This chapter will therefore consider also the effectiveness of conventions as constraints on political power under the British constitution. In particular, it will consider the question of why conventions are abided by government and the extent to which recent reforms – such as the recent surge in the codification of conventions and the implementation of the Wright Committee Reforms<sup>16</sup> – strengthen the role of conventions within the constitution. It will be argued that, although executive compliance with conventions is unlikely to be motivated by a fear of political sanctions due to the government's traditional dominance

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<sup>13</sup> Joint Committee on Conventions, Report of Session 2005-06, *Conventions of the UK Parliament*, HL Paper 265-I, HC 1212-I, October 2006, 29 [83].

<sup>14</sup> *Ibid*, 44 [153].

<sup>15</sup> *Ibid*, 53 [189].

<sup>16</sup> See House of Commons Reform Committee, First Report of Session 2008-09, *Rebuilding the House*, HC 117, November 2009.



over the House of Commons, recent reforms have the potential to readdress this imbalance and thus strengthen the role of conventions as effective constraints on executive power.

## 2. The Law-Convention Distinction

### 2.1 *The Regulatory Purpose of Conventions*

Constitutional Conventions, because they shape the behaviour of political actors, are regulatory in nature. Because of this, conventions are also normative. In considering the ways in which a convention can be established, Jennings concluded that mere practice, and mere precedent, is not enough; the persons concerned in the precedents must believe that they were bound by the rule, and there must, crucially, be a reason for the rule.<sup>17</sup> As Jennings stated:

As in the creation of law, the creation of a convention must be due to the reason of the thing because it accords with the prevailing political philosophy. It helps to make the democratic system operate; it enables the machinery of the state to run more smoothly; and if it were not there friction would result. Thus, if a convention continues because it is desirable in the circumstances of the constitution, it must be created for the same reason.<sup>18</sup>

Admittedly, the necessity for a reason may appear self-evident. Conventions without purpose, as with all rules, simply do not and cannot exist. However, despite this, the requirement of a purpose for the establishment of convention has subsequently been accorded greater constitutional significance. This can be seen, it is submitted, in the ruling of the Supreme Court of Canada in the *Patriation Reference*.<sup>19</sup>

The case concerned the patriation of the Canadian Constitution by the Canadian Federal Government.<sup>20</sup> Such patriation, however, ironically required the British Parliament to amend the British North America Act 1867 (BNA). The British Parliament, however, could only amend the statute if requested to do so by Canada.<sup>21</sup> This request was to be made via a joint resolution of both Houses of the Canadian Parliament – which would include the proposed amendment to the BNA permitting patriation along with a Charter of Rights and Freedoms – which would, when

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<sup>17</sup> Jennings, Sir W.I. *The Law and the Constitution* [1933] (5<sup>th</sup> edn, London: University of London Press, 1960), 134-136.

<sup>18</sup> *Ibid*, 136.

<sup>19</sup> *Re Resolution to amend the Constitution* [1981] 1 SCR 753. For a general overview of the case, as well as of the events leading up to it, see Marshall, n 6, Chapter 11.

<sup>20</sup> On the meaning of patriation see *ibid*, 180: 'The 'patriation' of the Constitution simply meant the passing of a final agreed British North America Act at Westminster, designed to vest future amendment powers in some body of legislators in Canada.'

<sup>21</sup> This was by virtue of the Statute of Westminster 1931.

approved by both Houses, be sent to Britain for enactment, and which would be binding, not only on the Federal Government, but on the provinces as well.

Although the British Government at the time had expressed every intention of enacting the requested change,<sup>22</sup> the ability of the Canadian Parliament to unilaterally alter the Canadian Constitution without first seeking the approval of the Canadian provinces was nevertheless challenged in court by a number of the provinces,<sup>23</sup> the appeals from which were heard by the Canadian Supreme Court just a few days after the Canadian Senate and the Canadian House of Commons approved the joint resolution. The Canadian Supreme Court therefore had to decide whether a convention existed under the Canadian Constitution to the effect that the Federal Government of Canada needed to obtain the consent of the Canadian provinces before requesting the British Parliament to change legislation which would affect the legislative competence of those provinces.

Six of the nine judges in the Supreme Court held that such a convention did in fact exist. As they noted:

[T]he agreement of the Provinces of Canada ... is constitutionally required for the passing of the "Proposed Resolution for a Joint Address to her Majesty the Queen respecting the Constitution of Canada" and that the passing of this Resolution without such agreement would be unconstitutional in the conventional sense.<sup>24</sup>

Despite this, however, the court held that it could not, by virtue of it being a constitutional convention, enforce the requirement. There were no legally-enforceable limitations upon the power of the Canadian Parliament to pass resolutions or petition the Crown. There were only political limitations – conventions – which 'do not engage the law,'<sup>25</sup> and which, they noted, could not 'translate into a legal limitation, without expression in imperative constitutional text or statute.'<sup>26</sup> As a result, the Supreme Court could prevent neither the passing of the joint resolution nor the subsequent request for the British Parliament to amend the BNAA.

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<sup>22</sup> See Marshall, n 6, 181.

<sup>23</sup> Specifically the provinces of Manitoba, Quebec, and New Foundland.

<sup>24</sup> *Re Resolution to amend the Constitution*, n 19, 909.

<sup>25</sup> *Ibid*, 803.

<sup>26</sup> *Ibid*, 784.

In finding in favour of the existence of a constitutional convention, however, the Supreme Court adopted Jennings' tripartite test.<sup>27</sup> In so doing, the court considered the purpose, not only of the constitutional convention claimed, but of constitutional conventions generally. With regards to the claimed convention, the court noted that its purpose was 'to protect the federal character of the Canadian Constitution and prevent the anomaly that the House of Commons and Senate could obtain by simple resolution what they could not validly accomplish by statute.'<sup>28</sup> On the purpose of conventions more generally, the court had this to say:

The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period. For example, the constitutional value which is the pivot of the conventions stated above and relating to responsible government is the democratic principle: the powers of the state must be exercised in accordance with the wishes of the electorate; and the constitutional values or principle which anchors the conventions regulating the relationship between the members of the Commonwealth is the independence of the former British colonies.<sup>29</sup>

The purpose of constitutional conventions, therefore, is to shape and inform the constitution in line with the principles they embody via a constitution's political actors; to 'impose a framework of rules the observance of which transcends the sectional interest of political party.'<sup>30</sup> Hence the reason why, it is submitted, Dicey used the term 'constitutional morality'<sup>31</sup> as a substitute for constitutional conventions. In this regard, conventions can be seen to perform the same function as the law. James G. Wilson in particular has advocated for the greater use of constitutional conventions in the United States of America on the grounds that they serve the same constitutional purposes as the law. As he remarks:

Most of us know that it is difficult, if not impossible, to infer an "ought" from an "is." Arguably, the widespread existence of conventions only shows that conventions ought to be studied, not that they ought to exist. But there are also strong normative arguments for developing a doctrine of American constitutional conventions. Conventions can and do serve many of the same valuable purposes that constitutional legal doctrine should fulfil. Conventions prevent tyranny, constrain discretion, distribute power, enhance efficiency

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<sup>27</sup> See Jennings, n 17, 136: '[F]irst, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?' In support see Allan, n 4, 249.

<sup>28</sup> *Re Resolution to amend the Constitution*, n 19, 908.

<sup>29</sup> *Ibid*, 880.

<sup>30</sup> Jaconelli, n 5, 35.

<sup>31</sup> Dicey, n 3.

and accountability, strengthen separation of powers, and generate an internal political morality.<sup>32</sup>

Despite their shared purpose, however, it is clear that conventions remain distinct from laws. Although it is often argued that conventions are more flexible than laws – and therefore perform an important role in keeping the law up-to-date with constitutional ideas – it will be shown below that this is not the case. An absence of legal enforcement, not flexibility, distinguishes convention from law.

## *2.2 Flexibility and the Creation of Conventions*

The ruling of the Supreme Court in the *Patriation Reference* helps to illustrate that the principles embodied by constitutional conventions should not be seen to be fixed. As the Supreme Court noted, conventions embody the ‘prevailing constitutional values or principles of the period.’<sup>33</sup> In order to keep up with any changes in constitutional principle, there is the strong implication that constitutional conventions are, or should be, flexible. As O. Hood Phillips remarked, ‘[c]onventions change in accordance with the ideas of government.’<sup>34</sup> Such reasoning may go some of the way towards explaining Jennings’ famous remark that the purpose of constitutional conventions ‘is that they provide the flesh which clothes the bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas.’<sup>35</sup> As Jennings went on to say:

A constitution does not work itself; it has to be worked by men. It is an instrument of national co-operation, and the spirit of co-operation is as necessary as the instrument. The constitutional conventions are the rules elaborated for effecting that co-operation. Also, the effects of a constitution must change with the changing circumstances of national life. New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate.<sup>36</sup>

Geoffrey Marshall clearly shared in Jennings’ view on the role of conventions, noting that their primary purpose was to give effect to government accountability ‘in accordance with political reality rather than legal form.’<sup>37</sup> Under the British constitution, conventions have certainly been used to bridge the gap between legal theory and political reality. The convention that the Queen

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<sup>32</sup> Wilson, n 10, 651-652.

<sup>33</sup> *Re Resolution to amend the Constitution*, n 19, 880.

<sup>34</sup> Phillips, O.H. and Jackson, P. *O. Hood Phillips’ Constitutional and Administrative Law* (7<sup>th</sup> edn, London: Sweet & Maxwell, 1987), 119, n 36.

<sup>35</sup> Jennings, n 17, 81-82.

<sup>36</sup> *Ibid*, 82.

<sup>37</sup> Marshall, n 6, 18.

must exercise her prerogative powers on the advice of her ministers is a good example of this. Jennings argument has also been deployed in order to explain, at least in part, the existence of constitutional conventions under many primarily legal constitutions.<sup>38</sup> Conventions can assist in giving expression to the constitutional principles and values which are said to permeate the written 'higher law' constitution.<sup>39</sup> This is especially needed in areas where the constitution itself may be silent and the limits or division of power uncertain – constitutional loopholes where elected officials could potentially act *unconstitutionally* without also acting *illegally*.<sup>40</sup> As Wilson notes:

The written text [the constitution] initially allocates many broad constitutional powers to different groups of political leaders, but the exercise of such powers is often not amenable to effective judicial review. Only conventions can control the politicians' implementation of many constitutional powers.<sup>41</sup>

Because written 'higher law' constitutions are often entrenched, some have even argued for a greater reliance upon conventions under such jurisdictions than under constitutions such as Britain's. As Munro argues, 'it is at least arguable that conventions should play a larger role in countries with written constitutions; the greater the degree of constitutional rigidity, the greater is the need for the benefits of informal adaptation which conventions bring.'<sup>42</sup>

It is argued, however, that although conventions may work change 'without formal changes to the law',<sup>43</sup> this does not necessarily make them more flexible, and therefore more apt at gap-filling, than laws. Conventions, as with laws, are normative in nature. Their primary purpose, therefore, is to influence political behaviour. This necessitates a degree of rigidity. Under the British constitution, there exist a number of conventions – those governing the exercise of the Crown's prerogative powers for example – which have existed for centuries and which have changed very

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<sup>38</sup> In support of this see Phillips and Jackson, n 34, 119.

<sup>39</sup> See Wilson, n 10, 723-724: 'The theory of conventions suggests that the Constitution is not completely amoral ... [C]onventions of honesty, toleration of opposition, and self-restraint indicate a richer moral universe.'

<sup>40</sup> It is submitted that not all of a constitution's principles or values will be expressed explicitly. Some, such as the separation of powers doctrine under the American constitution, may only be inferred from the division of powers outlined in Articles I-III. The separation of powers doctrine is in essence a political doctrine or 'convention' only. Therefore, in theory, despite the doctrine's significant constitutional importance, an elected official could act unconstitutionally in specific instances, and yet not have acted illegally.

<sup>41</sup> Wilson, n 10, 652.

<sup>42</sup> Munro, C. 'Laws and Conventions Distinguished' (1975) 91(Apr) *LQR* 218, 219: 'Indeed, it is at least arguable that conventions should play a larger role in countries with written constitutions; the greater the degree of constitutional rigidity, the greater is the need for the benefits of informal adaptation which conventions bring.'

<sup>43</sup> Phillips and Jackson, n 34, 119.

little, if at all, in that time. Her Majesty remains an unelected Head of State who, legally speaking, possesses considerable and wide-ranging powers. Flexibility is therefore not a desirable characteristic in this instance – rules regulating the exercise of her powers are as needed today as they were when they were first created. Undue flexibility ultimately risks arbitrariness, which runs counter to the aims of constitutionalism. It is submitted also that, although conventions are used to bridge the gap between legal theory and political reality, the gap could be just as easily bridged by reforming the law to better reflect political reality. This is because the process by which conventions are established is often anything but quick and easy.

As Aileen McHarg has observed, conventions may either evolve over time as matter of practice or be deliberately declared.<sup>44</sup> The orthodox view of conventions was that conventions arose or 'evolved' slowly over time; 'a gradual hardening of practice into rule.'<sup>45</sup> Because of this, it has been argued that principle often played no role in the emergence of 'evolved conventions',<sup>46</sup> although it has played some role in guaranteeing their acceptance. As C.J.G. Sampford explains:

Where conventions arise over time it is rarely because of right reason, goodwill or political morality, but because those whose interests lie in other directions face pressure to act in conformity to a practice. Once the practice persists (and if the pressures remain that is likely), participants come to feel that the practices into which some or all were pressured are justified ... These justifications reinforce the practice with internally generated moral pressure. But the other pressures come first and the potential for pressure usually remains and is needed to steady the waters.<sup>47</sup>

The gradual transference of executive power from the Crown to its ministers in Parliament acts as a good example of this phenomenon. The Crown, instead of relying only upon its own discretion in exercising the royal prerogative, eventually did so more and more upon the advice of its ministers in Parliament, a convention which is still adhered to today. The reason for this gradual surrender of power was painfully pragmatic: survival. Following the Glorious Revolution of 1688, the Crown existed only at the behest of Parliament. Parliament had been a rival to the Crown since the reign of Charles I and, following a series of wars and revolutions, had eventually emerged as the victor. If the Crown was to survive, it would have to yield to Parliament. Therefore, although retaining much of its power as a matter of law, such power would, as a matter of politics,

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<sup>44</sup> See McHarg, A. 'Reforming the United Kingdom Constitution: Law, Convention, Soft Law (2008) 71(6) *MLR* 853, 856.

<sup>45</sup> *Ibid*, 857. See also Sampford, C.J.G. "'Recognise and Declare: An Australian Experiment in Codifying Conventions' (1987) 7 *OJLS* 369, 401: 'Although conventions have developed very considerably, this has been over a very long period, a period of enormous social, economic and political change.'

<sup>46</sup> McHarg, n 44, 861.

<sup>47</sup> Sampford, n 45, 411.

be exercised by ministers. With the emergence of Parliament as a democratically-elected assembly over time this surrender of power by one institution to another became endowed with the democratic principle. The Crown's power was now to be exercised by ministers, not only because the Crown's survival depends upon its appeasement of Parliament (though this is still the case), but because ministers were democratically-elected representatives of the people, and it was accordingly the right thing to do.

'Evolved conventions,' therefore, come into existence over many years as a matter of practice, can change over time, and can absorb principles which help to bridge the gap between legal theory (such as the royal prerogative being vested in the Crown) and political reality (the need for it to be exercised by democratically-elected representatives).<sup>48</sup> It is now the case, however, that constitutional conventions may also be 'declared' without the need for precedent. A good contemporary example of such a 'declared convention'<sup>49</sup> can be seen with the Sewell Convention.<sup>50</sup> During the enactment of the Scotland Act 1998 – which devolved power from Westminster to Scotland – concerns arose over the preservation of Parliament's ability to legislate on devolved issues without requiring the consent of the Scottish Parliament.<sup>51</sup> In order to alleviate these fears, the British Government published a memorandum on the issue, which stated that 'the UK government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.'<sup>52</sup> There was no precedent for such a convention. The Government, in issuing the memorandum, created a new constitutional convention which embodied the democratic principle.

Just because a convention can be declared, however, does not mean that it will be binding. In considering the question of whether conventions can be explicitly created, McHarg argues that 'declared conventions' should be seen as a form of constitutional soft law 'which attempt to influence constitutional behaviour rather than generating binding norms.'<sup>53</sup> She distinguishes this

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<sup>48</sup> For more on this line of reasoning see Elliott, M. 'Parliamentary sovereignty and new constitutional order: legislative freedom, political reality and convention' (2002) 22(3) *Legal Studies* 340.

<sup>49</sup> McHarg, n 44, 856.

<sup>50</sup> See *Hansard*, HL Deb, vol. 592, col. 791 (21 July 1998) (Lord Sewell): '[W]e [the government] would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament.'

<sup>51</sup> The legislative supremacy of the Westminster Parliament, even on devolved matters, is expressly preserved by section 28(7) of the Scotland Act 1998.

<sup>52</sup> *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Cabinet of the National Assembly of Wales and the Northern Ireland Executive Committee*, Cm.5240 (2001), [13].

<sup>53</sup> McHarg, n 44, 853.

from 'evolved conventions,' which she claims are concerned with establishing binding norms.<sup>54</sup> McHarg draws this distinction on the grounds that the former is without a history of compliance whilst the latter is not. As she observes, 'it is subsequent practice, rather than initial statement, which has determined both the status and the scope of these constitutional norms.'<sup>55</sup> It is also through this subsequent practice, she argues, that 'the obligatory nature of conventional rules is not merely *evidenced* ... but actually *constituted* ... In the absence of an authoritative text – of a law-giver – the requirements of a particular constitutional role can be determined only through the performance of that role.'<sup>56</sup> Admittedly, without conformity to a rule, there can be no rule. In this sense, McHarg's distinction between declared and evolved conventions is sound. The latter is an established rule, whilst the former is a merely a proposed rule. Without conformity, it cannot be considered binding. Subsequent conformity, McHarg notes, is therefore needed in order to make a 'declared convention' binding.<sup>57</sup>

Therefore, because conventions, both evolved or declared, require either retrospective or prospective evidence of use in order to be considered 'binding,' it is clear that they are not necessarily more flexible than laws. In fact, because conformity over many years is not required in order to determine the existence of validity of laws, the process by which a law is drafted, proposed, debated, and enacted, is comparatively quicker, easier, and arguably more apt at embodying the necessary constitutional principles of the day than conventions.

### *2.3 Recognition versus Enforcement*

Constitutional conventions, therefore, may only be distinguished from laws on the grounds that they are legally unenforceable. As Dicey famously noted:

The rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.

The one set of rules are in the strictest sense 'laws,' since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the common law) are enforced by the courts; these rules constitute 'constitutional law' in the proper sense of that term, and may for the sake of distinction be called collectively 'the law of the constitution.'

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<sup>54</sup> *Ibid*, 856.

<sup>55</sup> *Ibid*, 859.

<sup>56</sup> *Ibid*, 861.

<sup>57</sup> *Ibid*.



The other set of rules consist of conventions, understandings, habits or practices which, though they may regulate the conduct of ... officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution,' or constitutional morality.<sup>58</sup>

Dicey's court-enforcement test, however, has been subject to widespread and varied criticism. In particular, it has been criticised for defining conventions, as Colin Munro contends, negatively by example, of drawing a distinction between convention and law premised on the simple fact he defines law as rules capable of legal enforcement by the courts.<sup>59</sup>

Sir Ivor Jennings, for instance, disputed Dicey's distinction, and declared that there was 'no distinction of substance or nature'<sup>60</sup> between the two, insisting that both were dependent upon general acquiescence. As he argued:

The conventions are like most fundamental rules of any constitution in that they rest essentially upon general acquiescence. A written constitution is not law because somebody has made it, but because it has been accepted. Anyone can draft a paper constitution, but only the people concerned in government can abide by it; and if they do not, it is not law.<sup>61</sup>

J.D.B. Mitchell likewise criticised Dicey's court-enforcement test:

Conventions cannot be regarded as less important than rules of law. Often the legal rule is the less important. In relation to subject-matter the two types of rule overlap: in form they are often not clearly distinguishable ... very many conventions are capable of being expressed with the precision of a rule of law, or of being incorporated into law. Precedent is as operative in the formation of convention as it is in that of law. It cannot be said that a rule of law is necessarily more certain than is a convention. It may therefore be asked whether it is right to distinguish law from convention.<sup>62</sup>

Although both writers' arguments hold true – conventions can and do deal with issues which the law is capable of governing – neither explain satisfactorily why therefore conventions should be treated any differently by the courts who, although feeling able to give recognition to conventions when handing down their judgments, have consistently viewed conventions as being legally unenforceable.<sup>63</sup>

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<sup>58</sup> Dicey, n 2, 23-24.

<sup>59</sup> See Munro, C. *Studies in Constitutional Law* (London: Butterworths, 1987), 53: 'Conventions were illustrated by examples, and negatively defined by that fact that they were not court-enforced.'

<sup>60</sup> Jennings, n 17, 117.

<sup>61</sup> *Ibid.*

<sup>62</sup> Mitchell, J.D.B. *Constitutional Law* (2<sup>nd</sup> edn, 1968), 34, as cited in Munro, C. *Studies in Constitutional Law* (2<sup>nd</sup> edn, London: Butterworths, 1999), 61-62.

<sup>63</sup> See Phillips and Jackson, n 34, 116.

Allan, however, has challenged the extent to which judicial *recognition* of conventions differs if at all from judicial *enforcement* of conventions. As he argues:

It follows that recognition of convention by a court in the course of adjudication generally entails its acceptance as a rule which is legitimate. It is acknowledged as a rule of practice which is grounded in political principle. Curial 'recognition' implies judicial approval. In the result, the distinction between recognition and enforcement – that last refuge of orthodox theory – plainly dissolves. To recognize a convention is necessarily to endorse the principle which justifies it; and, in a context where legal doctrine is developed to reflect that principle, recognition means enforcement. Indeed, in the absence of a willingness to *act* on the basis of convention – to acknowledge its significance for legal rights and obligations – a court's 'recognition' would be empty and futile. The positivist distinction between recognition and enforcement is grounded in an implausibly theoretical view of the judicial function: it overlooks the moral and political responsibility inherent in the practical activity of adjudication.<sup>64</sup>

Allan's argument, however, is not based upon any substantial empirical evidence of how a judge goes about deciding whether or not to recognise a constitutional convention.<sup>65</sup> His proposition, therefore, may be dismissed on the grounds that it is more normative than analytical. It is therefore submitted that there remains a real and important distinction between enforcement and recognition that makes conventions particularly attractive for political constitutionalists who wish to curtail the intrusion by the courts into the political sphere. The decision of the Supreme Court of Canada in the *Patriation Reference* stands as a testament to this fact.

Although it may be argued that the Supreme Court's recognition of the claimed convention necessarily entails the Court's endorsement of it, it nevertheless held that it could not be legally enforced. The court's endorsement of the convention, if that was indeed what it was, did not result in its legal enforcement. By recognising the convention, the court was effectively acknowledging that it did not have jurisdiction over the behaviour the convention regulated. Wilson's work on conventions under the American constitution advocates a similar understanding. As he notes:

On a purely legal level, the concept of conventions is important because it assists the [United States] Supreme Court in determining which constitutional issues should be ultimately resolved by the political branches. Congress, the President, and/or the public will determine the existence of conventions, their precise contours, any violations, and any sanctions. By simultaneously revealing and refining the existence of nonlegal constitutional conventions on political behavior which violate constitutional norms, constitutional conventions prevent the Supreme Court from deciding constitutional

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<sup>64</sup> Allan, n 4, 244.

<sup>65</sup> *Ibid*, 245. Allan uses the decision of the Court of Appeal in *Attorney-General v Jonathan Cape* [1976] QB 752 as evidence to support his claims.

controversies which are so disturbing that they cry for a remedy, but for a remedy that should be political, not legal. Just as the Court is more willing to intervene when it can perceive a judicial remedy, it is less likely to produce final judicial resolutions if it is aware of alternative, political solutions. The elected branches can sanction those who breach conventions, with the voters retaining the last word. In other words, certain constitutional wrongs can only be effectively prevented or corrected by the politicians and/or the voters. Many constitutional debates should focus on the precise form of conventions, not solely on legal doctrine. Many law review articles appear unaware of how the distinction between law and convention can improve their inquiries, even though they are primarily concerned with formulating appropriate constitutional conventions, not with developing constitutional law.<sup>66</sup>

The result of the Supreme Court of Canada's recognition of convention in the *Patriation Reference*, it is submitted, was, if anything, political in nature. By recognising the convention that the Federal Government had to obtain the consent of the Canadian provinces in order to make the changes to the constitution it desired, the court made it clear that the Federal Government was acting, not illegally, but unconstitutionally by subverting the democratic principle of the constitution. Although unable to enforce the convention legally, the court nevertheless firmly shifted responsibility for the unconstitutionality of the joint resolution to the Federal Government. The Federal Government's accountability for its actions to both the Canadian Parliament and the wider public was, therefore, arguably strengthened as a result of the court's very public acknowledgment of its failure; this in effect gave the Parliament and the public the ammunition required to defeat the government should they chose to do so. Judicial recognition of convention, therefore, may constitute further evidence of complementary constitutionalism.

Despite this, however, the primary duty of the court remains to enforce the law. If an issue was governed by both law and convention, therefore, the primary duty of the court, as endorsed in the *Patriation Reference*, is to enforce the law irrespective of the convention.<sup>67</sup> Conventions, however, often exist in areas where legal regulation is non-existent such as, for example, in the exercise of the royal prerogative. As a result, the primary duty of the court is often not engaged where questions concerning conventions are involved. Judicial recognition of conventions, therefore, serves to reinforce, not blur, the distinction between laws and conventions.

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<sup>66</sup> Wilson, n 10, 653-654.

<sup>67</sup> *Re Resolution to amend the Constitution*, n 19, 880-881.

### 3. The Constitutional Significance of British Dependency

#### 3.1 *Regulatory and Foundational Conventions*

Because constitutional conventions represent the means by which government may be regulated politically without judicial interference in the political decision-making process, they can be seen to be of particular normative appeal to political constitutionalists who prefer political accountability over legal accountability. Although it cannot be said that Britain relies more upon convention than it does law, it can be said to be more dependent upon convention than most other nations, relying upon convention for the regulation of behaviour which a primarily legal constitution would perhaps reserve for law.<sup>68</sup> As noted above, without conventions, there would be neither democratic nor accountable government in Britain. This would not be the case in more legal jurisdictions, such as the United States of America, where the basic structures of government are more often than not established by law.

As a result, it is argued that such dependency upon convention is indicative of a general preference for political as opposed to legal accountability. Entire swathes of the constitution remain non-justiciable. The British constitution, therefore, can be said to remain primarily political in nature. As Eric Barendt argues:

The central part played by conventions in the constitutional arrangements of the United Kingdom indicates a preference for self-regulation by governments and politicians over a system of legal checks and balances enforceable by the courts, which is much more characteristic of modern codified liberal constitutions. That conventions are so important to the working of the constitution in the United Kingdom should occasion no surprise. They are an integral aspect of the 'political' constitution.<sup>69</sup>

Despite this, however, it is submitted that Britain's heavy reliance upon convention goes beyond what even a political constitutionalism would consider desirable. This is because conventions under the British constitution can be separated into two types: regulatory and foundational.

Regulatory conventions influence the behaviour of democratically-elected politicians. The Convention of Ministerial Responsibility and the Sewell Convention are key examples of regulatory conventions. Under the former, government ministers are placed under an obligation to make themselves accountable to Parliament, whilst under the latter Parliament is under an obligation to

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<sup>68</sup> Blick, A. 'The Cabinet Manual and the Codification of Conventions' (2014) 67(1) *Parliamentary Affairs* 191: 'Within uncodified constitutions, of which the UK provides one of the few examples internationally, conventions can be even more prominent than in their codified counterparts.'

<sup>69</sup> Barendt, E. *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998), 45.

not legislate in relation to devolved matters without their prior consent. Dependency upon such regulatory conventions would be preferred by political constitutionalists because they constitute a form of self-regulation on the behalf of elected politicians. Foundational conventions, by contrast, serve to establish the political framework from which the democratically-elected politicians may operate. The conventions which regulate the Crown are prime examples. Although the conventions governing the exercise of the royal prerogative are by design regulatory in that they govern the behaviour of the Crown, such conventions are ultimately foundational in effect because they ensure that the government is democratic and thus accountable to both Parliament and the electorate. Foundational conventions, therefore, serve only to help bridge the gap between legal theory and political reality which, as noted above, can just as easily be remedied by changing the law.

Britain's heavy reliance upon foundational conventions, especially in relation to the Crown, however, ultimately exaggerates and distorts the prominence of political accountability within the constitution. This is because conventions which regulate the prerogative powers of the Crown *de facto* confer those powers upon government ministers. Although the Queen may no longer be able to exercise the majority of her prerogative powers as a result of convention, therefore, her ministers certainly can. Conventions, and their ability to move accountability of political actors out of the legal sphere and into the political one, is therefore of no normative value in this instance because rules – either legal or political – are still needed in order to regulate the government's exercise of the prerogative. As noted in the previous chapter, however, conventions and laws governing the exercise of the prerogative are few and far between, with the existence of some conventions remaining in serious doubt, such as the supposed requirement for parliamentary approval for the use of armed forces following the government's decision in 2003 to seek the House of Commons' support for military intervention in Iraq.<sup>70</sup> Despite the presence of convention, therefore, a gap in accountability remains. Given the lack of clear rules governing the exercise of the prerogative, as well as the government's traditional dominance over the House of Commons, any appearance of political accountability or control as a consequence of foundational conventions is illusory. Government may be more democratic as a result of such conventions, but this does not make it more accountable.

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<sup>70</sup> Following the decision of Prime Minister David Cameron to seek parliamentary approval for potential military action in Syria on 29 August 2013, however, the existence of such a convention may have been strengthened due to precedent. See *Hansard*, HC Deb, vol. 566, col. 1425-1556 (29 August 2013). On the doubt surrounding the existence of this convention prior to the Syrian Crisis, see Turpin, C. and Tomkins, A. *British Government and the Constitution: Text and Materials* (8th edn, Cambridge: Cambridge University Press, 2011), 192-193.

Therefore, although it is true to say that the British constitution remains primarily political as a result of its heavy dependency upon convention, the normative value of such dependency is severely undermined by the constitution's greater reliance upon foundational as opposed to regulatory conventions.

### 3.2 *Why do Conventions Bind?*

It is submitted also that even dependency upon regulatory conventions is meaningless where they are ineffective in providing real and meaningful regulation of political behaviour. Although difficult to prove empirically, it appears safe to say that conventions under the British constitution are generally observed. Given the fact that the existence of conventions is wholly dependent upon their regular observance, it is doubtful whether any of the constitution's current conventions could be identified as such without evidence of their compliance. It is submitted, however, that mere conformity with convention alone is not indicative of real and meaningful regulation of political behaviour. It is not a question of compliance but instead of enforcement: *why* do conventions bind?

It is clear that conventions cannot arise solely from precedent. Even 'evolved conventions' were once pioneering deviations of normal practice without past authority. In order to become binding constitutional norms, therefore, conventions must be seen to be binding by those they purport to bind and by those they could bind. As McHarg notes:

[T]he moral commitment involved in abiding by conventions flows not from a *personal* morality, but rather from a *role* morality. In other words, for a norm to have the status of a constitutional convention, it must be accepted as a correct and binding account of constitutionally appropriate behaviour by anyone who occupies the relevant role.<sup>71</sup>

Understanding what exactly facilitates this *role* morality, however, is no easy task. If it is not illegal for a government to disobey or deviate from convention, therefore, what then compels them to follow it? Although numerous answers to this question have been proposed, it will be shown that each provides only a partial explanation for the obligatory nature of conventions.

According to Jennings, conventions may be followed merely out of habit. As he notes:

[M]en being what they are, they tend to follow rules of their own devising; they develop habits in government as elsewhere. And when these men give place to others, the same practices tend to be followed. Capacity for invention is limited, and when an institution

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<sup>71</sup> McHarg, n 44, 860.

works well in one way it is deemed unnecessary to change it to see if it would work equally well in another. Indeed, people begin to think that the practices ought to be followed. It was always so done in the past, they say; why should it not be done so now?<sup>72</sup>

On the other hand, Bradley and Ewing suggest that conventions are perhaps followed because it would be unconstitutional to do otherwise. As they note, 'conventions are observed for the positive reason that they express prevailing constitutional values and for the negative reason of avoiding the difficulties that may follow from 'unconstitutional' conduct.'<sup>73</sup> On this account, conventions can be said to possess strong moral authority, and are therefore observed simply because it is the 'right' thing to do. Traces of this argument can certainly be inferred from Tomkins' account of the political constitution. As discussed in Chapter Two, Tomkins argues that, a political constitution – whereby 'those who exercise political power (let us say the government) are held to constitutional account through political means, and through political institutions (for example, Parliament)<sup>74</sup> – has normative value because it is founded upon republican values such as 'freedom as non-domination.'<sup>75</sup> As a result, he argues against the adoption of a legal constitution in Britain on the grounds that it would be unconstitutional.<sup>76</sup> Because the hallmark of Tomkins' political constitution is the Convention on Ministerial Responsibility – the obligation upon government to make themselves accountable to Parliament – it stands to reason that any failure to observe it would likewise be deemed unconstitutional.

By leaving compliance with conventions wholly dependent upon the moral persuasions of those they purport to bind, however, habit and moral imperativeness serve only to undermine the reliability of conventions as effective constraints upon primarily executive power. Cynical of the extent to which government can be trusted to do the 'right' thing, some have accordingly sought more pragmatic reasons behind executive compliance with conventions. As Dicey himself asked, '[w]hat is the sanction by which obedience to the conventions of the constitution is at bottom enforced?'<sup>77</sup>

In an attempt at answering the difficult question he himself posed, Dicey was ultimately unable to escape the coercive force of the law, and explained the binding nature of conventions by arguing that a breach of convention would inevitably result in a breach of law. As he noted:

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<sup>72</sup> Jennings, n 17, 80.

<sup>73</sup> Bradley and Ewing, n 12, 24.

<sup>74</sup> Tomkins, A. *Public Law* (Oxford: Oxford University Press, 2003), 18.

<sup>75</sup> See Tomkins, A. *Our Republican Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2005), 46-52.

<sup>76</sup> *Ibid*, 40.

<sup>77</sup> Dicey, n 3, 292.

[T]he sanction which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offender into conflict with the Courts and the law of the land.<sup>78</sup>

Given the interdependency within the British constitution between law and convention, as witnessed in the previous chapter in relation to the Fixed-term Parliaments Act 2011, Dicey's argument has some basis. A breach of convention may indeed result in a breach of law, but the circumstances whereby this would occur is difficult to state with any certainty. Dicey based his argument upon the then convention that Parliament meet at least once a year. If Parliament were prorogued for longer than a year, he argued, key laws controlling the Army would expire and the collecting of taxes would eventually become illegal. Government, therefore, could not impose army discipline or collect taxes without acting illegally, all because the convention requiring Parliament to meet at least once a year was disobeyed.<sup>79</sup> Although Dicey proclaimed his example to be 'a particularly plain case,'<sup>80</sup> it has since been partially discredited by Jennings.<sup>81</sup>

Given the uncertainty surrounding what breach of conventions would inescapably result in a breach of law, therefore, it is highly unlikely that the threat of a breach of law compels compliance with all conventions. Jennings, therefore, argues that conventions are obeyed 'because of the political difficulties which follow if they are not.'<sup>82</sup> Sampford similarly notes that '[w]here a 'breach' of convention is likely to be politically costly, the convention is far more secure. Where recent breaches have been politically costly for key participants, the convention may be stronger than imagined.'<sup>83</sup> Yet again, however, this appears an inadequate explanation. Not every breach of convention will invariably result in political difficulties and not all political difficulties will have arisen as a result of a convention having been breached. Compliance with a convention will also depend very much upon the nature of the political difficulties that will result from it being disobeyed. As Bradley and Ewing note, '[a]s these rules [conventions] regulate the conduct of those holding public office, possibly the most acute political difficulty which can arise for such a person is to be forced out of office.'<sup>84</sup> Because conventions are legally-unenforceable, it certainly stands to reason that the responsibility for their enforcement should lie instead in the political

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<sup>78</sup> *Ibid*, 297.

<sup>79</sup> *Ibid*, 297-299.

<sup>80</sup> *Ibid*, 299.

<sup>81</sup> Jennings, n 17, 128-129.

<sup>82</sup> *Ibid*, 135.

<sup>83</sup> Sampford, n 45, 375.

<sup>84</sup> Bradley and Ewing, n 12, 24.



arena. The threat of political sanctions is therefore the most convincing explanation on paper for why conventions should be followed, as well as the explanation most likely favoured by political constitutionalists who, after all, prefer political as opposed to legal methods of accountability. As Turpin and Tomkins note, 'the breach [of a constitutional convention] may provoke accusations of unconstitutional behaviour and lead to serious consequences.'<sup>85</sup> Despite this, however, the threat of political sanctions also appears incapable of explaining why conventions are followed in practice. This is because of the tendency for single party majority governments within the House of Commons.

The House of Commons, being a democratically-elected chamber, is one populated by many individuals of numerous political persuasions. It is also one, however, dominated, not only by political parties, but often by a single political party with a working majority that accordingly forms government. Party whips are adept at ensuring that the government retains the support of its elected members and thus the 'confidence' of the House. Parliament is therefore largely ineffective at holding the government to account through threats of political sanctions, such as removing it from office via a vote of no confidence. This has led Allan to conclude that the distinction between laws and conventions along the lines of judicial enforcement should prove unimportant to a court faced with the task of protecting the Rule of Law. As he notes:

In some cases ... such means [political accountability] may prove inadequate. If a failure to enforce convention would undermine a basic constitutional principle, without effective means of redress, the court's duty to safeguard the constitution will limit its freedom to manoeuvre. In those circumstances, the distinction between what is unconstitutional as a matter of law and what is unconstitutional only as a matter of convention is likely to be elusive.

When the integrity of the rule of law itself is threatened, artificial barriers to justiciability must certainly be rejected: conventions may properly 'crystallize' into law whenever the principle of due process and equality demand it.<sup>86</sup>

Despite the dominance of political parties in Britain, however, their hold over Parliament is notably weaker than in other jurisdictions. Parliament, therefore, should not be completely abandoned as an effective means of compelling executive compliance with convention. In Australia, for example, party discipline is so strong that government accountability occurs, not on

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<sup>85</sup> See Turpin and Tomkins, n 70, 183.

<sup>86</sup> Allan, T.R.S. *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2005), 185.

the floor of the House, but behind closed doors in the 'party room'.<sup>87</sup> As a result, public dissent is non-existent. Party members are always expected to publically toe the party line, reserving any disagreements they may have with party policy or party leadership to the party room.<sup>88</sup> As David Hamer accordingly notes, 'Australia has gone to the extreme lengths of viewing all legislation as a vote of confidence and any legislation amended by the House of Representatives against the Government's wishes as a vote of no confidence in that Government.'<sup>89</sup> Public dissent in Britain, however, remains rare but comparatively more common. Backbench MPs in particular have no aversion to rebelling against their own party when there is strong disagreement or where they feel they may secure more votes by dissenting rather than acquiescing to government policy. As Fergal Davis has noted,

[P]arliamentary rebellion is rare but part of the reason for this is that the costs of rebellion in a system of political parties and patronage are high. Parliamentarians are more likely to rebel after the mood in the country has already changed, because supporting an already popular movement is likely to be popular with the electorate thereby increasing the chances of electoral success.<sup>90</sup>

Mark Shephard cites extraordinary rendition, ID cards, and the extension of the period of detention for suspected terrorists without charge as issues which were subject to a 'parliamentary backlash' following the 2005 general election due to public distrust in Blair's Government.<sup>91</sup> More recently, having already been forced by Labour and the threat of backbench rebellion to delay a vote on actual military intervention in Syria until the UN Weapon Inspectors had reported their findings on the use of chemical weapons,<sup>92</sup> the Prime Minister David Cameron failed to secure

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<sup>87</sup> Thompson, E. 'The "Washminster" Mutation' (1980) 15(2) *Politics* 32, 37: 'It is the fight in the party room for the control of government that is the heart of our system. It is the party room, not on the floor of the house, that changes in leadership occur ... The cabinet is not a committee of parliament but a committee of the governing party or parties. Sharing of power exists not between the executive and its legislature but between the party and its leaders.'

<sup>88</sup> For a discussion of these issues and a detailed comparison of UK and Australian party discipline and parliamentary scrutiny see the chapter by Fergal Davis in de Londras, F. and Davis, F. (eds) *Critical Debates on Counter-Terrorist Judicial Review* (Cambridge University Press, 2014, forthcoming).

<sup>89</sup> Hamer, D. 'Senate Committees – Keeping Parliament Responsible,' *Papers on Parliament*, Number 12, September 1991, Senate Committees and Responsible Government: Proceedings of the Conference to mark the twentieth anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees, 3 October 1990  
<[http://www.aph.gov.au/About\\_Parliament/Senate/Research\\_and\\_Education/pops](http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops)> (accessed on 14/11/2013).

<sup>90</sup> de Londras, F. and Davis, F.F. 'Controlling the Executive in Times of Emergency: Competing perspectives on Effective Oversight Mechanisms' (2010) 30(1) *OJLS* 19, 32.

<sup>91</sup> Shephard, M. 'Parliamentary Scrutiny and Oversight of the British "War on Terror:" From Accretion of Executive Power and Evasion of Scrutiny to Embarrassment and Concessions' (2009) 15 *Journal of Legislative Studies* 191, 204, as cited in *ibid*.

<sup>92</sup> See Elliott, F. 'Cameron humiliated as MPs veto Syria strike,' *The Times*, August 31, 2013, 1.

parliamentary support in principle for military intervention in Syria by thirteen votes due to a backbench rebellion of 39 MPs.<sup>93</sup> As a result, the Prime Minister confirmed that he would not use his powers under the royal prerogative to engage in military operations in Syria without another vote in the House of Commons, noting that '[i]t is very clear tonight that, while the House has not passed a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly.'<sup>94</sup> Consequently, there remains the real potential for MPs in Britain to be further freed from the iron-grip of their party whips, thereby enhancing the coercive effect of political sanctions, even for breaches of convention. Until this potential is fully tapped, however, fear of political sanctions is unlikely to motivate executive compliance with convention in every instance.

Although a threat of political sanctions could also emanate, not from Parliament itself, but instead from the general public at the ballot box, it is submitted that any threat of removal from public office at a general election still cannot be relied upon as a valid explanation for why conventions are indeed followed. Although governments are understandably keen to retain the public's support during their time in office, there is simply no guarantee that the members of the general public that vote for the government will disagree with the government's decision to disregard it. The coercive force of public opinion, therefore, is often unknown if and until there is a breach of convention. It is therefore unreliable as a general explanation for the binding nature of all constitutional conventions.

Joseph Jaconelli has proposed a more pragmatic explanation for why conventions bind, that of reciprocal obligation. He suggested that governments, in abiding by convention, are in fact reciprocating the previous government's adherence to the rule in the hope that their adherence will be likewise reciprocated by the next government.<sup>95</sup> Although, as noted above, there is no guarantee that the general public will eject the government from office following a breach of convention, they may nevertheless still lose an election for any number of reasons and be replaced, more often than not, by the official opposition. The major political parties, therefore, can be seen to take turns in office over many years and decades. Although the party in power may view a breach of convention as particularly advantageous in the short term, Jaconelli suggests that

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<sup>93</sup> See *Hansard*, n 70. The government lost its motion expressing support in principle for military intervention in Syria in the House of Commons by 272 votes to 285. Of the 39 backbench MPs that voted against the motion, 30 were Conservative and 9 were Liberal Democrat. See *The Times*, August 31, 2013, 8-9.

<sup>94</sup> *Hansard*, HC Deb, vol. 566, col. 1555-1556 (29 August 2013).

<sup>95</sup> See Jaconelli, J. 'Do constitutional conventions bind?' (2005) 64(1) *CLJ* 149.

they are likely to be discouraged from doing so as they will almost inevitably pay the price for it in the long term when they are no longer in office. As he notes, 'each party political actor must conduct himself in the realisation that he is helping to shape a social rule. As he acts, so too may those of the opposite political persuasion when they, in their turn, attain office.'<sup>96</sup> Unfortunately, however, Jaconelli's proposition is not based upon any empirical evidence. It is therefore not yet known whether government's abide by conventions for the reasons he suggests. A government may just as easily disobey convention in the knowledge that, although they may pay for it whilst in opposition, it will most likely be given the chance to form government again sometime in the future and thus regain the benefit of disobeying it once again. At best, therefore, Jaconelli's proposition appears more than plausible, but is nevertheless unlikely to explain general acquiescence to convention by successive governments in every instance.

Despite the merits of the above explanations for why conventions are followed, therefore, it is clear that each provides only a partial explanation, their application varying in degree and emphasis. Although constitutionalists would prefer it to be the case that conventions are abided by because of the effectiveness of political sanctions – particularly political constitutionalists who believe political forms of accountability to be more effective than legal ones – this may only be the case in a handful of instances, thereby weakening the reliability of conventions as effective checks on executive power. Some conventions may instead bind because non-compliance would result in a breach of law, or because to breach convention would give a political advantage to the government's political rivals should they one day form government. In the end, because conventions are incapable of legal enforcement, the impetus is ultimately upon government to abide by them. Governments, therefore, will only follow conventions if it is in their interests to do so. As Colin Munro notes, '[m]ore than any other factor, a principle no higher than political self-interest accounts for the observance of conventions.'<sup>97</sup> Although much reform is likely needed, therefore, before the threat of political sanctions makes any breach of convention unthinkable to government, it is submitted that the recent codifications of conventions and the reforms to the composition and abilities of Select Committees have the potential to significantly improve the effectiveness of many of the British constitution's key conventions.

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<sup>96</sup> *Ibid*, 176.

<sup>97</sup> Munro, n 42, 221.

## 4. Strengthening Conventions

### 4.1 Codification and Justiciability

Many commentators have come to observe a widespread, albeit *ad hoc*, codification of constitutional conventions in recent years.<sup>98</sup> That is the process whereby conventions are reduced to writing in an ‘authoritative statement,’ which, as the Joint Committee on Conventions have observed, can take any of the following forms:

- a) a statement made anywhere, e.g. in a book
- b) some form of concordat or memorandum of understanding
- c) a statement made in Parliament, e.g. in Hansard or in evidence to a Committee
- d) a Committee report
- e) a report agreed to by one or both Houses of Parliament
- f) a resolution of one or both Houses of Parliament
- g) a literal Code, such as each House’s Code of Conduct for Members
- h) a statement in the House of Lords’ Companion to Standing Orders
- i) words in *Erskine May*
- j) a Standing Order
- k) an Act of Parliament<sup>99</sup>

Conventions in relation to governmental behaviour have accordingly been included in non-statutory publications such as the *Ministerial Code*, the *Guide to the Rules Relating to the Conduct of MPs*, the *Civil Service Code*, the *Code of Practice on Access to Government Information*,<sup>100</sup> and *The Cabinet Manual* – which expressly published for the first time all of the conventions relating to the operation of government – whilst others have been placed on a statutory footing under the Constitutional Reform and Governance Act 2010 and the Fixed-term Parliaments Act 2011.

The popular but inaccurate claim that the British constitution is unwritten stems from that fact that its many constitutional conventions remain predominantly unwritten i.e. lacking a definitive or authoritative written source.<sup>101</sup> Given the fact that conventions are traditionally unwritten, concerns have therefore been raised over their codification on the grounds that it will lead to greater rigidity and legalism.<sup>102</sup> The Joint Committee on Conventions was certainly of the opinion that the phrase ‘codifying conventions’ was ‘a contradiction in terms’ because conventions ‘by

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<sup>98</sup> For example, Fenwick and Phillipson, n 7, 72.

<sup>99</sup> Joint Committee on Conventions, n 13, 68 [253].

<sup>100</sup> The Government’s *Code of Practice on Access to Government Information* has since been superseded by the Freedom of information Act 2000.

<sup>101</sup> Sampford, n 45, 369.

<sup>102</sup> Such fears were felt by Britain’s major political parties. For a summary of these fears see Joint Committee on Conventions, n 13, 69-70 [257]-[261].

their very nature, are unenforceable' and codification, they claim, implies 'rule-making, with definitions and enforcement mechanisms.'<sup>103</sup> On this argument, codification implies enforcement, and enforcement implies law. Contrary to the opinion of the committee, however, it is submitted that codification does not risk transforming Britain into a more legal constitution.<sup>104</sup> As Dicey argued:

The distinction [between law and convention] differs essentially, it should be noted, from the distinction between "written law" (or statute law) and "unwritten law" (or common law). There are laws of the constitution, as, for example, the Bill of Rights, the Act of Settlement, and Habeas Corpus Acts, which are "written law," found in the statute-books – in other words, are statutory enactments. There are other most important laws of the constitution (several of which have already been mentioned) which are "unwritten" laws, that is, not statutory enactments. Some further of the laws of the constitution, such, for example, as the law regulating the descent of the Crown, which were set one time unwritten or common law, have now been written or statute law. The conventions of the constitution, on the other hand, cannot be recorded in the statute-book, though they may be formally reduced to writing. Thus the whole of our parliamentary procedure is nothing but a mass of conventional law; it is, however, recorded in written or printed rules. The distinction, in short, between written and unwritten law does not in any sense square with the distinction between the law of the constitution (constitutional law properly so called) and conventions of the constitution. This latter is the distinction on which we should fix our whole attention, for it is of vital importance, and elucidates the whole subject of constitutional law.<sup>105</sup>

Although codification, by virtue of reducing conventions to writing, gives the appearance of positive law,<sup>106</sup> codified conventions can still be distinguished from laws where they remain judicially unenforceable. In order for codification to transform a convention into a law, therefore, it must be codified in a justiciable statute.<sup>107</sup> This can be seen in relation to the Constitutional Reform and Governance Act 2010, where the conventions that traditionally governed the actions of the civil service<sup>108</sup> and the 'Ponsonby Rule' – the requirement for ministers must put before the House of Commons treaties before ratifying them<sup>109</sup> – were placed on a statutory footing. This has had the effect of transforming the 'Ponsonby Rule' from a convention into a 'legal obligation on

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<sup>103</sup> *Ibid*, 73 [279].

<sup>104</sup> *Ibid*, 72-73 [272]-[275]. It can be inferred from the evidence supplied by both Dr Russell and Professor Bogdanor that, if conventions are largely unique to the British constitution, their codification would bring the constitution more in line with the majority of the world's legal constitutions.

<sup>105</sup> Dicey, n 3, cxliii-cxliv.

<sup>106</sup> This is arguably one of the aims and benefits of codification. See Wood, D. and Sampford, C.J.G. 'Codification of constitutional conventions in Australia' (1987) *PL* 231.

<sup>107</sup> See Joint Committee on Conventions, n 13, 69 [258]: 'Codification in statute would invite intervention by the courts.'

<sup>108</sup> Part 1.

<sup>109</sup> Section 20(1).

Government,<sup>110</sup> thereby effectively abolishing it and replacing it with law. This transformative effect can be avoided, therefore, where conventions are included, either in non-statutory publications, or in statute but as 'non-justiciable declarations of principle,'<sup>111</sup> such as with the Fixed-term Parliaments Act 2011. Given the fact that codification in Britain has been primarily non-statutory, it is therefore submitted that the recent surge in codification does not mark a move away from reliance upon political accountability, but instead, as argued below, a potential strengthening of it.

#### 4.2 Clarity, Legitimacy, and Accountability

It is submitted that reducing regulatory conventions to writing has a number of advantages which have the potential to strengthen their effectiveness as political constraints on government power. As Bogdanor and Vogenauer argue, both the content and scope of conventions is far from clear.<sup>112</sup> It is therefore submitted that, where conventions are unclear or doubtful, codification could have the effect bringing greater clarity and certainty to some of the most important rules governing the Constitution.<sup>113</sup> Much of the uncertainty surrounding the existence of the requirement for parliamentary approval for the use of armed forces can be attributed to the fact that a proposed House of Commons' resolution of the convention, although promised in a 2008 White Paper,<sup>114</sup> has to date never been brought,<sup>115</sup> although the convention was eventually stated in *The Cabinet Manual*.<sup>116</sup> By contrast, a draft version of *The Cabinet Manual* published in March 2010 arguably brought greater clarity and certainty to the rules regulating what to do in the event of a hung Parliament, thereby helping to ensure that a government could be properly formed following the general election of May 2010.<sup>117</sup> Codification, therefore, has the potential to improve executive, parliamentary, and public knowledge of the restrictions on government power, thereby enabling

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<sup>110</sup> *The Governance of Britain – Constitutional Renewal*, Cm.7342-I (2008), 38 [150].

<sup>111</sup> "Identifying Conventions Associated with the Commonwealth Constitution", Australian Constitutional Convention, Standing Committee "D", vol.2, 1982, p.1, cited in Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, p.151, as cited in Bogdanor and Vogenauer, n 12, 50.

<sup>112</sup> Bogdanor and Vogenauer, *ibid*, 44.

<sup>113</sup> See Marshall, G. and Moodie, G. C. *Some Problems of the Constitution* (5<sup>th</sup> edn, 1971), 34-36, as duplicated in Fenwick and Phillipson, n 7, 70-72.

<sup>114</sup> *The Governance of Britain – Constitutional Renewal*, n 110, 51 [215].

<sup>115</sup> For more detail see Turpin and Tomkins, n 70.

<sup>116</sup> *The Cabinet Manual*, October 2011, [5.36]-[5.38]. However, as noted at 70, the existence of a convention requiring prior parliamentary approval for the deployment of armed forces may have been strengthened by the decision of Prime Minister David Cameron to seek prior parliamentary approval for potential military action in Syria.

<sup>117</sup> See Turpin and Tomkins, n 70, 187-189.

governments to perform their functions with greater confidence, whilst simultaneously enabling MPs, the media, and citizens to better judge the behaviour of the government.

It is submitted also that codified conventions, where approved by Parliament, can accord even well-established conventions greater democratic legitimacy. During Australia's codification experiment, questions were raised over the authority of the Constitutional Convention, set up initially to recommend constitutional changes, to recognise and declare Australia's conventions.<sup>118</sup> Its authority, after all, would impact upon the authority of the recognised and declared conventions.<sup>119</sup> Because the recognised and declared conventions are not law, their acceptance as a source of convention is dependent upon acquiescence by politicians, which in turn is dependent upon the authority of the body that made the codification. As Sampford explains, '[t]he text [written convention] merely restates existing rules so that the rules retain whatever authority they already had – the declaration merely *adds* whatever authority the body [the institution codifying the convention] itself has.'<sup>120</sup> In the case of Australia, the authority of the Constitutional Convention tasked with recognising and declaring Australia's conventions is unclear. It did, however, consist of politicians. As a result, Sampford concludes that '[p]oliticians are likely to accord them [written conventions] greater authority as politicians have a hand in drafting them and been responsible for recognizing and declaring them.'<sup>121</sup>

A convention approved by the Westminster Parliament, therefore, would assumedly be endowed with the democratic authority of Parliament. As a result, the moral authority of the convention may be strengthened, thereby simultaneously strengthening the obligation upon government to follow it, as well as the potential for negative political consequences for non-compliance. *The Ministerial Code* is a good example of this. Although published by the Cabinet Office, the provisions of *The Ministerial Code* relating to the Convention of Ministerial Responsibility and the duty it imposes upon ministers were approved by a resolution of both Houses of Parliament.<sup>122</sup> The result is a degree of entrenchment not too dissimilar to that accorded to Standing Orders and other parliamentary rules. As Adam Tomkins remarks:

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<sup>118</sup> See Sampford, n 45, 384-388.

<sup>119</sup> For a list of the recognised and declared conventions see *ibid*, 415-420 and Wood and Sampford, n 106, 239-244.

<sup>120</sup> Sampford, n 45, 384. Sampford, however, appears to reject such reasoning in drawing his conclusion that a new source for conventions has been created because it ignores the need for authority in codifying conventions on the grounds that the authority of the original conventions are preserved.

<sup>121</sup> *Ibid*, 390.

<sup>122</sup> *Hansard*, HC Deb, vol. 292, cols. 1046-1047 (19 March 1997), and *Hansard*, HL Deb, vol. 579, cols. 1055-1062 (20 March 1997).



No longer is ministerial responsibility merely an unwritten constitutional convention. No longer is it even a doctrine of political practice formally written down only in the government's own documents. It is now a clear parliamentary rule, set down in resolutions by both Houses of Parliament ... [T]he government acting on its own cannot now change the terms of ministers' responsibility to Parliament in the way that the Conservative government did throughout its period in office.<sup>123</sup>

The approval by resolution of duty upon ministers to make themselves accountable to Parliament under the Convention of Ministerial Responsibility, as Fenwick and Phillipson note, gave the convention 'far greater significance than mere guidance from the executive to its own.'<sup>124</sup> The accountability of the government to Parliament is undisputedly strengthened as a result.

Despite this, however, Andrew Blick has expressed doubts over the desirability of codifying conventions on the grounds that, because the existence and content of many conventions is unclear and subject to various interpretations, drafters 'must express themselves in such general or balanced terms as to add little value, or else impose particular interpretations.'<sup>125</sup> Because non-statutory codifications to date have been drafted by the government, Blick argues also that codification subverts the role conventions play in limiting government. This is because government, in disseminating a document which codifies conventions, are permitted to 'frame the overall terms of debate about conventions'<sup>126</sup> concerning their interpretation of 'the nature of the constraints on itself,<sup>127</sup> which may not be in the best interests of everyone. Consequently, even where parliamentary approval is secured, the codified convention may nevertheless be disproportionately favourable to government. It is submitted, however, that codification as part of non-justiciable statute could resolve this issue because, unlike with non-statutory codifications issued by the government, Parliament can play an active role in drafting the codification, thereby infusing it with even greater legitimacy, and preventing the government from dominating the debate on conventions. Although executive dominance of the House of Commons remains an issue, thereby granting it 'the power of initiative'<sup>128</sup> even in relation to the drafting of legislation, reforms have recently been enacted with the purpose of weakening the executive's dominance over the House.

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<sup>123</sup> Tomkins, A. *The Constitution after Scott: Government Unwrapped* (Oxford: Clarendon Press, 1998), 62.

<sup>124</sup> Fenwick and Phillipson, n 7, 628.

<sup>125</sup> Blick, n 68, 195.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

### 4.3 The Wright Committee Reforms

The Convention of Ministerial Responsibility, by making ministers accountable to Parliament, has resulted in the development of a series of parliamentary procedures designed to give the Convention practical effect. As Tomkins argues, '[i]t would all very well having rules and conventions of ministerial responsibility, but without adequate parliamentary means to apply those rules in practice, the doctrines would be useless.'<sup>129</sup> These procedures include, but are not limited to, parliamentary debates, opposition days, oral questions (both Prime Minister's and Departmental Questions), written questions, and – most importantly – select committees.

Concerns have been expressed over the effectiveness of these procedures, however, with legal and political constitutionalists alike citing the influence of party whips in the Commons as the principal reason for their unreliability.<sup>130</sup> As noted above, the dominance of political parties within the House of Commons has, at the very least, cast doubt over their ability to hold the government to account for breaches of convention. Far from abandoning these methods in favour of more legal checks, however, successive Parliaments have in fact sought to reform the effectiveness of these political controls in an attempt to strengthen the Convention of Ministerial Responsibility.

Significant reforms were initiated recently in order to implement the findings of the Wright Committee, which aimed 'to make the Commons matter more, increase its vitality and rebalance its relationship with the executive, and to give the public a greater voice in parliamentary proceedings.'<sup>131</sup> Established in the wake of the MPs' Expenses Scandal,<sup>132</sup> the Committee focused on considering reform options to both the composition of select committees and the scheduling of business within the House of Commons,<sup>133</sup> both of which are discussed below.

The membership of Select Committees traditionally consisted of backbenches chosen by the Committee of Selection. It was felt, however, that the membership of the Committee of Selection, because it was determined by the party whips, granted the government too great an influence

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<sup>129</sup> Tomkins, n 74, 159.

<sup>130</sup> For an objective assessment of the effectiveness of these parliamentary methods of scrutiny see Fenwick and Phillipson, n 7, 384-424 and Tomkins, n 123, in general.

<sup>131</sup> House of Commons Reform Committee, n 16, 5.

<sup>132</sup> For a detailed account of the creation of the Wright Committee see Russell, M. 'Never Allow a Crisis to Go To Waste: The Wright Committee Reforms to Strengthen the House of Commons' (2011) 64(4) *Parliamentary Affairs* 612.

<sup>133</sup> In addition to this, the Wright Committee also considered a number of ways in which greater public involvement with the Commons could be achieved.

over them, particularly in respect to the appointment of the Committee Chairs, which threatened to undermine their role as ‘independent monitors of government.’<sup>134</sup> This was made abundantly clear after the 2001 General Election when the Blair Government tried to remove two select committee Chairs – Gwyneth Dunwoody of the Transport Committee and Donald Anderson of the Foreign Affairs Committee – because they were deemed to be too critical of Government policy. Although the Blair Government’s motions for altering the composition of both the Foreign Affairs and Transport Committees failed due to a Labour rebellion, the incident nevertheless helped to popularise the issue of Select Committee reform amongst parliamentarians and thus helped to pave the way for the establishment of the Wright Committee.<sup>135</sup>

In considering the issue, the Wright Committee concluded that ‘[t]he credibility of select committees could be enhanced by a greater and more visible element of democracy in the election of members and Chairs.’<sup>136</sup> As a result, the Committee proposed that the Chairs of departmental and similar Select Committees should be elected by the House as a whole, with the remaining committee members being elected by secret ballot by each political party according to their share of seats in the House.<sup>137</sup>

The Committees proposals were duly implemented with the support of the Commons,<sup>138</sup> and the first elections for the Chairs of the Select Committees was successfully held on June 9<sup>th</sup> 2010. The change, it is submitted, helped to distance select committees from both the government and party politics, thereby strengthening their independence. As Meg Russell remarks, the election of Chairs ‘should give them a greater sense of legitimacy and more confidence to speak for the chamber as a whole’ with the election of members making them ‘answerable to all of their party colleagues, rather than just the whips.’<sup>139</sup> As a result of this increased independence, the Convention of Ministerial Responsibility can be more effectively enforced.

The second change concerned the crucial issue of the timetabling of business. By virtue of Standing Order 14, government business takes precedence in the House of Commons.<sup>140</sup> Prior to reform, backbenchers who wanted to hold a debate and a vote designed to hold the government to

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<sup>134</sup> Phrase taken from House of Commons Liaison Committee, First Report of Session 1999-2000, *Shifting the Balance: Select Committees and the Executive*, HC 300, March 2000, [10].

<sup>135</sup> See Fenwick and Phillipson, n 7, 394.

<sup>136</sup> House of Commons Reform Committee, n 16, [74].

<sup>137</sup> *Ibid*, [71]-[80].

<sup>138</sup> See Russell, n 132, 622-627.

<sup>139</sup> *Ibid*, 628.

<sup>140</sup> Standing Order 14 (1): ‘Save as provided in this order, government business shall have precedence at every sitting.’

account would first have to receive the government's permission to do so. Unsurprisingly, therefore, non-governmental business was left largely unheard.<sup>141</sup>

In order to shift the balance of power away from the executive and back towards the House, the Wright Committee recommended the creation of a new category of backbench business, which would be scheduled by a newly created Backbench Business Committee. In addition to this, the Committee recommended also the creation of a House Business Committee. Although the Wright Committee maintained a distinction between governmental and non-governmental business (therefore rejecting calls for the creation of an all-encompassing Business Committee responsible for the scheduling of all of the House's business), it did recommend the creation of a House Business Committee. Comprising of members of the Backbench Business Committee and others, the House Business Committee, though unable to overturn the government's schedule for business, would provide a platform by which the government's agenda could be discussed.

Upon forming government, the Conservative-Liberal Coalition decided to act upon the recommendations of the Wright Committee. As a result, they amended Standing Order 14 in order to establish both a category of backbench business and a Backbench Business Committee responsible for its scheduling, and promised the creation of a House Business Committee by the Parliament's third year.<sup>142</sup> Now, although the time available for backbench business varies monthly and the government decides which days of the week will be given over to backbench business, the Backbench Business Committee meet once a week in order to hear requests for debates and allocate the parliamentary time made available to them. This change, it is submitted, helps to break the government's monopoly over the scheduling of business, thereby significantly strengthening the power of the Commons in relation to the executive in a way which may prove irreversible.<sup>143</sup> As Russell remarks:

[T]he amendment to standing order 14 to create 'backbench time' ends the government's effective stranglehold over the Commons' agenda ... [T]he new arrangements ... create an opportunity for backbenchers, including committees, to put issues onto the agenda that the frontbenches (sometimes jointly) find uncomfortable. The main result may be greater

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<sup>141</sup> See Russell, n 132, 616-617: 'Standing order 14 provided some exceptions to government control: reserving time for non-governmental parties (through 'opposition days'), and individual backbenchers (e.g. through private members' bills and adjournment debates). But there were few opportunities for backbenchers to push matters to a vote, virtually no opportunity for groups or backbenchers collectively to sponsor debates. This most obviously disadvantaged cross-party groups of members, including select committees. It explained, for example, why the Liaison Committee had been unable to force its suggestions for select committee reform onto the Commons agenda for decision.'

<sup>142</sup> *The Coalition: our programme for government* (HM Government, 2010), 27.

<sup>143</sup> Russell, n 132, 631.

frontbench responsiveness to backbench opinion at an early stage. But the new mechanism offers an important safety valve. It also means that backbenchers can in future bring forward their own proposals for procedural change via the newly elected Procedure Committee, rather than relying on government to provide the parliamentary time ... Government can no longer keep such issues off the agenda.<sup>144</sup>

The establishment of the Backbench Business Committee has also made Select Committees more effective because it can timetable debates concerning Select Committee reports and recommendations which are contrary to the government's interests. This was seen in July 2012 when a motion in favour of the recommendation of the Public Administration Select Committee concerning the powers of the Advisor on Ministers' Interests were put to the House of Commons for debate and ultimately accepted. Currently, the Advisor may only investigate alleged breaches of the Ministerial Code when asked to do so by the Prime Minister. The recommendation was to empower the Advisor to investigate potential breaches of the Ministerial Code on his own accord, thereby increasing his independence from government. Although the government may still choose not to act on the recommendation, it is nevertheless unable to silence or stifle the issue as they once could by refusing to award it any parliamentary time.<sup>145</sup> By exposing government unwillingness to engage with specific issues, the government and its Ministers can now be greater held to account, not just for what it does, but also for what it refuses to do, thereby strengthening the Convention of Ministerial Responsibility, and thus the ability of the Commons to hold government to account for breaches of convention.

David Foster, in an article critiquing the effectiveness of the Backbench Business Committee during the 2010-2012 parliamentary session, certainly affirms the view that the Backbench Business Committee is 'an excellent method of holding government to account.'<sup>146</sup> He notes that the Backbench Business Committee:

[S]howed considerable effectiveness in meeting the hopes expressed by the Wright Committee ... , increasing the transparency of scheduling non-government business and improving the topicality of, and public interest in, parliamentary debates. Furthermore, the Committee has proved to be 'an excellent method of holding the executive to account,' scheduling debates that would not have come to light under the former

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<sup>144</sup> *Ibid*, 628.

<sup>145</sup> On this event generally see 'House of Commons adopts PASC recommendation on PM's Adviser on Minister's Interests' (17 July 2012) <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/public-administration-select-committee/news/independent-adviser-debate/>> (accessed on 10/08/2012).

<sup>146</sup> Foster, D.H. 'Going 'Where Angels Fear to Tread:' How Effective was the Backbench Business Committee in the 2010-2012 Parliamentary Session? (2013) *Parliamentary Affairs* (e-published ahead of print on June 9, 2013), 1.

system and influencing government policy in a number of areas (HC Deb, 12 March 2012, 52). Linked to this, the Committee demonstrated its potential to alter the institutional context of parliament, reducing the partisan nature of security in the Commons and thereby improving its effectiveness.<sup>147</sup>

The Wright Committee Reforms, therefore, can be seen to demonstrate Britain's commitment to improving the parliamentary rules and mechanisms by which the Convention of Ministerial Responsibility is made effective and the political enforcement of conventions made possible.

## 5. Conclusion

It has been demonstrated that conventions, because they are incapable of judicial enforcement, are both distinct from laws and of particular normative value to political constitutionalists who prefer political accountability over legal accountability. It has been shown also, however, that whilst it is true to say that the British constitution remains primarily political as a result of its heavy dependency upon conventions, its over-reliance upon foundational conventions exaggerates the role of political accountability within the constitution. Although conventions within the constitution continue to be regularly observed, it is clear that the reliability of conventions as effective checks on executive power is weakened by the fact that executive compliance with convention remains at the discretion of government, motivated neither exclusively nor heavily by a fear of political sanctions for non-compliance, but for a multitude of different reasons. Despite this, however, recent attempts at codification have the potential to bring greater clarity and legitimacy to conventions, thereby making compliance with them more likely. In addition to this, the recently initiated Wright Committee Reforms appear to strengthen Parliament's ability to hold the executive to account, thereby strengthening the Convention of Ministerial responsibility, and in turn the ability of the House of Commons to hold the government to account for breaches of convention.

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<sup>147</sup> *Ibid*, 16.

## Chapter Five

# THE HUMAN RIGHTS ACT 1998

### 1. A British Bill of Rights?

#### *1.1 Law and Politics: Protecting Rights on Two Fronts*

Because Britain took a different path towards constitutionalism than the majority of Western states, it has historically been suspicious of the supposed benefits of having an entrenched Bill of Rights which empowers the courts to strike down primary legislation.<sup>1</sup> However, due to Britain being a signatory to the European Convention on Human Rights 1950 (ECHR), as well as increased fears during the seventies and eighties of what Lord Hailsham in 1976 referred to as 'elective dictatorship,' the second half of the twentieth century saw a fevered but sustained debate over the merits of and potential for both a British Bill of Rights and the domestic implementation of the ECHR.<sup>2</sup>

In response to this debate, the Blair Government, in the wake of Labour's victory in the 1997 General Election, successfully passed through Parliament the Human Rights Bill 1997. The Human Rights Act 1998 (HRA) came into force on October 2 2000 in order to give 'further effect' to the rights contained under the ECHR within domestic law.<sup>3</sup> The aim of this reform, as stated in the Green Paper *Bringing Rights Home*, was 'to change the relationship between the State and the citizen, and to redress the dilution of individual rights by an over-centralising government that has taken place over the past two decades.'<sup>4</sup> Despite this, however, the HRA was enacted as an ordinary statute only, and does not empower the courts to strike down incompatible legislation. The reason for this, according to the Government, was because entrenchment 'could not be

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<sup>1</sup> Fenwick, H.M. *Civil Liberties and Human Rights* (London: Routledge-Cavendish, 2007), 146.

<sup>2</sup> See Gardbaum, S. 'The New Commonwealth Model of Constitutionalism' (2001) 49 *Am. J. Comp. L.* 707, 732.

<sup>3</sup> This is reflected in the long title of the Human Rights Act 1998: 'An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provisions with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.'

<sup>4</sup> Straw, J. and Boateng, P. *Bringing Rights Home: Labour's Plans to Incorporate the ECHR into UK Law: A Consultation Paper*, December 1996 (1997), as cited in Fenwick, H.M. and Phillipson, G. *Text, Cases and Materials on Public Law and Human Rights* (3<sup>rd</sup> edn, London and New York: Routledge, 2011), 949.

reconciled with our own constitutional traditions, which allow any Act of Parliament to be amended or repealed by a subsequent Act of Parliament.’<sup>5</sup>

Consequently, the HRA was designed to protect human rights without undermining the sovereignty of Parliament. This was to be achieved on both the political and legal fronts, with the latter informing the former, but without dominating it. As Murray Hunt observes:

The scheme of the Act envisages that both Parliament and the courts should have a role in ensuring that law, policy and practice respect, protect and fulfil human rights. It embodies a model of human rights protection which aims to provide practical and effective guarantees through judicial enforcement of rights without detracting from the UK's very strong tradition of representative parliamentary democracy.<sup>6</sup>

On the political front, s 19 was to encourage greater governmental engagement and compliance with rights at the pre-legislative stage by requiring ministers, when introducing a bill into Parliament, to issue a statement pertaining to the bills compatibility with the Convention Rights. In so doing, Parliament's ability to scrutinise governmental compliance with the Convention Rights would also be strengthened. Although independent of the HRA, the Joint Committee on Human Rights (JCHR) was thus established in order to assist Parliament in this task by scrutinising Government bills for their compatibility with human rights, probing ministerial reasoning behind issuing s 19 statements of compatibility, and considering s 10 remedial orders.

On the legal front, although the courts are unable to declare invalid an Act of Parliament,<sup>7</sup> they are nevertheless instructed under s 3 to interpret legislation in order to bring it into conformity with the Convention Rights ‘[s]o far as is possible to do so.’<sup>8</sup> When the courts find themselves unable to do so,<sup>9</sup> however, they are empowered under s 4 – what Hilaire Barnett describes as ‘a peculiarly British device’<sup>10</sup> – to issue a declaration of incompatibility which, crucially, ‘does not affect the

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<sup>5</sup> *Rights Brought Home: The Human Rights Bill*, Cm.3782 (1997), [2.16].

<sup>6</sup> Hunt, M. ‘The impact of the Human Rights Act on the legislature: a diminution of democracy or a new voice for Parliament?’ (2010) 6 *EHRLR* 601, 602.

<sup>7</sup> Section 3(2)(b).

<sup>8</sup> Section 3(1): ‘So far as it possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.’

<sup>9</sup> Section 4(4): ‘If the court is satisfied – (a) that the provision is incompatible with a Convention rights, and (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.’

<sup>10</sup> Barnett, H. *Constitutional and Administrative Law* (5<sup>th</sup> edn, London: Cavendish Publishing Limited, 2004), 198.



validity, continuing operation or enforcement of the provision in respect of which it is given,<sup>11</sup> thereby leaving the final say on the matter to Parliament, not the courts.

Although the HRA – via s 19 and the JCHR – clearly seeks to strengthen Parliament's role in enforcing human rights against the executive, thereby reinforcing the constitution's traditionally political foundations, it nevertheless expands the role of the judiciary under the constitution into the realm of constitutional review as a result of ss 3 and 4. As Klug notes:

The courts are clearly given powers of judicial review under the HRA that they did not have before. They can review the decisions and actions of ministers and officials in substantive, human rights terms and they can even consider the compatibility of primary legislation with the Convention rights in the HRA, something they were effectively constitutionally barred from doing before.<sup>12</sup>

The HRA, therefore, has been correctly identified as 'a turning point in the UK's legal and constitutional history.'<sup>13</sup> As a result, the HRA may be seen to be pulling in opposite directions – one towards political constitutionalism, the other towards legal constitutionalism. As discussed below, however, such expansive powers were accorded to the courts in order to help facilitate the development of a parliamentary culture of rights. Sections 3 and 4 were thus designed to inflict political costs sufficient to compel Parliament and the government to take rights seriously when drafting legislation, although without undermining Parliament's role in the protection of rights nor its right to the final say. Because the HRA purports to grant greater legal protection to human rights without compromising parliamentary sovereignty, therefore, some have argued that the HRA constitutes an example of what Francesca Klug describes as 'third wave' Bills of Rights,<sup>14</sup> which form part of what Stephen Gardbaum calls the 'new Commonwealth model of constitutionalism.'<sup>15</sup>

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<sup>11</sup> Section 4(6)(b).

<sup>12</sup> Klug, F. 'The Human Rights Act – a "third way" or "third wave" Bill of Rights' (2001) 4 *EHRLR* 361, 370.

<sup>13</sup> Lord Lester, 'The Impact of the Human Rights Act on Public Law' in *Constitutional Reform in the United Kingdom: Practices and Principles* (1998), 105, as cited in Gardbaum, n 2.

<sup>14</sup> See Klug, n 12, in general.

<sup>15</sup> Gardbaum, n 2, 710. See also Gardbaum, S. 'The Case for the New Commonwealth Model of Constitutionalism' (2013) 14(12) *German Law Journal* 2229. Gardbaum styles this new Commonwealth model as an alternative to both legal and political constitutionalism.

## 1.2 Weak-form Judicial Review

Unlike 'strong-form judicial review' typified by Bills of Rights found under legal constitutions, 'third wave' Bills of Rights adopt what Mark Tushnet dubs 'weak-form judicial review.'<sup>16</sup> This is said to embody the notion of constitutional or democratic dialogue,<sup>17</sup> which was first championed by Peter Hogg and Allison Bushell in relation to the Canadian Charter of Rights and Freedoms 1982.<sup>18</sup>

The crux of the idea is as follows:

Where a judicial decision is open to legislative reversal, modification or avoidance, than it is meaningful to regard the relationship between the courts and the competent legislative body as a dialogue ... the judicial decision causes a public debate in which the *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplishes the social and economic objectives that the judicial decision has impeded.<sup>19</sup>

Because the ruling of the court goes on to inform a public debate and heavily influence the legislature's formal response to it,<sup>20</sup> constitutional dialogue can be seen to permit at least a degree of judicial interference with the democratic decision-making process. Such interference, however, should not be viewed as necessarily contradictory to the political school. As Alison Young argues, '[d]emocratic dialogue has a specific aim – to provide for a protection of rights that does not damage democracy.'<sup>21</sup> As a result, constitutional dialogue, despite requiring the courts to engage with issues previously seen to fall within the special competence of Parliament, remains respectful of the underlying values of the political school. When seeking to protect human rights, therefore, Hogg and Bushell's dialogical model is more than capable of providing a theoretical framework from which the courts may be ascribed a role in protecting these values without

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<sup>16</sup> See generally Tushnet, M. 'New forms of judicial review and the persistence of rights-and democracy-based worries' (2003) 38 *Wake Forest Law Review* 813.

<sup>17</sup> For a detailed discussion on democratic dialogue see Young, A.L. *Parliamentary Sovereignty and the Human Rights Act* (Oxford and Portland, Oregon: Hart Publishing, 2009).

<sup>18</sup> Hogg, P. and Bushell, A. 'The *Charter* Dialogue between Courts and Legislators (Or perhaps the *Charter of Rights* isn't Such a Bad Thing After All)' (1997) 35 *Osgood Hall Law Journal* 75.

<sup>19</sup> *Ibid*, 79-80.

<sup>20</sup> *Ibid*, 80: '[O]f course, the precise terms of any new law would have been powerfully influenced by the Court's decision.'

<sup>21</sup> Young, n 17, 118.

threatening or undermining Parliament's sovereignty, an example, therefore, of complementary constitutionalism.<sup>22</sup>

Despite this, however, Tushnet theorised that systems of weak-form judicial review may be prone to instability:

That is, they may well be transformed in either direction – reducing their scope so that weak-form systems are actually systems of parliamentary supremacy (and thereby reproducing the worry about inadequate protection of liberal rights), or expanding their scope so that weak-form systems are actually strong-form systems (and thereby reproducing the worry about interfering with democratic self-governance).<sup>23</sup>

The two oldest examples of 'third wave' Bills of Rights – the Canadian Charter of Rights and Freedoms 1982, and New Zealand's Bill of Rights Act 1990 – can be seen to provide some vindication for Tushnet's theory.<sup>24</sup>

The Canadian Charter, as stipulated by s 52 of the Constitution Act 1982, is given supreme status as higher law.<sup>25</sup> Taken in conjunction with s 24(1) of the Canadian Charter, this means that the courts are empowered to rule on the constitutionality of Acts of the Canadian Parliament, and strike down any Act it deems to be unconstitutional.<sup>26</sup> As a result, it is the courts, not Parliament, which, as Janet Hiebert notes, 'determine the constitutional meaning as well as appropriate remedies for rights violations';<sup>27</sup> the adoption, in other words, of 'strong-form judicial review.' However, in order to appease certain Canadian provinces who feared the loss of parliamentary sovereignty,<sup>28</sup> the Canadian Charter included s 33 – the so-called 'notwithstanding clause' – which enables the Canadian Parliament, through the use of express words, to override the Charter, albeit

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<sup>22</sup> For a discussion of the connection between 'weak-form judicial review' and political constitutionalism see Tushnet, M. 'The Relationship Between Political Constitutionalism and Weak-Form Judicial Review' (2013) 14(12) *German Law Journal* 2249.

<sup>23</sup> Tushnet, n 16, 824.

<sup>24</sup> In support see Hiebert, J.L. 'Governing Like Judges?' in Campbell, T., Ewing, K.D. and Tomkins, A. (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011), 53: 'These systems [including the HRA] operate at both ends of the continuum distinguishing weak from strong-form systems.'

<sup>25</sup> Section 52: '[A]ny law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no effect.'

<sup>26</sup> Section 24(1): 'Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'

<sup>27</sup> Hiebert, J.L. 'Parliamentary Bills of Rights: An Alternative Model?' (2006) 69(1) *MLR* 7, 11, n 17.

<sup>28</sup> Gardbaum, n 2, 721.

subject to renewal.<sup>29</sup> As a result, the Canadian Charter marks a dramatic departure from 'strong-form judicial review' by preserving Parliament's right to the final say on issues of human rights. Despite the significance of s 33 on paper, however, it has been infrequently used, and never at the Federal level.<sup>30</sup> Although the reasons for this are perhaps too numerous and complex in order to ascertain with any degree of certainty,<sup>31</sup> it is nevertheless clear that the use of s 33 to either override judicial pronouncements or pre-empt negative judicial rulings,<sup>32</sup> is widely viewed as being illegitimate, serving only to subvert and invalidate the separation of powers inherent to the constitution.<sup>33</sup> Although there is nothing to prevent its use in the future,<sup>34</sup> s 33 is at present a dead letter.<sup>35</sup> Doubts must accordingly be raised over the Canadian Charter's ability to produce constitutional dialogue.<sup>36</sup> Without the political option to use s 33, legislators, save for constitutional amendment, cannot escape the judgment of the court. They may respond to it, but any such response must show acceptance of the court's decision. Despite its best efforts, therefore, the Canadian Charter can be seen to collapse into 'strong-form judicial review.'

Gardbaum distinguishes New Zealand's Bill of Rights Act from the Canadian Charter on the grounds that the former is an 'interpretive' Bill of Rights, whilst the latter is an 'overriding' Bill of Rights. Under 'overriding' Bills of Rights, so he argues, 'the protective legal force lies in the court's power to set aside conflicting statutes,' whilst under 'interpretive' Bills of Rights, such protective

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<sup>29</sup> Under s 33, the Canadian Parliament may override the rights and freedoms contained under sections 2 and 7-15 subject to renewal by Parliament every five years.

<sup>30</sup> See Davis, F.F. 'Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK' (2014) 67(1) *Parliamentary Affairs* 137, 144.

<sup>31</sup> For a breakdown and discussion of some of the potential reasons, see Goldsworthy, J. *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), 217-222.

<sup>32</sup> Gardbaum, n 2, 723 n 61. Gardbaum notes that s 33, although s 33 was designed in order to prevent the courts from having the final say on issues of fundamental rights, s 33 'also permits preemptive overrides; i.e., immunizing legislative provisions from judicial review under the Charter.'

<sup>33</sup> Hiebert, n 27, 20: 'There is little public or political acceptance for the proposition that invoking the notwithstanding clause represents a legitimate Charter interpretation. Most Canadians construe the use of the notwithstanding clause both as an unjustifiable violation of rights in the particular circumstance, but also as act of defiance of the Charter project.' See also Gardbaum, n 2, 722. The Canadian Charter was intended to be a fully entrenched component of the constitution, hence its status as supreme law under s 52 of the Constitution Act 1982, which is further reinforced by the fact that the Charter can only be amended via special procedures under ss 38-49 of the Constitution Act 1982.

<sup>34</sup> See Goldsworthy, n 31, 221: 'It is still possible that s. 33 will be resuscitated sometime in the future.' See also Gardbaum, S. 'How Successful and Distinctive is the Human Rights Act? An Expatriate Comparativist Assessment' (2011) 74(2) *MLR* 195, 203: '[W]ere the Supreme Court of Canada to decide a case that triggered the degree of controversy marked by certain judicial decisions in other countries with full constitutional supremacy, there is good reason to think that the relevant legislature would seriously consider and perhaps use the override power.'

<sup>35</sup> Hogg and Bushell, n 18, 83. Hogg and Bushell concede that s 33 is now unimportant in practice to the operation of the Canadian Charter.

<sup>36</sup> *Ibid*, 19-20 and 27.

legal force resides in 'its interpretive power to force a legislature to pay the political costs of clear and explicit rights violations.'<sup>37</sup> The New Zealand's Bill of Rights Act, unlike the Canadian Charter, is not supreme law, but instead an ordinary Act of the New Zealand Parliament, and thus, like the HRA, subject to ordinary repeal. The courts, therefore, can neither strike down legislation it deems to be incompatible with the s 1 rights, nor can they impliedly repeal any inconsistent legislation passed prior to the Act.<sup>38</sup> Instead, the courts are empowered to protect rights through s 6, which states that '[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.' Despite initial suggestions that s 6 would be given a wide interpretation,<sup>39</sup> Cooke P. in *Ministry of Transport v Noort* asserted a restrained approach whereby a rights-friendly meaning would only prevail where reasonable,<sup>40</sup> thereby successfully curbing the scope of s 6.<sup>41</sup> Given the limited scope of s 6 situations whereby statutes are incapable of being given a rights-friendly meaning are quite common.<sup>42</sup> In such situations the New Zealand courts are not empowered to issue a declaration of incompatibility, but are instead obliged under s 4 to uphold the offending legislation as stipulated.<sup>43</sup>

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<sup>37</sup> Gardbaum, n 2, 728.

<sup>38</sup> Section 4: 'No court shall, in relation to any enactments (whether passed or made before or after the commencement of this Bill of Rights) – (a) hold any provisions of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) decline to apply any provision of this enactment – by reason only that the provision is inconsistent with any provision of this Bill of Rights.'

<sup>39</sup> *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439, 441, as cited in Taggart, M. 'Tugging on Superman's cape: lessons from experience with the New Zealand Bill of Rights Act 1990' (1998) *PL* 266, 282. Speaking for the Court, Cooke P. conceded that there was 'force in the argument that, to give full effect to the rights...[the statutory provision]...should now receive a wider interpretation than has prevailed hitherto.'

<sup>40</sup> [1992] 3 NZLR 260, 272: '[A] consistent meaning is to be preferred to any other meaning. The preference [in section 6] will come into play only when the enactment can be given a meaning consistent with the rights and freedoms. This must mean, I think, can reasonably be given such a meaning. A strained interpretation would not be enough.'

<sup>41</sup> See Fenwick, n 1, 173.

<sup>42</sup> See Geddis, A. and Fenton, B. "'Which is to be Master? Rights-friendly Statutory Interpretation in New Zealand and the United Kingdom' (2005) 25 *Ariz. J. Int'l & Comp. L.* 733, 750: '[T]he courts ... have demonstrated a marked disinclination to use their section 6 interpretative power in several notable cases involving individual rights.'

<sup>43</sup> An implied power under s 4 was supposedly claimed in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17. For a rebuttal of this claim see Geiringer, C. 'On the Road to Nowhere: Implied Declaration of Inconsistency and the New Zealand Bill of Rights Act' (2009) 40(3) *Victoria University of Wellington Law Review* 613, 619. Post-*Moonen* case law has certainly not given credence to this claim. In *R v Hansen* [2007] 3 NZLR 1, this issue was not even discussed, although it was argued that the court informally indicates inconsistency when stating its reasoning for deciding that s 4 should prevail over s 6 (at [245] (McGrath J.)). See also *R v Exley* [2007] NZCA 393 and *Exley v R* [2007] NZSC 104. The courts did successfully strengthened their ability to curb legislative infringements of rights in *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent's Case*), where the majority of the Court of Appeal held that, although

Because of the relatively limited role it accords to judicial review, Hiebert has argued that New Zealand's Bill of Rights Act aimed to protect human rights by way of what she describes as 'political rights review' – 'a two-pronged concept that involves executive-based review of proposed bills from a rights perspective. This is combined with a requirement of alerting parliament about inconsistencies, thereby creating the stage for broader rights-based political and public scrutiny'<sup>44</sup> – the aim of which is 'to prevent rights abuses from actually occurring.'<sup>45</sup> This was to be achieved by the requirement under s 7 for the Attorney-General to 'bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.' As Andrew Geddis notes, however, a government bill attracting a section 7 report almost always will become law in its original form.<sup>46</sup> As of 2012, there have been 59 reports of inconsistency, 28 of which involved government bills,<sup>47</sup> the majority of which 'became law without any change to the apparently NZBORA-inconsistent measure.'<sup>48</sup> Consequently, section 7 reports appear to provide little incentive to either Parliament or the government to take human rights seriously.<sup>49</sup> This is because the s 6 interpretive duty and the absence of a power to formally declare legislation as inconsistent with the s 1 rights do not inflict political and legal costs sufficient to compel political compliance.<sup>50</sup> As a result, the New Zealand Parliament has felt confident enough to knowingly and publically flout human rights,<sup>51</sup> thus suggesting that New Zealand's Bill of Rights Act has prioritised parliamentary sovereignty at the expense of human rights protection.

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the Bill of Rights Act did not stipulate the remedies available for breach of the protected rights, the courts may nevertheless award remedies.

<sup>44</sup> Hiebert, n 27, 11.

<sup>45</sup> *Ibid*, 12 and 14.

<sup>46</sup> Geddis, A. 'Inter-institutional 'Rights Dialogue' under the New Zealand Bill of Rights Act' in Campbell, T., Ewing, K.D. and Tomkins, A. (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011), 99.

<sup>47</sup> <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/domestic-human-rights-protection/about-the-new-zealand-bill-of-rights-act/advising-the-attorney-general/section-7-reports-published-before-august-2002/section-7-reports-published-before-august-2002>> (accessed on 03/11/2013).

<sup>48</sup> Geddis, n 46, 98. Geddis' comments refer to the number of s 7 reports issued up to 1 August 2009.

<sup>49</sup> See Hiebert, n 27, 26: '[N]either the prospect of such a report, nor its eventual release, appears to be serious disincentive for ministers to introduce and defend the impugned bill. Moreover, parliamentarians often dispute the conclusions of the legal analysis, that limitations on rights are not justified, or ignore the reports altogether.'

<sup>50</sup> Hiebert, n 24, 44-45 and 47-48.

<sup>51</sup> See *ibid*, 47-48.

### 1.3 A Complementary Balance?

Some commentators, therefore, have come to view the HRA's compromise between parliamentary sovereignty and fundamental human rights with suspicion. As Tom Campbell *et al* note, scepticism surrounding the legal protection of human rights can be seen to fall within one of two broad categories: 'ideological scepticism,' which concerns the existence and content of human rights, and 'institutional scepticism,' which concerns the mechanisms for protecting human rights.<sup>52</sup> Both types of scepticism have been directed towards the HRA by political constitutionalists, who see the HRA as a vehicle through which Parliament's democratic authority may be usurped.<sup>53</sup> Keith Ewing, for example, has criticised the HRA for amounting to:

[A]n unprecedented transfer of political power from the executive and legislature to the judiciary, and a fundamental restructuring of our 'political constitution'... [I]t is unquestionably the most significant formal redistribution of political power in this country since 1911, and perhaps since 1688.<sup>54</sup>

Likewise, Colin Turpin and Adam Tomkins identify the HRA as one of three contemporary challenges to parliamentary sovereignty after the European Communities Act 1972 and the rise of 'common law radicalism.'<sup>55</sup> The Conservative Party is now also firmly committed to repealing the HRA and replacing it with a UK Bill of Rights in order to put a stop to what they see as 'the legal abuse of human rights legislation in our courts.'<sup>56</sup>

Given the apparently inherent instability of 'third wave' Bills of Rights, as well as the concerns expressed by political constitutionalists about the HRA and its impact upon the traditional British constitution, the aim of this chapter, therefore, will be to critique the extent to which the HRA achieves a complementary balance between parliamentary sovereignty and the judicial protection

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<sup>52</sup> Campbell, T., Ewing, K.D. and Tomkins, A. (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011), 1.

<sup>53</sup> For scepticism on ideological grounds see Ewing, K.D. 'The Unbalanced Constitution' in Campbell, T., Ewing, K.D. and Tomkins, A. (eds) *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001). For scepticism on institutional grounds see Bellamy, R. 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in Campbell, T., Ewing, K.D. and Tomkins, A. (eds) *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001). See also Bellamy, R. 'Political constitutionalism and the Human Rights Act' (2011) 9(1) *International Journal of Constitutional Law* 86. Although Bellamy reiterates his institutional scepticism of the projection of rights by the courts, he nevertheless concedes that the HRA may have the potential to strengthen political constitutionalism.

<sup>54</sup> Ewing, K.D. 'The Human Rights Act and Parliamentary Democracy' (1999) 62(1) *MLR* 79.

<sup>55</sup> Turpin, C. and Tomkins, A. *British Government and the Constitution, Text and Materials* (7th edn, Cambridge: Cambridge University Press, 2011), 79-95.

<sup>56</sup> See <[http://www.conservatives.com/Policy/Where\\_we\\_stand/Justice.aspx](http://www.conservatives.com/Policy/Where_we_stand/Justice.aspx)> (accessed on 15/11/2013).

of rights. Although an analysis of the Convention rights and their compatibility with the political constitution would be of unquestionable value to this thesis, the complexity and magnitude of such a task place it beyond its scope and limits. It will therefore be presumed for the purposes of this chapter that the substantive rights protected by the HRA are of value to the political school or, at the very least, of no threat to it. The focus will therefore be on the manner by which such rights are enforced, not the rights themselves. As a result, this chapter will conduct a thorough analysis of both political and legal mechanisms adopted under the HRA to facilitate greater protection for human rights. The impact of s 19 and the JCHR will therefore be considered along with the relationship between ss 3 and 4. It will be argued that s 19 and the JCHR, because they seek to achieve constitutional democracy by imbedding human rights norms within the legislative process using Parliament as the primary mechanism of enforcement, envisage a model of human rights protection which is firmly in line with the ideals of political constitutionalism. Despite concerns regarding their influence upon government legislation, it will be shown that s 19 and the JCHR have succeeded in facilitating the development of a culture of rights within Parliament, thereby enabling Parliament to play a more central role in the protection of rights. It will also be argued that ss 3 and 4, although representing a shift towards constitutional review of primary legislation which is at odds with political constitutionalism, is nevertheless necessary in order for a culture of rights within Parliament to flourish. Although it is conceded that the inclusion of ss 3 and 4 within the scheme of the HRA has the potential to destabilise the otherwise political settlement sought, it will be shown that the use of both provisions to date, although far from ideal, nevertheless remains complementary to the political school.

## **2. Legislative Rights Review**

### *2.1 Fostering a Culture of Rights*

Because the HRA denies the courts the ability to strike down incompatible legislation and instead empowers them to interpret legislation compatibly with the Convention rights, the HRA, like New Zealand's Bill of Rights Act, can similarly be described as an 'interpretive' Bill of Rights. Consequently, because of the limited role accorded to the judiciary in comparison to Canada, the HRA also sought to secure greater protection for human rights by fostering a political culture of



rights across all institutions of governance<sup>57</sup> whereby Parliament would engage more with human rights issues and play a more active role in ensuring government compliance with human rights.

The scheme of the HRA, therefore, was designed to help foster this culture of rights by encouraging the legislature to review the compatibility of proposed legislation with human rights as seen under New Zealand's Bill of Rights Act. Although Hiebert calls this phenomenon 'political rights review'<sup>58</sup> – because the executive is also encouraged to consider the compatibility of its proposed bills with rights at the pre-legislative stage – this thesis prefers the term 'legislative rights review,' as it emphasises more the central role of played by Parliament in protecting and promoting human rights, thereby clearly distinguishing it from its conceptual rival – judicial rights review – which is the traditional and most common mechanism for protecting human rights globally. Constitutional democracy can thus be achieved without resort to the courts by imbedding human rights norms within the legislative process itself, thereby theoretically preventing human rights abuses from ever arising. It is submitted, therefore, that the aim of the HRA to place Parliament and not the courts at the centre of human rights protection coincides strongly with the aims and values of political constitutionalism. Such legislative rights review was to be achieved under the HRA by facilitating greater legislative engagement with human rights issues. This goal, as Francesca Klug and Helen Wildbore observe, is reflected in three main provisions of the HRA – s 4, s 10, and s 19.<sup>59</sup>

As will be discussed in greater detail below, declarations of incompatibility issued under s 4 are not legally binding upon Parliament. As Klug and Wildbore therefore note, '[i]t is ... open to Parliament to disagree with the courts that a provision is incompatible with the rights in the HRA and to decide that the legislation in question should remain in force or be amended differently.'<sup>60</sup> By preserving its right to the final say, however, s 4 declarations compel Parliament to engage with the human rights issues it raises. Section 10 of the HRA is a 'Henry VIII' clause which grants Ministers the power to amend primary legislation in order to remove any incompatibility following the issuing of a s 4 declaration of incompatibility subject to parliamentary approval.<sup>61</sup> As a result, Parliament is invited to scrutinise the reasoning of the executive in making a remedial order,

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<sup>57</sup> Nicol, D. 'The Human Rights Act and the politicians' (2004) 24(3) *Legal Studies* 451, 452.

<sup>58</sup> Hiebert, n 27, 9 and 11.

<sup>59</sup> Klug, F. and Wildbore, H. 'Breaking new ground: the Joint Committee on Human Right and the role of Parliament in human rights compliance' (2007) 3 *EHRLR* 231, 233.

<sup>60</sup> *Ibid.*

<sup>61</sup> See The Human Rights Act 1998, Schedule 2.

thereby further enveloping Parliament within the human rights debate and giving it the opportunity to further hold the government to account for its actions.

Both s 4 and s 10, therefore, by promoting greater legislative engagement with human rights, have the potential to contribute towards the development of a culture of rights within Parliament. Despite this, however, it is submitted that s 19, along with the JCHR, are the principal drivers of legislative review under the Act. Both, therefore, are discussed in greater detail below, followed by an assessment of their effectiveness in facilitating a culture of rights.

## *2.2 Section 19 and the Joint Committee on Human Rights*

Under s 19, before the second reading of a Bill, the Minister responsible for the Bill is obliged to issue, either 'a statement of compatibility' expressing his or her belief that the proposed Bill is compatible with the Convention Rights,<sup>62</sup> or 'a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.'<sup>63</sup> In either instance, the statement must be in writing and published 'in such a manner as the Minister making it considers appropriate.'<sup>64</sup> By placing upon Ministers a duty to declare before Parliament whether, in their view, a proposed piece of legislation is or is not compatible with the Convention rights, s 19 is designed to force a minister (and thus the government) to seriously consider compatibility issues at the pre-legislative stage. The risk of a court ruling that a piece of government legislation infringes the Convention Rights should act as an incentive for governments to ensure that its legislation conforms with the ECHR and that their conclusion on Convention compliance is well supported. As Murray Hunt observes, however, this is not all that s 19 was designed to do:

[A]s well as disciplining the Government to conduct proper scrutiny of a Bill's compatibility with Convention rights at departmental level before its introduction, it [s 19] provides a firm legal foundation for parliamentary scrutiny of a Bill's compatibility.<sup>65</sup>

In issuing either a statement of compatibility under s 19(1)(a) or a 'negative' statement of compatibility under s 19(1)(b), the government exposes its reasoning to scrutiny by Parliament. Section 19 statements, therefore, help to inform Parliament's deliberations regarding the

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<sup>62</sup> Section 19(1)(a).

<sup>63</sup> Section 19(1)(b).

<sup>64</sup> Section 19(2).

<sup>65</sup> Hunt, n 6, 603. See also Hiebert, n 27, 15: 'The UK has created a specific parliamentary committee, the Joint Committee on Human Rights (JCHR), with an explicit mandate to examine the rights-dimensions of legislative bills. This increases the likelihood that political rights review will systematically occur at the parliamentary as well as executive level.'

proposed Bill<sup>66</sup> and force the government to defend its decision, thereby strengthening Parliament's ability to hold the government to account on human rights issues and ensuring that Parliament, in passing a law accompanied by a negative s 19 statement, is fully aware of the fact that it infringes rights. As Hunt therefore concludes:

The Human Rights Act ... commits the UK to a distinctively democratic human rights culture. It sets up mechanisms for the transparent scrutiny of the adequacy of public justifications for interferences with, or failures to protect, human rights: in other words, a culture of democratic justification.<sup>67</sup>

However, as Carolyn Evans and Simon Evans have noted:

[C]ircumstances within parliaments make it difficult for parliamentarians adequately to analyse and raise human rights issues in parliamentary debate. A crowded parliamentary agenda, combined with bills of ever greater length and complexity, which often need to be passed within short time-frames, means that it is difficult for parliamentarians to grasp the rights implications of all pieces of legislation. Many, perhaps most, members of parliaments lack the expertise that would allow them to make an assessment of the human rights implications of legislation, even if they had the time or interest to do so.<sup>68</sup>

In order to further strengthen Parliament's ability to scrutinise the government's adherence to human rights and facilitate this culture of rights, therefore, Parliament established the Joint Committee on Human Rights (JCHR).

Although there were indications in the Green Paper *Bringing Rights Home* that a joint committee on human rights would be established,<sup>69</sup> the JCHR did not form part of the scheme of the HRA. Its creation was instead announced by the then Leader of the House of Commons on 14 December 1998 over a month after the HRA had received Royal Assent,<sup>70</sup> and it did not meet until over a year after the HRA came into force on 31 January 2001. The JCHR is a permanent non-departmental select committee whose members are drawn from both the House of Lords and the House of Commons. The aim of establishing the JCHR was to assist in the development of a parliamentary

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<sup>66</sup> In support see Morgan, J. 'Amateur Operatics: The Realization of Parliamentary protection of Civil Liberties' in Campbell, T., Ewing, K.D. and Tomkins, A. (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011), 442: 'Conversely, s 19 in its way promotes parliamentary debate, and should be retained in some form; however, the duty to state whether 'the provisions of the Bill are compatible with the Convention rights' should be replaced by a wider and more useful obligation to provide a 'reasoned statement of the Bill's implications for civil liberties and human rights.'

<sup>67</sup> Hunt, n 6, 603.

<sup>68</sup> Evans, C. and Evans, S. 'Legislative scrutiny committees and parliamentary conceptions of human rights' (2006) *PL* 785, 785-786.

<sup>69</sup> Straw, J. and Boateng, P. *Bringing Rights Home: Labour's Plans to Incorporate the ECHR into UK Law: A Consultation Paper*, December 1996 (1997), 12 as cited in Klug and Wildbore, n 59, 234.

<sup>70</sup> The HRA received Royal Assent on 9 November 1998.

culture of rights by 'enhancing the role of Parliament in protecting and promoting human rights.'<sup>71</sup> Consequently, the Committee has a broad mandate to consider 'matters relating to human rights in the United Kingdom (but excluding consideration of individual cases),' along with a duty to oversee s 10 remedial orders.<sup>72</sup> As Klug notes, therefore, it was clear from the outset that the Committee itself would be given the discretion to decide what matters to pursue as well as to determine its own working practices.<sup>73</sup> The Committee quickly decided that it would scrutinise the compatibility of proposed Bills with human rights, in particular the Convention Rights, with priority being given to Government Bills and their attached s 19 statement of compatibility.<sup>74</sup> Parliament's ability to hold the government to account on matters of human rights, therefore, should be greatly strengthened as a result of the JCHR.<sup>75</sup> As Evans and Evans argue:

When functioning properly and adequately resourced, such scrutiny committees can provide valuable assistance to parliamentarians (and others) in identifying the rights implications of Bills. In addition, such committees encourage governments to be more cautious about infringing rights, and allow for a more focused dialogue about rights, and allow for a more focused dialogue about rights between the executive and the legislature.<sup>76</sup>

Determining the success of s 19 and the JCHR in facilitating a culture of rights within Parliament, therefore, is clearly important in understanding whether the HRA complements Britain's primarily political constitution, especially in light of ss 3 and 4. Despite this, however, it is submitted that the type of parliamentary rights culture facilitated by s 19 and the JCHR is just as important as the existence of a rights culture itself, if not more so.

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<sup>71</sup> Hunt, n 6, 603.

<sup>72</sup> See <<http://www.parliament.uk/jchr>> (accessed 09/11/2012). The full remit of the Joint Committee on Human Rights is to consider: '(a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); (b) proposals for remedial orders, draft remedial orders and remedial orders made under the Human Rights Act 1998; and (c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in HC Standing Order No. 151 (Statutory Instruments (Joint Committee))'. See also Order of Reference of the House of Lords, *Hansard*, HL Deb, vol. 621, col. 11-12 (22 January 2001); Standing Order 152B of the House of Commons, *Hansard*, HC Deb, vol. 361, col. 482-490 (17 January 2001).

<sup>73</sup> Klug and Wildbore, n 59, 235-236.

<sup>74</sup> Joint Committee on Human Rights, First Report of Session 2000-01, *Criminal Justice and Police Bill*, HL Paper 69, HC 427, April 2001. See also Hiebert, J.L. 'Governing under the Human Rights Act: the limitations of wishful thinking' (2012) *PL* 27, 37.

<sup>75</sup> See Hiebert, n 27, 15: '[T]he UK has created a specific parliamentary committee, the Joint Committee on Human Rights (JCHR), with an explicit mandate to examine rights-dimensions of legislative bills. This increases the likelihood that political rights review will systematically occur at the parliamentary level as well as executive level.'

<sup>76</sup> Evans and Evans, n 68.

### *2.3 Striking a Balance between Compliance and Contestability*

In 2004, Danny Nicol outlined two distinct types of human rights cultures which could emerge in Parliament following the enactment of the HRA: a 'culture of compliance'<sup>77</sup> or a 'culture of controversy'.<sup>78</sup> As Nicol notes, the former culture of rights 'casts the legislature in the role of the adjunct of the courts. Parliamentarians ... police government legislative proposals for their compatibility with judicially interpreted rights.'<sup>79</sup> Under such a culture, therefore, the judiciary, not Parliament, is dominant.<sup>80</sup> Under the latter culture, rights are held to be contestable. It expects politicians and the wider public, therefore, 'to seek a more active role in defining them rather than hanging on the lips of the judicial oracle.'<sup>81</sup> As a result, Parliament, not the courts, retains the final say on matter of human rights. It is submitted that the two potential cultures identified by Nicol are each underpinned by a radically different view of the role and purpose of the HRA which reflect the wider debate within the British constitution between political and legal constitutionalism.

Under a culture of compliance, Parliament, although actively engaged with scrutinising Government Bills for compliance with human rights, is nevertheless debarred from developing and applying its own view on human rights. Because it privileges judicial interpretations of rights over those of Parliament, therefore, a culture of compliance denotes a view of the HRA which differs little from those of traditionally entrenched Bills of Rights advanced under legal constitutionalism. Such a view is held by Philip Sales and Richard Ekin, who argue that compliance with judicial pronouncements on rights was the purpose of the HRA, not the facilitation of democratic dialogue. According to Sales and Ekin, '[t]he notion of "democratic dialogue" overlooks the primary function of the HRA, which is to provide a domestic remedial regime in relation to the rights to which the United Kingdom is subject under international law by its adherence to the ECHR, which are authoritatively interpreted by the European Court of Human Rights (ECtHR)'.<sup>82</sup> As they note:

By entering into its obligations under the ECHR, the United Kingdom has chosen to identify an authoritative body for interpreting the meaning and effect of Convention rights,

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<sup>77</sup> Nicol, n 57, 453.

<sup>78</sup> *Ibid*, 454.

<sup>79</sup> *Ibid*, 453.

<sup>80</sup> *Ibid*, 454.

<sup>81</sup> *Ibid*.

<sup>82</sup> Sales, P. and Ekins, R. 'Rights-consistent interpretation and the Human Rights Act 1998' (2011) 127(Apr) *LQR* 217, 218.

namely the ECtHR. Under the scheme of the ECHR there is no further need for, and no space for, identifying a different theory of authority for determining the content of Convention rights.<sup>83</sup>

It is accordingly the role of the courts under the HRA, they argue, to 'assess what an international court has stipulated (or would stipulate) rights to mean under the ECHR.'<sup>84</sup> Sales and Ekin, therefore, dismiss the argument that Parliament has a real choice in deciding whether or not to follow judicial determinations on the Convention Rights:

[U]nder the HRA the courts are identified as the body which can authoritatively determine the content of Convention – or human – rights, and do not have to accept the view of Parliament on the issue ...

The practical effect of this, coupled with the rhetorical force associated with the giving of a ruling that legislation violates human rights, is to create major political pressure for government and Parliament to amend statutes to accommodate the courts' view ... This means that the HRA has created a system which is closer to a constitution in which the courts have the power to strike down legislation than is often supposed.<sup>85</sup>

Under this reading of the HRA, it is submitted that the role of the JCHR, as pioneered by Robert Blackburn,<sup>86</sup> would be a purely technical one whereby the Committee would attempt to anticipate and predict what the courts would rule regarding the compatibility of legislation with the Convention Rights.<sup>87</sup> There is little to no room, therefore, for parliamentary deviation from judicial rulings on legislative compliance with the Convention Rights both domestically and at Strasbourg. Parliament would be actively engaged in protecting rights against the executive, but its right to the final say would be in doubt.

Under a culture of contestability, Parliament is free to develop and apply its own interpretations on human rights when scrutinising the executive which may differ from those of the judiciary. As Evans and Evans note, this can be both a positive and a negative:

Unlike judges, parliamentarians are not bound by precedent or detailed rules in developing conceptions of rights. At best, parliamentarians could develop a conception of human rights that is responsive to community conceptions of rights. They could demonstrate a familiarity with international human rights standards and also the local interests and needs of the community which they serve. At worst, parliamentarians could adopt an incoherent or severely constrained conception of rights. The conceptions of

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<sup>83</sup> *Ibid*, 228.

<sup>84</sup> *Ibid*, 229.

<sup>85</sup> *Ibid*, 230.

<sup>86</sup> See Blackburn, R. 'A Human Rights Committee for the UK Parliament' [1998] 5 *EHRLR* 534, 538.

<sup>87</sup> Joint Committee on Human Rights, Twenty-third Report of Session 2005-06, *The Committee's Future Working Practices*, HL Paper 239, HC 1575, July 2006, Appendix 1, 43 [4.9] and Klug and Wildbore, n 59, 235.

human rights adopted by parliamentarians will have a significant influence on the value and impact of their scrutiny of proposed legislation for rights compliance.<sup>88</sup>

Parliament would unquestionably retain its right to the final say, but this may be at the expense of human rights protection. Despite the risks, however, it is clear that enabling Parliament to develop its own independent view on human rights corresponds strongly with the view of political constitutionalism that human rights are subject to reasonable disagreement and, as a result, should not be determined solely by the courts whose judgment the legislature should follow. This envisages a role for the HRA which, as Nicol notes, is atypical of Bills of Rights,<sup>89</sup> and characteristic of constitutional dialogue embodied by 'third wave' Bills of Rights. Under this reading of the HRA, therefore, the JCHR, as proposed by the Constitution Unit, would be free to conduct 'an examination of how the legislation has succeeded in balancing competing interests, and applying the doctrine of proportionality.'<sup>90</sup> By enabling it to consider the merits of the legislation in question, the JCHR is not debarred from departing from judicial rulings on human rights compliance. The role of the Committee, therefore, is not to ensure strict compliance with the judicial interpretation of rights, but to assist in developing Parliament's own view on human rights.

As noted above, the aim of the HRA was to protect human rights without undermining parliamentary sovereignty. Because the HRA is an 'interpretive' Bill of Rights which restricts the judiciary's role in protecting rights in comparison to 'overriding' and traditional Bills of Rights, a gap in human rights protection inevitably emerges which the HRA expects Parliament to fill. The HRA, therefore, encourages Parliament to engage with human rights issues in the various ways outlined above in order to facilitate a culture of rights whereby Parliament would play an active role in ensuring executive compliance with rights. As Hiebert notes, however, the creation of a culture of rights is dependent upon there being a real risk of political loss for non-compliance with rights:

Where costs are significant, bureaucratic and governmental actors have a strong incentive to protect legislation from the risk of being declared unconstitutional, incompatible, or altered through judicial interpretation, and will incorporate case law into the legislative process in order to lower the risk of judicial censure. Two factors affect the perception of costs: the willingness of courts to interpret rights and remedies broadly; and the extent to which prior judicial rulings have compelled significant legislative changes (either through rulings that directly alter or invalidate legislation or from a treaty obligation that elevates judicial rulings to the status where they cannot easily be ignored.) These costs will be

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<sup>88</sup> Evans and Evans, n 68, 787.

<sup>89</sup> Nicol, n 57, 454.

<sup>90</sup> Reidy, A. *A Human Rights Committee for Westminster*, Constitution Unit, 1999, 14, as cited in Joint Committee on Human Rights, n 87, Appendix 1, 44 [4.10] and Klug and Wildbore, n 59, 235.

amplified if political legitimacy for determining the scope of rights and how they should guide or constrain legislation resides with courts rather than parliament, but will be diminished if legitimacy resides with Parliament.<sup>91</sup>

As noted above, New Zealand's Bill of Rights Act has arguably failed to instil greater political respect for human rights due to the absence of sufficient political costs for non-compliance. In order for legislative rights review under the HRA to be effective, therefore, ss 3 and 4 must have the capacity to inflict political costs sufficient to compel greater respect for the Convention Rights. As the White Paper *Rights Brought Home* reveals:

Enabling the Convention rights to be judged by British courts will also lead to closer scrutiny of the human rights implications of new legislation and new policies. If legislation is enacted which is incompatible with the Convention, a ruling by the domestic courts to that effect will be much more direct and immediate than a ruling from the European Court of Human Rights. The Government of the day, and Parliament, will want to minimise the risk of that happening.<sup>92</sup>

This necessitates a degree of compliance with judicial pronouncements on Convention Rights, therefore, which on first inspection appears to undermine the dialogical aims of the HRA. Given the international dimensions of the HRA identified by Sales and Ekin, compliance with judicial pronouncements on Convention Rights was most likely expected in the majority of cases. Because parliamentary sovereignty, and thus Parliament's right to disagree with the courts, was expressly preserved under the Act, however, it was clearly not expected in every instance.<sup>93</sup> Although Parliament, by virtue of its sovereignty, can exercise its right whenever it so wishes, it is submitted that the political pressure exerted by Strasbourg means that Parliament is only realistically likely to exercise this right in exceptional circumstances.<sup>94</sup> The HRA, therefore, should be seen to blaze a path between the two opposing views on the HRA which generates a culture of rights within

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<sup>91</sup> Hiebert, n 24, 44-45.

<sup>92</sup> *Rights Brought Home*, n 5, [1.18].

<sup>93</sup> Hiebert, J. 'The Human Rights Act: Ambiguity about Parliamentary Sovereignty' (2013) 14(12) *German Law Journal* 2265, 2266-2267 (please note page numbering error in original publication): 'A political expectation of compliance with European Court of Human Rights rulings reduces the practical consequences of having formally retained the principle of parliamentary sovereignty. However, it does not eliminate the tension that undercuts the HRA between respecting judicial interpretations of liberal constitutional norms and democratic principles that allow Parliament the final say on whether and how to respond to a contrary rights judgment.'

<sup>94</sup> See *ibid*, 2269-2274 (please note page numbering error in original publication). Hiebert identifies four points of consideration when assessing whether governmental inaction or parliamentary refusal to remedy an infringement is justified or not.



Parliament that strikes a balance between compliance and contestability proportionate to its overall aims.<sup>95</sup>

The HRA's success in achieving the correct balance, however, is dependent upon several factors. Firstly, although ss 3 and 4 must be capable of inflicting political costs sufficient to compel political compliance with rights in the majority of instances, they must also remain respectful to the underlying themes of the political school of thought in order to constitute an example of complementary constitutionalism. Should s 3 be used too expansively, or s 4 declarations of incompatibility complied with automatically, Parliament's role in the protection of rights may be marginalised and its right to the final say undermined, thereby frustrating the HRA's aim of placing Parliament, not the courts, at the centre of human rights protection. Secondly, although the JCHR should be sensitive to the pressures exerted upon both Parliament and the executive to conform with judicial pronouncements on rights, and advise compliance where appropriate, it must not be an ersatz of the judiciary. The Committee must be willing and able to explore the issue of human rights more broadly and, crucially, form its own view on human rights<sup>96</sup> in order to better enable Parliament, when scrutinising the executive, to make an informed decision on whether or not to adopt a view which differs from that of the judiciary. To do otherwise, it is submitted, would have the effect of undermining Parliament's ability to make up its own mind on human rights in such a way as to make its right to the final say meaningless. As Klug notes:

For a select committee to adopt a "quasi-judicial role" in legislative scrutiny is to miss the point of the "dialogue model" which is said to characterise the HRA. Without the engagement of Parliament, the dialogue about the operation and development of the rights in the Act is missing a significant voice. Parliamentary select committees have an essential role to play in helping Parliament to develop its "voice" on human rights ... Whilst the HRA retained "parliamentary sovereignty," it is now for Parliament, and its select committees, to ensure that this does not become "executive sovereignty" in all but name.<sup>97</sup>

Whether the JCHR has succeeded in developing its 'own voice'<sup>98</sup> will now be considered as part of an assessment of the extent to which the JCHR and s 19 have succeeded in facilitating greater legislative engagement with human rights and strengthening parliamentary control over the executive.

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<sup>95</sup> The majority of JCHR members expressed the view that the Committee should accommodate both roles. See Joint Committee on Human Rights, n 87, Appendix 1, 71 [13.2].

<sup>96</sup> See *ibid*, Appendix 1, 69-70 [12.9].

<sup>97</sup> Klug, and Wildbore, n 59, 249-250.

<sup>98</sup> *Ibid*, 248.

## 2.4 Legislative Rights Review in Practice

As noted above, the obligation upon ministers to issue either a positive or a negative statement of compatibility under s 19 was designed with two goals in mind: first, to compel ministers to consider compatibility issues at the pre-legislative stage in order to increase the likelihood that Government Bills will be Convention-compliant; second, to provide a platform from which Parliament could then scrutinise the executive on human rights grounds.

Because the issuing of either a positive or a negative statement of compatibility is mandatory for all Government Bills, it is clear that s 19 has increased government engagement with human rights issues. Despite this, however, the quality of this engagement remains dubious, with the government appearing unwilling to advance its own view on rights compatibility free from legal influence. Hiebert's research reveals a strong presumption against governments issuing negative statements of incompatibility under s 19(1)(b),<sup>99</sup> even where there is a high risk of it being declared incompatible by the courts,<sup>100</sup> with only one government bill to date – the Communications Act 2003 – having received a negative statement.<sup>101</sup> This strongly suggests a culture of compliance within government of second-guessing what a court might say regarding the compatibility of a proposed Bill with the Convention rights, and amending it accordingly in order to avoid confrontation with them. As Hiebert observes:

Governments in Canada and the United Kingdom are able to take advantage of their hegemony in the legislative process to insulate legislation from unwelcome policy and fiscal consequences that could accompany a negative judicial ruling, by utilizing case law in the pre-legislative evaluation process to anticipate and avoid possible judicial objections.<sup>102</sup>

This is as a result of reliance by ministers upon the advice of Government lawyers who, as Hiebert observes, conduct a risk assessment of the likelihood that a proposed Bill will be held incompatible by the courts.<sup>103</sup> This appears to remain the case despite changes in guidelines issued by the Cabinet Office permitting a minister to issue a s 19 statement where 'in her or his view the bill's

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<sup>99</sup> Hiebert, n 24, 58 and Hiebert, n 74, 36.

<sup>100</sup> Hiebert, n 74, 35.

<sup>101</sup> See *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

<sup>102</sup> See Hiebert, n 24, 54. See also Allan, J. 'Meagher's Mischaracterisation of Majoritarianism: A Reply' (2009) 20 *KCLJ* 115, 122.

<sup>103</sup> Hiebert, n 74, 34.

provisions are compatible with the Convention rights,<sup>104</sup> and no longer only where there is sufficient legal opinion in support of compatibility.<sup>105</sup> As Hiebert notes:

[L]egal officials have suggested that it is extremely unlikely that a minister will claim that a bill is compatible if this contradicts the clear legal advice he or she received, and is even more unlikely if the Attorney general believes the bill is not compatible.<sup>106</sup>

Hiebert's research also suggests that the JCHR has little impact on government at the pre-legislative stage. As she notes, '[a]nticipation of potential JCHR criticism might influence a legislative initiative in the pre-introduction stage ... its opinion on compatibility appears too late in the process to be effective, because it is presented after the government has already committed itself to a bill.'<sup>107</sup> By contrast, the courts appear to be the primary influence on government, albeit indirectly. As James Allan notes:

Statements of Compatibility have collapsed into a wholly legalized account of how some right or other *has been treated* in various domestic and overseas courts, or how they are *likely to be treated* by the top judges. And once that happens, whether intended or not, yet more weight will be put on what the unelected judiciary thinks about rights. Their power, albeit indirectly and pre-emptively this time, will be increased yet again because of the enactment of the statutory bill of rights.<sup>108</sup>

Greater compliance with rights may be assured as a result, but it is achieved in a manner which undermines, rather than bolsters, Parliament's role in the process.

Following the 2006 Klug Report on the Working Practices of the JCHR, however, this may be in the process of changing. Whereas the Committee had seldom reported upon any Green Papers, White Papers or draft Bills up until 2006,<sup>109</sup> Hunt argues that the Committee now engages more regularly with pre-legislative scrutiny, 'usually by corresponding with the relevant department about a policy proposal, e.g. in a Green or White Paper or other policy document, before the policy has been finalized, and feeds that pre-legislative scrutiny work into its scrutiny of the

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<sup>104</sup> Cabinet Office, *Guide to Making Legislation*, July 2013, 93 [11.14].

<sup>105</sup> See Hiebert, n 74, 34-35.

<sup>106</sup> *Ibid*, 35.

<sup>107</sup> *Ibid*, 40. See also Klug, and Wildbore, n 59, 240: 'In the experience of officials interviewed for the Working Practices Report, once Government Ministers have formed a view on s.19 compatibility, advised by departmental lawyers and sometimes law officers, they are unlikely to alter it significantly. The earlier the advice is received, the more likely it would be to influence policy or legislation.'

<sup>108</sup> Allan, J. 'Statutory Bills of Rights: You read Words In, You read Words Out, You Take Parliament's Clear Intention and You Shake it All About – Doin' the Sankey Hanky Panky' in Campbell, T., Ewing, K.D. and Tomkins, A. (eds) *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011), 120.

<sup>109</sup> Joint Committee on Human Rights, n 87, Appendix 1, Table 1, 80.

subsequent Bill.<sup>110</sup> A recent example of this can be seen with the JCHR's report on the Justice and Security Green Paper.<sup>111</sup> Should this refocus on legislative proposals and early draft Bills continue, we may yet see the JCHR have an impact upon Government Bills before they are introduced into Parliament, thereby further strengthening Parliamentary control over the executive on matters of human rights.

It is submitted that s 19, with the help of the JCHR, has also enhanced Parliament's ability to scrutinise the executive on human rights grounds. Although s 19 was designed to enhance Parliamentary scrutiny of Government Bills, the minimalistic nature of one-line s 19 statements of compatibility made this more difficult.<sup>112</sup> If the government is neither obliged nor willing to explain its decision, how then can Parliament be expected to effectively scrutinise that decision? Although unable to convince the Government to provide a "Human Rights Memorandum" with every Government Bill, the JCHR's continued criticism of the Government's reluctance to explain their reasons behind issuing a statement of compatibility nevertheless resulted in the Government providing more detailed reasons in the Explanatory Notes of proposed bills.<sup>113</sup> Cabinet Office guidelines on the making of legislation now stipulate that the Explanatory Notes of a Government Bill must indicate that a s 19 statement has been issued and give details on the human rights issues it raises. Crucially, it requires the government's assessment of the Bill's compatibility with the Convention Rights in the Explanatory Notes to be 'as detailed as possible setting out any relevant case law and presenting the Government's reasons for concluding that the provisions in the bill are Convention compatible.'<sup>114</sup>

This change in practice, which, as Hunt argues, 'reflects a generally more conscientious engagement by departments with human rights implications of legislation,<sup>115</sup> should provide Parliament with the information it needs to effectively scrutinise the executive on human rights, thereby going some way towards rebalancing the relationship between Parliament and the executive in favour of the former. Crucially, however, it demonstrates that the work of the JCHR, although perhaps unable to impact significantly upon Government Bills at the pre-legislative stage,

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<sup>110</sup> Hunt, n 6, 603.

<sup>111</sup> Joint Committee on Human Rights, Twenty-fourth Report of Session 2010-12, *The Justice and Security Green Paper*, HL Paper 287, HC 1777, April 2012.

<sup>112</sup> Hazell, R. 'Who is the guardian of legal values in the legislative process: Parliament or the Executive?' (2004) *PL* 495, 497.

<sup>113</sup> Joint Committee on Human Rights, Sixth Report of Session 2007-08, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, HL Paper 38, HC 270, February 2008, 14 [24].

<sup>114</sup> See Cabinet Office, n 104, 74-75 [10.65]. See also 95-96 [11.28]-[11.29].

<sup>115</sup> Hunt, n 6, 607.

is nevertheless capable of both influencing governmental behaviour and enhancing Parliamentary scrutiny.

As noted above, the JCHR decided very early on that it would prioritise the scrutiny of Government Bills, and it is clear from the evidence so far that it has not shrank from this commitment. The Committee routinely screens all legislative proposals and examines in detail any and all that raise what they consider to be significant human rights issues.<sup>116</sup> As Hunt notes, the JCHR has also been relentless in its efforts to make its legislative scrutiny more effective:

It [the JCHR] now regularly recommends amendments to Bills to give effect to its recommendations and reports on Bills before Report stage in the first House, which provides members with an opportunity to table those amendments and to initiate a debate on the human rights issue raised by the Committee's report.<sup>117</sup>

The JCHR continues to devote considerable time and energy to scrutinising anti-terrorism measures with at least some degree of success. The JCHR's highly critical reports on the Anti-Terrorism, Crime and Security Bill early on in the Committee's life,<sup>118</sup> for example, were utilised during the parliamentary debates and ultimately compelled the Government to make some changes to the Bill.<sup>119</sup> Despite this, however, it is generally accepted that the government rarely accepts JCHR recommendations.<sup>120</sup> Hiebert, therefore, although initially expressing strong support for the work of the JCHR,<sup>121</sup> has subsequently expressed scepticism over the JCHR's success in enhancing parliamentary scrutiny of legislation, concluding that 'the HRA has not enhanced the power of Parliament vis-à-vis the executive.'<sup>122</sup>

Hiebert observes that 'JCHR reports might ... lead to minor changes made after a bill is introduced,' but only if they 'do not significantly alter the legislative objective or delay the legislation,'<sup>123</sup> thereby suggesting that the JCHR's influence on government is only 'relatively modest.'<sup>124</sup> Priority

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<sup>116</sup> Hazell, n 112, 497. For a demonstration of this screening process see Joint Committee on Human Rights, Ninth Report of Session 2012-13, *Legislative Scrutiny Update*, HL Paper 157, HC 1077, April 2013.

<sup>117</sup> Hunt, n 6, 603.

<sup>118</sup> Joint Committee on Human Rights, Second Report of Session 2001-02, *Anti-Terrorism, Crime and Security Bill*, HL Paper 37, HC 372, November 2001; Joint Committee on Human Rights, Fifth Report of Session 2001-02, *Anti-Terrorism, Crime and Security Bill: Further Report*, HL Paper 51, HC 420, December 2001.

<sup>119</sup> For a detailed assessment of the JCHR's scrutiny of the Anti-terrorism, Crime and Security Bill, see Hiebert, J.L. 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4(1) *International Journal of Constitutional Law* 1, 27-31.

<sup>120</sup> Hunt, n 6, 607. See also Hiebert, n 74, 39-40.

<sup>121</sup> See in particular Hiebert, n 119.

<sup>122</sup> Hiebert, n 74, 41. On her scepticism of third wave Bill of Rights generally see Hiebert, n 24.

<sup>123</sup> Hiebert, n 74, 40.

<sup>124</sup> *Ibid.*

is instead given to legal advice because JCHR reports on Government Bills, as noted above, arrive too late in the process to influence the government.<sup>125</sup> As she notes:

Once an initiative has been deemed compatible in the complex pre-legislative (that can include review by the Attorney General), the government is unlikely to change its position on the basis of a single but contrary parliamentary committee report. Legal advisors and ministers accept that valid differences of opinion can arise on the question of whether a proposed measure is compatible with Convention rights. By the time the JCHR Reports, the minister and cabinet will already have consulted their advisors, reached their decision, and are extremely reluctant to revisit the judgment. Consequently, they treat the JCHR's judgment *as simply another opinion*; and one that does not warrant overriding the earlier interpretation.<sup>126</sup>

Hiebert, therefore, believes that Parliament is ineffectual at giving effect to JCHR recommendations, primarily because of the continued dominance of party discipline within the House of Commons which make government defeats a rarity.<sup>127</sup> If the MPs of the ruling party continue to vote along party lines, the ability of the Commons as a whole to influence the government is severely curtailed, and there is then less of an incentive for governments to endorse or even acknowledge human rights arguments presented by the JCHR. As Hiebert notes:

If the government subsequently agrees to more substantive amendments, this decision is most likely to occur because the government anticipates a realistic chance that a bill will be defeated. This is far more likely to occur in the House of Lords than in the Commons, and it says more about the government's determination to save its legislation, than its acceptance of the merits or justification of redressing the JCHR's concerns. The admission that rights-based pressures from the House of Commons rarely prompts amendments to government legislation also confirms that, as a general rule, neither the HRA nor JCHR reports influence political behaviour in the sense of utilising rights-based concerns as a basis for supporting amendments.<sup>128</sup>

Hiebert also claims that parliamentarians are generally uninterested in scrutinising legislation for compliance with the Convention Rights,<sup>129</sup> and even if they were interested, she argues, the JCHR's frequent and lengthily reports, because they 'draw upon legalistic analysis better suited to an audience of constitutional legal scholars or judges than to members of Parliament,<sup>130</sup> make it difficult for MPs to 'take advantage of the committee's work.'<sup>131</sup> She is therefore of the opinion

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<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, 39-40.

<sup>127</sup> *Ibid.*, 41 and 42-44.

<sup>128</sup> *Ibid.*, 40. See also Hiebert, n 24, 63

<sup>129</sup> Hiebert, n 74, 41 and 44. See also Joint Committee on Human Rights, n 87, Appendix 1, 71 [13.3]. Klug notes that JCHR reports are rarely cited by MPs in the House of Commons.

<sup>130</sup> Hiebert, *ibid.*, 41.

<sup>131</sup> *Ibid.*

that the JCHR performs a technical role whereby it encourages compliance with judicial interpretations on rights and second-guesses the court on the compatibility of legislation – another reason why the government may view JCHR reports as adding little else to the advice they have already received from their lawyers.<sup>132</sup>

It is submitted, however, that although the dominance of Parliament by both the executive and political parties does indeed inhibit Parliament's scrutiny of the executive, this fact should not overshadow the JCHR's success in increasing Parliament's overall engagement with human rights. As Hunt observes, the JCHR has sought to increase parliamentary engagement beyond legislative scrutiny by monitoring human rights institutions, reviewing the operation of the HRA, and by scrutinising UK compliance with international human rights treaties other than the ECHR.<sup>133</sup> The JCHR have thus published reports, for example, on the Equality and Human Rights Commission,<sup>134</sup> the interpretation of public authorities under the HRA,<sup>135</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>136</sup> The JCHR has also conducted a number of thematic enquiries on major human rights issues in the hope of sparking debate within Parliament.<sup>137</sup> As a result, areas which raise serious issues of human rights have been brought to the attention of Parliament such as: adults with learning disabilities;<sup>138</sup> the use of restraint in secure training facilities;<sup>139</sup> the Bill of Rights debate;<sup>140</sup> policing protest;<sup>141</sup> children's rights;<sup>142</sup> human rights and

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<sup>132</sup> *Ibid*, 40 and 41.

<sup>133</sup> See Hunt, n 6, 605-606. See also Hunt, M. 'Enhancing Parliament's role in relation to economic and social rights' (2010) 3 *EHRLR* 242.

<sup>134</sup> Joint Committee on Human Rights, Thirteenth Report of Session 2009-10, *Equality and Human Rights Commission*, HL Paper 72, HC 183, March 2010.

<sup>135</sup> Joint Committee on Human Rights, Ninth Report of Session 2006-07, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 77, HC 410, March 2007.

<sup>136</sup> Joint Committee on Human Rights, Twenty-first Report of Session 2003-04, *The International Covenant on Economic, Social and Cultural Rights*, HL Paper 183, HC 1188, November 2004.

<sup>137</sup> Hunt, n 6, 604-605.

<sup>138</sup> Joint Committee on Human Rights, Seventh Report of Session 2007-08, *A Life Like Any Other? Human Rights of Adults with Learning Disabilities*, HL Paper 40-I, HC 73-I, March 2008.

<sup>139</sup> Joint Committee on Human Rights, Eleventh Report of Session 2007-08, *The Use of Restraint in Secure Training Facilities*, HL Paper 65, HC 378, March 2008.

<sup>140</sup> Joint Committee on Human Rights, Twenty-ninth Report of Session 2007-08, *A Bill of Rights for the UK?*, HL Paper 165-I, HC 150-I, August 2008.

<sup>141</sup> Joint Committee on Human Rights, Seventh Report of Session 2008-09, *Demonstrating Respect for Rights? A human rights approach to policing protest*, HL Paper 47-I, HC 320-I, March 2009; Joint Committee on Human Rights, Twenty-second Report of Session 2008-09, *Demonstrating Respect for Rights? Follow-up*, HL Paper 141, HC 522, July 2009.

<sup>142</sup> Joint Committee on Human Rights, Twenty-fifth Report of Session 2008-09, *Children's Rights*, HL Paper 157, HC 318, November 2009.

the private sector;<sup>143</sup> facilitating peaceful protest;<sup>144</sup> the UK's extradition policy,<sup>145</sup> the rights of disabled people to independent living,<sup>146</sup> the human rights of unaccompanied migrant children and young people;<sup>147</sup> and the implications for access to justice of the Government's proposals to reform both legal aid and judicial review.<sup>148</sup> The JCHR's most recent inquiry, announced on 29 January 2014, explores violence against women and girls.<sup>149</sup>

In the spirit of its duty to oversee the use of s 10 remedial orders, the JCHR has crucially sought to enhance Parliament's scrutiny of government responses to negative judicial rulings. As Hunt notes:

The JCHR has ... pressed the Government to keep Parliament fully and regularly informed about what it is doing to change law, policy or practice in the light of a judgment; asking detailed questions of the relevant ministers in both correspondence and oral evidence sessions; involving civil society in its scrutiny of the Government's responses; and reporting regularly to Parliament about the swiftness and adequacy of that response and on any shortcomings in the system for responding. It has brought about debates in Parliament about the Government's responses, both generally, and by proposing amendments to Bills to give effect to certain judgments.<sup>150</sup>

Reviewing responses to negative judicial rulings, as Hiebert notes, 'increases pressure on the executive to introduce or justify remedial action or inaction.'<sup>151</sup> Although Jonathan Morgan identifies the JCHR as a 'main driver'<sup>152</sup> of a political trend towards compliance with s 4 declarations,<sup>153</sup> it is clear from the ongoing prisoner voting rights saga that Parliament is not

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<sup>143</sup> Joint Committee on Human Rights, First Report of Session 2009-10, *Any of our Business? Human Rights and the UK private sector*, HL Paper 5-I, HC 64-I, December 2009.

<sup>144</sup> Joint Committee on Human Rights, Tenth Report of Session 2010-11, *Facilitating Peaceful Protest*, HL Paper 123, HC 684, March 2011.

<sup>145</sup> Joint Committee on Human Rights, Fifteenth Report of Session 2010-12, *The Human Rights Implications of UK Extradition Policy*, HL Paper 156, HC 767, June 2011.

<sup>146</sup> Joint Committee on Human Rights, Twenty-third Report of Session 2010-12, *Implementation of the Right of Disabled People to Independent Living*, HL Paper 257, HC 1074, March 2012.

<sup>147</sup> Joint Committee on Human Rights, First Report of Session 2013-14, *Human Rights of unaccompanied migrant children and young people in the UK*, HL Paper 9, HC 196, June 2013.

<sup>148</sup> Joint Committee on Human Rights, Seventh Report of Session 2013-14, *The implications for access to justice of the Government's proposals to reform legal aid*, HL Paper 100, HC 766, December 2013; Joint Committee on Human Rights, Seventh Report of Session 2013-14, *The implications for access to justice of the Government's proposals to reform judicial review*, HL Paper 174, HC 868, April 2014.

<sup>149</sup> <<http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/>> (accessed 27.04.2014).

<sup>150</sup> Hunt, n 6, 604.

<sup>151</sup> Hiebert, n 74, 39.

<sup>152</sup> Morgan, n 66, 439.

<sup>153</sup> *Ibid*, 437.



always convinced by the JCHR's arguments.<sup>154</sup> In any event, the JCHR's work in this area has ensured that Parliament plays an active role in responding to judicial rulings, thereby safeguarding Parliament's right to the final say from both the executive and the courts.

Despite Hiebert's contention to the contrary, it is also submitted that the JCHR, although it still frequently recommends compliance with judicial rulings, no longer performs an exclusively technical role. In her 2006 report to the JCHR, Klug argued that the JCHR had adopted a 'quasi-judicial' approach in the performance of its duties,<sup>155</sup> whereby the JCHR provided *de facto* 'legal advice to Parliament'<sup>156</sup> which, she concluded, 'sits uncomfortably with the scheme of the HRA which was intended to allow Parliament the 'final say' on legislation.'<sup>157</sup> As she noted:

The current approach to scrutiny of published bills relies primarily on an estimation of the 'degree of risk' that a court will find legislation incompatible. The focus is on predicting how the domestic courts are likely to judge the legislation in question, based mainly on the jurisprudence of the European Court of Human Rights or case law from the domestic courts interpreting the ECHR. The Committee only rarely makes judgments for itself on whether legislation is compatible or not. This is despite that fact that the courts not infrequently 'defer' to 'elected representatives' in making discretionary human rights judgments, on the grounds that they have greater legitimacy and capacity, in particular when rights collide or are limited on the grounds of meeting an important social purpose.<sup>158</sup>

Following Klug's 2006 Report, however, the Committee expressed some interest in reaching its own view on human rights.<sup>159</sup> Although Klug, in a 2007 follow-up to her report, noted that it was too early to tell whether the JCHR had started to develop its own view on human rights,<sup>160</sup> Hunt argues that the practice had become firmly established by 2010, although he notes that it had taken some time to emerge.<sup>161</sup> This is an encouraging development which substantially increases the chances of a balance being struck between a culture of compliance and a culture of contestability envisaged by the HRA. One can now say with greater certainty that if and when the

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<sup>154</sup> Although the JCHR had argued that Parliament should comply with the judgment in *Hirst* (see for example Joint Committee on Human Rights, Sixth Report of Session 2010-11, *Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill*, HL Paper 64, HC 640, November 2010, 14 [2.14]), Parliament nevertheless decided to vote in favour of a motion expressing support for the retention of the current blanket ban on prisoner voting. See also Hiebert, n 93, 2256-2266 (please note page numbering error in original publication). For a detailed discussion of the prisoner voting rights saga see below, 203-206.

<sup>155</sup> Joint Committee on Human Rights, n 87, Appendix 1, 71 [13.1(i)] and 73-74 [13.15].

<sup>156</sup> *Ibid*, Appendix 1, 71 [13.1(i)].

<sup>157</sup> *Ibid*, Appendix 1, 73-74 [13.15].

<sup>158</sup> *Ibid*, Appendix 1, 73[13.14].

<sup>159</sup> Klug and Wildbore, n 59, 248-249.

<sup>160</sup> *Ibid*.

<sup>161</sup> Hunt, n 6, 603 n 16.

Committee recommends compliance with a judicial interpretation, it does so having examined the issue itself and reached the same conclusion. As a result, Parliament may also be more willing to develop its own voice on human rights, something which Ewing claims has already started to emerge.<sup>162</sup>

It is therefore submitted that the JCHR's apparent inability to consistently influence legislation at both pre-legislative and legislative stages does not in any way indicate the failure of legislative rights review under the HRA. As David Feldman has argued, the preservation of parliamentary sovereignty means that 'human rights can only gradually be built into the political process.'<sup>163</sup> The JCHR's aim of engaging Parliament, the Government, and the wider public in human rights discussions, therefore, 'is a slow process.'<sup>164</sup> Both the HRA and the JCHR have only been apart of the British constitution for a relatively short period of time, and it is thus still too soon to condemn the political settlement sought by the HRA as a failure. Processes are just as important as outcomes, and it is clear from the above analysis that s 19 and the JCHR have played a significant role in shifting the attention of both Parliament and the government towards human rights issues. Section 19, as Hunt notes, has proven to be an 'effective catalyst' for greater parliamentary scrutiny,<sup>165</sup> which the JCHR has consistently sought to cultivate through its various lines of inquiry. Consequently, 'it can be said unequivocally that, by engaging with human rights ... Parliament's role in relation to human rights has increased not decreased since the passage of the Human Rights Act.'<sup>166</sup> A culture of rights, therefore, can be seen to be taking root within Parliament, thus forming the foundations upon which Parliament may better scrutinise the executive on human rights issues. As a result, Parliament may yet convert its increased engagement with human rights into regular action and perhaps even displace the courts as the primary influence on government when drafting legislation.

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<sup>162</sup> Ewing, K.D. *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (Oxford: Oxford University Press, 2010), 277: '[I]n recent years the House of Commons has begun to find a voice on human rights issues.'

<sup>163</sup> Feldman, D. 'The Impact of Human Rights on the UK Legislative Process' (2004) 25(2) *Statute Law Review* 91, 114.

<sup>164</sup> *Ibid*, 113-114.

<sup>165</sup> Hunt, n 6, 608.

<sup>166</sup> Hunt, n 6, 607.

### 3. Judicial Rights Review

#### 3.1 Sections 2 and 6 of the Human Rights Act 1998

Before engaging with the analysis of ss 3 and 4, the exclusion of ss 2 and 6 from the chapter will first be addressed. Section 2 has been excluded on the grounds that its constitutional significance can be seen to hinge upon ss 3 and 4, whilst s 6 has been excluded on the grounds that it deals, not with the review of legislation as with s 3, but instead with the review of executive action.

When determining whether a Convention right has been breached or not under the HRA, judges under s 2(1) are obliged to take into account Strasbourg jurisprudence. Strasbourg authority has persuasive, but not binding authority. On the face of it, therefore, judges are given discretion under s 2 to either apply or disapply jurisprudence of the European Court of Human Rights (ECtHR) depending on the circumstances of the case before them.<sup>167</sup> Since the HRA came into force, however, courts have appeared unwilling to exercise their discretion, thereby preventing the development of a 'distinctively British contribution to the development of the jurisprudence of human rights in Europe.'<sup>168</sup> Instead, courts have generally chosen to follow what Jonathan Lewis describes as the 'mirror principle,' whereby s 2 is interpreted as providing a ceiling to the scope of Convention Rights, not a floor.<sup>169</sup> Consequently, the courts, in the absence of 'special circumstances',<sup>170</sup> have sought merely to apply any 'clear and constant jurisprudence' of the ECtHR.<sup>171</sup>

It is clear from the wording of s 2, however, that the courts are given the discretion to determine the precise scope of the Convention Rights they are obliged to enforce under ss 3, 4, and 6. Parliament must, therefore, be taken to have foreseen the possibility of the courts adopting either an expansive or a minimalistic interpretation of the Convention Rights. Although an expansive interpretation of Convention Rights may result in more parliamentary legislation and executive acts being held to be incompatible than envisaged by its drafters, it is submitted that the application of Convention Rights nevertheless remain subject to the restrictions imposed by ss 3,

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<sup>167</sup> In support see Fenwick, n 1, 191, and Masterman, R. 'Aspiration or Foundation? The status of the Strasbourg jurisprudence and the "Convention rights" in domestic law' in Fenwick, H., Phillipson, G. and Masterman, R. (eds) *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007), 62.

<sup>168</sup> *Rights Brought Home*, n 5, [1.14].

<sup>169</sup> Lewis, J. 'The European ceiling on human rights' (2007) *PL* 720, 725.

<sup>170</sup> *R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment* [2001] UKHL 23, [26] (Lord Slynn).

<sup>171</sup> *Ibid.*

4, and 6. As will be shown below, the s 3 interpretative power is not an unlimited one. Consequently, the scope of the Convention Rights, although determinative of whether a breach has occurred, does not automatically result in a change in the law. However, while an expansive interpretation of the Convention Rights does not necessarily equate into an increased use of s 3, the same cannot be said of s 4.

As noted above, if a breach is incapable of being remedied by way of judicial interpretation, the court may then issue a declaration of incompatibility under s 4. Should the courts adopt an expansive interpretation, therefore, more statutes may be deemed incompatible with the Convention Rights, and more s 4 declarations of incompatibility issued as a result. The extent to which this undermines the dialogical aims of the HRA depends upon the political response to such declarations. As argued below, however, s 4 declarations, although highly persuasive, do not themselves change the law. Theoretically, therefore, the political branches should be able to respond to any excessive use of s 4 declarations as a result of an expansive interpretation of the Convention Rights by merely deciding not to act in accordance with them. Should the government and Parliament show deference towards any and all s 4 declarations of incompatibility, however, constitutional dialogue would be severely undermined. It is submitted, therefore, that the significance of this scenario to the question of whether the British constitution continues to resemble a political one nevertheless hinges more upon s 4 than s 2.

Section 6(1) states that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right,' thereby extending the traditional grounds for judicial review of executive action to include failure to comply with the Convention rights. This may be seen in the replacement of the *Wednesbury* unreasonableness test with a test of proportionality in *R (on the application of Daly) v Secretary of State for the Home Department*,<sup>172</sup> which has the effect of subjecting executive decisions in relation to human rights issues<sup>173</sup> to a higher standard of judicial scrutiny. As a consequence of this, Helen Fenwick is correct in identifying s 6 as being 'the central provision of the HRA.'<sup>174</sup> Despite this, however, the focus of s 6 is not on influencing the legislature's understanding or appreciation of human rights, but of public authorities such as

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<sup>172</sup> [2001] 2 *WLR* 1622.

<sup>173</sup> See, however, the decision of the House of Lords in *RB (Algeria) (FC) and another v Secretary of State for the Home Department* [2009] UKHL 10, where their Lordships subjected the decision of an immigration appeals tribunal to the *Wednesbury* unreasonableness test, although the decision made by the tribunal engaged human rights, and would have had to have taken them into account. Therefore, despite the Convention rights being engaged, the *Wednesbury* unreasonableness test nevertheless appears to have survived.

<sup>174</sup> Fenwick, n 1, 215.

government departments.<sup>175</sup> Although this subjects discretionary executive powers to judicial constraints, 6(3), in defining what amounts to a ‘public authority,’ categorically states that it ‘does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.’ By empowering the courts to ensure that public authorities do not act contrary to the Convention rights, s 6 can therefore be seen to easily fit within the *ultra vires* model of judicial review. Should a public authority act contrary to the Convention rights, it can be seen to have acted beyond the powers granted to it by Parliament. In order for a breach of Convention rights to be legal, therefore, it must be permitted by primary legislation.<sup>176</sup> Because the *ultra vires* model of judicial review, as noted in Chapter Two, is an example of complementary constitutionalism, the same can likewise be said of s 6.<sup>177</sup>

### 3.2 Section 3 of the Human Rights Act 1998

Although the HRA sought to strengthen Parliament's role in the protection of human rights – and thus prevent human rights from becoming the exclusive domain of the courts to whom Parliament must adhere to – it was nevertheless necessary for the development of a culture of rights within Parliament for the courts to be able to inflict political costs sufficient to compel greater respect for rights. The HRA, therefore, empowers the courts to review the compatibility of primary legislation with the Convention rights, thereby marking a significant departure from political constitutionalism's prohibition on constitutional review. Section 3, therefore, enables judges to interpret legislation in order to bring it into conformity with the Convention Rights ‘[s]o far as is possible to do so.’ Compared to s 6 of New Zealand's Bill of Rights Act, therefore, the s 3 interpretative obligation is much stronger. This is best illustrated by the decision of the New Zealand Supreme Court in *Hansen*.<sup>178</sup> Whereas the House of Lords in *R v Lambert* were able to use s 3 in order to render a reverse onus provision compliant with the Convention rights,<sup>179</sup> the Supreme Court in *Hansen* declined to use s 6 to reinterpret a similar provision on the grounds that

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<sup>175</sup> See Fenwick and Phillipson, n 4, 978.

<sup>176</sup> Section 6(2): ‘Subsection (1) does not apply to an act if – (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.’

<sup>177</sup> See Chapter Two, 56-59.

<sup>178</sup> *Hansen*, n 43.

<sup>179</sup> [2001] UKHL 37.

it would require a departure from Parliament's clear and unambiguous intention.<sup>180</sup> Following Hiebert's reasoning, therefore, s 3 may have the potential, if used often and expansively, to avoid a repeat of the situation in New Zealand by providing the government and Parliament with the incentive needed to comply with the Convention rights.<sup>181</sup> This is because s 3 interpretations require positive action by government and Parliament to overturn them. Theoretically, therefore, the more times s 3 is used to alter legislation to achieve compliance, the greater the political cost, the more the government and Parliament will be compelled to ensure that they will conform with Convention rights in the future.

Although it was expected that s 3 would be used more often than s 4, and that a s 4 declaration would in fact not be needed 'in 99 percent of cases,'<sup>182</sup> case law to date indicates that s 3 has been used less frequently,<sup>183</sup> and s 4 more often,<sup>184</sup> than anticipated, thereby potentially undermining the claim that s 3 is the 'prime remedial measure' of the HRA<sup>185</sup> and s 4 only a 'measure of last resort.'<sup>186</sup> This may seem an undesirable development from the point of view of legal constitutionalism in so far as s 4 declarations of incompatibility provide no remedy for those

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<sup>180</sup> For a detailed discussion of the decision, see Geddis and Fenton, n 42, 751-754, and Geddis, n 46, 101-103.

<sup>181</sup> For arguments in favour of a maximalist use of s 3 see Phillipson, G. '(Mis)-reading section 3 of the Human Rights Act' (2003) 119(Apr) *LQR* 183. It must be noted, however, that Phillipson has since retracted from this strong position. See Phillipson, G. 'The Human Rights Act, Dialogue and Constitutional Principles' in Masterman, R. and Leigh, I. (eds) *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford: Oxford University Press, 2013).

<sup>182</sup> *Hansard*, HL Deb, vol. 585, col. 840 (5 February 1998) (Lord Irvine LC).

<sup>183</sup> See Clayton, R. and Tomlinson, H. *The Law of Human Rights, Volume 1* (2<sup>nd</sup> edn, Oxford: Oxford University Press, 2009), 191-194. They identify 24 cases by the end of 2008 where s 3 has been used successfully: *R v Offen* [2001] 1 WLR 253; *R v A (No. 2)* [2002] 1 AC 45; *Cachia v Farluyi* [2001] 1 WLR 1966; *R v Lambert* [2002] 2 AC 545; *Goode v Martin* [2002] 1 WLR 1828; *R v Carass* [2002] 1 WLR 1714; *R (J) v Enfield LBC* [2002] 2 FLR 1; *Financial Times v Interbrew* [2002] EMLR 24; *R (Van Hoogstraten) v Governor of Belmarsh Prison* [2003] 1 WLR 263; *Fox v HM Customs and Excise* [2003] 1 WLR 1331; *R (Wooder) v Feggetter* [2003] QB 219; *PW & Co v Milton gate Investments* [2004] 1 Ch 142; *R (Sim) v Parole Board* [2004] QB 1288; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; *Barca v Mears* (2005) 1 FLR 1; *R (Hammond) v Secretary of State for the Home Department* [2006] 1 AC 603; *Beaulane Properties v Palmer* [2006] Ch 79; *Culnane v Morris* [2006] 2 All ER 149; *R v Holding* [2006] 1 WLR 1040; *R (O) v Harrow Crown Court* [2007] 1 AC 249; *R (MB) v Secretary of State for the Home Department* [2006] EWCA Civ 1140; [2008] 1 AC 440; *R v Keogh* [2007] 1 WLR 1500; *R (Wright) v Secretary of State for Health* [2008] QB 422; [2009] UKHL 3. Since the end of 2008, s 3 has also been used successfully in *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28.

<sup>184</sup> See *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2012-13*, Cm.8727 (2013), 43.

<sup>185</sup> *Ghaidan*, n 183, 575 [46] and [50] (Lord Steyn).

<sup>186</sup> *R v A (No. 2)*, n 183, 68 (Lord Steyn) and *ibid*, 575 [46] (Lord Steyn).

whose rights have been infringed,<sup>187</sup> and, unlike s 3, can only be issued by the higher courts.<sup>188</sup> To some supporters of constitutional dialogue, however, this will come as a welcome development. Commentators such as Tom Campbell,<sup>189</sup> Geoffrey Marshall,<sup>190</sup> and Francesca Klug<sup>191</sup> have long advocated for the use of s 4 because they fulfil one of the key purposes of the HRA: to give the final say on questions of human rights to Parliament, not the courts. It is submitted, however, that the purpose of the HRA was more extensive than this. It sought to preserve parliamentary sovereignty whilst also protecting human rights. Section 4, therefore, as discussed in greater detail below, was not designed to provide an escape route for governments wishing to circumvent rights arbitrarily, but instead to facilitate greater engagement with and respect for Convention rights.

It is therefore submitted that the HRA's success at facilitating complementary constitutionalism is not wholly dependent upon whether s 3 has been used more or less than 4. As Kavanagh argues, what matters is that both s 3 and s 4 are used appropriately. As she notes:

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<sup>187</sup> Section 4(6): 'A declaration under this section ("a declaration of incompatibility") – (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.'

<sup>188</sup> Section 4(5). Section 3 of the Human Rights Act 1998 has no equivalent provision. See also Lord Hope, 'The Human Rights Act 1998 – The Task of the Judges' in Andenas, M. and Fairgrieve, D. (eds) *Lieber Amicorum in Honour of Lord Slynn of Hadley, Volume II, Judicial Review in International Perspective* (The Hague: Kluwer Law International, 2000), 415: '[A]lthough section 4 of the Act will restrict the jurisdiction to make declarations of incompatibility to the higher courts, section 3 which deals with the interpretation of legislation will apply generally.'

<sup>189</sup> Campbell, T. 'Incorporation through Interpretation' in Campbell, T., Ewing, K. D., and Tomkins, A. *Sceptical Essays on Human Rights* (Oxford: Oxford University, 2001), 99: '[I]t would be best if declarations of incompatibility were to be seen as routine and unproblematic. If moral disagreement over what the provisions of the ECHR should be taken to mean is accepted as commonplace, because of the inherently controversial nature of the issues which call to be determined in making such interpretations, then the courts should be regarded as having the right to make only provisional determinations of what it is that human rights asserted in the ECHR require us to do. These determinations may, with perfect propriety, be challenged and overturned by elected governments after public debate.'

<sup>190</sup> Marshall, G. 'The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained?' (2003) *PL* 236, 243-244: 'A declaration by the courts provides the legislature with a considered judicial view of the rights compatibility of the legislation. It can then reflect on its actions and either take the remedial steps provided for in section 10 of the Act or exercise its retained sovereign prerogative to disagree with the judicial assessment and confirm its initial view of its legislation.'

<sup>191</sup> Klug, F. 'Judicial Deference under the Human Rights Act 1998' (2003) 2 *EHRLR* 125, 132: 'The purpose of the HRA is to allow the courts to apply human rights principles where they were once barred from doing so. It was not enacted so that the courts could have the final say in areas where there is no settled human rights answer any more than it allows them to abdicate from their responsibility to scrutinise on the grounds that it is outside their sphere of competence ... in the unlikely event that the courts were to declare that any future legislation outlawing fox hunting, for example, was incompatible with Convention rights ... then Parliament would be entitled to choose to protect its democratic mandate on an issue where the human rights case law is far from settled. Encouraging this kind of 'dialogue' was one of the purposes of the HRA.'

[S]tatistical generalisation alone cannot inform us about the appropriateness of choosing between section 3 and section 4 ...

All one can say is that section 3 should be used when it is appropriate, considering all the factors relevant to that issue in the case before the courts, and section 4 should be used when it is not.<sup>192</sup>

The HRA's success at facilitating complementary constitutionalism, therefore, is dependent also upon whether the current judicial reading of s 3 and its limits, as discussed below, either complement or contradict the underlying themes and values of the political school. Should it be used too expansively, s 3 risks, not only marginalising Parliament's role in the protection of rights, but undermining parliamentary sovereignty as well.

The use of s 3 to date has been far from uncontroversial, with a number of cases seemingly blurring the distinction between interpretation and legislation which the inclusion of s 4 was designed to prevent. Admittedly, the distinction between interpreting and legislating is a fine one. Some political constitutionalists may therefore question the legitimacy of adopting any interpretative measure under the HRA. Aileen Kavanagh, however, has nevertheless made a compelling case for the difference between the two in reference to the application of s 3. According to Kavanagh, 'the activity of interpretation involves, rather than eschews, judicial law-making.'<sup>193</sup> Her argument proceeds as follows: the legal meaning of statutory language, when drafted in 'broad evaluative terms,'<sup>194</sup> can often not be determined by recourse to the language itself. In order to establish its legal meaning, a judge must necessarily look beyond linguistic meaning, therefore, and make evaluative judgments and draw upon a number of different factors in order to reach a conclusion.<sup>195</sup> The application of specific legislation to cases before judges may also be without precedent. In such a situation, a judge, if he wishes to decide the case, may have no choice but to act creatively. Consequently, as Kavanagh notes, '[e]ven under traditional doctrines of statutory interpretation, judges have exercised a creative role by elaborating, supplementing, modifying and developing statutory meaning. So, when a court interprets an unclear statutory provision, settling its meaning will inevitably mean *giving* it a meaning.'<sup>196</sup> Such

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<sup>192</sup> Kavanagh, A. *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), 123.

<sup>193</sup> *Ibid*, 29.

<sup>194</sup> *Ibid*, 30.

<sup>195</sup> *Ibid*.

<sup>196</sup> *Ibid*, 32.



'judicial law-making,' however, should not, be confused with '*legislative* law-making,' the former of which, Kavanagh claims, is far more 'limited in scope and effect' than the latter.<sup>197</sup>

Following Kavanagh's analysis, it can be said that, when judges enforce any Act of Parliament, one must come to expect from them a degree of judicial law-making. Consequently, the appearance of judicial law-making under s 3 should not necessarily be seen to undermine Parliament's law-making monopoly. Section 3, however, is not without its limits. Despite the inclusion of judicial law-making within the scope of s 3, Kavanagh makes clear that this does not extend to legislative law-making. As she explains:

In contrast to legislators, who have almost unrestricted choice in the areas of the law they can change or improve, it is not open to judges to reform any law they wish: they are limited in the decisions they can make by vagaries of litigation. Even when a case comes before them, the issues are presented in the form of a bivalent dispute on a particular aspect of the law. They are confined to resolving that particular issue. If they stray beyond those confines, their pronouncements may be *obiter* and therefore not binding on future courts. Rarely does a case encompass an entire area of law, or allow for possible radical reform of that area. The fact that judges must operate within existing legal structures and can only make law on a case-by-case basis in response to the accidents of litigation, makes it difficult for them to provide a blueprint of reform for an entire area of law.<sup>198</sup>

If s 3 was therefore used to interpret law not relevant to resolving the legal issue at hand, the court would thus be acting illegitimately. If the court was of the opinion that Convention-compliance could not be achieved without an expansive use of the s 3 interpretative power, it appears that a court would then need to issue a s 4 declaration of incompatibility instead.

As a vindication of her distinction between judicial law-making and legislative law-making, Kavanagh relies heavily upon the reasoning of Lord Nicholls in *Re S, Re W*.<sup>199</sup> In this case, the House of Lords unanimously overturned the decision of the Court of Appeal to use s 3 to read into the Children Act 1989 powers and procedures for the judicial supervision of local authority care orders. According to Lord Nicholls:

For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory

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<sup>197</sup> *Ibid*, 29 and 35-37.

<sup>198</sup> *Ibid*, 29 and 36.

<sup>199</sup> *Re S, Re W* [2002] 2 AC 291.

provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even through a limitation on Convention rights is not stated in express terms ...

I should add a further general observation in the light of what happened in the present case. Section 3 directs courts on how legislation shall, as far as possible, be interpreted. When a court, called upon to construe legislation, ascribes a meaning and effect to the legislation pursuant to its obligation under section 3, it is important the court should identify clearly the particular statutory provision or provisions whose interpretation leads to that result. Apart from all else, this should assist in ensuring the court does not inadvertently stray outside its interpretation jurisdiction.<sup>200</sup>

As Kavanagh accordingly concludes:

[I]n *Re S*, he [Lord Nicholls] felt that this reform could not be brought about by limited and piecemeal nature of the judicial law-making power under section 3. A feature is 'fundamental' therefore, *if it is so embedded in the fabric of the statute, that it cannot be removed or changed by way of the necessarily piecemeal tool of judicial rectification ...*

*Re S* clarifies that section 3(1) should not be used as a way of radically reforming a whole statute or writing a quasi-legislative code, granting new powers and setting out new procedures to replace the existing statutory scheme. This type of reform requires *legislative* law-making and is therefore best undertaken by Parliament, rather than the courts.<sup>201</sup>

From a political constitutionalist perspective, the decision in *Re S*, for the reasons Lord Nicholls and Kavanagh advance, should be a welcome one. It would be illegitimate for a court to read into a piece of legislation complex provisions without legislative approval, especially where the new provisions have the effect of increasing judicial scrutiny. Kavanagh is correct to conclude, therefore, that the decision to forgo a s 3 interpretation and instead issue a s 4 declaration of incompatibility in both *International Transport Roth GmbH v Secretary of State for the Home Department*<sup>202</sup> and *Bellinger v Bellinger*<sup>203</sup> were done so on the grounds that Convention-compliance in each instance required radical reform.<sup>204</sup>

Despite this, however, s 3 has proven controversial due to the fact that, following the decisions of the House of Lords in *R v A (No. 2)*,<sup>205</sup> *Ghaidan v Godin-Mendoza*,<sup>206</sup> and *Secretary of State for the*

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<sup>200</sup> *Ibid*, 313-314 [40]-[41].

<sup>201</sup> Kavanagh, n 192, 39.

<sup>202</sup> [2002] 3 WLR 344.

<sup>203</sup> [2003] 2 AC 467.

<sup>204</sup> See Kavanagh, n 192, 39-41.

<sup>205</sup> *R v A (No. 2)*, n 183.

<sup>206</sup> *Ghaidan*, n 183.

*Home Department v AF (No. 3)*,<sup>207</sup> courts may rely upon their interpretative power to achieve Convention compliance even in the face of seemingly clear and unambiguous statutory language to the contrary. This expansive use of s 3 has led to the claim that, despite the best efforts of the HRA to strike a complementary balance between parliamentary sovereignty and the judicial protection of rights, 'the balance of power has ... gone a little too far in the judicial direction.'<sup>208</sup>

*R v A (No. 2)*, more commonly known as the rape shield case, concerned a challenge to s 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999. Section 41(1) of the Act prevented a complainant from having evidence presented of, or being questioned about, their previous sexual behaviour with the person accused of having committed a sexual offence against them. This was subject to a number of exceptions under s 41(3). Section 41(3) (c) permitted evidence of the complainant's previous sexual history with the accused to be presented where:

[I]t is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar –

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

Section 41 was challenged on the grounds that its general prohibition in rape cases against a woman being questioned about any previous sexual relationship with the defendant was in breach of the defendant's right to a fair trial under Article 6. Although it was claimed by some that s 41 was passed with the intention of protecting a woman's right to privacy under Article 8,<sup>209</sup> and thus that a s 4 declaration of incompatibility should be issued, their Lordships, despite the reiteration by Lord Hope that s 3 'is only a rule of interpretation. It does not entitle judges to act as legislators',<sup>210</sup> nevertheless held unanimously that their interpretative power under s 3 could be

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<sup>207</sup> *AF (No. 3)*, n 183.

<sup>208</sup> Gardbaum, n 34, 215.

<sup>209</sup> See Fenwick, n 1, 175.

<sup>210</sup> *R v A (No. 2)*, n 183, 87. This echoed Lord Hope's earlier comments in *R v Lambert*, n 102, [79]: 'Resort to it [section 3] will not be possible if the legislation contains provisions, either in the words or phrases which are under scrutiny or elsewhere, which expressly contradict the meaning which the enactment would have to be given to make it compatible.'

used in order to achieve compliance with Article 6. As a result, s 41(3)(c) was read, as Lord Steyn noted:

[S]ubject to the implied provision that evidence on questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible. The result of such a reading would be that sometimes logically relevant sexual experiences between a complainant and an accused may be admitted under section 41(3)(c). On the other hand, there will be cases where previous sexual experience between a complainant and an accused will be irrelevant, e.g. an isolated episode distant in time and circumstances. Where the line is to be drawn must be left to the judgment of the trial judges.<sup>211</sup>

In so doing, the House of Lords granted themselves discretion in instances where it had been excluded,<sup>212</sup> thereby seemingly contradicting the express intention of Parliament.<sup>213</sup>

In *Ghaidan v Godin-Mendoza*, the question at issue was whether paragraph 2(2) of Schedule 1 of the Rent Act 1977, which enabled 'a person who was living with the original tenant as his or her wife or husband' to succeed to the tenancy following the death of their spouse, could be read under s 3 HRA to include same-sex couples. After unanimously agreeing that paragraph 2(2) violated the respondent's Convention rights under Article 14 taken in conjunction with Article 8, their Lordships, by a majority of four to one, held that the terms 'husband' and 'wife' were not gender-specific and that s 3 could be used to read paragraph 2(2) so as to include same-sex couples.<sup>214</sup> As a result, the provision now read as follows: 'living together *as if they were* his or her wife or husband.' Compared with *R v A (No. 2)*, however, the departure from Parliament's intention in *Ghaidan* can be seen to be a relatively modest one. Although there was evidence that Parliament, in enacting the infringing legislative provision, did not intend for it to apply to same-sex couples,<sup>215</sup> the ambiguity surrounding the statutory language nevertheless made the provision's applicability to same-sex linguistically possible. In addition to this, although Parliament

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<sup>211</sup> *R v A (No. 2)*, *ibid*, 68.

<sup>212</sup> Nicol, D. 'Gender Reassignment and the Transformation of the Human Rights Act' (2004) 120(Apr) *LQR* 194, 195: 'The legislative intention [behind s 41(3)(c)] was transparently to restrict judicial discretion in respect of evidence of the complainant's previous sex life, yet their Lordships' interpretation reinstated the wide judicial discretion that Parliament thought it had abolished.'

<sup>213</sup> This is a fact which is expressly acknowledged by Kavanagh, but excused by virtue of the fact that the change initiated was not radical and far-reaching. See Kavanagh, n 192, 41: '[A]lthough the interpretation in *R v A* undeniably went against what Parliament originally intended when enacting section 41, the discretion given to the trial judge by the section 3(1) interpretation did not require the setting up of whole new procedures or mechanisms to implement the decision. It could take place within the framework provided by section 41 YJCEA [the Youth Justice and Criminal Evidence Act 1999] and the existing judicial decision-making power to consider exceptions from the general prohibitions.'

<sup>214</sup> Lord Millett dissenting.

<sup>215</sup> *Ghaidan*, n 183, 588 [78] (Lord Millett).

had enacted paragraph 2(2) with the intention that it not apply to same-sex couples, it appears unlikely that this remains the case. In using s 3, therefore, the House of Lords, although ignoring Parliament's enacted intention, could be viewed as enforcing what is likely Parliament's current intention. Paragraph 2(2) had already been amended by Parliament in 1988 to bring survivors of long-term heterosexual partnerships within the ambit of the Act and, as Lord Rodger observed, 'society has moved on since 1988.'<sup>216</sup> Consequently:

In this particular context, even if there once was, there is no longer any reason in principle for not including within the concept of "spouse" someone who had lived with the original tenant in an equivalent long-term, but homosexual, relationship. To interpret paragraph 2 so as to include such a person would, of course, involve extending the reach of paragraph 2(2), but it would not contradict any cardinal principle of the Rent Act. On the contrary, it would simply be a modest development of the extension of the concept of "spouse" which Parliament itself made when it enacted paragraph 2(2) in 1988. The position might well have been different if Parliament had not enacted paragraph 2(2) and had continued to confine the right to succeed to the husband or wife of the original tenant. But that bridge was crossed in 1988.<sup>217</sup>

In *Secretary of State for the Home Department v AF (No. 3)*, the fair hearing provisions of the Prevention of Terrorism Act 2005 were challenged on the grounds that they infringed the right to a fair trial under Article 6 of the ECHR. The 2005 Act empowered the Secretary of State to make control orders against individuals suspected of being involved with terrorism.<sup>218</sup> Under s 3 of the Act, the High Court was tasked with ensuring that a decision by the Secretary of State to make a control order satisfied the criteria for doing so under s 2. In deciding to make a control order, however, the Secretary of State could rely either partly or wholly upon 'closed material' – evidence the government deems too sensitive to disclose to either the suspect or his legal representatives. In addition to this, the court was also forbidden under the scheme of the 2005 Act to disclose material it thought to be 'contrary to the public interest.'<sup>219</sup> As Phillipson notes, this arrangement 'subordinated fair trial rights to the public interest,'<sup>220</sup> thereby infringing the right to a fair trial under Article 6. In order to combat this, Special Advocates – lawyers with security clearance – were permitted to review the 'closed material' on behalf of the suspect.<sup>221</sup> Having seen the 'closed material,' however, Special Advocates were prevented from receiving instructions from the

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<sup>216</sup> *Ibid*, 603 [128].

<sup>217</sup> *Ibid*, 603-604 [128].

<sup>218</sup> Section 2.

<sup>219</sup> Schedule, para 4(3)(d)-(f).

<sup>220</sup> Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles,' n 181, 41.

<sup>221</sup> Civil Procedure Rules 1998, Rules 76.23 and 76.24.

suspect.<sup>222</sup> In the case, the House of Lords had to decide whether the use of Special Advisors in this manner 'was sufficient to counterbalance the lack of an open adversarial hearing,'<sup>223</sup> thereby ensuring compliance with Article 6. Applying the decision of the ECtHR in *A v United Kingdom*,<sup>224</sup> the House of Lords held that, where the Secretary of State's decision to make a control order was based wholly or mainly upon 'closed material,' there would be an infringement of Article 6.<sup>225</sup> In order to remedy this infringement, therefore, their Lordships, despite Parliament's clear intention to the contrary, used s 3 of the HRA to read into the 2005 Act a requirement for limited disclosure of information. As Lord Phillips noted:

[T]he controlee must be given sufficient information about the allegations against him to enable him to give efficient instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations.<sup>226</sup>

Despite departing from clear and unambiguous statutory language, however, their Lordships in *R v A (No. 2)* and *Ghaidan* were in no doubt that their respective actions fell within the expansive scope of their s 3 interpretative duty. In *R v A (No. 2)*, Lord Steyn argued that:

[T]he interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings... The White Paper made clear that the obligation goes far beyond the rule which enabled the courts to take the Convention into account in resolving any ambiguity in a legislative provision ... The draftsman of the Act had before him the slightly weaker model in section 6 of the New Zealand Bill of Rights Act 1990 but preferred stronger language. Parliament specifically rejected the legislative model of requiring a reasonable interpretation. Section 3 places a duty on the court to strive to find a possible interpretation compatible with Convention rights. Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further ... In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.<sup>227</sup>

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<sup>222</sup> *Ibid*, Rules 76.25 and 76.28(2) and the Prevention of Terrorism Act 2005, s 11 and Schedule, para 7(5): 'A person appointed under this paragraph is not to be responsible to the person whose interests he is appointed to represent.'

<sup>223</sup> Kavanagh, A. 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73(5) *MLR* 824, 838.

<sup>224</sup> (2009) 49 *EHRR* 29.

<sup>225</sup> *AF (No. 3)*, n 183, [59] (Lord Phillips): 'Where ... the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.'

<sup>226</sup> *Ibid*.

<sup>227</sup> *R v A (No. 2)*, n 183, 67-68.

Echoing Lord Steyn's judgment in *R v A (No. 2)*, Lord Nicholls in *Ghaidan* likewise declared that 'the interpretative obligation decreed by section 3 is of an unusual and far-reaching character.'<sup>228</sup> Section 3, he argued, 'enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant.'<sup>229</sup> As a result, s 3 'may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation.'<sup>230</sup> Once this is accepted, he claimed, 'it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration.'<sup>231</sup> Apart from Lord Scott's minor reservation,<sup>232</sup> however, the question of whether s 3 could be used to ignore clear statutory language was not discussed in *AF (No. 3)*.

This expansive use of s 3 has drawn criticism from political constitutionalists for exceeding the limits of statutory interpretation envisaged by Parliament in enacting the HRA,<sup>233</sup> thereby spearheading the popular view that the HRA, as Stephen Gardbaum notes, is now 'less distinctive from US-style constitutionalism than initially claimed or hoped; that it has created what might be thought of as de facto judicial supremacy.'<sup>234</sup>

The political constitutionalist objection to this expansive approach towards s 3 is certainly not difficult to recount. Because Parliament's intention is expressed in clear and unambiguous language, there is by definition no room for the court to interpret in a Convention-friendly manner. The courts' role in such an instance would have to be purely applicative, not interpretive. To act otherwise would therefore be to ignore Parliament's will as expressed in the language of the infringing statute, thereby undermining the doctrine of Parliamentary sovereignty, as well as Kavanagh's justification for judicial law-making altogether which, as seen above, appears to hinge greatly on the ambiguity of enacted legislation. As Lord Bingham argued in defence of the House of Lords' decision to issue a s 4 declaration of incompatibility in *R (on the application of Anderson) v Secretary of State for the Home Department*:

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<sup>228</sup> *Ghaidan*, n 183, 571 [30].

<sup>229</sup> *Ibid*, 571-572 [32].

<sup>230</sup> *Ibid*, 571 [30].

<sup>231</sup> *Ibid*, 571 [31].

<sup>232</sup> *AF (No. 3)*, n 183, [95].

<sup>233</sup> For an analysis and rebuttal of this claim see Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles,' n 181, 32-38.

<sup>234</sup> Gardbaum, n 34, 196.

To read section 29 [of the Crime (Sentences) Act 1997] as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretive process sanctioned by section 3 of the 1998 Act.<sup>235</sup>

Departure from 'original intent' should instead only be permitted – if at all – where such intent is ambiguous – in other words, where the statutory language is also ambiguous. In such instances, the courts could legitimately use s 3 to read in or read down legislation, but only because there is absent a strong countervailing intention. If such a contrary intention were to be manifested clearly and expressly, s 4 would be the appropriate section to rely on.

The difficulty with this reasoning, however, is that the courts, in ignoring Parliament's original intention as expressed in the infringing statute, are in fact enforcing the will of Parliament as expressed in s 3. Therefore, although the expansive approach towards s 3 adopted by the House of Lords in *R v A (No. 2)* and *Ghaidan* can be seen to contradict, rather than complement, the underlying themes of the political school of thought, it is submitted that this contradiction is mitigated by the fact that such an approach was envisaged by the drafters of the HRA and, crucially, approved by Parliament. As Gavin Phillipson therefore argues, 'the judges, in using section 3 in far-reaching ways, are simply doing Parliament's bidding.'<sup>236</sup> It is thus 'strange for those who cavil against any judicially imposed limits on what Parliament may instruct to be so critical of mere judicial obedience to Parliament's will.'<sup>237</sup>

When one examines the text of s 3, it also becomes apparent that the provision in no way expressly precludes the reinterpretation of clear and unambiguous statutory language. The White Paper *Rights Brought Home* reveals that the operation of s 3 was always intended to depart from traditional forms of statutory interpretation.<sup>238</sup> It can be concluded, therefore, that s 3 of the HRA

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<sup>235</sup> *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [30]. Section 29 of the Crimes (Sentences) Act 1997 read as follows: 'If recommended to do so by the Parole Board, the Secretary of State may, after consultation with the Lord Chief Justice, together with the trial judge if available, release on licence a life prisoner who is not one to whom section 28 above applies.'

<sup>236</sup> Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles,' n 181, 33.

<sup>237</sup> *Ibid.* See also Bellamy, 'Political constitutionalism and the Human Rights Act,' n 53: '[I]t is perfectly coherent for judges to say they acknowledge the force of Convention rights as legal standards because Parliament has authorized them to do so and 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 they apply. So conceived, judicial interpretation post-HRA would be more solidly in line with Parliamentary sovereignty than it was before.'

<sup>238</sup> *Rights Brought Home*, n 5, [2.7]: 'The Bill provides for legislation - both Acts of Parliament and secondary legislation - to be interpreted so far as possible so as to be compatible with the Convention. This goes far beyond the present rule which enables the courts to take the Convention into account in resolving any



was designed, not to emulate s 6 of New Zealand's Bill of Rights Act, but instead to depart from it. Parliament even rejected a proposal which, like New Zealand's Bill of Rights Act, would have expressly required interpretations under s 3 to be reasonable, not merely possible.<sup>239</sup> As Phillipson notes, '[w]hen Parliament deliberately rejects an amendment limiting the courts to only reasonable reinterpretations ... it must be taken to have intended some pretty strong rereadings of other legislative provisions.'<sup>240</sup> Kavanagh is correct, therefore, in arguing that s 3 is designed to permit departure from parliamentary intention. As she notes, '[i]f the courts were not empowered to go against the 'original intention' to some degree, then section 3(1) would be rendered otiose.'<sup>241</sup> Given the political aspirations for s 3 noted above, it seems highly unlikely that s 3 was designed to function as a dead letter. Express terms, therefore, cannot be said to prohibit the use of s 3,<sup>242</sup> although they may, as Kavanagh argues, be used in order to ascertain what the fundamental feature of legislation is, and thus if a s 3 interpretation is possible or not.<sup>243</sup>

Despite this, it is clear that s 3 was not intended to completely circumvent the doctrine of parliamentary sovereignty. As Jack Straw MP commented during the passage of the Human Rights Bill through Parliament:

We decided to reject Canada's approach, which was, in effect, to establish a fundamental law that, in certain circumstances, took precedence over laws passed by its Parliament. We also considered the New Zealand model. We came up with our own approach--it is a British answer to a British problem--fundamental to which is the sovereignty and supremacy of Parliament.<sup>244</sup>

He was therefore of the opinion that, in the fulfilment of their duty under s 3, the courts would not 'contort the meaning of words until they lose their meaning altogether.'<sup>245</sup> As he noted:

[W]e [the Government] want the courts to strive to find an interpretation of legislation that is consistent with convention rights, so far as the plain words of the legislation allow,

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ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.'

<sup>239</sup> See *Hansard*, HC Deb, vol. 313, cols. 415-437 (3 June 1998).

<sup>240</sup> Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles,' n 181, 35.

<sup>241</sup> Kavanagh, n 192, 81.

<sup>242</sup> *Ibid*: '[D]eparture from the express words or legislative purpose are not, in themselves, indications that a section 3(1) interpretation is prohibited.'

<sup>243</sup> *Ibid*, 58.

<sup>244</sup> *Hansard*, HC Deb, vol. 313, cols. 419-420 (3 June 1998).

<sup>245</sup> *Hansard*, HC Deb, vol. 313, col. 422 (3 June 1998).

and only in the last resort to conclude that the legislation is simply incompatible with them.<sup>246</sup>

Following this, the HRA is perhaps best characterised as an attempt to find a middle-ground between a New Zealand-style 'interpretive' Bill of Rights and a Canadian-style 'overriding' Bill of Rights. It must be weaker than the Canadian Charter, but stronger than New Zealand's Bill of Rights Act if it wishes to defy Tushnet's instability thesis and achieve workable 'weak-from judicial review.'<sup>1</sup> One could therefore conclude that the courts may use s 3 to reinterpret even clear and unambiguous statutory language with the only legitimate limitation on its scope being the natural limits of judicial law-making – the 'fundamental feature' limitation advanced above. As Kavanagh argues, '[t]he legitimacy or illegitimacy of an interpretation does not hinge on *whether* the courts depart from legislative intent, but rather on the *extent* to which it so departs.'<sup>247</sup> How radical the reform required in order to achieve Convention-compliance, therefore, remains the deciding factor.

Kavanagh certainly reconciles the decision in *Re S* with *R v A (No. 2)* on the grounds that the change facilitated by s 3 in *R v A (No. 2)* 'did not depart substantially from a fundamental feature' of the Youth Justice and Criminal Evidence Act 1999.<sup>248</sup> Following Kavanagh's definition of judicial law-making and legislative law-making, her conclusions in this regard appear sound. The fact that s 3 enables the reading down and reading in of word is not in and of itself significant, as it can be seen to be an inevitable if not necessary part of judicial law-making. All that matters is that s 3 was not used in *R v A (No. 2)* 'as a way of radically reforming a whole statute or writing a quasi-legislative code granting new powers and setting out new procedures to replace the existing statutory scheme,'<sup>249</sup> whilst it arguably was in *Re S*.

*Ghaidan* is also distinguished from *Re S* along similar lines. Although Lord Nicholls was of the opinion that s 3 could be used to 'modify the meaning, and hence the effect, of primary legislation,'<sup>250</sup> he was nevertheless of the opinion that s 3 should not be used to 'adopt a meaning inconsistent with a fundamental feature of the legislation,'<sup>251</sup> with Lord Rodger noting that any interpretation should 'go with the grain of the legislation.'<sup>252</sup> Lord Nicholls also noted that s 3

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<sup>246</sup> *Hansard*, HC Deb, vol. 313, cols. 421-422 (3 June 1998).

<sup>247</sup> Kavanagh, n 192, 80.

<sup>248</sup> *Ibid*, 38.

<sup>249</sup> *Ibid*, 39.

<sup>250</sup> *Ghaidan*, n 183, 572 [32].

<sup>251</sup> *Ibid*, 572 [33].

<sup>252</sup> *Ibid*, 601 [121].

should be avoided by judges in circumstances which required 'legislative deliberation',<sup>253</sup> as they would require the courts 'to make decisions for which they are not equipped.'<sup>254</sup> To act otherwise, 'would be to cross the constitutional boundary section 3 seeks to demarcate and preserve.'<sup>255</sup> As Kavanagh concludes, these arguments made by Lord Nicholls and Lord Rodger appear to echo strongly the 'fundamental feature limitation' advanced in *Re S*.<sup>256</sup> As a result, the use of s 3 in *Ghaidan* to include same-sex couples within the scope of the Rent Act 1977, despite the fact that words were read into the statute, can be seen to be a relatively modest linguistic change which pales in comparison to the changes envisaged by the Court of Appeal in *Re S*. On such grounds, the decision in *Ghaidan* can be seen to fall within the scope of s 3.

The decision in *AF (No. 3)*, however, is harder to reconcile. According to Kavanagh, the case shows that the courts can use 'creative methods of interpretation to stretch ... provisions to their limit.'<sup>257</sup> She is therefore of the view that the 'reading down' of the Prevention of Terrorism Act 2005 by the House of Lords, although severe, nevertheless fell within the scope of s 3. As she argues:

The degree of departure from the original statutory meaning (or intent) is one important factor the courts take into account when considering whether to adopt a Convention-compatible interpretation under s 3 on the one hand, or a declaration of incompatibility under section 4 on the other. In general, the more radical the departure is, the less likely the courts are to rely on section 3. However, cases such as *AF* show that this concern is not determinative in every case. The courts may be prepared to countenance a substantial departure from the original meaning of the statute if it would achieve the aim of complying Convention rights and give the litigants before them a remedy.<sup>258</sup>

In 'reading down' 2005 Act, however, their Lordships not only departed from Parliament's clear and unambiguous intention, but initiated a reform so radical that it arguably went against the grain of the legislation, and thus beyond the scope of s 3. As Phillipson argues:

[T]he House of Lords was reversing what was arguably a 'fundamental feature' – a fundamental principle even – of the legislation: the principle that the suspect's rights of disclosure were to be subordinated to the public interest, with (the government claimed) the ultimate aim of upholding national security in combating the terrorist threat. This might fairly be said to be a key feature of the legislation, since the whole *raison d'être* of 'pre-emptive' measures like control orders is precisely to avoid the disclosure of evidence to suspects that criminal prosecution in open court would require ... Moreover, this basic non-disclosure principle was made crystal clear by the relevant provisions of the ...

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<sup>253</sup> *Ibid*, 572 [33].

<sup>254</sup> *Ibid*.

<sup>255</sup> *Ibid* (Lord Nicholls).

<sup>256</sup> Kavanagh, n 192, 61-62.

<sup>257</sup> Kavanagh, n 223, 854.

<sup>258</sup> *Ibid*, 848.

[Prevention of Terrorism Act 2005] ... which *precluded* the judge from allowing evidence to go into the open case that would be 'contrary to the public interest,' *regardless* of the impact on procedural fairness. For this reason it is strongly arguable that *AF (No. 3)* was, for this reason, the most radical use of section 3 yet.<sup>259</sup>

The JCHR has also concluded that, in 'reading down' the 2005 Act, the House of Lords 'effectively rewrote the statutory regime.'<sup>260</sup> As a result, it is perhaps surprising that that a s 4 declaration of incompatibility was not issued.<sup>261</sup> As noted above, however their Lordships in the case did not engage in a detailed discussion of the appropriate limits of s 3 as they had in both *R v A (No. 2)* and *Ghaidan*. The House of Lords appeared instead to treat the use of s 3 as a non-issue, with only Lord Scott expressing any reservations about the legitimacy of its use in the case:

My Lords, I am not sure that, if the point had been taken on these appeals, I would have agreed with my noble and learned friend's reading-down of the statutory power to make control orders. It seems to me very well arguable that the detail in which and the precision with which the statutory procedure for the judicial hearings is laid down in the 2005 Act makes it impermissible to argue that compliance with the express statutory requirements is not enough to ensure the validity of control orders and that, in addition, other requirements of a "fair hearing" for Article 6(1) purposes must also be met.<sup>262</sup>

In reaching their decision, the Government's preference for a s 3 reinterpretation over a s 4 declaration appears to have been a significant, if not overriding, factor.<sup>263</sup> As Kavanagh observes:

[W]hilst the courts are not legally obliged to follow the views of the parties (including those of the Crown) on the issue of whether to adopt a section 3 interpretation or a section 4 declaration, in reality, if no party is prepared to argue in favour of a declaration of incompatibility, the courts are reluctant to issue one. This may simply be a consequence of the fact that the courts tend not to decide an issue on which there has been no argument at the hearing of the case.<sup>264</sup>

The expansive use of s 3 in *AF (No. 3)* clearly undermines the argument that the decision in *R v A (No. 2)* constituted a 'high point of interpretative power'<sup>265</sup> that the courts had since climbed down from. Given the absence of any meaningful discussion of s 3, however, it is difficult to ascertain with any certainty the long-term implications of the decision. Although it clearly sets a precedent

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<sup>259</sup> Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles,' n 181, 43.

<sup>260</sup> Joint Committee on Human Rights, Ninth report of Session 2009-10, *Counter-Terrorism Policy and Human Rights (Sixteenth report): Annual Renewal of Control Orders legislation 2010*, HL Paper 64, HC 396, February 2010, 26 [81].

<sup>261</sup> In support see Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles,' n 181, 43.

<sup>262</sup> *AF (No. 3)*, n 183, [95].

<sup>263</sup> *Ibid*, [67] (Lord Phillips), [95] (Lord Scott), and [102] (Baroness Hale).

<sup>264</sup> Kavanagh, n 223, 850.

<sup>265</sup> Gardbaum, S. 'Reassessing the new commonwealth model of constitutionalism' (2010) 8(2) *International Journal of Constitutional Law* 167, 195.

that the lower courts are bound to follow, it would be premature to conclude that it marks a general departure from the limits of s 3 established by previous case law until the Supreme Court is given the opportunity to consider the matter again.

Because it both undermines both parliamentary sovereignty and Parliament's role in the protection of rights, the expansive interpretation of s 3 can be seen to clearly contradict the underlying themes of the political school of thought. Morgan, echoing the above view of Lord Bingham in *Anderson*,<sup>266</sup> therefore advocates the repeal and replacement of s 3 'with a provision that makes clear that interpretation cannot distort the meaning of statutory language.'<sup>267</sup> Under such a provision, Parliament would, retain the final say, and the court's role in the protection of rights, not Parliament's, would instead be marginalised. Despite this, however, it is nevertheless a contradiction that has been endorsed by Parliament. It also remains the case that s 3, along with any cases decided under it, are technically subject to legislative reversal by Parliament. Section 3 is thus unable to usher in judicial supremacy on matters of human rights. Because the courts are merely enforcing Parliament's clear intention, therefore, s 3 must be seen as complementary, rather than contradictory, to the political school. Despite this, however, it is submitted that the absence of express words as a limitation on the application of s 3, if not contradictory to the political school due to its enactment by Parliament, is certainly not as complementary to the political school as it could be. By empowering the courts under s 3 to ignore Parliament's clear and unambiguous intention in other statutes, despite retaining the final say, Parliament nevertheless appears to be undermining its own authority. If the courts shrink from their responsibility to achieve Convention-compliance in spite of clear and unambiguous statutory language to the contrary, however, Parliament's authority would almost certainly be undermined. The expansive interpretation of s 3 endorsed by the HRA and followed in both *R v A (No. 2)* and *Ghaidan*, therefore, is perhaps best seen as an area of unresolved tension between the legal and political schools of thought which pushes the boundaries of complementary constitutionalism to its limits.

### *3.3 Section 4 of the Human Rights Act 1998*

Unlike their New Zealand colleagues, British judges are also expressly empowered under s 4 of the HRA to issue a declaration of incompatibility in relation to any infringement. According to Morgan, the effect of s 4 'is that the court is not declaring what the law is, but rather what the law

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<sup>266</sup> *Anderson*, n 235.

<sup>267</sup> Morgan, n 66.

isn't. In effect, the court is empowered to issue legal advice, without binding legal effect, to Parliament and the government.<sup>268</sup> As Tom Hickman – a critic of this argument – recounts:

Those who praise the Human Rights Act's dialogic character believe that the role of the courts under the Human Rights Act is to *propose* to other branches answers to substantive questions of justice. It envisages courts proposing arguments of principle to the political branches, and so will here be termed 'principle-proposing dialogue.' It is said that, in this way, the Human Rights Act provides for an effective synthesis of parliamentary democracy and human rights by forging a partnership between legislature, executive and judiciary. Importantly it is implicit in this view that the Government can legitimately deviate from declarations of incompatibility on competing grounds of principle as well as of expediency.

This reveals a deeper feature of arguments that rely on section 4 to 'reconcile parliamentary democracy and human rights.' Behind such arguments lies a radical reconceptualisation of the separation of powers, according to which the courts are transformed from arbiters of rights, albeit subject to legislative overrule, to a form of privileged pressure group whose function it is to raise good reasons why a litigant's interests should be respected. It abandons the idea that the courts should hold government to fundamental principle and the law, and repositions the courts within the forum of ordinary politics, providing not a check or balance, but counsel.<sup>269</sup>

If so, s 4 could be seen to embody the idea of 'constitutional dialogue' underpinned by 'third wave' Bills of Rights, the idea that the courts should be allowed to participate in the human rights debate without dominating it.<sup>270</sup> Following a declaration of incompatibility, the impetus should be placed upon both Parliament and the government to correct any incompatibility identified by the courts either via ordinary legislation or remedial order.<sup>271</sup> As noted above, s 4 declarations of incompatibility are legally non-binding. Consequently, Parliament and the government are under no legal obligation under the HRA to respond positively to declarations. Once issued, the response to the decision of the court, regardless of the eventual outcome, should theoretically have been subject to political scrutiny, and thus influenced by political pressure. In this regard, the 'weak-form judicial review' or 'principle-proposing dialogue' embodied by s 4 would appear to give expression to complementary constitutionalism. Declarations of incompatibility are only issued in order to remind the executive and Parliament of their obligations under the ECHR, the final say on the matter is reserved for democratically elected legislators.

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<sup>268</sup> *Ibid*, 434.

<sup>269</sup> Hickman, T. *Public Law after the Human Rights Act* (Oxford and Portland, Oregon: Hart Publishing, 2010), 60-61.

<sup>270</sup> See Hogg and Bushell, n 18, 79-80.

<sup>271</sup> Section 10(2): 'If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.' The full procedure for making amendments via remedial order can be found in Schedule 2 of the Act.

However, as Hickman argues, by reducing court rulings to mere 'provisional determinations',<sup>272</sup> principle-proposing dialogue 'affords courts a weak role in the constitutional system.'<sup>273</sup> The aim of the HRA was not solely to preserve Parliament's right to the final say, but to ensure greater conformity with the Convention Rights by preventing abuses from ever arising – the creation of a parliamentary culture of rights. The HRA, therefore, must be capable, through the issuing of a s 4 declaration of incompatibility, to generate an effect not too dissimilar to soft law, laws which, as Aileen McHarg notes, 'attempt to influence constitutional behaviour rather than generating binding norms.'<sup>274</sup>

Because the successful creation of a parliamentary culture of rights, as Hiebert argues, is highly dependent upon the political and legal cost for non-compliance, principle-proposing dialogue offers little incentive to both the government and Parliament to respond positively, if at all, to declarations of incompatibility, therefore providing a stark contrast to s 3. As Hiebert remarks:

In Canada, parliament and the provincial legislatures have to act assertively to disagree with judicial rulings, to ensure that their legislative objectives can be realised despite a judicial finding of unconstitutionality ... The assertive requirement for political disagreement contrasts with the other jurisdictions, where parliament can disagree by simply maintaining the status quo. In New Zealand, the UK and the ACT, parliament generally must legislate only if it wishes to give effect to a judicial decision and pass remedial measures. The exception to this is if the judiciary has altered the intention or effects of legislation, in an attempt to render legislation compatible with judicial interpretations of rights. Such judicial action would require an affirmative parliamentary response to restore the original intention or scope of legislation.<sup>275</sup>

Under both ss 3 and 4, Parliament ultimately retains the final say. Of this there can be little doubt.<sup>276</sup> Whereas positive action is required by both Parliament and the government in order to overturn a s 3 interpretation, s 4 should exert less pressure upon Parliament and the government to comply with rights than s 3. Parliament and the government may merely ignore declarations should they disagree with the court's decision. Given that fact that s 4 'decouples rights from remedies',<sup>277</sup> it should come of little surprise therefore that s 3 was intended by its drafters to be

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<sup>272</sup> Hickman, n 269, 97.

<sup>273</sup> *Ibid.*

<sup>274</sup> McHarg, A. 'Reforming the United Kingdom Constitution: Law, Convention, Soft law' (2008) 71(6) *MLR* 853.

<sup>275</sup> Hiebert, n 27, 17.

<sup>276</sup> See ss 3(2) and 4(6).

<sup>277</sup> Hickman, T. 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act' (2005) *PL* 306, 327.

the first port of call for judges.<sup>278</sup> It is submitted, however, that s 4 should not be dismissed as being of little value to the development of a culture of rights within Parliament. Although comparatively weaker than s 3, the ability of the courts to formally declare legislative inconsistencies with rights, as Hiebert argues,<sup>279</sup> could nevertheless place the government and Parliament under significant pressure to remedy the alleged infringement.<sup>280</sup> Given the ambitious aims of the HRA, this should in fact be seen to be one of the intended purposes of s 4. In order to prevent s 4 from being little more than a dead letter which dresses judicial supremacy in the garments of Parliamentary legitimacy, however, Parliament must be capable of disagreeing with the courts where it strongly disagrees with its judgment. Section 4 declaration of incompatibility, therefore, must not be treated as binding authority, but only as highly persuasive authority. As Gardbaum notes in general about 'third wave' Bills of Rights:

[T]he best understanding and operation of legislative final words under the new model in general is a presumption that legislatures will abide by court decisions and not routinely ignore them – but where there is reasonable disagreement on matters of major principle after high quality debate, it should be considered legitimate for legislatures to exercise their independent legal power of having the final word.<sup>281</sup>

As noted in the previous section, the courts have issued more s 4 declarations of incompatibility than initially expected. Despite s 3 being applied expansively, therefore, Parliament's role in the protection of rights does not appear to have been completely bypassed. However, according to the Ministry of Justice, as of 31 July 2013, there have been a total of 28 declarations of incompatibility, of which 19 have become final and not subject to an appeal, 8 have been overturned on appeal, and 1 remains subject to further appeal.<sup>282</sup> Of the 19 final declarations:

- 11 have been remedied by later primary legislation
- 3 have been remedied by a remedial order under section 10 of the Human Rights Act 1998;
- 4 related to provisions that had already been remedied by primary legislation at the time of the declaration;

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<sup>278</sup> See *Hansard*, n 182: '[I]n 99 percent of cases that will arise, there will be no need for judicial declarations of incompatibility.' See also *Ghaidan*, n 183, 575 [46] and [50] (Lord Steyn).

<sup>279</sup> Hiebert, n 27, 14.

<sup>280</sup> It was arguably the loss of face that would accompany a s 4 declaration of incompatibility that persuaded the Government to support a s 3 reinterpretation of the Prevention of Terrorism Act 2005 in *AF (No. 3)*, n 183. On this point see Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles,' n 181, 43-45 and Kavanagh, n 223, 848-50.

<sup>281</sup> Gardbaum, n 34, 204.

<sup>282</sup> *Responding to human rights judgments*, n 184.



- 1 is under consideration as to how to remedy the incompatibility.<sup>283</sup>

The government, therefore, has responded positively to all but one of the declarations of incompatibility issued,<sup>284</sup> thereby suggesting the presence of a 'culture of compliance'<sup>285</sup> amongst parliamentarians towards s 4 declarations of incompatibility. By showing deference to the judiciary, s 4's supposed weak-form judicial review may in practice differ little from strong-form judicial review, thereby undermining Parliament's sovereignty irrespective of its express preservation. As Hiebert notes:

If the political culture develops in a manner that assumes remedial legislation is required whenever a court rules under s 4 that legislation is not compatible with rights, the retention of the principle of parliamentary sovereignty may be no more significant than is the inclusion of a notwithstanding clause in Canada for preserving a political ability to disagree with judicial rulings. Moreover, if political compliance with the judicial rulings becomes the model of choice, the potential for judicial rulings to alter policy choices can occur even without judicial declarations of incompatibility or remedial legislation. This is because of the considerable latitude in how the judiciary approaches its interpretative obligations under section 3.<sup>286</sup>

For human rights sceptic James Allan, the government's apparent deference towards s 4 declarations comes as no surprise. In his view, because the wording of s 4 implies that 'the judges' decisions about rights are to be treated as somehow the correct or right or indisputable and certainly the authoritative ones,<sup>287</sup> the impression is therefore created that the issuing of a declaration of incompatibility means beyond all doubt that that a Convention right has been infringed.<sup>288</sup> Allan therefore claims that the wording of s 4 is factually incorrect 'as regards what is

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<sup>283</sup> *Ibid.*

<sup>284</sup> The declaration of incompatibility yet to receive a government response was issued in *Smith v Scott* [2007] CSIH 9 against s 3(1) of the Representation of the People Act 1983 on the grounds that its blanket ban on convicted prisoners being able to vote was incompatible with the right of the individual to free elections under Article 3 of the First Protocol.

<sup>285</sup> Nicol, n 57, 453.

<sup>286</sup> Hiebert, n 27, 25.

<sup>287</sup> Allan, n 108, 116.

<sup>288</sup> *Ibid.* See also Allan, J. 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906, 914: '[Declarations of Incompatibility] can convey the impression that the unelected judges have some authoritative, definitive (and to me, mysterious) ability to know and to declare precisely where to draw all the highly contestable and disputed lines (including knowing just what amounts to a reasonable limit and what does not). So if the judges say that statutory provisions X breaches rights, then the wording of the declaration section implies (wrongly, but for some reason persuasively all the same) that *their view* is contestably correct.'

often dispute between the judiciary and the legislature,<sup>289</sup> thereby making it very difficult for Parliament to ignore s 4 declarations. As he notes:

In many, many instances the elected legislature and the unelected judiciary (or, rather, a majority of the former and a majority of the latter) simply disagree over a highly contestable decision about how best to respect rights and about what limits on them are reasonable ... And so it is grossly misleading in terms of a characterisation of what is in fact happening and in dispute to portray the legislature (and indeed to force them to portray themselves) as wanting to take people's rights away. They are, in fact, disagreeing about the scope, reach, and limits of rights in a way that happens every day, all the time, amongst smart, well-informed, reasonable people.<sup>290</sup>

The wording Allan identifies as being chiefly responsible for the empowering of judges are those found under s 4(2), which states that '[i]f the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.' It is submitted, however, that Allan's reading of s 4 is incorrect. The phrasing of the provision instead makes it clear that the issuing of a declaration of incompatibility is anything but irrefutable. A declaration is instead the learned opinion of the court, and should therefore not be treated as binding authority but as persuasive authority. Allan's claim that the wording implies that the judges' opinion on the matter is to be treated as irrefutable fact is accordingly without legal basis.

Support for Allan's claim may yet rest, however, with s 10 of the HRA. Because s 10 places the impetus on government and not Parliament to initiate legislative changes in response to s 4 declarations, Parliament's role is not only severely undercut,<sup>291</sup> but the perception that responses to s 4 declarations must be both positive and prompt is further perpetuated. Despite this, however, s 10 has only been used in response to a declaration of incompatibility in order to amend an incompatibility a total of three times, with primary legislation being used a total of eleven times.<sup>292</sup> As a result of this, one may reasonably conclude that s 10 is also blameless in encouraging deference towards s 4 declarations. The reason behind Parliament's apparent deference, therefore, must lie elsewhere.

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<sup>289</sup> Allan, n 108, 118.

<sup>290</sup> *Ibid.*

<sup>291</sup> In support see Morgan, n 66: 'It is suggested that as amending legislation by statutory instrument is essentially a way of avoiding full-dress legislative scrutiny and debate in Parliament, this procedure is itself incompatible with the promotion of a parliamentary culture of human rights.'

<sup>292</sup> *Responding to human rights judgments*, n 184.

Similarly concerned with the deference being shown towards judicial pronouncements on legislative incompatibility with the Convention rights, Morgan argues that it is the result, not of s 4's drafting *per se*, but instead of the fact that the HRA incorporates the ECHR. As he notes:

[I]f Parliament refused to amend the legislation, the losing party would proceed to the European Court of Human Rights (ECtHR) in Strasbourg, and almost certainly win. The government would then have little option but to pass remedial action.<sup>293</sup>

As a result of this, Morgan claims that, regardless of the fact that s 4 declarations are not legally binding, 'the *political pressure* exerted by this 'advice' [s 4 declarations of incompatibility] is extraordinarily potent.'<sup>294</sup> Morgan's argument is highly persuasive. Decisions of the ECtHR are, after all, binding on the State involved,<sup>295</sup> and it is accordingly necessary that they be implemented under international law. Consequently, following the issuing of a s 4 declaration of incompatibility, Parliament 'would really have no option but to amend the law in order to comply with the Convention,'<sup>296</sup> thereby making the HRA, as Morgan concludes, 'just as potent as the Canadian Charter of Rights.'<sup>297</sup>

Research conducted by Hiebert also provides support for the ECHR being the principal driving force behind political deference towards s 4 declarations of incompatibility.<sup>298</sup> Because ECtHR judgments must be complied with, the only circumstance whereby Parliament and the government could legitimately depart from a s 4 declaration would be where there was no ruling by the Strasbourg Court on the issue in question. Even in such an event, a ruling by Strasbourg on

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<sup>293</sup> Morgan, n 66, 436. In support, Morgan cites the ruling of the ECtHR in *Burden v UK* (2008) 47 EHRR 857, 870 [43]: 'The Grand Chamber agrees with the Chamber that it cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that s 4 of the Human Rights Act is to be interpreted as imposing a binding obligation. In those circumstances, except where an effective remedy necessitates the award of damages in respect of past loss or damage caused by the alleged violation of the Convention, applicants would be required to exhaust first to exhaust this remedy before making an application to the court.' The right of citizens of Member States to petition the ECtHR is guaranteed by Article 34 of the Convention.

<sup>294</sup> Morgan, *ibid*, 438. In support see also Sales and Ekins, n 82, 230.

<sup>295</sup> Article 46 ECHR.

<sup>296</sup> Johnson, N. *Reshaping the British Constitution* (Basingstoke: Palgrave Macmillan, 2004), 131.

<sup>297</sup> Morgan, n 66, 436. In support of his argument, Morgan cites Perry, M.J. 'Protecting Human Rights in a Democracy: What Role for the Courts?' (2003) 38 *Wake Forest Law Review* 635, 672: judicial protection of rights in UK 'is at least as strong ... as in Canada.'

<sup>298</sup> Hiebert, n 24, 47: 'Although the HRA lacks any obvious equivalent to the Canadian constitutional supremacy provision in s 52 or the broad judicial remedy power of s 24 of the Charter, the treaty character of the European Convention on Human Rights creates a similar presumptive expectation of compliance with judicial review as occurs in Canada. Thus, as in Canada, this expectation of compliance with judicial rulings discourages government from pursuing legislation that is patently inconsistent with relevant precedents or, at the very least, forces it to make difficult political calculations as to whether it is willing to incur risks associated with passing legislation that will likely be subject to a negative judicial ruling.'

the matter, as Morgan notes above, would most likely not be too far behind and, although there is always the chance that Strasbourg will rule in favour of the State, the only certainty is that Parliament and the government would be obliged to amend the law should they lose. It is therefore easier for s 4 declaration of incompatibility to be followed, than to defend incompatible legislation at Strasbourg. As a result, the non-binding nature of s 4 becomes little more than a dead letter which on paper preserves Parliamentary sovereignty, but in practice does not.

It is submitted, however, that the compliance with s 4 declarations of incompatibility as a result of pressure from Europe is not in and of itself an indicator of the failure of the HRA. A high rate of compliance with s 4 declarations at present does not guarantee a high rate of compliance in the future. As Gardbaum notes, '[t]he fact that so far Parliament has not clearly exercised its legal power to disagree with and depart from a judicial rights decision is not yet compelling evidence of a political inability to use it.'<sup>299</sup> Parliament need only refuse to comply with one declaration of incompatibility to demonstrate that the non-binding nature of s 4 is not a dead letter but instead a legal reality. Because the HRA has only been in force for thirteen years, '[f]ew ... reasonably contestable issues of major principle have really arisen yet in the declaration of incompatibility context, which is why it is far too soon to render final judgement.'<sup>300</sup> The high rate of compliance to date should also not overshadow that fact that one s 4 declaration of incompatibility has yet to be complied with.

The declaration in question was issued in *Smith v Scott*.<sup>301</sup> In this case, s 3 of the Representation of the People Act 1983 (RPA) was held to be incompatible with Article 3 of the First Protocol and an individual's right to free and fair elections because it imposed a blanket ban on convicted prisoners from being able to vote in elections to Parliament. The court accordingly issued a s 4 declaration of incompatibility. The judgment largely followed the reasoning of the ECtHR in *Hirst v United Kingdom (No. 2)*,<sup>302</sup> where the Grand Chamber, by majority of 12 to 5, also held that the blanket ban on prisoner voting in Britain infringed Article 3 of the First Protocol.

The ECtHR reached its decision in *Hirst* on the grounds that a blanket ban was disproportionate. As the ECtHR noted, '[i]t applies automatically to ... prisoners, irrespective of the length of their

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<sup>299</sup> Gardbaum, n 34.

<sup>300</sup> *Ibid*, 205. Gardbaum is referring to the first ten years of the HRA's enactment when he makes this comment. In support of this argument see also Sathanpally, A. *Beyond Disagreement: Open remedies in Human Rights Adjudication* (Oxford: Oxford University press, 2012).

<sup>301</sup> *Smith v Scott*, n 284.

<sup>302</sup> (2006) 42 EHRR 41.

sentence and irrespective of the nature or gravity of their offence and their individual circumstances.<sup>303</sup> The decision of the ECtHR was also motivated by the fact that Parliament had not debated the issue of disenfranchisement following the enactment of the HRA. As they noted, 'it cannot be said that there was any substantive debate by members of the legislature on the right of prisoners to vote.'<sup>304</sup> As Colin Murray notes:

The absence of any relevant debate separated the UK from the majority of ECHR states, which also maintained restrictions on the prisoner franchise at the time *Hirst* was decided. These other states could draw upon their legislative debates as efforts to assess their restrictions in light of human rights concerns, because of the Court's discretion to vary the application of the ECHR to respect particular national policies and practices ... *Hirst* made it clear that, in the absence of any efforts by Parliament to consider the UK's restrictions in light of the human rights at issue, the provisions of the RPA 1983 lay outside any potential margin of appreciation.<sup>305</sup>

However, despite further pressure from the ECtHR, and more recently the Supreme Court, successive governments have been reluctant to implement the decision in *Hirst*. Although the Government had issued two consultation documents in the wake of the ruling in *Hirst*,<sup>306</sup> it still had not taken any legislative action to remedy the infringement by 2010. As a result, the decision in *Hirst* was reaffirmed in the pilot judgment of the ECtHR in *Greens & MT v United Kingdom*.<sup>307</sup> The Court held also that legislative proposals designed to achieve Convention-compliance needed to be brought forward within six months of the judgment becoming final.<sup>308</sup> In response to this, a debate was held on 10 February 2011 in the House of Commons, where a majority of 234 to 22 MPs<sup>309</sup> backed a backbench motion moved by David Davis MP which stated that 'legislative decisions of this nature should be a matter for democratically elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand.'<sup>310</sup>

With the ECtHR soon to address the issue of prisoner voting rights again in *Scoppola v Italy (No. 3)*,<sup>311</sup> the Government, emboldened by the House of Commons' refusal to comply with Strasbourg,

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<sup>303</sup> *Ibid*, [82].

<sup>304</sup> *Ibid*, [79].

<sup>305</sup> Murray, C.R.G. 'A Perfect Storm: Parliament and Prisoner Disenfranchisement' (2013) 66(3) *Parliamentary Affairs* 511, 524.

<sup>306</sup> They were published in December 2006 and April 2009 respectively. See *Voting Eligibility (Prisoners) Draft Bill*, Cm.8499 (2012), [25]-[26].

<sup>307</sup> (2011) 53 EHRR 21.

<sup>308</sup> *Ibid*, [115]. The deadline for legislative action was 11 October 2011. See Davis, n 30, 147.

<sup>309</sup> *Hansard*, HC Deb, vol. 523, col. 584, Div. 199 (10 February 2011).

<sup>310</sup> *Hansard*, HC Deb, vol. 523, col. 493 (10 February 2011).

<sup>311</sup> (2013) 56 EHRR 21.

successfully petitioned the Court to revisit their decision in *Hirst* and extend the deadline set in *Greens & MT v United Kingdom* to six months after their judgment in *Scoppola v Italy (No. 3)*.<sup>312</sup> Despite the Government's argument that prisoner disenfranchisement was a matter for individual member states,<sup>313</sup> the ECtHR again reaffirmed the ruling in *Hirst*.<sup>314</sup> Consequently, in November 2012, the Government introduced into Parliament the *Voting Eligibility (Prisoners) Draft Bill* and charged a joint committee of both Houses to scrutinise and make recommendations on three potential legislative responses to the ECtHR's decision, including the option to maintain the current ban.<sup>315</sup> In December 2013, the Joint Committee published its report, recommending compliance with the judgment in *Hirst* and allow convicted prisoners serving a sentence of 12 months or less to retain the right to vote.<sup>316</sup> In *R (Chester) v Secretary of State and McGeoch v The Lord President of the Council & another*,<sup>317</sup> where Britain's blanket ban on prisoner voting was challenged yet again, the Supreme Court affirmed that it would not depart from Strasbourg's clear and consistent view on prisoner disenfranchisement.<sup>318</sup> In so doing, the Court made it clear that it was for Parliament to decide what to do next, declining to issue another s 4 declaration of compatibility on the grounds that Parliament was already considering the matter.<sup>319</sup>

Murray has criticised the political resistance to *Hirst* as being founded upon the misunderstanding that the judgment was an 'assault on centuries of settled practice,'<sup>320</sup> as opposed to a 'request that Parliament reconsider the UK's disenfranchisement of prisoners in light of human rights ... bounded only by the requirement that any restrictions resultant from this reconsideration be proportionate to the crimes in question.'<sup>321</sup> Despite this, however, it is submitted that the issue of prisoner voting rights demonstrates unequivocally that both Parliament and the government, where they strongly disagree with the ECtHR, will not automatically follow declarations of incompatibility, regardless of the pressure from Strasbourg to do so. As Fergal Davis argues in agreement, 'the prisoner disenfranchisement debates perhaps demonstrate that Parliament is

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<sup>312</sup> The deadline for legislative action was therefore changed to 23 November 2012. See *Voting Eligibility (Prisoners) Draft Bill*, n 306, [24].

<sup>313</sup> *Scoppola v Italy (No. 3)*, n 311, [75]-[80].

<sup>314</sup> *Ibid*, [93]-[96].

<sup>315</sup> *Voting Eligibility (Prisoners) Draft Bill*, n 306, [3]. The three options are as follows: (1) '[a] ban for prisoners sentenced to 4 years or more;' (2) '[a] ban for prisoners sentenced to more than 6 months;' and (3) '[a] ban for all convicted prisoners – a restatement of the existing ban.'

<sup>316</sup> Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, Report of Session 2013-14, HL Paper 103, HC 924, December 2013, 62 [236].

<sup>317</sup> [2013] UKSC 63.

<sup>318</sup> *Ibid*, [27] (Lord Mance).

<sup>319</sup> *Ibid*, [39] (Lord Mance).

<sup>320</sup> Murray, n 305, 525.

<sup>321</sup> *Ibid*.

willing to take a principled stand against the judgment of a court and in so doing assert its own supremacy.<sup>322</sup> The issue of prisoner voting rights, therefore, may be the exception which proves the rule. Although it remains to be seen whether the financial cost for defying the ECtHR will eventually compel the current Coalition Government comply with their consistent ruling on the matter<sup>323</sup> – thereby confirming Sales and Ekins' interpretation of the HRA – the non-binding nature of s 4 cannot yet be dismissed as a dead letter provision which only preserves Parliament's right to the final say on paper, but in practice delivers it to the judiciary and the Strasbourg Court.

#### **4. Conclusion**

The HRA seeks to secure greater protection for human rights without ushering in judicial supremacy. It achieves this by protecting rights both politically and legally, with the latter informing, but without dominating, the former. On the political front, the HRA seeks to facilitate a parliamentary culture of rights whereby Parliament plays an active role in protecting human rights against the executive, primarily by reviewing the compatibility of Government Bills with the Convention rights. On the legal front, the HRA empowers the courts to either correct or identify human rights infringements in order to provide an incentive for Parliament and the government to respect rights when drafting legislation whilst also preserving Parliament's right to the final say on human rights. Ensuring that the aims of the HRA are achieved without the legal controls undermining the political ones, is essential if the HRA is to be considered an example of complementary constitutionalism. From the above analysis, it can be seen that judicial and political activity under the HRA, although mixed, is nevertheless in broad conformity with the HRA's twin aims.

Section 19 has arguably heralded a culture of compliance within government on matters of rights whereby the courts, not Parliament, has the most influence on the formation of government legislation. Despite this, s 19 has also spearheaded greater parliamentary scrutiny of government compliance with human rights, assisted greatly by the JCHR. Although its direct influence on government legislation has so far been minimal, the JCHR has nevertheless compelled the government to justify its human rights record before Parliament and has crucially facilitated greater parliamentary engagement with human rights issues. Evidence also suggests that the JCHR no longer performs a purely technical role in the performance of its duty, but instead reports in its

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<sup>322</sup> Davis, n 30, 145.

<sup>323</sup> See 'Grayling: MPs to decide on prisoner votes' 28 October 2012 <<http://www.bbc.co.uk/news/uk-politics-20115675>> (accessed 07.11.2012).

'own voice,' thereby ensuring that Parliament is capable of reaching its own conclusions on human rights and of disagreeing with the courts where it feels it is necessary.

Although the expansive approach to s 3 adopted in *R v A (No. 2)* and *Ghaidan* is contradictory to the values of the political school and has arguably had the effect of marginalising Parliament's role in the protection of rights, it is nevertheless an approach which was sanctioned by Parliament. Because the courts are merely enforcing Parliament's clear intention, therefore, s 3, although resulting in an area of unresolved tension at the very heart of the HRA, must nevertheless be seen as complementary, rather than contradictory, to the political school. Crucially, the fact that more s 4 declarations of incompatibility have been issued than anticipated means that Parliament's role in the protection of rights has not been completely bypassed. Despite the political responses to s 4 giving the appearance of deference towards judicial pronouncements on matters of human rights, it is clear that automatic compliance with s 4 declarations is not always assured. It would therefore be premature to conclude that the non-binding nature of s 4 is a dead letter. The rule on paper is that Parliament remain sovereign and may refuse to comply with s 4 declarations of incompatibility. If it does so successfully only once, it nevertheless demonstrates that the non-binding nature of s 4 is not a dead letter but a legal reality. The continued refusal by both the government and Parliament to respond positively to the declaration of incompatibility issued in *Smith v Scott*, therefore, may prove to be the exception which proves the rule.

Overall, therefore, the HRA can be seen to constitute an example of complementary constitutionalism which provides support for the claim that that the British constitution, although unquestionably more dependent upon legal methods of accountability, nevertheless remains primarily political.



## Chapter Six

# CONCLUSION

### 1. The Political Constitution No More?

Over the last half-century, the British constitution has undergone some dramatic changes which have unquestionably ushered in greater reliance upon judicial forms of accountability. Whereas Vernon Bogdanor claims that Britain's 'old' political constitution – which relies primarily on political forms of accountability – is therefore in the process of being replaced by a 'new' more legal constitution,<sup>1</sup> this thesis offers an alternative account of the contemporary constitution premised upon a new middle-ground between the legal and political schools: complementary constitutionalism.

This thesis has shown that the differences between the legal and the political schools have been largely exaggerated. Both schools, rely upon elements of both the legal and the political schools, most notably their respective mechanism of accountability, and disagree with one another primarily, although not exclusively, on emphasis. It is submitted, therefore, that a real world constitution may be characterised as either primarily legal or primarily political in character, but the predominance of one school's normative preferences does not necessarily negate the importance of its rival's under the constitution, nor do they necessary operate in contradiction to one another. Both legal and political methods of accountability instead support and sustain each other in order to achieve better government accountability than either methods could achieve on their own, thereby resulting in a more balanced constitution.

Although the expansion of legal controls tests orthodox views on both the British constitution and the political school of constitutionalism, this thesis has thus sought to demonstrate that the expansion of law is not necessarily contradictory to the political school. By demonstrating the constitution's continued dependency on, and preference for political methods of accountability, as well as the complementary effect of its increasing reliance upon legal methods on the underlying principles of the political school, this thesis has proven that the British constitution, although unquestionably more legal, nevertheless remains primarily political in nature.

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<sup>1</sup> Bogdanor, V. *The New British Constitution* (Oxford and Portland, Oregon: Hart Publishing, 2009).

## 2. Strengthening Political Controls

Although Britain's reliance upon legal methods of accountability and control has clearly increased in recent years, such increased reliance has not been at the expense of its political methods. Much of Britain's 'old' political constitution has not only survived the judicial expansionism of the last forty years, but in some instances has even been strengthened. This can be seen most acutely with constitutional conventions.

Because they substitute judicially-enforceable rules with political ones, thereby enabling the regulation of democratically-elected politicians without judicial interference with the political decision-making process, constitutional conventions are of particular normative value to the political school which prefers political forms of accountability over legal ones. The British constitution also continues to depend heavily upon constitutional conventions for the regulation of political behaviour which a primarily legal constitution would perhaps reserve for law.<sup>2</sup> Because it renders entire swathes of the constitution non-justiciable, therefore, British dependency upon convention, although not of normative value to the political school in every instance,<sup>3</sup> is nevertheless indicative of a general preference for political as opposed to legal methods of accountability.

Although the executive's historic dominance over the House of Commons unquestionably weakened Parliament's ability to hold it to account, thereby potentially undermining the effectiveness of conventions as politically-enforceable constraints on public power, recent attempts at codification have the potential to bring greater clarity and legitimacy to conventions, thereby making compliance with them more likely. In addition to this, the recently implemented Wright Committee Reforms<sup>4</sup> have had the effect of weakening the government's hold over the Commons whilst simultaneously strengthening the ability of backbenchers to more effectively hold the government to account. As a result, the Convention of Ministerial Responsibility has been strengthened, along with the ability of the Commons to hold the government to account for breaches of convention.

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<sup>2</sup> Blick, A. 'The Cabinet Manual and the Codification of Conventions' (2014) 67(1) *Parliamentary Affairs* 191: 'Within uncodified constitutions, of which the UK provides one of the few examples internationally, conventions can be even more prominent than in their codified counterparts.'

<sup>3</sup> This is due to the distinction this thesis draws between regulatory and foundational conventions. See Chapter Four, 131-133.

<sup>4</sup> See House of Commons Reform Committee, First Report of Session 2008-09, *Rebuilding the House*, HC 117, November 2009.

The British constitution's continued preference for political controls, however, is not restricted to the retention and strengthening of conventions – a key feature of Britain's 'old' political constitution – but can be seen also by the extension of political controls into new and previously unregulated areas of the constitution. The royal prerogative – another key feature of Britain's 'old' political constitution – has until recently operated with immunity from both legal and political controls. Although the courts have sought to bring the royal prerogative under control by expanding judicial review, Parliament has instead sought to plug the gap in accountability by bolstering political controls via legislation. The Fixed-term Parliaments Act 2011, for example, abolishes the Crown's controversial power of dissolution and replaces it with a system of fixed-terms.<sup>5</sup> The Prime Minister can no longer call an election at his or her discretion, thereby weakening his or her hold over Parliament. Crucially, the Act also transfers the power to call an early election from the executive to Parliament, thereby strengthening parliamentary, rather than judicial, controls over the government.<sup>6</sup>

Political accountability has also been extended to include the protection of human rights – a relatively new phenomenon to British public law – which is traditionally left to the courts in countries with an entrenched 'higher law' constitution. The principal aim of the Human Rights Act 1998 (HRA), however, was to achieve greater human rights protection without judicial supremacy. It thus sought to place Parliament, not the courts, at the centre of human rights protection by fostering a culture of rights in which Parliament would play a more active role in scrutinising Government Bills on their compatibility with the Convention rights. The scheme of the HRA, therefore, was designed to facilitate this, most notably s 19, which places a duty upon a minister introducing a bill to issue statement as to the bill's compatibility with the Convention rights. Although s 19 statements were designed to compel the government to take rights into consideration at the pre-legislative stage in order to prevent any legislative incompatibility with rights from ever emerging, they were also meant to provide a platform from which Parliament may then better scrutinise the government. The Joint Committee on Human Rights (JCHR) was also established in order to assist Parliament with its scrutiny of government on human rights grounds.

Although the courts appear to exert greater influence over government, albeit indirectly, than either the JCHR or Parliament, thereby ushering in a culture of compliance within government, s 19, with the help of the JCHR, has nevertheless forced the government to explain its reasons

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<sup>5</sup> Section 1.

<sup>6</sup> Section 2.

behind their statement, thereby exposing it to greater levels of parliamentary scrutiny. Although evidence suggests that the JCHR's influence on Government Bills is minimal at best, and that Parliament is either unable or unwilling to give effect to JCHR recommendations due to the continued dominance of party discipline within the House of Commons, the Committee has nevertheless succeeded in increasing Parliament's overall awareness of and engagement with rights, thereby helping to lay the foundations for a culture of rights within Parliament. Where human rights once occupied only the peripherals of parliamentary activity, they can now be seen to take centre stage. Parliament's increasing engagement with rights, therefore, as well as the changing practices of the JCHR, may yet increase its impact upon government and dilute the indirect influence of the courts. It is now also the case that the JCHR regularly reports in its 'own voice' rather than that of the judiciary. Its recommendations, therefore, offer an alternative to purely technical legal advice which enables Parliament's to make an informed decision on whether or not to disagree with the courts, thereby enabling it to reach its own conclusions on rights in such way as to give its right to the final say meaning.

### **3. A Complementary Constitution**

Where there has been an increased reliance upon legal methods of accountability, this thesis has sought to demonstrate that such reliance complements, rather than contradicts, the underlying values of the political school. In so doing, it has demonstrated that determining whether something is complementary is seldom clear-cut, thus highlighting the necessarily fine line complementary constitutionalism straddles between legal and political constitutionalism.

The House of Lords expanded judicial review in *Bancoult (No. 2)*<sup>7</sup> to include Orders in Council issued under the prerogative, thereby plugging one of the gaps in reviewability left by the *GCHQ* case.<sup>8</sup> Judicial review of prerogative powers, because they are not derived from statute, cannot be justified by recourse to the *ultra vires* model of review. This is because the courts, in reviewing the actions of the executive based on non-statutory powers, cannot possibly be enforcing Parliament's will. The extension of judicial review, therefore, unquestionably strengthens legal as opposed to political controls. In *Bancoult (No. 2)*, however, judicial review was expanded in order to protect Parliament's democratic authority against the executive's use of the royal prerogative. The expansion of judicial review to include the royal prerogative, although undermined by the courts' unwillingness to interpret prerogative powers narrowly and abandon deference to the executive

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<sup>7</sup> *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61.

<sup>8</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

on matters of colonial governance and national security, can nevertheless be seen to protect, rather than contradict, the underlying values of the political constitution. Although it fails to bring the prerogative under control, therefore, the decision, at least in principle, can be seen to provide evidence of complementary constitutionalism.

Although it is contended that *Bancoult (No. 2)* strengthens legal controls over the prerogative in a complementary manner, earlier case law has certainly tested the boundaries of complementary constitutionalism. In the *Fire Brigades Union* case,<sup>9</sup> for example, the House of Lords' decision to prevent the executive from using the prerogative to subvert Parliament's will unquestionably readdressed the balance between Parliament and the executive in favour of the former. By implying a limitation upon the Home Secretary's seemingly unlimited discretionary power to decide both when and whether to introduce the statutory scheme, however, this rebalance was arguably achieved by the House of Lords in a manner more akin to legal constitutionalism and thus less complementary than that adopted by the Court of Appeal.<sup>10</sup> Here, the majority merely extend the principle in *De Keyser's Royal Hotel*<sup>11</sup> to include statutory provisions not yet in force, thereby avoiding the need for creative statutory construction which blurs the distinction between judicial interpretation and legislative lawmaking.

Although the HRA sought to place Parliament, not the courts, at the centre of human rights protection, it nevertheless empowered the courts to review the compatibility of legislation with the Convention rights albeit without the power to strike down incompatible legislation. Section 3 empowers the courts to interpret legislation in order to bring it into conformity with the Convention Rights '[s]o far as is possible to do so,'<sup>12</sup> whilst s 4 empowers the courts to issue a non-binding declaration of incompatibility when they are unable to do so. Under both provisions, therefore, parliamentary sovereignty is expressly preserved,<sup>13</sup> thereby achieving 'weak form judicial review.'<sup>14</sup> This was done in order to provide an effective incentive for the government and Parliament to engage and comply with rights, thereby avoiding a repeat of the situation in New Zealand where respect for human rights has arguably failed to take root due to the absence of sufficient political costs for non-compliance. Legal mechanisms of accountability, therefore, are

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<sup>9</sup> *Secretary of State for the Home Department, ex parte Fire Brigades Union and Others* [1995] 2 WLR 1.

<sup>10</sup> *Secretary of State for the Home Department, ex parte Fire Brigades Union and Others* [1995] 2 AC 513.

<sup>11</sup> *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508.

<sup>12</sup> Section 3(1): 'So far as it possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

<sup>13</sup> Sections 3(2)(b) and 4(6)(a).

<sup>14</sup> See generally Tushnet, M. 'New forms of judicial review and the persistence of rights-and democracy-based worries' (2003) 38 *Wake Forest Law Review* 813.

used in order to bolster political controls, and supposedly in a manner which is complementary to the underlying values of the political school. Whether ss 3 and 4 has this complementary effect, however, is clearly dependent upon their appropriate usage. Should s 3 be used too expansively, or s 4 declarations complied with automatically, they risk undermining, rather than bolstering, the HRA's aim of placing Parliament, not the courts, at the centre of human rights protection.

An expansive approach towards s 3 has been adopted by the House of Lords in both *R v A (No. 2)*<sup>15</sup> and *Ghaidan*,<sup>16</sup> which arguably marginalises Parliament's role in protecting rights and, because it permits the courts to interpret incompatible primary legislation despite clear parliamentary words to the contrary, contradicts the values of the political school. Despite this, however, it is clear that such an expansive approach was sanctioned by Parliament, thereby making it complementary. This is because the courts, in ignoring Parliament's clear intention in incompatible legislation passed either before or after the HRA, are merely enforcing Parliament's clear intention as expressed in s 3. Should the courts adopt a more restrictive approach towards their interpretative duty under s 3, they would ultimately be acting contrary to Parliament's will, thereby undermining what they were seeking to safeguard. Section 3, therefore, poses a unique paradox which can be seen to test the acceptable limits of complementary constitutionalism. Because s 4 has been used more often than expected, the expansive approach adopted by the courts towards s 3 has ensured that Parliament's role in the protection of rights has not been bypassed. Although the political responses to s 4 give the appearance of deference towards judicial pronouncements on matters of human rights, thereby casting doubt over Parliament's right to the final say on matters of human rights, it would be premature to conclude that the non-binding nature of s 4 is a dead letter. The continued refusal by both the government and Parliament to respond positively to the declaration of incompatibility issued in *Smith v Scott*<sup>17</sup> may yet prove to be the exception which proves the rule.

#### **4. A Primarily Political Constitution**

Although complementary constitutionalism, as the above examples illustrate, necessarily treads a fine line between legal and political constitutionalism, it demonstrates clearly that the debate in public law discourse between legal and political constitutionalism fails to capture the subtlety and nuance of the interplay between law and politics under real world constitutions. It is therefore

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<sup>15</sup> [2002] 1 AC 45

<sup>16</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

<sup>17</sup> *Smith v Scott* [2007] CSIH 9.

submitted that, whilst different examples may produce different conclusions, consideration of the royal prerogative, constitutional conventions, and the HRA combined justifies the conclusion of complementary constitutionalism reached by this thesis, and that this conclusion provides highly persuasive authority as to the general character of the British constitution. The British constitution, although unquestionably more legal, nevertheless remains primarily political. The history of the British constitution, however, is that of gradual change. So far, it has retained long-held political values and ideas whilst also embracing newer more legal ones, and can thus be best seen as a fusion of the old and the new; the past and the present. Whether its increasing reliance upon legal methods of accountability will one day tip the balance of the constitution away from that of a primarily political constitution and towards that of a primarily legal one remains to be seen. Much will depend, as it always has, upon the actions of both politicians and judges, not just in relation to the three areas addressed by this thesis, but across every facet of the constitution.

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