THE HUMAN RIGHTS ACT AND THE SLOW TRANSFORMATION OF THE UK'S "POLITICAL CONSTITUTION"

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1. The UK Constitutional System – A 'Political Constitution' Infused With Normative Values

The constitutional system of the UK has acquired its current shape and texture through a process of incremental evolution over centuries. Its content is derived from a variety of written and unwritten sources, including statutes, case-law and established patterns of political behaviour ('constitutional conventions'). These norms reflect current expectations as to how institutional expression should be given to accepted democratic principles. These 'rules of the game', although not set out in any single overriding written text, are nevertheless woven together into a densely textured constitutional fabric.[1] They set out the day-to-day rules of the political system, establish normative expectations as to how politicians, judges and other decision-makers should behave, and ensure that state power is exercised in accordance with post-Enlightenment democratic constitutionalist principles.

In another words, the unwritten constitutional system of the UK plays a broadly similar role in national law and politics as do the 'written' constitutions of other states.[2] Where the UK does differ from most other

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[1] Murkens has recently criticised the use of the term 'constitutionalism' in public law discourse in the UK, arguing that it often lacks precise definition: here, it is used as a short-hand to indicate the system of normative values that structures and controls the use of public power in the UK. See J. Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29(3) *Oxford Journal of Legal Studies* 427–455.

[2] The UK's unwritten constitution is thus not fundamentally different in kind from its written counterparts. In fact, it is best viewed as located at one end of a spectrum of constitutional ty-

constitutional systems is that there exists no fixed legal mechanism for determining whether something is or is not 'constitutional' as such. What is 'constitutional' ultimately becomes a political question, the answer to which can shift as the 'deep' political culture of the country alters over time.[3] This means that the UK constitution exists in a permanent state of flux and transition: it remains a continuous work in progress, which is constantly undergoing revision, renewal and repair.

This state of affairs has led some prominent scholars to suggest that the UK constitutional system does not have a core or fixed content. John Griffith once famously described the British constitution as simply '[e]verything that happens' when actors within the system exercise state power at any given time.[4] Other scholars have followed Griffith's lead and argued that the UK constitution is best seen as a malleable set of political rules, which lacks any substantive normative dimension other than a basic commitment to democratic governance.[5] In other words, the British constitution in their view is essentially a 'prudential' and open-ended set of arrangements that give shape and structure to the process of political contestation and provide a vehicle for the exercise of public power to be conducted in line with the outcomes of democratic debate.[6]

However, analysing the UK constitutional system in these terms as a purely 'political constitution' risks underplaying the extent to which the exercise of political power is subject to a number of substantive constraints, which play a key role in controlling how state power is exercised. The historical evolution of the British constitutional system has given rise to

pes that are differentiated according to the extent to which their substantive content is shaped by convention and practice rather than by fixed and formal legal rules.

3 This is one reason why the British constitutional system is often described as being essentially 'pragmatic' and flexible in nature. It has certainly evolved organically while avoiding serious crisis since its basic contours were established in the late 18th and early 19th centuries.

4 J.A.G. Griffith, The Political Constitution (1979) 42 *Modern L. Rev.* 1, 19.

5 See the analysis of the existing state of the UK constitutional system in Ch. 1 of V. Bogdanor, *The New British Constitution* (Hart, 2009). For a normative defence of a purely 'political' constitutional order, see R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy,* Cambridge: Cambridge University Press, 2007.

6 The description here borrows from Martin Loughlin's analysis of what he considers to be the appropriate nature and function of public law: see M. Loughlin, *The Foundations of Public Law,* OUP, 2010.

a set of relatively 'thick' and deeply-embedded normative expectations as to how that state power should be exercised. Adherence to democratic constitutionalism in the UK is assumed to involve respect for these values, which range beyond a minimalist commitment to democratic governance. They provide the normative standards against which the legitimacy of the acts of public bodies is judged. They also help to dictate the content of the unwritten conventions, behavioural expectations and written legal rules that together shape the UK's dense democratic constitutionalist fabric.

Three core values in particular underpin the British system, which have been laid down in successive layers since the 18th century. The first layer to take root was the *presumption of liberty*, which requires public authorities to have a clear legal basis for any action that they may take which infringes upon individual freedom and helps to generate a political culture that often adopts a sceptical stance towards government intrusions into personal liberty.[7] The second core value is the *imperative of representative government*, which requires decisions as to where the public interest lies to be made by the elected representatives of the people. This value underpins the UK's attachment to the doctrine of parliamentary sovereignty: through a gradual process dating from the 'Glorious Revolution' of 1688 to the grant of universal suffrage, Parliament acquired the sovereign authority formerly exercised by the Crown and became the mechanism through which the democratic will of the British people was expressed. The third value, *the rule of law*, mediates between the first two, seeking a balance between unrestrained freedom and unrestrained governmental authority. It requires that the exercise of state power rest on a firm legal basis, respect the requirements of fair procedure, respect basic rights, and be

[7] Historically, this presumption of liberty has been of great importance. It gave rise to the canon of statutory interpretation that legislation creating criminal offences should be interpreted and applied narrowly by the courts. The presumption also lead to the restrictive interpretation of police and public order powers, which was of immense historical significance in the 18th century, when cases such as *Entick v Carrington* (1765) 19 St.Tr. 1029 established that interference with an individual's property or person would constitute trespass unless the existence of lawful justification could be established. For a more recent example, see the decision of the House of Lords in *R (on the application of Laporte) v. Chief Constable of Gloucestershire* [2006] UKHL 55, where police intervention in the interest of maintaining public order to prevent anti-war protesters picketing an air force base was held to be unlawful on the basis that the relevant public order legislation could not be interpreted so as to authorise the action taken against the protestors.

rational, consistent and non-arbitrary. Adherence to this mixed procedural/substantive concept of the rule of law is enforced by UK courts applying administrative law norms through judicial review, while even the sovereign Westminster Parliament which retains ultimate law-making authority is expected to legislate in a manner that conforms to these norms.[8]

Taken together, these three core values lie at the heart of the UK constitutional system. They mesh together to ensure that the exercise of public power is subject to various forms of political and legal accountability, and provide a normative framework which shapes how political debate and decision-making proceeds in Britain. In particular, governments face considerable pressure to adhere to the rule of law and associated principles of good governance. In other words, compliance with the core elements of the rule of law is expected, and state actors who attempt to cut loose from these restraints face a mixture of legal and political sanctions.

This was illustrated by the failure of the Labour government in 2004 to push through legislation which would have 'ousted' the jurisdiction of the superior courts in respect of certain categories of immigration and asylum cases. Notwithstanding that government's sizeable majority in the House of Commons and the politically unpopular status of asylum-seekers, judicial and political opposition to the proposal on the basis that it constituted an 'unconstitutional' interference with the judicial review powers of higher courts resulted in the draft legislation being amended to delete the proposed changes.[9]

As a result, the UK's constitutional system may have an unmistakably political character, but the exercise of political power is subject to very significant normative constraints. A deeply rooted set of expectations exist that certain patterns of public behaviour are both necessary and expected in a democratic society, and these expectations are woven tightly into the

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[8] See for example the debate that surrounded the prohibition of incitement to religious hatred in the Racial and Religious Hatred Act 2006, which resulted in additional defences being introduced to protect freedom of expression as the bill proceeded through Parliament.

[9] See R. Rawlings, Review, Revenge and Retreat (2005) 68(3) *Modern Law Review* 378-410; Lord Woolf, The Rule of Law and a Change in the Constitution (2004) 63 *Cambridge LJ* 317-330

UK's constitutional fabric. Furthermore, a range of independent public bodies monitor compliance with transparency legislation and various codes of public behaviour: their work links together with the exercise of administrative and human rights review powers by the courts and the aggressive media scrutiny commonplace in the UK to ensure that political and administrative decision-making adheres in general to these normative requirements.

2. The Primacy of Politics and the Doctrine of Parliamentary Supremacy

However, while the UK's unwritten constitutional system thus contains a normative dimension that ensures it consists of more than a set of rules to structure political contestation, it is true to say that it remains orientated towards a political conception of constitutionalism. In part, this is due to a historically engrained distrust of legalism and a reluctance to confine the free-flow of the UK's confrontational political culture within the strait-jacket of court-monitored 'constitutionalisation', to use Martin Loughlin's phrase.[10] Law has often been viewed within UK constitutional thought as one mode of regulation among many, which possesses some virtues but also certain vices.[11] In particular, concern has often been expressed about the elitist character of judicial decision-making and its inbuilt preference for adherence to legal values when other considerations may deserve to be accorded equal or even superior weight in particular contexts.[12] In contrast, placing reliance on the political processes to control abuses of exercise of state power opens (at last in theory) an avenue for the ordinary citizen voter to participate, and thus is seen as being intrinsically preferable to other forms of control.[13] Furthermore, political controls are viewed in the UK as having proved their efficacy through its long process of constitutional evolution: in contrast, legal controls were in the past viewed as having

[10] M. Loughlin, What is Constitutionalisation?, in P. Dobner and M. Loughlin, *The Twilight of Constitutionalism?* (OUP, 2010), 47-69.

[11] See the analysis in C. Harlow and R. Rawlings, *Law & Administration* (3th ed.) (OUP, 2009).

[12] See the discussion of the relationship between law and discretion in in Harlow and Rawlings, *ibid.*, Ch. 5.

[13] See Bellamy, n. 5 above.

often fallen short of their promise, and still are seen in some quarters as inherently limited and of suspect value.[14]

The distinctly political character of the UK's constitutional system also reflects the primacy that has historically been given to representative government in the order of values that underpins the British constitutional order, which is given concrete expression through the doctrine of the sovereignty of Parliament.[15] To grasp the nature of Parliament's authority, it is necessary to probe a little into its role and status within the UK constitutional order. As already mentioned, Parliament inherited the sovereign power of the monarch to make law, with the result that legislation passed in Westminster is conventionally assumed to override any competing or contradictory legal norms. At first glance, this 'sovereign' authority may seem analogous to the law-making power vested in the French Parliament under the 1958 Constitution of the Fifth Republic, or to the equivalent power vested in the parliaments of most continental European jurisdictions. However, more is involved than the exercise of legislative power. The sovereign authority of Parliament serves as a proxy for the exercise of the popular will, the *pouvoir constituent*: as the representative body of the people, Parliament functions as a type of permanent constituent assembly, with its every decision being conceptualised as an expression of the principle of collective self-governance.

This contrasts with the constitutional orthodox that exists in many other systems, where popular sovereignty is expressed through the constitutional text which both confers powers on the organs of the state (including the legislative assembly) and places limits on their authority. In the UK, the situation is different: popular sovereignty is viewed as expressed through the decisions of the sovereign Parliament, in which both the constituent power of the people and the constituted power of the state are combined.[16] This means that primacy is accorded to representative governance in the

[14] See the essays in T. Campbell, K. Ewing and A. Tomkins (eds), *Sceptical Essays on Human Rights* Oxford University Press, 2001.

[15] For an excellent analysis of why UK constitutional theory does not locate the constituent power in the hands of the people at large, and the negative consequences of this, see M. Loughlin, Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice, in M. Loughlin and S. Tierney, *The Paradox of Constitutionalism* (OUP: 2008), 27-49.

[16] See Loughlin, *ibid.*

UK constitutional scheme of values, and all law is conventionally assumed to be subject to the political will of Parliament, including decisions of the common law courts. Furthermore, this explains some of the reluctance to subject politics to law: the imposition of constraints on the sovereign will of Parliament is conceptualised as the imposition of constraints on the exercise of the *pouvoir constituent* itself.

As a result, law has often played second fiddle to politics in the regulation and maintenance of the UK's constitutional system. Indeed, for much of Britain's long history of democratic constitutionalism, courts played a relatively marginal role in ensuring the exercise of public power confirmed to the system's embedded normative values. In particular, during the first half of the twentieth century, the courts gave considerable leeway to public officials exercising discretionary powers conferred upon them by legislation or ministerial regulation. Adherence to the rule of law was understood to include a commitment on the part of the courts to securing the smooth implementation of the sovereign Parliament's designs, and by extension those of the government of the day and its civil servants.[17] This was coupled with a longstanding and deeply-rooted mistrust of the use of legal techniques of dispute-resolution to regulate the activities of public bodies, which was shared by judges, administrators, academics and politicians alike. The transformative Labour government of 1945, which established the UK's once-great welfare state, explicitly sought to avoid 'judicial sabotage of socialist legislation' and even the highest judges regarded themselves as 'handmaidens of the administration'.[18]

[17] For the classic example of this judicial stance in action, see the judgment of the majority in *Liversidge v Anderson* [1942] AC 206.

[18] This suspicion was linked to distrust among socialist politicians and intellectuals of judicial elites, generated in particular by the use of the rhetoric of constitutionalism to attack the actions of the trade unions in the General Strike of 1926, as well as by the emphasis on *laissez-faire* individualism in the trans-Atlantic economic rights jurisprudence of the US Supreme Court in cases such as *Lochner v New York* 198 U.S. 45 (1905).

3. The Slow Transformation – Judicial Review and the Growth of UK Administrative Law

However, the balance between law and politics is changing. In fact, when compared to the glacial pace at which the UK constitution usually evolves, there has been a remarkable transformation in the role legal remedies play in ensuring conformity to the basic values of democratic constitutionalism. Various factors have driven this shift. In particular, from the 1960s on, expectations have changed: a newly multicultural and highly diverse society has lost faith in the ability of bureaucratic state governance to consistently deliver social progress if left to its own devices. Furthermore, the ever-growing influence of human rights, the (re)emergence of much stronger regional identities in the 'Celtic Fringe', the impact of Europeanisation, the existence of a growing disconnect from established political parties and the legacy of twenty-five years of political division and armed conflict in Northern Ireland have all helped to destabilise the existing constitutional order and create a demand for enhanced legal regulation of the exercise of state power.

This shift in approach has resulted in a significant expansion of the role of the judiciary in the UK constitutional system. As discussed later in this paper, this has been driven to a considerable extent by the influence of the ECHR and the incorporation of Convention rights into the UK legal system via the Human Rights Act 1998. However, even if one leaves aside the impact of the ECHR/HRA for the time being, a range of administrative law controls enforced through judicial review now shape and regulate the exercise of state power in the UK.

The beginnings of this shift can be dated back to the 1960s, when the courts began (with unexpected suddenness) to require discretionary power to be exercised in conformity with the rule of law. In so doing, they began to dilute the extent to which political and administrative decision-making reigned untrammelled under the umbrella of the broadly 'political constitution'. Parliament itself also played a role in this shift, by setting increasingly explicit standards for the control of administrative discretion and the possibility of its appeal or review.

Now, the exercise of discretionary powers have become subject to judicially-imposed controls designed to ensure greater certainty, predictability and equality in their application. In particular, the wide-ranging powers of the royal prerogative wielded by the executive have been made subject to judicial oversight: the UK judges have even asserted the authority to review the exercise of the prerogative in the area of foreign relations, with for example the Court of Appeal in the case of *R (Abbassi) v Secretary of State for Foreign and Commonwealth Affairs* being willing to make an order requiring the UK Foreign Secretary to make representations to the US Government to secure the release of prisoners having British nationality who were being held in Guantanamo Bay.[19]

Furthermore, under the influence of international human rights law, in particular the European Convention on Human Rights, and comparative jurisprudence from other Commonwealth and European countries, the British courts began in the 1980s on to adopt a more 'substantive' conception of the rule of law, whereby public authorities were expected not alone to adhere to the 'formal' virtues of legality, certainty and so on but also to respect certain basic rights and entitlements such as freedom of expression, equality of treatment and freedom from destitution.[20] Building on existing case-law, the common law was interpreted as containing built-in presumptions that state action which infringed upon one of these 'common law rights' would be unlawful unless it could be shown to rest upon a clear legal basis.

Thus in *Simms*, restrictions placed by a prison governor upon a prisoner's correspondence with a journalist were held to be unlawful, as the House of Lords considered that the general provisions of the Prisoner's Rules which enabled the governor to maintain good order in the prison could not be read as conferring a specific power to interfere with the prisoner's common law entitlement to seek access to justice by contesting his sentence.[21] In *ex p Witham*, ministerial regulations restricting access to legal aid were held to be incompatible with the common law right to access justice, with the courts interpreting the relevant power-conferring legislation as not

[19] [2002] EWCA Civ 1598, [2002] All ER (D) 70.
[20] See P. Craig, Formal and Substantive Concepts of the Rule of Law [1997] *Public Law* 467.
[21] *R v Home Secretary, Ex parte Simms* [1999] 3 All ER 400.

contemplating the exercise of these powers to deny access to this basic right.[22]

Similarly, in *JCWI*, the Court of Appeal held that ministerial regulations depriving asylum seekers of the right to welfare support were *ultra vires*, on the basis that in giving the Secretary of State the power to regulate the provision of welfare in the Immigration and Asylum Act 1993, Parliament could be presumed not have intended that this power would be used to drive individuals into a state of destitution.[23] In his leading judgment, Simon Brown LJ (subsequently Lord Brown) commented:

> *'…the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it…. Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution.'*[24]

The extent of the 'common law rights' recognised by the courts remains unclear.[25] Furthermore, UK courts are generally assumed to lack the authority to review Acts of Parliament. (However, see the discussion of *Jackson* below.) Thus for example, in *JCWI*, Simon Brown LJ took the view that the 'sorry state of affairs' in question, namely that asylum seekers might be forced into destitution that 'no civilised nation' should tolerate, was capable of being lawfully brought about by primary legislation enacted by Parliament.[26]

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22 [1997] 2 All ER 779.

23 [1997] 1 W.L.R. 275.

24 *ibid*, 292-93.

25 See *R (Bancoult) v Secretary of State for the Foreign Office* [2008] UKHL 16.

26 Parliament subsequently legislated to this effect (disgracefully) in s.55 of the Nationality, Immigration and Asylum Act 2002: however, s.55 provided that welfare support would be given to asylum seekers where necessary to ensure compliance with the requirements of the ECHR, and the House of Lords in *R(Adam) v Secretary of State for the Home Department* [2005] UKHL 66 held that all asylum-seekers should be provided with welfare support where a 'real risk' existed that they would be driven into a state of destitution which would constitute a violation of Art. 3 ECHR.

Thus, the courts have come to play a key role in ensuring that the executive and other public authorities comply with the rule of law, and this embrace of law as a mode of regulation in the public sphere appears here to stay. However, the political orientation of the British constitution lives on, symbolised and embodied by the continuing sovereignty of Parliament.[27] This means that law and politics now co-exist in an occasionally uneasy relationship, and the relationship between these two modes of regulation remains uncertain.

4. The Influence of 'Europeanisation'

The process of Europeanisation has also played a crucial role in introducing a new legal dimension to the UK's constitutional system. It has also called into question some of the traditional assumptions that previously underpinned UK constitutional orthodoxy. Both EU membership and ratification of the ECHR have exerted a massive impact on the UK legal system. They have in particular altered in fundamental ways the day-to-day workings of its constitutional system. However, as with the growth of British administrative law since the 1960s, the basic underpinnings of the 'political constitution' remain intact for now.

UK membership of the European Union (EU) as established by the European Communities Act 1972 means that EU law becomes part of UK law and must be treated by British courts as superior to any conflicting domestic laws. The House of Lords confirmed in the case of *Factortame* that even acts of the sovereign Parliament should not be applied by domestic courts if they are not in conformity with EU law.[28] This seminal decision can be reconciled with the orthodox doctrine of parliamentary sovereignty: as Lord Bridge explained in his judgment, Parliament is viewed as having bound itself to respect EU law through the 1972 Act, and this self-limitation of its sovereign authority will continue in effect unless Parliament were ever to choose to repeal the 1972 Act and thereby

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27 S. Sedley, The Sound of Silence: Constitutional Law Without a Constitution (1994) 110 *Law Quarterly Review* 270.

28 *R v Secretary of State for Transport, ex p. Factortame Ltd (No.2)* [1990] ECR I-2433, applied by the House of Lords in *R v Secretary of State for Transport, ex p. Factortame Ltd (No. 2)* [1991] 1 AC 603.

leave the EU, or else were to state expressly and without qualification that the provisions of a new statute should prevail over the assumed supremacy of EU law.[29]

In other words, the 1972 Act is treated within UK constitutional theory as an voluntary decision of the sovereign Parliament to defer to EU law, which could in theory be rescinded: Parliament has not abandoned its sovereign authority as the constant embodiment of the *pouvoir constituent*, but rather chosen not to assert its final authority where conflicting EU norms are in play. There has been academic discussion as to whether this situation fully reflects reality, with some commentators arguing that EU membership has brought with it a transfer of sovereign (at least in part) to the common European polity.[30] However, the continuing sovereign authority of Parliament has been repeatedly affirmed in a variety of contexts, including s. 18 of the recently enacted s. 18 of the European Union Act 2011. Furthermore, public opinion in the UK is certainly not reconciled to the idea of a fundamental transfer of sovereign authority, nor has it accepted the idea that national sovereignty has been limited or subsumed by the requirements of European law. The *pouvoir constituant* remains vested in Westminster: in fact, as a referendum was used for the first time in the history of the UK in 1975 to approve EEC membership and further referendums will now be required if there is to be any further transfer of powers to the EU by virtue of the provisions of ss. 2-6 of the EU Act 2011, it could be said that in this context sovereign authority has been vested in the hands of the UK population at large.[31]

As a result, EU membership is not seen as having changed the basic underpinnings of the UK constitutional system. However, it has nevertheless introduced a new legal dimension into the day-to-day workings of that system. EU law has been hugely influential in many areas of UK law, while the layer of controls it has laid down has required the UK judges to assume a more active stance in regulating the exercise of public power.

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29 See also *Thoburn v Sunderland City Council* [2002] EWHC 195.

30 See the discussion in D. Anderson, Shfting the *Grundnorm* and Other Tales, in D. O'Keefe and A. Bavasso, *Judicial Review in European Union Law* (Kluwer, 2000), at pp. 344-6.

31 According to constitutional orthodoxy, referendum results do not necessarily bind the sovereign parliament, but are merely indicative of public opinion: however, the political reality is of course very different.

In a wide diversity of areas, ranging from environmental law to anti-discrimination and data protection, judicial enforcement of EU law has provided new forms of legal protection for citizens, and now plays a very important role in controlling both executive and legislative decisions.[32] Compliance with European law is enforced with rigour by the courts, and this will continue unless the 'nuclear option' of repeal of the 1972 Act and withdrawal from the EU ever takes place.

5. The Human Rights Act – An Elegant Constitutional Compromise

Perhaps most significantly of all, the incorporation of ECHR rights into UK law via the Human Rights Act 1998 and the treaty obligation under the Convention to respect ECHR rights and give effect to judgments of the Strasbourg Court has also greatly enhanced the role of the courts in protecting rights. Conversely, it has also reduced the freedom of manoeuvre of political actors in the system.

Even the Human Rights Act can be seen as perfectly reconcilable with parliamentary sovereignty, even though it entrusts UK judges with the task of holding public authorities accountable for non-compliance with Convention rights. The Act is an elegantly designed statute, which was intended to provide the maximum protection possible for Convention rights while not infringing upon parliamentary sovereignty.[33] Its structure has attracted considerable praise from academic commentators and judges, and needs to be set out in some detail.

S. 6 of the Act makes it unlawful for public authorities to violate the ECHR, except where their actions are authorised or required to give effect to an Act of Parliament. This means that courts under the HRA cannot strike down a statute, or grant a remedy against a public authority which has breached a right but done so under cover of a statutory authorisation.

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[32] See e.g. *Factortame* above at n. 28.

[33] A. YOUNG, "Judicial Sovereignty and the Human Rights Act 1998" [2002] *CLJ* 53. Note that ratification of the ECHR is also not viewed as formally encroaching upon the sovereignty of Parliament. In deciding to adhere to its provisions and judgments of the European Court of Human Rights, Parliament is simply exercising its sovereign authority in a manner that ensures that it respects its obligations under an international treaty.

However, s. 3 provides that the UK courts should interpret parliamentary legislation 'as far as possible' in a manner that ensures conformity with Convention rights. In other words, the courts are required to deviate from the usual rules of statutory interpretation, which focus on giving effect to the presumed will of Parliament, and to adopt a rights-friendly interpretation of the statute in question where it is 'possible' to do so. If such an interpretation is not possible, then under s. 4 of the HRA the courts can issue a 'declaration of incompatibility', a statement that sets out their legal finding that the statute in question is not compatible with the Convention. Such a declaration has no legal effect, as the courts are obliged to give effect to the statute in question and to apply it in the case before them. However, the issuing of such a declaration is intended to trigger a political response to the compatibility problem identified by the court. The HRA makes it possible for incompatible legislation to be quickly remedied through an accelerated parliamentary procedure, and the expectation underlying the Act is that the government of the day and Parliament as a whole will take a declaration of incompatibility very seriously.

The HRA therefore gives the UK courts wide-ranging powers to review the decisions of all public authorities (including the devolved assembles in Scotland, Wales and Northern Ireland), except for the sovereign Westminster Parliament. However, sections 3 and 4 of the Act are designed to combine together in a way that minimises the gap in rights protection left by the absence of judicial control over legislation. The interpretative power under s. 3 ensures that the courts will be able to interpret legislation in manner that protects rights in most situations: the merging case-law on this point has established that the courts should read statutes in a rights-friendly manner except where it would clearly contradict the intention of the legislator or involve the court re-writing the provisions of the Act itself. [34] Where this is impossible, the issuing of a declaration of incompatibility

[34] See *R(GC) v Commissioner of Police for the Metropolis* [2011] UKSC 21. For commentary on the relationship between s. 3 and s. 4, see T. R. Hickman, Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998 [2005] *PL* 306; T. R. S. Allan, Parliament's Will and the Justice of the Common Law: the Human Rights Act in Constitutional Perspective (2006) 59 *Current Legal Problems* 27-50; A. Kavanagh, The elusive divide between interpre-

under s. 4 is intended to prod Parliament into action to remedy the defect: if it fails to act, then a litigant can appeal to Strasbourg and use the issuing by a court of the declaration of incompatibility as a significant point in her favour.

Therefore, the HRA does not affect parliamentary sovereignty, as Parliament retains the power to pass legislation that the UK courts consider to be incompatible with the Convention. However, it is designed to ensure that Parliament faces pressure to amend offending legislation. Furthermore, the Act also aims to encourage a greater focus on human rights in the legislative process. S. 19 requires ministers introducing legislation into either of the Houses of Parliament to make a statement certifying whether in their opinion the legislation complies with the ECHR. In addition, in parallel with the HRA becoming law, Parliament established a Joint Committee on Human Rights, composed of members of the (dominant) House of Commons and the (nonelected and advisory) House of Lords, to advise it on the human rights compatibility of legislation.

6. The Impact of the Human Rights Act

The HRA therefore has both a legal and a political dimension. This is why it is an elegant and well-crafted measure: it works within the orthodox structure of the UK constitutional system to maximise the protection of Convention rights.[35] However, it inevitably enhances the role of law within the system. The courts in giving effect to the HRA have developed a case-law that has generated substantial change in many areas of UK law, including family law, the law of housing, anti-terrorism and security, discrimination, social welfare, property law and so on. Furthermore,

tation and legislation under the Human Rights Act 1998 (2004) 24(2) *OJLS* 259; C. Gearty, Reconciling Parliamentary Democracy and Human Rights (2002) 118 *LQR* 248; G. Phillipson, (Mis)-reading Section 3 of the Human Rights Act (2003) 119 *LQR* 183 and Gearty's response, 'Revisiting Section 3(1) of the Human Rights Act' (2003) 119 *LQR* 551.

35 The drafting of the HRA was heavily influenced by the examples of the New Zealand Bill of Rights and the Canadian Charter of Fundamental Rights, which adopt a similar approach in integrating the legal protection of rights within constitutional systems based on legislative supremacy: see S. Gardbaum, The New Commonwealth Model of Constitutionalism (2001) 49 *American Journal of Comparative Law* 707-60.

the HRA has changed the nature of UK law as a whole. Rights-based arguments have become commonplace, as evidenced by how a substantial proportion of the cases heard by the UK Supreme Court (the former Judicial Committee of the House of Lords) now concern the HRA.[36] Furthermore, despite initial scepticism, it is clear that the HRA has extended protection for rights in concrete ways: terrorist suspects, asylum-seekers, gay and transsexual persons and other vulnerable groups have all benefited from decisions in their favour.[37]

Furthermore, the 'political' dimension of the HRA has also worked with reasonable effectiveness. The s. 19 statement of compatibility has rarely triggered much in the way of a substantive parliamentary debate, but the reports of the Joint Committee on Human Rights have exerted influence. Furthermore, with one very important exception (see below), Parliament has responded positively to every declaration of incompatibility made so far, remedying the problematic legislation in every case. [38]

It is clear that Parliament under the HRA is not subject to any legal obligation to respond to a declaration of incompatibility. Furthermore, many of the declarations of incompatibility issued under s. 4 HRA have related to relatively uncontroversial issues. However, in 2004, the government of the day and subsequently Parliament agreed to change the relevant legislation after the finding by the House of Lords in the 'Belmarsh' case of *A v Secretary of State for the Home Department* that legislation making provision for the detention without trial of certain categories of non-nationals suspected of involvement in terrorism was not compatible with Article 14 ECHR.[39] The Home Secretary (Minister for

[36] For an empirical analysis of the impact of the HRA on the work-load of the House of Lords before it was transformed into the Supreme Court, see T. Poole and S. Shah, The Impact of the Human Rights Act on the House of Lords (2009) *Public Law*, Apr, 347-371.

[37] For an assessment of the HRA's impact on rights protection, see G. Phillipson, Deference, Discretion and Democracy in the Human Rights Act Era (2007) 60 *Current Legal Problems* 40-78.

[38] Detailed information on each declaration can be found in the Ministry of Justice's annual report to the Joint Committee on Human Rights, *Responding to Human Rights Judgments*, September 2011, available online at http://www.justice.gov.uk/downloads/publications/policy/moj/responding-to-human-rights-judgments.pdf (last accessed 1st October 2011).

[39] [2004] UKHL 56.

the Interior) had initially attacked the decision, but then agreed to remove the incompatibility identified by the Law Lords.

The readiness (thus far) of politicians to respond to declarations of incompatibility reflects the strength of the pull exerted by the idea of the rule of law in the UK constitutional system. A political presumption exists that the state should be seen to comply with court decisions, even if they are not binding as such. This also applies to judgments of the Strasbourg Court, which the UK has consistently implemented (even when they have been politically unpopular) within a reasonable timeframe since the 1970s. This presumption of conformity underpins the HRA, and explains why it has succeeded for the most part in delivering what it was designed to achieve. Indeed, most academic opinion views the HRA as being highly successful.[40] Some criticise the absence of a legal remedy in declaration of incompatibility cases.[41] Others disagree about the merits of the approach the courts have taken to sections 3 and 4 HRA.[42] However, for the most part, the verdict from scholars has been positive.

7. The Hostile Reaction to Strasbourg and the HRA

However, many politicians remain hostile to the HRA, on the basis that it confers too significant a role on the judiciary. Elements of the right-wing media have also attacked the Act regularly, on the basis that the HRA grants excessive protection to asylum-seekers, illegal immigrants and other unpopular groups. (This of course is a point in its favour in the eyes of others.) These debates have also extended to the influence exerted by the European Court of Human Rights over UK law.

The relationship between the Strasbourg Court and UK law has periodically generated brief but intense explosions of political anger at

[40] For an excellent assessment of the HRA's impact, see S. Gardbaum, How Successful and Distinctive is the Human Rights Act? An Expatriate Comparatist's Assessment (2011) 74 *Modern Law Review* 195.

[41] R. Wintemute, The Human Rights Act's First Five Years: Too Strong, Too Weak, or Just Right? (2006) 17(2) *KCLJ* 209-228.

[42] See the articles mentioned in ftn. 34 above: see also P. Sales and R. Ekins, Rights-consistent interpretation and the Human Rights Act 1998 (2011) 127 (April) *LQR* 217-238.

specific judgments of the Court. For example, in March 1996 following the Court's judgments against the UK in cases of *McCann v UK* and *Hussain v UK*,[43] Jacques Arnold MP attacked the Strasbourg Court as lacking in democratic legitimacy and called for the UK to withdraw from the ECHR.[44] In the past, these periodic flare-ups have not disturbed the overall tenor of the generally harmonious relationship between the Court and the UK's legal system. In fact, the case could be made that the UK has been remarkably open to the Court's influence, given its constitutional traditions.[45] However, in recent years, there has been a ramping-up of political hostility towards the Strasbourg Court, and also against the HRA. In particular, the decision in *Hirst v UK (No. 2)*[46] that the automatic denial of voting rights to all convicted prisoners violated Article 2 of the First Protocol to the Convention has triggered a strong reaction, which has been deeper and more sustained than any previous outbreak.

Thus far, the UK government has delayed implementing the *Hirst* decision, and also not taken any steps to give effect to the declaration of incompatibility that was issued by the UK courts after the Strasbourg decision was originally handed-down.[47] Furthermore, a parliamentary debate on a motion tabled in the House of Commons on 11th February 2011 demonstrated strong opposition to the Court's decision in *Hirst*. The wording of the motion asserted that the question of prisoner voting rights was a 'legislative decision…which should be a matter for democratically-elected law makers' and it was ultimately carried by 234 votes to 22.[48]

No legal consequences flowed from the passing of the motion, which was a purely rhetorical exercise designed to fire a warning shot across the bow of the Court. Furthermore, fewer than half the members of the House of Commons voted. However, the hostility directed at the Strasbourg Court during the debate was notable. For example, Philip Hollobone MP

43 (1996) 22 EHRR 1.

44 *HC Deb*., 6th March 1996, vol. 273, cc. 308-16.

45 See the analysis in N. Krisch, The Open Architecture of European Human Rights Law (2008) *Modern Law Review* 71 (2) 183-216.

46 *Hirst v UK (No. 2)* (2006) 42 EHRR 41: see now **Greens and MT v UK*, Application Nos. 60041/08 and 60054/08, ECtHR, 23 November 2010

47 *Smith v Scott* [2007] CSIH 9.

48 10 Feb 2011: Column 493-586.

described the Strasbourg Court as a 'kangaroo court',[49] Priti Patel MP expressed concern about 'the capitulation of successive Governments to these unelected judges in Strasbourg',[50] while Dominic Rabb MP described the Strasbourg decision in the *Hirst* case as a 'serious abuse of power' and stated that it was 'time that we drew a line in the sand…this House makes the laws of the land, because this House is accountable to the British people'.[51]

Much of this criticism came from the Eurosceptic wing of the Conservative party, and often lacked legal nuance (to put it mildly). However, Jack Straw MP, who had been the Minister responsible for the HRA, asserted that the Strasbourg Court 'is setting itself up as a supreme court for Europe, with an ever-widening remit', and suggested that the Court lacked constitutional legitimacy to intervene in matters in respect of which 'member states...have not surrendered their sovereign powers'. He also emphasised that '[t[here is no…democratic override available for decisions of the Strasbourg Court', which he regarded as representing a fundamental distinction between its role and that assigned to the UK judiciary under the HRA (and domestic judges in other constitutional systems).[52]

Some UK judges have also been critical of the Strasbourg Court, and of how the UK courts have been at pains to adhere to the Strasbourg case-law when applying the HRA. A leading Law Lord, Lord Hoffmann, delivered a lecture to the Judicial Studies Board in 2009, in which he suggested that an international court like Strasbourg made up of judges from multiple different jurisdictions lacked the 'constitutional legitimacy' to impose its particular interpretation of these abstract rights on national parliaments and courts. He then concluded by casting doubt on the entire system of transnational human rights adjudication under the ECHR: 'I have no objection to the text of the Convention being used as a standard against which a country's compliance with human rights can be measured for the purposes of…political criticism…the problem is the Court; and the right

[49] 10 Feb 2011: Column 538
[50] 10 Feb 2011: Column 575
[51] 10 Feb 2011: Column 583-4
[52] 10 Feb 2011: Column 502-504.

of individual petition, which enables the Court to intervene in the details and nuances of the domestic laws of Member States'.[53]

Lord Hoffmann's criticisms have been rapidly been taken up and extended by other opinion-formers. For example, the key points of his attack on the Court were faithfully echoed in a report written by Michael Pinto-Duschinsky and published by Policy Network, an influential think-tank linked to the Conservative Party, in February 2011.[54] Similar arguments were also been made by a pamphlet entitled *Strasbourg in the Dock* published by a Conservative MP, Dominic Rabb, in conjunction with the think-tank Civitas in April 2011. Both publications repeated many of Lord Hoffmann's key points, focusing in particular on what their authors saw as the failure of the Strasbourg Court to grant states a sufficient margin of appreciation, the Court's alleged expansion of the scope of Convention rights beyond what was originally intended by the drafters of the ECHR, and the questionable composition of the Court. Both authors also called for a fundamental 'reform' of the Court and the adoption in its case-law of a much more deferential stance towards the decisions of national lawmakers, and suggested that if this 'reform' was not forthcoming, the UK should reconsider its acceptance of the jurisdiction of the Court.[55]

8. The ECHR/HRA and the 'British Bill of Rights'

These attacks on the Strasbourg Court and by extension the HRA do not necessarily represent the mainstream of political or judicial opinion in the

[53] See the text of the speech at http://www.judiciary.gov.uk/media/speeches/2009/speech-lord-hoffman-19032009 (last accessed 16th January 2012).

[54] M. Pinto-Duschinsky, *Bring Rights Back Home: Making human rights compatible with parliamentary democracy in the UK* (London: Policy Exchange, 2011). Lord Hoffmann wrote the introduction to this report and signalled his support for its conclusions, with the exception of a rather feeble suggestion put forward by its author that introducing US-style judicial confirmation hearings into the appointments process for UK judges would make judicial protection of human rights more democratic.

[55] Several English newspapers associated with the Eurosceptic right-wing of UK politics have picked up this theme and begun to supplement their standard attacks on the protection afforded by human rights law to prisoners, asylum seekers and other unpopular minorities with calls for the UK to withdraw from the jurisdiction of the Strasbourg Court.

UK.[56] Many judges have spoken very favourably of the ECHR/HRA, as have leading politicians. Lord Dyson, a leading member of the Supreme Court, recently commented in a public lecture as follows:

In its short life, the HRA has changed the legal landscape. Many said that it would not make much of a difference. They said that the principles would be established in the first 5 years and then things would settle down. Well, they were wrong. The flood of human rights cases in our jurisdiction continues unabated. The fact that, in the eyes of many, it has caused many changes to our law (some of them thought to be unwelcome) shows that they were wrong. My own view is that the criticisms of the Strasbourg case-law are largely unjustified. As I have said, for the most part it has been successful in raising standards. The court is not a wild maverick organisation…Some of us may consider that we have no need at all for an international court, in effect, to oversee the way in which our domestic courts interpret the Convention. I do not accept this. It is a view born of the arrogant belief that we know best and have nothing to learn from foreigners.[57]

The current media and political hostility directed against the Court and the HRA may prove to be merely a passing political phase. However, the intensity of the recent criticism the Court has attracted is nevertheless striking. It demonstrates the extent of the hostility that exists in certain quarters in the UK to the European institutional framework and the extent to which this requires national law to conform to pan-European standards that have not been developed organically within the UK's own national constitutional tradition. It also demonstrates the resistance that exists in some quarters to the dilution of the political constitution that has been achieved by the HRA and by the influence of the ECHR in general. Even though expert commentators and leading judges view the HRA as a considerable success, it has not yet been comfortably integrated into the UK constitutional system.

[56] Cali et al. have shown that the Court still enjoys considerable 'legitimacy credit' among senior UK politicians and judges, and ministers in the current UK government have consistently re-affirmed their commitment to respecting the Court and its judgments: see B. Cali [complete]..

[57] See the text of his speech at http://www.supremecourt.gov.uk/docs/speech_111103.pdf (last accessed 16th January 2012).

Part of the problem clearly lies in how the HRA uses Convention rights as a substitute for a domestic home-grown bill of rights. This stirs resentment among Eurosceptics. It also means that the HRA tends to lack the emotional appeal or the sense of popular ownership that often surrounds constitutional bills of rights. Indeed, the current UK government has launched a consultation process on whether the UK could benefit from introducing its own 'British Bill of Rights', either alongside or as a replacement for the HRA, and whether reform of the Strasbourg Court and its relationship to UK law is needed.[58]

It remains to be seen how this Bill of Rights process will play out. The current coalition government in London is deeply divided on this issue. Furthermore, the leading UK human rights NGOs and the Equality and Human Rights Commission (the national independent human rights institution) are very sceptical about the proposals for a new Bill of Rights, viewing it as a potential Trojan Horse designed to weaken the protection offered by the HRA.

It is also clear that there is little interest among the political classes at large in extending the judicial role in protecting rights. The traditional 'political' orientation of the UK constitutional system may have become increasingly diluted over the last few decades, but parliamentary sovereignty is still widely recognised to constitute a core constitutional principle in the absence of some other established mode for channelling the expression of the *pouvoir constituant*.[59]

9. The Slow Erosion of Parliamentary Sovereignty

However, it is also clear that the old constitutional orthodoxies are crumbling quickly. In particular, more and more *de facto* limits are being

[58] The terms of reference of the Commission on a Bill of Rights, established in April 2011 to consider whether the UK needs a new Bill of Rights, state that any proposals it makes should build on the UK's existing obligations under the ECHR: this appears to indicate that withdrawal from the jurisdiction of the Court is not on the political agenda for now.

[59] See the analysis in A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart: 2009).

imposed on parliamentary sovereignty.[60] For example, the establishment of devolved assemblies in Scotland, Northern Ireland and Wales with law-making powers has involved a delegation of authority by the Westminster Parliament to these new representative institutions. While in theory the sovereign Westminster Parliament could retract this delegation of power, in reality any substantial adjustment of the existing devolution settlement would require popular approval via referendum vote in the areas concerned and, in the case of Northern Ireland, the consent of the Irish government.[61] The current debate on the regulation of the impending referendum on Scottish independence illustrates this point well: the sovereign authority of the Westminster Parliament to regulate any referendum on a constitutional question is in practice qualified by the political necessity of ensuring that the Scottish Parliament approves of any decision it takes.[62]

The automatic equation between the Westminster Parliament and the *pouvoir constituant* is thus becoming problematised, a development also reflected in the increasing recourse to referendums in issues such as the reform of the voting system and deeper EU integration.[63] Question marks have even appeared over the *de jure* status of parliamentary sovereignty. An alternative constitutional theory, 'common law constitutionalism', has been advanced by Lord Justice Laws, Trevor Allen and other commentators since the early 1990s. It echoes views first expressed by Coke C.J. in a 1610 judgment in *Bonham's Case*, where he pronounced that 'in many cases the common law will control acts of Parliament and sometime adjudge them to be utterly void: for when an act of Parliament is against common right

[60] M. Elliott, Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention (2002) 22 *Legal Studies* 340.

[61] See the discussion in G. Little, Scotland and Parliamentary Sovereignty (2006) 24(2) *Legal Studies* 540 – 567. The Northern Irish Assembly has been periodically suspended and direct rule resumed from Westminster, due to political paralysis in Belfast, but this is to be distinguished from wholescale re-structuring of the devolution settlement in Northern Ireland, as established in the Belfast Agreement 1998 and the Northern Ireland Act 1998. Consent for any such wholescale re-structuring would in practice require re-negotiation of the Belfast Agreement with all the political parties in Northern Ireland and the government of Ireland. Perhaps conscious of this, in *Robinson v. Secretary of State for Northern Ireland* [2002] UKHL 32, Lord Bingham described the Belfast Agreement as 'in effect a constitution' for Northern Ireland.

[62] For a taste of the complexity of these debates, see the excellent posts on this subject on the UK Constitutional Law blog, available at http://ukconstitutionallaw.org/blog/.

[63] See e.g. ss. 2-6 of the European Union Act 2011 and the (unsuccessful) referendum on electoral reform in May 2011.

or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an Act to be void'.[64] This theory suggests that the doctrine of parliamentary sovereignty is a common law norm which may in certain circumstances be capable of being overridden by more fundamental common law norms, in particular the core elements of the principle of the rule of law, such as access to justice.[65]

Common law constitutionalism remains a heterodox theory. It has been criticised by some academics and judges for lacking any basis in the exercise of popular will, and for being based on an opaque conceptualisation of the rule of law.[66] However, it recently has attracted some high-profile judicial supporters. Lord Woolf (then Lord Chief Justice of England and Wales) raised the possibility that the UK judiciary might treat parliamentary sovereignty as limited in scope during the 'ouster clause' controversy in 2004. Subsequently, Lord Steyn in *Jackson v Attorney General* speaking *obiter* adopted a similar approach in asserting that the doctrine of parliamentary sovereignty was limited: in his view, Parliament lacked the power to pass legislation which would deny fundamental rights or erode the democratic basis of the state.[67]

In the same case, Baroness Hale suggested that the question of whether parliamentary sovereignty was absolute remains unsettled, while Lord Hope expressed the view that the exercise by Parliament of its sovereign authority was conditioned by the expectation that the rule of law would be observed and fundamental rights respected. In contrast, Lord Carswell

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64 (1610) 8 Coke's Reports 114, 118. See also *Thomas* v *Sorrell* (1674) Vaughan 330: 'A law which a man cannot obey, nor act according to it, is void and no law; and it is impossible to obey contradictions, or act according to them'.

65 For commentary, see Sir John Laws, Is the High Court the Guardian of Fundamental Constitutional Rights? [1993] PL 59; Sir John Laws, Law and Democracy [1995] *PL* 72; J. Jowell, Beyond the Rule of Law: Towards Constitutional Judicial Review [2000] *PL* 671-83; T. Allan, The Rule of Law as the Rule of Reason: Consent and Constitutionalism (1999) 115 *LQR* 221; S. Lakin, Debunking the Idea of Parliamentary Sovereignty: the Controlling Factor of Legality in the British Constitution, (2008) 28 *Oxford J. Legal Stud*. 709.

66 See J. A. G. Griffith, The Brave New World of Sir John Laws (2000) *Modern L. R*. 159; T. Poole, Back to the Future? Unearthing the Theory of Common Law Constitutionalism (2003) 23 *Oxford Journal of Legal Studies* 435-454.

67 *Jackson v AG* [2005] UKHL 56.

expressed support for the existing constitutional orthodox, reaffirming the supremacy of Parliament.

Taken together, the *Jackson* judgments show the diversity of views that currently exist as to how the normative values that underpin the UK constitutional system can best be combined together. They also serve notice that the primacy historically accorded to representative governance as embodied in the Westminster Parliament may no longer be taken as a given.[68]

10. Conclusion – Future Directions

In general, the expansion of judicial review and the introduction of the HRA, along with the influence of EU law and the ECHR, are widely regarded as having updated and enhanced the UK's constitutional system. They have played a key role in infusing human rights values into UK law, and in tandem with other developments have ensured that a better balance has arguably been struck between 'legal' and 'political' elements of the UK constitutional order.[69]

However, the political hostility that the HRA has encountered demonstrates that a deep attachment still exists in certain quarters to the 'political constitution'. Furthermore, the recent attacks on the Strasbourg Court and the UK's ongoing unwillingness to give effect to the judgment show that the authority of pan-European standards is not universally accepted. A sizeable echelon within UK legal academia remains sceptical as to the extent to which a shift towards 'legalisation' constitutes a positive development.[70] All of this means that, for the time being, the growing role

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[68] A. Young, Hunting Sovereignty: *Jackson v Her Majesty's Attorney-General* (2006) *Public Law* 187-197; A. Bradley, The Sovereignty of Parliament – Form or Substance?, in J. Jowell and D. Oliver, *The Changing Constitution* (7th ed.) (OUP, 2007), 25-58.

[69] See the excellent analysis in T. Hickman, In Defence of the Legal Constitution (2005) 55(4) *University of Toronto Law Journal* 981-1022.

[70] See e.g. A. Tomkins, In Defence of the Political Constitution (2002) 22 *Oxford Journal of Legal Studies* 157, who argues that the UK constitutional system should 'celebrate politics', rather than seeing it as 'some wild beast that must be tamed by law'. See also M. Loughlin, *Sword and Scales*: *An Examination of the Relationship between Law and Politics* (Oxford:

of law in the constitutional order has not displaced the UK's continuing attachment to parliamentary sovereignty. The UK remains wedded to the forms of its political constitution, even if the reality is changing rapidly.

However, it is worthwhile to end by noting that the UK's attachment to the rule of law and democratic constitutionalism in general runs deep. Successive UK governments have taken their commitments under the ECHR very seriously, just as they have been very careful to respect the independence of the judiciary and other institutions, and to keep political contestation within fixed parameters.

Furthermore, while the UK's relationship with the wider European frameworks will never be free of tension, it is difficult to envisage a situation where the UK breaks the link with Strasbourg. Indeed, the case-law of the Strasbourg Court has provided the UK courts with a well-developed set of norms which can be applied with relative ease through the HRA. Attempts to replace or supplement the HRA with a Bill of Rights seem thus far to be unconvincing, and over time the many virtues of the HRA may become more apparent to the public at large than they are at present.

SUMMARY

The Human Rights Act and the Slow Transformation of the UK's 'Political Constitution'

COLM O'CINNEIDE

This paper examines how respect for the core principles of democratic constitutionalism is secured with the UK's unwritten constitutional system. It begins by describing the structure of this constitutional system, and how it has traditionally given primacy to representative governance through the doctrine of parliamentary sovereignty while also adhering to

Hart, 2000); T. Campbell, K. Ewing and A. Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001).

rule of law principles. It then analyses how this 'political constitution' has over the last few decades been diluted by an infusion of 'legal' elements, in particular through the expansion of domestic administrative law and the influence of EU law and the ECHR. The paper then examines the Human Rights Act 1998 (HRA) and the recent controversies that have surrounded the Act and the relationship between the UK and the European Court of Human Rights, and concludes by suggesting that the pan-European human rights framework remains indispensable even for a country like the UK that retains a (healthy?) suspicion of excessive legalisation.

RESÜMEE

Das Gesetz über die Menschenrechte und die allmähliche Veränderung der „politischen Verfassung" des Vereinigten Königreichs

COLM O'CINNEIDE

Die Studie untersucht, wie im Vereinigten Königreich, wo das Verfassungssystem nicht auf einer kodifizierten Verfassung gründet, die Einhaltung der grundlegendsten Prinzipien der demokratischen Verfassungsmäßigkeit gewährleistet wird. Der erste Teil des Essays beschreibt die Struktur dieses Verfassungssystems. Wir erfahren, dass über die Doktrin der Souveränität des Parlaments dem Regieren durch Volksvertreter traditionell der Vorrang gewährt wird und die Prinzipien der Rechtsstaatlichkeit eingehalten werden. Der Verfasser ist der Ansicht, dass diese „politische Verfassung" in den vergangenen Jahrzehnten durch bestimmte „rechtliche Faktoren" aufgeweicht wurde. Diese Faktoren sind in erster Linie das interne Verwaltungsrecht, das einen immer breiteren Kreis an Fragen aufwirft, das Recht der Europäischen Union und die Europäische Menschenrechtskonvention. Der Verfasser analysiert das britische Gesetz über die Menschenrechte aus dem Jahre 1998 und diejenigen Diskussionen der jüngsten Vergangenheit, die sich um dieses Gesetz drehen. Ein weiteres, in der Studie behandeltes Thema ist die

Beziehung zwischen dem Vereinigten Königreich und dem Europäischen Gerichtshof für Menschenrechte. Die Schlussfolgerung der Studie ist, dass die allgemeinen europäischen Rahmenverordnungen der Menschenrechte selbst für das Vereinigte Königreich unabdingbar notwendig sind, das (in gesundem Maße?) Vorbehalte gegen die Überregulierung hegt.