

HUMAN RIGHTS IN A POLITICAL CONSTITUTION: AN ANALYSIS OF THE  
COMPATIBILITY OF THE HUMAN RIGHTS ACT 1998 WITH POLITICAL  
CONSTITUTIONALISM

by

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**ABSTRACT:**

This thesis presents an analysis of the compatibility of the Human Rights Act 1998 with the theory of political constitutionalism. The theory envisions a constitutional order where those exercising political power are held to account, for the most part via the political process and political institutions. The thesis posits from the position of an observer of the theory that the Act is predominantly compatible with political constitutionalism. Nonetheless, there is scope for reforms which could render a future statutory bill of rights more compatible with political constitutionalism. The first section of the thesis examines the history of political constitutionalism in the United Kingdom (UK) Public Law from its descriptive origins to more recent attempts to construct a normative account. It argues there are actually different conceptions of a normative account and that these accounts might be in conflict with each other over certain issues, even though they are underpinned by a set of shared commitments about the relationship between law and politics and the proper role of political and judicial institutions. The rest of the thesis applies this hypothesis to the Act, analysing the Act's impact on the UK's historically political constitution, the compatibility of the Act's provisions and how proponents of different accounts of political constitutionalism might perceive these changes differently. Finally, the thesis concludes by suggesting how proponents of different accounts of political constitutionalism might suggest different reforms.

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# Contents

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<b>Introduction</b>	<b>1</b>
<b>1. Political Constitutionalism</b>	<b>8</b>
1) The Descriptive Account of J.A.G Griffith's 'The Political Constitution'	8
a) Reasonable Disagreement	9
b) Managing Disagreement	11
2) Republicanism and the Normative Political Constitution	15
a) Popular Sovereignty and Non-Domination	16
b) Promoting Non-Domination	17
3) Two Political Constitutions	22
a) Limiting Political Constitutionalism	23
b) Enabling Political Constitutionalism	29
c) Tensions between the limiting and enabling accounts of political constitutionalism	35
Conclusion	41
<b>2. The Human Rights Act</b>	<b>43</b>
1) The Road to Incorporation	43
A) Domestic Pressure	44
B) International Pressure	46
2) The Human Rights Act	47
3) The Human Rights Act's Institutional Model of Rights Protection	51
Stage One: Executive Rights Protection	52
Stage Two: Legislature Rights Protection	56
Stage Three: Judicial Post Legislative Review	59
Stage Four: Democratic Post Legislative Review	65
Conclusion	66

<b>3. Political Constitutionalism and Judicial Scrutiny under the Human Rights Act</b>	<b>67</b>
1) Weak Form Review and Political Constitutionalism	67
2) Section 4 and Political Constitutionalism	70
3) Section 3 and Political Constitutionalism	81
4) The Interplay between Section 3 and Section 4	89
5) Judicial Scrutiny and the Different Accounts of Political Constitutionalism	92
Conclusion	95
<b>4. Political Constitutionalism and Democratic Scrutiny under the Human Rights Act</b>	<b>96</b>
1) Political Constitutionalism and a Culture of Rights	97
2) Executive Consideration and Political Constitutionalism.	102
3) Parliamentary Consideration and Political Constitutionalism	107
4) Section 10 of the Human Rights Act	115
Conclusion	118
<b>Conclusion</b>	<b>119</b>
Reflecting on Political Constitutionalism	119
The Compatibility of the Human Rights Act with Political Constitutionalism	121
Reforms	124
The Future	128
<b>Bibliography</b>	<b>129</b>

# Introduction

*“We will scrap Labour’s Human Rights Act and introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK.”<sup>1</sup>*

The Human Rights Act 1998 has been a divisive piece of legislation among politicians, the media, academics and citizens. The Act has become a battleground in the long running debates about the nature and content of the UK’s constitution, in particular about the place of a bill of rights within it. Traditionally, it was felt by many that a bill of rights was unnecessary and incompatible with constitutional principles. The famed constitutional scholar A.V. Dicey, for example, argued that liberty was safeguarded not by a bill of rights, but by the sovereignty of Parliament, the rule of law and common law principles.<sup>2</sup> However, during the course of the twentieth century, some such as Ronald Dworkin, Lord Scarman and Lord Hailsham cast doubt on the traditional view; they advocated that the UK should adopt a bill of rights to better safeguard liberties.<sup>3</sup> This triggered a debate concerning the UK’s adoption of a bill of rights. Today, the debate appears to have moved forward in some important respects: most notably, all the major political parties are committed to a bill of rights, but disagree about its contents and status, and of course the proper judicial role under it. Yet, at the same time, less than 20 years since the Labour Party’s manifesto advocated the incorporation of the European Convention of Human Rights through the enactment of the Human Rights Act,<sup>4</sup> the current Conservative

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<sup>1</sup> ‘The Conservative Party Manifesto 2015’ (The Conservative Party, 2015) 73  
<<https://www.conservatives.com/manifesto>> accessed 15 April 2015.

<sup>2</sup> A.V Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan and Co,1939) 197-204, A Bradley and K.D Ewing, *Constitutional and Administrative Law* (16th edn, Pearson 2014) 357-358.

<sup>3</sup> See R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Sir Leslie Scarman, *English Law: The New Dimension* (Stevens 1975); and Lord Hailsham, *Dilemma of Democracy: Diagnosis and Prescription* (Collins 1978).

<sup>4</sup> ‘New Labour: Because Britain Deserves Better’ (Labour Party, 1997)  
<<http://www.politicsresources.net/area/uk/man/lab97.htm>> accessed 15 April 2015.

Government seeks to replace the Human Rights Act with a ‘British Bill of Rights.’<sup>5</sup> At the time of writing, the Conservative Party has not made clear how their reforms will differ from the Human Rights Act, nor is it clear whether the current Conservative Government will be able to attract enough parliamentary support for its reforms given its slim majority in Parliament. With the future of the Human Rights Act uncertain, this is an opportune time to reflect on strengths and weaknesses of the Act, and in particular to consider the extent to which it is consistent with the dominant schools of thought over the UK’s constitutions.

One such school of thought known as legal constitutionalism posits that the judiciary is the most effective institution to promote rights. Among its most notable proponents are Ronald Dworkin, Trevor Allan and John Laws.<sup>6</sup> In its strongest form, legal constitutionalism argues that judicially enforceable higher laws found either in a bill of rights or in common law principles can best protect liberty. In contrast, another school of thought known as political constitutionalism argues that democratic institutions and ordinary political activity provide more legitimate and effective means for the protection and promotion of rights.<sup>7</sup> Proponents of Political Constitutionalism include J.A.G. Griffith. His descriptive but influential lecture ‘the Political Constitution’ inspired the theory.<sup>8</sup> More recent proponents such as Adam Tomkins recognised the need to craft a normative theory of the political constitution and attempted to do so by incorporating republicanism.<sup>9</sup> Tomkins contribution was quickly followed by Richard Bellamy, who also used

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<sup>5</sup> *ibid* (n 1) 60.

<sup>6</sup> *ibid* (n 3), T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001), J Laws, ‘The Constitution: Morals and Rights’ [1996] P.L. 622.

<sup>7</sup> R Bellamy, ‘The Political Constitution and Human Rights Act’ (2011) 9 *ICON* 86, 91; and R Bellamy, ‘The democratic legitimacy of international human rights conventions: political constitutionalism and the Hirst case’ in A Føllesdal, J Karlsson Schaffer, G Ulfstein (eds), *The legitimacy of international human rights regimes: legal, political and philosophical perspectives* (CUP 2015) 251.

<sup>8</sup> J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 *MLR* 1.

<sup>9</sup> A Tomkins, *Our Republican Constitution* (Hart 2005) 38-40.

republicanism to produce a normative theory.<sup>10</sup> Legal and political constitutionalism are frequently seen as in competition with each other.<sup>11</sup> This thesis concentrates on political constitutionalism. It examines whether the Human Rights Act is compatible with political constitutionalism.

Examining whether the Human Rights Act is compatible with political constitutionalism is important for several reasons. The most significant reason is that the impact of the Act on the constitution has arguably made the existence of political constitutionalism more important for helping us understand developments in the British constitution. Most notably, and if counter-intuitively, the Act appears to have triggered renewed interest in political constitutionalism. The Act is in part responsible for the attempts by different proponents to craft a normative theory of the political constitution.<sup>12</sup> Insofar as they saw the Act as potentially hastening the constitution's evolution towards something more like the model of the legal constitution, proponents sought to make clear what exactly is at stake by departing from the political constitution. They did so by clarifying the norms that, in their view, make the political constitution attractive. In doing so, this normative turn, shows how political constitutionalists believe the constitution should develop in the future. Analysing the compatibility the Act with these normative theories might help to cast a new light on our understanding of political constitutionalism. It might, for example, help us to determine whether there is a unity of thought or disagreement among proponents about the current Act and what changes may be desired out of its replacement. Further reasons to examine this issue include, firstly, that political constitutionalists are often presented as sceptical of the

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<sup>10</sup> R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007)

<sup>11</sup> G Gee and G C.N. Webber, 'What Is a Political Constitution?' (2010) 30 OJLS 273, 276.

<sup>12</sup> See most recently M Goldoni and C McCorkindale (eds) 'Special Issue—Political Constitutions' (2013) 14 German Law Journal 2103-2292.

Human Rights Act. As Gavin Phillipson recently claimed, there is a fashionable narrative from some political constitutionalists that the Human Rights Act is “a doubtful enterprise made worse by the courts’ over use of their powers” under the Act.<sup>13</sup> Secondly, the Human Rights Act is said to mark a “fundamental re-structuring of our political constitution” or, at least, to supply further proof that the UK is slowly evolving from a political into a legal constitution.<sup>14</sup> Finally, some claim the Act is significant because it seeks “to reconcile and balance the rival claims [of legal constitutionalism on the one hand and political constitutionalism on the other], to create a middle ground between them rather than adopt a wholesale transfer from one pole to the other.”<sup>15</sup> The Human Rights Act creates an approach to the protection of rights that seeks to involve both political and legal actors in the promotion and protection of these rights.

As an observer rather than an advocate of the theory of political constitutionalism, I believe that the Human Rights Act can be compatible with the core claims made by political constitutionalists. Although it might dilute the theory’s relevance, it does not mark its demise. I will argue that although there might be scope for reform, many aspects of the Human Rights Act actually improve political institutions by creating scope for them to engage in rights protection, which in turn partially vindicates political constitutionalist’s faith in those institutions. In all of this, one goal of this thesis is to highlight how a future bill of rights could be made compatible with the political constitution. A second goal is to shed new light on political constitutionalism by examining its relationship with the Human Rights Act. This can help our understanding of how political constitutionalists are likely to perceive future reforms which are likely to have very

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<sup>13</sup> G Phillipson, ‘The Human Rights Act, Dialogue and Constitutional Principles’ in R Masterman, I Leigh (eds), *The United Kingdom's Statutory Bill of Rights, Constitutional and Comparative Perspectives* (OUP for the British Academy 2013) 32.

<sup>14</sup> K.D Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 MLR 79, 79, *ibid* (n 8) 273.

<sup>15</sup> S Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 A.J.C.L. 707, 709.

real implications for the ecosystem in which ordinary political activity operates. This thesis will engage in interpretative constitutional theory which combines descriptive and normative accounts of constitutionalism.<sup>16</sup> The normative element here refers to political constitutionalism. The descriptive account refers to the existing situation regarding the Human Rights Act. This is appropriate for this question as one can use the descriptive account of the current situation and compare its similarities and differences with an idealized account of constitution as found in the normative accounts of political constitutionalism to analyse and evaluate the compatibility of the Human Rights Act with political constitutionalism.

From the outset, I wish to make clear that two core assumptions upon which my argument is predicated. First, I will adopt the view held by political constitutionalists that, viewed through a historical lens, the UK's constitution has been predominantly political as opposed to legal due in large part to its emphasis on Parliamentary Sovereignty.<sup>17</sup> There are of course different views within constitutional scholarship regarding the nature of the UK constitution.<sup>18</sup> However, the purpose of this thesis is not to question the validity of this claim. Rather, it suffices for these purposes to accept that there was an important sense in which the UK's constitution has a distinct political character, even whilst recognizing that there was still an important role for the courts within it. Secondly, as a party to the European Convention on Human Rights (ECHR),<sup>19</sup> I will also assume that the UK Government has and continues to respect its treaty obligations under international law. Although the Convention has domestic constitutional implications for the UK, it is also a treaty under international law. With any treaty under International Law, a signatory

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<sup>16</sup> See N Barber, *The Constitutional State* (OUP 2010) 1-16.

<sup>17</sup> D Nicol, 'The Human Rights Act and the Politicians' (2006) 24 LS 451, 454- 455.

<sup>18</sup> See T.R.S Allan, *The Sovereignty of Law: Freedom, Constitution, And Common Law* (OUP 2013).

<sup>19</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

state must respect the terms of the treaty as long as it remains party to it. If the UK no longer wishes to respect its treaty obligations, it must leave. Leaving any treaty can have serious political consequences, both domestic and international. The Conservatives have refused to rule out leaving the ECHR, but this seems unlikely to occur.<sup>20</sup> Therefore, as the UK is a party to the ECHR, it should respect its international obligation. I will not analyse the compatibility of the ECHR regime with political constitutionalism, as this would raise questions about the relationship between Political Constitutionalism and international law.

In chapter one, I begin by examining what is meant by “political constitutionalism”, charting its origins to more recent developments by Adam Tomkins and Richard Bellamy.<sup>21</sup> Although, other academics have contributed to recent development of political constitutionalism, Tomkins and Bellamy’s work represents the most explicit attempt to present a normative theory and in doing have invoked of the language of political constitutionalism more so than any other proponents.<sup>22</sup> I will also suggest that there are different accounts of political constitutionalism, which are distinguished by different if overlapping focuses which in turn lead to somewhat different interpretations of political theories and practices. There are, as I see it, two main accounts of political constitutionalism: what I term “limiting” and “enabling” political constitutionalism. The limiting account emphasizes the vital importance of limiting the power of the executive and holding it to account through the ordinary political process in order to protect liberties. In contrast, the enabling account views the governing majority as directly accountable to the electorate based on its ability to successfully deliver the policies on which it was elected. Thus it

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<sup>20</sup> N Watt ‘Cameron refuses to rule out leaving European convention on human rights’ *The Guardian* (London, 3 June 2015) <<http://www.theguardian.com/law/2015/jun/03/cameron-refuses-to-rule-out-leaving-european-convention-on-human-rights>> accessed 3 June 2015.

<sup>21</sup> *ibid* (n 9), *ibid* (n 10).

<sup>22</sup> Other advocates of political constitutionalism include Keith Ewing, Conor Gearty and Danny Nicol.

emphasises the need to avoid obstacles which would disable the majority's ability to deliver policies. Towards the end of chapter one, I suggest that these accounts might be in conflict with each other over certain issues, even though they are underpinned by a set of shared commitments about the relationship between law and politics and the proper role of political and judicial institutions. In chapter two, I briefly discuss the origins of the Human Rights Act before setting out how it operates. I focus on how the Act engages both political and legal actors over various institutional stages of rights consideration. Chapter three will analyse post-legislative review by the judiciary, reflecting on how this tallies with the norms of political constitutionalism. In doing so, I point to possible tensions between the different accounts over them. Chapter four takes a similar approach to chapter three, in regards to democratic forms of pre- and post- legislative review. I conclude by arguing the Human Rights Act is compatible with political constitutionalism in several respects, before considering possible reforms to enhance the Act and reflect, in the final analysis, on whether a future bill of rights is likely to cohere with the political constitution.

# 1.

## Political Constitutionalism

In order to analyse the compatibility of the Human Rights Act with political constitutionalism, it is necessary first to define what is meant by “political constitutionalism.” This chapter will establish a framework for understanding political constitutionalism. This will be achieved by analysing the most prominent proponent’s accounts of it. This will begin with its origins in UK Public law, starting with the descriptive account presented by J.A.G. Griffith, followed by the more recent revival of the theory. Although several writers played an important role in influencing the revival, the focus here will be on the attempts by Adam Tomkins and Richard Bellamy to craft a normative account of political constitutionalism. In the final section of this chapter, I will suggest that today there are two dominant but different accounts of political constitutionalism, which I will identify as the “enabling” and “limiting” accounts. I will suggest that despite a common commitment to the idea of a political constitution, there is scope for disagreement between proponents of these two accounts.

### 1. Descriptive account of J.A.G. Griffith’s ‘The Political Constitution’

Griffith’s lecture on ‘The Political Constitution’ serves as a starting point for understanding political constitutionalism.<sup>1</sup> Despite the title, the phrase “political constitution” is not used during the lecture itself.<sup>2</sup> The exact reason why Griffith did not choose to use the phrase is unknown, although one may suggest he may “never conceived of it as anything distinct or separate from the British constitution itself.”<sup>3</sup> Another possible reason could be that Griffith’s focus was on presenting a counter argument rather than presenting an account of political constitutionalism. Griffith sought to rebut calls by the leading politicians, judges and

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

<sup>2</sup> K.D. Ewing, 'The Resilience of the Political Constitution' (2013) 14 German Law Journal 2111, 2114.

<sup>3</sup> G Gee and G C.N. Webber, ‘What is a Political Constitution?’ (2010) 30 O.J.L.S. 273, 277.

academics like Ronald Dworkin, Lord Scarman and Lord Hailsham for the UK to adopt what one might call various interpretations of legal constitutionalism.<sup>4</sup> Proponents of legal constitutionalism emphasise that a constitution protects individual autonomy, dignity, respect, equality and security.<sup>5</sup> To legal constitutionalists, these values are not best protected by the temporary majority of the legislature.<sup>6</sup> Instead, they suggest that at worst ordinary politics pose a threat to these values, or at best it is unable to effectively defend them from an aggressive executive.<sup>7</sup> As a result, legal constitutionalists may envisage a constitution in which “politics [is] under the constraints of legal order.”<sup>8</sup> Griffith criticism of these views is reflected throughout much of “the political constitution” and from this the basic foundations of political constitutionalism were laid.<sup>9</sup> There are two hallmarks of his argument: the recognition of disagreement, and the management of disagreement.

#### a) Reasonable Disagreement

Political constitutionalism recognises that disagreement stems from the reality of human nature, which in turn shapes society and politics. Griffith observed that society was facing “considerable disagreement about the controversial issues of the day.”<sup>10</sup> Individuals have claims, desires, interests and rights that they want to achieve in life. They are social creatures, “[they] seek a life lived with others.”<sup>11</sup> However, these two factors are not always compatible with one another. They range from disagreements over what is the best colour, to more

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<sup>4</sup> See R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Sir Leslie Scarman, *English Law: The New Dimension* (Stevens 1975); and Lord Hailsham, *Dilemma of Democracy: Diagnosis and Prescription* (Collins 1978).

<sup>5</sup> See J Laws, ‘The Constitution: Morals and Rights’ [1996] P.L. 622, 623; and D Oliver, ‘The Underlying Values of Public and Private law’ in M Taggart (ed) *The Province of Administrative Law* (Hart 1997); and T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001) 62-87.

<sup>6</sup> T. R. S. Allan, ‘Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism’ (1985) 44 C.L.J 111, 116.

<sup>7</sup> T Poole, ‘Back to the future? Unearthing the Theory of Common Law Constitutionalism’ (2003) 23 O.J.L.S 435, 449; and D Oliver, ‘Democracy, Parliament and constitutional watchdogs’ [2002] P.L. 553-555.

<sup>8</sup> D Dyzenhaus, ‘The Difference Law Makes’ (1997) 60 MLR 866, 870.

<sup>9</sup> *ibid* (n 3) 277.

<sup>10</sup> *ibid* (n 1) 12.

<sup>11</sup> M Goldoni and C McCorkindale, ‘Why we (still) need a revolution’ (2013) 14 German Law Journal 2197, 2198.

complex disagreements such as welfare cuts, whether flag burning is a form of expression or whether a celebrity's privacy should be treated with the same respect as ordinary citizens.<sup>12</sup> Interactions with others only serve to multiply the differences and disagreements.<sup>13</sup> These disagreements are continuous and wide in scope. They are ever evolving and changing as new variables come into play, as a result of changes in society. Thus, disagreement is inescapable and an unavoidable part of modern society.<sup>14</sup> Griffith argued that at the heart of modern society there is conflict.<sup>15</sup> Even today, one might argue Griffith's point about disagreements remains true; there is still disagreement about the controversial issues of the day.

For Griffith, conflict was unavoidable and undeniable.<sup>16</sup> It was unrealistic to attempt to eliminate disagreement altogether; instead "a more realistic aim is the effective management of conflict."<sup>17</sup> Society does not wish to be in constant conflict; it seeks to find solutions to at least some of the disagreements it faces. This is what Jeremy Waldron has called the 'circumstances of politics': where there is "a felt need among the members of a certain group for a common framework, decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be."<sup>18</sup> It is through this that some political constitutionalists recognise there are potentially positive qualities that come from reasonable disagreement. It can be a catalyst for change and progress in society. For example, Graham Gee suggests that we should see some disagreements as a healthy and productive for society. Disagreements can result in "discussion, dialogue, debate,

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<sup>12</sup> R Bellamy, 'Constitutive Citizenship versus Constitutional Rights, Republican Reflection on the EU Charter and the Human Rights Act' in T Campbell, K.D Ewing, A Tomkins (eds) *Sceptical Essays on Human Rights* (OUP 2001) 15.

<sup>13</sup> *ibid* (n 11) 2198.

<sup>14</sup> G Gee, 'The Political Constitutionalism of JAG Griffith' (2008) 28 L.S. 20, 25.

<sup>15</sup> *ibid* (n 1) 2.

<sup>16</sup> *ibid* (n 14) 24.

<sup>17</sup> *ibid* (n 14) 25-26.

<sup>18</sup> J Waldron, *Law and Disagreement* (OUP 1999) 102.

deliberation, negotiation and bargaining... to aid in identifying new ways of thinking about and possibly resolving society's conflicts."<sup>19</sup> Rather than being "a sinister product of self-interest," disagreement can spur society to progress.<sup>20</sup> Therefore, disagreement needs to be limited but must not be, and cannot be, eliminated from political life.<sup>21</sup> Managing disagreement is a more practical method, one which presents a process which preserves the positive qualities of disagreement, creative debate and progression.

### **b) Managing Disagreement**

Griffith's recognition of disagreement manifested itself in several ways in 'The Political Constitution'. First, Griffith's understanding of rights can be distinguished from the legal constitutionalism view of rights. Under legal constitutionalism, there are said to be fundamental values or rights that lie outside the realm of politics, on the grounds these "rights are recognized as being evident on the basis of reason or as natural rights, their content should not be left to the bargaining that typically characterizes political decision-making."<sup>22</sup> Rights can be seen as trumps ensuring "a collective good is not sufficient for imposing some loss or injury upon" an individual.<sup>23</sup> These 'trumps' act as a higher law to "ensure the rules are equitable and protect those vital interests without which humans would lack the capacity" for autonomy.<sup>24</sup> In contrast, Griffith presents a different view of rights. In his view overriding human rights do not exist, instead of rights there are actually "political claims by individuals."<sup>25</sup> What we describe as our 'inherent rights' are merely the expressions of claims we believe should be recognised in general or in a specific context.<sup>26</sup> By ourselves or with a

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<sup>19</sup> *ibid* (n 14) 26.

<sup>20</sup> *ibid* (n 11) 16.

<sup>21</sup> M Goldoni, 'Two internal critiques of political constitutionalism' (2012) 10 *ICON* 926, 930.

<sup>22</sup> *ibid* 930.

<sup>23</sup> Dworkin *ibid* (n 3) XI.

<sup>24</sup> R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007) 17-18.

<sup>25</sup> *ibid* (n 1) 17.

<sup>26</sup> *ibid* (n 1) 17.

group of likeminded individuals, we can seek to have our claim recognised. Therefore, the significance of Griffith argument is that he presents an alternative view which cast doubt on the existing arguments about rights. He has observed that despite how rights are presented by proponents of a bill of rights, a claim to a right is no greater than a claim to anything else. Secondly, the process of having claims recognised is a continuous struggle of reasonable disagreement which is “political throughout.”<sup>27</sup> Griffith described politics as the management of disagreement; it is the “continuance or resolution of those conflicts.”<sup>28</sup> Law is a form of politics in that it “is one means, one process, by which those conflicts are continued or may be temporarily resolved.”<sup>29</sup> In this, “law is neither separate from nor superior to politics, but rather a sophisticated form of political discourse.”<sup>30</sup>

For this reason, Griffith was critical of bills of rights, in particular the European Convention on Human Rights (ECHR) which his opponents advocated. Griffith took issue with the generalised nature of ECHR rights. Most bills of rights are drafted in an abstract way in order to promote broad agreement at a high level of generality, but as a result they leave “the resolution of disputed claims of rights to a later day.”<sup>31</sup> Consequently, Griffith maintained that the rights found in the ECHR were political disagreements masquerading as a resolution to said conflicts rather a real solution.<sup>32</sup> In this sense, the convention’s rights are unlikely to unite opinion; rather, they serve to divide opinion (or at least to highlight the divisions that already exist in society at large).<sup>33</sup> Thus, for Griffith, bills of rights do not resolve or even decrease social disagreement.<sup>34</sup>

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<sup>27</sup> *ibid* (n 1) 17.

<sup>28</sup> *ibid* (n 1) 20.

<sup>29</sup> *ibid* (n 1) 20.

<sup>30</sup> *ibid* (n 3) 277.

<sup>31</sup> G C.N. Webber, ‘Rights and the rule of law in the balance’ (2013) 129 L.Q.R. 399, 400-402.

<sup>32</sup> *ibid* (n 1) 14.

<sup>33</sup> *ibid* (n 1) 20.

<sup>34</sup> T Poole, ‘Tilting at Windmills? Truth and Illusion in ‘The Political Constitution’’ (2007) 70 MLR 250, 258.

However, Griffith's principal concern was that placing these rights in a judicially enforceable bill of rights would ultimately place political decision of these social disagreements in the hands of judges instead of politicians.<sup>35</sup> Managing disagreement through a court would not make those decisions any less political because "law is not and cannot be a substitute for politics."<sup>36</sup> To present questions of politics and economics as questions of law would lead to the real issues being evaded, to questions of legal interpretations.<sup>37</sup> Instead politicians should make these decisions.<sup>38</sup> By this, Griffith is not suggesting with enthusiasm that political actors will do a better job; Griffith accepted the idea that politicians are no more likely to come up with the right answer. However, unlike the judiciary, political actors are more likely to be held to account and are ultimately dismissible at elections.<sup>39</sup> Accordingly, the incorporation of the ECHR would have undesirable consequences such as disagreements would end up in the hands of lawyers who will engage in the "exercise of interpreting woolly principles and even woollier exceptions."<sup>40</sup> A process of democratic decision making was viewed as a more legitimate mechanism for the promotion of rights.<sup>41</sup> Once again, Griffith questions the arguments presented by the advocates of bill of rights.

Griffith's critique of the ECHR and the term "rights" has sometimes led to political constitutionalism being misrepresented as rights sceptic. It would be more accurate to suggest that although Griffith himself was sceptical of rights, most political constitutionalists are better described as sceptical merely of the mechanisms used to uphold rights such as a

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<sup>35</sup> *ibid* (n 1) 16.

<sup>36</sup> *ibid* (n 1) 16.

<sup>37</sup> *ibid* (n 1) 17.

<sup>38</sup> *ibid* (n 1) 16.

<sup>39</sup> *ibid* (n 1) 18.

<sup>40</sup> *ibid* (n 1) 14.

<sup>41</sup> R Bellamy, 'The democratic legitimacy of international human rights conventions: political constitutionalism and the Hirst case' in A Føllesdal, J Karlsson Schaffer, G Ulfstein (eds) *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2015) 251.

justiciable bills of rights.<sup>42</sup> Many contemporary political constitutionalists describe themselves and others as being committed civil libertarians.<sup>43</sup> Griffith himself was arguably a rights sceptic, but for our purposes what is important is that his arguments highlight that rights give rise to disagreement. This does not deny rights can exist under a political constitution, as long as it is understood that rights themselves give rise to disagreement rather than being unquestionable truths. Rights are not susceptible to a singular, “correct” interpretation but rather to a range of reasonable interpretations.<sup>44</sup> Therefore, the best method to “interpret and implement rights is to leave the determination of their content to the political process.”<sup>45</sup> Political actors may confer legal “rights” via statutes to ensure individuals or minority’s claims receive protection or are promoted. However, said laws must be drafted by democratically legitimate institutions “as precise as possible and not open to abuse” to prevent extensive re-interpretation by less legitimate institutions such as the courts.<sup>46</sup> Thus as Bellamy claims under political constitutionalism “the specialness of rights can be indicated by the special way they are treated by politicians” instead of the way they are handled by judges.<sup>47</sup>

Finally, Griffith’s stated “politics is what happens in the continuance or resolution of those conflicts. And law is one means, one process, by which those conflicts are continued or may be temporarily resolved.”<sup>48</sup> This is the recognition that the management of disagreement must reflect the temporal nature of disagreement. Society is an ever changing organism. In turn, disagreements and their solutions must also change. As a consequence of this, disagreements

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<sup>42</sup> R Bellamy, ‘UCL Lunch hour lectures: Do We Need a British Bill of Rights and a Written Constitution?’ (UCL, London 13 November 2008) <[http://www.ucl.ac.uk/lhl/lhlpub2/10\\_131108](http://www.ucl.ac.uk/lhl/lhlpub2/10_131108)> accessed 11 December 2014.

<sup>43</sup> A Tomkins, ‘The Role of the Courts in the Political Constitution’ (2010) 60 UTLJ 1, 3.

<sup>44</sup> D Nicol, ‘Professor Tomkins’ House of Mavericks’ [2006] P.L. 467, 470.

<sup>45</sup> *ibid* (n 21) 931.

<sup>46</sup> J.A.G. Griffith, ‘The Common Law and the Political Constitution’ (2001) 117 L.Q.R. 42, 61.

<sup>47</sup> *ibid* (n 41) 252-253.

<sup>48</sup> *ibid* (n 1) 20.

may have temporary solutions, wrong solutions or- in rarest circumstances- have permanent solutions. Accordingly, political constitutionalism recognises the resolutions of conflicts are at best temporary in nature.<sup>49</sup> As later writers have stated in “pluralist societies, the range of core values held by individuals is so wide that almost any proposed reason is likely to conflict with that of someone else,” it is plausible to assume disagreement will also increase over time.<sup>50</sup> Throughout time disagreements will continue as societies’ views change. For example, in the UK society once felt that the death penalty was a suitable form of punishment for the most serious crimes, but by 1965 society felt it was no longer the right solution due to several miscarriages of justice.<sup>51</sup> Yet recent polling suggests 50% of citizens want the death penalty reinstated.<sup>52</sup> Society may reinstate the death penalty; after a few years, it may also decide it was an error to bring it back and therefore seek to repeal it again. Any process for managing disagreement must accommodate the evolving nature of disagreement.

## 2. Republicanism and the Normative Political Constitution

Griffith’s account has been criticised as being merely descriptive.<sup>53</sup> It is hard to determine if he intended to establish a normative account or provide a descriptive account of the British constitution as it was in 1979.<sup>54</sup> This descriptiveness is problematic, as modern constitutional developments have been said to move the UK constitution towards a legal constitution.<sup>55</sup> As a consequence, political constitutionalism was overlooked by many who believed it was never grounded in any particular norms or values.<sup>56</sup> A second generation of political constitutionalists spearheaded by Adam Tomkins and Richard Bellamy have sought to rebut

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<sup>49</sup> *ibid* (n 1) 20; *ibid* (n 14) 20.

<sup>50</sup> *ibid* (n 24) 164.

<sup>51</sup> Murder (Abolition of Death Penalty) Act 1965.

<sup>52</sup> W Dahlgreen, '50 years on, Capital punishment still favoured' (YouGov.co.uk, 13/08/2014) <<https://yougov.co.uk/news/2014/08/13/capital-punishment-50-years-favoured/>> accessed 10 November 2014.

<sup>53</sup> D Oliver, *Constitutional Reform in the United Kingdom* (OUP 2003) 20.

<sup>54</sup> Although some have cast doubt on whether Griffith’s account was really descriptive. See *ibid* (n 3) 277; *ibid* (n 14) 20-45; *ibid* (n 34) 250-277.

<sup>55</sup> *ibid* (n 3) 273-274.

<sup>56</sup> A Tomkins, *Our Republican Constitution* (Hart 2005) 40.

this, developing instead a normative model of the political constitution. They saw Griffith's arguments as providing "a fresh and provocative way of thinking and talking about the British constitution,"<sup>57</sup> but requiring the injection of a normative grounding. A normative model of political constitutionalism seeks to render explicit the normative qualities of day-to-day politics (what its proponents regard as) the normatively attractive qualities of day-to-day politics which can help to secure constitutional goods such as the rule of law, human rights and political equality. The second generation sought to show this by drawing on norms of republican political theory. Both Tomkins and Bellamy claim that republicanism undergirds political constitutionalism.<sup>58</sup> The following section discusses the values of republicanism that both Tomkins and Bellamy emphasise in their work: popular sovereignty and freedom by non-domination.

#### **a) Popular Sovereignty and Non-Domination**

The first norm is popular sovereignty which requires that the source of power starts at the bottom of a state with the citizens, as opposed to the top. When power is filtered down from the top, it is often ill-defined, unaccountable and left in the hands of those at the top of the state such as with the government or a monarchy. For example, Tomkins highlights the distinction between the US and UK's Constitution. The US Constitution states that any power not specifically stated in the constitution rests with the states and the people.<sup>59</sup> In contrast, in the UK, any power not expressed by Parliament remains with the Crown under the Royal Prerogative.<sup>60</sup> This power does not come from an accountable source of authority, thus open to abuse by those at the top. The second norm is freedom by non-domination which means

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<sup>57</sup> *ibid* (n 3) 277.

<sup>58</sup> However, more recently Goldoni and McCorkindale have questioned this claim: see M Goldoni, C McCorkindale, 'A Note from the Editors: The State of the Political Constitution' (2013) 14 *German Law Journal* 2103, 2104.

<sup>59</sup> The Constitution of the United States of America, Article V.

<sup>60</sup> *ibid* (n 56) 58.

“we are not free if we are subject to another who dominates us.”<sup>61</sup> It can be distinguished from the liberal theory of freedom from interferences. Under freedom from interference, a person is free as long they are not interfered with by those in power.<sup>62</sup> However, republicanism argues that under a dictatorship one could be deemed free under the liberal interpretation, as long as the regime does not interfere with their interests. They are not free, as long as those in power can still practice interference at will and with impunity, without seeking permission or being subject to any punishment for such an action.<sup>63</sup> It is not restraint that makes us unfree; it is the possibility of unaccountable power dominating us. In this regard, republicanism appears to recognise the reality of the modern state: we need government, and we need some restraint and interference.<sup>64</sup> Non-domination requires that when citizens are to be interfered with, the action is taken by a person with the legitimate authority to do so. This, in turn leads to how the government does not exercise power to damage the rights of the people. Here Philip Pettit’s answer is that not only should legitimate authority be a question of the consent of the people, but also be subject to a requirement for “contestability by the people of everything the government does.”<sup>65</sup> Thus, an elected legislator gains legitimacy through elections and only holds power on trust of citizens.<sup>66</sup>

### **b) Promoting Non-Domination**

To promote non-domination, Tomkins and Bellamy emphasise the following values; open government, civic virtue and political equality.<sup>67</sup> Open government and civic virtue allows citizens to be able to contest the decision of the executive and the legislator. Open government is a requirement that aims to ensure that political decisions are in the public

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<sup>61</sup> *ibid* (n 56) 47.

<sup>62</sup> See I Berlin, *Liberty: Incorporating 'Four Essays on Liberty'* (H Hardy ed, OUP 2002).

<sup>63</sup> P Pettit, *Republicanism: a Theory of Freedom and Government* (Clarendon Press 1997) 22.

<sup>64</sup> H S. Richardson, *Democratic Autonomy: Public Reasoning about the end of policy* (OUP 2002) 24.

<sup>65</sup> *ibid* (n 63) 277.

<sup>66</sup> A Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 O.J.L.S. 157, 174.

<sup>67</sup> Tomkins, *ibid* (n 56) 61-65, Bellamy *ibid* (n 24) 145-175.

interest over particular groups.<sup>68</sup> As citizens, we need to be able to see and understand what their elected government is doing in order to contest them. Therefore, freedom of expression to criticise government is pointless without freedom of information to help us feed and articulate our grievances.<sup>69</sup> Nevertheless, open government serves little purpose if citizens are apathetic towards political activity.<sup>70</sup> According to Tomkins, republicanism emphasises civic virtue. Tomkins argues citizens need to be interested in what is the common or public good and thus, they need a strong sense of “public spiritedness.”<sup>71</sup> This aims to foster a sense of collective spirit rather than individualism. As a bi-product of this, it will help aid government and Parliament to track and act in the common good. Citizens should not be apathetic; they should want to actively engage in the political process.<sup>72</sup> In turn, civic virtue implies that a collective community should be vigilant to the actions of the government as apathy grants them more discretion. However, what is meant by the common good is ill-defined and idealistic. Tomkins uses “the right to clear air” as an example of a common good.<sup>73</sup> In contrast, others claim the common good is an ideological interpretation.<sup>74</sup>

The final element is political equality. Domination can occur if there is inequality between citizens. This may be material inequality; money can dominate when the wealthy are able to influence public affairs more than the poor.<sup>75</sup> Political constitutionalism advocates political equality. If “non-domination only operates where everyone has equal status” then the decision making process should reflect this.<sup>76</sup> Political equality requires a process where

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<sup>68</sup> *ibid* (n 56) 61.

<sup>69</sup> *ibid* (n 56) 62.

<sup>70</sup> *ibid* (n 56) 62.

<sup>71</sup> *ibid* (n 56) 62.

<sup>72</sup> *ibid* (n 56) 63.

<sup>73</sup> *ibid* (n 56) 63.

<sup>74</sup> *ibid* (n 44) 468.

<sup>75</sup> *ibid* (n 24) 162.

<sup>76</sup> *ibid* (n 24) 179.

every citizen has “the equal chance to have one’s voice heard.”<sup>77</sup> Only through this can citizens “enjoy a non-dominating environment that treats them with equal concern and respect.”<sup>78</sup> Equal voting operates on two levels: on one level it applies to citizens in general elections and on another level it applies to institutions.<sup>79</sup> Consider this in the context of citizens at a general election: by giving each and every citizen just one vote, we can ensure that all citizens views carry equal weight in the decision making process.<sup>80</sup> No matter their wealth, position, gender, race or other distinguishing trait, all citizens are equal when engaging in the political process by voting. At an institutional level, each representative of legislature will have an equal say when voting on a decision. Their race, wealth, intelligence, popularity, political career and consistency location will not lead to them having an unfair weight behind their vote than any other representative.

In this respect, majority rule is perceived to be the fair process for reaching an outcome.<sup>81</sup> Majority rule ensures a process which does not favor the content of the views. It is neutral in that winners cannot claim victory on the grounds that their judgment is superior to their opponents; their success merely reflects their view was endorsed by the majority of the political community.<sup>82</sup> Furthermore, majority rule gives equal respect to individuals. Both Bellamy and Waldron approve of majority rule because it is input-related, as opposed to output reasoning.<sup>83</sup> Majority rule is neutral in terms of process; it does not favor a particular outcome, therefore no one view needs to be played down or hushed up in the name of reaching a preferred outcome.<sup>84</sup> Secondly, the inputs of millions of individuals are all

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<sup>77</sup> *ibid* (n 21) 932.

<sup>78</sup> *ibid* (n 24) 221.

<sup>79</sup> *ibid* (n 21) 932.

<sup>80</sup> *ibid* (n 24) 223.

<sup>81</sup> *ibid* (n 24) 225-226.

<sup>82</sup> *ibid* (n 24) 226.

<sup>83</sup> *ibid* (n 24) 145.

<sup>84</sup> *ibid* (n 18) 108.

weighted equally; the weight will be minimal because of the large numbers involved, and those in the minority may feel they carry no weight at all. However, these are necessary to ensure fairness.<sup>85</sup> Therefore, because of the achievement of reaching the decision in this way it is said decisions warrant respect.<sup>86</sup> Through equal voting and majority rule when governments issue law, they have authority “not because people agree or give their consent to them, but because they have had a fair say in the process that led to the adoption of the law.”<sup>87</sup> To ignore this would cause domination, as it would “not respect citizens as people capable of political judgment on fundamental questions such as the content of rights.”<sup>88</sup> Political constitutionalists argue that the parliamentary model can ensure in terms of institutional design the principle of political equality.

Political equality also entails a rejection of constitutional entrenchment.<sup>89</sup> To entrench certain values or procedures in a constitution would act as a source of domination by taking issues out of the public discussion and freezing them in some constitutional document.”<sup>90</sup> The problem is the content of the constitution will give rise to disagreement. We have seen disagreement will never cease because the ever changing circumstances will continuously affect people’s opinions. Entrenchment can limit future political action without providing a solid justification.<sup>91</sup> It gives the views of those who believe something should be entrenched more weight than everyone else. Thus, the values of previous generations of citizens are entrenched producing domination over future generations who may disagree with their ancestor’s judgments. As a consequence, “any constraint or limit imposed by legal

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<sup>85</sup> *ibid* (n 18) 108-114; *ibid* (n 24) 226.

<sup>86</sup> *ibid* (n 18) 108.

<sup>87</sup> *ibid* (n 21) 933.

<sup>88</sup> *ibid* (n 21) 931.

<sup>89</sup> However, Goldoni has recently taken issue with this. See M Goldoni, 'Political Constitutionalism and the Question of Constitutional-Making' (2014) 27 *Ratio Juris* 387-408.

<sup>90</sup> M Goldoni, 'Constitutional Reasoning According to Political Constitutionalism: Comment on Richard Bellamy' (2013) 14 *German Law Journal* 1053, 1072.

<sup>91</sup> *ibid* (n 18) 282–312.

instruments [might] appear as illegitimate and arbitrary over the following generations.”<sup>92</sup> The solution instead is to view the constitution not as a fixed point, but instead as something which “lives on, changing from day to day for the constitution is no more and no less than what happens.”<sup>93</sup> Bellamy argues the constitution must be left open so we may rebuild the ship at sea – employing, as we must, the prevailing procedures to renew and reform those self-same procedures.<sup>94</sup> By this, Bellamy argues that “the democratic process is the constitution.”<sup>95</sup> Since the process of political equality through voting and majority rule provides a neutral system which treats everyone with equal concern and respect, it is the only process for determining the content of a constitution. Through the ordinary political process, the constitution must be “forever subject to challenge, revision, amendment and conceivable rejection.”<sup>96</sup> In this sense, all politics are constitutional and contestable.<sup>97</sup>

As a consequence of this, political constitutionalism appears to invite a degree of ambiguity over its prescriptive content.<sup>98</sup> As Gee and Webber have observed, the political model envisaged by Tomkins and Bellamy prescribes “no more than the bare minimal conditions for political equality and accountability and non-domination.”<sup>99</sup> Therefore, they suggest by design the model “leaves it to political actors, operating through the ordinary political process, to prescribe the nature and content of the constitution.”<sup>100</sup>

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<sup>92</sup> *ibid* (n 21) 936.

<sup>93</sup> *ibid* (n 1) 19.

<sup>94</sup> *ibid* (n 24) 172.

<sup>95</sup> *ibid* (n 24) 5.

<sup>96</sup> *ibid* (n 3) 283.

<sup>97</sup> *ibid* (n 21) 934.

<sup>98</sup> *ibid* (n 3) 286-290.

<sup>99</sup> *ibid* (n 3) 287.

<sup>100</sup> *ibid* (n 3) 287.

### 3. Two Political Constitutions

As I see it, there are two dominant accounts of political constitutionalism. The accounts that I set out below are highly stylized, and necessarily exaggerate some themes—but they do so in a way that helps to highlight importance differences of emphasis between proponents of political constitutionalism. As we shall see, despite the many similarities in their constitutional thought. I see both Richard Bellamy and Adam Tomkins as each offering slightly different accounts of political constitutionalism, which in turn are emblematic of two dominant strands within political constitutionalist thought. That there should be more or less distinct streams of thought within political constitutionalism is perhaps unsurprising. After all, the vision of the constitution outlined in Griffith’s work, together with the nature and content of republicanism and ordinary political activity, are all open to interpretation. As a consequence, proponents envisage the values of political constitutionalism being achieved in somewhat different ways. Given all that unites the work of political constitutionalists (e.g. the shared belief in the primacy of political institutions, a commitment to parliamentary sovereignty, and an opposition to an expansive judicial role oriented around a justiciable bill of rights), it might seem mean-spirited to emphasize the distinctions between them. But, as I hope to show, there are subtle yet significant differences between proponents of political constitutionalism. I argue that these differences reflect variations in how political constitutionalists perceive key facets of everyday political activity. I will use Tomkins and Bellamy’s works as representative of two schools of thought. The former is representative of what I shall identify as “limiting political constitutionalism,” the latter is representative of “enabling political constitutionalism.” Griffith’s work influences both. Thus Griffith cannot be as easily categorised as he displays elements of both accounts in “the political constitution.” Furthermore, some proponents of political constitutionalism might oscillate between the two accounts, depending on the focus of their argument. Finally, I point to

evidence of an internal tension between the two accounts, based on a debate over the role of political parties, which helps to highlight some of the subtle differences between these two accounts.

### **a) Limiting Political Constitutionalism**

The limiting account of political constitutionalism focuses on ensuring the executive is subject to effective and democratic control by the legislature to protect the common good.<sup>101</sup>

For sure, this is a concern for all political constitutionalists. But the special emphasis placed on the need to limit government is a feature of what I term the “limiting” account of political constitutionalism. Those who subscribe to this account of political constitutionalism stress that the government’s power and freedom must be limited by Parliament to ensure it does not act in its own or a privileged minority’s interest against the common good. In the UK, the Government’s power is limited by the requirement that it needs to maintain the support of the elected House of Commons. According to Tomkins, the success of the UK’s Constitution results from “a simple and beautiful rule” that the government of the day may only hold power if it continues to have the support of the majority of the House of Commons.<sup>102</sup>

Therefore, the executive is constitutionally accountable to a democratic legislature. This account seeks to weaken the power of government and strengthen the power of democratic legislatures.

The limiting account is sceptical of government, believing that it is unable to self-regulate in a wholly effective way.<sup>103</sup> Tomkins argues that we need to recognise what he describes as the

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<sup>101</sup> *ibid* (n 56) 3.

<sup>102</sup> *ibid* (n 56) 1.

<sup>103</sup> *ibid* (n 56) 31.

‘reality of government.’ This is the idea that “those in political office are liable to try to do whatever they think they can get away with.”<sup>104</sup> Similarly, other proponents (e.g. Keith Ewing) have argued in the past the government has used the vagueness and flexibility of the constitution for their own ends, resulting in freedoms being unnecessarily limited.<sup>105</sup> Some have criticized the rapid growth of the power of the office of Prime Minister and the Cabinet office, alongside a failure to update the structure of executive accountability to reflect this.<sup>106</sup> They claim governments are prone to overreacting in the face of a crisis, taking actions “with insufficient regard to the repression that might result, causing disproportionate and unnecessary rights violations.”<sup>107</sup> Governments are criticised for having a reluctant attitude to reforming themselves.<sup>108</sup> There is also some evidence suggesting that citizens’ trust in government has fallen since the millennium.<sup>109</sup> For these reasons, proponents of limiting political constitutionalism argue that the government cannot be trusted to act as a benevolent ruler for the common good at all times. Therefore, institutional protection is needed to ensure the government’s powers are limited to guarantee they act in the common good, rather than their own desires.<sup>110</sup>

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<sup>104</sup> *ibid* (n 56) 2.

<sup>105</sup> K.D Ewing and C.A Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Clarendon Press 1990) 7. See also K.D Ewing, *Bonfire of Liberties* (OUP 2010).

<sup>106</sup> A Tomkins, ‘The Struggle to delimit executive power in Britain’ in P Craig, A Tomkins (eds) *The Executive and Public Law* (OUP 2006) 51.

<sup>107</sup> F De Londras and F Davies, ‘Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms’ (2010) 30 O.J.L.S. 21; F Davies, ‘The Human Rights Act and Juridification: Saving Democracy from Law’ (2010) 30 Politics, 94.

<sup>108</sup> A Tomkins, ‘What is Parliament for?’ in N Bamforth and P Leyland (eds), *Public Law in a Multi-layered Constitution* (Hart 2003) 75.

<sup>109</sup> See ‘Measuring National Well-being – Governance’ (Office for National Statistics, 31 October 2012) <<http://www.ons.gov.uk/ons/rel/wellbeing/measuring-national-well-being/governance/art-governance.html>> accessed 01 April 2015.

<sup>110</sup> *ibid* (n 56) 31.

Tomkins believes that the purpose of all constitutions is to find ways of insisting that a government is held to account for its actions.<sup>111</sup> However, instead of legal controls as advocated by legal constitutionalism, the limiting account advocates the “holding of those who exercise political power to account, for the most part, through political processes and in political institutions.”<sup>112</sup> These are primarily achieved through existing ordinary political activity. For example, the doctrine of responsible government means all the members of the government are subject, individually and collectively to Parliament for their actions, policies and decisions.<sup>113</sup> The Members of Parliament (MP’s) role is to hold the government to account.<sup>114</sup> In turn, MPs are accountable directly to their citizens in their constituency at elections.<sup>115</sup> Therefore, both the government and Parliament are politically accountable for their decisions to citizens.<sup>116</sup>

Since under this interpretation of constitution the government is accountable to the Parliament, Tomkins claims “we should abandon the notion that Parliament is principally a legislator, we should instead see Parliament as a scrutineer, or regulator of government.”<sup>117</sup> This is because, in practice, Parliament does not make many laws; instead, the government as executive makes the overwhelming majority of bills, which are then placed before Parliament for approval to become law. Additionally, the power of Parliament comes from its power to refuse to enact laws, although the power is rarely exercised. Nevertheless, it is fair to say that Parliament defeating government legislation is not the norm.<sup>118</sup> Instead, Parliament has

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<sup>111</sup> *ibid* (n 56) 2.

<sup>112</sup> *ibid* (n 3) 273.

<sup>113</sup> *ibid* (n 106) 37-38.

<sup>114</sup> A Tomkins, ‘Professor Tomkins’ House of Mavericks: a reply’ [2007] P.L. 33, 33.

<sup>115</sup> *ibid* (n 56) 25.

<sup>116</sup> *ibid* (n 56) 64.

<sup>117</sup> *ibid* (n 108) 53.

<sup>118</sup> However, Russell and Cowley have questioned the focus government defeats. They advocate a broader approach. See M Russell and P Cowley, ‘The Policy Power of the Westminster Parliament: The “Parliamentary State” and the Empirical Evidence’ (2015) *Governance* (Forthcoming)

powerful legislative influence. Through the use of committees, amendments and day to day negotiations, the government must engage with Parliament to ensure it has sufficient parliamentary support on its bills, and it is in this way that the Commons (and the Lords) can protect the common good by curtailing the worst excesses of government.<sup>119</sup> Thus, the limiting account views Parliament as a democratic institution for scrutinising the government. By design, Parliament is effectively the best institution to ensure deliberative, contestatory democracy that produces reasonable and proportionate laws.<sup>120</sup>

In applying republican norms, Tomkins argues that where government acts unaccountably (as in avoiding acting without the majority support of Parliament), it is not merely wrong; it is unconstitutional.<sup>121</sup> Government acting unaccountably is incompatible with for proponents of limiting political constitutionalism, as it would be to act in a way which is incompatible with the republican norms of popular sovereignty and non-domination.<sup>122</sup> Tomkins considers the use of the royal prerogative as being incompatible with his account. For example, the Thatcher government used the Royal Prerogative instead of statute to grant the Home Secretary emergency powers. These included the power to authorise the Home Office to supply CS gas and plastic baton rounds to a chief constable for operational use by the police, even where the local police authority had refused to approve the supply of such equipment.<sup>123</sup> In the case of *ex parte Northumbria Police Authority*, the court held that the government was able to rely on the royal prerogative of keeping the peace to authorise such decisions.<sup>124</sup> Tomkins argues that the judgment and the use of any prerogative powers without

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<<http://onlinelibrary.wiley.com/doi/10.1111/gove.12149/references>> accessed 1 September 2015.

<sup>119</sup> *ibid* (n 108) 76; *ibid* (n 56) 2.

<sup>120</sup> *ibid* (n 44) 5.

<sup>121</sup> D Nicol, 'Book Review: Our Republican Constitution' (2006) 69 *MLR* 280, 281.

<sup>122</sup> *ibid* (n 56) 60.

<sup>123</sup> See A.W. Bradley, 'Police powers and the Prerogative' [1988] *P.L.* 298-303.

<sup>124</sup> *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1989] 1 *QB* 26.

Parliamentary consent are unconstitutional under this account.<sup>125</sup> To be compatible with the norm of popular sovereignty and non-domination, the government should only possess power which the people, through their elected representatives in Parliament have conferred on them. The executives powers must be completely “constructed out of and... constrained by the law.”<sup>126</sup> Only Parliament can grant the government the power it seeks by producing a statute. Since under the UK doctrine of Parliamentary Sovereignty no Parliament can bind a future Parliament, said statute will remain contestable, thus ensuring through political accountability the republican norms of popular sovereignty and non-domination are achievable. To keep an effective check on the government, legislation should be the government’s only source of power as it is a product of a politically accountable process.<sup>127</sup>

Similarly, it would be unconstitutional for the courts to engage in political questions. Tomkins, like Griffith before him, makes clear the role of the courts should be to resolve legal disputes and not to take the role of political actors by attempting to resolve political disputes because they are unaccountable. Since the judiciary is not elected, neither is it responsible to any elected body. The courts lack popular sovereignty as a source of their power to make political decisions. They also could be a source of domination as they are not politically accountable, when compared to legislature.<sup>128</sup> Therefore, the courts should refrain from engaging in political questions since transferring responsibility for determining such political questions from a political realm to the judicial realm is objectionable when viewed from a republican standpoint.<sup>129</sup> It is for Parliament, as the scrutiniser of governmental power, to ensure the executive legislation is proportional and reasonable during legislative

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<sup>125</sup> *ibid* (n 56) 60, 132.

<sup>126</sup> *ibid* (n 44) 7.

<sup>127</sup> *ibid* (n 44) 8.

<sup>128</sup> *ibid* (n 56) 25.

<sup>129</sup> *ibid* (n 56) 26, 60.

proceedings. Proponents of limiting political constitutionalism view “Parliaments [as] the true guardians of liberty” against the excesses of government.<sup>130</sup>

Nevertheless, the limiting account recognises the courts have a role to play in holding the government to account. The courts in some circumstances may play a vital role in ensuring political accountability of the government. Firstly, the limiting account recognises that the courts are vital to “ensure that government acts within the scope of its legal powers and that the protection of civil liberties should be privileged.”<sup>131</sup> The limiting account envisages “the courts’ attitude should be assertive and not deferential toward the executive power.”<sup>132</sup> Many limiting political constitutionalists have criticised the courts for giving too much deference to the government in matters of national security.<sup>133</sup> The courts must ensure that the government acts only within (and not beyond) its statutory powers, strictly construed.<sup>134</sup> Secondly, the courts should have the responsibility to alert Parliament when the government acts in a manner that undercuts or circumvents effective parliamentary scrutiny.<sup>135</sup> For example, Tomkins envisages a system where, when faced with doubts about the proper scope or meaning of a government power, the courts could refer the matter back to Parliament, who can then provide a clear final view on the matter.<sup>136</sup> Thus, limiting political constitutionalism envisages a system where by both the legislature and judiciary can work together to provide an effective check on the executive. Under this system, Parliament should only confer power on the government after serious consideration which can be achieved through ordinary

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<sup>130</sup> H Bolingbroke, ‘A Dissertation upon Parties, Letter X’ (January 26, 1734), in *Bolingbroke: Political Writings* (D Armitage ed, CUP 1997) 94.

<sup>131</sup> *ibid* (n 44) 6.

<sup>132</sup> *ibid* (n 89) 1063.

<sup>133</sup> See A Tomkins, ‘The rule of law in Blair’s Britain’ (2007) 26 UQLJ 255-291; and A Tomkins, ‘Parliament, Human Rights, and Counter Terrorism’ in T Campbell, K.D Ewing, A Tomkins (eds) *The Legal Protection of Human Rights Sceptical Essays* (OUP 2011) 13-39; and K.D Ewing and JC Tham ‘The continuing futility of the Human Rights Act’ [2008] P.L. 668, 679; and *ibid* (n 44).

<sup>134</sup> *ibid* (n 44) 8.

<sup>135</sup> *ibid* (n 89) 1063.

<sup>136</sup> *ibid* (n 44) 21.

parliamentary scrutiny and debate. When Parliament does confer a statutory power on Government, it must take great care to ensure the exact extent of the power being confirmed is made clear by the words of the statute. The courts, in turn, must not be deferential to Government and enforce Parliaments will do its best to ensure the government does not exceed its power.<sup>137</sup>

### **b) Enabling Political Constitutionalism**

The enabling account of political constitutionalism focuses on facilitating the successful delivery of policy goals by the governing majority. This is because the government's policy goals are seen to have the support of the citizens who voted for the political party that commands a majority in the House of Commons. This account places special emphasis on the capacity of electoral competition to incentivise political parties to represent the beliefs of the people and are "able to galvanize popular support around even controversial and socially transformative legislation."<sup>138</sup> Furthermore, they believe that the government should not be subject to constitutional obstacles in the delivery of policy, as this will either result in domination or the distortion of effective political accountability to the citizens.<sup>139</sup> Constitutional obstacle can take both legal and political forms. For example, constitutional review by the courts or filibustering might be considered constitutional obstacles. There are two elements to this account. First, the ordinary political process modelled on (although not exclusively on) the UK Parliament promotes a culture of "incentivisation" which results in effective accountability and progressive democratic legislation. Secondly, the rejection of constitutional obstacles to the delivery of policy goals such as entrenched laws and judicial strike down powers.

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<sup>137</sup> *ibid* (n 44) 1.

<sup>138</sup> *ibid* (n 11) 2207-2208.

<sup>139</sup> *ibid* (n 121) 284.

The enabling account draws on existing political activity such as competing political parties,<sup>140</sup> although, its interpretation of it is different from the limiting account. In particular, the enabling account emphasises the importance of voting in periodic elections, the need to secure a majority to govern and a balance of power between competing political parties. The enabling accounts emphasises that citizens should vote directly for a political party to gain or remain in power. Firstly, competing political parties are viewed as “the engine of the democratic process and the mirror that reflects the citizens’ critical judgment.”<sup>141</sup> Secondly, the act of voting for a party is more like expressing a judgement of the common good.<sup>142</sup> Thus, the common good viewed as ideological concept with different political parties presenting their conception of the common good according to their ideology. The balance of power here represents the republican view of dividing power in such as a way which ensures ensuring decision makers have to ‘hear the other side.’<sup>143</sup> Together, these create what could be called a ‘culture of incentivisation’ in political institutions which promotes political parties to ‘hear the other side’ and build winning electoral coalitions.<sup>144</sup> This is believed to create a system which can facilitate the idea of creative working compromises in the face of reasonable disagreement and incentivise progressiveness. First, the division of power will facilitate “rival aspirants for power” who will take the form of competing parties.<sup>145</sup> Second, under a system of majority, rival parties will need to recruit the support of the largest majority of the citizens to either gain power or remain in office.<sup>146</sup> This incentivises parties to

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<sup>140</sup> *ibid* (n 24) 231.

<sup>141</sup> *ibid* (n 21) 932.

<sup>142</sup> *ibid* (n 24) 135.

<sup>143</sup> *ibid* (n 24) 195.

<sup>144</sup> *ibid* (n 24) 201.

<sup>145</sup> *ibid* (n 24) 200.

<sup>146</sup> *ibid* (n 24) 200.

seek to represent the widest workable range of views to construct a broad election winning campaign.<sup>147</sup>

The progressiveness of this approach is that in order to attain and stay in government, parties will continuously need to recruit and retain quite a divisive range of support.<sup>148</sup> Rather than focus on a single or narrow range of issues, the most successful party “needs to involve a broad collection of ideals and interests,” as “too narrow a focus will restrict its appeal and limit its chances of winning support.”<sup>149</sup> Parties must continuously seek to broaden their appeal to citizens, to ensure that they represent more citizens than their opponents. For this to be workable, parties need to act as a vehicle for “people sharing similar visions for society to come together to pursue common aspirations.”<sup>150</sup> For example, consider that the Conservative party, who might include a broad coalition of views such as social, fiscal, and progressive forms of conservatism. The continuous need to recruit voters will mean that parties must also look beyond their own ideologies and update with society in order secure or maintain a majority. Parties may adopt policies from their rivals which are popular. As a result, parties frequently end up “stealing their opponent’s clothes and even conceding that in certain areas [their opponents] do indeed have the better policies.”<sup>151</sup> If a party is unwilling to change with society, it runs the risk of losing voters and ground in the debate to more progressive rivals.<sup>152</sup> Additionally, a culture of incentivisation encourages parties to be tolerant and sympathetic towards less numerically strong groups within society. The balance of power and majority rule means that parties are unlikely to attempt to particularly discriminate against selective

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<sup>147</sup> G Gee, ‘Is there more to the Political Constitution than meets the eye?’ (Political vs. Legal Constitutionalism: fin de siècle? Workshop, SOAS, London, 29 October 2014).

<sup>148</sup> *ibid* (n 24) 203.

<sup>149</sup> R Leach, B Coxall, L Robins, *British Politics* (1<sup>st</sup> Edition, Palgrave Macmillan 2006) 114.

<sup>150</sup> *ibid* (n 44) 474.

<sup>151</sup> *ibid* (n 24) 237, H Klingemann, R Hofferbert, I Budge, *Parties, Policies and Democracy* (Westview Press 1994) 30-31, 243-4.

<sup>152</sup> *ibid* (n 24) 238.

groups or act against the interest of the voters, as this will lose support for the party to another political party.

Once a political party has secured the support of a majority, it must also deliver on its promises. Here, the culture of incentivisation works to prompts the successful delivery of policy goals by the government. The failure to deliver those policies means that the governing party may lose office. For example, a party promises to introduce legislation that would create a universal health care system. The governing party has promised to deliver this policy during its 4 year term in office. Should they fail to do as, they should be held to account at the next election by citizens. Therefore, the act of voting also serves to pass judgment on the performance of the government. This may not always be case, as each individual voter will give different weight to each policy. However, if a majority of voters were to see failure to deliver as significant, the governing party may lose office to another party. Yet, this form of accountability “requires the governing party to be given a reasonable term to carry out its policies without constitutional obstacles which would provide it with an alibi for failing to deliver.”<sup>153</sup> By constitutional obstacles or hurdles, the enabling account refers to measures which stop the governing party carrying it out its policies such as legislative veto’s, entrenched laws and constitutional strike down powers by the courts. These should not act as obstacles to the government in successful implementation of policies which have the support of the majority. These obstacles would have a distorting effect on the direct accountability of the government. Furthermore, these constitutional obstacles are seen as a way of maintaining the status quo.<sup>154</sup>

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<sup>153</sup> *ibid* (n 121) 284.

<sup>154</sup> *ibid* (n 21) 946.

The enabling account sees entrenched laws as a potential attempt to lock-in elites, who fear the possibility that in the near future they may be overturned.<sup>155</sup> Although, some constitutions entrench laws in order to create counter majority checks, Bellamy has argued that “counter-majoritarian checks unfairly favour the status quo, potentially entrenching the unjust privileges of historically powerful minorities, but it also offers no incentives for those running these different branches to be responsive to citizens.”<sup>156</sup> For example, “the constitutions of many democracies have excluded significant categories of people from citizenship, notably women and those without property, and placed severe limits on the exercise of the popular will.”<sup>157</sup> Furthermore, the enabling account see the constitutional review by the courts as another constitutional obstacle. They argue “constitutional courts have a tendency to consolidate the status quo.”<sup>158</sup> The judiciary is representative of a small white, wealthy and well educated minority within society,<sup>159</sup> and because “the judiciary simply are part of the ruling class,” they have an interest in preserving the status quo and in the past have used their power to do so.<sup>160</sup> Enabling political constitutionalists point to cases such as *Dred Scott v Sandford* where the US Supreme Court supported slavery,<sup>161</sup> or *Hammer v Dagenhart* where the US Supreme Court deemed laws outlawing child labour as unconstitutional.<sup>162</sup> Judicial review of constitutional laws is perceived as re-enforcing the status quo or acting as a way of oppression.<sup>163</sup> In order to avoid domination, there must be no bias towards the status quo.<sup>164</sup> Therefore there should be no constitutional obstacles to stop the government delivering its policy goals.

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<sup>155</sup> *ibid* (n 21) 943.

<sup>156</sup> *ibid* (n 24) 9.

<sup>157</sup> *ibid* (n 24) 90.

<sup>158</sup> *ibid* (n 21) 941.

<sup>159</sup> *ibid* (n 24) 248.

<sup>160</sup> *ibid* (n 24) 34,42,121.

<sup>161</sup> *Dred Scott v Sandford*, 60 U.S. 393 (1857).

<sup>162</sup> *Hammer v Dagenhart*, 247 U.S. 251 (1918); *ibid* (n 24) 41-42; *ibid* (n 56) 25-33.

<sup>163</sup> *ibid* (n 21) 941.

<sup>164</sup> *ibid* (n 24) 227.

Proponents of the enabling account frequently highlight what are regarded as progressive policies that result out of the culture of incentivisation as evidence to support their claims. For example, Bellamy has highlighted legislative changes which have given “greater numbers of people more of a say, either by enfranchising previously excluded groups or through the devolution of power to sub-units.”<sup>165</sup> It might also be used to repeal previously oppressive legislation and judicial judgments. For example, the Representation of the People Act granted universal suffrage.<sup>166</sup> As Bellamy comments, “[m]ost progressive democratic reforms have been made with the support of existing voters acting to undermine their own privileged position.”<sup>167</sup> Legislation can be progressive by repealing laws which are no longer acceptable to the majority such as the de-criminalisation of homosexuality.<sup>168</sup> Furthermore, both Bellamy and Waldron have commented that the political process can lead to richer and more respectful debates. Waldron has argued, that “it is sometimes liberating to be able to discuss issues like abortion directly, on the principles that ought to be engaged, rather than having to scramble around constructing those principles out of scraps of some sacred text, in a tendentious exercise of constitutional calligraphy.”<sup>169</sup> Elsewhere, Danny Nicol has argued the ordinary process has given us “the NHS and the Welfare state, aspects of British life which have liberated many more of us than any fundamental rights instrument ever will.”<sup>170</sup>

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<sup>165</sup> *ibid* (n 24) 135, 255.

<sup>166</sup> Representation of the People (Equal Franchise) Act 1928.

<sup>167</sup> *ibid* (n 24) 225.

<sup>168</sup> Sexual Offences Act 1967.

<sup>169</sup> *ibid* (n 18) 290–291.

<sup>170</sup> *ibid* (n 121) 280.

### c) Tensions between the Limiting and Enabling Accounts of Political Constitutionalism

One must concede that both accounts present highly stylised visions of political constitutionalism. They are each designed to supply “an explanatory framework within which to make sense of a real world constitution.”<sup>171</sup> Despite the overlap between the two, there is also scope for disagreement between each other. The difference between the two is one of emphasis. Ordinary political activity is open to interpretation; for example, “law is either an instrument for implementing political decisions or a constraint on political action.”<sup>172</sup> How one evaluates the current system and responds to reforms may differ and in turn may give rise to disagreement. In this section I want to illustrate this point by suggesting that proponents of the limiting and enabling accounts of political constitutionalism might differently view the role of political parties. Tomkins (as a limiting political constitutionalist) and Nicol (as an enabling political constitutionalist) have disagreed about the role of parties. I will now evaluate this debate between the two and consider what this tells us about the two different accounts of political constitutionalism.

Tomkins has suggested some potential reforms to the British constitution to further conform to his model.<sup>173</sup> One of his proposed reforms is to ensure that both houses of Parliament operate freely from constraints caused by party loyalty. Tomkins argues that party is the biggest hurdle to effective executive accountability. Instead of holding the government to account in the name of the common good, backbench MP’s become “loyal to their political parties. If their political party is one which happens to be in government, the logic of party loyalty dictates that they support the governments regardless of the greater common good. Conversely, if their political party is in opposition MP’s can seek to obstruct government policy for the sake of political point scoring even where the government is acting in the

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<sup>171</sup> *ibid* (n 3) 291.

<sup>172</sup> *ibid* (n 21) 943.

<sup>173</sup> *ibid* (n 56) 131-141.

[common good].”<sup>174</sup> Tomkins suggests the only way to secure a system where by Parliament seeks to represent the common good and hold the executive to account is to prohibit party whips. Thus, “there should be no institutional means- save for seeking to justify the merits of their policy in open parliamentary debate—by which the government is able to secure parliamentary support.”<sup>175</sup>

Nicol, adopting an enabling account rejects Tomkins arguments. He views party as vital to political constitutionalism. Nicol suggests “most MP’s vote for the party line not because anyone is forcing them but because they agree [with it].” They are voting with the coalition of people with whom they have more in common than their rivals.<sup>176</sup> Party ideology serves as an expression of one conception of a common good; thus, there is good reason for MP’s to vote with their party. Additionally, the role of the parliamentary whip is to coordinate willing support to pass a bill, rather than bullying MPs to vote with the party. Therefore, government whips help enable the successful delivery of policy. Furthermore, he believes removing parties will damage accountability. Nicol concedes that MP’s must keep the government in line through the back bench pressure or potential rebellions. However, he believes incumbent MPs should use the promises the party was elected on to act as a barometer to which government policy can be judged. Party ideology can help members of the incumbent party secure concessions or keep the government in line with values they were elected on.<sup>177</sup> Removing ideology would not benefit parliamentary debates either, as it would result in a situation where MPs “would be concealing their ideologies under the cloak of objective neutrality as to the common good” as judges are often accused of doing.<sup>178</sup> Thus, removing

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<sup>174</sup> *ibid* (n 56) 137.

<sup>175</sup> *ibid* (n 56) 138.

<sup>176</sup> *ibid* (n 44) 467.

<sup>177</sup> *ibid* (n 44) 468-469.

<sup>178</sup> *ibid* (n 44) 471.

parties would end up severing “the fundamental cord of accountability that links the British government to the electorate.”<sup>179</sup>

This disagreement highlights the subtle distinctions between the two accounts on multiple axes. The first distinction is how the executive is viewed. In the limiting account, the executive is viewed negatively. The proponents of the limiting account lack faith in the government. They believe that those that hold powers will struggle to resist the “desire to dominate.”<sup>180</sup> Hence why are they are perceived as being liable to try to get with whatever they can political get away with. If the limiting account is correct, then “we can never aspire to decent government.”<sup>181</sup> In contrast, the enabling account adopts a different view. They recognise the government is capable of restricting liberty and acting against the common good; they also recognise it is equally capable of making progressive policy and acting in the common good. Nicol has criticized Tomkins for his narrow view of the executive. Instead, “any analysis [of the executive] should encompass the role of government in extending liberty and well-being, as well as its role in restricting liberty.”<sup>182</sup> The crux for the enabling account is that the constitution ensures that the government performs positively. As a consequence, both accounts view accountability differently. To the limiting account, accountability focuses on the prevention of the government acting against the common good. The enabling account is about incentivising the government to act in the common good at all times.

This is a crucial distinction between the two, resulting in both accounts presenting different answers to whom and how accountability should be achieved. For the limiting account, the

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<sup>179</sup> *ibid* (n 44) 471.

<sup>180</sup> N Machiavelli, *The Discourses* (B Crick ed, B Richardson trs, L Walker trs, Harmondsworth Penguin Books 1970) 116.

<sup>181</sup> *ibid* (n 44) 474.

<sup>182</sup> *ibid* (n 121) 281.

government is accountable to the House of Commons, who are representatives of the citizens. This is why Parliament is described as the “guardian of liberties” under this account; Parliament must protect the interests of citizens from the excesses of the government. As a consequence, similarly to how “the independence of the judiciary is a constitutional essential in legal systems that seek to rely on the courts to play the lead role in attempting to hold the government to account, so too is the independence of Parliament essential in the British context.”<sup>183</sup> Thus, “Parliament desperately needs MPs who, while they may belong to political parties, can nevertheless see beyond the limited horizons of short-term party advantage ... and who can understand that it is by working together that those on the backbenches can have the most influence over, and can most effectively scrutinize, those in office.”<sup>184</sup> This form of accountability works more effectively where the House of Commons is stronger and government is weaker.<sup>185</sup> The government may be weaker because of a tiny majority or because MP’s are more willing to challenge the government; for example, Tomkins cites the Commons ability to challenge the Blair government in the early 2000’s as evidence of the Commons ability even when the government have a large majority.<sup>186</sup> A stronger Parliament means more opportunity for parliamentary debate.

However, this form of approach to accountability can be criticised on two grounds. First, this form of accountability promotes a narrow form of deliberation known as “elite deliberation,” where by a “manageably small body of representatives... can deliberate about the [appropriateness of measures].”<sup>187</sup> By placing faith in the House of Commons, only 650 MPs are allowed to contribute to this form of deliberation; thus, the electorate could be relegated

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<sup>183</sup> *ibid* (n 114) 34.

<sup>184</sup> A Tomkins, *Public Law* (OUP 2003) 168-169.

<sup>185</sup> *ibid* (n 114) 39.

<sup>186</sup> *ibid* (n 55) 127-131.

<sup>187</sup> J S Fiskin, ‘Deliberative democracy and constitutions’ (2011) 28(1) *Social Philosophy and Policy* 242, 242.

to being an observer of the deliberation until the next election. As Nicol critiques, “an elite of 650 is better than a Downing Street cabal, but not much better.”<sup>188</sup> Secondly, in favouring a strong House of Commons, this approach could result in risk aversion by the government. If the government is fearful of the short term political consequences that might arise from Parliament, they may be more inclined to introduce more conservative policies rather than radical policies. However, radical policies may be needed to enable progressive social goods. Thus, Nicol has criticised this form of accountability as being “better at stopping proposals than in advancing them. As a blueprint for governance it is essentially reactionary because it privileges the status quo.”<sup>189</sup> Although progressive policies could occur, it may be the case that they are incremental.

The enabling account seeks to “foster a different kind of accountability which emphasises the positive delivery of policy goals.”<sup>190</sup> The government is accountable to the electorate, rather than the Commons. Accountability is about what the electorate believes the government should do, rather than the Commons. Under this account, rather than restricting the process, the parties play a vital role in assisting the government deliver its goals. The enabling account views that the “pursuit of the “common good” is a transparently ideological one.”<sup>191</sup> The external conflict between rivaling political parties and the internal conflicts within parties represent “the conflicts inherent in society.”<sup>192</sup> Parties become an important factor within Parliament in ensuring the government is held to account. The party provides the terms of which to hold the government to account and the authority to do so. If the government is elected on pledges to increase funding to education or not privatising the

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<sup>188</sup> *ibid* (n 121) 283.

<sup>189</sup> *ibid* (n 44) 474.

<sup>190</sup> *ibid* (n 44) 474.

<sup>191</sup> *ibid* (n 44) 471.

<sup>192</sup> *ibid* (n 121) 283.

National Health Service but decides to do the opposite within the Commons, MP's can rebel when the leadership attempts to veer away from the policies they were elected on.<sup>193</sup> Furthermore, with terms given to them by the electorate, MPs can hold significant influence in ensuring the government delivers its policies. This form of accountability is thus less about stopping policy, but more about enabling it to occur. Thus, "party democracy does not sidestep the main issue: rather, it prioritises capture of the executive as the very focus of political activity."<sup>194</sup> Thus, the limiting account desires to remove parties who would produce problems. Without parties, the governing majority would be without reasonable terms to carry out its policies. Rebellious MPs would provide the government with an excuse for failing to deliver its promises to the electorate.<sup>195</sup> Without party, the citizens would have no say over the policies of government. Party serves as a link between the government and the citizens.<sup>196</sup> Thus, under this account the "emphasis would be placed not on MPs checking the executive but on democratised parties *constituting* the executive."<sup>197</sup>

This account favours strong governments over strong Parliaments. According to Tom Ellis, strong government can be defined in either a narrow sense or a wider sense. The narrow sense focuses on short term goals; the wider sense focuses on the long term goals.<sup>198</sup> There is scope to see the enabling account desiring strong government in both contexts. For example, it is clear that there is a focus on the achievement of the short term interests of the elected political party. However, one can also infer a long term interest as the enabling account appears to believe while there might be differences between the political parties about details, there remains a common held and continuous belief that "the point of government has

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<sup>193</sup> *ibid* (n 44) 473.

<sup>194</sup> *ibid* (n 44) 474.

<sup>195</sup> *ibid* (n 44) 284.

<sup>196</sup> *ibid* (n 44) 471.

<sup>197</sup> *ibid* (n 44) 474-475.

<sup>198</sup> T Ellis, 'What is Strong Government?' (1997) 34 *Representation* 135, 136.

become to initiate legislation in the cause of social progress.”<sup>199</sup> In contrast, the limiting account dislikes strong government. Tomkins has described it as “a vision (beloved of the right and of the “old” left alike) of strong government in which Parliament is little more than the obedient vehicle through which the government legislates, and in which elections are turned into false referendums on the government in which the overwhelming majority of the electorate is denied a relevant vote, members of the government representing only a small minority of parliamentary seats.”<sup>200</sup> Furthermore, Marco Goldoni has suggested because the time gap between elections gives “representatives a period of time during which they become isolated and independent from the citizenry... elected officials may become a sort of political clergy.”<sup>201</sup> In sum, the simple but significant point that bears emphasis is that those who advocate limiting and enabling accounts of political constitutionalism can hold more or less distinct views about important aspects of everyday political life such as political parties. The question that will be pursued later on in this thesis is whether proponents of the political and limiting accounts have different views about and reactions to the Human Rights Act.

## **Conclusion**

This chapter has sought to provide an overview of political constitutionalism from the historical descriptive account through to the modern republican-inspired accounts. The main message conveyed in this chapter is that there are different interpretations of political constitutionalism. The enabling accounts focuses on strong government, the successful delivery of policy and the direct accountability of government to the electorate over the delivery of these policies. In contrast, the limiting account focuses on deliberative democracy in the commons, the protection of common goods, and the accountability of the government to Parliament and Parliament to the people. As a result, political parties are viewed positively

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<sup>199</sup> D Dyzenhaus, ‘The Left and the Question of Law’ (2004) 17 CJLJ 7, 11.

<sup>200</sup> *ibid* (n 114) 39.

<sup>201</sup> *ibid* (n 21) 940.

by the enabling, but negatively by the limiting account. What this demonstrates is the scope for disagreement within political constitutionalism. A new generation of political constitutionalists such as Marco Goldoni and Christopher McCorkindale have begun engaging in a reflective analysis of political constitutionalism.<sup>202</sup> This thesis will not focus on their works directly for two reasons. Firstly, the nature of their work is engaging in a similar approach as this thesis is; a reflective analysis of political constitutionalism. Their work seeks to cast light on the nature of political constitutionalism by studying recent writing on it. As a result, they do not seek to advance the substantive core claims of political constitutionalism per se. Therefore, they are not directly engaging in a critique of the scope of judicial review or seeking to defend the workings of parliamentary accountability. As such, their work--although vitally important in helping us understand political constitutionalism yet it is not directly relevant to this thesis's exploration of the Human Rights Act. Secondly, due to their reflective focus, they have not touched directly on the Human Rights Act as extensively as other proponents of political constitutionalism. This thesis will be analysing the compatibility of the Human Rights Act with political constitutionalism; I will suggest possible implications of it for the enabling and limiting accounts. Given that elements of ordinary political practice can be interpreted differently, it remains probable that the Human Rights Act also gives rise to these forms of disagreements. Therefore potentially allowing greater reflection of political constitutionalism's understanding of ordinary political activity and how proponents can exchange in debates about a bill of rights.

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<sup>202</sup> See M Goldoni and C McCorkindale (eds), 'Special Issue—Political Constitutions' (2013) 14 *German Law Journal* 2103-2292.

## 2.

### **The Human Rights Act**

This chapter focuses on the introduction of the Human Rights Act 1998 and the institutional model of rights protection it instituted. The first section of this chapter recaps on the reasons for the Act's creation and the concerns that influenced the framers of the Act. The second section explains how the Human Rights Act creates an institutional model of rights protection which involves both political and legal institutions in a mix of pre- and post-legislative review over various stages. All of this is necessary (and admittedly mostly descriptive) background for the analysis undertaken later in this chapter where I identify and reflect on the issues that the Act's model of rights protection raises for the "limiting" and "enabling" understandings of political constitutionalism identified in the first chapter.

#### **1) The Road to Incorporation**

J.A.G. Griffith's vision of a constitution organised around the ideals of political debate, participation and accountability provided a foundation for the theory of political constitutionalism that developed into an important school of thought in the UK over the last 40 years. Yet, despite this, Griffith's critique against calls to incorporate the European Convention of Human Rights (ECHR) into domestic law were unsuccessful.<sup>1</sup> Both domestic and International pressure encouraged the creation of the Human Rights Act.

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

### a) Domestic Pressure

Calls during the 1970s for reforms to the way that rights were protected in the UK suggested that some were growing concerned about a developing crisis of “over governability in which executive proposals quickly became law, via a quiescent Parliament without sufficient consultation, scrutiny or debate and without any possibility of subsequent judicial challenge.”<sup>2</sup>

During the 1980s concerns intensified. For many, such as Keith Ewing and Conor Gearty, faith in the constitution came under serious challenge from a Prime Minister who was willing to use the vagueness and flexibility of the constitution to her own ends.<sup>3</sup> The Thatcher government “merely utilized to the full the scope for untrammelled power latent in British constitution but obscured by the hesitancy and scruples of previous consensus-based political leaders.”<sup>4</sup> As a consequence, the Thatcher government “acquired a reputation for authoritarianism and disregard of traditional checks and balances.”<sup>5</sup> The opposition parties were unable in Parliament, nor in the 1983, 1987 and 1992 general elections, to substantively weaken the Conservative government.

During this period several private members tried to introduce a bill of rights. Although these attempts failed due Government opposing them, they do provide useful insight into the tensions about adopting a bill of rights in 1980s and 1990s. In 1987, Sir Edward Gardener introduced a Private Member Bill called Human Rights Bill.<sup>6</sup> Although there was some cross bench support in the commons, the bill failed to get enough support.<sup>7</sup> Some members welcomed the bill expressing concerns about the growing power of the executive and potential for it act in an

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<sup>2</sup> K.D Ewing and C.A Gearty, *Freedom under Thatcher* (Clarendon Press 1990) 6.

<sup>3</sup> *ibid* 7.

<sup>4</sup> *ibid* 7.

<sup>5</sup> D Erdos, 'Ideology, Power Orientation and Policy Drag: Explaining the Elite Politics of Britain's Bill of Rights Debate' (2009) 44 *Government and Opposition* 20, 32.

<sup>6</sup> Sir Edward Gardner (Conservative) HC Deb 06 February 1987 vol 109 col 1223.

<sup>7</sup> *ibid* col 1223- 89.

authoritarian way.<sup>8</sup> However, a range of arguments were raised against the bill. Some argued it would undermine parliamentary sovereignty,<sup>9</sup> or the risk of politicisation of the judiciary.<sup>10</sup> Some even suggested that it might lead to reduced parliamentary scrutiny insofar as it might encourage future parliamentarians to become less diligent when scrutinising legislation.<sup>11</sup> Lord Lester of Herne Hill also tried to use two separate private members bills to incorporate the convention during the mid-1990s. The first in 1994 was fashioned on the European Union model.<sup>12</sup> The second in 1996 was fashioned on the New Zealand one.<sup>13</sup> It was clear from these attempts that Government support for a statutory bill of rights would be needed if one was ever to be adopted.

By 1997 the major opposition parties—the larger Labour party and the smaller Liberal Democrat party—had both pledged in their manifestos to incorporate the ECHR into domestic law.<sup>14</sup> In contrast, the Conservative party after being in power for 18 years remained the only major party to argue against incorporation. Their manifesto argued incorporation would ‘risk transferring power away from Parliament to legal courts - undermining the democratic supremacy of Parliament as representatives of the people,’ with the Party concluding that such reforms were inappropriate for the UK.<sup>15</sup> Support for a bill of rights and the ECHR was a long held policy for the Liberal Democrats, but it represented a change for the Labour Party. The party had

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<sup>8</sup> *ibid* Geoffrey Rippon (Conservative) col 1243-44.

<sup>9</sup> *ibid* Fred Silvester (Conservative) col 1257-1258, William Cash (Conservative) col 1286-87.

<sup>10</sup> *ibid* The Solicitor-General Sir Patrick Mayhew (Conservative) col 1267.

<sup>11</sup> *ibid* Andrew F Bennett (Labour) col 1258-1259.

<sup>12</sup> Lord Lester of Herne Hill (Liberal Democrat) HL Deb 25 January 1995 vol 560 cc1136-74.

<sup>13</sup> Lord Lester of Herne Hill (Liberal Democrat) HL Deb 05 February 1997 vol 577 cc1725-58.

<sup>14</sup> See ‘New Labour: Because Britain Deserves Better’ (Labour Party 1997)

<<http://www.politicsresources.net/area/uk/man/lab97.htm>>; and ‘Make The Difference: The Liberal Democrat Manifesto 1997’ (The Liberal Democrats 1997) <<http://www.politicsresources.net/area/uk/e97/man/ld97man.htm>> both accessed 15 April 2015.

<sup>15</sup> See ‘You Can Only Be Sure With The Conservatives: The Conservative Manifesto 1997’ (The Conservative Party 1997) <<http://www.politicsresources.net/area/uk/man/con97.htm>> accessed 15 April 2015.

traditionally being against a bill of rights. However, as David Erdos suggests, by experiencing “a long period out of power as a result of the Conservatives’ winning an unprecedented four general elections. [The] experience gradually eroded the executive-minded power-hoarding mentality that had generally been central to Labour’s thinking as a party of government.”<sup>16</sup> The Conservative party lost office to Labour following the 1997 General Election. Within the same year, the Labour government published ‘*Rights Brought Home: The Human Rights Bill*’ which set out its plans for the Human Rights Act.<sup>17</sup>

### **b) International Pressure**

The UK’s continuing relationship with the ECHR also played a significant part. The Convention is a treaty, and under international law treaties are contracts between the governments of two or more sovereign states.<sup>18</sup> The UK ratified the Convention in 1952 and in 1966 it allowed the right of individual petition to the European Court of Human Rights (ECtHR).<sup>19</sup> Therefore, well before Griffith’s criticisms, the UK was under an international obligation to observe the Convention and its protocols.<sup>20</sup> Individual petition to ECHR was problematic in practice for the citizens. First, public authorities were not required as a matter of domestic law to comply with the Convention. Second, citizens could not invoke the ECHR as an independent cause of action in domestic law.<sup>21</sup> Finally, as a result of Article 35 (1) of the Convention, the ECtHR “may only deal with the matter after all domestic remedies have been exhausted.”<sup>22</sup> *Rights Brought Home* highlights some perceived problems of this system. It was predicted that the average citizen would have

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<sup>16</sup> *ibid* (n 5) 31.

<sup>17</sup> Home Office ‘Rights Brought Home: The Human Rights Bill’ Cm 3782 (1997).

<sup>18</sup> *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476-477.

<sup>19</sup> M Elliot and R Thomas, *Public Law* (2nd edn, OUP 2014) 698.

<sup>20</sup> H Fenwick, *Civil Liberties and Human Rights* (3rd edn, Routledge-Cavendish 2002) 118.

<sup>21</sup> *ibid* (n 19) 698.

<sup>22</sup> ECHR Article 35.

spent “on average five years to get an action to ECtHR once all domestic remedies had been exhausted; and it would cost an average of £30,000.”<sup>23</sup> As a consequence, these were substantial hurdles, unless the individual was part of a small but wealthy group of claimants<sup>24</sup> or a powerful media outlet.<sup>25</sup> The UK also had a growing number of cases being brought before the ECtHR. Ewing suggests that past governments had effectively “created a climate whereby incorporation in domestic law became inevitable.”<sup>26</sup> One of the purposes of the Human Rights Act was to reduce these hurdles for the individual by providing domestic mechanisms.

## 2) The Human Rights Act

The Act makes it “unlawful for a public authority to act in a way which is incompatible with a Convention right”<sup>27</sup> and allows convention rights to have effect in domestic law.<sup>28</sup> As David Feldman observes, the Human Rights Act “merely provides the machinery by which domestic courts and public authorities give effect to them.”<sup>29</sup> Accordingly, the Human Rights Act does not by design produce a “home-grown bill of rights”<sup>30</sup> but rather provides a system for allowing the direct challenge of legislation, actions and decision of public authorities through the domestic courts. The Act does not give effect to the entirety of the Convention. Inter-state obligations have been omitted.<sup>31</sup> Section 1 of the Act states that the Convention rights that it gives effect to are; Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol and Article 1 of

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<sup>23</sup> *ibid* (n 17) para 1.14.

<sup>24</sup> *Al-Fayed v United Kingdom* (1994) 18 E.H.R.R. 393, *Saunders v United Kingdom* (1994) 18 E.H.R.R. CD23.

<sup>25</sup> *The Sunday Times v United Kingdom* (1979–80) 2 EHRR 245.

<sup>26</sup> K.D. Ewing, ‘The Human Rights Act and Parliamentary Democracy’ (1999) 62 MLR 79, 84.

<sup>27</sup> Human Rights Act 1998 s.6 (1).

<sup>28</sup> *ibid* (n 17) para 2.1.

<sup>29</sup> D Feldman ‘The Human Rights Act and the interaction of legal orders’ in M Elliot, R Thomas, *Public Law* (2nd edn, OUP 2014) 740.

<sup>30</sup> J.L Hiebert, ‘Governing under the Human Rights Act: The Limitations of Wishful Thinking’ [2012] P.L. 27, 27.

<sup>31</sup> Lord Boston of Faversham, HL Deb 18 November 1997, vol 583 col 467.

the Thirteenth Protocol.<sup>32</sup> Convention rights can be categorised as absolute, limited and qualified. Qualified rights feature a limitation clause. The limitation clause allows a legislature's infringement or violation of a right to be 'saved' or 'defended' in the circumstances set by the Convention.<sup>33</sup> The clause sets out that the "interference with the rights will be lawful if the interference is (1) prescribed by law, (2) necessary in a democratic society, and (3) in order to protect a certain, listed, public interest—such as national security."<sup>34</sup> These rights include freedoms such as privacy and expression.<sup>35</sup> Additionally, due to the abstract nature of the Convention rights, the actual text of the Convention is meaningless without the jurisprudence.<sup>36</sup> Section 2 of the Act requires courts and tribunals determining questions which have arisen in connection with a Convention right to take into account the Strasbourg jurisprudence. This suggests the Strasbourg jurisprudence should be viewed as a floor rather than a ceiling for rights standards, with the UK providing its own "distinctively British contribution to the development of the jurisprudence of human rights in Europe."<sup>37</sup> This is an ambitious goal which ultimately depends on the standards adopted by political and legal actors.

A desire to reduce the risk of the UK of failing to fulfil its international obligations clearly plays a significant influence in the UK's model, but so does the supremacy of Parliament. Of particular importance is that the Human Rights Act is not entrenched. From the outset, the framers of the Act rejected the idea of entrenchment as they believed it was an unnecessary and undesirable

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<sup>32</sup> *ibid* (n 27) s.1.

<sup>33</sup> G.C.N. Webber, *The Negotiable Constitution* (CUP 2009) 4.

<sup>34</sup> A Tomkins, 'What's Left of the Political Constitution?' (2013) 14 *German Law Journal* 2275, 2283.

<sup>35</sup> See ECHR Article 8 and Article 10 as an example of this type of limitation clause.

<sup>36</sup> *ibid* (n 26) 86.

<sup>37</sup> *ibid* (n 17) para 1.14.

step contrary to the UK's constitutional traditions.<sup>38</sup> Instead, the Human Rights Act is at one level an ordinary Act of Parliament, as in theory like all legislation, the Human Rights Act "is vulnerable to express and implied repeal."<sup>39</sup> However, at another level, obiter in *Thoburn v Sunderland City Council*<sup>40</sup> and the recent *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*,<sup>41</sup> suggest that not all legislation is equal, but rather there is a hierarchy, with a distinction to be drawn between ordinary and constitutional statutes.<sup>42</sup> Traditionally "neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law."<sup>43</sup> However, the obiter here represents a "departure from the traditional definition."<sup>44</sup> In *Thoburn*, Laws LJ suggested that a constitutional statute was to be exempt from the doctrine of implied repeal. If it could be shown "that the legislature's actual... intention was to effect the repeal or abrogation" through expressed words or words so specific that their inference was irresistible, only then a constitutional statute could be repealed by a later statute.<sup>45</sup> Later legislation that was inconsistent (but not explicitly inconsistent) would cede priority to the constitutional statute. More recently in the *HS2 case*, Lord Neuberger and Lord Mance suggested not all constitutional legislation is equal in status.<sup>46</sup> In both *Thoburn* and *HS2* the Human Rights Act is listed as a constitutional instrument.<sup>47</sup> However, these comments remain obiter for now. The Human Rights Act is not entrenched. If the Conservative party wish to repeal it, they can do so via a normal parliamentary majority. Amending or repealing the

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<sup>38</sup> *ibid* (n 17) para 2.16.

<sup>39</sup> M Elliot, 'Embracing Constitutional Legislation: Towards Fundamental Law?' (2003) 54 NILQ 25, 29.

<sup>40</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

<sup>41</sup> *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

<sup>42</sup> *ibid* (n 39) 26.

<sup>43</sup> A.V Dicey, *Introduction to the Study of the Law of the Constitution* (9th edn, Macmillan and Co, 1939) 145

<sup>44</sup> S Boyron, 'In the name of European law: the metric martyrs case' (2002) 27 E.L. Rev. 771, 775.

<sup>45</sup> *ibid* (n 40) [63] (Laws LJ).

<sup>46</sup> *ibid* (n 41) [207] (Lord Neuberger).

<sup>47</sup> *ibid* (n 40) [62] (Laws LJ), *ibid* (n 33) [207] (Lord Neuberger).

Human Rights Act does not require a supermajority. Thus, at least in terms of its formal legal status, the Human Rights Act seems compatible with political constitutionalism.

A second consequence of UK constitutional traditions is that the framers did not envisage rights protection as an exclusive responsibility of the courts.<sup>48</sup> As Lord Falconer describes, “[the Labour government] didn’t bring in the Human Rights Act to get a litigation culture.”<sup>49</sup> Instead, the aim was to have Parliament “play a leading role in protecting the rights which are at the heart of a parliamentary democracy.”<sup>50</sup> Consequently, the framers rejected the orthodox choice between the Courts and Parliament as the sole guardians of human rights.<sup>51</sup> To do this, the Act attempts to produce a shared labour approach between the executive, Parliament and the judiciary with an emphasis on both pre-legislative and post legislative scrutiny. According to Lord Irvine, it is an attempt “to create a society in which our public institutions are habitually, automatically responsive to human rights considerations in relation to every procedure they follow, in relation to every practice they follow, in relation to every decision they take, in relation to every piece of legislation they sponsor.”<sup>52</sup>

These intentions behind the Act can lead to conflicting accounts regarding its purpose and operation. For example, Alison Young, Richard Clayton, Tom Hickman and Francesca Klug all

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<sup>48</sup> Joint Committee on Human Rights, ‘The Case for a Human Rights Commission’ Sixth Report of Session 2002-03 (HL Paper 67-I/HC 489-I), at para 19.

<sup>49</sup> Lord Falconer, ‘Human Rights and Constitutional Reform’ (Human Rights and Constitutional Reform Law Society and Human Rights Lawyers’ Association London, 17 February 2004). <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/speeches/2004/lc170204.htm>> accessed 7 April 2015.

<sup>50</sup> *ibid* (n 17) para 3.6.

<sup>51</sup> M Hunt, H Hooper and P Yowell, ‘Parliaments and Human Rights: Redressing the Democratic Deficit’ (Art and Humanities Research Council, 2012) 6, <<http://www.ahrc.ac.uk/News-and-Events/Publications/Documents/Parliaments-and-Human-Rights.pdf>> accessed 10 February 2015.

<sup>52</sup> Joint Committee on Human Rights, ‘Minutes of Evidence on the Implementation of the Human Rights Act 1998 given by Lord Irvine of Lairg’ Session 2001-2002 (HL 66-ii, HC 332-ii) Q38.

believe the Act represents an intention to balance rights protection and parliamentary sovereignty through the adoption of a dialogue model.<sup>53</sup> Peter Hogg and Allison Bushell developed the model based on their observation of the Canadian human rights system. “If judicial decision is open to legislative reversal, modification or avoidance” then this is representative of a dialogue model.<sup>54</sup> Here judicial and democratic actors can disagree with each other and ultimately parliamentary sovereignty is theoretically preserved as “the final decision is the democratic one.”<sup>55</sup> In contrast, Philip Sales and Richard Ekins argue that its purpose is to “provide a domestic remedial regime in relation to rights to which the United Kingdom is subject under international law.”<sup>56</sup> With all constitutional actors involved “to replicate what they understand the ECtHR would decide in that situation.”<sup>57</sup> Thus, they argue the Act is more balanced towards the compliance with UK international obligations and strongly disagree with the idea the Act promotes a dialogue model.

### **3) The Human Rights Act’s Institutional Model of Rights Protection**

The Human Rights Act attempts to ensure “human rights form part of the rules of the game” that are recognised and respected by the government, Parliament and the judiciary.<sup>58</sup> It seeks to create a culture of rights and responsibilities, in which the importance of having the need to respect

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<sup>53</sup> A Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009) 115-159; and R Clayton ‘Judicial deference and “democratic dialogue”: the legitimacy of judicial intervention under the Human Rights Act 1998’ [2004] P.L. 33-47; and T Hickman, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’ [2005] P.L. 306-335; and F Klug, ‘The Human Rights Act - a “third way” or “third wave” Bill of Rights’ [2001] E.H.R.L.R. 361-372.

<sup>54</sup> P.W Hogg and A A Bushell, ‘The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)’ (1997) 35 Osgoode Hall L.J. 75, 79.

<sup>55</sup> *ibid* 80.

<sup>56</sup> P Sales and R Ekins, ‘Rights- consistent interpretation and the Human Rights Act 1998’ (2011) 127 L.Q.R. 217, 218.

<sup>57</sup> *ibid* 228.

<sup>58</sup> J Croft, ‘Whitehall and the Human Rights Act 1998 The First Year’ (The Constitutional Unit, UCL, London) <<https://www.ucl.ac.uk/spp/publications/unit-publications/88.pdf>> accessed 16 April 2015.

Convention rights is mainstreamed in the thinking and actions of political and judicial actors.<sup>59</sup> The Act creates a model of rights protection which operates within what Janet Hiebert describes as a four stage institutional system.<sup>60</sup> The first two stages relate to the pre-legislative context. These attempt to improve rights protection by integrating it into the existing legislative process involving the government and Parliament. The final two stages relate to post legislative scrutiny. Stage 3 engages the courts, and if stage 4 occurs, the government and Parliament engages in post legislative scrutiny. Given that three out of the four stages engage political actors, one could describe the UK's model as a more politically orientated form of rights protection.<sup>61</sup> However, we should not assume simply because of this that it is compatible with political constitutionalism. It must be determined if each individual stage is compatible with political constitutionalism. The question of compatibility was be considered at both a theoretical level and in practice. It may well be the case that despite being potentially compatible with political constitutionalism, it is not realised in practice. Finally, we must consider how compatible in practice these stages are with the different accounts of political constitutionalism. It may be that, the Act is more compatible for proponents of one account than the other. This might mean that the different account would perceive reforms to the Human Rights Act different.

### **Stage One: Executive Rights Protection**

The model begins with the internal consideration of the possible rights implications of legislation by the executive, as the majority of legislation is initiated by the government. This stage infuses rights consideration into the traditional legislative considerations by the government. It seeks to promote awareness within the executive about the possible implications of their plans with the

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<sup>59</sup> Joint Committee on Human Rights, 'Minutes of Evidence on Human Rights Act: building the culture of rights and responsibilities given by Richard Wilson' Session 2001-02, 21 March 2002, Annex B.

<sup>60</sup> J Hiebert, 'The HRA: Ambiguity about Parliamentary Sovereignty' (2013) 14 German Law Journal 2253, 2254.

<sup>61</sup> *ibid.*

conventions rights before they introduce their bill before Parliament. This culminates with the statutory requirement under section 19 of the Act for each minister to make a statement about the compatibility of their bill when they are introducing it to Parliament.<sup>62</sup> A minister may give a statement to the effect that their bill is compatible. However, the minister may also state that they believe their bill may not, or is not compatible but wishes to proceed nonetheless.<sup>63</sup> However, section 19 reports are merely the outcome of a series of pre-introduction considerations by the government.

Before a bill can be introduced, it must receive the approval of the Parliamentary Business and Legislation (PBL) Committee of the Cabinet. This committee “manages the government's current legislative programme” and primarily exists to help ensure that the bill’s passage through Parliament is as smooth as possible. This Committee is primarily focused with reducing the risk of criticism, possibility of amendments and ensuring time wasting during the legislative passage of government business is kept to a minimum.<sup>64</sup> The committee is in charge of choosing which bills will form part of the government legislative programme, whether the bill can be published in draft form, when the bill can be introduced to Parliament and which house the bill will be introduced in.<sup>65</sup> As such, the Committee holds considerable power within the executive. Ultimately, the department seeking to introduce the bill will have to satisfy the PBL committee that their bill is ready and that other legal and procedural issues have been resolved before the government is willing to introduce the bill.<sup>66</sup> The PBL requires an ECHR memorandum setting

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<sup>62</sup> *ibid* (n 27) s.19 (1) (a).

<sup>63</sup> *ibid* (n 27) s.19 (1) (b).

<sup>64</sup> Cabinet Office, ‘Guide to Making Legislation’ July 2014, 2.1 - 2.7.

<sup>65</sup> Cabinet Office, ‘Guidance Legislative process: taking a Bill through Parliament’ 20 February 2013 <<https://www.gov.uk/legislative-process-taking-a-bill-through-parliament>> accessed 16 April 2015.

<sup>66</sup> *ibid*.

out the bill's compatibility before approval of the bill for introduction or publication in draft.<sup>67</sup> The Cabinet Office Guide makes clear that rights consideration is “an integral part of the policy-making process, not a last minute compliance exercise” and, hence, “early discussion with departmental legal advisers is essential.”<sup>68</sup> The Cabinet Manual and Cabinet Guide to Making Legislation also provide a description of the ECHR and Human Rights Act for Ministers and their departments.

The department must produce a memoranda that covers the rights issue raised with a frank assessment of the vulnerability to challenge in legal and policy terms.<sup>69</sup> The PBL requires a “clear and succinct statement of the human rights considerations and the justification in ECHR terms for any interference” but such a statement should only make reference to significant cases and avoid over-lengthy discussion of the case law.<sup>70</sup> Legal advice on compatibility will primarily come from departmental legal advisers and legal advisers in the Ministry of Justice's Human Rights Division.<sup>71</sup> Furthermore, once a memorandum is produced, it must be sent to the Attorney General's Office (referred to in the Cabinet Manual as the Law office) before submitting said memorandum to the PBL.<sup>72</sup> The memorandum “must be cleared by the Law Officers before it is submitted to the [PBL] committee”<sup>73</sup> However, even where the PBL and law office approve a bill, allowing it to be introduced, the guidelines make clear that “ultimately, it is the Minister in charge of the Bill who is accountable to Parliament for stating that the Bill is compatible with the

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<sup>67</sup> *ibid* (n 64) 98.

<sup>68</sup> *ibid*.

<sup>69</sup> *ibid* 101 para 11.104.

<sup>70</sup> *ibid*.

<sup>71</sup> *ibid* 101 para 11.100.

<sup>72</sup> *ibid* 100-101 para 11.102.

<sup>73</sup> Cabinet Manual (1st edn, 2011) 53 para 6.31.

Convention rights.”<sup>74</sup> This is a reflection of the convention of individual ministerial responsibility and seeks to incentivise ministers to avoid risking their ministerial career by taking a lazy approach to matters relating to the Convention.

The PBL Committee will aim to ensure a statement of compatibility can be given for the majority of bills, but section 19 (1) (b) recognises that this may not always be the case.<sup>75</sup> This provision reflects a realistic understanding of the pressures on government. From time to time, the government will need to “proceed with legislation without being fully aware of its implications.”<sup>76</sup> This occurred when the government introduced the Communication Bill 2003.<sup>77</sup> Section 19 is said to have facilitated a growing sensitivity towards rights within the departments of government.<sup>78</sup> However, it also appears to have resulted in “a far larger role in the policy process for government lawyers.”<sup>79</sup> Stage one raises several questions. First, as a consequence of the need to present a section 19 report before Parliament has it resulted in a shift in government and parliamentary behaviour? The enabling account of political constitutionalism might ask whether section 19 has resulted in the government having to abandon policy and engage in an overly cautious desire to avoid legal risk. The limiting account, on the other hand, may wonder if section 19 reports are open to abuse and whether they help improve parliamentary scrutiny of the government.

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<sup>74</sup> *ibid* (n 64) 101-102 para 11.106.

<sup>75</sup> *ibid* (n 27) s.19 (b).

<sup>76</sup> *ibid* (n 26) 96.

<sup>77</sup> Communication Bill 2003.

<sup>78</sup> D Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Stat.L.R.* 91, 93.

<sup>79</sup> *ibid* (n 30) 34.

## Stage Two: Legislature Rights Protection

Stage two is described as parliamentary rights protection and is concerned with the scrutiny of bills during their passage through Parliament. Here, the Human Rights Act seeks to infuse greater rights consideration into the traditional day to day legislative negotiations between the various actors within Parliament. Although it was possible before the Human Rights Act for parliamentarians to discuss the compatibility of legislation with the conventions, the Human Rights Act seeks to improve the likelihood of this occurring. Murray Hunt views the Act as an attempt to foster “a culture of justification” which enhances Parliament’s role to protect rights. A culture of justification can be defined as a system where the adequacy of public justification for the interference or failure to protect a right is subject to transparent scrutiny.<sup>80</sup> Section 19 has a dual function in this regard, as the statements by the ministers are open to scrutiny by parliamentarians who can question the minister’s belief that the bill is compliant. Failure to claim a bill is compatible by way of a section 19 (1) (b) report could be extremely problematic for the government as it is likely to give rise to increased scrutiny by Parliament, which in turn may leave the government open to criticism. This was clearly the intention behind section 19. As Lord Irvine described, failure to give a statement of compatibility will act as “a very early signal to Parliament that the possible human rights implications of the Bill will need and will receive very careful consideration.”<sup>81</sup> Furthermore, section 19 could in some circumstances “focus attention both inside and outside of Parliament on whether there is compelling reasons to enact this legislation.”<sup>82</sup>

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<sup>80</sup> M Hunt, 'The impact of the Human Rights Act on the legislature: a diminution of democracy or a new voice for Parliament?' [2010] E.H.R.L.R. 601, 603.

<sup>81</sup> Lord Irvine of Lairg, HL Deb 27 November 1997, vol 576, col 1163.

<sup>82</sup> *ibid* (n 19) 699.

In addition to section 19 reports, the Joint Committee on Human Rights (JCHR) can further assist Parliament's role in scrutinising legislation. The JCHR has many advantageous qualities to facilitate this. Firstly, the committee is a dedicated joint committee for evaluating rights issues in legislation.<sup>83</sup> Secondly, it is a permanent Joint Committee in Parliament.<sup>84</sup> Traditionally, Joint Committees are ad-hoc, formed to specifically scrutinise a specific bill alongside the normal departmental select committees. The Committee has 12 members; membership is divided between elected MPs and the appointed Lords, six from each House. Thirdly, the committee is said to have a "non-partisan ethos."<sup>85</sup> Hansard Society highlights "the arithmetic of the Lords representation means that the government has not had an overall majority."<sup>86</sup> The members of the Lords are recognised as being less partisan than the commons due to the weaker party discipline in the Lords.<sup>87</sup> Additionally, committee members from the Commons are generally recognised as being less partisan than their front and back bench colleagues. The decision to have a permanent Joint Committee allows the members from the Commons to "exercise a specifically parliamentary role (rather than a party political one)."<sup>88</sup> The Hansard Society suggests Select Committees in general place emphasis on collegiality, consensus (where possible) and avoid party issues.

JCHR performs multiple functions, embracing both pre- and post-legislative work.<sup>89</sup> The JCHR's pre-legislative work is more in line with traditional legislative scrutiny. Firstly, the committee scrutinises section 19 statements by pressing the minister to explain their justification. Secondly,

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<sup>83</sup> J Hiebert, 'Governing like a Judge' in T Campbell, K.D Ewing, A Tomkins (eds), *The Legal Protection of Human Rights* (OUP 2011) 62.

<sup>84</sup> 'Joint Committees' Hansard Society Briefing Paper, Issues in Law Making, Issue 9, June 2006, 2.

<sup>85</sup> *ibid* 2.

<sup>86</sup> *ibid* 1.

<sup>87</sup> *ibid* 5.

<sup>88</sup> *ibid* 5, Joint Committee on Human Rights 'The Committees Future Working Practice' Twenty Third Report of 2005-06 Session, Appendix 1 (Klug Report) para 5.8.

<sup>89</sup> C Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 *Australian Journal of Political Science* 41, 45.

it performs an assessment over risk of incompatibility based on existing domestic and international case law with the aim of being able to complete its reports before the second reading.<sup>90</sup> In the process of performing these tasks, the JCHR collects evidence from minority groups, charities, pressure groups, academics, civil servants and other ministers. Therefore the committee's primary function is to provide Parliament with "regular and often critical reports on the persuasiveness of the minister's earlier claim that a bill is consistent with the Convention rights."<sup>91</sup> The hope being that these reports assist both the executive and Parliament in making an informed decision over whether the existing bill requires amendments and raises awareness of rights issues for future legislation. The JCHR's post-legislative work relates to the following up declarations of incompatibility and Remedial Orders. This includes pressing the Government for a response following a declaration, oversight over Remedial Orders and scrutiny of the remedy.

The 2006 'Klug Report' in the JCHR's working practices highlighted that members of the committee held different opinions over the committee's role. Interviews with members of the committee showed that some members believed their function was to provide 'quasi-judicial' legal advice to Parliament.<sup>92</sup> In contrast, other members suggested the committee could have a broader approach of "advising Parliament to... help frame the agenda on issues of national importance concerning human rights, engaging with, and responding to, the public in the process."<sup>93</sup> In reaction, the committee has sought to accommodate both views into its working practices.<sup>94</sup> Thus, the committee, in Hiebert's opinion, is "an important component of the Human

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<sup>90</sup> *ibid* 45.

<sup>91</sup> *ibid* (n 60) 2254.

<sup>92</sup> Klug Report *ibid* (n 80) para 13.1.i.

<sup>93</sup> Klug Report *ibid* (n 80) para 13.1.ii.

<sup>94</sup> Klug Report *ibid* (n 80) Summary 3.

Rights Act project” as it is an important tool of raising rights awareness in both houses.<sup>95</sup> Several questions arise from stage two. First, how does Parliament think about rights? For example does it just closely consider the case law or does it engage in a range of potential methods of considering rights? Critically for the limiting account of political constitutionalism, the question will be whether section 19 and the JCHR assist Parliament in scrutinising the government’s bills. In contrast, for the enabling account, the question will be as to whether parliamentary scrutiny of section 19 and the JCHR present significant constitutional hurdles for the implementation of their legislation.

### **Stage Three: Judicial Post Legislative Review**

Stage 3 refers to the judicial review stage. Despite pre-legislative consideration and scrutiny of rights issue, the possibility remains that legislation may be incompatible with Convention rights (or at least challenged on that basis in legal proceedings). The ECHR case law changes as what was once compliant can be found to be non-compliant later under the living tree of interpretation. Furthermore, countless Acts remain in effect which did not go through the sort of rights-informed legislative scrutiny described above due to being passed before the Act was introduced. Stage 3 requires the judiciary to ‘reduce the mis-match’ between the Convention and domestic law.<sup>96</sup> This is to be achieved through sections 3 and 4 of the Human Rights Act. Section 3 is the provision relating to the statutory interpretation of legislation by the courts.<sup>97</sup> In contrast, under section 4, a higher court may issue a ‘Declaration of incompatibility’ which gives rise to stage

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<sup>95</sup> J.L Hiebert ‘Parliament and the Human Rights Act: can the JCHR help facilitate a culture of rights?’ (2006) 4 ICON 1, 28.

<sup>96</sup> *ibid* (n 26) 87.

<sup>97</sup> *ibid* (n 27) s.3.

4.<sup>98</sup> These two provisions are said to form a “comprehensive regime for dealing with legislation that is potentially contrary to one or more of the conventions rights.”<sup>99</sup> The relationship between the two is that under section 3(1) “[s]o far as it is 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” by the courts.<sup>100</sup> Where it is ‘not possible’ to do so, a higher court may issue a declaration of incompatibility.<sup>101</sup> The question of what is and what is not possible becomes paramount in understanding the relationship between these judicial provisions. Unfortunately, section 3 itself is unclear on what is meant by “so far as possible.”

The leading case on the limits of section 3(1) is *Ghaidan v Mendoza*.<sup>102</sup> The case revolves around paragraph 2(2) of Schedule 1 of the Rent Act 1977, which states on the death of a protected tenant of a dwelling-house his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession.<sup>103</sup> The Housing Act 1988 amended Schedule 1 of Rent Act to include “a person who was living with the original tenant as his or her wife or husband.”<sup>104</sup> Thus marriage was not necessary. In the pre-Human Rights Act case of *Fitzpatrick v Sterling House Association Ltd*, the House of Lords held this provision did not include persons who are in a same-sex relationship due to gender specific connotations.<sup>105</sup> In their lordships opinion, to interpret the provision as to allow same-sex relationships would go beyond the recognised standards of statutory interpretation, therefore, this was a matter for Parliament to

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<sup>98</sup> *ibid* (n 27) s.4.

<sup>99</sup> *ibid* (n 19) 703.

<sup>100</sup> *ibid* (n 27) s.3 (1).

<sup>101</sup> *ibid* (n 27) s.4 (1).

<sup>102</sup> *Ghaidan v Mendoza* [2004] 3 W.L.R 113.

<sup>103</sup> Rent Act 1977, Schedule 1 Para 2.

<sup>104</sup> *ibid* Schedule 1 Para 2 (2).

<sup>105</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

resolve should it wish.<sup>106</sup> *Ghaidan* returns to this issue following the Human Rights Act coming into force. The question was whether this reading could be compatible with the Article 14's prohibition on discrimination read in conjunction with Article 8.<sup>107</sup> Their Lordship held it was not. As a consequence, they used section 3 to interpret the provision in a way which would be compatible with the Conventions rights. In doing so, their Lordships attempted to determine the limits of section 3.

Lord Nicolls stated that the use of section 3(1) does not depend on the presence of ambiguity in the legislation. Rather, even where “the meaning of the legislation admits no doubt, section 3 may nonetheless require the legislation to be given a different meaning.”<sup>108</sup> In doing so Nicolls acknowledged that “section 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>109</sup> Thus section 3 “enables language to be interpreted restrictively or expansively... It is also apt to require a court to read in words which alter the meaning of the enacted legislation, so as to make it Convention-compliant.”<sup>110</sup> Nevertheless, section 3 is subject to limitations. Firstly, the court is not entitled to violate a fundamental feature of the legislation. As Lord Rodgers stated “however powerful the obligation in section 3(1) may be, it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen.”<sup>111</sup> Therefore, the interpretation must “go with the

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<sup>106</sup> *ibid*, 33-34, 67.

<sup>107</sup> ECHR Article 8 and 14.

<sup>108</sup> *Ghaidan v Mendoza* [2004] 3 W.L.R 113, [29] (Lord Nicholls).

<sup>109</sup> *ibid* [30] (Lord Nicholls).

<sup>110</sup> *ibid* [32] (Lord Nicholls).

<sup>111</sup> *ibid* [121] (Lord Rodger).

grain”<sup>112</sup> and “underlying thrust of the statute.”<sup>113</sup> Secondly, the courts should not make a decision for which they are not equipped.<sup>114</sup> Lord Nicholls cites the decision of *Bellinger v Bellinger*<sup>115</sup> as supportive of this approach. In *Bellinger*, the petitioner was a transsexual female who when born had been classified as male at birth. She sought to use section 3(1) to make the Matrimonial Causes Act 1973<sup>116</sup> compatible with the convention. The House of Lords declined to use section 3 on the grounds that in doing so their lordships would be required to handle issues they were ill-suited to deal with due to the potential wide ramifications of the outcomes.<sup>117</sup>

Under section 4 (2), the higher courts may make a declaration of that incompatibility.<sup>118</sup> As Colm O'cinneide notes, section 4 allows the courts to make a statement “that sets out [on] their legal finding that the statute in question is not compatible with the Convention.”<sup>119</sup> A declaration of incompatibility neither affects the continuing operation or enforcement of the legislation in question, nor does it bind the parties to the case in which the declaration is made.<sup>120</sup> Instead, the “decision on whether to remedy the incompatibility by amending the legislation rests with the government and, ultimately, Parliament.”<sup>121</sup> Thus, it “leaves the ball in Parliament’s court.”<sup>122</sup> Section 4 appears to only allow the courts to prod Parliament into action to remedy the defect,

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<sup>112</sup> *ibid* [121] (Lord Rodger).

<sup>113</sup> *ibid* [33] (Lord Nicholls).

<sup>114</sup> *ibid* [33] (Lord Nicholls).

<sup>115</sup> *Bellinger v Bellinger* [2003] 2 AC 467.

<sup>116</sup> Matrimonial Causes Act 1973, s.11(c).

<sup>117</sup> *ibid* (n 108) [34] (Lord Nicholls).

<sup>118</sup> *ibid* (n 27) s.4.

<sup>119</sup> C O’Cinneide, ‘The Human Rights Act and the Slow Transformation of the UK’s ‘Political Constitution’, UCL Institute for Human Rights, 2012, 10.

<[http://www.ucl.ac.uk/human-rights/research/working-papers/docs/colm-o\\_cinneide](http://www.ucl.ac.uk/human-rights/research/working-papers/docs/colm-o_cinneide)> accessed 11 February 2015.

<sup>120</sup> *ibid* (n 27) s.4 (6).

<sup>121</sup> R Bellamy, ‘The Political Constitution and Human Rights Act’ (2011) 9 *ICON* 86, 98.

<sup>122</sup> Joint Committee on Human Rights, ‘Oral Evidence on Human Rights Judgments given by Professor Jeremy Waldron’ Session 2010-2012, 15 March 2011, Q46.

rather than strikes down the inconsistent legislation.<sup>123</sup> Accordingly, Lord Scott’s description of section 4 as being a remedy that is “political in character rather than legal” seems apt.<sup>124</sup>

A more contemporary case over what is possible under section 3 (1) is *R (GC) v Commissioner of Police of the Metropolis*.<sup>125</sup> The case regards the retaining of biometric data such as DNA samples and finger prints taken as evidence to be kept in aid of the detection of crimes at a later date. s.64 (A1) of the Police and Criminal Evidence Act,<sup>126</sup> allows the Police to collect biometric data from a person in connection with the investigation of an offence. A later amendment states “samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes” listed including the prevention or detection of crime.<sup>127</sup> Although, the Association of Chief Police Officers provide guidelines which allowed Chief Officers the discretion to destroy the data in exceptionally rare circumstances.<sup>128</sup> In a post Human Rights Act case of *R (Marper) v Chief Constable of South Yorkshire*, the House of Lords had held this regime to be compatible with Article 8.<sup>129</sup> However, the ECtHR disagreed with the House of Lords in the case of *Marper v UK*. The ECtHR held instead this was a disproportionate interference with an applicant’s right to respect for private life under Article 8.<sup>130</sup> Although the UK government was implementing legislation in response to *Marper v UK* at the time, the Supreme Court still had to make a ruling in *GC* on how to respond to *Marper v UK* now its previous precedent could not stand.<sup>131</sup> Though the Supreme Court could have issued a

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<sup>123</sup> *ibid* (n 119) 10.

<sup>124</sup> *A v Secretary of State for the Home Department* [2005] 2 A.C. 68, [145] (Lord Scott).

<sup>125</sup> *R (GC) v Commissioner of Police of the Metropolis* [2011] UKSC 21.

<sup>126</sup> Police and Criminal Evidence Act 1984, s.64 (1A) (a).

<sup>127</sup> *ibid* s.64 (1A) (b).

<sup>128</sup> *ibid* (n 125) [4] (Lord Dyson).

<sup>129</sup> *R (Marper) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196.

<sup>130</sup> *S and Marper v United Kingdom* (2008) 48 EHRR 1169.

<sup>131</sup> *ibid* (n 125) [15] (Lord Dyson).

declaration of incompatibility, instead the Courts used section 3.<sup>132</sup> A 5/2 majority held “it is possible to read and give effect to section 64(1A) in a way which is compatible with the ECHR.”<sup>133</sup> As Beverley Steventon reported, “the use of the word ‘*may*’ not ‘*must*’ allows for the reading of this section in a way that is compliant with article 8.”<sup>134</sup> Lord Rodger dissented on the grounds he felt the use of section 4 would be more appropriate in the circumstances. In his view, Parliament had wanted to eliminate the danger of valuable evidence being lost and potential prosecutions of the guilty based on the latest science would be jeopardised if material had to be removed from the database. For that reason, “providing for the material to be retained on the database indefinitely was therefore the fundamental feature.”<sup>135</sup> Given this, Lord Rodgers advocated that section 4 was a more suitable course of action.<sup>136</sup> This difference in opinion about what was a fundamental feature of the Act in *GC* represents a good example of the continuing uncertainty about when the courts feel it is appropriate to use section 3 or section 4. Although statutory interpretation is an essential part of the relationship between Parliament and the courts, section 3 is a significant expansion of statutory interpretation powers. Does section 3 represent a judicial amendment power and if so does this render it incompatible with political constitutionalism? It must also be asked as to whether the government and Parliament have the freedom to reject a section 3 interpretation at a later date? In regards to section 4, it must be determined if the provision really does leave the government and Parliament the freedom to respond. Finally, we must also consider whether these provisions cohere with the limiting and enabling accounts of political constitutionalism.

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<sup>132</sup> *ibid* (n 125) [65-66] (Baroness Hale).

<sup>133</sup> *ibid* (n 125) [35] (Lord Dyson).

<sup>134</sup> B Steventon, ‘DNA profile retention and the right to respect for private life’ (2011) 16(1) *Cov. L.J.* 55, 58.

<sup>135</sup> *ibid* (n 125) [114] (Lord Rodger).

<sup>136</sup> *ibid* (n 125) [121] (Lord Rodger).

#### Stage Four: Democratic Post Legislative Review

The use of section 4 engages the fourth stage of the model. It is the junction between the political and legal actors in terms of post legislative scrutiny. Following a declaration by a higher court, the judicial decision is open to legislative reversal, modification, or avoidance, the discretion lies with the political actors on how to proceed after a declaration of incompatibility. This is said to represent the dialogue model and should theatrically maintain parliamentary sovereignty.<sup>137</sup> Chintan Chandrachud suggests that it should be viewed as creating two types of space for democratic actors to respond. First, there is a decisional space, this refers to freedom to respond. Decisions may be accepted, either fully or partially, it may also be rejected or it may be ignored.<sup>138</sup> Should the government and parliament either reject or ignore the declaration, the claimant may go to the ECtHR, although they may not win. Thus in practice the government's freedom to ignore the decision is unlikely, they must either accept it, or reject it. In the latter case, they must be prepared to present their arguments to ECtHR as part of their treaty obligations. The second type of space is the remedial space, this refers to how democratic actors address declaration of incompatibility if they choose to accept the decision space.<sup>139</sup> They can do the minimum necessary to accept or they may do something completely different. It also refers to the process in which they make the changes. This can take several forms. Under section 10 of the Human Rights Act, a minister of the Crown may make a remedial order, to fast track the amendments to incompatible provisions.<sup>140</sup> This occurred after *R (on the application of H) v The Secretary of State for Health*.<sup>141</sup> However, what has become far more common is to either repeal

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<sup>137</sup> Jack Straw, HC Deb 21 October 1998, vol 317, col 1300.

<sup>138</sup> C Chandrachud, 'Reconfiguring the discourse on political responses to declarations of incompatibility' [2014] P.L. 624, 625.

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid* (n 27) s.10, Schedule 2.

<sup>141</sup> *R (on the application of H) v Mental Health Review Tribunal for the North and East London Region and The Secretary of State for Health* [2001] EWCA Civ 415.

or amend through the ordinary legislative process. For example, following *R (on the application of M) v Secretary of State for Health*,<sup>142</sup> the law was simply amended by the Mental Health Act 2007.<sup>143</sup> To determine stage 4 compatibility with political constitutionalism, we must analyse how and why the government and parliament chooses to respond to declarations.

## Conclusion

This chapter has provided an overview of how the Human Rights Act operates. The Act creates an ambitious institutional model of rights protection which engages both political and legal actors over various stages. Nevertheless, the Human Rights Act poses serious implications for the UK's Political Constitution, not only in terms of judicial power, but also regarding the day to day work by the government and Parliament. I have sought to raise questions regarding the Act and Political Constitutionalism. The most crucial question for political constitutionalists will be whether the expansion of judicial powers under the Act allows the courts to dominate the democratic institutions. Furthermore; these judicial powers may also have implications for the judiciary's relationship with the government and Parliament. The democratic form of rights protection also raises several questions for proponents of the limiting and enabling accounts; for example, whether they have resulted in a change in behaviour by the government and Parliament. It will be critical for the enabling account that these forms of democratic rights protection do not become a frequent obstacle to successful delivery of the policy. Proponents of the limiting account will be concerned with whether the Act has improved Parliament's ability to protect rights through the holding of the government to account. These questions will be considered in the following chapters.

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<sup>142</sup> *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094.

<sup>143</sup> The Mental Health Act 2007.

### 3.

## **Political Constitutionalism and Judicial Scrutiny under the Human Rights Act**

Under the Human Rights Act, the judiciary plays a vital role in post-legislative rights protection and scrutiny through Section 3 and 4. Therefore, it is critical to analyse whether these powers can be compatible with political constitutionalism. To answer this, one must first determine what type of judicial power might be compatible with political constitutionalism. I will suggest that weak-form judicial review can be compatible. I will then analyse whether sections 3 and 4 of the Act are representative of weak form review, both in theory and practice. In the final section of this chapter, I will consider the possible implications of these powers for the different accounts of political constitutionalism identified in chapter one.

### **1) Weak Form Review and Political Constitutionalism**

Mark Tushnet has used the terms ‘weak’ and ‘strong’ form judicial review to distinguish between different types of constitutional review. They represent opposing poles on a scale which can be used to measure judicial power. Where the judiciary has the ability to strike down, dis-apply or “modify the effect of a statute to make its application conform with individual rights,” their powers are said to be representative of strong form judicial review.<sup>1</sup> Furthermore, “judicial interpretations of the Constitution are final and un-revisable by ordinary legislative majorities.”<sup>2</sup> Instead, they require supermajorities to amend the constitution, or the court to overturn its own

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<sup>1</sup> M Tushnet, 'New Forms of Judicial Review and the Persistence of Rights and Democracy Based Worries' (2003) 38 Wake Forest L. Rev. 813, 824, J Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346, 1354.

<sup>2</sup> M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009) 33.

precedents. In practice, given the high threshold required, the court's interpretation of the rights prevails over the legislatures.<sup>3</sup> In contrast, under weak-form review, the courts are given the opportunity to consider the constitutional compatibility of legislation "without displacing the ultimate power of legislatures to determine public policy."<sup>4</sup> The courts can "assess legislation against constitutional norms, but they do not have the final word on whether statutes comply with those norms."<sup>5</sup> The judicial interpretation may be rejected by political branches through more or less ordinary legislative activity.<sup>6</sup>

Applying this to political constitutionalism suggests that only weak form review can be compatible.<sup>7</sup> Three arguments support this claim. First, weak form review theoretically preserves sovereignty of democratically legitimate institutions to decide if and how to respond to the court's judgment.<sup>8</sup> Second, the nature of weak review reflects the acceptance of the contestability of rights; they are open to disagreement and any decision about them is fallible.<sup>9</sup> Third, weak form review provides for a more equal consideration of interests by political institutions than the courts are able to provide.<sup>10</sup> Weak review is representative of an editorial form of democracy, in that judgments serve as "editorial alarm bells" rather than authoritarian commands.<sup>11</sup> Strong form review does not share these characteristics. An undemocratic institution effectively imposes

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<sup>3</sup> *ibid* 21.

<sup>4</sup> Tushnet, *ibid* (n 1) 831.

<sup>5</sup> Tushnet, *ibid* (n 1) 831, *ibid* (n 2) IX.

<sup>6</sup> M Tushnet, 'Political Constitutionalism and Weak Form Judicial Review' *Review* (2013) 14 *German Law Journal* 2249, 2250.

<sup>7</sup> R Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the Hirst Case', in A Føllesdal, J K Schaffer, G Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives*, (CUP 2013) 254.

<sup>8</sup> R Bellamy, 'Political constitutionalism and the Human Rights Act' (2011) 9 *ICON* 86, 89.

<sup>9</sup> *ibid* (n 7) 254.

<sup>10</sup> *ibid* (n 7) 255.

<sup>11</sup> R Bellamy, 'Republicanism, Rights and Democracy,' in A Niederberger, P Schink (eds), *Republican Democracy: Liberty, Law and Politics* (Edinburgh University Press 2013) 273.

its own or a minority's will over the majority, producing domination and other consequences for ordinary political activity.

Nevertheless, there is one potential problem for political constitutionalism. Weak-form judicial review is unpredictable because of a lack of guidelines on how political or legal actors should react to one another's decisions.<sup>12</sup> If it is used incorrectly, it can defeat its own purpose. It "may fail to protect democracy if despite having the opportunity to respond, the legislature is convinced that judiciary has greater authority to determine the decisions of rights."<sup>13</sup> Alternatively, it "may fail to protect rights if courts exercise restraint."<sup>14</sup> Tushnet contends this renders it unstable as it "may degenerate into a return to parliamentary supremacy or escalate into strong-form review."<sup>15</sup> For political constitutionalism, the latter is problematic. Weak form review provides little certainty that the judicial powers are not a Trojan horse for the strong-form review. Despite this, potential uncertainty should not render weak form review incompatible with political constitutionalism. Instead, political constitutionalism can provide guidelines to promote stability. Political actors should recognise the contestability of rights, that they give rise to different interpretations. Politicians should not be overly deferential to the courts.<sup>16</sup> They must be willing to contest the court's interpretation when they disagree. Political actors must "think twice, not blindly obey" the judgments of the court.<sup>17</sup>

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<sup>12</sup> A Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009) 118-119.

<sup>13</sup> *ibid* 119.

<sup>14</sup> *ibid* 119.

<sup>15</sup> Tushnet *ibid* (n 1) 814.

<sup>16</sup> D Nicol, 'Law and Politics after the Human Rights Act' [2006] P.L. 722, 745.

<sup>17</sup> C Gearty, *Can Human Rights Survive? The Hamlyn Lectures 2005* (CUP 2006) 96.

There is a strong argument for viewing weak form review as compatible with political constitutionalism at a normative level. In practice, it will remain crucial that it does not collapse into strong form review. Therefore, one must analyse whether section 3 and 4 are representative of weak form review in both theory and practice to determine if they can be compatible. I will begin with section 4. I admit this seems counterintuitive given the structure of the Human Rights Act. Nevertheless, I feel that the strengths of section 4 and weaknesses of section 3 are best highlighted by adopting this structure. As I will argue below, while section 4 can be seen as compatible with political constitutionalism, section 3 cannot. Despite the desirability of section 4 for political constitutionalists, under the Act, section 4 can only be used where it would be impossible to resolve the incompatibility with section 3. This further highlights the problems of section 3 and structure of the Act for political constitutionalists.

## **2) Section 4 and Political Constitutionalism.**

In theory, the power of a higher court to issue a declaration of incompatibility is representative of weak form review. Section 4 is designed to give the last word on whether to revise legislation or not to Parliament.<sup>18</sup> It represents a clear intention by the framers to protect parliamentary sovereignty and maximize rights protection.<sup>19</sup> Political branches may accept or reject the declaration. The Act requires a positive legislative action to accept the decision and remedy incompatibility. It does not require any positive legislative action to reject a declaration, although ignoring or rejecting a declaration is likely to lead to the applicant challenging the decision before the ECtHR. As we shall see, many political constitutionalists find it to be the most

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<sup>18</sup> *ibid* (n 8) 99.

<sup>19</sup> Lord Irvine of Lairg, HL Deb 03 November 1997, vol 582 col 1228-1229. Secretary of State for the Home Department 'Rights Brought Home: The Human Rights Bill' Cm 3782, para 2.11-2.13.

desirable judicial power found in the Act. Connor Gearty has gone as far as describing section 4 as “probably the most ingenuous and perhaps also the most effective” provision of the Human Rights Act.<sup>20</sup>

There are several arguments that suggest that section 4 appears to be normatively compatible with political constitutionalism. First, section 4 theoretically preserves parliamentary sovereignty. Richard Bellamy asserts that section 4 achieves this, as the final decision over the correct interpretation of rights will be a democratic one. The government and Parliament retains control instead of the judiciary, thus providing assurances that the law will reflect the interest of citizens, rather than judges.<sup>21</sup> Gearty adopts a similar view, claiming that section 4 invites “the political back in to control the legal at just the moment when the supremacy of the legal discourse seems assured.”<sup>22</sup> Secondly, section 4 reflects an acceptance of the contestability of rights. A declaration merely offers “thoughtful opinions on rights.”<sup>23</sup> The lack of binding legal effect means that a declaration is not “pronouncements of truth from on high” about the correct interpretation of rights.<sup>24</sup> The court is merely saying “this is our truth on rights, now tell us yours.”<sup>25</sup>

Thirdly, section 4 can promote debate among citizens. According to Jeremy Waldron, declarations serve to “alert the public that this was not a trivial matter but a hugely important

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<sup>20</sup> C Gearty, 'The Human Rights Act - an academic sceptic changes his mind but not his heart' [2010] E.H.R.L.R. 582, 583.

<sup>21</sup> *ibid* (n 8) 110-111.

<sup>22</sup> *ibid* (n 17) 95.

<sup>23</sup> *ibid* (n 16) 743.

<sup>24</sup> *ibid* (n 17) 96.

<sup>25</sup> *ibid* (n 16) 475.

one, and not a right to be taken away lightly,” thus promoting a debate over the right.<sup>26</sup> Similarly, Danny Nicol suggests it allows judges to “influence political debate without stifling it.” He argues that a declaration has the potential to “grab headlines, thereby exposing rights issues to wider debate and forcing them up the political agenda.”<sup>27</sup> The fourth argument is that it allows the courts to assist the political branches without overruling them. Gearty contends that there are “some rights issues... which judges are equipped to identify but not to resolve.”<sup>28</sup> Furthermore, Tushnet highlights that all legislatures have limitations, such as a lack of foresight, time constraints and draftsmanship problems. They legislate knowing there is always the risk that an individual provision of their Act in practice may result in something unintended in specific circumstances. However, judges may be able to recognise a potential problem when a dispute comes before them. The judge can identify the issue and signal it to Parliament, who may in hindsight modify the law or uphold their original view on the provision.<sup>29</sup> Furthermore, it might encourage a current Parliament to re-consider old legislation passed by previous Parliaments. It provides Parliament “an opportunity to cleanse the statute books of legislation which is outdated.”<sup>30</sup> It can also provide a mechanism for helping minorities which are so “‘discreet and isolated’ that their concerns fail to gain a hearing through democratic politics.”<sup>31</sup>

The *R(M)* case could be an example of this.<sup>32</sup> The Mental Health Act 1983 provided for the appointment of a nearest relative to the patient who was being detained for illness. The statute governed who was defined as the nearest relative and did not allow the patient to contest it. The

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<sup>26</sup> Joint Committee on Human Rights, ‘Oral Evidence on Human Rights Judgments given by Professor Jeremy Waldron’ Session 2010-2012, 15 March 2011, Q48 and Q61.

<sup>27</sup> *ibid* (n 16) 747.

<sup>28</sup> *ibid* (n 20) 583.

<sup>29</sup> *ibid* (n 6) 2253.

<sup>30</sup> *ibid* (n 6) 2252.

<sup>31</sup> *ibid* (n 7) 255.

<sup>32</sup> *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094.

purpose of the provision was to safeguard the interests of the detained patient.<sup>33</sup> M's adopted father had been appointed. However, M had previously accused him of sexually abusing her as a child. Jeff King describes this as an example of "classic legislative oversight."<sup>34</sup> In 1983, the government and Parliament simply failed to foresee such an issue arising. By giving a declaration, the High Court was able to alert the government and Parliament to this. They responded by considering the case and enacting the Mental Health Act 2007 to resolve this issue.<sup>35</sup>

Finally, Adam Tomkins has attempted to incorporate section 4 into his account of limiting political constitutionalism. Tomkins approves of section 4 because it leaves matters for Parliament to resolve.<sup>36</sup> Moreover, in chapter one, it was noted that Tomkins had suggested that the courts should have the power to refer a matter back to Parliament where there is doubts about the power being conferred on the executive.<sup>37</sup> Indeed, Tomkins acknowledges this idea is heavily influenced by section 4.<sup>38</sup> Therefore, there appears to be a normative argument for recognising section 4 as representative of weak form review and being compatible with political constitutionalism. Not all political constitutionalists are as approving of section 4. J.A.G. Griffith was sceptical of its design, stating it "argues in favour of parliamentary sovereignty while at the same time creating a situation in which governments may often be politically bound to support a judicial finding of incompatibility."<sup>39</sup> This suggests he was concerned that it would collapse into

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<sup>33</sup> A Young, 'Is Dialogue Working under the Human Rights Act 1998?' [2011] P.L. 733, 782.

<sup>34</sup> J King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' in M Hunt, H J Hooper, P Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 168.

<sup>35</sup> *ibid* (n 33) 783-784.

<sup>36</sup> A Tomkins, 'The Rule of Law in Blair's Britain' (2007) 26 UQLJ 255, 267.

<sup>37</sup> See Chapter 1, 26.

<sup>38</sup> A Tomkins, 'The Role of the Courts in the Political Constitution' (2010) 60 UTLJ 1, 21.

<sup>39</sup> J.A.G. Griffith, 'The Common Law and the Political Constitution' (2001) 117 L.Q.R. 42, 51.

strong review because “the pressure on the government to accept their judgment will be irresistible and parliamentary criticism ineffective.”<sup>40</sup>

The application of section 4 might concern political constitutionalists that the power has transmogrified into strong review. According to the latest Ministry of Justice statistics, there have been 29 Declarations granted, 9 of which have been overturned on appeal. 19 out of 20 have been responded to so far. 95% of the time the government has accepted the court’s opinion and remedied the incompatibility.<sup>41</sup> Some such as James Allen and Jonathan Morgan have used these statistics to claim that Parliament is in fact now de facto bound to follow the court’s opinions.<sup>42</sup> However, a closer examination is needed.

First, there are 4 cases which related to provisions that had already been resolved by Parliament at the time of the declaration.<sup>43</sup> Secondly, I would argue we need to distinguish between high and low profile cases to better understand why the government and Parliament have accepted the court’s opinion. Low profile cases do not trigger either a negative response by Parliament or serious debates among citizens. They pass by under-the-radar of the lay person. The most likely reason for this is that a common element of these cases is that the claimants are part of often

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<sup>40</sup> J.A.G. Griffith, 'Human Rights, Legal Wrongs' *New Statesman* (London 21 June 1998) 12.

<sup>41</sup> Ministry for Justice, 'Responding to Human Rights Judgments Report to the Joint Committee on Human Rights on the Government response to human rights judgments 2013–14' (Cm 8962, 2014) Annex A <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389272/responding-to-human-rights-judgments-2013-2014.pdf)> accessed 04 April 2015.

<sup>42</sup> J Allan 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About' 117; and J Morgan 'Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties' 436-427, both in T Campbell, KD Ewing, A Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

<sup>43</sup> See: R (on the application of Wilkinson) v Inland Revenue Commissioners [2003] EWCA Civ 814; R (on the application of Hooper and others) v Secretary of State for Work and Pensions [2003] EWCA Civ 875; R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another [2006] UKHL 54; R (Wright and others) v Secretary of State for Health and another [2009] UKHL 3.

discrete groups and unlikely to register on the political agenda.<sup>44</sup> As King's review of declarations shows, many claimants include mental health patients,<sup>45</sup> transgender persons,<sup>46</sup> and lorry drivers.<sup>47</sup> Similar to *R(M)*, it is unlikely that the Labour or Coalition government set out to intentionally affect these minority groups. They either realised in hindsight their legislation had affected these groups in ways which they had not intended, or they disagreed with a past government's legislation. As a result, the government and Parliament changed the law with little objection.<sup>48</sup> 80% of cases can be categorised as low profile, thus outweighing high profile cases.

In contrast, high profile cases are where the declaration triggers a public debate about whether to accept and how to respond to the court's declarations. These cases become high profile because of strong vocal disagreement by members of the government, Parliament and the media. These declarations tend to relate to national security or involve applicants who are accused or convicted of criminal wrongdoing. High profile cases present a more troubling picture for political constitutionalism. Despite political actors disagreeing with the judicial interpretation, they have chosen to comply with the court's interpretation, suggesting they see the declaration as binding on them. There are 4 cases which fall into this category: *Anderson*,<sup>49</sup> *A (Belmarsh judgment)*<sup>50</sup> and *F and Thompson*.<sup>51</sup> *Smith v Scott* could also be added to this category, despite the situation

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<sup>44</sup> *ibid* (n 34) 178.

<sup>45</sup> *R (H) v London North and East Region Mental Health Review Tribunal* [2001] EWCA Civ 415; *R (M) v Secretary of State for Health* [2003] EWHC 1094.

<sup>46</sup> *Bellinger v Bellinger* [2003] UKHL 21.

<sup>47</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158.

<sup>48</sup> C Crawford, 'Dialogue and declarations of incompatibility under Section 4 of the Human Rights Act 1998' (2013) 25 *Denning L.J.* 43, 60-61.

<sup>49</sup> *R (Anderson) v Secretary of State for the Home Office* [2002] UKHL 46.

<sup>50</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

<sup>51</sup> *R (F and Thompson) v Secretary of State for the Home Department* [2008] EWHC 3170.

being unresolved as of writing this; there is evidence of some attempts to comply with the interpretation.<sup>52</sup>

*Anderson* involved what Nicol described as a “turf war” over sentencing tariffs between the Judiciary and the Home Secretary.<sup>53</sup> The House of Lords held the Home Secretary’s sentencing powers under section 29 of the Crime (Sentences) Act 1997 was incompatible with Article 6 of the convention. Crucially, in *Stafford v United Kingdom* the ECtHR had already reached this judgment.<sup>54</sup> Both judgments received a lukewarm reaction. The Home Secretary stated he was disappointed with the judgment.<sup>55</sup> The Conservative opposition was critical.<sup>56</sup> Merris Amos and Christopher Crawford claim the Home Secretary appeared anxious to give up his role in sentencing.<sup>57</sup> Despite the apprehension and the freedom to reject the declaration, both the government and Parliament accepted the judicial interpretation and remedied the incompatibility with the Criminal Justice Act 2003. In this case, the ECtHR judgment clearly motivated the government to accept the *Anderson* declaration.<sup>58</sup> Given the Home Secretary’s apprehension and the political opposition, it is unlikely the government would have amended the law, had it not been for the ECtHR judgment. The UK would likely have lost again if *Anderson* had gone before the ECtHR.

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<sup>52</sup> *Smith v Scott* [2007] CSIH 9.

<sup>53</sup> *ibid* (n 16) 741.

<sup>54</sup> *Stafford v United Kingdom* (2002) 35 EHRR 32.

<sup>55</sup> C Dyer, 'Blunkett loses key power to keep killers in jail' *The Guardian* (London 29 May 2002) <<http://www.theguardian.com/politics/2002/may/29/ukcrime.immigrationpolicy>> accessed 12 June 2015.

<sup>56</sup> Dominic Grieve, HC Deb 28 October 2002 vol 391, col 605.

<sup>57</sup> M Amos 'R v Secretary for the Home Department, ex p Anderson - Ending the Home Secretary's Sentencing Role' (2004) 67 MLR 108,116-117; *ibid* (n 48) 56.

<sup>58</sup> Amos *ibid* 117.

In Belmarsh, the indefinite detention of foreign suspects without charge was held incompatible with Article 5. Following the declaration, the Home Secretary told the Commons, “the government believe that the powers have played an essential part in addressing the current public emergency... however, I accept the Law Lords' declaration of incompatibility with the ECHR of section 23 of the Anti-terrorism Crime and Security Act.”<sup>59</sup> The Prime Minister Tony Blair later revealed in his autobiography “there was simply a fundamental disagreement between myself and the judiciary and media... Once the House of Lords made the ruling, we had to amend the law.”<sup>60</sup> Furthermore, several prominent members of the Labour government were openly critical of the court’s interpretation.<sup>61</sup> Yet the government did not have to respond or change the law. It could have defended its views before the ECtHR. The reason the government responded is likely to do with the circumstances it found itself in. The detaining of foreign terrorist suspects without trial had already proven to be a controversial issue among parliamentarians, the media and citizens. The Commons did not appear to reject the Lords decision, feeling a more appropriate scheme was needed, and some opposition MPs praised the government for accepting the decision.<sup>62</sup> As Crawford states in this case, “the government amended the law, not because it thought that it was wrong, but because the political pressure to do anything else was just too great.”<sup>63</sup> Another argument is to do with timing. There is evidence that the judgment “caught the government off guard.”<sup>64</sup> It was handed down less than 6 months before the 2005 general election. It is possible that the government was reluctant to challenge the courts during the run up

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<sup>59</sup> Charles Clarke, HC Deb 26 January 2005 vol 430, col 305-306.

<sup>60</sup> T Blair, *A Journey: My Political Life* (Random House 2010) 575.

<sup>61</sup> 'Lords wrong on detainees - Straw' (BBC News. 17 Dec 2004)  
<[http://news.bbc.co.uk/1/hi/uk\\_politics/4103987.stm](http://news.bbc.co.uk/1/hi/uk_politics/4103987.stm)> accessed 12 May 2015.

<sup>62</sup> See HC Deb 26 January 2005, vol 430, David Davis (Conservative) col 309; Mark Oaten (Liberal Democrat) col 312.

<sup>63</sup> *ibid* (n 48) 68.

<sup>64</sup> J L. Hiebert and J B. Kelly, *Parliamentary Bills of Rights: The New Zealand and United Kingdom Experiences* (CUP 2015) 312.

to the election. To openly reject the judicial interpretation would have had political consequences on the campaign. It would have distracted the campaign debate and provided the opposition with ammunition. Thus, the temporal circumstances transpired against the Labour government.

*F and Thompson* is the first high profile case to be dealt with by the Coalition government. The declaration held the inability of those on the sex offenders registers to have their indefinite notification requirement subject to review as being incompatible. Once again, there is strong evidence of disagreement over the judicial interpretation. The press claimed “the Supreme Court ruling will open the door for hundreds of serious criminals to conceal their sick past.”<sup>65</sup> The disagreement appears more vocal by the Conservative side of the Coalition, with the Prime Minister and Home Secretary openly disagreeing with the judgment.<sup>66</sup> Despite the clear objections, the government complied by doing the “minimum necessary.” The *Sexual Offences Act 2003 (Remedial) Order 2012* remedied the incompatibility. Unlike Labour, the Conservatives had shown “a deep hostility to the Human Rights Act” and Strasbourg before taking office.<sup>67</sup> Surely they must have felt more willing to disagree with a domestic court’s interpretation, especially considering Labour also seemed unsupportive of the judgment.<sup>68</sup> Nevertheless, despite Labour’s attempts to force the Home Secretary to openly admit she was not under any obligation to accept the judicial opinion before the commons,<sup>69</sup> the Home Secretary

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<sup>65</sup> R Smith, 'No No No' (New Law Journal 21 May 2010) <<http://www.newlawjournal.co.uk/nlj/content/no-no-no>> accessed 12 May 2015.

<sup>66</sup> A Travis, 'David Cameron condemns supreme court ruling on sex offenders' *The Guardian* (London 6 February 2011) <<http://www.theguardian.com/society/2011/feb/16/david-cameron-condemns-court-sex-offenders>> accessed 12 June 2015.

<sup>67</sup> *ibid* (n 16) 464-469.

<sup>68</sup> *ibid* (n 48) 83.

<sup>69</sup> Jack Straw, HC Deb 16 February 2011 vol 531, Col 960.

was presented herself as being “de-facto bound.”<sup>70</sup> There are two potential reasons for this. The junior partners in the coalition government, the Liberal Democrats, appeared more inclined to accept the declaration.<sup>71</sup> Therefore, the Conservatives were begrudgingly forced to amend the legislation in order to keep the coalition intact.<sup>72</sup> A more cynical argument is presented by Gavin Phillipson. He claims the Conservatives have sought to “weaponise the declaration of incompatibility,” using it to generate public hostility against the ECHR, the Act and judges.<sup>73</sup> He fears that by misrepresenting the judgment and its legal effect, the Conservatives have actively encouraged short-term political defeats to feed a long term campaign.<sup>74</sup> If Phillipson is correct, then this presents a serious problem for political constitutionalism; not only is the government supporting judicial domination, but they are also potentially attempting to distort a future debate by misleading citizens, thus conflicting with the values of open government.

The final case is *Smith v Scott*, which follows from the ECtHR Judgment of *Hirst* regarding the UK’s blanket ban on prisoner voting.<sup>75</sup> Neither the Labour nor the Coalition government fully responded to *Hirst* and *Smith*. However, the Labour government held two consultations during the 2005-10 Parliament, but did not produce a bill. The Coalition government published a draft “*Voting Eligibility (Prisoners) Bill*” in 2012. Yet the government did not bring forward the bill in their final Queens Speech before the 2015 election.<sup>76</sup> There was also a prisoners voting debate in the House of Commons, which resulted in a non-binding but authoritative rejection in

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<sup>70</sup> G Phillipson, ‘The Human Rights Act, Dialogue and Constitutional Principles’ in R Masterman, I Leigh (eds), *The United Kingdom’s Statutory Bill of Rights, Constitutional and Comparative Perspectives* (OUP for the British Academy 2013) 48.

<sup>71</sup> *ibid* (n 48) 84.

<sup>72</sup> *ibid* (n 48) 84.

<sup>73</sup> *ibid* (n 70) 49.

<sup>74</sup> *ibid* (n 70) 45-49.

<sup>75</sup> *Hirst v the United Kingdom (No 2)* [2005] ECHR 681.

<sup>76</sup> A Horne, I White, ‘Prisoners’ voting rights’ (11 February 2015) House of Common Library, Standard note: SN/PC/01764.

principle of prisoner voting.<sup>77</sup> Both the Labour and Coalition government appeared critical of the judgment, yet they have also clearly accepted it and attempted to remedy it. Similarly to Anderson, the shadow of the ECtHR judgment and their international obligation appears to be the biggest source of pressure to comply. Janet Hiebert and James Kelly suggest another reason might be that they faced financial rather than political pressure. The large number of prisoners meant the government faced “substantial costs of litigation and compensation associated with the failure to enact remedial measures.”<sup>78</sup> It is unlikely that the current Conservative government will comply before it attempts to introduce a replacement bill of rights

A possible explanation for all high profile cases is that political actors believe there is a high threshold of disagreement required to disagree with the court’s opinions. During the passage of the bill, an example of where the government would disagree was if courts held abortion laws to be incompatible. In such circumstances “it would be wrong simply to accept what the Committee had said, and that a right to abortion, albeit quite properly limited and developed in this country over a period of 30 years, should suddenly be cast aside.”<sup>79</sup> As Hiebert suggests, this implies Parliament should only disagree with a court decision to protect a right.<sup>80</sup> As a result, Labour and the Liberal Democrats might have set themselves a high threshold. In contrast, one would assume the Conservative Party would adopt a much lower threshold given their criticism of the Act. Thus, political constitutionalists should be interested in how the Conservatives respond to a high profile declaration during 2015-2020 Parliament. A future reform could seek to convince

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<sup>77</sup> HC Deb, 10 February 2011 vol 523 col 493-584.

<sup>78</sup> *ibid* (n 64) 382.

<sup>79</sup> Jack Straw, HC Deb, 21 October 1998, vol 317, col 1301.

<sup>80</sup> J L. Hiebert, 'Governing under the Human Rights Act: the limitations of wishful thinking' [2012] P.L. 27, 32.

both government and Parliament that the threshold should not be seen as high as the example given in 1998 by the framers.

While in theory section 4 appears representative of weak form review, in practice it is less clear. Although the overall picture is not as bad as some have claimed. This is not to deny the responses to high profile cases identified above are not problematic for political constitutionalism. However, they represent a minority of cases and the behaviour of the government and Parliament can still change. On a case by case basis, there has been a range of reasons which suggest why each compliance occurred. Nevertheless, as the Human Rights Act is less than 20 years old, we can only observe it over a short period of time, which is simply “too brief for sweeping generalisations” about Parliamentary responses or the development of a convention.<sup>81</sup> There is a case for seeing section 4 as representative of weak form review and in practice being predominately compatible with political constitutionalism.

### **3) Section 3 and Political Constitutionalism**

In contrast, section 3 is more problematic for political constitutionalists as the power appears more representative of strong form review. There are three problems with section 3; first the interpretation powers are too expansive. Second, said powers do not appear to be subject to sufficient democratic oversight and finally, Section 3 is the primary judicial power for resolving potential incompatible legislation. This final problem relates to the interplay between section 3 and section 4, potentially making the former redundant.

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<sup>81</sup> *ibid* (n 34) 167.

Political constitutionalism accepts the need for some degree of statutory interpretation to ensure that the will of Parliament is applied by the courts. Parliament's will, as a whole, can only be expressed through the words of the text it enacts.<sup>82</sup> This reveals the practical limits of the legislature's law making powers. As Bellamy accepts, "with the best will in the world, one cannot hope to eradicate all such linguistic problems. Nor can legislators be expected to foresee all the potential cases and circumstances to which their legislation may be applied."<sup>83</sup> However, the extent in which Parliament is able to control the courts through the words it uses is important.<sup>84</sup> In the face of ambiguity, the courts have used the purposive approach to find the intention that can be reasonably attributed by Parliament to the Act.<sup>85</sup> As Jeffrey Goldsworthy argues, the courts must act as "an agent striving to interpret and apply statutes equitably, so as better to serve the legislature's values, intentions and purposes."<sup>86</sup> This ensures parliament's legislative intentions are enabled, but it gives judges "a (partly) creative role in attributing to legislation an 'underlying purpose.'<sup>87</sup> The ability of judges to engage in creative interpretation can be reduced through clear intentions and precise wording. This is desirable for political constitutionalism as it reduces the scope for judicial discretion, ensuring the courts will respect Parliaments and distance judicial decision-making from the political fray.<sup>88</sup> Although Parliament may even intentionally leave ambiguities for the judiciary to resolve.<sup>89</sup> This is because it remains

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<sup>82</sup> J Waldron, *Law and Disagreement* (OUP 1999) Ch 4.

<sup>83</sup> *ibid* (n 8) 103.

<sup>84</sup> *ibid* (n 8) 100.

<sup>85</sup> See *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [21], *ibid* (n 16) 728; and J Van Zyl Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' (2007) 70 MLR 294, 297; and A Kavanagh, 'The Role of Parliamentary Intention in adjudication under the Human Rights Act 1998' (2006) 26 O.J.L.S. 179, 184.

<sup>86</sup> J Goldsworthy, 'Legislative Intentions, Legislative Supremacy, and Legal Positivism' in J Goldsworthy, T Campbell (eds) *Legal Interpretation in Democratic States* (Ashgate, Dartmouth, 2002) 66.

<sup>87</sup> Kavanagh *ibid* (n 85) 185.

<sup>88</sup> *ibid* (n 16) 724.

<sup>89</sup> *ibid* (n 8) 93.

“open to Parliament to change the law in response.”<sup>90</sup> For political constitutionalism, some statutory interpretation must be necessary and tolerable for a productive relationship between Parliament and the courts.

Yet under section 3 (1) “purposivism has been eclipsed” by a far stronger form of interpretation.<sup>91</sup> This expansion of interpretative powers coupled with the abstract nature of the convention rights results in the judges being able to “exercise their political judgments in the process of interpretation much more widely than in the past.”<sup>92</sup> Section 3 is poorly drafted providing no guidance to the judiciary. Section 3(1) simply states the court should adopt a Convention compatible reading ‘so far as it is possible to do so.’<sup>93</sup> As Gearty highlights, the problem with the word ‘*possible*’ is that it can be “construed to deliver effective judicial supremacy... or it can be so narrowly restricted that the intended effect of section 3 is largely neutered.”<sup>94</sup> In the early years of the Act, the lack of guidance resulted in uncertainty over the scope of what was possible.<sup>95</sup> Although the situation is now more stable as the parameters have been established by the courts, the current approach is problematic. With the benefit of hindsight, Parliament should have drafted section 3 more precisely themselves, instead of leaving it to the judges to determine.<sup>96</sup>

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<sup>90</sup> *ibid* (n 16) 728.

<sup>91</sup> *ibid* (n 16) 729.

<sup>92</sup> J.A.G. Griffith, 'A Brave New World of Sir John Laws' (2000) 63 MLR 159-170; *ibid* (n 16) 729; and Allan *ibid* (n 42) 109.

<sup>93</sup> A Kavanagh 'What's so Weak About 'Weak-Form Review'? The Case of the UK Human Rights Act 1998' (January 7, 2015). International Journal of Constitutional Law (ICON) 2015 (Forthcoming); Oxford Legal Studies Research Paper No. 5/2015. Available at SSRN: <<http://ssrn.com/abstract=2548530>> accessed 16 May 2015.

<sup>94</sup> C Gearty, 'Revisiting Section 3(1) of the Human Rights Act' (2003) 119 L.Q.R. 551, 551.

<sup>95</sup> See C Gearty, 'Reconciling Parliamentary Democracy and Human Right' (2002) 118 L.Q.R. 248-269; and G Phillipson, '(Mis)-reading Section 3 of the Human Rights Act' (2003) 119 L.Q.R. 183-188; and C Gearty, 'Revisiting Section 3(1) of the Human Rights Act' (2003) 119 L.Q.R. 551-553.

<sup>96</sup> A Young, 'Judicial Sovereignty and the Human Rights Act 1998' (2002) 61 C.L.J. 53, 53.

The judicial set parameters established in *Ghaidan* appear to suggest section 3 is more representative of strong form review. First, unlike the purposive approach “a section 3 interpretation is not stopped in its tracks when faced with a statute which, in its ordinary meaning violates convention rights.”<sup>97</sup> As Allan argues it allows just about any statutory language to be given some other meaning by judges. Furthermore, when coupled with the ability to read in words without any ambiguity present, “the legislation under consideration is not in any real sense of interpretation. It is being re-written.”<sup>98</sup> Similarly, Aileen Kavanagh claims, the use of section 3 can sometimes be indistinguishable from legislative amendment.<sup>99</sup> In her view, section 3 has the greater effect of displacing the power of Parliament than a more traditional form of strong review such as a strike down power. This is because unlike a strike down power, section 3 takes the power of how to proceed out of the hands of Parliament. It “does not confine itself to the negative task of merely identifying the existences of rights violation. It also takes the further positive step of implementing corrective action.”<sup>100</sup> As Kavanagh concludes, “if judges rectify the statute themselves by way of judicial interpretation under section 3, they effectively engage in a form of judicial amendment.”<sup>101</sup> Therefore one might describe Section 3 as “conferring ‘interpretation on steroids’ on the unelected judiciary.”<sup>102</sup>

The most controversial example of this power remains in *R v A*.<sup>103</sup> In the case, the House of Lords used section 3 to re-write section 41 of the Youth Justice and Criminal Evidence Act 1999.

Nicol is critical of this judgment, arguing that section 41 plainly represented the “intention of

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<sup>97</sup> A Kavanagh, *Constitutional Review under the UK HRA 1998* (CUP 2009) 319.

<sup>98</sup> *ibid* (n 42) 111.

<sup>99</sup> *ibid* (n 93) 15.

<sup>100</sup> *ibid* (n 93) 16.

<sup>101</sup> *ibid* (n 93) 16.

<sup>102</sup> J Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' Criticism' (2006) 30 MULR 906, 911.

<sup>103</sup> *R v A* (No 2) [2001] UKHL 25.

Parliament to severely restrict the circumstances in which complainants could be interrogated about their sexual histories.”<sup>104</sup> However, this “clarity of parliamentary purpose in no way inhibited the House of Lords. Nor did the fact that the words of the statute were as plain as day. Their Lordships boldly held that section 41 (3) (c), construed in accordance with the s.3 HRA interpretative obligation.”<sup>105</sup> Although the House of Lords decisions of *Re S*,<sup>106</sup> *Anderson*<sup>107</sup> and *Ghaidan*<sup>108</sup> have stepped back from this approach, many still consider *R v A* “as the highpoint of judicial creativity.”<sup>109</sup>

One may argue, even where the Judiciary engages in creative interpretations of statutes, democratic institutions can still choose to uphold it, reverse it, or suggest an alternative interpretation through ordinary legislative activity. This suggests that section 3 can operate much like a declaration of incompatibility; a section 3 interpretation gives scope for dialogue between the courts, the government and Parliament.<sup>110</sup> As Alison Young suggests, the use of section 3 by the courts sends out “a different signal” to democratic institutions than a Section 4.<sup>111</sup> Unlike, section 4, section 3 interpretations cannot be passively ignored. Instead, they must be actively overridden, in sufficiently clear and precise terms.<sup>112</sup> One might suggest despite the questionable expansion of interpretation, sufficient democratic oversight can control section 3 to make it more compatible with political constitutionalism, as democratic institutions retain the

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<sup>104</sup> D Nicol, 'Statutory interpretation and Human Rights after Anderson' [2004] P.L. 274, 275.

<sup>105</sup> *ibid* 275.

<sup>106</sup> *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

<sup>107</sup> *R (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 A.C. 837.

<sup>108</sup> *Ghaidan v Godin-Mendoza* [2004] 3 W.L.R. 113.

<sup>109</sup> D Mead, 'Swallowing the camel, straining at the gnat: the implications of *Mendoza v Ghaidan*' [2003] E.H.R.L.R. 501, 509.

<sup>110</sup> R Clayton, 'Judicial Deference and "Democratic Dialogue": the Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] P.L. 33, 46; and T Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] P.L. 306, 327; and *ibid* (n 12) 10.

<sup>111</sup> *ibid* (n 12) 10.

<sup>112</sup> Hickman, *ibid* (n 110) 327.

freedom to overrule re-writes preventing domination. However, in 2006, Nicol claimed there was no real practice of this occurring in the UK.<sup>113</sup> If this remains the case, then section 3 is representative of strong form review. If Parliament is reluctant to challenge the judiciary over interpretations, then the judiciary will have the stronger constitutional position.<sup>114</sup>

Thus, it is critical to determine whether the situation has changed since Nicol's claim. To answer this question, a closer examination of how Parliament responds to section 3 interpretations is required. One major problem is that unlike responses to declarations, there is no official record of section 3 interpretations published by the Ministry of Justice. A review by Crawford in 2014 represents an unofficial record. He identified 59 recorded upheld cases where section 3 was used to interpret a provision of an Act in convention compliant way. In 7 cases, Parliament had already completed or was engaged in the process of amending legislation.<sup>115</sup> In 9 cases Parliament formally accept the court's interpretation via statutory amendments. In only 1 case there has been a rejection of the interpretation.<sup>116</sup> Following *M, Applicant*,<sup>117</sup> the Scottish Parliament repealed section 93(2) (b) of the Children (Scotland) Act 1995 with the Children's Hearing (Scotland) Act 2011. However, the 2011 Act does not appear to accept the court's interpretation of section 93(2) (b) from *M, Applicant*.<sup>118</sup> This means in the majority of cases, Parliament has not chosen to respond.

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<sup>113</sup> *ibid* (n 16) 729.

<sup>114</sup> *ibid* (n 16) 729.

<sup>115</sup> C Crawford, 'Dialogue and Rights-Compatible Interpretations under Section 3 of the Human Rights Act 1998' (2014) 25 *KLJ* 34, 38.

<sup>116</sup> *ibid* 39.

<sup>117</sup> *M, Appellant* 2010 Fam. L.R. 152.

<sup>118</sup> *ibid* (n 115) 39-40.

For political constitutionalism, it is important to understand why the government and Parliament accepted the court's interpretation. However, we simply cannot tell if Parliament has given implied consent to re-write, or disagreed, but been unwilling to challenge the court interpretation.<sup>119</sup> It appears democratic institutions are unable to pick up this different type of signal emitted by section 3. If this is the case, then why have section 3 re-writes failed to appear on the parliamentary radar? The answer may be that section 3 re-writes are extremely difficult to spot. One reason for this might be a result of the limits of section 3. By not re-writing fundamental features and going with the flow of the Act, judicial creativity remains subtle. The limits ensure judicial re-writes do not engage in radical, whole sale reform of statute. Such an approach as seen in *Re S* was firmly rejected by the House of Lords.<sup>120</sup> Instead, as Kavanagh argues, the judicial law making power is incremental rather than radical.<sup>121</sup> There are significant constraints on judges. They must operate within precedent and they can only deal with issues that come before them on a case by case basis. Thus, judges are only able to “engage in partial and piecemeal reform.”<sup>122</sup> This approach ensures the less radical statutory renovation, the less noise produced by the re-write. Although the power afforded to judiciary has increased, it has done so in a way which produces a signal that Parliament cannot detect. As a consequence, the interpretation remains lost in a sea of cases; maybe the only people able to spot the signal are the sharks circling the case out of interest.

Nor does the signal seem strong enough to attract the attention of the media, who can, in turn bring it to the attention of citizens and the government. This is because as Nicol has argued,

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<sup>119</sup> *ibid* (n 42) 434.

<sup>120</sup> *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10.

<sup>121</sup> A Kavanagh, 'The Elusive Divide Between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 O.J.L.S 259, 272.

<sup>122</sup> *ibid* 272.

‘rewrites’ of legislation under section 3 are a relatively invisible means of changing the law when compared to headline-grabbing declarations.<sup>123</sup> Even if section 3 re-writes are spotted by journalists, they present a challenge of how to communicate to their audience the significance of it. Explaining to a lay person how and why the courts have interpreted an Act is a more challenging task than stating the court has found a law incompatible. A declaration of incompatibility makes for a more compelling story. Perhaps it’s plausible to understand why the average citizen has little interest in, or remains unaware of section 3 interpretations. However, it is concerning where Parliamentarians remain unaware. For example, only a year after the *R v A* judgment, a Private Members Bill was put forward by several Labour MPs to change the law on rape in favour of complainants. As Nicol comments, they were seemingly unaware of the decision of *R v A*.<sup>124</sup> It is plausible that a similar situation has occurred following *M, Appellant*. According to Crawford, it is unclear if the Scottish Parliament actually knew of the judgment. The judgment was handed down within the same month a rejecting provision was approved.<sup>125</sup> Therefore, even in the one rejection, it is hard to determine if the rejection was intentional. The judicial power under section 3 has increased, allowing judges to engage in creative re-writes that are akin to strong form reviews. Yet at the same time, sufficient democratic oversight of such re-writes has not occurred. Parliament may be able to overturn these re-writes, but clearly lacks the ability to track them.

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<sup>123</sup> D Nicol, 'The Human Rights Act and the politicians' (2004) 24 LS 451, 469.

<sup>124</sup> *ibid* 468.

<sup>125</sup> *ibid* (n 118) 40.

#### 4) The Interplay between Section 3 and Section 4

Section 4 should be seen as more compatible and desirable for political constitutionalists than section 3. Therefore, the heavy use of section 3 effectively renders section 4 redundant.<sup>126</sup> It has been suggested by some that while legal constitutionalists aiming to promote ECHR as a higher law prefer maximising the use of section 3 to resolve incompatibilities. In contrast, political constitutionalists prefer a narrow reading of section 3 to promote a more routine practice of using section 4, as it will produce debates about rights.<sup>127</sup> For example, Tom Campbell, Francesca Klug, Keith Ewing, Gearty and Nicol have all argued for greater use of section 4.<sup>128</sup> The greater the use of section 4, the more possibility there is of debate over interpretation of rights by not just the courts, but also democratic institutions and citizens. However, this leads to the final problem of section 3. In order for a high court to issue a declaration of incompatibility, the courts must find it impossible to resolve the incompatibility with section 3. Accordingly section 3 must preclude section 4. Although as Gearty suggests it is possible to narrowly restrict the intended effect of section 3, this is not current practice of the judiciary, nor was it the intention of the framers.

First, as Lord Steyn established in *Ghaidian*, “section 3(1) is the prime remedial remedy and that to resort to section 4 must always be an exceptional course.”<sup>129</sup> According to Steyn, the judicial practice of section 3 and 4 before the early years of the Act was incorrect; the courts had relied too greatly on the latter at the expense of the former. Instead, it should be seen that section 3 is

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<sup>126</sup> *ibid* (n 8) 103.

<sup>127</sup> Gearty, *ibid* (n 95) 250; *ibid* (n 104) 274.

<sup>128</sup> T Campbell, ‘Incorporation through Interpretation’ in T Campbell, KD Ewing, A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, OUP 2001) 99; and F Klug, ‘Judicial deference under the Human Rights Act 1998’ [2003] E.H.R.L.R. 125, 130-131; and KD Ewing, ‘The futility of the Human Rights Act’ [2004] P.L. 829, 850; and Gearty, *ibid* (n 95) 250; and *ibid* (n 104) 274.

<sup>129</sup> *Ghaidan v Godin-Mendoza* [2004] 3 W.L.R. 113, [50] (Lord Steyn).

the principal remedial measure, and that the making of a declaration of incompatibility is a measure of last resort.<sup>130</sup> Second, during the passage of the Human Rights Bill, the Lord Chancellor stated “in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility.”<sup>131</sup> Similar statements were also made in the Commons; Jack Straw stated “we expect that, in almost all cases, the courts will be able to interpret legislation compatibly with the convention.”<sup>132</sup> Philip Sales and Richard Ekins have argued these statements appear to reject the idea that the Labour government sought to promote dialogue between the courts and Parliament. Instead their primary goal is to provide domestic remedies and ensure compliance with the convention.<sup>133</sup> They argue “the point of enacting section 3 was to introduce a new interpretative direction that would improve the likelihood that legislation would be interpreted to conform to the ECHR.”<sup>134</sup> Effectively, the goal of judicial powers is for the domestic courts to “replicate what they understand the ECtHR would decide in that situation.”<sup>135</sup> In many cases “the government does not want the last word and is quiet happy to let the court make the decision on these questions thus obviating the need for them to rectify the problem.”<sup>136</sup> This avoids the need for the government or Parliament to spend time engaging in post legislative review.

Furthermore, using section 4 sparingly damages the effects when it is used as it feeds two presumptions. The first presumption is that under section 4, the courts feel they “are effectively

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<sup>130</sup> *ibid* [39] (Lord Steyn).

<sup>131</sup> Lord Irvine of Lairg, HL Deb 5 February 1998, vol 585, col 840.

<sup>132</sup> Jack Straw, HC Deb 16 February 1998 vol 306 col 778.

<sup>133</sup> P Sales and R Ekins ‘Rights-Consistent Interpretations and the Human Rights Act 1998’ (2011) 127 L.Q.R. 217, 227.

<sup>134</sup> *ibid* 232.

<sup>135</sup> *ibid* 228.

<sup>136</sup> *ibid* (n 93) 20.

forcing the executive, through Parliament, to change the law.”<sup>137</sup> This makes judges more reluctant to use it and makes the government and Parliament more reluctant to challenge the courts over rights interpretations. This prompts the misguided view that if the government were to disagree with the courts, it would “provoke a constitutional crisis.”<sup>138</sup> This might explain why Parliament has voiced disagreement, yet it remains reluctant to reject the judicial interpretation.<sup>139</sup> The second presumption is that section 4 is an undesirable remedy to the individual. This incentivises the greater use of section 3. It has been argued that section 4 provides “no incentive for individuals to litigate human rights cases because there is no opportunity of overturning the law in question.”<sup>140</sup> Since section 4 is only a potential political remedy rather than a legal one, it is unhelpful for the disappointed applicant.<sup>141</sup> For example, Ewing has pointed out in the *Belmarsh case* “the detained individuals remained in custody until new legislation was introduced, giving the Home Secretary the power to detain them at home by way of control orders, a form of de facto indefinite detention that was worse for some than the indefinite detention in *Belmarsh*.”<sup>142</sup> The concern is that the perceived weakness of section 4 might place pressure to adopt more robust and creative interpretations to avoid issuing declarations.<sup>143</sup> A political constitutionalist’s interpretation of section 4 is that, instead of being an empty remedy, the courts should recognise it as a powerful right of petition. The courts should see themselves as an influential body akin to the Bank of England or the British Medical Association. Under this conception, section 4 can be re-envisioned as a claim before democratic

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<sup>137</sup> Klug *ibid* (n 128) 131.

<sup>138</sup> C Dyer, M White, A Travis, ‘Judges verdict on terror laws provokes constitutional crisis’ *The Guardian* (London 17 Dec 2004) <<http://www.theguardian.com/uk/2004/dec/17/terrorism.humanrights3>> accessed 01 June 2015.

<sup>139</sup> *ibid* (n 97) 132.

<sup>140</sup> Joint Committee on Human rights, ‘A Bill of Rights for the UK? Memorandum by Tom Hickman’ Twenty Ninth Report Vol 2 Session 2007-2008, (HL Paper 165-II/ HC 150-II) para 24.

<sup>141</sup> Morgan *ibid* (n 42) 438.

<sup>142</sup> K.D Ewing, ‘The Political Constitution of Emergency Powers: A Comment’ (2007) 3 *Int J Law Context* 313, 315.

<sup>143</sup> *ibid* (n 97) 132.

institutions made by an individual who has been able to rally the support of influential backers.<sup>144</sup> Reducing the scope or repealing section 3 might achieve this and make the third stage more compatible with political constitutionalism.

## **5) Judicial Scrutiny and the Different Accounts of Political Constitutionalism**

The limiting and enabling account of political constitutionalism may view these powers differently from another. I would argue that section 3 presents a more unique problem for the limiting account. Therefore, its proponent would favour its complete repeal, leaving only section 4 as the sole judicial power. Conversely, this would suggest that proponents of the enabling account might instead advocate reforms rather than the complete repeal of section 3.

The problem for the limiting account is that section 3 might allow the executive to by-pass post legislative parliamentary scrutiny. As Timothy Endicott suggests “If the courts can remove an apparent incompatibility by interpreting it away, the government will not need to make a remedial order. A declaration of incompatibility means that the government controls the form of any change... but the government may not want this.”<sup>145</sup> Section 4 allows for the government and Parliament to debate the matter. There is evidence that the government and the Judiciary are engaging in post-legislative changes without Parliament’s expressed approval. As Lord Philips pointed out “counsel for the Secretary of State usually invites the court to read down however

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<sup>144</sup> *ibid* (n 16) 743-744.

<sup>145</sup> T Endicott, *Administration Law*, (OUP 2011) 78.

difficult it may be to do so, rather than make a declaration of incompatibility.”<sup>146</sup> He suggests this occurred in the control order case *AF*.<sup>147</sup> He further revealed that “provided that the main thrust of their legislation is not impaired they have been happy that the courts should revise it to make it Convention compliant, rather than declare it incompatible.”<sup>148</sup>

The strength and appeal of section 4 is that it promotes debate and allows parliament to consider whether to accept the court’s view. If the government via counsel is advising the courts to use section 3, it is producing some form of dialogue, but it is a dialogue that doesn’t involve Parliament. It may be the case that Parliament agrees with executive and judiciary on the matters. However, section 3 renders Parliaments current views irrelevant, as Parliament has no say on the change. Furthermore, as argued above, section 3 interpretations appear to be invisible to the parliamentarians; the government has not published an official record of these interpretations. By arguing in the court room for section 3 and failing to inform Parliament, the government can avoid the potential risks of a defeat or criticism by keeping parliamentarians in the dark. For the limiting account, section 4 is a neutral measure. It could allow Parliament to use the judicial argument to strengthen their own.<sup>149</sup> As Fergal Davies has suggested “the declaration of incompatibility should be seen as a ‘moment’ capable of galvanizing parliamentary and popular dissent.”<sup>150</sup> On the other hand, it can allow government to engage in blame avoidance, using the declaration to withdraw or roll back a policy it no longer feels is necessary or effective, without

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<sup>146</sup> Lord Phillips, ‘The Art of the Possible Statutory Interpretation and Human Rights’ (First Lord Alexander of Weedon Lecture, London, 22 April 2010) 44 <[https://www.supremecourt.uk/docs/speech\\_100419.pdf](https://www.supremecourt.uk/docs/speech_100419.pdf)> accessed 28 May 2015.

<sup>147</sup> Secretary of State for the Home Department v *AF* (No 3) [2009] UKHL 28.

<sup>148</sup> *ibid* (n 146) 44.

<sup>149</sup> A Stone Sweet, *Governing with Judges* (OUP 2000) 55.

<sup>150</sup> F De Londras and F Davies, ‘Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms’ (2010) 30 *O.J.L.S.* 19, 46.

being subject to attack by the opposition for doing so.<sup>151</sup> The matter is effectively de-politicised. The criticism is focused at the judiciary rather than the government. Despite this problem, section 4 remains neutral; de-politicisation can be contested by Parliament. Both the government and Parliament can use declaration as ammunition to support their views in a debate. Alternatively, where both are in agreement they can use the declaration to reject the courts.

In contrast, this might suggest section 3 is less problematic for the enabling account. If the government advocates the use of section 3 via counsel and the court can use the power to re-write the provision to go with the grain in the way the government wants. This ensures the government is still able to achieve its legislative goals. Section 3 would therefore avoid potential constitutional obstacles that might result out of a declaration which disables the government from successfully delivering its policies.<sup>152</sup> Section 3 could serve to reconcile the intention behind the current legislation with the intention behind the Human Rights Act of ensuring compliance with the UK's international obligations. This makes sense in regards to the arguments presented by Sale and Ekins over the intention behind the Human Rights Act. As Kavanagh claims, a "section 3 Interpretation seems like a clean bill of health in human rights terms."<sup>153</sup> The government is able to in the broad sense successfully get through its policies, while complying with its international obligations. In contrast, a declaration could become a "major governmental headache," as Philipson suggests "remedial action is time consuming and may involve re-jigging the parliamentary timetable and thus delaying other legislation rather dearer to the government's heart."<sup>154</sup> The enabling account uses the successful delivery of policy

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<sup>151</sup> F Davies, 'The Human Rights Act and Juridification: Saving Democracy from (2010) 30 Politics 91, 94.

<sup>152</sup> D Nicol, 'Professor Tomkins' House of Mavericks' [2006] P.L. 467, 471.

<sup>153</sup> *ibid* (n 93) 21.

<sup>154</sup> *ibid* (n 70) 40.

as the way of holding the government to account by citizens. A section 4 leaves the government open to problems within Parliament which prevent the successful delivery of policy. The crux for the enabling account is therefore one of control: how section 3 can be reformed to ensure interpretations are more aligned with intentions behind the legislation, and to not allow the judges to replace the government's interpretation with their own.

## **Conclusion**

In conclusion, there is a strong case for seeing section 4 as representative of weak form review. This means it can be seen as compatible with political constitutionalism in theory. In practice, it is mostly compatible. Reforming it should go as far as ensuring the prevention of a parliamentary convention which makes the declaration a binding rather than advisory judicial opinion. Section 3 appears more representative of strong form review. Nonetheless, how to reform this provision is likely to give rise to disagreement between political constitutionalists. The enabling account is likely to favour reforming the provision to ensure greater democratic control. Conversely, the limiting account is likely to favour the repeal of section 3, in order to maximise parliamentary debate and scrutiny in the post legislative review stages of the Human Rights Act.

## 4.

# Political Constitutionalism and Democratic Scrutiny under the Human Rights Act

The framer of the Human Rights Act envisaged that “Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy.”<sup>1</sup> In chapter 2, I explained how the Human Rights Act seeks to achieve this over various stages which engage the government and Parliament in pre and post legislative consideration of rights issues. This is achieved through the statutory obligations on the government under section 19, parliamentary scrutiny which includes ordinary debate and the Joint Committee on Human Rights (JCHR) and finally potential post legislative consideration following a declaration of incompatibility. This chapter will examine the relationship between these democratic forms of scrutiny under the Human Rights Act and political constitutionalism. The Human Rights Act seeks to change the way in which democratic actors engage in rights. As a consequence, this raises questions for political constitutionalism about how rights are debated by democratic actors. It also raises questions about how the limiting and enabling accounts of political constitutionalism perceive these forms of scrutiny. One may assume that these forms of scrutiny are *prima facie* compatible with political constitutionalism as they engage democratic actors in rights review. However, as we shall see, things may not be as straightforward as this suggests. Therefore, one must take into consideration how political actors think and engage in debates about rights.

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<sup>1</sup> Secretary of State for the Home Department ‘Rights Brought Home: The Human Rights Bill’ Cm 3782, 13.

## 1) Political Constitutionalism and a Culture of Rights

Members of the Labour government such as Lord Irvine and Mike O'Brien claimed that "a culture of awareness of human rights will develop" with the Act serving as "van" for the promotion a rights culture.<sup>2</sup> Nevertheless, they were not explicit about what is meant by a culture of rights.<sup>3</sup> Some believe this is nothing more than "an illusion of governmental aspiration for transforming society."<sup>4</sup> Others believe it refers to a minimum "expectation that prospective state actions that implicate rights should be subject to scrutiny of their merits and legitimacy before they are passed into law."<sup>5</sup> Danny Nicol has presented two interpretations which are significant to political constitutionalism. The first interpretation is what he calls a culture of compliance.<sup>6</sup> This interpretation takes its cue from the works of Alec Stone Sweet's *Governing with Judges*.<sup>7</sup> Stone Sweet observes that in mainland Europe there is a culture of what he calls judicialization where by judges develop authority over the normative structure of a state and in doing so shape how individuals interact with each other.<sup>8</sup> This has several consequences on ordinary political culture. First, the government begins to anticipate adverse judicial decisions.<sup>9</sup> At the same time, the opposition parties begin to use judgments to win debates which "they would otherwise lose in normal un-judicialized politics."<sup>10</sup> This further incentivises the executive to shape its legislation in ways which complies with judicial interpretation. The governing majority becomes subject to autolimitation as it engages in anticipatory behaviour, sacrificing initially held policies

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<sup>2</sup> HL Deb 03 November 1997 vol 582 col 1227-312; Mike O'Brien MP, HC Deb 21 October 1998 vol 317 col 1322; HC Deb 09 April 2001 vol 366 col 458W; and J Straw, 'Building a Human Rights Culture' Address to Civil Service College Seminar (19 December 1999).

<sup>3</sup> F Butler, 'Building a Human Rights Culture' in C.J. Harvey (ed) *Human Rights in the Community: Rights as Agents for Change* (Hart 2005) 65.

<sup>4</sup> *ibid.*

<sup>5</sup> J L. Hiebert, 'Governing Under the Human Rights Act: The Limitations of Wishful Thinking' [2012] P.L. 27, 30

<sup>6</sup> D Nicol, 'The Human Rights Act and the Politicians' (2006) 24 LS 451, 453.

<sup>7</sup> A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000).

<sup>8</sup> *ibid* 13.

<sup>9</sup> *ibid* 73.

<sup>10</sup> *ibid* 55.

to avoid parliamentary attack and judicial censure.<sup>11</sup> This results in a political culture where the executive and “legislators engage in structured deliberation of the constitutionality of legislative proposals.”<sup>12</sup>

A culture of compliance presents problems for the enabling account. Under this culture, “judges enjoy the dominant role.”<sup>13</sup> They are the ultimate decision makers in both the pre and post legislative context, not just through constitutional review but also through their ability to hold a monopoly of influence over political debate. They also influence future debates further through their *obiter* comments and extra judicial speeches.<sup>14</sup> Autolimitation will result in the governing majority abandoning its plans in the face of constitutional obstacles such as parliamentary disagreement and judicial censure. In the post legislative context, there will be problems. For example, if a delivered electoral promise is found incompatible, the governing majority will have no decisional space and no remedial space.<sup>15</sup> They will not only feel unable to oppose the judgment of the court, but also unable to deviate from the exact opinion expressed by the courts. For proponents of enabling political constitutionalism, these court-inspired hurdles represent an unwelcome check on the government’s ability to pursue its policy goals. Furthermore, this appears to sap the qualities of parliamentary politics treasured by some political constitutionalists. As both the government and opposition begin to rely more on legal precedent, debates will become more structured, akin to legal discourse.<sup>16</sup> The scope for disagreement decreases as the focus becomes more about technical issues of interpretation. This reduces the

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<sup>11</sup> *ibid* 75.

<sup>12</sup> *ibid* 73.

<sup>13</sup> *ibid* (n 6) 454.

<sup>14</sup> *ibid* (n 6) 726.

<sup>15</sup> C Chandrachud, ‘Reconfiguring the discourse on political responses to declarations of incompatibility’ [2014] P.L. 624, 625.

<sup>16</sup> See also M A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press 1993).

potential creativity that some political constitutionalists feel disagreement can yield.<sup>17</sup> There is nothing wrong with legal arguments being raised, but they should be part of a rich range of arguments and not be seen as a superior form of discourse. Although Parliament would remain sovereign, the practice of politics within it would be constrained by “the straitjacket of law.”<sup>18</sup> Ultimately, the Convention rights would be elevated beyond the reach of contestability.<sup>19</sup> It also might reduce the values of open government as Parliament becomes more like a court in which MPs conceal “their ideologies under the cloak of objective neutrality.”<sup>20</sup> Nevertheless, the enabling account would have to tolerate judicial deference where citizens voiced strong vocal support for a judicial judgment. Even if the leaders of the government party disagreed with a judgment, they may have to accept in order to continue to have the support of citizens in the future.<sup>21</sup>

In contrast, it is debatable whether a culture of compliance would be problematic for the limiting account. The issue here is that a culture of compliance can assist Parliament in holding the government to account. Legal precedents can serve as a floor for rights protection for parliamentarians to maintain. In some circumstances, Parliament will be able to secure concessions it would not have been able to otherwise. Yet in other circumstances, a culture of compliance can weaken Parliament’s ability to hold the government to account as precedent can be used against Parliament. For instance, in the event that the government wanted powers to intercept communication, it would draft the legislation in a way which would comply with

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<sup>17</sup> See J Waldron, *Law and Disagreement* (OUP 1999) 23; and G Gee, ‘The Political Constitutionalism of J.A.G. Griffith’ (2008) 28 L.S. 20, 26-27.

<sup>18</sup> M Loughlin, *Sword and Scales: An Examination of the Relationship Between Law and Politics* (Hart 2000) 5.

<sup>19</sup> D Nicol, ‘Are Convention rights a no-go zone for Parliament?’ [2002] P.L. 438, 438.

<sup>20</sup> D Nicol, ‘Professor Tomkins’ House of Mavericks’ [2006] P.L. 467, 471.

<sup>21</sup> R Bellamy, ‘The Political Constitution and Human Rights Act’ (2011) 9 ICON 86, 102.

existing legal precedent. The government feels able to achieve its goals by doing the minimum necessary to comply with legal precedent. Despite this, during its passage, a significant number of MPs may feel that more safeguards are required. Perhaps citizens also disagree with the government on the matter. To win this debate, both sides must convince those MPs who remain undecided. The government might be able to convince those undecided MPs by claiming their critics' calls are unnecessary by using the case law as evidence to support their arguments. Therefore, legal precedent might also serve as a glass ceiling. Yet in either circumstance, the superiority of legal discourses over all others is implied, contrary to political constitutionalism's rejection of this.<sup>22</sup> Those academics who are prone to speaking the language of the limiting account of political constitutionalism frequently agree with the Joint Committee on Human Rights' assessment over the government's.<sup>23</sup> Yet the committee is arguably more of a culture of compliance in its reasoning. This might suggest that the limiting account places less emphasis on the richness of discourse than the enabling account. Instead, it appears to emphasise the accountability of the MPs and how effective they are at scrutinising the government to protect the common good. For example, although Adam Tomkins is critical of the superiority of law, his core criticisms against legal constitutionalism are that judges are unaccountable and ineffective rather than how they discuss and debate right issues.<sup>24</sup> Nicol has even suggested Tomkins would prefer Parliament to behave like a Court.<sup>25</sup>

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<sup>22</sup> J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1, 20; and A Tomkins, *Our Republican Constitution* (Hart 2005) 12.

<sup>23</sup> see K.D Ewing and J C Tham, 'The Continuing Futility of the Human Rights Act' [2008] P.L. 668, 674-693; and A Tomkins, 'Parliament, human rights and counter-terrorism' in T Campbell, K.D Ewing, A Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 13-39; and C Gearty, 'The Human Rights Act - an academic sceptic changes his mind but not his heart' [2010] E.H.R.L.R. 582, 586.

<sup>24</sup> Tomkins *ibid* (n 22) 25.

<sup>25</sup> *ibid* (n 20) 471.

As well as a culture of compliance, Nicol also draws on the idea of a culture of controversy.”<sup>26</sup> It is influenced by Tom Campbell’s work.<sup>27</sup> Here, rights are recognized as being political in that they are open to disagreement. The culture is “political rather than legal in its nature, preferring debate to litigation and voting in representative assemblies to voting in the court room, particularly when fundamental interests are at stake”<sup>28</sup> This culture rejects the absolute deference to courts of the culture of compliance. The culture believes no one institution has a monopoly of wisdom over rights.<sup>29</sup> Instead, it favours more debates about rights by political actors. Nicol suggests that this culture of rights is more likely to develop. Firstly because the UK’s perceived traditional position as a political constitution will be resistant to a radical culture overhaul.<sup>30</sup> Secondly, he sees the Human Rights Act as designed to facilitate such debates about rights. According to this conception, the Human Rights Act is a unique constitutional instrument designed to enable Parliament and the government as well as the courts to participate in giving “further effect” to fundamental rights.<sup>31</sup> This culture would appear to overcome the issues for a culture of compliance poses for the enabling account and limiting account. For the enabling account, it appears not to add any more restraints on the executive than already exists. It does not denounce legal discourse, but instead views it as being neither superior to political discourse nor the only form of consideration in the legislative process. Similarly, a culture of controversy is not problematic for the limiting account as it means debates are neutral in that they do not favour the government or Parliament any more than normal.

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<sup>26</sup> *ibid* (n 6) 454.

<sup>27</sup> T Campbell, 'Human Rights: A Culture of Controversy' (1999) 26 JLS 6.

<sup>28</sup> *ibid* 25.

<sup>29</sup> *ibid* 26.

<sup>30</sup> *ibid* (n 6) 455.

<sup>31</sup> *ibid* (n 19) 439.

We can conclude that, generally speaking, a culture of controversy is more desirable to both accounts of political constitutionalism (although a culture of compliance might be acceptable for both in some limited circumstances). These cultures represent extreme ends of the scale; normal political consideration and debate within the UK is likely to continuously drift between the two depending on a variety of factors around the debate. While some debates might lean towards a culture of compliance, others may lean towards a culture of controversy. The crux for political constitutionalism will be the freedom to drift between the two rather than being boxed into a culture of compliance.

## **2) Executive Protection and Political Constitutionalism**

With or without the Human Rights Act, some degree of a culture of compliance exists within the executive. The Parliamentary Business and Legislation (PBL) Committees' existence is representative of this behaviour.<sup>32</sup> PBL Guidance states "parliamentary time available for government bills is extremely limited."<sup>33</sup> Any potential parliamentary delays will result in time being lost and "can have a knock-on impact on the programme as a whole."<sup>34</sup> As a consequence, "any government has a strong interest in being fully informed of whether a legislative initiative has a serious chance of being litigated and of ways to reduce risks before deciding to commit itself politically to introduce the legislative bill."<sup>35</sup> Additionally, the government is responsible for upholding the UK's obligation under international law. Therefore, compliance with the ECHR was considered before the Human Rights Act. As Aileen Kavanagh points out, "like it or

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<sup>32</sup> Cabinet Office, 'Guide to Making Legislation' July 2014, 9.

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid* 10, para 2.4.

<sup>35</sup> J.L. Hiebert, 'Legislative Rights Review: Addressing the Gap between Ideals and Constraints,' in M Hunt, H J Hooper, P W Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015), 47.

not, these are legal documents which have a body of jurisprudence built up around them.”<sup>36</sup> Furthermore, litigation in a domestic or international court is expensive.<sup>37</sup> Although our ability to evaluate the government is hampered by a lack of transparency because of confidential documents and the 30 year rule,<sup>38</sup> there is good reason to suspect under the Human Rights Act, a culture of compliance will increase. The statutory obligation under section 19 means the government has to confront the issue of compliance with the Convention more than previously. Section 19 not only increases the frequency of consideration of compliance, but also introduces new domestic implications. By its design, inability to claim a bill is compatible with the convention is likely to bring unwelcomed negative attention on the government.<sup>39</sup> Therefore, section 19 should incentivise greater consideration and compliance with the convention. As of writing this, only 2 bills introduced by the government into the Commons have come with a section 19(1) (b) report.<sup>40</sup> This statistic may indicate a culture of compliance has developed.

Interestingly, evidence suggests although the government now considers rights and the legal implications in greater detail, surprisingly it has done so in a way which does not appear to shackle the government.<sup>41</sup> Thus, while some of the mechanisms and practices we would expect to see in a culture of compliance have developed, their effects have been no-where near those

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<sup>36</sup> A Kavanagh, ‘The Joint Committee on Human Rights: A hybrid Breed of Constitutional Watchdog’ in M Hunt, H J Hooper, P W Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015), 128.

<sup>37</sup> J L. Hiebert and J B. Kelly, *Parliamentary Bills of Rights: The New Zealand and United Kingdom Experiences* (CUP 2015) 268.

<sup>38</sup> See The National Archives, 'The Cabinet Papers: Meetings and papers' <<https://www.nationalarchives.gov.uk/cabinetpapers/cabinet-gov/meetings-papers.htm>> accessed 24 July 2015.

<sup>39</sup> *ibid* (n 37) 266.

<sup>40</sup> Communication Bill 2003 and House of Lord Reform Bill 2012 were both introduced by the Government. Additionally, two others bill have received section 19 (1) (b) reports when entering the House of Commons as an unintended consequence of amendments made by the House of Lords rather the decision of the Government.

See Local Government Bill [HL] (Session 1999-2000)

<<http://www.publications.parliament.uk/pa/cm199900/cmbills/087/2000087.htm>> accessed 01 August 2015; and

The Civil Partnership Bill [HL] (Session 2003-04)

<<http://www.publications.parliament.uk/pa/cm200304/cmbills/132/en/04132x-o.htm>> accessed 01 August 2015.

<sup>41</sup> *ibid* (n 37) 269.

observed by Stone Sweet in mainland Europe. Interviews conducted by Janet Hiebert and James Kelly present three core findings. First there is a strong presumption to ensure that each bill can be put before Parliament with an s.19 (1) (a) compliance report.<sup>42</sup> Second, there is increased legal evaluation of bills with the convention and case law. Under the Human Rights Act the quality of legal evaluations has become “more robust and sophisticated” than before.<sup>43</sup> For example, the number of legal experts within each department has increased.<sup>44</sup> Further legal advice comes from the Ministry of Justice<sup>45</sup> and external counsel.<sup>46</sup> The PBL also require each department to produce a “memorandum setting out the impact, if any, of a bill” on a convention rights, which will need to be vetted by the Attorney General’s office.<sup>47</sup> Thus, any bill since the commencement of the Human Rights Act appears to be subject to a “multi-layer process” of legal scrutiny.<sup>48</sup> These two findings would be predicted symptoms of a culture of compliance developing within the executive.

The third finding is unexpected; Hiebert and Kelly’s research found both the Labour and Coalition governments showed considerable risk taking over compliance. This finding is partly based on their interviews, the way in which compliance is assessed and frequency of disagreement between the government and the JCHR. Legal advisors within each department assess compatibility by way of risk assessment. The standard is on the balance of a probability, does the bill have a chance of being held incompatible.<sup>49</sup> Hiebert and Kelly considered this a low

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<sup>42</sup> *ibid* (n 37) 274.

<sup>43</sup> *ibid* (n 37) 272.

<sup>44</sup> *ibid* (n 37) 273.

<sup>45</sup> *ibid* (n 32) 100, para 11.100.

<sup>46</sup> *ibid* (n 37) 283.

<sup>47</sup> *ibid* (n 32) 100, para 11.101-11.106.

<sup>48</sup> *ibid* (n 37) 275.

<sup>49</sup> *ibid* (n 35) 47.

threshold on the government.<sup>50</sup> Legal advice is not binding on the minister.<sup>51</sup> Although the Attorney General is the ultimate legal advisor within the government, it is possible that political pressure might result in his or her approval despite the risk.<sup>52</sup> Additionally, the Cabinet Office guide to ministers states the assessment should be based on his or her own view.<sup>53</sup> Furthermore stating “ultimately, it is the Minister in charge of the Bill who is accountable to Parliament for stating that the Bill is compatible with the Convention rights.”<sup>54</sup> Thus, there is scope for minister’s personal judgment. This might explain why interviews suggest bills have been approved by the PBL even with a high risk level.<sup>55</sup>

Hiebert and Kelly suggest legislation such as the Anti-Terrorism Crime and Security Act 2001, Prevention of Terrorism Act 2006 and Civil Partnership Act 2004 all appeared to be more risky than 50 per cent.<sup>56</sup> However, Heibert and Kelly’s claim is based on interviews and the level of disagreement between the JCHR and the government. The JCHR applies a different standard and has a different focus. While the government adopts risks of domestic legal defeat, the committee focuses on scrutinising, convention compatibility, safeguards and other issues. They do concede that the issue of proportionality is a continuous source of disagreement between the government and JCHR.<sup>57</sup> For these reasons, Hiebert and Kelly argue that section 19 (1) (a) reports often mask substantial political judgments that may not be based solely on interpretation of case law.<sup>58</sup> Thus, section 19 (1) (a) reports can give a false impression about culture of compliance within the

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<sup>50</sup> *ibid* (n 37) 286.

<sup>51</sup> *ibid* (n 35) 48.

<sup>52</sup> *ibid* (n 37) 277.

<sup>53</sup> *ibid* (n 32) 98.

<sup>54</sup> *ibid* (n 32) 101-102 para 11.106.

<sup>55</sup> *ibid* (n 37) 280.

<sup>56</sup> *ibid* (n 37) 359.

<sup>57</sup> *ibid* (n 37) 282.

<sup>58</sup> *ibid* (n 37) 269.

executive. The minister may in their own personal opinions believe their legislation is compliant, despite legal advice.<sup>59</sup> The minister may falsely represent their legislation as compliant.<sup>60</sup> This willingness to take risks, to proceed despite the legal advice shows that a culture of compliance appears to have not taken hold within the government. The government has “demonstrated strong reluctance to allow concerns of compliance with the [Human Rights Act] to substantially constrain” themselves.<sup>61</sup> This confirms Nicol’s prediction in 2004 that the roots of political constitutionalism run deep and are resistant to cultural overhauls.<sup>62</sup> Nevertheless, it is unclear whether such a risk taking attitude is shared equally across all departments. It is possible that some departments might be keener than others to place more weight on the legal assessment, than other political consideration. It does seem that in most contentious matters or centre piece policies, the Government is not shackled by a culture of compliance.

This reveals a paradox about section 19 and the Government. Section 19 has incentivised greater sensitivity to rights within government.<sup>63</sup> Yet contrary to the expectations it has done so in a way which does not substantially constrain the government. This paradox begins to reveal a tension between the enabling and limiting account of political constitutionalism. The paradox shows the government is incentivised to consider the potential impact of their legislation in a more robust way than before. This provides further evidence to support claims that the Government takes rights related issues seriously. It does this without placing the government into constitutional constraints. In contrast, section 19 might present problems for the limiting account.

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<sup>59</sup> D Feldman, ‘Institutional roles and meanings of “compatibility” under the Human Rights Act 1998, in H Fenwick, G Phillipson, R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2011) 99.

<sup>60</sup> H Fenwick, ‘Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?’ (2002) 65 MLR 724, 727-728; and M Elliot and R Thomas, *Public Law* (OUP 2014) 699.

<sup>61</sup> *ibid* (n 37) 342.

<sup>62</sup> *ibid* (n 6) 455.

<sup>63</sup> D Feldman, ‘The Impact of Human Rights on the UK Legislative Process’ (2004) 25 Stat.L.R. 91, 91.

### 3) Parliamentary Protection and Political Constitutionalism

Another potential reason for the government's ability to take risks relates to Tomkins's reality of government principle.<sup>64</sup> If the government is liable to try to do whatever it can get away with, then the level of scrutiny over section 19 reports by Parliament impacts the scope of the government's freedom. If the government appears willing to take risky legislative gambles, this suggests parliamentary scrutiny of section 19 reports is not as high as would be expected in a culture of compliance. As Nicol, Hiebert and Kelly have all argued, a culture of compliance is not especially prominent in all parts of Parliament. The House of Commons appears to be uninterested in effectively scrutinising the government's section 19 reports.<sup>65</sup> The JCHR and House of Lords appear more interested yet they cannot bind the Commons; in practice they need to convince the Commons to support their views. Yet where the JCHR and House of Lords have raised concerns about the government's assessment, the Commons has frequently appeared apathetic. Although, from time to time some MPs have expressed direct doubts about the Ministers report, rarely does it affect the direction of the debate. For example, during the second reading on the Terrorism Bill, only 1 MP directly questioned the minister's claim of compatibility.<sup>66</sup> MPs tend to express concerns about human rights in a less focused manner; section 19 appears not to serve as a lightning rod for human rights issues. Human rights issues are raised in a more general way in debates. Thus, direct scrutiny of a section 19 (1) (a) report currently is a relatively low hurdle for the government to overcome.

Furthermore, where the government has brought forward an openly incompatible bill, it appears to have not improved the Commons's willingness to securitise the government. To date the

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<sup>64</sup> Tomkins *ibid* (n 22) 2.

<sup>65</sup> *ibid* (n 6) 472, *ibid* (n 37) 342.

<sup>66</sup> See: Tony Lloyd (Labour) HC Deb 26 October 2005 vol 438 col 345, 366.

government has only had to give a section 19 (1) (b) report twice.<sup>67</sup> These were given at the introduction of the Communication Bill 2003 and the House of Lords Reform Bill 2012. While the Communication Bill became law,<sup>68</sup> the House of Lords Reform bill did not. The way in which the Commons responded to the section 19 (1) (b) reports differs. The House of Lords Reform bill was withdrawn by the government due to persistent backbench pressure.<sup>69</sup> The Deputy Prime Minister was unable to state the bill was compliant due to the UK's ongoing issues with the blanket ban on prisoner voting following *Hirst v UK*.<sup>70</sup> MPs were critical of reforming the UK's second chamber to make it for the most part directly electable. Contrary to what would be expected in a culture of compliance, during the second reading, the section 19 (1) (b) report was never raised by a single MP.<sup>71</sup> Since the in-compliance related to prisoners voting, which Parliament had already firmly rejected,<sup>72</sup> it is probable that the rebels felt raising the compliance argument would not have helped their cause. In contrast, during the Communication Bill, the Commons was willing to debate the rights implication following the minister's section 19 (1) (b) report.<sup>73</sup> Several opposition MPs were keen to debate the human rights implication with the minister.<sup>74</sup> It is possible, the opposition merely seized the opportunity to criticise the government as this was the first 19(1) (b) report. Alternatively, the bill had implications to Article 10 Freedom of Expression, which is traditionally well understood by MPs; perhaps MPs were more willing to debate it. There is little evidence to suggest that the failure to bring forward an

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<sup>67</sup> *ibid* (n 40).

<sup>68</sup> Communication Act 2003.

<sup>69</sup> P Bowers, 'Commons Briefing papers SN06405: House of Lords Reform Bill 2012-13: decision not to proceed' 2012) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06405>> accessed 12 July 2015.

<sup>70</sup> *Hirst v the United Kingdom* (No 2) [2005] ECHR 681.

<sup>71</sup> Bill stages — House of Lords Reform Bill 2012-13 <<http://services.parliament.uk/bills/2012-13/houseoflordsreform/stages.html>> accessed 12 July 2015.

<sup>72</sup> HC Deb 10 February 2011 vol 523 col 493-584.

<sup>73</sup> HC Deb 03 December 2002 vol 395 col 782-864.

<sup>74</sup> *ibid* George Osborne (Conservative) col 785; John Whittingdale (Conservative) col 789; Andrew Lansley (Conservative) col 836-883; Andrew Robathan (Conservative) col, 851; Richard Allan (Liberal Democrat) col 788; Nick Harvey (Liberal Democrat) col 803; Reverend William Martin Smyth (Ulster Unionist Party) col 845-846.

incompatible bill presents a hurdle for the government during the second reading, or that section 19 has improved Commons scrutiny of the government during the second reading. With or without a section 19 (1) (a) report, the Commons generally places little emphasis on the minister's report. Thus, despite its aim for improving parliamentary scrutiny, section 19 has done little to improve the Commons ability, which should disappoint proponents of the limiting account.

In contrast, the JCHR does place considerable emphasis on the section 19 report. Their focus is to provide "regular and often critical reports on the persuasiveness" of the section 19 reports.<sup>75</sup> The committee has been praised by political constitutionalists such as Tomkins,<sup>76</sup> Richard Bellamy<sup>77</sup> and Jeremy Waldron.<sup>78</sup> Tomkins has claimed the committee has "worked to strengthen the political constitution."<sup>79</sup> There are several reasons for being supportive of this claim for the limiting account of political constitutionalism. First, the JCHR seeks to improve Parliament's own ability to consider rights, instead of leaving rights with the government and the courts. It does this by highlighting issues, providing a narrative and helping to gain concessions from the government.<sup>80</sup> Second, the committee has a strong reputation for scrutinising the government, frequently requiring ministers to present additional evidence before the committee. For example, the committee makes evidential based judgments in its reports.<sup>81</sup> Third, it is also often critical of the judiciary's decisions. The committee has in the past criticised the Judiciary

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<sup>75</sup> J.L Hiebert, 'The HRA: Ambiguity about Parliamentary Sovereignty' (2013) 14 German Law Journal 2253 2254.

<sup>76</sup> Tomkins (ibid n 23) 13-39.

<sup>77</sup> ibid (n 21) 99.

<sup>78</sup> Joint Committee on Human Rights (JCHR), 'Oral Evidence on Human Rights Judgments given by Professor Jeremy Waldron' Session 2010-2012, 15 March 2011, Q46.

<sup>79</sup> A Tomkins, 'What's Left of the Political Constitution' (2013) 14 German Law Journal 2275, 2282.

<sup>80</sup> Tomkins ibid (n 23) 20.

<sup>81</sup> Tomkins ibid (n 23) 25, 27.

for failing to protect rights. For example, the JCHR was critical of the *JJ* judgment.<sup>82</sup> Lord Brown's judgment held permanent home confinement of no more than 16 hours a day would be compliant with the convention.<sup>83</sup> The JCHR disagreed, recommending 12 hours.<sup>84</sup> Fourth, it does not share some of limitations of the courts. The JCHR is not constrained by precedent.<sup>85</sup> Nor does it need to give deference to the government.<sup>86</sup> The JCHR is able to return to matters as it does not need litigation to arise before it can reconsider a matter. Evidence of this includes the JCHR's persistent calls to Parliament not to renew powers conferred on the executive such as indefinite detention<sup>87</sup> and control orders.<sup>88</sup> Furthermore, the JCHR can continuously press the government to respond to the ECHR judgments and Declarations of Incompatibility.<sup>89</sup> The JCHR must take some credit for the fact that the UK has attempted to respond to all declarations. The high level of compliance of declarations of incompatibility identified in chapter 3, suggests the JCHR is effective at placing continuous pressure on the government for a response. The government's decisional space to ignore a declaration is considerably reduced by the JCHR. Fifth, the committee also provides an opportunity for minorities and the vulnerable to be represented in the parliamentary process and whose concerns often can fail to gain a hearing or are under-represented during the ordinary political debate.<sup>90</sup> Research shows 60% of references

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<sup>82</sup> Secretary of State for the Home Department v JJ and others [2008] 1 A.C. 385

<sup>83</sup> *ibid* [438] (Lord Brown).

<sup>84</sup> JCHR Twentieth Report of Session 2007-08 HL 108/HC 554 31-32, 46.

<sup>85</sup> *ibid* (n 36) 127.

<sup>86</sup> Tomkins *ibid* (n 23) 20.

<sup>87</sup> JCHR Sixth Report, Session 2003-2004 HL 38/HC 381; JCHR Eighteenth Report, Session 2003-2004 HL 158/ C 713.

<sup>88</sup> JCHR Twelfth Report Session 2005-2006 HL 122/ HC 915; JCHR Eight Report Session of 2006-2007 HL 60/HC 365; JCHR Tenth Report, Session 2007-2008 HL 57/ HC 356; JCHR Fifth Report Session 2008-2009 HL 37/HC 282; JCHR Ninth Report, Session 2009-2010, HL 65/HC 395; JCHR Sixteenth Report 2009-2010 HL 65/HC 395.

<sup>89</sup> *ibid* (n 75) 2257.

<sup>90</sup> M Hunt, H Hooper and P Yowell, '*Parliaments and Human Rights: Redressing the Democratic Deficit* (Swindon, Art and Humanities Research Council, 2012) 34-35 <<http://www.ahrc.ac.uk/documents/project-reports-and-reviews/ahrc-public-policy-series/parliaments-and-human-rights-redressing-the-democratic-deficit/>> accessed 10 February 2015.

by MPs of the JCHR were made in relation to marginal groups and the vulnerable.<sup>91</sup> This helps supports the claims that Parliament can and is able to consider minorities and the vulnerable in society.

However, there are several arguments that raise doubts about the appropriateness of limiting accounts' faith in the JCHR. The first is that the JCHR has a strong legal element in practice. The committee sees itself "as the guardian of Strasbourg values" within the parliamentary process<sup>92</sup> As Kavanagh suggests, the committee seems to assist non-specialist parliamentarians in understanding the implications of government bills, domestic and international case law and values.<sup>93</sup> Yet Joo-Cheong Tham, for example has criticised the JCHR for adopting a far too legalistic approach that is inaccessible to parliamentarians, resulting in "greater barriers to political deliberation."<sup>94</sup>With its focus on ensuring compliance with the ECHR and a higher standard of care towards compliance, the committee is easier to categorise as adopting a culture of compliance in its practices. The committee of course tends to use the ECtHR case law as a floor rather than a ceiling in its approach. Nevertheless as Kavanagh argues presenting the JCHR as "a mascot of political constitutionalism" is misguided as it effectively turns a blind eye towards the legal dimensions of the committee's work, focusing more on its parliamentary and democratic credentials.<sup>95</sup> It also appears to downplay the fact that half of the JCHR members are Lords, and thus unaccountable on an individual basis. The committee is also reliant on its legal adviser. Tomkins claims the JCHR shows what "Parliament could achieve" in terms of rights

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<sup>91</sup> *ibid* 34.

<sup>92</sup> *ibid* (n 6) 464.

<sup>93</sup> *ibid* (n 36) 129.

<sup>94</sup> JC Tham, 'Parliamentary deliberation and the National Security Executive: the case of control orders' [2010] P.L. 79, 101.

<sup>95</sup> *ibid* (n 36) 130.

protection and holding the executive to account over the judicial methods.<sup>96</sup> However, this seems to ignore the questions of how this high standard was reached, focusing on whether the people who make the argument are democratic and if they are critical of the government.

Secondly, the effectiveness of the JCHR is underwhelming. Research by Murray Hunt, Hayley Hooper and Paul Yowell suggests similar to section 19 reports, the House of Commons is generally apathetic to the work of the JCHR. Although on the one hand there has been an increase in the substantive references to the JCHR reports since 2005.<sup>97</sup> 34% of those references were made in the Commons, the rest were made in the Lords.<sup>98</sup> References to the JCHR report were popular in the context of counter terrorism, crime and health care.<sup>99</sup> They distinguished between high frequency users who made over 30 references and the medium frequency users. Only 2 MPs were identified as high frequency users and both of them were on the JCHR and their references represented 38% of all references within the House of Commons.<sup>100</sup> Their research also shows at least 16 direct JCHR references resulted in the government offering the amendment.<sup>101</sup> These are low figures considering the research covered from the creation of the JCHR in 2001 to May 2010. More concerning for the limiting account is that 15 of these amendments have been accepted by the government not as consequences of pressure from the Commons, but from pressure from the Lords.<sup>102</sup> In the same way as Nicol's observation in 2004,

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<sup>96</sup> Tomkins *ibid* (n 23) 35.

<sup>97</sup> *ibid* (n 90) 22.

<sup>98</sup> *ibid* (n 90) 25.

<sup>99</sup> *ibid* (n 90) 31.

<sup>100</sup> *ibid* (n 90) 25.

<sup>101</sup> *ibid* (n 90) 43.

<sup>102</sup> *ibid* (n 90) 44.

the House of Lords engages more in the behaviour of a culture of compliance and continues to remain so.<sup>103</sup>

Although these figures might be disappointing, amendments are “only one form of committee influence, and arguably not even the most important.”<sup>104</sup> As Benton and Russell’s research has shown the influence of committees takes many forms including influencing debate, spotlighting issues, providing expert evidence, accountability and exposure and critically generating fear.<sup>105</sup> The JCHR’s ability to secure amendments may disappoint some, but their presence helps maintain the standard of rights consideration we saw within the government. One can presume without the JCHR, the government would likely be able to adopt a lower standard because of “the ongoing lack of human rights awareness in Parliament.”<sup>106</sup> Benton and Russell’s research shows ministers do not enjoy giving evidence before the committees which prompts greater policy consideration. One official told them that frequently ministers thought about “how would I explain that to the committee?”<sup>107</sup> In this regard, the process of consideration within the executive may assist ministers. The improved internal mechanisms of rights consideration have helped the government predict and respond to parliamentary concerns over human rights. Evidence given to the JCHR by Harriet Harman shows that the Labour government felt the JCHR’s calls for safeguards were redundant since the government’s own internal consideration will have considered and normally rejected these safeguards.

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<sup>103</sup> *ibid* (n 6) 472.

<sup>104</sup> M Benton and M Russell, 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons' (2013) 66 *Parl. Aff.* 772, 774.

<sup>105</sup> *ibid* 778-792.

<sup>106</sup> C.R.G. Murray, 'The Continuation of Politics, by other means: Judicial Dialogue under the Human Rights Act 1998' in R Masterman, I Leigh (Eds) *The United Kingdom's Statutory Bill of Rights, Constitutional and Comparative Perspectives* (OUP for the British Academy 2013) 75.

<sup>107</sup> *ibid* (n 104) 792.

“We are tooled up to the point at which we believe we can rely on that legal advice, so that basically, if we finally get the advice from the Attorney General that something can be done, then I do not think there is anybody else who can trump that in the government's mind. The government is not likely to think again about the legal issues once it has had all the legal advice going up as far as the Attorney General if it needs to, but I do think the issues of how we take forward legislation, how we monitor, how we review, how we promote, whether we have the right framework, whether accountability under the framework is operating effectively, and in particular pieces of legislation which affect human rights... are very important work of the committee and very important for government.”<sup>108</sup>

Similar evidence was given to Hiebert and Kelly and Benton and Russell in their studies that “once government has decided to introduce a bill and has reached a judgment about how to interpret the statutory reporting obligation, this judgment will not (be) revised once a bill is introduced regardless of what the JCHR say.”<sup>109</sup> This is not unique to the JCHR. Benton and Russell have highlighted that in general the government is unwilling to change its mind, although “there is increased likelihood of acceptance and implementation of smaller-scale changes” recommended by committees.<sup>110</sup> Therefore, one may argue that more robust internal rights consideration by the government, makes the likelihood of the government compromising by accepting amendments in the face of parliamentary concerns is less likely. This reduces Parliament’s role in rights consideration.

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<sup>108</sup> JCHR ‘Oral Evidence and Memoranda given by Harriet Harman MP, Minister for State Department of Constitutional Affairs,’ Session 2005-2006 (HL 143/ HC 830i), Q45.

<sup>109</sup> *ibid* (n 37) 300.

<sup>110</sup> *ibid* (n 104) 782.

There is currently little evidence to suggest scrutiny of section 19 reports or the JCHR opinions present any significant constitutional obstacles preventing the government from delivering its policies. A culture of compliance has not taken hold, despite improvements to both the government and Parliament's abilities to consider human rights issues. Although, there remains great potential for Parliament to improve its abilities to scrutinise the government by making better use of the JCHR, it is very disappointing for limiting account to see this opportunity being wasted. As Tomkins claims the JCHR shows what "Parliament *could* achieve" (emphasis added).<sup>111</sup> Nevertheless for the limiting account, it would be wrong to say the JCHR is completely ineffective. It does have some effect, its ability to force the government to publish explanatory notes, question ministers and prompt the government to respond to declarations of incompatibility shows it does have some impact. Furthermore, our ability to analyse how effective it is severally challenged as "much of Parliament's influence is subtle, largely invisible, and frequently even immeasurable."<sup>112</sup> As Hunt and Conor Gearty claimed, the human rights literacy of parliamentarians appears to have improved.<sup>113</sup> After all, the civil libertarian dilution of some legislation must be owed to the Human Rights Act as a "peg upon which parliamentarians could hang their arguments."<sup>114</sup>

#### **4) Section 10 of the Human Rights Act**

Finally one must briefly consider the section 10 fast track remedy process which gives the minister the statutory power to take remedial action to amend legislation following a declaration

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<sup>111</sup> Tomkins *ibid* (n 23) 35.

<sup>112</sup> M Russell and M Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (PSA Legislative Studies Specialist Group Conference, London, 24 June 2009) 1 <[https://www.ucl.ac.uk/constitution-unit/research/parliament/policy-impact/policy\\_impact\\_parliament.pdf](https://www.ucl.ac.uk/constitution-unit/research/parliament/policy-impact/policy_impact_parliament.pdf)> accessed 05 May 2015.

<sup>113</sup> M Hunt, 'The impact of the Human Rights Act on the legislature: a diminution of democracy or a new voice for Parliament?' [2010] E.H.R.L.R. 601, 607; and Gearty *ibid* (n 23) 586.

<sup>114</sup> Gearty *ibid* (n 23) 586.

of incompatibility via statutory instrument. Schedule 2 sets out two procedures, a normal route and urgent route. Under the normal route, a minister must lay a draft of the order for approval by resolution of both Houses of Parliament before remedying.<sup>115</sup> In contrast, in urgent cases, the order can be placed before Parliament after the legislation has been amended.<sup>116</sup> Ministry of Justice records show section 10 has been used sparingly. It has been used once following an ECHR judgment<sup>117</sup> and three times following a domestic declarations.<sup>118</sup> It is more common practice to use primary legislation to resolve the situation.<sup>119</sup>

One can assume, section 10 is the preferable route of remedy for the government, as it reduces the potential risk of parliamentary scrutiny and time wasting. Remedying legislation via the normal route means the government will have to invest political capital and time in its legislative programme and open itself to normal criticism. The normal route does allow for a degree of parliamentary scrutiny. However, the urgent route does not. Kavanagh has criticised the urgent route for allowing the government to take the amendment “totally outside of the parliamentary process.”<sup>120</sup> Similarly some parliamentarians feel “it is wrong that primary legislation can be altered by Statutory Instrument if found incompatible.”<sup>121</sup> Remedial measures are subject to

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<sup>115</sup> Human Rights Act 1998, Schedule 2, para 3.

<sup>116</sup> *ibid* Schedule 2, para 4.

<sup>117</sup> *Gillan and Quinton v United Kingdom* (2009) 50 EHRR 45 and *Terrorism Act 2000 (Remedial) Order 2011* (SI 2011/631).

<sup>118</sup> *R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & the Secretary of State for Health* [2001] 3 W.L.R. 512 and *Mental Health Act 1983 (Remedial) Order 2001* (SI 2001 No.3712); *R (Baiai and another) v Secretary of State for the Home Department* [2007] 1 W.L.R. 693 and *The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011*; *R (F and Thompson) v Secretary of State for the Home Department* [2008] EWHC 3170 and *Sexual Offences Act 2003 (Remedial) Order 2012*.

<sup>119</sup> J King, ‘Parliament’s Role Following Declarations of Incompatibility under the Human Rights Act’ in M Hunt, H J Hooper, P Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 168.

<sup>120</sup> A Kavanagh, *Constitutional Review under the UK HRA 1998* (CUP 2009).

<sup>121</sup> D Grieve MP, ‘Dominic Grieve: It’s the interpretation of the Human Rights Act that’s the problem – not the ECHR itself’ (*Conservative Home*, 2009) <<http://www.conservativehome.com/platform/2009/04/dominic-grieve-2.html>> accessed 29 July 2015.

scrutiny by the JCHR.<sup>122</sup> Nevertheless, as the Equality and Human Rights Commission point out, there is a “lack of any evidence to show that the remedial power in section 10 has been in any way problematic.”<sup>123</sup> One might suggest that section 10 is a less desirable method of remedying legislation for proponents of the limiting account. Similar to the way the government encourages the courts to use section 3 to amend legislation, section 10 reduces Parliament’s role in the process. For the enabling account, section 10 reduces the risk of constitutional obstacles for the government.

Nevertheless, one consequence of failing to use section 10 is that it risks a slower response time from the political institutions in addressing the incompatibility. There is evidence the UK has a slower response time to the judgments than other countries including those that use a weak form review such as Canada.<sup>124</sup> This slow response time may further present section 4 as undesirable to claimants. Alternatively, slow response times should not be seen as problematic for political constitutionalism. They show that the government is not rushing into changing the law. If this were the case, post democratic scrutiny would be nothing more than a rubber stamping exercise. Although, section 10 is used sparingly, reforming or replacing the Human Rights Act provides a good opportunity to remove this provision.<sup>125</sup>

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<sup>122</sup> *ibid* (n 119) 167.

<sup>123</sup> Equality and Human Rights Commission, ‘The case for the Human Rights Act’ (2011) 81 <<http://www.equalityhumanrights.com/legal-and-policy/legislation/bill-rights/case-human-rights-act>> accessed 07 August 2015.

<sup>124</sup> *ibid* (n 119) 170.

<sup>125</sup> M Pinto-Duschinsky, ‘Bringing Rights Back Home Making human rights compatible with parliamentary democracy in the UK’ (Policy Exchange, London, 07 February 2011) 61 <<http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%2011.pdf>> accessed 05 June 2015.

## Conclusion

The democratic scrutiny side of the Human Rights Act has certainly helped improve democratic actors think and consider rights. Perhaps most surprisingly, it has done so in a way that has not resulted in a culture of compliance. The government has been able to improve its ability to consider rights and despite an existing practice of risk aversion, the government has always leaned towards a culture of compliance. The government is now more willing to consider rights and work to ensure its measures are proportionate, but it has not been willing to let the potential risk of legal censure stop it. Furthermore, “the political behaviour in the Commons has not been substantially re-oriented” towards a culture of compliance either.<sup>126</sup> Therefore, democratic scrutiny under the Human Rights Act is certainly compatible with political constitutionalism, but there is more evidence of tension between the two accounts of political constitutionalism. Under the Human Rights Act the government’s position appears to be considerably better for the enabling account. The Human Rights Act does not present a serious constitutional obstacle to the successful delivery of policy in democratic stages. It has improved policy making and rights consideration without collapsing into a culture of compliance. In contrast, much to the frustration of the proponents of the limiting account, although it is compatible, the current practice of the House of Commons is that it insufficiently engages in human rights debates. It is more often than not that the Commons is all too willing to accept the government’s conclusion or fail to make effective use of the JCHR’s reports. As Colin Murray asserts, “Parliament as a whole has to shoulder some of the burden of engaging in Human Rights jurisprudence.”<sup>127</sup> If the UK is engaged in a culture of controversy then the House of Commons appears to be the weakest institution.

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<sup>126</sup> *ibid* (n 37) 342.

<sup>127</sup> *ibid* (n 106) 74.

## **Conclusion**

The aim of this thesis has been threefold. First, it has sought to contribute to the current debate over the future of the Human Rights Act by analysing the UK's current statutory bill of rights with the theory of political constitutionalism. I have highlighted the strengths and weaknesses of the Act according to the theory. Second, this thesis has attempted to identify two main accounts of the political constitution; which I have termed "limiting" and "enabling" political constitutionalism. There is internal disagreement between these accounts, focused on how to best achieve a normative version of political constitutionalism. Finally, building on this, I have sought to show how proponents of the limiting and enabling accounts of political constitutionalism might perceive elements of the Human Rights Act differently, which in turn shapes how they might propose different reforms.

### **Reflecting on Political Constitutionalism**

The first part of this thesis reflected on political constitutionalism by examining its development from its seemingly descriptive origins to its modern normative theory. On a closer examination of the current normative theory, there are at least two different accounts of political constitutionalism emerging. Proponents of these accounts have adopted different interpretations of the Griffith's work, republicanism and ordinary political culture. There is a difference in emphasis between the two accounts.

The first account is what I have termed the limiting political constitutionalism. Proponents of this account are sceptical of the executive and believe that Parliament serving as a representative of

citizens can and should provide effective scrutiny of all executive activity to avoid domination. Proponents advocate reducing the government's control over the Parliament so to enrich political debate and ensure the protection of the common good from excessive actions by the government. The second account I identified was the enabling political constitutionalism. In contrast to the limiting account, the enabling believes the executive is accountable directly to people rather than the Commons. They view the executive as vital to ensure the successful promotion and delivery of the common good, through a culture of incentivisation which emphasizes the successful delivery of electoral promises. Competition between rival aspirants of power to gain and maintain a majority promotes political parties to constantly seek new ways of gaining support. They also suggest this can yield progressive and inclusive policies. The enabling views the government as being directly accountable to the electorate, who should judge it for its ability to deliver policy and effectiveness of those policies. This form of accountability rejects constitutional obstacles such as constitutional review, entrenched laws or forces within Parliament. If these were to prevent the government from delivering the promises it was elected on, it would only provide the government with an excuse for the failure to deliver the common good, distorting effective accountability.

As a consequence, these two accounts interpret ordinary political activity and in particular the relationship between the executive and legislature differently. Therefore, reforms which have implications to these institutions may produce disagreement. For example, Adam Tomkins, whose works is representative of the limiting account, advocated the removal of party whips from Parliament to loosen the executive's control over the Commons. Danny Nicol, adopting the enabling position, strongly disagreed with this idea for reform.

## **The Compatibility of Human Rights Act with Political Constitutionalism**

In chapter two, it was identified that under the Human Rights Act, the courts, the government and Parliament now engage in various forms of rights consideration and scrutiny. This is achieved over a four institutional stages. Stages 1 and 2 refer to pre-legislative rights consideration by the government and Parliament. Stages 3 and 4 engaged the courts, the government and Parliament in post-legislative rights consideration. In the pre-legislative context, the government and Parliament must consider the rights implications of legislation. The government must do this as a result of their statutory obligations under section 19. Parliament can consider rights by scrutinising the government's section 19 assessments through ordinary political debate and the Joint Committee on Human Rights (JCHR). In post legislative context, the courts, the government and Parliament may also have to re-consider earlier rights assessments. The courts can do this via section 3 and section 4. The government and Parliament can do this through section 4, section 10, the JCHR and ordinary political activity. As a result, the Human Rights Act has reformed the relationship between all three institutions in the UK. Therefore, it was suggested this current system would likely give rise to different views between the limiting and enabling accounts.

In regards to the section 3 and section 4 judicial powers, I argued that weak form review had the potential of being compatible with political constitutionalism. The crucial consideration is to ensure it does not collapse into strong form review. The power to issue a declaration of incompatibility under section 4 appears currently more representative of weak form review, thus theoretically compatible with both accounts of political constitutionalism.

Following a section 4 declaration of incompatibility by a higher court, in the majority of cases the government and Parliament reflected on the declaration and then changed the law. In many cases, the courts assisted political institutions by highlighting areas of existing legislation that affected discrete minorities. The government and Parliament changed the law either accepting their own legislation had negative consequences which they had not foreseen, or because they disagreed with an earlier government's legislation. However, in a small minority of cases, either the government or Parliament appeared apprehensive or clearly opposed to accepting the declaration. Despite this, they ultimately changed the law. On a case by case basis, we can see a range of internal and external pressures that resulted in compliance. In some cases, the domestic judgment merely mirrored the judgment handed down by the European Court of Human Rights (ECtHR) against the UK, thus the compliances were made to respect the UK obligations under International Law. However, in those cases where they disagreed and could have defended their position even if the case went to the ECtHR, they did not take the opportunity. Internal pressures such as coalition stability, Parliamentary pressure and timing were significant factors in these cases. Yet these circumstances have arisen on a case by case basis rather than being the norm. As a result, at this stage it is simply too early to determine if a convention is developing that would transform section 4 into strong form review.

Despite these issues, section 4 in practice is more compatible with political constitutionalism than section 3. The power to amend legislation through a more radical form of statutory interpretation, appears more like strong form review, therefore incompatible with political constitutionalism. It has given the courts the power to amend legislation in a way which might conflict with the clear intentions of Parliament. There is also a clear lack of democratic oversight

of this power. Finally, since section 3 precludes section 4, despite the problems of section 3, it is the primary judicial power under the current Human Rights Act. This means the potential benefits of section 4 is being wasted by relegating it to a measure of last resort.

The democratic methods of rights consideration are compatible with political constitutionalism. Despite the concerns that they would reduce debate by engulfing all forms of political activity in a culture of compliance, the reality is that the Human Rights Act has improved political institution's ability to consider rights without curtailing debate. In this regard, the democratic elements have arguably provided stronger evidence which supports the political constitutionalist faith in democratic institutions. It has done in way which addresses some of the perceived shorting comings of the legislative process. The government now considers rights in a more robust and detailed way as a result of section 19. However, section 19 has not become a constitutional obstacle for the government. Autolimitation has not appeared to have occurred. Rather, it has simply resulted in more refined policy consideration. JCHR also helps Parliament consider rights in greater detail than before. It is likely that the limiting and enabling accounts view this democratic rights consideration as a positive, but will have some issues over reforms.

The current model appears to have favoured the government over Parliament. As a result, this presents some problems for the limiting account. Section 19 has helped foster more refined and robust policy making. The government is able to consider rights to a greater extent than before, allowing them to foresee the rights implications and potential safeguards at the earliest stage. Yet this has consequences on Parliament's role under the Human Rights Act. It can reduce Parliament's ability to contribute. One reason for this is that the government, the majority of the

time, will be seeking to do the minimum necessary to comply with the convention. However, Parliament may apply a higher standard. Although, some MP's and JCHR may disagree with the government assessment, they will often struggle to convince the government to change its legislation. This is because the government is likely to have already considered these arguments and rejected them as unnecessary before introducing the bill before Parliament. Thus, the government is more able to reject advice of the JCHR because it has likely to have already considered the issue and prepared a response before the bill is introduced. Furthermore, amendments might disrupt the government's plans thus are less likely to be accepted.

Another potential problem is that despite the strong work done by the JCHR, the majority of MPs appear unwilling to make better use of JCHR reports. If the JCHR's recommendations do provide a high standard of rights protection and demonstrate what Parliament could achieve then, some blame must be placed on MPs for their failure to be implemented. Currently, it appears, to the frustration of proponents of the limiting account, too many MPs are either giving too much deference to the government's assessment or refusing to engage in the human rights debates.

## **Reforms**

Reforming the judicial and democratic consideration and scrutiny in the Human Rights Act will likely give rise to disagreement between the proponents of the limiting and enabling accounts of political constitutionalism. It is crucial to reform the judicial elements of the current system. Section 3 is the most problematic element. Whether a future of bill of rights completely repeals or replace it with a reformed version, it is vital that the problems of section 3 are removed to ensure a future statutory bill of rights is more compatible with political constitutionalism.

There is reason to suspect that the enabling account would advocate amending the provision, rather than completely repealing it. This is because there is some evidence suggesting that the provision can favour the government. Counsel for the government frequently advocates that the courts use section 3 by recommending their own interpretation to resolve the issue. This allows the government to change the law and still achieve its goals without the risk of negative press or further parliamentary hurdles. If section 3 is to be reformed, rather than repealed, the quest here is for greater democratic control over judicial activity.<sup>1</sup> As it stands, section 3 is poorly drafted, there is certainly scope to reform it. Reforms might include re-drafting the provision promoting greater deference to statute. Section 3 could be amended to “make clear that interpretation cannot distort the meaning of statutory language.”<sup>2</sup> Another reform could be to give the relevant minister the power to approve an interpretation or provide guidance and terms to judges on how to proceed. Alternatively, “questions relating to the interpretation of existing legislation be referred back to Parliament.”<sup>3</sup> This would allow Parliament to then make a decision about how a judge should interpret a provision.

In contrast, the limiting account should advocate the complete repeal of section 3. They should believe that courts should only have the power to issue declarations of incompatibility, as it allows Parliament to engage in the process. Section 3 can leave re-writes just to the courts and the government which is unconstitutional according to the limiting account. With regards to

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<sup>1</sup> R Bellamy, 'Political constitutionalism and the Human Rights Act' (2011) 9 ICON 86, 100.

<sup>2</sup> J Morgan, 'Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties' in T Campbell, K.D Ewing, A Tomkins (eds) *The Legal Protection of Human Rights Sceptical Essays* (OUP 2011) 442.

<sup>3</sup> M Pinto-Duschinsky, 'Bringing Rights Back Home Making human rights compatible with Parliamentary democracy in the UK' (Policy Exchange, London, 07 February 2011) 61

<<http://www.policyexchange.org.uk/images/publications/bringing%20rights%20back%20home%20-%20feb%2011.pdf>> accessed 05 June 2015.

section 4, the more the provision is used, the more opportunity there is for democratic actors to engage in post-legislative review and perhaps disagree with the courts. Leaving the ECHR could also potentially allow for greater decisional and remedial space for democratic actors. However, leaving the ECHR will have serious consequences in both domestic and international politics. Currently this seems to be an unlikely step for the Conservative government to take.

Reforming democratic elements is less necessary yet more complicated. The easiest reform to make to the democratic stage would be to the fast track remedy system. Although it is rarely used, section 10 should be either reformed or complete repealed. Once again, as section 10 appears to assist the government, the enabling account might advocate reform. Conversely, the limiting account would advocate the removal of “this opportunity for ministers to bypass Parliament” from a future model.<sup>4</sup>

Reforming other elements is more complex. Evidence suggests one consequence of the section 19 statutory requirement is that the government is able to predict and strengthen its arguments in the face of Parliamentary disagreement. One might assume the limiting account would wish to see section 19 repealed. They might advocate it be replaced with a Parliamentary version of it. Instead of being the government’s assessment over the bill’s compliance, it would be Parliament’s. However, the only problem is that the practices of greater internal executive consideration would continue without the statutory requirement as the process has generally improved policy making. This might also potentially tip the UK political system into a culture of compliance. A more suitable but equally more challenging area of reform the limiting account should focus on is getting Parliamentarians to better utilize the JCHR and develop their own

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<sup>4</sup> *ibid* 61.

voice over rights consideration, rather than simply see rights as the preserve of the governments or the courts. This not an easy task, as it will be hard to draw a line at which ordinary political debates becomes a culture of compliance.

Yet it is critical to resolve this issue, as Murray Hunt argues; the more we move away from the 1998 consensus with each new generation of Parliamentarians, the more urgent it become to get Parliamentarians to engage with rights discourse.<sup>5</sup> One problem with the current system is that the Conservative party has been what Nicol describes as “the epicentre of resistance” to the Human Rights Act.<sup>6</sup> The “Conservatives in no way assumed the role accorded to opposition parties by Alec Stone Sweet” thus avoiding the Commons being engulfed in a culture of compliance. Nevertheless, the resistance to the Act, along with the tainting of Human Right Act by sections of the press eventually began to infect Labour MPs. This appears to have toxified the idea of human rights debates. Instead of MPs engaging in debates over rights and judicial decisions, debates have become more focused on the very existence of the Human rights Act.<sup>7</sup> A Conservative Bill of Rights might encourage both Conservative MPs and the section of the press to stop criticizing human rights which might de-toxify the notion of seriously debating rights, in doing so potentially allowing for more enriching debates about rights in the commons.

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<sup>5</sup> M Hunt, ‘Introduction’ in M Hunt, H Hooper, P Yowell (eds) *Parliament and Human Rights: redressing the democratic deficit* (Hart 2015) 12-13.

<sup>6</sup> D Nicol, ‘The Human Rights Act and the politicians’ (2004) 24 LS 451, 472.

<sup>7</sup> C.R.G. Murray, ‘The Continuation of Politics, by other means: Judicial Dialogue under the Human Rights Act 1998’ in R Masterman, I Leigh (eds), *The United Kingdom's Statutory Bill of Rights, Constitutional and Comparative Perspectives* (OUP for the British Academy 2013) 78.

## **The Future**

In conclusion, Human Rights Act is predominantly compatible with political constitutionalism. The democratic stages have helped strengthen the claim that democratic actors are able to consider and promote rights in a democratically legitimate way. Section 4 is also compatible and allows the courts to assist the political branches. There is area for reform, in particular regarding the judicial power under section 3. The potential of replacing the Human Rights Act presents an opportunity of political constitutionalists to push for reforms that will further refine the UK's rights protection in a way which is more compatible with political constitutionalism.

However, it may also result in what might be viewed as a regression or a more dramatic shift towards legal constitutionalism. Although it is unlikely, a 'British Bill of Rights' could somehow give more power to the judges over rights, such as a strike down power or retain an unmodified section 3 but repeal section 4. The theory of political constitutionalism is in a far more developed state to engage in debates about reforming the statutory bill of rights than it was 1997. The theory not only has a more developed understanding of its values, but also of statutory bills of rights and different judicial powers. As a result, proponents of political constitutionalism are now able to better reflect, respond and prompt reforms to a bill of rights. As the UK's constitution continues to evolve and change, it is vital for political constitutionalists to consider the implication of potential future reforms like devolution, electoral reform or emerging conventions with the theory of political constitutionalism if they wish to continue to see the UK as a predominantly political constitution.

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