

THE DYNAMICS OF JUDICIAL POWER IN THE NEW BRITISH CONSTITUTION

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I. Introduction

This paper considers the expansion of judicial power in the new British constitution. In particular, the paper aims to explain *how* and *why* judicial power is expanding, such that judges are increasingly able to question the merits of decisions taken by the political authorities. The expansion confirms and presupposes a new understanding of constitutional principle and of the relative responsibilities and capacities of institutions. The force of this new understanding has turned not simply on its intellectual merits but rather on its apparent explanatory power in view of changes in British constitutional law and practice. The changes include membership of the EU and the ECHR and the enactment of the Human Rights Act 1998. Parliament has chosen to confer new responsibilities on the courts, which has transformed the judicial function in ways both intended and unintended. The paper traces how courts have sometimes misconstrued the legislative choices in question and have relied on them to expand their role more generally. Importantly, this new role often invites or requires judges to speculate about how political authorities may respond to the court’s judgment. The expansion of judicial power is thus sensitive to, and to some extent takes advantage of, the political reception of judicial rulings. This dynamic relationship between legislative action, court judgment, and anticipated response is problematic, I argue, for it undercuts the rule of law and weakens parliamentary democracy. But the dynamics of the expansion of judicial power also suggest, tentatively, a path to reform.

II. The changing idea of judicial power

No state is well-governed without an independent judiciary, exercising legal and constitutional authority to adjudicate disputes, including disputes between citizens and officials, fairly and in accordance with settled positive law. Our constitutional tradition has long recognised this truth, making provision since the Act of Settlement 1701 for judicial independence and adopting conventions that support mutual respect between the Queen-in-Parliament, the Queen's ministers and other servants, and the Queen's courts. The central, important place of the courts in securing the rule of law, fairly adjudicating disputes by applying settled law, has not involved, in our tradition, general oversight of the justice or prudence of the laws that fall to be applied. The courts have an important capacity to develop the common law, but it is Parliament that enjoys the main responsibility for overseeing the content of the law and changing it when required or appropriate.

The supremacy of Parliament within the constitution has not been a departure from the rule of law or a failure to recognise the importance of human rights. On the contrary, our constitutional tradition provides that the body that ought to have authority to decide what the law should be is Parliament, in part because it represents the community but in part also because it is best placed to change the law wisely and in a way that secures the rule of law. In abolishing slavery, extending the franchise, establishing the NHS, protecting workers who form unions, abolishing capital punishment, and decriminalising homosexual acts, to give only a few examples, Parliament acted to secure rights – to secure the just relations that ought to hold between persons.¹ The separation of powers between the judicial and political authorities is grounded in constitutional principle, being pivotal to realisation of the rule of law and parliamentary democracy.

For many lawyers and judges, this is an outdated view of the judicial function.² Instead, the courts should stand between citizen and state, including Parliament, which requires courts not only to enforce existing law but also to improve it to secure justice. This new view, which I here outline in ideal-type form, so to speak, takes for granted a theory of human rights as minority interest that are in tension with legislation, which, it is said, reflects majority preferences and is disposed to neglect individuals.³ This theory of human rights entails a new separation of powers – human rights are for the courts, general policy is for Parliament and executive – and a new account of the rule of law – requiring positive law not only to be clear and prospective and so forth but also to secure human rights adequately.⁴ The political constitution, parliamentary process, and political competition are often thought inapt to secure these ends without active judicial intervention. Thus, the rule of law is taken to require that the merits of *all* exercises of public power, including Parliament's authority to legislate and the executive's in high policy, should be subject to judicial oversight.⁵

¹ R Ekins, 'Human Rights and the Separation of Powers' (2015) 34 UQLJ 217

² Lord Steyn, *Democracy Through Law* (Routledge, 2004); Lord Cooke, 'The Myth of Sovereignty' (2005) 3 NZJPIIL 39

³ R Dworkin, *Taking Rights Seriously* (Duckworth, London, 1977)

⁴ *AXA General Insurance Limited v. The Lord Advocate* [2011] UKSC 46 at [49], per Lord Hope

⁵ TRS Allan, *The Sovereignty of Law* (OUP, Oxford, 2013); Lord Neuberger, "Judge not, that ye be not judged": judging judicial decision-making' F A Mann Lecture 2015 [48]

Not all judges or lawyers adopt this new view, and of course there are significant variations amongst those who hold to something like it. Its foothold in our legal practice is also arguably much less secure than many assume. Still, it is (or has been) the coming thing. Why? The answer is not, I suggest, its intellectual force. Powerful criticisms can be, and have been, levelled at each part of it, not least its inconsistency with the central duty of courts to adjudicate disputes in accordance with settled law and without fear or favour.⁶ But the new view has the advantage of trading on the prestige of North American constitutionalism,⁷ as well as the human rights law movement more generally. It also intersects to an extent with the sometime rationalisation of the expansion of ordinary judicial review in the late twentieth century, viz. that *executive* domination of Parliament warranted a more assertive and intrusive role on the part of courts.⁸ That is, lawyerly doubts about the adequacy of the political process have been in play for some time and a loss of confidence in parliamentary democracy is a cultural trend that goes beyond lawyers alone.

The most obvious explanation for the new view, however, is its resonance with developments in our practice, which seem to confirm that the traditional view is outdated. The UK's membership of the EU and ECHR has made vivid in our law and practice the idea that the UK qua state might be subject to legal obligations enforceable in ordinary courts. The orthodoxy that Parliament's choices may not be gainsaid has been put under considerable pressure by the provision that the European Communities Act 1972 (ECA) makes for EU law to take precedence over incompatible Acts of Parliament and for decisions of the Court of Justice of the European Union (CJEU) to be authoritative on questions of EU law. Likewise, the Human Rights Act 1998 (HRA) domesticates the parallel and ongoing practice of an international court, the European Court of Human Rights (ECtHR), reviewing the merits of legislative action. The practice of the European courts, which forms part of or bears on our law, is at odds with the traditional understanding outlined above. Parliament has required domestic judges to follow their lead, at least to some extent. Thus, pivotal in the expansion of judicial power in the UK has been Parliament's choice to confer new responsibilities on domestic courts and to incorporate the decisions of European courts to which the UK is subject in international law.

None of this need be a fundamental rupture with our constitutional tradition, for what a sovereign Parliament gives it can take away.⁹ That Parliament chose to authorise new modes of judicial action is important in several ways. First, judges have no lawful option save to do as Parliament requires, even if they think this an unsound mode of action: primary responsibility for having initiated such action thus lies with Parliament. Second, for many judges and lawyers, it is an important part of the rationale for the new mode of judicial action that Parliament retains the freedom to change its mind.¹⁰ This possibility, even if it is not likely

⁶ *Momcilovic v R* [2011] HCA 34, per Heydon J; G Webber, 'Rights and the Rule of Law in the Balance' (2013) 129 LQR 399; J Finnis, 'Human Rights and Their Enforcement', essay 1 in John Finnis (ed), *Human Rights & Common Good: Collected Essays Volume III* (2011), 19 (originally published as 'A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence' (1985) 71 *Proceedings of the British Academy* 303); R Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 LQR 127

⁷ Lord Neuberger 'UK Supreme Court decisions on private and commercial law: The role of public policy and public interest', Centre for Commercial Law Studies Conference 2015, 4 December 2015 [12-15]

⁸ Cf. S Kalitowski, 'Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation' (2008) 61 *Parliamentary Affairs* 694, and M Russell et al, 'Does the Executive Dominate the Westminster Legislative Process?: Six Reasons for Doubt' (2016) 69 *Parliamentary Affairs* 286

⁹ J Goldsworthy, *Parliamentary Sovereignty: Contemporary Essays* (CUP, Cambridge, 2010)

¹⁰ Lady Hale, 'Magna Carta: Our Shared Heritage', the Supreme Court Historical Society Annual Lecture 2015, Washington D.C., 1 June 2015, p.11; Lord Neuberger, "'Judge not, that ye be not judged": judging judicial decision-making' F A Mann Lecture 2015 [38] and Justice Innovation Programme Lecture for the Northern Ireland Assembly Committee for Justice, 3 March 2016 [12]

it will be exercised, is thought to remove the sting of the democratic critique. Thus, the expansion of judicial power, traced in part in this paper, is thought by most to take place under the aegis of parliamentary sovereignty. The continuity of legal form conceals a constitutional change, not in the radical sense that British democracy inhabits a medieval monarchy, but in the more limited sense that one may sharply expand judicial power in novel ways without strictly abandoning parliamentary sovereignty.

This analysis echoes much of Lord Neuberger's own explanation of the rising power and politicisation of domestic judges.¹¹ He has noted seven reasons for this change in judicial practice. The first is the expansion of the power of the executive which has required an ever greater judicial role to counterbalance it. The second is the changed judicial mind-set that followed from the requirement to overrule primary legislation that clashes with EU law. The third is that the Prime Minister often dominates Parliament, and with parliamentary power on the wane the courts have often, perhaps unconsciously, stepped in to fill the vacuum. The fourth is the quasi-constitutional role the HRA introduced. The fifth is the new judicial role required by the devolutionary settlements in reviewing acts of the devolved institutions. The sixth, curiously, is that today's judges came of age in the sixties and seventies and so are less inclined than their forebears to respect authority. The seventh is that the legislature may be too divided to take a difficult or unpopular decision 'and the courts therefore may be *tempted* to feel that they ought to step in': so, he says, legislative indecision may spur judicial activism, as in relation to assisted suicide. His Lordship is at pains to say he is describing, not praising, the expansion of judicial power. He goes on to stress that judges should not be eager to expand their powers and notes Parliament's democratic legitimacy, but notes also that this has disadvantages too, which may warrant action by unelected persons, subject to reversal later by Parliament if need be.

III. Questioning parliamentary sovereignty

The dynamics of the expansion of judicial power are made clear in an abortive attempt to assert a radical new judicial power to invalidate unjust statutes. This attempt to repudiate parliamentary sovereignty was articulated in the speeches of Lord Hope and Lord Steyn in *Jackson*.¹² Lord Hope and Lord Steyn each argued that a series of changes to the British constitution have qualified parliamentary sovereignty and have confirmed that the fundamental constitutional principle is the rule of law, which limits even Parliament. The changes in question were said to be: the devolution legislation, especially the Scotland Acts; the UK's membership of the ECHR and the enactment of the HRA; the UK's membership of the EU and the enactment of the ECA; and the House of Lord's decision in *Jackson* itself to hear the challenge to the validity of the Hunting Act 2004. Their Lordships took for granted that parliamentary sovereignty and the rule of law are in tension, with the question being which is to be master, and argued that the executive's domination of Parliament undercuts the latter's democratic legitimacy. The doctrine of parliamentary sovereignty was invented by the judges, Lord Steyn asserted, and may thus be revised over time.

¹¹ Lord Neuberger, 'UK Supreme Court decisions on private and commercial law: The role of public policy and public interest', Centre for Commercial Law Studies Conference 2015, 4 December 2015 [30-31] and 'Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?', Guildford Cathedral, 18 June 2015 [54-62]

¹² *Jackson v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262

This is not a strong argument – legally, constitutionally or politically – for rejecting parliamentary sovereignty. Its analysis of each constitutional change is problematic, for in truth each such change is reconcilable with parliamentary sovereignty and thus does not constitute a further episode in the slow-burning abandonment of the doctrine. The devolution legislation establishes new legislative and executive authorities in Wales, Scotland and Northern Ireland but does not legally limit the lawmaking authority of the Westminster Parliament. The HRA bears on how judges receive and deal with statutes but is designed not to stand in the way of clear legislative choices to the contrary: in one way, it is expressly subject to all other statutes. The question for the House of Lords in *Jackson* concerned the meaning of s 2(1) of the Parliament Act 1911, which is a familiar type of question for a court to consider.¹³ That the court answered the question does not establish that the courts are entitled to determine whether Acts of Parliament are valid. On the contrary, the question was whether the Hunting Act was an Act at all, which turned in main part on the meaning of s 2(1). Membership of the EU looks to be a trickier proposition. But however the EU may understand the supremacy of EU law it has always been the case that such law has only that effect in our law as Parliament has provided, for the time being, in the ECA. When judges set aside statutes that post-date the ECA, on the grounds that they are inconsistent with EU law, they are not invalidating Acts of Parliament but rather are recognising their intended meaning and effect when taken together with the rule of priority set out in s 2(4) of the ECA and not set aside, expressly or implicitly, by any Parliament since then.

Lord Hope and Lord Steyn drew the wrong conclusion, it seems to me, from the series of important constitutional changes they note. They assert that in each case parliamentary sovereignty has been qualified, whereas in fact it has simply been exercised. And they wrongly take for granted that parliamentary sovereignty is open to judicial revision in this way, with judges reconsidering which principles should be fundamental. Still, their mode of reasoning is revealing, for it relies on the wider constitutional significance of these changes – the ECA and HRA do qualify the traditional separation of powers between court and legislature – to assert a new general theory of the constitution. This new theory takes the ECA and HRA not as the choice of a sovereign Parliament to introduce some new mode of action and hence to approve a limited qualification of the rule of law and the separation of powers, but rather as the grounds of new understandings of constitutional principle. Hence they conclude that the rule of law may now license retrospective invalidation of otherwise good law and that the separation of powers authorises judges to veto legislation they think is unjust in the course of adjudicating some particular dispute.

The argument was not taken up by many of Lord Hope and Lord Steyn’s colleagues in *Jackson* and it was decisively rejected by Lord Bingham extra-judicially.¹⁴ This rejection was important and has limited the reception of the argument, although Lord Hope continued to recall it and others in the Supreme Court have done so more equivocally.¹⁵ It matters that these judicial musings remain in the case law, for they may serve in turn for some later reiteration of the same argument, with a latter-day Lord Hope recalling the earlier doubts raised by some senior judges about the constitutional grounding of parliamentary sovereignty. In this way, the *Jackson* dicta seed the case law, much as Cooke P did in New Zealand to similar effect.¹⁶

¹³ I set aside whether the Parliament Act 1911 itself, or constitutional principle more widely, ousted the court’s jurisdiction: see further R Ekins, ‘Acts of Parliament and the Parliament Acts’ (2007) 123 LQR 91, 111-114

¹⁴ Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 196

¹⁵ *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 [50]-[51], per Lord Hope; *Moohan v The Lord Advocate* [2014] UKSC 67 at [36], per Lord Hodge

¹⁶ Robin Cooke, ‘Fundamentals’ [1988] NZLJ 158

Whether the seeds germinate turns on the soil on which they fall, which is why the response by Lord Bingham and others was important. And while it is only occasionally that this narrative of the rule of law in the ascendancy and parliamentary sovereignty in decline, as Lady Hale frames it,¹⁷ culminates in argument that the doctrine should itself be rejected outright, the narrative informs much of the expansion of judicial power, including the surprising use of new powers and old techniques alike.

IV. Engaging and resisting European courts

In any examination of the scope of judicial power in our constitutional order, one must of course consider the role of the European courts to whose jurisdiction the UK is subject. The UK is, pending Brexit, integrated into the EU legal order, such that decisions of EU courts, which includes domestic courts applying EU law, have direct legal force in Britain. It is also a signatory to the ECHR and subject to the rulings of the ECtHR, rulings which bind the UK at international law and which bear on our law by way of the ECHR's partial incorporation in the HRA and in addition by way of the presumption, in statutory interpretation, that Parliament legislates consistently with the UK's international legal obligations.

The CJEU and ECtHR provide a different model of judging in which the state, including Parliament, is subject to their adjudication, and in which it is entirely open to the court to reject Acts of Parliament as inconsistent with law, often on the grounds that the Act in question flouts human rights or is disproportionate or otherwise unprincipled. The traditional common law separation of judicial power is not to be seen here. Likewise, these European courts have a much less disciplined approach to legal materials, which they may extend or update or otherwise vary as the exigencies of the situation demand. The CJEU is well known for its integrationist agenda and its teleological approach to EU law, cutting some central principles out of whole cloth and turning others on their head.¹⁸ The ECtHR conceives of the ECHR as a 'living instrument', updating its meaning in ways that depart from the terms agreed by the signatories.¹⁹ It also deploys an open-ended idea of proportionality, which invites free-wheeling legislative choice under the banner of adjudication.²⁰

The UK's membership of EU and ECHR implicates British judges in this mode of judging, especially since the HRA came into force in 2000. The mode of implication is different, for the HRA incorporates the ECHR, and hence the rulings of the ECtHR, less directly than is the case with the ECA's incorporation of EU law. It is fair to say that British judges have at times been critical of the reasoning and judgment of the CJEU and ECtHR, criticism that has informed how and to what extent judgments of those courts are received in UK law.

Consider the CJEU in particular. The Supreme Court and Court of Appeal have both noted, with alarm, that the CJEU at times seems to sharply misconstrue EU law.²¹ Following the lead of their German counterparts, the Supreme Court has in *HS2* and *Pham* sought to articulate limits on the incorporation of EU law and especially on the CJEU's interpretation of such.²²

¹⁷ Lady Hale, 'The UK Supreme Court in the United Kingdom Constitution' Institute for Legal and Constitutional Research, University of St Andrews, 8 October 2015, pp.2-3

¹⁸ G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing, Oxford, 2013)

¹⁹ Lord Sumption, 'Limits of Law' and Lord Hoffmann 'Judges, Interpretation and Self-Government', chapters 2 and 5 in N Barber, R Ekins, and P Yowell (eds), *Lord Sumption and the Limits of Law* (Hart Publishing, Oxford, 2016)

²⁰ J Finnis, 'Judicial Law-Making and the "Living" Instrumentalisation of the ECHR', chapter 6 in *ibid*

²¹ *R (GI) v Home Secretary* (2003) QB 1008

²² *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3; *Pham v Secretary of State for the Home Department* [2015] UKSC 19

These limits have been said to be implicit in the terms of the ECA, specifically that the Act does not incorporate actions by the organs of the EU, including the CJEU, that are manifestly ultra vires the Treaties and/or does not incorporate EU law that cuts across fundamentals of the UK constitution, such as parliamentary privilege.

It is not clear whether this is a compelling legal argument, viz. whether the operation or effect of the ECA is implicitly limited in the way the Supreme Court suggests. It is arguable, but no more than that. However, it seems rather clear that the significance of the dicta is in the message it sends to the CJEU. That is, this is first and foremost judicial brinkmanship, a shot across the bows. That a British court would act thus is in one sense very surprising. However, one can see in these cases (and in the Court of Appeal) an articulation of some principled limits about the interplay between foreign courts and domestic courts, especially where the latter have reason to fear the former's commitment to the rule of law. Likewise, the dicta aim to articulate a commitment to a sound idea of judging, in which the court is governed strictly by settled law and sets aside any wider political agenda. It is striking that one court conveys to another, indirectly in the midst of adjudication, a political threat that it will not long conform unless the other puts its house in order. Will the threat work (or would it have worked, had Brexit not intervened)? The German example is not encouraging, for two days before the referendum the German court effectively surrendered in the latest to and fro with the CJEU about the dubious legality of Euro-financing.

Does Brexit make all this moot? It will likely end the CJEU's direct role in our law. However, it is worth noting that Lord Mance's remarks in *HS2* and *Pham* arguably apply just as much to the ECtHR's interpretation of the ECHR as to the CJEU and EU law. If, as I contend, the living instrument approach is fundamentally misconceived then the interpretation of the ECHR reached in this way, which by admission departs from what the signatories agreed in entering into the ECHR, is manifestly ultra vires. In refusing to incorporate the ECHR as thus interpreted, or to conform to a ruling of the ECtHR giving effect to this interpretation, the UK would be acting in the principled way contemplated by our Supreme Court in confronting the CJEU. Thus, it would be no denial of the international rule of law for the UK, whether by way of its Parliament, executive or judiciary, to defy a ruling that is a clear subversion of the agreed terms of the ECHR.

Though few judges have publicly interested themselves in this fact (or assessment or line of reflection), much of the ECtHR's case law arguably falls afoul of this limit and while it may be impolitic or imprudent for the UK to defy all such, there are good reasons in principle so to do, to vindicate the treaty-making act of the signatories and to restore the relatively limited judicial role that the ECtHR should properly enjoy. Like the CJEU, the ECtHR is in effect a foreign court, which makes it very difficult indeed for the UK's authorities to discipline it. Indeed, this distance is part of the rationale for its jurisdiction. But the risk that comes with distance is departure from its brief and the answer to that departure, other than outright withdrawal, may well be to stand ready not to conform when it is clearly ultra vires. However, it is not clear that the HRA positions British judges to resist Strasbourg in this way. They have outlined a limited case not to follow ECtHR case law that fails to understand relevant British law, but this does not extend to repudiation of a clearly wrong, but well settled line of ECtHR rulings. I consider below whether the HRA permits our judges to go further and to resist Strasbourg when it fundamentally misconstrues the ECHR.

V. Parliament's responsibility for the Human Rights Act 1998

Since its adoption of the living instrument approach in the late 1970s,²³ the ECtHR has transformed the scope and content of the ECHR. The court's developing case law has been of increasing importance to the UK since then, with the UK at various times being held to be in breach, which is politically embarrassing and gives rise to further obligations in international law. The British courts were increasingly aware of this case law, alive as they were to the presumption that Parliament legislates consistently with international law and to the prospect of Strasbourg later ruling the UK in breach. Hence, they sought to read legislation consistently when possible. But there were sharp limits to what was possible on this approach. In 1998, the Human Rights Act 1998 (HRA) was enacted, purportedly to bring to an end the stream of cases before Strasbourg, making it easier for applicants to find a remedy before a domestic court.²⁴ The Act came into force in 2000 and it is perhaps unsurprising that one finds strong affirmations of the principle of legality in the years 1998-2000, when the courts, consciously or not, sought to emphasize the continuity between the common law reception of statutes and the new regime to come. Still, this did not prevent the early years of the HRA involving much surprising *discontinuity*.

The HRA was an intelligible and intelligent response to a problem. For so long as the UK remained a signatory to the ECHR, the UK would be vulnerable to adverse rulings in Strasbourg. Hence it made good sense to act to limit that vulnerability by bringing forward the relief one might otherwise find before Strasbourg, such that no further action would be needed. The means chosen to this end were the now-familiar operative provisions of the HRA, especially ss 3-4, 6, 10 and 19. These provisions make 'convention rights' directly enforceable – subject to other statutes – and made them bear on the processes by which statutes after the HRA are to be made and on how all statutes, whenever enacted, are to be read. This scheme compromises the principles of the rule of law and the separation of powers, for the operative provisions in question (as they give effect to the articles set out in Sch. 1) unsettle positive law in far-reaching ways and confer on the courts and on the executive powers and responsibilities that are legislative in kind.²⁵ These inroads into principle might well be justified in view of the need to manage ECHR membership and related foreign policy considerations and it was of course for Parliament to make this evaluation. Strictly, one did not and does not need the HRA to secure respect for human rights – or indeed for Convention rights – in our law:²⁶ as noted above our tradition has long secured justice and recognised and promoted individual rights (in ways partly codified in the ECHR's predominantly British drafting). The change that the HRA introduces is to the *means* by which rights would be protected and especially to how judicial power could be used better to secure the UK's conformity to the case law of the ECtHR, so as to avoid findings of breach.

One can object to Parliament's choice to enact the HRA and thereby compromise constitutional principle. The responsibilities the Act confers on courts require them to consider matters that ought to be non-justiciable, in the resolution of which they enjoy no particular competence –

²³ *Golder v United Kingdom* (4451/70) 21 February 1975; *Tyrer v UK* [1978] ECHR 2, (5856/72), 25 April 1978

²⁴ P Sales and R Ekins, 'Rights-consistent Interpretation and the Human Rights Act 1998' (2011) 127 LQR 217

²⁵ D Heydon, 'Are Bills of Rights Necessary in a Common Law System?' (2014) 130 LQR 392; P Sales, 'Three Challenges to the Rule of Law in the Modern English Legal System', chapter 10 in R Ekins, *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011), 189

²⁶ Cf. Lady Hale 'What's the point of human rights?' Warwick Law Lecture 2013, 28 November 2013 pp.3-6; see also, R Ekins and G Gee, 'How not to argue for human rights law reform' Judicial Power Project website, 11 May 2016

matters such as what is “necessary in a democratic society” or what constitutes a “proportionate” impact on vaguely specified rights and countervailing rights and interests. The new interpretive direction, which invites considerable argument before the courts, undermines the capacity of legislation to settle clearly what should be done, especially when one factors in change over time and the standing openness to such in the ECtHR’s case law.²⁷ And the power to declare legislation incompatible with convention rights puts the courts in a politically fraught position in relation to Parliament and the public. The qualification of constitutional principle may be somewhat lessened to the extent that ECtHR case law clearly settles the content of convention rights.²⁸ And these problems may, as I say, be worth the cost in order to minimise findings of breach. The operative provisions of the HRA distort the constitutional role of the judge, but it would nonetheless be a misuse of judicial power for the courts to fail to do their HRA duty. However, the significance of the HRA lies not only in Parliament’s choice to modify the separation of powers, but at least as much in the way the Act has been received by courts, both in misinterpreting its strictures and at times in applying it strategically, taking advantage of the anticipated reactions of the political authorities.

VI. The judicial transformation of the 1998 Act

While Parliament is responsible for the HRA, the courts are responsible for extending the Act beyond its intended scope.²⁹ For a time the courts wrongly took the Act to apply retrospectively to events arising before its commencement. This holding, which caused much difficulty, has since been reversed.³⁰ The reason for the misstep was, it seems to me, a presupposition that the HRA was intended to be transformative, which obscured the detail of the argument as to Parliament’s likely intention. Relatedly, the courts have had to determine whether the HRA applies extra-territorially. Adopting the idea of jurisdiction current in ECtHR case law at the time (interpreting Art 1 of the ECHR), a majority of the House of Lords held that the HRA had such limited extra-territorial effect as would track the ECtHR’s understanding of jurisdiction, which was then largely territorial.³¹ But in the next stage of the dispute, the ECtHR abandoned its earlier understanding and tacitly adopted an interpretation of Art 1 that extends to any use of force by the state anywhere.³² For the last five years, this extra-territorial extension has held in the UK, giving rise to thousands of cases against the state in relation to events in Iraq and Afghanistan. The Supreme Court may soon need to reconsider the scope of the HRA, reflecting more closely on the ambit of convention rights protection that Parliament intended at enactment.³³

More problematic still has been the judicial interpretation of s 3, the interpretive direction, and of ‘convention rights’, on which the operative provisions of the Act centre. Section 3 has been wrongly understood to create a judicial power to change the meaning of legislation. Yet the provision does not mention the courts and indeed is not framed as a power: it imposes a duty on all persons as to how statutes are to be read, namely that whenever possible they are to be

²⁷ R Ekins, ‘Rights, Interpretation and the Rule of Law’ in R Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis, Wellington, 2011)

²⁸ Sales and Ekins, n24 above

²⁹ They have also often ignored ss 12-13 of the Act: Simon Lee, ‘From judge-shaming to judiciousness-sharing’ Judicial Power Project website, 31 May 2016

³⁰ For further details, see B Juratowitch, *Retroactivity and the Common Law* (Hart Publishing, 2006) 91-101

³¹ *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153

³² *Al-Skeini v UK* (2011) 53 EHRR 18, effectively abandoning *Bankovic v Belgium* (2001) 11 BHRC 435

³³ R Ekins and G Verdirame, ‘Judicial Power and Military Action’ (2016) 132 LQR 206

taken to conform to convention rights.³⁴ Some of the early applications of s 3 were obviously untenable, with Lord Steyn asserting starkly in *R v A (No 2)* that only an express repudiation of the ECHR would suffice to make a rights compatible interpretation ‘impossible’.³⁵ The irony is that this would of course mean that in any case in which s 3 would not support a rights-compatible meaning s 4 would be redundant, because the Act would already declare itself in breach. The House of Lords imposed an apparently more plausible – but still extreme – gloss on s 3 in *Ghaidan*,³⁶ stipulating that the limits of the interpretive direction turned neither on the words used by Parliament nor on its intended meaning, either of which the court might depart from, but rather on two limits: whether the interpretation departed from a fundamental feature of the statute and whether it required reasoning and choice for which the court was institutionally ill-suited.³⁷ The nature and detail of these limits imply that s 3 has been misread, not as the interpretive direction it was intended to be, but, in effect, as an unusual Henry VIII power to *amend* statutes.³⁸ The likelihood of its use thereafter has been unpredictable.

Section 3, properly understood, does not create a judicial power but rather changes how all persons should read statutes, quite apart from any judgment of a superior court. (If it were a power then the statute’s meaning would change only when the court chose rather than the court being obliged to recognise the meaning the statute has all along because of s 3.) In relation to statutes enacted before 1998 (or at latest 2000, when the HRA came into force), s 3 constitutes an amendment of vast but uncertain effect, requiring one to read the old statute as if it had been enacted against the background of the ECHR.³⁹ The working out of the implications of this odd mode of amendment certainly requires of the court considerable reflection on what the law should be, albeit framed in the way just indicated. For statutes that post-date the HRA, s 3 is not a Henry VIII clause permitting ongoing judicial amendment but a strong presumption about intended meaning, a qualifying rule that makes convention rights part of the background against which other provisions are read. This is exactly how Lord Hoffmann in *Wilkinson* explains s 3, and rationalises the result in *Ghaidan*, in a judgment with which the whole court agreed.⁴⁰ Yet surprisingly, *Ghaidan* remains the leading case and *Wilkinson* has slipped out of view. The reason may be that *Ghaidan* is a better fit with the new, expansive view of judicial power and that it is convenient to retain discretion to cut a statute down to size, and especially to limit almost any empowering provision under which regulations might be made.

The misinterpretation of s 3 bears on the relative power of the courts, but, like other provisions in the Act, is still limited by reference to ‘convention rights’. The recent misinterpretation of ‘convention rights’ thus further transforms the scope of the HRA, empowering domestic judges in relation to the political authorities. The question for decision was how ‘convention rights’ in the HRA relate to the ECHR as authoritatively interpreted, in international law, by the ECtHR. Section 2 of the Act requires one to take into account judgments of the ECtHR. For many years, in line with the structure and point of the Act, the superior courts understood themselves to be bound, narrow exceptions aside, to construe convention rights consistently

³⁴ R Ekins, ‘Abortion, Conscience and Interpretation’ (2016) 132 LQR 6

³⁵ *R v A (No 2)* [2002] 1 AC 45

³⁶ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557

³⁷ Aileen Kavanagh argues that anything is possible, but only some things are appropriate: A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, CUP 2009), 88-90. This does seem rather hard to square with the detail of s 3, which presupposes only some things are possible and that if a rights-compatible reading is possible then it *must* be adopted.

³⁸ N Barber and A Young, ‘The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty’ [2003] PL 112

³⁹ Sales and Ekins, n24 above

⁴⁰ *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718

with any clear line of ECtHR rulings.⁴¹ Some seven or eight years ago, this consensus began to fray, with judges reasoning that the convention rights were domestic law and so need not be interpreted thus.⁴² The usual direction of travel was not to flout clear Strasbourg rulings, although this option was more readily affirmed, but rather to go beyond those rulings, to develop a hinterland, so to speak, of ‘convention rights’ that the courts would enforce against British authorities but which Strasbourg might not yet – or even would not in the foreseeable future – recognise.⁴³

This is a very significant change.⁴⁴ It sharply expands the freedom of domestic judges to find a statute or executive action to be rights-incompatible, notwithstanding that there is no prospect that it will invite a finding of breach before Strasbourg. The judicial rewriting of the statute in question, or quashing of the executive action, thus trades on operative provisions of the HRA which were chosen to help the UK conform to its international legal obligations. This is a misuse of the Act. It involves an assertion of judicial power that Parliament did not squarely choose and that risks much public misunderstanding, when the declaration of incompatibility or quashing of a policy is inevitably represented as conveying the position in international law. It is of course always open to Parliament to amend the HRA to enable such judicial action, but it is not for the courts themselves to choose to expand the scope of convention rights and thus to expand their relative authority.

VII. Strategic rights adjudication

In applying the HRA, courts have often sought to anticipate and exploit the likely response of political authorities to their judgments. In one limited sense, this is consistent with the structure of the Act, for s 4 confers a discretion on the courts to make a declaration. But s 3 is not discretionary, and determining whether legislation is rights-incompatible is not discretionary either. Having found that a statute is incompatible one then has a discretion as to whether formally to declare it so, an action that triggers the executive’s s 10 power to amend the offending legislation. But in broad-brush the scheme of the Act is tolerably clear, viz. strive to interpret legislation consistently with convention rights and if this is not possible then declare it incompatible and leave to Parliament the choice of whether to act. The interpretive direction is difficult to apply, especially in the way it has been misinterpreted to be a judicial power, and this creates space in which courts may reflect on the likely outcomes if they deploy s 3 or s 4. This course of reflection encourages strategic thinking, it seems to me, and rights adjudication is thus often characterised by an attempt to game the responses of the political authorities at the cost of the integrity of the adjudication itself.

One sees this tendency when the courts strive to avoid confrontation, as in *R v A (No 2)*.⁴⁵ Here, the court imposed a (wildly implausible) rights-compatible meaning rather than declaring the provision incompatible. One likely reason for this course of action was that in so doing the court secures the outcome it thinks justice requires. But note also that the political response to a declaration would have been unpredictable. Parliament might well have insisted that protection of rape complainants was more important, in this context, than judicial discretion to

⁴¹ *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323

⁴² *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173

⁴³ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200; *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57

⁴⁴ P Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine’ [2012] PL 253

⁴⁵ [2002] 1 AC 45

permit cross-examination, not least since the statute in question had been enacted very recently. This was not promising ground for the court to initiate public argument about the merits of rape-shield legislation. Or to put it more bluntly the court might have ‘lost’ the confrontation and so it avoided it and won by other means. Of course, it is likely quite wrong to think of the court as having lost if Parliament decides not to change the law – this is the scheme of the HRA after all. Still, the temptation for the court to secure the legal or political change it thinks warranted is strong.

At times the courts may actively choose confrontation, in order to secure the outcome they think justified. One sees this in *Belmarsh*,⁴⁶ in which the court ignored s 3 and instead deployed s 4 to declare, in sweeping terms, the legislation incompatible.⁴⁷ If the s 3 duty had been recalled, and indeed if the ordinary principles of statutory interpretation had been considered, then the court would have been much more likely to interpret the statutory provisions in question compatibly with the ECHR, securing the protection that the claimants were entitled to in law. (That is, the power to detain should have been limited, per its context, to an ongoing purpose of trying to effect deportation.) Instead, the House of Lords declared the legislation fundamentally rights-incompatible, delivering a crushing political blow to the government policy of which they disapproved. In so doing the court mischaracterised the legislation and overlooked relevant constitutional principle, but it is the neglect of s 3 that is truly striking, rather suggesting the aim was political victory. The almost universal approval, in legal circles, of the decision, is problematic, for in truth the judgment is a failure of legal craft and duty and of constitutional propriety.⁴⁸

There have been other cases where s 3 has been wrongly set aside. In *Doogan*,⁴⁹ the Supreme Court declined to engage in argument about whether one or other interpretations of the conscience provision in the Abortion Act 1967 would be compatible with Art 9 of the ECHR. The court chose not to strive, per its s 3 duty, to construe the provision consistently with the ECHR, reasoning that the question of rights-compatibility was better left to other related proceedings. The unanimous judgment is short and is ostensibly framed with a view to avoiding the merits of the abortion controversy. But the resolution of the case narrows the scope of the conscience provision in a controversial way, which s 3 would arguably have prevented. The judgment is unlikely to be contested in view of the subject-matter (abortion) and the political unpopularity of the claimants (Catholic midwives) and one might speculate that the likely absence of a political response freed the court to dismiss the claim. Thus, in a case when minority rights were in serious question, the political weakness of the claimants likely emboldened the court to dismiss their claim unjustly.⁵⁰

Not all strategic rights adjudication involves ss 3 and 4. In *Purdy*,⁵¹ the House of Lords aimed to prompt the de facto decriminalisation of assisted suicide, not by ruling that the ECHR conferred a right to be assisted in one’s suicide (Strasbourg had clearly rejected this claim)⁵² but by ruling that the ban on assisted suicide was an interference with Art 8 otherwise than in

⁴⁶ *A v. Secretary of State for the Home Department* [2005] 2 AC 68; Rights Info describes *Belmarsh* as the single most important judgment under the HRA in their list of top fifty human rights cases: <http://rightsinfo.org/infographics/fifty-human-rights-cases/>

⁴⁷ J Finnis, ‘Nationality, Alienage and Constitutional Principle’ (2007) 123 LQR 417

⁴⁸ J Finnis, ‘Judicial Power: Past, Present, and Future’ Judicial Power Project lecture, Gray’s Inn, 20 October 2015

⁴⁹ *Greater Glasgow Health Board v Doogan and Another* [2014] UKSC 68

⁵⁰ Ekins, n34 above

⁵¹ *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345

⁵² *Pretty v United Kingdom* (2346/02) 29 April 2002 (4th Section)

accordance with law. This surprising claim required the court to assert that the likelihood of prosecution formed part of how the law guided the subject. The point of the assertion was to force the DPP to promulgate a more specific policy, the subtext being that prosecutions that did not conform to such would be abuses of process. The DPP adopted a new policy, after consultation, which ignored the court's nudge towards de facto decriminalisation.⁵³ The new policy invited further litigation, demanding more specification, which was brought to a close (for now) in the *Nicklinson* judgment.⁵⁴ Thus, the House of Lords in *Purdy* sought to compromise the clear criminal law by prompting the DPP to assist would-be lawbreakers in calculating their odds of prosecution. The court's challenge to the rule of law was not altogether successful – the DPP rightly complied only with the court's order, not with its political agenda – but did spur yet more legal uncertainty.

The ongoing challenge to the DPP's policy was joined with a more direct challenge to the Suicide Act 1961 in *Nicklinson*.⁵⁵ The claimants sought a declaration that the Act's ban on assisted suicide was not compatible with the ECHR. The Supreme Court rejected the claim by majority, but several were plainly open to making the declaration in question, either in principle or if Parliament did not promptly amend the Act. The split amongst the judges is very significant. Five of the nine thought it open in principle for the British courts to declare legislation incompatible with convention rights in a case like this where it was clear that Strasbourg would think the question fell within the margin of appreciation, such that the legislation would not breach the ECHR. Two of the nine judges, as I say, were willing to make a declaration of incompatibility, notwithstanding that the matter had not been properly argued. Another two, including Lord Neuberger, strictly did not find incompatibility but indicated that they would be minded to do so and to make a declaration if Parliament did not act promptly. Thus, these judges sought to make a declaration without making a declaration, indeed without even finding incompatibility.

Lord Neuberger has since reflected on *Nicklinson* as a case in which the courts helped Parliament grasp a nettle it was otherwise unwilling to grasp. This is not true, as his judgment makes clear, and that judgment is a curious attempt to compel legislative action without following the discipline of the HRA itself. Shortly after *Nicklinson*, the Commons considered and overwhelmingly rejected a bill to loosen the ban. The Supreme Court had practically invited further litigation in this event and such seems inevitable. It remains to be seen what the next iteration of the Court will do, and whether the vote in the Commons will bear on their deliberation and action. I note in passing that *Nicklinson* is awfully obscure, with nine speeches and little clarity (even for the legal reader) about how they intersect, giving rise to much misinformation about what was in fact decided.

This drift towards strategic adjudication may also be in view in recent judicial efforts to ground convention rights in the common law. The enthusiasm for this course of action would seem to owe something to the prospect of the HRA being repealed. It would hardly be satisfactory, I suggest, for Parliament's decision to reform human rights law to be rendered effectively futile by reason of the courts having hastily transposed the jurisprudence of the ECtHR into the common law so as to survive legislative reform. The risk of such transposition may be a reason

⁵³ J Finnis, 'Invoking the Principle of Legality against the Rule of Law' [2010] NLZR 601 (and in R Ekins (ed.), *Modern Challenges to the Rule of Law* (Wellington: Lexis Nexis, 2010), 129); cf. J Waldron 'Torture, Suicide and *Determinatio*' (2010) 55 AJJ 1

⁵⁴ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200

⁵⁵ *Ibid.*

for a British Bill of Rights, rather than simple repeal of the HRA, viz. to maintain legislative control over how the courts reason about rights.

VIII. Beyond human rights law

The expansion of judicial power is not confined to human rights law, for it turns on a more general theory of the rule of law and the separation of powers. If, like many judges, one reasons that Parliament is dominated by the executive and that the rule of law requires the courts to discipline the executive, then one may think constitutional principle grounds assertive judicial action quite apart from the HRA or EU law. This is not to say that the example of the HRA has not proven immensely important, with its tacit requirement that courts venture ever further into questions otherwise thought non-justiciable. Adopting their new role under the HRA as central to the rule of law, rather than a legislative departure from such, many judges (not all) have reconsidered how they act apart from the HRA. This has manifested itself in the misinterpretation of some statutes and in overly intrusive judicial review of the actions of some public bodies. One might add that the questioning by some judges of parliamentary sovereignty itself is another instance of the trend, as surprising revision of common law principles may also be.

The principle of legality grounds the presumption that Parliament does not intend to displace the existing constitutional order, including established legal rights. One should take for granted that statutes do not bind the Crown, or levy or authorise taxes, or authorise torture save to the extent that such an intention is clearly made out.⁵⁶ The principle is sound but apt to be misused. Lord Hoffmann's articulation of it in *Simms* was problematic insofar as it suggested the principle is a device to discipline Parliament, to force it to pay the political cost of outrageous legislative choices.⁵⁷ Rather, the principle is an axiom of a well-ordered legislative and interpretive practice, in which subjects of the law rightly presume that the existing constitutional order forms the context in which Parliament acts.⁵⁸ The temptation is to transmute the principle into a warrant for selective disobedience, for ignoring what Parliament has clearly chosen and instead requiring it to choose again.

The principle of legality is of general application, yet the court ignored it in *Doogan*, failing to reason about whether, and if so to what extent, Parliament in enacting the 1967 Act intended to qualify freedom of conscience.⁵⁹ The absence of the principle from the unanimous judgment of the court is all the more remarkable in view of its significance in Lady Dorrian's judgment,⁶⁰ which the Supreme Court overturned, and counsel's reliance on it in argument. By contrast, the principle looms large in *Evans*, with Lord Neuberger (with whom Lord Kerr and Lord Reed agreed) relying on it to interpret s 53 of the Freedom of Information Act 2000 so as to preclude ministers from overruling the decision of the Upper Tribunal that disclosure of information was in the public interest.⁶¹ This interpretation was, Lord Neuberger admitted,⁶² awfully strained, leaving s 53 almost meaningless. Parliament plainly intended, in enacting the section, to

⁵⁶ P Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 LQR 598

⁵⁷ *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115, per Lord Hoffmann

⁵⁸ R Ekins, *The Nature of Legislative Intent* (OUP, Oxford, 2012), 245

⁵⁹ See Ekins, n34 above

⁶⁰ [2013] CSIH 36; 2013 S.L.T. 517

⁶¹ *Evans v Attorney General* [2015] UKSC 21

⁶² *Ibid.* [89-90]

establish just such a power.⁶³ The premise for this extraordinary interpretation was that if interpreted otherwise (that is, as plainly intended) the section would flout the rule of law, which the court should strive to prevent. This judgment assumes that the principle of legality is a license for interpretation that runs directly contrary to what one is able to infer Parliament clearly intended. The other four judges rejected the misinterpretation: Lord Mance and Lady Hale reached the same result by other means, whereas Lord Hughes and Lord Wilson dissented strongly.

The judgment of Lord Neuberger sees the principle of legality as a means to secure the rule of law. But the means involves departing from the statute. As Lord Hughes says in dissent, the rule of law does not mean the rule of judges whatever the statute may say.⁶⁴ Lord Neuberger does not expressly reject parliamentary sovereignty and indeed I think he does not intend to reject it, for his rationalisation for his interpretation is that it secures the rule of law and that Parliament can always respond if it chooses by making its intentions clearer.⁶⁵ In a critical but sympathetic reflection on this argument, Mark Elliott suggests that the standing possibility that Parliament may correct the judgment helps legitimate it:⁶⁶ outright invalidation of the statute would be unprincipled but tacit disobedience on principled grounds, provided one yields to any legislative response, is defensible. He argues later that the Government's tepid response to the Freedom of Information Commission's recommendation that Parliament reverse *Evans* vindicates Lord Neuberger.⁶⁷

This mode of analysis, and conception of legality, seems to me wrong-headed. Our constitution vests legislative authority in Parliament and it is the duty of the courts, as much as any other official or citizen, to give effect to the intended meaning of its enactments. In inferring that meaning one should certainly presume that Parliament intended to legislate consistently with established constitutional principle, but this is a presumption not a license to distort what Parliament clearly intended to enact. Lord Neuberger uses legality as an excuse to remake the statute. This is to depart from the rule of law not to vindicate it, *even if* one is right that Parliament has enacted a statute that compromises the rule of law. Further, the rationalisation that Parliament may respond if it wishes is unsatisfactory. It overlooks the scarcity of parliamentary time and political capital and it grants far too much power to courts to distort statutes when they speculate that a response is unlikely. The rule of law requires the courts, more than anyone, to uphold statutes. Parliament may sometimes need to vindicate the rule of law by reversing a (wilful) misinterpretation of some statute, but it certainly does not follow that this possibility licenses such misinterpretation in the first place.

It bears noting that *Evans* misconstrues constitutional principle in another way too.⁶⁸ The majority assumes that the ministerial veto flouts the rule of law if it extends to decisions of the Upper Tribunal on appeal from the Information Commissioner. But this analysis ignores the history of the freedom of information regime and the nature of the question on which the Commissioner, Tribunal and Minister decide. The question concerns the balance of the public interests in favour of disclosure and against disclosure. This is not at all an ordinary question

⁶³ R Ekins and C Forsyth, *Judging the Public Interest: The Rule of Law vs. The Rule of Courts* (Policy Exchange, 2015)

⁶⁴ [2015] UKSC 21, [154]

⁶⁵ This is implicit from his stress on the need for crystal clarity in the legislative language.

⁶⁶ M Elliott, 'A tangled constitutional web: The black spider memos and the British constitution's relational architecture' [2015] PL 539

⁶⁷ M Elliott, 'A postscript on the *Evans* case: The report of the Freedom of Information Commission and the Government's response', *Public Law For Everyone*, 2 March 2016

⁶⁸ Ekins and Forsyth, n63 above at 16-19

of law and it is entirely proper for Parliament to entrust the final decision on point to a minister who is responsible to Parliament for his actions. This misapprehension was shared by Lord Mance and Lady Hale, who reached the same result, quashing the Attorney-General's exercise of the power, by a different means.

In *AXA*, the principle is relied upon to introduce wholly unnecessary doubts about the validity of Acts of the Scottish Parliament. Framing the rule of law as a principle in tension with parliamentary sovereignty, Lord Hope reasons that the Scottish Parliament, not being sovereign, is subject to the rule of law, which means that its Acts may be ultra vires if they impugn the rule of law, notwithstanding otherwise complying with the terms of the Scotland Act, including the requirement to conform to EU law and the ECHR. This line of reasoning seems to me to mistake the Westminster Parliament's authoritative choice in constituting the Scottish Parliament. The choice was to introduce a new, democratically legitimate legislature of general competence, subject to certain express limitations. It is wrong to imply that Parliament was not authorising those Acts that a court might later conclude somehow trespass on a vague idea of the rule of law. The judgment casts a cloud of uncertainty over the validity of future legislation, encouraging (often hopeless) challenges, solely to reserve to the courts the option of invalidating legislation they think unjust. Strikingly, Lord Hope's worry is in part that Scottish democracy may misfire, that one party may dominate Holyrood and misuse the Scottish Parliament's powers. This risk does not legally justify assertion (invention) of a countervailing reserve judicial power. In truth, the assertion compromises rather than secures the rule of law.

The misinterpretation of statutes is also clear in cases in which the courts purport to update the meaning of statutes, setting aside the meaning Parliament intended to convey at enactment and instead remaking them to better suit present mores. This mode of reasoning is at times rationalised by appeal to legislative purposes, but always purpose pitched at a high level of abstraction such that it does not constrain. The analogy with the ECtHR's living instrument doctrine is clear, a doctrine that expressly abandons the decisions made by the signatories to the ECHR, instead moving them ever forwards and outwards.⁶⁹ The starkest case of this kind in recent British law is *Yemshaw*, in which a quasi-unanimous Supreme Court sharply expanded the scope of 'violence' in the Housing Act 1996, to include not only physical violence (or threats of such likely to be carried out) but any action that might give rise to harm, and especially psychological abuse.⁷⁰ There were good reasons to speculate that Parliament would not respond to this misinterpretation. The court reasoned that this reading brought the relevant provisions of the Act, which concerned the definition of voluntary homelessness, in line with wider government policy. Maybe so, but revision of the statute book is for Parliament not the court. The judgment reorders the relative priority for scarce public housing without considering or perceiving the wide range of relevant considerations and does so in a way that invited further litigation to expand still further the scope of the provision, extending violence to harmful behaviour irrespective of whether the parties in question were in any kind of domestic relationship.⁷¹ This is not a good way to adjudicate disputes. It abandons the discipline of settled law, which Parliament has enacted and remains free to amend, and remakes the law in the course of adjudication.

⁶⁹ S Fredman, 'Living Trees or Deadwood: The Interpretive Challenge of the European Convention on Human Rights' and J King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy', chapters 4 and 8 in Barber et al, n19 above

⁷⁰ *Yemshaw v Hounslow LBC* [2011] UKSC3; [2011] 1 WLR 433

⁷¹ *Waltham Forest LBC v Hussain* [2015] EWCA Civ 14

The other main technique by which judicial power may be misused is in the course of ordinary judicial review, in which the courts may address questions that ought to be non-justiciable and/or fail to show comity for other institutions. In *Evans*, Lord Mance reached the same outcome as Lord Neuberger, effectively excising s 53 from the statute book, by reasoning that while the Attorney-General was free to depart from the Tribunal's evaluation of the public interest, he was obliged to accept the Tribunal's findings, including its assertions about constitutional convention and speculation about the likely consequences of disclosure. This made it practically impossible for the Attorney General to exercise the statutory power. Lord Mance overlooked, or discounted, the minister's responsibility to Parliament for the exercise of the power, a responsibility for which the statute made provision by arming the Information Commissioner to contribute.

Political accountability and judicial review are not alternatives. They often overlap and neither is capable of constituting an alternative for the other.⁷² But the statutory context of some public power and its place in the scheme of responsible government are relevant to the grounds on which judicial review should be available and/or to the intensity with which they should be applied. In *Litvinenko*,⁷³ the Home Secretary's decision not to exercise her wide statutory power to initiate an inquiry was quashed by the reviewing court, which effectively disagreed with her decision on the merits. Yet the Home Secretary was accountable to Parliament for her decision, which required evaluation of the UK's relations with Russia, a matter that the court is neither competent nor entitled to consider.⁷⁴ In *Bradley*,⁷⁵ the Court of Appeal evaluated the adequacy of a minister's response to an ombudsman report, interfering with the political process in which such reports take their place. The Court assumed that its intervention would support rather than undermine the process, but instead it delayed and complicated the resolution of the political controversy. In fact, Parliament was more than capable of bringing pressure to bear on the executive and the court's intervention was both unnecessary and inimical to the integrity of the ombudsman process.⁷⁶

My point, I should add, is not that courts now know no limits and review all and every public action – plainly not. But the drift is towards ever more searching judicial review of ever more previously non-justiciable matters. For many judges and lawyers, this is the long march of the rule of law. For my part it seems rather an extension – halting and uncertain – of the rule of law. The limits of judicial intervention are in many cases a function more of temperament than principle, as Elias LJ contemplates in his insightful reflection on recent changes in judicial practice.⁷⁷ The trend in the law, especially when human rights law is in play, has been towards judicial intervention, rationalised by a capacious understanding of the rule of law and a related despair at the capacities of the political authorities. But this trend sputters in cases on the margins, when the old constitutional forms reassert themselves, when the greater competence and legitimacy of, say, the executive in relation to foreign affairs or the legislature in relation to social policy (and, I would say, general lawmaking) is hard to escape.⁷⁸

⁷² T Endicott, *Administrative Law* (OUP, Oxford, 3rd ed, 2015), chapter 2 'The rule of law and the rule of judges'

⁷³ *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194

⁷⁴ J Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange, 2016), 42-44

⁷⁵ *R (Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116

⁷⁶ Varuhas, n74 above at 30-39

⁷⁷ Lord Justice Elias, 'Are Judges Becoming too Political?' (2014) 3 *Cambridge Journal of International and Comparative Law* 1

⁷⁸ *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60

IX. The dynamics of judicial power

Judges are of course often tempted to subvert the law. For the most part, judges (and, happily, many other officials) resist and do their duty, which helps explain how and why Britain has long succeeded in securing the rule of law. However, the temptations are on the rise and the legal culture within which judges operate is now less inclined to see them as temptations to resist so much as opportunities to seize. British legal culture has been re-forming around the series of developments in legal practice – including the enactment of the HRA and its reception and application – which have been informed by and have in turn informed new understandings of constitutional principle. The rule of law is now often thought to require judicial departure from settled law, to require the second-guessing, and frustration, of legislative or executive action. These changes take their place within, or against the backdrop of, a long-standing tradition of disciplined adjudication. Not all judges are enthusiasts for the new responsibilities thrust upon them and not all are willing to assent to the improper extension of this mode of judicial action.

This ongoing cultural change makes parliamentary sovereignty less secure. However, the doctrine remains deep-rooted in our constitutional practice – ever more so after Brexit – and it is telling that the expansion of judicial power aims to avoid direct challenge to Parliament. Rather, the possibility, however unlikely and however politically untenable, that Parliament might choose to unwind the new judicial role or to answer its excesses plays an important role in the intellectual case for adopting that role. The dismissal of direct challenge to parliamentary sovereignty, welcome though it is, should not obscure the importance of the changes that have been taking place: the new responsibilities Parliament has conferred, the misinterpretation and extension of them, the more general misuse of ordinary statutory interpretation and judicial review. The courts are here often breaking new ground, often illegitimately departing from settled law, which means they are sensitive to the responses of others, including judges in dissent, judges in subsequent cases, lawyers, and MPs and ministers. This apprehension and anticipation further encourages judicial gamesmanship, in which judgment turns on political speculation. The courts may have proven to be quietly shrewd in their political judgment, but it should be clear that this mode of action is not consistent with the rule of law and puts the integrity of adjudication in risk. The Supreme Court's *Nicklinson* judgment, for example, may have put it on a collision course with Parliament. If the court pursues confrontation on the merits of assisted suicide – if it purports to put the rule of law in service of one side in the controversy – it may invite those on the other side (a large majority of the Commons) to respond bluntly.

If one thinks the ongoing expansion of judicial power threatens the rule of law and parliamentary democracy, how should one respond? Not by removing wayward judges, save in the most extraordinary of cases, such as a serious challenge to parliamentary sovereignty. For the independence of judges is an indispensable precondition of the rule of law, which makes fearless adjudication according to law possible. Appointing judges who one has reason to think are likely to uphold settled law is more promising, but this is often difficult to discern and the way in which judges act over time may turn on the shape of the culture over time. How then does one reform this culture? Parliament's choice to vest responsibilities in judges is of course very important as are expectations as to how they will be discharged. Repealing the HRA would help, although the UK would need to anticipate the ECtHR more often finding the UK in breach of the ECHR as the Court interprets it. This repeal would almost certainly spur further litigation about common law rights, although shorn of formal legislative support it may

be that common law rights reasoning would be much less adventurous than its HRA equivalent. Government policy is to repeal the HRA and replace it with a British Bill of Rights. Whether this would help improve matters turns partly on the detail: it might make matters worse if it emboldens domestic judges not only in relation to Strasbourg but also in relation to Parliament and executive. And arguably, in view of the revision of ‘convention rights’, we are close to this position already.

The future shape of Britain’s legal culture will doubtless be informed by Brexit. Ending the ongoing incorporation of EU law will make the example of the CJEU less relevant. This change will end the disapplication of Acts of Parliament and so will further undermine the argument that parliamentary sovereignty has been taken over by events. In particular, it will end the emerging trend towards greater use of the EU Charter of Fundamental Rights, which was likely to loom ever larger in human rights law litigation. Brexit is likely also to be relevant to the UK’s relationship with the ECtHR, for the willingness of the UK to leave the EU, in part to restore national sovereignty and better to secure its borders, may suggest that it will be ever less tolerant of objectionable ECtHR’s rulings. The alternative is possible too, of course, for it may be that after Brexit the UK will be keen to avoid further straining the devolutionary settlement and will aim to present itself as a good international citizen. In terms of how Brexit will bear on domestic judicial thinking, again multiple possibilities are open. The retreat of EU law may weaken the idea of the judge as standing in a sense above the political process. Or, the absence of EU law as a discipline on Parliament may alarm judges and lawyers, who will strive ever more to compensate by way of the HRA/ECHR and ordinary techniques of interpretation and review.

X. Conclusion

The idea of judicial power is increasingly contested. The traditional view has long been that judges serve the rule of law by adjudicating disputes fairly in accordance with positive law. Thus, courts should not oversee Parliament and statutes should be given effect according to their clear intended meaning. The new view is grounded in a rather different conception of the rule of law and is much more sceptical about the capacities of Parliament and the executive. The responsibility of judges, on this view, is not just to uphold the law, or develop the common law incrementally, but to advance the law, including by overseeing the merits of Acts of Parliament and executive policy choices. The adoption of the new view owes much to the responsibilities the ECA and HRA conferred on British judges, as well as the CJEU and the ECtHR’s model of judicial craft. But the new view goes further in licensing judicial extension of the HRA beyond its intended scope and misuse of ordinary techniques of statutory interpretation and judicial review to check the political authorities. It is no surprise that this conception of judicial action often involves strategic adjudication, anticipating and exploiting the likely responses of Parliament and executive. This expansion and transformation of judicial power puts in danger the UK’s historical success in securing the rule of law and parliamentary democracy. Reversing the trend will involve cultural change, which Brexit and repeal of the HRA may help support but which also requires judges, lawyers, and others to affirm established constitutional principle and reject the many temptations to which modern judging gives rise.