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The Human Rights Act and 'Coordinate Construction': Towards a 'Parliament Square' Axis for Human Rights?

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I. FUNCTIONAL SEPARATION OF POWERS AND THE HUMAN RIGHTS ACT

A CURIOUS FEATURE of the debate about law and democracy in the context of the Human Rights Act (HRA) is the extent to which it has been dominated by a certain idea of separation of powers. Lord Sumption has traced this to a judicial source: Lord Diplock's description of a 'balanced constitution' in which Parliament possesses 'the sole prerogative of legislating' and ministers are doubly accountable—on the one hand to Parliament 'for their policies and for the efficiency with which they carried them out' and on the other to 'the courts for the lawfulness of their acts'.[1] Many years later, Lord Hoffmann based a similar analysis overtly on separation of powers, distinguishing 'questions of law' from questions of 'judgment and policy'.[2] Courts and executive in these depictions exercise different functions and are functionally separate. Lord Sumption, on the other hand, dismisses this type of functional analysis as 'neat' and 'elegant', but 'perfectly useless, because it begs all the difficult questions … The Diplock test will yield a different answer depending on how you define the issue'.[3] Functional analysis is reductive—perhaps deliberately so. Its effect is to transmute complex polycentric questions into a simple legal question and thus to re-allocate them to the judiciary without further discussion of justiciability. This is in fact precisely the way in which human rights campaigners present their case for human rights adjudication as primarily a judicial function.

[1] *R v Inland Revenue Commissioners ex p National Federation of Self-Employed and Small Businesses* [1982] AC 617, 619. But see similarly Sir Stephen Sedley, 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 *LQR* 270.

[2] *Home Secretary v Rehman* [2003] 1 AC 153 [50].

[3] Lord Sumption, 'The Limits of Law', 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, 1.

But a striking characteristic of the Westminster model of governance is the absence of any clear dividing lines between the classical triad of governmental institutions. Indeed, until the passage of the Constitutional Reform Act in 2005, the House of Lords served the dual function of second chamber of the legislature and highest court in the land, and its judges were Law Lords, with rights to sit and vote in the House when acting in its legislative capacity. Although their legislative interventions were rare and governed by convention, Law Lords did participate in debates during the passage of the Human Rights Bill. Arguably then, it was the Constitutional Reform Act that effected the dramatic change in the constitutional order generally attributed to the HRA, infusing the constitution with a soupçon of separation of powers that runs against the grain of the doctrine of parliamentary sovereignty, which is the keystone of our constitution.

For Ewing, the HRA marks a break with constitutional tradition, involving an unprecedented transfer of political power from the executive and legislature to the judiciary and fundamental restructuring of our 'political constitution'.[4] Yet the doctrine of parliamentary sovereignty possesses 'surprising vigour, deep roots and unshakeable strength' and 'behind all the hyperbole about the emergence of legal constitutionalism, we find a strong sense of deference by the courts to the political branches'.[5] Lord Hoffmann too believes in the enduring strength of the sovereignty doctrine. The HRA does not alter the fundamental principle of parliamentary sovereignty, and 'people expect' human rights issues to be decided by Parliament 'as they have been in the past' and not by the Law Lords assuming the role of 'Platonic guardian'.[6] For Lord Bingham, speaking eloquently in favour of the Bill in the House of Lords, the HRA would change nothing. The judges would not be empowered—and did not wish to have the power—to 'overrule, set aside, disapply, or—if one wants to be even more dramatic—strike down Acts of Parliament'; following incorporation, 'nothing will be decided by judges which is not already decided by judges'.[7] Lord Hoffmann's view is more nuanced. The function of a judicial declaration of incompatibility is to draw a difficulty to the attention of Parliament. 'The sovereign Parliament' must then 'squarely confront what it is doing and accept the political cost'; it must then decide whether or not to remove the incompatibility.[8] Declarations of incompatibility are, in Conor Gearty's words, 'courteous requests for a conversation, not pronouncements of truth from on high' and 'all that the non-judicial branches of the state are required to do [is] think twice, not blindly obey'.[9] This is a cooperative model of institutional dialogue in which responsibility for a human rights regime is shared and judges and legislators

[4] K Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79.
[5] K Ewing and J Tham, 'The Continuing Futility of the Human Rights Act' [2008] *PL* 668, 670, 692.
[6] Lord Hoffmann, 'Human Rights and the House of Lords' (1999) 62 *MLR* 159, 160–61.
[7] HL Deb 3 November 1997, vol 582, col 1246. Lords Scarman and Ackner also participated in the debate. See also *Rights Brought Home: The Human Rights Bill*, Cm 3782 (1997) [211]–[213].
[8] *R v Home Secretary ex p Simms* [1999] UKHL 33.
[9] C Gearty, *Can Human Rights Survive?* (Cambridge, Cambridge University Press, 2006) 96.

are (to put this differently again) partners 'engaged in a common enterprise'.[10] This is, I shall argue, the model on which the HRA is premised.

By 'bringing rights home', Lord Irvine (then Lord Chancellor) proclaimed in presenting his Bill to the House of Lords, our courts would develop human rights throughout society and 'a culture of awareness of human rights would develop'. Responsibility for developing the culture of rights would be shared. The logic of the Bill was to 'maximise the protection of human rights without trespassing on parliamentary sovereignty'. The role of Parliament would be enhanced in that 'there would have to be close scrutiny of the human rights implications of all legislation before it goes forward' and this would be doubly underpinned: first, by the duty in section 19 of the Act for ministers to make a 'statement of compatibility' before the second reading of every bill in each House; and, second, by the section 10 power for ministers, following a declaration of incompatibility, to take remedial action by ministerial regulation.[11] Finally, the Lord Chancellor declared his confidence that the 'incorporation of the European convention into our domestic law will deliver a modern reconciliation of the inevitable tension between the democratic right of the majority to exercise political power and the democratic need of individuals and minorities to have their human rights secured'.[12] Courts and legislators must, in other words, work together to develop a human rights culture and construct a human rights framework consonant with the Westminster model of governance.[13]

Janet Hiebert has questioned the tendency to allocate responsibility for human rights exclusively to the judiciary, insisting that Parliament must also engage in a process of rights review. She argues too that separation of functions is dysfunctional:

> Political actors can benefit from the exposure to the judgement of judges who have more liberty from the electoral, public and political pressures that may constrain political decision making and whose rulings may provide important insights into why legislation represents an inappropriate restriction on a protected right. This is particularly significant for parliamentary systems where a majority government may not otherwise face serious constraints on legislative decisions.[14]

Judges too, Lord Sumption argues, must bear in mind that the parliamentary process may be:

> [A] better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. The legislature has access to a fuller range of

[10] Lord Woolf of Barnes, 'Droit Public—English Style' [1995] *PL* 57, 69.

[11] All the citations are from HL Deb 3 November 1997, vol 582, cols 1227–34.

[12] ibid. Every declaration of incompatibility—save one—has been implemented by the government of the day.

[13] See similarly H Fenwick, 'Prisoners' Voting Rights, Subsidiarity, and Protocols 15 and 16: Re-creating Dialogue with the Strasbourg Court?' UK Constitutional Law Blog (26th November 2013), available at: ukconstitutionallaw.org/2013/11/27/helen-fenwick-prisoners-voting-rights-subsidiarity-and-protocols-15-and-16-re-creating-dialogue-with-the-strasbourg-court.

[14] J Hiebert, 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' (2005) 35 *British Journal of Political Science* 235, 240.

> expert judgment and experience than forensic litigation can possibly provide. It is better able to take account of the interests of groups not represented or not sufficiently represented before the court in resolving what is surely a classic 'polycentric problem'.[15]

Judges cannot afford—and are not required—to be 'insensitive to questions of democratic accountability'.

Mutual recognition is part of a process that Alec Stone Sweet calls 'coordinate construction'. This may in time lead courts habituated to deciding constitutional and human rights issues to engage in a form of 'sustained and intimate judicial-political interaction' in which they 'tell legislators how they ought to have written the law in the first place'. This in turn may promote a reaction in which legislators engage in 'the re-elaboration of a censured text in conformity with constitutional jurisprudence to secure promulgation'.[16] Danny Nicol has suggested that something similar may be beginning to happen in the context of the HRA. Rights-orientated interpretation, which tends towards generalities, has 'instilled a general sense of judicial interpretative liberty, giving courts a degree of legislative freedom'. They have, in other words, begun to 'act legislatively' and, 'although it would be open to a sovereign Parliament to alter or flesh out the Convention rights, Parliament has yet to sanction such a practice on any grand scale'.[17] But rather than a process of coordinate construction, Nicol depicts a formalist straitjacket in which law develops as a 'cordon within which politics is allowed to take place'.[18] Power is, in other words, draining away from Parliament towards the courts.

In the remainder of this chapter, I shall examine these ideas through the medium of four cases in which the relationship between Parliament and the courts was engaged and where human rights were problematic and often contentious. I shall argue that a dialogue model of human rights adjudication is a necessary antidote to the growing climate of rivalry, distrust and dissonance in which increasingly we find ourselves. I shall look for evidence of enhanced horizontal dialogue between national courts and the Westminster Parliament, but also at instances of parliamentary engagement with the Strasbourg Court and Council of Europe institutions. I shall consider the possible development of a web of multi-party horizontal, vertical and multi-level relationships, and I shall argue for a 'Parliament Square axis' in which courts and Parliament work together through a polycentric human rights dialogue to achieve a reasoned outcome.

[15] *R (Nicklinson and others) v Ministry of Justice and the DPP* [2014] UKSC 38 [28] and [231].

[16] A Stone Sweet, 'Constitutional Politics in France and Germany' in M Shapiro and A Stone Sweet, *On Law, Politics and Judicialization* (Oxford, Oxford University Press, 2002) 184, 189.

[17] D Nicol, 'Law and Politics after the Human Rights Act' [2006] *PL* 722, 729.

[18] ibid.

II. STUDIES IN CONFLICT RESOLUTION

A. Political Advertising, Careful Preparation

Of my four case studies, that which comes closest to the paradigm of 'coordinate construction' intended by the drafters of the HRA is the political advertising affair. Its largely coordinated and constructive outcome was doubtless facilitated by the facts that it began in Strasbourg with a case that did not involve the UK directly and that the challenged British legislation was initiated by a Labour government in a favourable climate shortly after the passage of the HRA when everyone was anxious to play by the rules. In *Verein gegen Tierfabriken* (*VgT*),[19] a panel of the European Court of Human Rights (ECtHR) had unanimously decided that a Swiss law prohibiting all political advertising on the state-owned television service violated Article 10 of the European Convention on Human Rights (ECHR) because it was too inclusive a ban to be necessary in a democratic society. Political advertising was not prohibited altogether and might be compatible with Article 10 ECHR (freedom of speech) in certain situations, but the reasons for a ban must be both 'relevant' and 'sufficient' in respect of the particular case. In *VgT*, which involved an innocuous advertisement from a group campaigning against cruelty to animals, the Swiss authorities failed to satisfy the Court in a 'relevant and sufficient' manner why the grounds advanced generally in support of the prohibition of political advertising served to justify the interference in the particular circumstances of the case.[20]

The main concern of the UK government in its Communications Bill was the establishment of communications networks and of Ofcom, a new regulator of communications services in the interest of consumers. Political advertising was not at the forefront of their minds and the draft Bill turned to the subject only in clause 314, which did not receive much attention during passage of the Bill. The clause (which became sections 319 and 321(2) of the Communications Act 2003) contained a ban on political advertising drafted widely enough to cover all 'objects of a political nature' or 'political ends' as defined in the Act. This policy could be traced back to the introduction of independent television in 1954 and it reproduced a similar prohibition under the Broadcasting Act 1990 premised on the recommendations of the 1998 Neill Committee on political party funding.[21] There had been a three-month public consultation on the 2002 Bill; it had been considered by two parliamentary joint committees and was supported by the

[19] *Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159.

[20] ibid [74] and [75].

[21] 5th Report of the Committee on Standards in Public Life, *The Funding of Political Parties in the United Kingdom*, Cm 4057-I (1998), ch 13. The Committee discussed the implications of the earlier ECtHR decision in *Groppera Radio v Switzerland*, Series A 173 (28 March 1990), but recommended maintaining the ban on political advertising (Recommendation 94).

Independent Television Authority[22] and the Electoral Commission.[23] Yet the government was well aware of the problem posed by *VgT* and the Secretary of State for Culture introducing the Bill made the following section 19 statement:

> I am unable (but only because of clause 314) to make a statement that, in my view, the provisions of the Communications Bill are compatible with the Convention rights. However, the Government nevertheless wishes the House to proceed with the Bill.

The Joint Committee set up to consider the Bill expressed support for the principles underlying the proposed ban in a cursory paragraph, while at the same time urging the government to give careful consideration to methods of carrying forward the ban in ways not susceptible to challenge for incompatibility with Convention rights.[24] As might be expected, the Joint Committee on Human Rights (JCHR) paid particular attention to the question of possible incompatibility with *VgT*, recommending that although it would be a formidable challenge to put in statutory form 'a more circumscribed ban applied more discriminatingly', the government 'should seek restrictions short of an outright ban which could be shown to advance one of the legitimate aims in Article 10(2), and to be a proportionate and non-discriminatory way of pursuing that aim'.[25] In addition, the JCHR wrote asking the Minister to explain why it would be impossible to introduce 'transparent and proportionate' controls on political advertising that would secure a fair balance between competing rights and interests.[26] The Minister responded with a memorandum explaining that the government had looked at ways to include 'workable and Convention-compatible restrictions' in the Bill, but had concluded that the schemes would be unworkable and would not only 'fall significantly short of the present outright ban' but would also allow a substantial degree of political advertising to be broadcast;[27] in other words, the Bill's legitimate objective would not be achieved. Somewhat grudgingly, the JCHR conceded that the course of action taken by the government did not evince a lack of respect for human rights and was 'legitimate in the circumstances',[28] and the Bill passed into law with the political exceptions.

Some five years later, the ban was challenged in court by Animal Defenders International, a campaigning group seeking to broadcast an advertisement about cruelty to primates. The Divisional Court refused a declaration of incompatibility and the case leapfrogged to the Lords.[29] Lord Bingham's speech was significant.

[22] Letter of 10 October 2002 from Sir Robin Biggam.
[23] Electoral Commission, *Party Political Broadcasting: Report and Recommendations* (January 2003).
[24] Joint Committee on the Draft Communications Bill, *Draft Communications Bill*, HC 876-1 (2002–03) [301] and Recommendation 100.
[25] JCHR, *Nineteenth Report of Session 2001–2002*, HC 1102 (2001–02) [64] and [57]–[63].
[26] See JCHR, *First Report of Session 2002–2003*, HC 191 (2002–03) [16].
[27] ibid, Appendix 6.
[28] JCHR, *Fourth Report of Session 2002–2003*, HC 397 (2002–03) [41].
[29] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* ([2006] EWHC 3069 (Admin); *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15. Lord Bingham spoke for Lords Carswell and Neuberger and the decision was unanimous.

After referring in some detail to the parliamentary stages of the Communications Bill, he summarised the government's position as being that it believed and had been advised that the proposed statutory ban on political advertising was compatible with Article 10 ECHR, but because of the ECtHR decision in *VgT*, it could not be sure of this. He went on to look at the *VgT* decision, weighing it against a later ECtHR ruling involving the banning of a religious advertisement under virtually similar Irish legislation[30] and concluding that there was no clear consensus on the broadcasting either of religious advertisements or of political advertising. It followed that the national margin of appreciation should be wider in such cases and 'it may be that each state is best fitted to judge the checks and balances necessary to safeguard, consistently with article 10, the integrity of its own democracy.'[31] In the instant case, the judgment of Parliament should be accorded great weight:

> First, it is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so. Secondly, Parliament has resolved, uniquely since the 1998 [Human Rights] Act came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed under section 19(1)(b) of the Act. It has done so, while properly recognising the interpretative supremacy of the European Court, because of the importance which it attaches to maintenance of this prohibition. The judgment of Parliament on such an issue should not be lightly overridden.[32]

Thus, the groundwork had been fully prepared by a government professing itself anxious to be compliant, a Parliament that had apparently taken its scrutiny obligations seriously, and courts that had both considered the parliamentary proceedings carefully and, perhaps more importantly, set out the course of events in some detail. Consequently, when, five years later, the ECtHR finally adopted its judgment, the national position was solid, sound and set out in a way that was easy for the ECtHR to follow with a clear message of support for government policy in Lord Bingham's speech. The importance of this is clear from the following passage in the majority judgment, which described the legislative ban as 'the culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression in the United Kingdom and all bodies found the prohibition to have been a necessary interference with Article 10 rights':

> It was this particular competence of Parliament and the extensive pre-legislative consultation on the Convention compatibility of the prohibition which explained the degree of deference shown by the domestic courts to Parliament's decision to adopt

[30] *Murphy v Ireland* (2003) 38 EHRR 212.
[31] *Animal Defenders* [2008] UKHL 15 [35].
[32] *Animal Defenders*, ibid [33].

> the prohibition … The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords. Both courts analysed the relevant Convention case-law and principles, addressed the relevance of the above-cited *VgT* judgment and carefully applied that jurisprudence to the prohibition. Each judge at both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was a necessary and proportionate interference with the applicant's rights under Article 10 of the Convention.
>
> The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.[33]

Even so, the government victory was marginal. The ECtHR decided by only nine votes to eight that the legislation—supported by Judge Bratza, the national judge—was not disproportionate and that there had been no violation of Article 10. A strong dissenting judgment carried the following warning:

> The fact that a general measure was enacted in a fair and careful manner by Parliament does not alter the duty incumbent upon the Court to apply the established standards that serve for the protection of fundamental human rights. Nor does the fact that a particular topic is debated (possibly repeatedly) by the legislature necessarily mean that the conclusion reached by that legislature is Convention compliant; and nor does such (repeated) debate alter the margin of appreciation accorded to the State. Of course, a thorough parliamentary debate may help the Court to understand the pressing social need for the interference in a given society. In the spirit of subsidiarity, such explanation is a matter for honest consideration. In the present judgment, however, excessive importance has been attributed to the process generating the general measure, which has resulted in the overruling, at least in substance, of *VgT*, *a judgment which inspired a number of member States to repeal their general ban—a change that was effected without major difficulties*.[34]

Underlying these conflicting judgments are two very different models of human rights adjudication. The majority shows respect for the 'particular competence of Parliament' and takes note of the cultural background against which the prohibition has been adopted and the 'exacting and pertinent reviews, by both parliamentary and judicial bodies', which are envisaged as cooperating as partners. The minority judgment adopts a diametrically opposed model in which the human rights court has legislative responsibility for the construction of human rights law and national legislatures merely transpose judicial rulings into national legislation. At the same time, *Animal Defenders* provides an exemplary model of 'coordinate construction' and the dialogic approach. It also underlines a point made

[33] *Animal Defenders International v UK* (2013) 57 EHRR 21 [114]–[116].

[34] ibid, Joint Dissenting Opinion of Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano [9] (emphasis added).

by Lord Bingham concerning the significant contribution of British judges to the development of human rights law. In the debate on the Bill, he had argued that the HRA would give the Strasbourg Court the benefit of a considered judgment by a British judge, with the consequence that 'some of our more idiosyncratic national procedures and practices may be better understood'.[35] This is an important point to bear in mind.

B. Prisoners' Voting Rights: Disobedience or Dialogue?

In *Hirst v UK*,[36] the Grand Chamber of the ECtHR ruled that section 3 of the Representation of the People Act 1983 imposed a 'blanket ban' on voting by convicted prisoners. This was disproportionate and a violation of Article 3, Protocol 1 of the ECHR (A3, P1), which provides that:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature

The margin of appreciation accorded to states under the ECHR was wide but not all-embracing and the automatic disenfranchisement of all convicted prisoners in prison fell outside any acceptable margin of appreciation, 'however wide that margin might be'.[37] The Court demanded legislation within six months.

For human rights lawyers in particular, this is simply a case of disobedience. As the JCHR put it in one of its three reports on the matter, the current 'blanket ban' on the enfranchisement of prisoners was 'incompatible with the UK's obligations under the European Convention and must be dealt with'. The issues were 'not legally complex' and:

> [T]he continued failure to remove the blanket ban, enfranchising at least part of the prison population, is clearly unlawful. It is also a matter for regret that the Government should seek views on retaining the current blanket ban, thereby raising expectations that this could be achieved, when in fact, this is the one option explicitly ruled out by the European Court.[38]

That the issue was controversial and that 'the Government would be taking a generally unpopular course if it were to enfranchise even a small proportion of the prison population' was swept aside by the JCHR as irrelevant. It was not open to the government to question the merits of the ECtHR. A year later, the JCHR was lamenting the fact that 'the case appears destined to join a list of long standing

[35] HL Deb 3 November 1997, vol 582, col 1245.

[36] *Hirst v UK (No 2)* (2006) 42 EHRR 41. For a full account of the affair, see I White, *Prisoners' Voting Rights*, House of Commons Research Centre, SN/PC/01764 (updated to 2014).

[37] *Hirst* (n 36) [83].

[38] JCHR, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HC 728 (2006–07) [77]–[78].

breaches of individual rights that the current Government, and its predecessors, have been unable or unwilling to address effectively within a reasonable time frame'.[39]

From this standpoint, the prisoners' voting rights affair seems to epitomise the dualistic character of the law/democracy debate. Thus, Thorbjørn Jagland, Secretary-General to the Council of Europe, giving evidence to a parliamentary bill committee, described himself as 'a rule of law man, so I have to respect the fact that the Court has the final word'. The explicit refusal to implement was a 'first'; no country had ever refused to execute an ECtHR judgment and if the UK—seen as the leading nation regarding human rights and rule of law in Europe and worldwide—were to do so, it might be 'the beginning of the weakening of the Convention system and probably after a while there may also be dissolution of the whole system'.[40] From the opposite end of the spectrum, Chris Grayling, the Justice Secretary, described the issue as one 'of totemic importance in a debate about who governs Britain',[41] while Eurosceptic MP, Philip Hollobone, called it in a parliamentary debate 'a golden opportunity' for the Coalition government 'to put Britain first' and consider 'pulling out of the Convention'.[42]

Yet Thorbjørn Jagland's evidence also provides support for a dialogic interpretation of the *Hirst* saga. Although there had not been a case of overt disobedience, he admitted, states had come to the Committee of Ministers and said: 'We have problems. We cannot do it now. You have to give us more time.'[43] Moreover, in response to questions from Lorely Burt MP, who asked 'You are saying that perhaps they should have talked to us then? We should have been able to have that dialogue?', Mr Jagland replied: 'If Protocol 16 had been in place, then one had this opportunity to have an exchange, but there are other possibilities to have a dialogue, which are not so based on formal articles.'[44] The new Protocol 16, which was not then in force, provides for dialogue in the form of advisory opinions between the highest national court and the ECtHR.[45] In a dialogic framework, stages in the *Hirst* saga can just be read as moves in a multi-level dialogue in which the participants change position and inch forward towards compromise.

In *Hirst*, for example, the majority took Parliament on directly, remarking that there was no evidence that it had, since 1968, 'ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote'.[46] Unusually, the House of Commons struck back with

[39] JCHR, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, HC 1078 (2007–08) [62].

[40] Evidence to the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, HC 924 (2013–14) 224.

[41] ibid 185.

[42] HC Deb 11 January 2011, vol 521, cols 5 and 6WH.

[43] HC 924 at 184–85.

[44] ibid 190.

[45] But see K Dzehtsiarou and N O'Meara, 'Advisory Jurisdiction and the ECtHR: A Magic Bullet for Dialogue and Docket-Control?' (2014) 34 *Legal Studies* 444.

[46] *Hirst* (n 36) [79]. There was a 12:5 majority.

a Westminster Hall debate calling for a 'proper parliamentary debate on the issue, so that colleagues can debate the pros and cons and be given the opportunity to vote to maintain the status quo'.[47] A cross-party, backbench motion followed, which asserted that 'legislative decisions of this nature should be a matter for democratically-elected lawmakers' and supported 'the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand'. At the end of a lengthy debate, the motion passed by 234 votes to 22.[48]

The ECtHR had asked for legislation within six months and the Labour government made gestures at compliance with a two-stage consultation on policy options, but the judgment remained unimplemented at the time of the General Election in 2010. Left to clear up the mess, the Coalition announced legislation that would provide for offenders sentenced to a custodial sentence of less than four years to vote in Westminster and European Parliament elections, unless the judge stated this to be inappropriate in sentencing.[49] In the same year, the ECtHR, treating *Greens and MT* as a 'pilot case', extended the six-month deadline by six months, while warning that the UK government was exposing itself to 'stockpiled' compensation claims.[50] Finally, in 2012, the Ministry of Justice submitted to a committee of both Houses a draft bill containing three options: a ban on prisoners sentenced to four or more years; a ban on prisoners sentenced to six months or more; or a restatement of the existing ban. The Bill Committee recommended that prisoners serving sentences of 12 months or less should have the vote,[51] but no legislation has been timetabled.

Alongside, the government had intervened in the *Scoppola* case[52] to ask the ECtHR to reconsider *Hirst.* Although it firmly declined to depart from precedent, the Court did soften *Hirst* by expanding the margin of national discretion. Caught between the ECtHR and Parliament, the Supreme Court manoeuvred skilfully in *Chester*, the first case to reach it. It held itself bound to follow the law as repeatedly confirmed by Strasbourg, yet declined to grant a declaration of invalidity on the ground that one had already been made.[53] Perhaps thankfully, Lord Mance declared that it was 'now for Parliament as the democratically elected legislature to complete its consideration of the position'[54] and the issue was neatly side-stepped when a claim to vote in the Scottish Referendum was dismissed by a majority on the ground that Article 3, Protocol 1 did not extend outside parliamentary elections.[55]

[47] HC Deb 11 January 2011, vol 521, cols 5 and 6WH (Philip Hollobone MP).
[48] HC Deb 10 February 2011, vol 523, col 584.
[49] HC Deb 20 December 2010, vol 520, col 151WS (Mark Harper MP).
[50] *Greens and MT v UK* (2010) ECHR 1826 [97].
[51] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, HC 924 (2013–14).
[52] *Scoppola v Italy (No 3)* (2013) 56 EHRR 19.
[53] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63. A declaration of invalidity had been granted by the Scottish Election Appeal Court in *Smith v Scott* (2007) SC 345.
[54] *Chester* (n 53) [42].
[55] *Moohan v Lord Advocate* [2014] SC 67. Lords Kerr and Wilson dissented.

A differently constituted Supreme Court was gently changing its position and a wider case law was starting to reclaim the authority of British courts in human rights adjudication.[56] A spirited extra-judicial discourse was developing. Lady Hale addressed the question of supremacy directly[57] and we find Lord Kerr arguing in a lecture that if the Court had ever seen itself as subservient to Strasbourg, we should 'stop it at once', 'kick the habit', 'stiffen our sinews and stride forward confidently'.[58] Lord Irvine—who had introduced the Human Rights Bill—exhorted the Supreme Court 'to re-assess all its previous statements about the stance it should adopt in relation to the jurisprudence of the ECHR in order to ensure that the Supreme Court develops the jurisdiction under the HRA that Parliament intended'. The Court should 'decide the cases before it for itself' and, in case of disagreement, should bear in mind that 'the resolution of the resultant conflict must take effect at State, not judicial level'.[59] Finally, Lord Sumption added to his extra-judicial defence of political decision-making[60] judicial warnings that parliamentary process may be 'a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas'[61] and that 'there remain areas which although not immune from scrutiny require a qualified respect for the constitutional functions of decision-makers who are democratically accountable'.[62] There should be no assumption that a court of review is entitled in human rights cases to substitute its own decision for that of the constitutional decision-maker: 'However intense or exacting the standard of review in cases where Convention rights are engaged, it stops short of transferring the effective decision-making power to the courts.'[63]

The Queen's Speech for 2014 contained no mention of legislation, but the government negotiated a further period of delay with the Committee of Ministers. The ECtHR has further eased the pressure by ruling that the finding of a violation of Article 3, Protocol 1 is in itself 'just satisfaction' for non-pecuniary damage sustained by applicants.[64] Fragmentary, disconnected, incoherent and incomplete, the exchanges are nonetheless part of a dialogue.

[56] The stages by which the Supreme Court has been led 'substantially to modify the *Ullah* principle' are provided in a timeline by Lord Wilson in *Moohan* (ibid) [104].

[57] Baroness Hale of Richmond, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 *Human Rights Law Review* 65.

[58] Lord Kerr, 'The UK Supreme Court: The Modest Underworker of Strasbourg?' Clifford Chance Lecture (25 January 2012). See text at nn 67 and 68 below.

[59] Lord Irvine of Lairg, 'A British Interpretation of convention Rights' (December 2012), www.ucl.ac.uk/laws/judicial-institute/files/British_Interpretation_of_Convention_Rights_-_Irvine.pdf.

[60] Lord Sumption (n 3).

[61] *R (Nicklinson and others)* (n 15).

[62] *R (Lord Carlile of Berriew) v Home Secretary* [2014] UKSC 60 [28].

[63] ibid [31].

[64] *Firth and others v UK* [2014] ECHR 874 (12 August 2014).

C. The Immigration Bill 2013: Structuring Judicial Discretion

Efforts by the Coalition government to strengthen and re-shape the Home Secretary's power to deport convicted criminals of foreign nationality afford a more advanced example of coordinate construction, involving a prolonged process of judicial-political interactions. Powers to deport are now statutory; the Immigration Act 1971 provided that a person who is not a British citizen is liable to deportation if 'the Secretary of State deems his deportation to be conducive to the public good', a term that is not defined, and the UK Borders Act 2007 provides more specifically that the Secretary of State must make a deportation order in respect of a 'foreign criminal'. The question whether a deportation is in the public interest was, until very recently, a matter of ministerial discretion. How the discretion would be exercised was set out in Immigration Rules, defined by the Immigration Appeals Act 1969 as 'rules made by the Secretary of State … which have been published and laid before Parliament'; when laid, the Rules can be disapproved by a Resolution of either House. The precise legal status of the Rules is uncertain and has given the courts a good deal of trouble; however, they are generally agreed to be something more than 'practice' or policy guidance, but less than regulation. A rule acquires the force of law if it is used as a ground for appeal to an immigration tribunal.[65]

The position changed radically after the HRA came into force, triggering growing recourse to Article 8 ECHR (which mandates respect for family life and limits the grounds on which the state can interfere with the right) to prevent deportation of non-national convicted criminals on grounds of intrusion into their family life. By 2010, this practice was having a considerable impact; indeed, it was claimed that such cases accounted for up to 50 per cent of immigration appeals.[66] The problem was exacerbated by the effect of the so-called 'mirror principle', which tied the UK courts tightly to the Strasbourg jurisprudence.[67] The upshot was the introduction of a two-stage test in Article 8 cases, whereby the ministerial view of the public interest would be evaluated with reference to the Strasbourg jurisprudence and the proportionality doctrine that this enjoined UK courts to apply.[68] Put crudely, the domestic view of the public interest in maintaining control over immigration could not, in the light of the mirror principle, prevail over a Strasbourg-dictated view of the ambit of Article 8 family rights. Moreover, in *Huang*,[69] where the

[65] In *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719, Sedley LJ provides a comprehensive analysis of the legal position. And see also *Odelola v Home Secretary* [2009] UKHL 25 [6] (Lord Hope).

[66] In *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, it was stated that of 602 appeals allowed by the immigration tribunals in 2013, 324 involved convicted criminals who succeeded under art 8. According to a freedom of information request submitted by Dominic Raab MP, the number ranges from 200 to 400 annually and they constitute around 89 per cent of all successful human rights challenges to deportation orders (HC Deb 30 January 2014, vol 574, col 1062).

[67] See *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

[68] *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27

[69] *Huang v Secretary of State for the Home Department* [2007] UKHL 11.

government argued that the Immigration Rules had 'the imprimatur of democratic approval as they were made by the responsible minister and laid before Parliament', the House of Lords disagreed; the Rules were not 'the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented'.[70]

Immigration is a high visibility political issue in the UK that can shape the outcome of general elections. It was therefore not altogether surprising that some time after *Huang*, the Home Secretary, Theresa May, announced changes to the Immigration Rules 'to ensure that the misinterpretation of Article Eight of the ECHR—the right to a family life—no longer prevents the deportation of people who shouldn't be here'.[71] The UK Borders Agency, which had just completed a prolonged and thorough consultation on family migration, also announced its intention to 'get the balance between individual rights and the public interest right' by framing rules that would produce 'a decision which is in accordance with our rules and which is also compatible with Article 8 of the ECHR'.[72] A statement from the Home Office announcing changes to the Rules was less conciliatory:

> The Courts have accepted [the] invitation to determine proportionality on a case-by-case basis. They do not defer to the Government's or Parliament's view of where the balance should be struck, as they do not know what that view is. They do not defer to the individual decision-maker's decision on what is proportionate because the Rules fail to establish where the Government considers the balance to be struck … However, proportionality decisions taken on an individual basis outside the Rules lack transparency and consistency. They do not allow Parliament a role in determining how the balance should be struck. Where legislation in other areas of law gives less discretion to the decision-maker, this has led the Courts to focus more on the policy in the legislation and less on a review of individual decisions.[73]

According to the Explanatory Memorandum, the draft Rules laid before Parliament would:

> [S]et proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public against foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis. Outside exceptional cases, *it will be proportionate* under Article 8 for an applicant who fails to meet the requirement of the rules to be removed from the United Kingdom.[74]

[70] ibid [17] and [18].
[71] Speech given at the Conservative Party Conference (4 October 2011).
[72] UK Borders Agency, *Family Migration—A Consultation* (July 2011) [8.18].
[73] Statement by the Home Office: Immigration Rules on Family and Private Life (HC 194) Grounds of Compatibility with Article 8 of the European Convention on Human Rights [13] and [17].
[74] Emphasis added. See Rules 398 and 399 of the Immigration Rules as amended in 2012, HC 395 (2011–12). See also s 65 of and sch 4 to the Immigration and Asylum Act 1999.

It was not to be. It fell to the courts to consider whether the new Rules created a 'complete code' as the government argued, rolling up the Article 8 proportionality test into a single determination governed by the Rules. Both the Upper Tribunal and the Court of Appeal thought otherwise. The primary decision-makers were as much bound by section 6 of the HRA as the judges and the new rules 'maintain[ed] the obligation on primary decision-makers to act "in compliance with" all the provisions of the Convention'.[75] The time had come to try legislation.

The Bill that became the Immigration Act 2014 gave the force of primary legislation to the Rules. It struck directly at Article 8 adjudication in deportation cases by 'requiring a court or tribunal, when determining whether a decision is in breach of Article 8 ECHR, to have regard to the public interest considerations *as set out in the Act*'.[76] The House of Lords Constitution Committee drew the attention of the House to this attempt to 'guide' courts and tribunals in their determination of Article 8, claiming it as 'a significant innovation'.[77] The JCHR's concern was greater. Although the Bill did not 'go so far as to determine individual applications in advance or to oust the courts' jurisdiction', the Committee was:

> [U]neasy about any statutory provision which purports to tell courts and tribunals that 'little weight' should be given to a particular consideration in any judicial balancing exercise, as is proposed by the Bill in relation to Article 8 claims in immigration cases. That appears to us to be a significant legislative trespass into the judicial function.[78]

The Committee recommended that the Bill be amended, but this was not conceded.

As enacted into law, the Act provides that, in considering the public interest question, a court or tribunal *must* have regard in all cases to the public interest considerations listed in the statute.[79] In the case of foreign criminals, deportation is presumed to be in the public interest subject to limited exceptions, which allow a claim to 'a genuine and subsisting relationship' with a qualifying partner or child *only* where the effect of the criminal's deportation on the partner or child would be unduly harsh. The Act also attempts to structure the proportionality test by providing that 'little weight should be given' to private life or to relationships established at a time when a person is in the UK unlawfully.

Can we interpret this as dialogue? It is more like a classic assertion of parliamentary sovereignty and the tenor of some of the parliamentary speeches hinted at a changing climate of opinion. Speakers targeted both the Strasbourg Court for

[75] *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 [46]; *MF (Article 8—New Rules) Nigeria* [2012] UKUT 00393 (IAC); *Izuazu (Article 8—New Rules) Nigeria* [2013] UKUT 45 (IAC).

[76] Explanatory notes to s 15 of the Immigration Act 2014 (emphasis added).

[77] House of Lords Constitution Committee, *Immigration Bill*, HL 148 (2013–14) [9]–[18]. Clause 14 became s 19 of the Immigration Act 2014.

[78] JCHR, *Legislative Scrutiny: Immigration Bill*, HL 102 HC 935 (2013–14) Recommendation 9. See similarly Constitution Committee, HL 148 [9]–[18].

[79] Section 19 of the Immigration Act 2014 inserts a new s 117 into pt 5 of the Nationality, Immigration and Asylum Act 2002.

'steadily eroding' UK powers of deportation and also the UK courts, describing them as responsible for tightening the Strasbourg fetters, which was 'rightly or wrongly' a consequence of the HRA. Parliament, one speaker threatened, must 'make it clear which, ultimately, is the supreme court for British law [and] the final word should stay in this country'.[80] And whether this attempt to engage in 'the re-elaboration of a censured text' will be successful or simply extend the dialogue remains an open question. In debate, Dominic Raab predicted that nothing would change. The proposed legislation required that courts, in considering the public interest question, 'must (in particular) have regard to' listed factors, leaving them wide discretion. This, in accordance with sections 3 and 4 of the Human Rights Act, would have to be exercised to comply with existing human rights case law'.[81] The *Huang* principle would, in other words, prevail.

D. The Jobseeker Affair: Decentring the Domestic Constitution

The jobseeker affair is certainly not a case of coordinate construction; indeed, whether it can be classified as dialogue or simply as an old-fashioned attempt by government to 'strike back' at an unwelcome judicial decision with inconvenient financial consequences is largely a matter of opinion. The affair originated with a package of welfare reforms designed to confine welfare benefits to those genuinely seeking work. As an element in the package, claimants were required in certain circumstances to undertake specified 'work-related activity' with a view to gaining work experience. Statute provided that participants could be required 'to undertake work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment', subject to the proviso that the Regulations must contain provisions for notifying participants of the requirements. Any claimant refusing unreasonably to join such a scheme as directed could be sanctioned by loss of the full amount of his or her allowances.[82] The provisions were to be completed by regulations, which became the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011.[83] Unfortunately, these regulations were strikingly badly drafted.

In the House of Lords, the Select Committee on the Merits of Statutory Instruments drew the attention of the House to the inadequacy of the Explanatory Memorandum and the information supporting it, which would render parliamentary scrutiny difficult. It also expressed concern that the Regulations 'interpret the

[80] HC Deb, 30 January 2014, vol 574, col 1092 (Julian Brazier MP).

[81] HC Deb 30 January 2014, vol 584, cols 1064–65.

[82] Section 1(2) of the Welfare Reform Act 2009, amending ss 17A and 17B of the Jobseekers Act 1995.

[83] The Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, SI 2011/917 (the 2011 Regulations).

Act very broadly so that future changes to the Scheme could be made administratively without any reference to Parliament'.[84] In short, neither the text of the Regulations nor the relationship of the Regulations to their parent Act had been adequately thought through or clarified. It was left to the Social Security Advisory Committee to question the merits of the proposals: the mandatory nature of the work experience and the 'sanctions-based conditionality approach' likely to produce hardship.[85]

Therefore, for many reasons, the proposals were controversial and liable to give rise to test cases, and the Regulations were soon challenged on the grounds that they were insufficiently specific, that the general notice provided for was inadequate and that, in the case of one of the claimants, no notification had been given. In the Divisional Court, Foskett J thought the procedural irregularities insufficient to warrant a declaration, but the Court of Appeal thought differently, ruling that the Regulations did not contain an appropriate description of the Employment, Skills and Enterprise Scheme and that the notices sent to claimants did not comply with the requirements of the 2011 Regulations.[86] A passage from the judgment of Stanley Burnton LJ contains a further warning about drafting for purposes of parliamentary scrutiny:

> Description of a scheme in regulations is important from the point of view of Parliamentary oversight of the work of the administration. It is also important in enabling those who are required to participate in a scheme, or at least those advising them, to ascertain whether the requirement has been made in accordance with Parliamentary authority.[87]

The government immediately counter-attacked, resorting to a formula tried and tested in social security cases: retrospective legislation designed to thwart a further appellate judgment.[88] The 2011 Regulations were revoked and replaced by new prospective Regulations, which came into effect on the date of the Court of Appeal judgment;[89] the Jobseekers (Back to Work Schemes) Bill introduced shortly afterwards retrospectively validated all notices served under the 2011 Regulations informing claimants of requirements as to participation and about the consequences of failing to meet requirements. The intention was spelled out unashamedly in the explanatory notes to the Bill; it was necessary to preserve the position under legislation relating to the government's 'Work Programme', which

[84] Select Committee on the Merits of Statutory Instruments, *Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 (SI 2011/917)*, HL 137 (2011–12) [10], [11].

[85] SSAC, *Report on Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011*, Cm 8058 (2011) [32], [33].

[86] Respectively *R (Reilly) v Work and Pensions Secretary* [2012] EWHC 2292 (Admin); *R (Reilly) v Work and Pensions Secretary* [2013] EWCA Civ 66.

[87] ibid [2013] EWCA Civ [76].

[88] See T Prosser, *Test Cases for the Poor* (London, CPAG, 1983); *R v Greater Birmingham Appeal Tribunal ex p Simper* [1974] QB 543; *R v Barnsley SBAT ex p Atkinson* [1977] 1 WLR 917.

[89] The Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013, SI 2013/276.

had been the subject of an adverse Court of Appeal judgment. The effect would be, first, that the government would incur a liability of up to an estimated £130 million in repaying claimants who had been sanctioned under these programmes and, second, inability to impose sanctions in cases that had been stockpiled.[90] The Bill would provide that no decision to sanction a claimant for failures to comply with the 2011 Regulations would be challengeable on the grounds that they were invalid or the notices given under them inadequate. This would blunt the impact both of the Court of Appeal judgment and of the further appeal that the government was making to the Supreme Court if it were to lose it. Self-righteously, the Minister added that the purpose was to ensure that jobseekers previously sanctioned (or to be sanctioned) for non-compliance under the Regulations would not 'receive an unfair advantage over compliant claimants'.[91] The only way to insure against sanction repayments in stockpiled cases was 'to press ahead with emergency legislation'.[92]

Although this plan was lawful and replicated a traditional practice, it raised two questions of constitutional importance. First, was retrospective legislation proper in these circumstances? Second, was resort to emergency or 'fast-track' legislation in order? The main concern of the House of Lords Constitution Committee was with the fast-track procedure, which diminished the opportunity for proper parliamentary consideration and debate.[93] But it also thought the Bill to be suspect on the ground of retrospectivity. It engaged:

> [T]he cardinal rule of law principle that individuals may be punished or penalised only for contravening what was at the time a valid legal requirement. According to the doctrine of the sovereignty of Parliament, retrospective legislation is lawful. Nonetheless, from a constitutional point of view it should wherever possible be avoided, since the law should so far as possible be clear, accessible and predictable.[94]

The Committee therefore drew the Bill to the attention of the House, suggesting that it should consider in particular whether retrospectively confirming penalties on individuals who, according to judicial decision, had not transgressed any lawful rule was constitutionally appropriate in terms of the rule of law.[95]

Unusually, the Supreme Court proceeded to hear the *Reilly* case, although the proceedings were now hypothetical. The explanation given was that even if it was 'rather unattractive for the executive to be taking up court time and public money to establish that a regulation is valid when it has already taken up Parliamentary time to enact legislation which retrospectively validates the regulation', the issue

[90] Explanatory notes to the Jobseekers (Back to Work Schemes) Bill [Bill 149].
[91] ibid [10].
[92] ibid [13]–[14].
[93] See Constitution Committee, *Fast-Track Legislation: Constitutional Implications and Safeguards*, HL 116-I (2008–09) [16]
[94] Constitution Committee, *Jobseekers (Back to Work Schemes) Bill*, HL 155 (2013) [22].
[95] ibid [12], [14], [15].

could be of some significance to the drafting of regulations generally.[96] Upholding the Court of Appeal on all points, the Supreme Court invoked the common law to enunciate a rights-based general principle of fairness with respect to notice.[97] It is important to note that the argumentation at this stage was based on domestic law, framed in terms of the rule of law, the doctrine of parliamentary sovereignty and common law principles of judicial review. The only Convention argument before the courts involved a claim that the Scheme amounted to a form of forced labour in contravention of Article 4(2) ECHR, which was easily dismissed by the Supreme Court.[98]

In *Reilly (No 2)*,[99] however, the claimants stood directly on Convention rights, invoking Article 6(1) ECHR to argue that the Jobseekers (Back to Work Schemes) Act undercut the right to a 'fair and public hearing' by an independent and impartial tribunal by arbitrarily determining ongoing judicial proceedings in favour of the government. Although the Convention did not directly rule out retrospective legislation, Article 6(1) cast doubt on its propriety when used to affect the outcome of judicial determination of disputes where the state itself was a party; such an intervention by the executive was permissible only on 'compelling grounds of the public interest'. This argument transformed a domestic squabble into a triangular dispute and incidentally put in issue some complex and confusing ECtHR jurisprudence.[100]

In the High Court, Lang J issued a declaration that the 2013 Act was incompatible with the principle of the rule of law and the notion of a fair trial protected by Article 6(1) ECHR, though not with the right to property protected by Article 1, Protocol 1. Two elements in her reasoning are particularly worrying. First, in her analysis, Lang J overtly invoked separation of powers doctrine while at the same time equating the ECHR jurisprudence with the 'fundamental principles of the UK's unwritten constitution'.[101] Reflecting the advice of the Constitution Committee, she declared that 'Parliament's undoubted power to legislate to overrule the effect of court judgments generally ought not to take the form of retrospective legislation designed to favour the Executive in ongoing litigation in the courts brought against it by one of its citizens, unless there are compelling reasons to do so'.[102] The judge fails signally to take into account the government's resource-allocation functions, instead drawing an imaginary bright-line between the government acting in the public interest and supposedly in its own interests

[96] *R (Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68 [40]–[41].

[97] ibid [65].

[98] See the judgment of Lord Neuberger and Lord Toulson, citing *Van Der Mussele v Belgium* (1983) 6 EHRR 163; *X v The Netherlands* (1976) 7 DR 161; *Talmon v The Netherlands* [1997] EHRLR 448.

[99] *Reilly (No 2) and Hewstone v Secretary of State for Work and Pensions* [2014] EWHC 2182.

[100] *Zielinkski v France* (2001) 31 EHRR 19; *Stran Greek Refineries v Greece* (1995) 19 EHRR 293; *Scordino v Italy (No 1)* (2007) 45 EHRR 7; *National and Provincial Building Society v UK* (1998) 25 EHRR 127.

[101] *Reilly and Hewstone* (n 99) [81].

[102] ibid [82].

as litigant. Thus, she falls directly into the trap that Lord Sumption warns against: transmuting a complex polycentric question into a simplistic legal question re-allocating the decision to the judge with no adequate discussion of justiciability.

Equally noteworthy is the extent to which Lang J crossed traditional boundaries in assessing the 'public interest' argument. Foskett J had quoted the report of the Committee on the Merits of Statutory Instruments, but had resolutely observed the traditional deferential approach to parliamentary material and proceedings.[103] Lang J, roundly rejecting counsel's protest that parliamentary proceedings were a matter for Parliament and not the court,[104] raked through the parliamentary proceedings with a nit-comb, finding a number of 'misconceptions' and 'inaccuracies'.[105] Parliament, she said, had failed to grapple with the Article 6(1) issues, probably because the Secretary of State had made an 'unsatisfactory' section 19 statement to the effect that the Bill was compatible with the ECHR.[106] This statement neither set out the relevant test to be applied by Parliament nor explained to Parliament that it was being asked to justify a departure from the legal norm, which would only be lawful if made for compelling reasons in the public interest. Instead, the statement had led Parliament to believe erroneously that the legislation was designed to 'close a loophole' in order to give effect to the original intention of Parliament.[107]

This 'anxious scrutiny' flies in the face of Lord Sumption's warning that judges cannot afford and are not required by ECtHR jurisprudence to be 'insensitive to questions of democratic accountability', substituting confrontation for partnership.

III. TOWARDS A PARLIAMENT SQUARE AXIS?

I have argued in this chapter for a collaborative approach to human rights issues in which the institutions with the main responsibility for resolving controversies pay due respect to each other's opinions. I have further argued for respect to be shown to variance and diversity; in human rights matters, a 'one size fits all' approach is unnecessary and divisive. The public interest is not monolithic and the judicial corset must not be laced too tightly. Sufficient space must be left for political solutions that, as Lord Sumption reminds us, involve 'a method of mediating compromises in which we can all participate, albeit indirectly, and which we are therefore more likely to recognise as legitimate'.[108]

[103] *R (Reilly) v Work and Pensions Secretary* [2012] EWHC 2292 (Admin) [44]–[48].
[104] ibid, James Eadie QC [96].
[105] *Reilly and Hewstone* (n 99) [92]–[98].
[106] ibid [111].
[107] ibid [113] and [114].
[108] Lord Sumption (n 3) 13.

The collaborative model of coordinate construction is shown at its best in the debate over political broadcasting, where the different views of the issue were duly considered and a successful compromise position reached. At the domestic level, the affair illustrates to perfection the elaboration of a text in conformity with human rights jurisprudence that is the hallmark of coordinate construction. But the dialogue was not purely horizontal. In pushing for a solution, the British judiciary 'reached out to Strasbourg' by 'cogently stating their reasoning with a view to influencing the approach which the Strasbourg Court ultimately adopts'.[109] Thus, the affair can be read as the start of a 'Westminster Square axis', whereby the courts and Parliament come together to jointly defend a position of national cultural importance.

Whether the same can be said of the prisoners' voting affair is, as indicated earlier, questionable. The debate is not yet over and it may be that what successive British governments have really been saying is—to quote Thorbjørn Jagland—'We have problems. We cannot do it now. You have to give us more time'.[110] But following the election of a Conservative government that advocates the repeal of the HRA, compliance now seems unlikely. In parallel, the judicial institutions have been inching towards a potential solution. However, the affair does highlight the dangers of a situation in which a supranational court operates (as the ECtHR does) in a virtual political void, creating a grave accountability deficit while leaving insufficient space for a political solution. Perhaps courts should engage in their own process of coordinate construction?

It is perfectly possible, of course, to read the changes to immigration legislation as a prime example of coordinate construction. There is sustained judicial–political interaction in which judges repeatedly tell the legislators how the law ought to be interpreted, meeting a response in kind from executive and legislature. But although the majority of speakers in the parliamentary debate clearly wished to remain within the parameters of the European Convention, there is an adversarial note in some of the contributions, as when Dominic Raab MP spoke of 'judicial expansion of the right to family life', calling it 'common ground that the Strasbourg Court has steadily eroded United Kingdom deportation powers over the past few decades', but blaming the domestic courts for imposing 'the tightest fetters … as a result— rightly or wrongly—of the Human Rights Act'.[111] The Bill might therefore be read as a first step in the direction of more complete ways of amending or circumscribing human rights by 'pulling out of the Convention altogether',[112] or, as expressed as a manifesto commitment by the Conservative

[109] Lord Irvine of Lairg (n 59).
[110] Above n 40.
[111] HC Deb 30 January 2014, vol 574, col 1063.
[112] ibid.

Party in the 2015 election,[113] by introducing a new British Bill of Rights and Responsibilities to ensure that 'Parliament is the ultimate source of legal authority, and that the Supreme Court is indeed supreme in the interpretation of the law'. Although there is nothing innately unethical in giving the last word to a representative legislature, the power surely carries with it a moral duty to listen, learn and consider. Deference is, in other words, a two-way process, in which both sides must steer between obsequiousness and authoritarianism. It cannot be said that the current debate avoids these vices.

Are we then really stuck with a model of government in which the legislature and the judiciary are doomed to travel forever down separate tracks, veering occasionally into open collision? The undoubtedly provocative use of parliamentary procedure to wipe out inconvenient judicial decisions—called by Lord Pannick in debate 'an abuse of power that brings no credit whatever on this Government'[114]—and the retaliatory judgment of Lang J with its intrusive examination of parliamentary proceedings suggests that we may be. I maintain, however, that a collaborative model is both preferable and within reach. There are many forms of dialogue, both formal and informal, which allow judges to talk vertically to judges and horizontally to legislators. Governments talk to each other horizontally in councils and committees, and also talk diagonally in interventions made to supranational courts. Many bridges are already in place to assist in balancing the debate, such as the JCHR with its two-way legislative and judicial focus or the growing practice of parliamentary committees to call on external evidence from expert witnesses; others may be forthcoming. Dialogue affords the best hope of preserving the distinctive British culture of rights and reinforcing the democratic element of the parliamentary sovereignty doctrine while allowing at the same time for progress. Parliament and the courts must be prepared to engage constructively in a process of coordinate construction; equally, they must face up to the need for tough, multi-level dialogue with Strasbourg. A 'Parliament Square axis for human rights' is needed.

[113] Available at https://www.conservatives.com/manifesto.aspx at 58. See also *Protecting Human Rights in the United Kingdom, the Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), available at: https://www.conservatives.com/~/media/files/downloadable%20Files/human_rights.pdf.

[114] HL Deb 21 March 2013, vol 755, col 739.