New Labour's Judicial Power Project

Roger Masterman*

INTRODUCTION

The implementation of New Labour's constitutional reforms between 1997 and 2005 came at a point in time when – as a result of, inter alia, significant changes to governmental infrastructure, [1] perceived failures of political frameworks of accountability,[2] and the inability of existing legal mechanisms to defend individual rights[3] – pressure for constitutional change was widespread.[4] The impact of the Blair Governments' reforms on the powers and institutional positioning of the judiciary was considerable. The Human Rights Act 1998 enabled the courts to determine – informed by the jurisprudence of the European Court of Human Rights – the Convention-compliance of both legislation and public body decision-making. Its primary function was to give 'further effect' in domestic law to rights previously only enforceable against the state by the European Court of Human Rights but – as a proto-Bill of Rights for the United Kingdom [5] – it also served to implicitly endorse the constitutionalist credentials of the judiciary through facilitating the legislative review of primary legislation on human rights grounds. Structural reforms brought into effect pursuant to the Constitutional Reform Act 2005 meanwhile served to underpin a more explicit institutional separation of judicial power from the other personnel and institutions of government. The severing of links between Parliament and apex court, and stripping the judicial role from the office of Lord Chancellor, gave succour to consideration of the judiciary as a separate 'branch' of government, institutionally and physically independent of the executive and legislature.[6]

Given the extent of Labour's programme of constitutional reforms, and the rate at which they were implemented, assessments which have emphasised the transformative, consequences of the Blair reforms for the constitutional order are not difficult to find.[7] As early as 2000, Anthony King's Hamlyn Lectures asked whether

* Professor of Constitutional Law, Durham Law School. Essay to be published in M. Gordon and A. Tucker (eds), *The New Labour Constitution Twenty Years On* (Oxford: Hart Publishing, forthcoming 2019).

[1] R.A.W. Rhodes, 'The Hollowing out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 *Political Quarterly* 138.

[2] See A. Tomkins, *The Constitution After Scott: Government Unwrapped* (Oxford: Clarendon Press, 1998).

[3] For example T.H. Bingham, 'The European Convention on Human Rights: Time to Incorporate' (1993) 109 LQR 390.

[4] On which see: Charter 88 (available at: https://unlockdemocracy.org/resources-index/2016/07/04/charter-88); Institute for Public Policy Research, *The Constitution of the United Kingdom* (1991); R. Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990); Scottish Constitutional Convention, *Scotland's Parliament, Scotland's Right* (1995); Labour Party/Liberal Democrats, *Report of the Joint Consultative Committee on Constitutional Reform* (1997).

[5] F. Klug, 'A Bill of Rights for the United Kingdom: Do we need one or do we already have one?' [2007] PL 701.

[6] On which see: R. Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge: Cambridge University Press, 2011).

[7] The most preposterously titled is K. Sutherland (ed), *The Rape of the Constitution?* (Thorverton: Imprint Academic, 2000).

the pre-1997 constitution remained intact.[8] King's follow up – *The British Constitution* – further developed the premise that the 'traditional' constitution had been so radically amended that it could not be 'reconstituted.'[9] By 2009 Vernon Bogdanor similarly argued that core tenets of the old order had been jettisoned, and a 'new' constitution – based on separation of powers and a federal principle – brought into being.[10] Both accounts provided deeper and richer narratives of constitutional development in the United Kingdom, but the influence of the Blair reforms was a central – indeed necessary – pillar of both theses.

In vital respects, the Blair reforms marked a turning point, and a modification of the principles of accountability core to the 'political constitution.'[11] The enhancement of judicial oversight of public decision-making with potential implications for individual rights can be understood as a partial response to perceived deficiencies in the traditional doctrine of Ministerial accountability to Parliament.[12] More than this, and in contradistinction to efforts by the judges themselves to develop the rights-protecting dimensions of the common law, the adoption of the Human Rights Act represented an amendment to the framework of legal accountability that was proposed and endorsed by those to whose actions it was to apply. The enactment of the Human Rights Act ensured that the specific means by which the protected rights were to be realised in claims against public bodies and via the construction of legislation enjoyed legislative endorsement. And though the adoption of a weak form of statutory review fell short of empowering courts to 'disapply'[13] statutes that unjustifiably interfered with human rights, it was nonetheless a notable innovation in a system that had traditionally resisted testing primary legislation on constitutionalist grounds.[14] The cumulative effect of these functional and institutional changes was to expand the spheres in which the influence of judicial power might be felt[15] *and* – by providing the judicial branch with a prominent, visible, focal point[16] – enhance the standing of the courts within the constitution.

Yet, extensive though the New Labour reforms undoubtedly were, they cannot be understood as standing apart from the more incremental, less explicit, constitutional developments of the latter years of the twentieth century. Nor should they be understood as marking a complete abandonment of core constitutional principles and characteristics; in important respects, the Blair reforms displayed conservative tendencies, and were projected as being consistent with – rather than a departure from – established features of the constitutional architecture. The modernising desires of the Labour government were therefore tempered by something of a tendency towards continuity. The impact of the New Labour constitution *on the judiciary* can be seen in this light. It is therefore possible to simultaneously view the New Labour project as both a radical reformation of the judicial function and a

[8] A. King, *Does the United Kingdom still have a constitution?* (London: Sweet and Maxwell, 2001).
[9] A. King, *The British Constitution* (Oxford: Oxford University Press, 2007), ch. 3 and p.362.
[10] V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009), p.289.
[11] J.A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1.
[12] J. Jowell and D. Oliver (eds), *The Changing Constitution* (4th ed) (Oxford: Oxford University Press, 2000), p.viii.
[13] *R v Secretary of State for Transport, ex parte Factortame (No.2*) [1991] 1 AC 603.
[14] *Cheney v Conn* [1968] 1 WLR 242, 247:'What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country.'
[15] G. Gee, R. Hazell, K. Malleson and P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015), p.2.
[16] K. Malleson, 'The Evolving Role of the Supreme Court' [2011] PL 754, 764-766.

continuation of the constitutionalisation of the formal role of judicial review traceable at least back to the 1960s.[17] The adoption of a statutory rights instrument can be viewed as a rejection of the common law's rationalisation of freedom as 'an immunity from interference by others'[18] and a complement to the (then) nascent efforts of the judges to recognise constitutional rights as existent within the common law[19] as well as to the (then) relatively stable position of EU norms in the domestic constitution. Similarly, the establishment of a Supreme Court can be understood as both an endorsement of the arguably alien concept of separation of powers, and as consistent with a long-standing domestic commitment to judicial independence.

This chapter examines the ostensibly competing (yet coexisting) narratives of constitutional continuity and constitutional realignment that – taken together – illuminate the judicial role within, and following, the Blair governments' constitutional reforms. It suggests that though the Blair reforms to the powers and position of the courts were considerable, they should not be solely understood as precipitating fundamental constitutional renewal. Through the lenses of decisions concerning (i) the interpretation of rights under the Human Rights Act, (ii) the exercise of the interpretative function under s.3(1) of the Act, and (iii) the apex court's 'federal' jurisdiction (each a core feature of the Blair constitution's judicial architecture), this piece examines the attempted reconciliation of the 'continuous' and 'transformative' in the post-1997 era. While accepting that the scope and prominence of judicial power has increased, this piece argues that the experience of the post-Blair years should be viewed as an exercise in reconciling this enhanced judicial role with the constitution's more long-standing features, rather than marking an abandonment of the *ancien régime*.

THE NARRATIVE OF CONSTITUTIONAL CONTINUITY

Though the New Labour programme of constitutional reform was undoubtedly ambitious, it did not amount to a comprehensive scheme of constitutional renewal.[20] The Blair Governments' project – significant though its individual components undoubtedly were – was more limited in scope, and was not informed by any overarching constitutional vision. Instead, the Blair reforms were targeted at pragmatically addressing a series of distinct politico-constitutional issues: the absence of a catalogue of individual rights enforceable against public bodies;[21] strengthening the Union through the devolution of power;[22] the modernisation of the House of Lords;[23] excessive secrecy in government;[24] and so on. If a broad vision could be said to have existed, it served rather more obviously political than constitutional objectives, with the early Blair reforms presented as an attempt to 'clean up government' after the scandal-mired twilight years of the preceding Conservative

[17] See: *Ridge v Baldwin* [1964] AC 40; *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997; *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
[18] *Wheeler v Leicester City Council* [1985] AC 1054, 1065 (Lord Browne-Wilkinson).
[19] For instance: *R v Secretary of State for the Home Department, ex parte Leech (No.2)* [1994] QB 198; *R v Lord Chancellor, ex parte Witham* [1998] QB 575.
[20] The prospect of *wholesale* constitutional reconfiguration taking the form of a written constitution was later mooted – with little practical effect – by Gordon Brown's administration (*The Governance of Britain* (July 2007), Cm.7170, [211]-[215]).
[21] Human Rights Act 1998.
[22] Scotland Act 1998; Government of Wales Act 1998; Northern Ireland Act 1998.
[23] House of Lords Act 1999.
[24] Freedom of Information Act 2000.

administration. In the light of this, the very notion of a 'New Labour' or 'Blair' constitution is perhaps something of a portmanteau concept.

A tendency towards constitutional continuity can also be evidenced in what was *not* delivered by New Labour's reforms. While the removal of the hereditary peers from the House of Lords was largely achieved as a result of the House of Lords Act 1999, momentum towards 'stage two' of the process quickly dissipated in the post-Wakeham period, and Lords reform did not feature in Labour's 2001 general election manifesto. Other proposals were similarly found to be lacking the requisite political and/or popular support. Reform of the voting system for Westminster elections stalled following the publication of the report of the Jenkins Commission,[25] and a promised referendum on first-past-the-post did not take place.[26] The implementation of a regional layer of devolved government in England was exposed as severely lacking in grassroots support.[27] And even though the Blair governments were bolstered by the size of their House of Commons majorities in the 1997-2005 period, a number of significant proposals either lacked the necessary Westminster traction (the 1997 manifesto's suggestion of a referendum on adoption of the Euro, for instance) or otherwise were scaled back in the light of the pressures of occupying office (for example, the proposals which became the Freedom of Information Act 2000[28]).

Commented [AT1]: X-Ref to Worthy chapter

Far then from amounting to an explicit and sweeping reshaping of constitutional fundamentals, the flagship reforms of the early New Labour years consciously sought to demonstrate continuity with constitutional orthodoxy. Ministers were at pains to situate the Government's programme of reform as being in accordance with – rather than a departure from – the United Kingdom's constitutional *grundnorm*.[29] As a result, the devolution of (limited) legislative powers from Westminster was not to formally diminish the legal ability of Parliament to legislate in fields of devolved competence.[30] Similarly, the scheme of rights protection afforded by the Human Rights Act 1998 – though centred on the enhancement of judicially-policed protections for rights[31] – did not permit invalidation or disapplication of rights infringing primary legislation[32] and was designed to uphold the ability of the legislature to enact measures which might contravene the protected rights.[33] The Human Rights Act model was therefore championed as a pragmatic accommodation of fundamental rights[34] and a departure from the experience of those

[25] *The Report of the Independent Commission on the Voting System* (Jenkins Commission), Cm.4090-I/Cm.4090-II (October 1998).
[26] A referendum on the adoption of the Alternative Vote system for use in UK General Elections was later promised as a part of the agreement securing the Conservative-Liberal Democrat coalition government of 2010-2015. The referendum – held in 2011 – saw almost 68% of voters reject the change.
[27] See: *Your Region, Your Choice: Revitalising the English Regions*, Cm.5511 (May 2002).
[28] On which see: R. Austin, 'The Freedom of Information Act 2000 – A Sheep in Wolf's Clothing?' in J. Jowell and D. Oliver (eds), *The Changing Constitution* (5th ed) (Oxford: Oxford University Press, 2000).
[29] For instance: HL Debs, Vol.582, Col.1228 (3 November 1997); HC Debs, Vol.306, Col.772 (16 February 1998).
[30] See eg Scotland Act 1998, s.28(7).
[31] Human Rights Act 1998, ss.2, 3, 6.
[32] Human Rights Act 1998, ss.3(2)(b), 3(2)(c), 4(6)(a).
[33] Human Rights Act 1998, s.19(1)(b).
[34] Lord Irvine of Lairg QC, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] PL 308. By 2006, the (short-lived) Department for Constitutional Affairs continued to maintain the narrative of constitutional continuity, responding to criticisms of the Human Rights Act

Bills of Rights overseas that explicitly curtailed the law-making competence of the legislature by permitting judicial invalidation of rights-infringing measures.[35] Even the Act's innovation of legislative review had been partially anticipated by Parliament's acceptance of EU norms into the domestic legal order and the testing of primary legislation against a catalogue of 'external' standards that accompanied EU membership.[36]

If the mechanisms by which rights were to be given effect as against public bodies and in the interpretation of legislation were demonstrative of a certain consistency with the past, so too was the catalogue of rights to which the Human Rights Act gave effect. Adoption of the core rights protected by the European Convention on Human Rights provided the Human Rights Act with both a normative backbone and a substantive content (in the case law of the Strasbourg Court) that the United Kingdom had been committed to uphold since 1951. The absence of social and economic rights from the protections afforded by the Act also provided further continuity with those rights indirectly upheld by the common law.[37] While giving domestic effect to the core provisions of the ECHR was – initially at least – seen as an interim step towards the adoption of a modern Bill of Rights,[38] momentum towards this more fundamental piece of constitutional engineering did not carry into the period following the implementation and enforcement of the Human Rights Act.[39]

The narrative of constitutional continuity was also in evidence in relation to the proposals that formed the backbone of the Constitutional Reform Act 2005. The establishment of the United Kingdom Supreme Court and removal of the Lord Chancellor's core judicial functions was premised on a desire to 'reflect and enhance the independence of the judiciary from both the legislature and the executive.'[40] Again, however, the Government sought to place emphasis on the pragmatism of the proposed change and downplayed the constitutional consequences of this formalisation of the institutional separation of powers. Potentially inventive options for the new Supreme Court – innovations which would have undermined the narrative of continuity, including recognition of the court as an explicitly constitutional organ or permitting abstract judicial review – were ruled out during the consultation process as 'a departure from the UK's constitutional traditions.'[41] In parallel with the reforms of the first Blair administration, the preservation of parliamentary sovereignty was of

---

by suggesting that 'arguments that the … Act has significantly altered the constitutional balance between Parliament, the executive and the judiciary have … been considerably exaggerated (Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006), p.4).'

[35] C.A. Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), p.94-98.

[36] *R v Secretary of State for Transport, ex parte Factortame (No.2*) [1991] 1 AC 603.

[37] *Rights Brought Home: The Human Rights Bill*, Cm.3781 (October 1997), [1.3]-[1.5].

[38] R. Brazier, *Constitutional Reform: Reshaping the British Political System* (3rd ed) (Oxford: Oxford University Press, 2008), p.28.

[39] Croft recorded that – as early as September 2000 (before the Act had come into full effect) – 'political enthusiasm for the Human Rights Act ha[d] diminished' and that 'the … Act [bore] the hallmark of a proposal conceived in opposition that comes to be viewed differently in the cold harsh light of government' (J. Croft, *Whitehall and the Human Rights Act* (London: Constitution Unit, 2000), p.27.

[40] Department for Constitutional Affairs, *A Supreme Court for the United Kingdom*, CP 11/03 (July 2003), p.4.

[41] Department for Constitutional Affairs, *A Supreme Court for the United Kingdom*, CP 11/03 (July 2003), [23], [24].

central concern.[42] The proposals were – as Robert Stevens noted at the time of their publication – 'intensely conservative.'[43]

In the absence of constitutionally-allocated functions and of formal institutional divisions at the apex of the executive, legislative and judicial branches, the under-theorised, and uneven, nature of separation of powers in the United Kingdom constitution gave credence to then Government's continuity narrative. Those elements of separation of powers that *could* be said to enjoy normative purchase – the role of the judge as interpreter of law and the independence of the individual judge – provided the backbone to the court's expanded powers under the Human Rights Act and the establishment of a Supreme Court. The separation of powers as reflected on the face of the Human Rights Act was hierarchical, derivative of the supremacy of the legislature and consistent with the (traditional) view of a binary division of functions between legislature and interpreter.[44] In casting judicial powers as primarily interpretative, a connection could be drawn between the *innovation* of positive, enforceable, rights and the *traditional*, interpretative, means by which those rights were to be realised. Similarly, in portraying the reforms to the office of Lord Chancellor and removal of the Law Lords from Parliament as reflections of pre-existing commitments to judicial independence, the implications of a structurally independent judicial branch of government were underemphasised.

THE NARRATIVE OF CONSTITUTIONAL TRANSFORMATION

The continuity narrative can only provide a partial reflection of reforms which undoubtedly saw significant transfers of political power away from the traditional loci of governmental authority in Whitehall and Westminster towards alternative seats of constitutional authority in the devolved nations and – as a result of the Human Rights Act 1998 – to the courts.[45] To an extent at least, Labour's decentralisation of powers from core institutions of government (including from Parliament to courts) provided a formal counterpart to the administrative and managerial redistribution of powers to quangos, executive agencies and contracted-out services that had taken place (since at least the 1980s) under preceding Conservative governments. The market-driven antipathy towards established governmental institutions that had driven the 'hollowing out of the state'[46] was not, however, explicitly recognised or promoted as a case of constitutional engineering. By contrast, the programme of reforms proposed by the new administration were clearly directed towards addressing perceived deficiencies in the United Kingdom's political and constitutional arrangements.

At the level of principle, the Human Rights Act – in the words of Lord Irvine – 'represent[ed] Britain's recognition that freedom in the Diceyan sense is not coterminous with the protection of fundamental human rights.'[47] The consequence of the constitution's failure to secure personal freedoms had seen the residue of liberty – the sphere within which individuals were free to act without being subject to the coercive powers of the state – slowly eroded through the statutory allocation of

[42] Department for Constitutional Affairs, *A Supreme Court for the United Kingdom*, CP 11/03 (July 2003), [23].
[43] R. Stevens, 'Reform in Haste and Repent at Leisure: Iolanthe, The Lord High Executioner and *Brave New World*' (2004) 24 *Legal Studies* 1, 33.
[44] *Duport Steel v Sirs* [1980] 1 WLR 142, 157.
[45] K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 MLR 79.
[46] R.A.W. Rhodes, 'The Hollowing out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 *Political Quarterly* 138.
[47] Lord Irvine of Lairg, 'Keynote Address' in Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998), p.1

powers to government. The common law, in spite of its historical claim to uphold rights[48] and more recent recognition of constitutional rights, lacked the structural and remedial armoury to offer robust protections for a catalogue of rights equivalent to that found in the Convention.[49] At a stroke, statute domesticated what was previously only accessible to litigants at Strasbourg, and embraced – in the positive recognition of individual rights, enforceable against the state at large – elements of the continental constitutional paradigm.

In order to address the enforcement deficits of the pre-Human Rights Act years, the Act allocated new powers to the courts, powers that – in the absence of enabling/incorporating legislation – had previously lain beyond the constitutional Rubicon.[50] While the constitution's divisions between legislation and interpretation, and between law and policy, had always been dynamic the Human Rights Act offered the prospect of increased fluidity and therefore of greater opportunity for the engagement of the courts in matters previously considered non-justiciable. Permitting courts to enforce the Convention rights against public bodies [51] and interpret legislation (so far as is possible)[52] to achieve compliance with those rights amounted – for Ewing – to 'an unprecedented transfer of power to the judiciary and a fundamental realignment of our "political constitution."' [53] Even in the light of the sovereignty-safeguarding provisions of s.4, it was acknowledged at the highest judicial levels that the Human Rights Act held the potential to 'subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary.' [54] The sheer range of governmental decisions to be potentially subjected to judicial scrutiny on the basis of the Human Rights Act, and the appointment of the judges as arbiters of the legality of alleged public body interferences with rights, provided the potential to collapse the separation between policy makers and judges; for Bevir, the Act effectively 'welcome[d] the court[s] into the policy-making process.' [55]

The creation of a United Kingdom Supreme Court was a both a divergence from the model of final appeal court that had endured since the Appellate Jurisdiction Act 1876 *and* from the government's own previously-stated position; in November 2001 the Blair administration had been 'committed to maintaining judicial membership of the House of Lords,' [56] by June 2003 it had come to endorse the establishment of a Supreme Court. This *volte-face* was (from a legal perspective, at least [57]) prompted by an earlier piece of the government's own constitutional engineering: the then recently-domesticated Article 6(1) ECHR had prompted concerns that the position of the Law Lords within the House of Lords was

[48] For instance *Beatty v Gilbanks* (1882) 9 QBD 308 (cf. *Thomas v Sawkins* [1936] 1 KB 249; *Duncan v Jones* [1936] 1 KB 218).
[49] *Malone v Metropolitan Police Commissioner (No.2)* [1979] Ch. 344; *Kaye v Robertson* [1991] FSR 62.
[50] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 761-762.
[51] Human Rights Act 1998, s.6.
[52] Human Rights Act 1998, s.3.
[53] K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 MLR 79, 79.
[54] *R v Director of Public Prosecutions, ex parte Kebiline* [2000] 2 AC 326, 374-375 (Lord Hope).
[55] M. Bevir, 'The Westminster Model, Governance and Judicial Reform' (2008) 61 *Parliamentary Affairs* 559, 571.
[56] *The House of Lords – Completing the Reform* (Cm.5291), [81].
[57] For analysis of the political circumstances surrounding the decision to establish a UK Supreme Court see: A. Le Sueur, 'From Appellate Committee to Supreme Court: A Narrative' in L. Blom-Cooper, B. Dickson and G. Drewry, *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009), esp. pp.67-73.

structurally compromised.[58] The web of convention and understanding that hitherto had served to protect the independence of the Appellate Committee [59] looked increasingly unlikely to be reconciled with the more formal approach to the segregation of judicial and legislative powers required by the Strasbourg Court.[60] The removal of the Law Lords from the legislature provided the logical solution to further suggestions of 'structural impartiality'[61] and also amounted to a partial rejection of the approach to judicial independence which had traditionally tolerated a degree of 'fusion' at its apex with the legislative and executive branches.

By contrast with earlier reforms impacting on the judiciary, the Constitutional Reform Act *explicitly* sought to amend the institutional divisions between the core branches of state. 'The very purpose of the Constitutional Reform Act 2005 (CRA) was to increase the formal separation of powers between the political and judicial branches of government and to reduce the role of the executive in judicial matters.'[62] The constitution has enjoyed something of an ambivalent relationship with theories of separation of powers, but the Constitutional Reform Act ended the 'anomaly'[63] of an apex court housed within the legislature. This step brought with it the promise of a 'purer separation of powers'[64] and that decisions of the new court would enjoy the 'added authority' attached to decisions of an apex court structurally separated from the legislature.[65] This newly-found autonomy facilitated the only formal change to the jurisdiction of the court. Though the Law Lords (sitting as the Judicial Committee of the Privy Council) had previously discharged the jurisdiction stemming from the 1998 legislation that gave effect to devolution, it was nonetheless a notable modification of the new court's responsibilities. The Appellate Committee of the House of Lords – by virtue of its position within the legislature – was felt to be an inapt mediator of disputes concerning the relationships between the devolved bodies and Westminster.[66] Allocation of this 'federal' jurisdiction to the Supreme Court provided implicit acknowledgement that the achievement of the structural independence of the Supreme Court *enhanced* the position of the court as an independent, and as a constitutional, arbiter.

Further, by adopting the nomenclature associated with explicitly constitutional organs elsewhere, the creation of a Supreme Court for the United Kingdom invited comparisons with authoritative/determinative apex courts in other jurisdictions. As a result, the creation of a *Supreme* Court alluded to a model of constitutionalism quite unlike the political constitution, in which the courts were explicitly identified as standing structurally apart from the other core institutions of the state and enjoying

[58] See in particular: *Procola v Luxembourg* (1996) 22 EHRR 193; *McGonnell v United Kingdom* (2000) 30 EHRR 289. For discussion see: R. Cornes, '*McGonnell v United Kingdom*, The Lord Chancellor and the Law Lords' [2000] PL 166.
[59] *Hansard*, HL Debs, Vol.614, Cols.419-420 (22 June 2000).
[60] *Starrs v Ruxton* 2000 JC 208, 250 (Lord Reed): 'It would be inconsistent with the whole approach of the Convention if the independence of the courts itself rested upon convention rather than law.'
[61] *Procola v Luxembourg* (1996) 22 EHRR 193, [45].
[62] G. Gee, R. Hazell, K. Malleson and P. O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015), p.254.
[63] Department for Constitutional Affairs, *A Supreme Court for the United Kingdom*, CP 11/03 (July 2003), [3].
[64] A. Patterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013), p.258.
[65] Lord Hope, Barnard's Inn Reading, 'The Creation of the Supreme Court—Was it worth it?' 24 June 2010.
[66] A. Le Sueur, *What is the Future for the Judicial Committee of the Privy Council?* (London: Constitution Unit, 2001), p.11

the constitutional function of policing an abstracted catalogue of legal rights. The Supreme Court has succinctly captured this tension – in the context of its devolution jurisdiction – in the following terms: '[t]he powers of the Scottish Parliament, like those of Parliaments in many *other* constitutional democracies, are delimited by law.'[67] The combination of statutory devolution and human rights jurisdictions – alongside powers exercisable resulting from EU membership, and by virtue of the common law's principle of legality – added weight to the claim that the UK Supreme Court was to exercise a constitutional jurisdiction, and function as a proto-constitutional court.[68]

TWENTY YEARS AFTER

The cumulative effect of new Labour's reforms was to reposition and empower the judicial branch of government within the constitutional architecture. The Blair reforms acknowledged that the courts play an active and distinctive role in the articulation, and potentially enforcement of, constitutional standards (a point emphasised in the post-1997 period as the diet of the apex court took on a distinctly public/constitutional law flavour[69]). The Human Rights Act became emblematic of a constitutional rejection of arbitrary power and – for some judges – represented the establishment of a 'new legal order'.[70] The devolution legislation further pointed to a 'division'[71] of sovereignty and – in establishing democratic assemblies that were to legislate within parameters established by law – towards a broader sense that public powers, including legislative powers, were amenable to judicial scrutiny.

In the light of this, it is unsurprising that the New Labour reforms have played a part in provoking a body of literature critiquing the extent to which the constitutional balance has been irrevocably altered, and the political (democratic) constitution compromised, by positioning law as 'the cordon within which politics is allowed to take place'.[72] Parliamentary sovereignty, it is argued, is threatened – if not displaced[73] – by this 'new', inexorably expanding, judicial role while an expansive vision of the rule of law fuels 'ever more searching judicial review', judicial 'misuse of ordinary techniques of statutory interpretation' and review of legislative and policy choices on their merits.[74]

In short, the Blair reforms impacting on the powers and status of the judiciary have come to be understood as radical, and the importance of the narrative of continuity has somewhat faded. Yet it is clear – and has been noted explicitly by many senior judges during this period – that the sovereignty doctrine retains its position at the core of the constitution.[75] Indeed, perhaps the most significant Supreme Court decision in recent years – *R (Miller) v Secretary of State for Exiting*

[67] *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [12] (emphasis added).
[68] R. Masterman and J.E.K. Murkens, 'Skirting Supremacy and Subordination: The Constitutional Authority of the UK Supreme Court' [2013] PL 800.
[69] T. Poole and S. Shah, 'The Impact of the Human Rights Act on the House of Lords' [2009] PL 347.
[70] *R (Jackson) v Attorney General* [2006] 1 AC 262, [102].
[71] *R (Jackson) v Attorney General* [2006] 1 AC 262, [102].
[72] D. Nicol, 'Law and Politics after the Human Rights Act' [2006] PL 722, 722.
[73] Above, n.00.
[74] R. Ekins, *The Dynamics of Judicial Power in the New British Constitution* (London: Policy Exchange, 2017), p.19. As with the 'transformative' accounts of Bogdanor and King noted above, Ekins' position considers a broader range of influences on this 'new' judicial role, but the influence of the Human Rights Act 1998 (and the courts' 'misuse' of the Act (p.11)) is central.
[75] *R (Jackson) v Attorney General* [2006] 1 AC 262, [9] (Lord Bingham); Lord Neuberger, 'Who are the Masters now?' Lord Alexander of Weedon lecture, 6 April 2011.

the European Union – amounted in key respects to a reaffirmation of the centrality of parliamentary legislative power in the domestic constitution.[76] The judicial record since 1997 displays a more complex embrace of the functions attached to the Blair Governments' reforms, and often can be seen to veer between extremes of judicial adventurism and judicial restraint. Emphasising the radical elements of the New Labour reforms makes it is easy to lose sight of the narrative of continuity, and the importance of that narrative to articulating the judicial function in the aftermath of the Blair reforms, and to sustaining this 'new' judicial role into the longer term.

Bringing rights home

The New Labour project to bring rights 'home' positioned the implementation of the Human Rights Act – and the enforcement of its catalogue of rights – as consistent with the United Kingdom's existing (international) obligations,[77] and a pragmatic step towards repatriating rights that were 'originally developed with major help from the United Kingdom Government.'[78] Some judges – Laws LJ chief among them – saw the enactment of the Human Rights Act as a confirmation of the common law's burgeoning jurisprudence of constitutional rights,[79] and in so doing adopted their own variant of the continuity narrative by seeking to explain the advent of the Human Rights Act as an endorsement of a trend already evident in common law reasoning. The relationship between the common law and the Convention was – on this view – to be complementary, with the emergence of a 'municipal law of human rights' a product of the incremental blending of the two sources of rights jurisprudence.[80] An alternative position – articulated by Lord Hoffmann – sought to minimise the transformative effect of the Strasbourg case-law by postulating that the effect of the Human Rights Act was:

> … to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.[81]

Hoffmann's view – expanded upon extra-judicially as a theory of human rights that are 'universal in abstraction but national in application'[82] – sought to preserve those dualist elements of the constitution that the Human Rights Act threatened to dissolve, and in doing so emphasised that the role of the domestic courts was to enforce the Act itself, rather than to position themselves as domestic proxies for the Strasbourg Court.[83]

---

[76] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61. On which see: T. Poole, 'Devotion to Legalism: On the Brexit Case' (2018) 80 MLR 696.
[77] *Rights Brought Home: The Human Rights Bill*, Cm.3781 (October 1997), [1.18].
[78] *Rights Brought Home: The Human Rights Bill*, Cm.3781 (October 1997), [1.14].
[79] *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, [71].
[80] *Runa Begum v Tower Hamlets London Borough Council* [2002] 2 All ER 668, [17]. See also: *R (ProLife Alliance) v British Broadcasting Corporation* [2002] 2 All ER 756, [33]-[34].
[81] *In Re McKerr* [2004] UKHL 12, [63].
[82] Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416, 422.
[83] *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Quark Fishing* [2005] UKHL 57; [2006] 1 AC 529, [34] (Lord Nicholls): 'The [Human Rights] Act was intended to provide a

In relation to the meaning and application of the Convention rights however, it was an approach that accentuated the transformative influence of the new (external) source of the Convention rights that came to be seen as dominant. The principle that domestic courts should effectively 'mirror'[84] the requirements of the Strasbourg case-law – articulated in *Ullah* by Lord Bingham as the 'duty of national courts to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'[85] – dominated the courts' approach to the application of the Act's protected rights for almost a decade. This 'internationalist'[86] reading of the courts' obligations under the Act tended towards emphasising the superior status of the Strasbourg case-law in Human Rights Act disputes and led to a 'baleful and unnecessary' tendency to overlook the rights protecting capacity of the common law.[87] Rather than seeing the Convention rights 'woven into' domestic law as the Labour government had hoped,[88] this approach gave rise to suggestions that the Convention rights were alien impositions[89] and – unfortunately – chimed with politically-motivated caricatures of expansionist, imperialising, decision-making by the European Court of Human Rights.[90]

The *Ullah* approach 'suggest[ed] a position of deference [to the Strasbourg Court]' [91] which in turn intimated the imposition of the Strasbourg rights jurisprudence to the detriment of distinct characteristics of national law. The increased propensity – since at least the Supreme Court decision in *Horncastle*[92] – of the courts to reconceive of their human rights jurisdiction as an enterprise shared between the domestic institutions and the European Court of Human Rights has somewhat diminished this trend. It has both facilitated the re-emergence of the common law as a means by which rights might be upheld and promoted the willingness of domestic courts to seek to engage in 'dialogue' with the European Court of Human Rights. The sense of unquestioning acceptance of the Strasbourg case-law has reduced, as the Supreme Court has steadily carved out a series of exceptions to the mirror principle which either seek to maintain the distinctive approaches of the existing domestic law[93] or otherwise seek to preserve the decision-making competence of the relevant domestic authority.[94] As a result, Lord Reed has argued against the apparently transformative demands of the *Ullah* approach:

---

remedy where a remedy would have been available in Strasbourg. Conversely, the Act was not intended to provide a domestic remedy where a remedy would not have been available in Strasbourg.'

[84] J. Lewis, 'The European Ceiling on Rights' [2007] PL 720.

[85] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, [20]

[86] B. Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford: Oxford University Press, 2013), p.56.

[87] *Kennedy v Information Commissioner* [2014] UKSC 20, [133]

[88] *Rights Brought Home: The Human Rights Bill*, Cm.3781 (October 1997), [1.14].

[89] Commission on a UK Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (December 2012), [24]-[40].

[90] See for instance: M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London: Policy Exchange, 2011).

[91] Sir Nicholas Bratza, 'The Relationship between the UK Courts and Strasbourg' (2011) EHRLR 505, 512.

[92] *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373.

[93] *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373; *Poshteh v Kensington and Chelsea LBC* [2017] UKSC 36; [2017] AC 624.

[94] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; [2008] 1 AC 1312; *In Re P* [2008] UKHL 38; [2009] 1 AC 173.

> The importance of the [Human Rights] Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based on the judgments of the European Court.[95]

Instead – and in line with the approach taken by Laws LJ in years following implementation – Lord Reed emphasised that the 'fundamentally subsidiary' nature of the Strasbourg Court demands that 'the Convention rights should be protected primarily by a detailed body of domestic law.'[96] The recent jurisprudence of the Supreme Court therefore emphasises that the Human Rights Act should be understood as allowing for the principled integration of the ECHR case-law with existing domestic laws, tending towards continuity through emphasising that the Strasbourg jurisprudence should not *necessarily* usurp established domestic rules or decision-making.

Interpreting rights

The judicial approach to the Human Rights Act's interpretative clause has seen similar trends, by turns emphasising the radical and rather more restrained potential of s.3(1). The permeable division between the (legitimate, or at least statutorily-endorsed) task of 'interpretation' pursuant to s.3(1) of the Human Rights Act and the (questionable, potentially constitutionally-illegitimate) exercise of judicial 'legislation' has provided a focal point of argument over the nature of the judicial role following the enactment of the Human Rights Act. If the traditional separation of powers drew a rudimentary distinction between legislator and interpreter,[97] the functional division between interpretation and judicial-law making was brought into sharper focus by the enforcement of the Human Rights Act. While the Human Rights Act suggests that interpretative functions fall within the remit of the courts and legislative functions fall to be exercised by Parliament (or – as a result of the s.10 procedure – to the executive), a precise delineation between the two functions remains elusive.[98]

Adjudication under the Act has revealed the s.3(1) species of 'interpretation' to be a multi-faceted process that requires focus on issues beyond the intention of the legislature as evidenced in statutory language. Though pre-Human Rights Act adjudication had already demonstrated the waning of formalist/literalist approaches to statutory construction, the reconciliation of (interpreted) statute and Convention right (and attendant case-law) within the remedial framework provided by the Act is a process arguably *demanding* of a purposive approach, as it subjects *all* legislation to the meta-requirement of Convention compliance in so far as that is 'possible.' In the sense that s.3(1) added – at a minimum – judicial assessment of external influences (Strasbourg decisions) as well as new questions of institutional competence (which remedial provision to employ) to linguistic, legislative intent-focused, processes of statutory construction then it should be considered a departure.

Early decisions deploying the provision in practice emphasised this impression, drawing parallels with the experiences of the Judicial Committee of the Privy Council in interpreting *constitutional* bills of rights, and suggesting that the

[95] *R (Osborne) v Parole Board* [2013] UKSC 61; [2014] AC 1115, [57].
[96] *R (Osborne) v Parole Board* [2013] UKSC 61; [2014] AC 1115, [56].
[97] *Duport Steel v Sirs* [1980] 1 WLR 142, 157.
[98] The most comprehensive assessment can be found in A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009).

Human Rights Act ought to be afforded a 'generous and purposive'[99] interpretation in order that individuals fully benefit from its protections.[100] The so-called 'radical' approach to interpretation[101] drew on this expansive (judicially-focused) understanding of the Act, conceiving of the courts' powers under s.3(1) as potentially remedial of all inconsistencies other than those explicitly 'stated in terms' by statute. This approach in turn viewed the declaration of incompatibility as a 'measure of last resort' to be avoided 'unless … plainly impossible to do so.'[102] While the radical approach was inspired by the Privy Council experiences of the Law Lords[103] and was contextualised by reference to the 'weaker'[104] model of the New Zealand Bill of Rights Act it nonetheless sat uneasily with the constitutional 'balance'[105] that the government had sought to preserve. The remedial architecture of the Human Rights Act does not clearly support a judicio-centric construction of its protections; though the courts are *a* central means through which the Convention rights might be upheld, it is clear that the Act was not to displace the ability of Parliament to legislate in connection (and potentially inconsistently[106]) with the protected rights and it is implicit in the Act's schema that the protection of the Convention rights is an enterprise shared.[107]

The expansive view, however, quickly ceded ground to a more contextual approach under which the dividing line between interpretation and law-making will be contingent on a range issues, including – but not limited to – linguistic matters,[108] perceived constitutional competence,[109] the impact of the proposed interpretation on the impugned legislation,[110] the weight to be attached to the relevant/applicable Strasbourg jurisprudence[111] and so on. In the abstract, the formal possibilities of interpretation pursuant to this contextual approach s.3(1) are tolerably clear: though s.3(1) falls short of permitting interpretations which would 'vandalise'[112] statutory provisions or allow for interpretations which run 'against the grain'[113] of primary legislation, it *does* permit the implication of words and phrases with potentially significant implications for the legislation under consideration.[114]

Rejection of the 'radical' approach to interpretation permits greater space for use of s.4. While the declaration of incompatibility mechanism lacks – from the perspective of the Strasbourg Court – the definitive characteristics of an 'effective remedy'[115] it preserves the right of the sovereign Parliament to sustain legislation

[99] *Minister of Home Affairs v Fisher* [1980] AC 319, 329 (Lord Wilberforce). See also: *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 375; *Brown v Stott* [2003] 1 AC 681, 703.
[100] Lord Steyn, 'The New Legal Landscape' [2000] EHRLR 549, 550.
[101] A. Kavanagh, 'Unlocking the Human Rights Act: The "Radical" Approach to s.3(1) Revisited' [2005] EHRLR 259.
[102] *R v A (No.2)* [2002] 1 AC 45, [44] (Lord Steyn).
[103] *R v A (No.2)* [2002] 1 AC 45, [38] (Lord Steyn).
[104] *R v A (No.2)* [2002] 1 AC 45, [44] (Lord Steyn).
[105] Lord Irvine of Lairg QC, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] PL 308.
[106] Human Rights Act, s.19(1)(b).
[107] Human Rights Act, s.4.
[108] *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467.
[109] *Bellinger v Bellinger* [2003] 2 AC 467.
[110] *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837
[111] *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28; [2010] 2 AC 269.
[112] *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837, [30].
[113] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [121].
[114] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [32].
[115] *Burden v United Kingdom* (2008) 47 EHRR 38.

which may fail to meet the requirements of the Convention. But perhaps just as importantly, the contextual approach to s.3(1) suggests that the determination of legislative intent remains at the core of the interpretative exercise; consistency with the intention behind the impugned legislation will condition whether or not an interpretative remedy is 'possible' or not. The broader point here is that recognition of the decision-making autonomy of the primary decision-maker remains as important to the processes of Human Rights Act judicial review as it is to judicial review more broadly considered. Indeed, the availability of a primary decision maker's 'discretionary area of judgment'[116] became seen as 'the classic separation of powers device in the post-Human Rights Act era.'[117] Yet, even in this sphere, the 'new' language of deference was often presented as a continuation of the '*ordinary judicial task* of weighing up the competing considerations on each side…'[118]

'Federal' Adjudication

Predictions that the courts would play a significant role in policing the boundaries of the devolutionary settlement[119] initially appeared to be unfounded. While adjudication over devolution matters was by no means uncommon following the establishment of the devolved bodies, its focus was in larger part on the Convention compatibility of elements of the Scottish criminal justice system, rather than competence disputes arising on 'federal grounds.'[120] Hazell concludes that a partial reason for this can be found in both the hierarchical structuring of the devolutionary arrangements, and in the 'flexibility' provided by the sovereignty concept (the latter evidenced in early pragmatic amendments to the devolved frameworks and accommodation of devolved interests into Westminster legislation).[121] From one perspective at least, the enduring influence of centralised government offered a partial explanation for the lack of 'federal' adjudication in the early years of the devolution project.

Evidence from the early case-law on the nature of this 'federal' jurisdiction was somewhat polarised. On the one hand, Lord Rodger in *Whaley v Lord Watson of Invergowrie* appeared to suggest that the legal limits on the powers of the Scottish Parliament were to be understood similarly to those attaching to 'any other statutory body'. Lord Rodger – in characterising the Scottish Parliament as a body 'created by statute and deriv[ing] its powers from statute' implicitly rejected suggestions that the 'constitutional' status of the Scotland Act and devolutionary settlement were to have any bearing on the method of interpretation adopted in resolving questions of competence. By contrast, the House of Lords in *Robinson v Secretary of State for Northern Ireland* advocated a devolutionary counterpart to the radical approach to interpretation under s.3(1) of the Human Rights Act. Lord Bingham, in the majority, found that the Northern Ireland Act 1998 was 'in effect a constitution' and that it followed that its provisions should be 'interpreted generously and purposively.'[122] Similarly, Lord Hoffmann found that the Act should not be interpreted 'rigidly' and

[116] *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, 380-381 (Lord Hope).
[117] S. Tierney, 'Determining the State of Exception? What role for Parliament and the Courts?' (2005) 68 MLR 668, 670.
[118] *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [16] (emphasis added).
[119] See eg: R. Cornes, 'Intergovernmental Relations' in R. Hazell (ed), *Constitutional Futures: A History of the Next Ten Years* (Oxford: Oxford University Press, 1999).
[120] R. Hazell, 'Out of Court: Why have the courts played no role in the resolving of devolution disputes in the United Kingdom?' (2007) 37 *Publius* 578, 581.
[121] R. Hazell, 'Out of Court: Why have the courts played no role in the resolving of devolution disputes in the United Kingdom?' (2007) 37 *Publius* 578.
[122] *Robinson v Secretary of State for Northern Ireland* [2002] ULHL 32, [11].

that giving effect to the broader political agreement it rested upon 'required … flexibility.'[123] In so finding, the Law Lords were able to dismiss a challenge to the validity of elections to the positions of First Minister and Deputy First Minister on the basis that they had fallen outside the statutory time limit.

Subsequent decisions have indicated an intermediate – sub-federal – approach, which seeks to reconcile the distinctive, democratic, characteristics of the devolved bodies with their statutory heritage. As such the Scottish Parliament is no ordinary statutory body, but a 'democratically elected legislature' [124] enjoying 'plenary powers'[125] subject to the limitations stated in the Scotland Act[126] and 'constitutional review' on the basis of the common law principle of legality. [127] Further – as recognised by Lord Hope in the *Imperial Tobacco* decision – while the Scotland Act might be regarded as a constitutional statute, that 'cannot be taken, in itself, as a guide to its interpretation. The statute must be interpreted like any other statute.' [128] *Robinson* – as Lord Reed has argued – now appears 'best understood as a decision concerned with its own specific circumstances.' [129] The balance to be struck was outlined by the unanimous Supreme Court in the reference on the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* in the following terms:

> The Scotland Act must be interpreted in the same way as any other statute. The courts have regard to its aim to achieve a constitutional settlement and therefore recognise the importance of giving a consistent and predictable interpretation of the Scotland Act so that the Scottish Parliament has a coherent, stable and workable system within which to exercise its legislative power. This is achieved by interpreting the rules as to competence in the Scotland Act according to the ordinary meaning of the words used.[130]

As such, the courts have sought to recognise – within the frameworks provided by the devolution legislation – the distinctive constitutional status of the devolutionary arrangements, *without* sanctioning general departures from the legislative intent-driven techniques of interpretation to be applied.

Consideration of the effects of the Sewel Convention – recognised in statute since the Scotland Act 2016 – in *Miller* also emphasised that the devolutionary functions of the Supreme Court would not necessarily authorise departures from established precedents. In *Miller* the Supreme Court was asked to determine whether the government's proposal to trigger Article 50 and commence the United Kingdom's departure from the EU could be achieved through use of the foreign relations prerogative. The applicants contended that this power could only be conferred upon the government by primary legislation. As a subsidiary question, the Supreme Court was asked whether, if primary legislation was required to bestow upon Ministers the power to initiate Article 50, the Sewel Convention in turn required that the consent of the devolved legislatures was a necessary precursor to Westminster enacting the authorising legislation.

---

[123] *Robinson v Secretary of State for Northern Ireland* [2002] ULHL 32, [32].
[124] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, [145].
[125] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, [147].
[126] Scotland Act 1998, s.29(2).
[127] *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868, [149]-[153].
[128] *Imperial Tobacco v Lord Advocate* [2012] UKSC 61; 2013 SC (UKSC) 153, [15].
[129] Lord Reed, 'Scotland's Devolved Settlement and the Role of the Courts', Dover House Lecture (27 February 2019).
[130] *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64, [12].

Consistently with the tenor of the Supreme Court's decision more broadly construed[131] the majority's treatment of Sewel tended towards the support of orthodox constitutional principles. The majority recognised the established position that constitutional conventions are not judicially-enforceable, finding that the coercive effect of the Sewel convention was 'a political restriction on the activity of the UK Parliament.' [132] Judges – the majority added – 'are neither the parents nor the guardians of political conventions; they are merely observers … they can recognise the operation of a political convention in the context of deciding a legal question … but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world.'[133] Though 'legislative recognition' of Sewel had had the effect of entrenching its status as a 'convention'[134], it did not – given the qualified language of s.28(8) – 'convert [the convention] into a rule which can be interpreted, let alone enforced, by the courts'.[135] In sum, Sewel was regarded as a political 'means of establishing cooperative relationships between the UK Parliament and the devolved administrations'[136] rather than a stronger regulatory tool capable of protecting devolved interests from central incursion. Accordingly, the majority found that the UK Parliament was subject to no justiciable/enforceable obligation resulting from the Sewel convention.

The delineation of the (distinct) legal and political spheres of the *Miller* dispute provides something of a *leitmotif* of the majority judgment in the Supreme Court (as indeed it had done in the Divisional Court). This, is in a sense, unsurprising: the majority decision was both largely supportive of constitutional orthodoxy and alert to the prospect of inflaming an already incendiary public debate surrounding Brexit. The compartmentalising by the majority of the legal and the political elements of the decision – only the former of which fell to the court for determination – therefore provided insulation in substantive and procedural terms. The institutional position of the Supreme Court may also provide some explanation for its failure to fully account for the complexities of the interplay between the forces of devolution and those of Brexit. While it is true to say that the Supreme Court exercises constitutional functions in relation to human rights adjudication and consideration of devolution issues, for instance, it is not *explicitly* a 'constitutional court'. Instead, the court – in cases with constitutional implications – adjudicates in relation to disputes which intersect law *and* politics,[137] and its findings may tend towards to emphasising the requirements of *the law* when confronted with circumstances with a particularly clear (and perhaps singularly controversial) political flavour. Resolution of the primary substantive issue – as the majority recognised – rendered it unnecessary to fully unpack those arguments pertaining to the UK's devolutionary arrangements. The relatively myopic view of the constitution provided shows that – despite

[131] T. Poole, 'Devotion to Legalism: On the Brexit Case' (2017) 80 MLR 696.
[132] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [145].
[133] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [146].
[134] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [149].
[135] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [148].
[136] *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [136].
[137] R. Masterman and J.E.K. Murkens, 'Skirting Supremacy and Subordination: The Constitutional Authority of the UK Supreme Court' [2013] PL 800.

acknowledgements from within the Supreme Court that devolution has transformed it into something 'more and more like a constitutional court'[138] – the Supreme Court carries the baggage of a system constitutionally dominated by the sovereignty of a centralised legislature.

CONCLUSION

The confluence of (i) legislatively-mandated review, (ii) the creation of an independent, politically-influential, Supreme Court and (iii) a growing propensity towards utilising courts as a means by which high-level politico-legal disputes might be addressed, has produced circumstances in which the Supreme Court might be regarded as a constitutional actor (in a way in which the Appellate Committee of the House of Lords perhaps never was). A trajectory towards an increasingly 'constitutional' judicial function was, however, evident prior to the Blair reforms – the seeds of a common law rights jurisdiction and of a constitutional hierarchy of statutes had already been sown – but it was given increased impetus by the explicit direction and structural realignments of the New Labour reforms. As a result, the role of the courts in articulating constitutional standards is more firmly established than it was pre-1997,[139] and the Supreme Court in particular exercises functions associated with constitutional courts elsewhere.[140] But it cannot be said that the old order has been dispensed with.[141] In both articulating and interpreting rights, and in expounding the constitutional implications of the devolutionary arrangements, characteristics of the pre-1997 constitution remain *essential* to the post-1997 judicial architecture and function. It is perhaps better to understand the consequence of these developments, not as a radical redrawing of judicial power, but as an explicit demarcation of the judicial function as central to the mapping of constitutional power as it is exercised within and across the United Kingdom.

[138] Lady Hale, 'Should the Law Lords have left the House of Lords?' Michael Ryle Lecture 2018 (14 November 2018).
[139] R. Masterman and J.E.K. Murkens, 'Skirting Supremacy and Subordination: The Constitutional Authority of the UK Supreme Court' [2013] PL 800, 819.
[140] Lord Phillips, 'The Challenges of the Supreme Court', Gresham Lecture, 2 June 2010.
[141] A trend also arguably evident in other fields of the Supreme Court's 'constitutional' jurisdiction (see for instance: *R (Evans) v Attorney General)* [2015] UKSC 21; *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324).