Special Issue—*Political Constitutions*

The Resilience of the Political Constitution

*By K.D. Ewing**

Abstract

The first part of this paper examines the nature and form of the political constitution, and argues that traditional approaches to its scope and purpose are too narrow in focus: The political constitution is about enabling and empowering government, as well as containing and constraining it; it is also predicated upon a body of core and indeterminate political freedoms (albeit frequently submerged and often displaced). The second part of the paper examines three contestable assumptions about what some claim to be a move from a political to a legal constitution. The first relates to the widespread (but flawed) ideological understanding of the political constitution; the second relates to the capacity of the "legal" to resist capture by the "political;" and the third relates to the effectiveness of the legal to protect political freedom. An attempt is made throughout unusually to illustrate argument with evidence, in this instance about the resilient political constitution.

A. Introduction

This paper was prepared for a workshop on political constitutionalism. The problem I encountered in preparing a paper for presentation at the workshop is that although the term political constitutionalism is widely used, it is increasingly highly contested.[1] I had always thought that all constitutions are political in the sense that they are born of political struggle of one kind or another: Class struggles, independence struggles, or physical struggles in the form of war and conquest. But not only are all constitutions political in terms of their origin: They are also political in terms of their content and operation, regardless of the nature of the system of government that is installed. All liberal-democratic constitutions create sites for political engagement and expression, difference and disagreement, as well as compromise and resolution.

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[1] For a valuable analysis, see Graham Gee & Grégoire Webber, *What is a Political Constitution?*, 30 O.J.L.S. 273 (2010).

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The fact that courts have a key role in the interpretation of a constitution or in policing the conduct of the other branches of government has never struck me as plausible evidence of a legal constitution.[2] Yet there is a sense too that all liberal-democratic constitutions are legal constitutions, insofar as government must be exercised within the scope of legal authority. That would be true of the United Kingdom where that legal authority may be based in an Act of Parliament, which as an expression of Parliament's supremacy both empowers and restrains government. But of course this appears not to be the sense in which legal constitutionalists use the term, though I confess to being as equally baffled about what they mean by a legal constitution, as I am by what others identify as a political constitution. It is certainly not the case that the constitution has been transformed by the Human Rights Act 1998.

But even if were the case that the constitution had been transformed by the Human Rights Act 1998, that would not be evidence that the constitution had ceased to be political: It would be evidence only that the site of the political struggle had been moved to another place.[3] It seems naïve, ignorant or disingenuous to suggest that the process of adjudication is not a political one. At its most basic it is a rule-making process, not only to make a rule to resolve a dispute in a particular case, but also to make a rule of general application to guide the conduct of everyone else in similar circumstances in the future.[4] Decisions are taken following reasoned argument of a policy nature, the decision being made on the basis of the reasoned preference of the decision-maker. The absence of the overtly partisan arguments associated with decision making in other institutions does not mean that adjudication is not a political process.[5]

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[2] This much is recognized by Griffith, whose lecture in 1979 forms the starting point of all discussion of the political constitution:

> For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bills of Rights or any other devices. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.

J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1, 16 (1979).

[3] As pointed out by Griffith, much of the ECHR (which forms the basis of the HRA) is the expression of conflict rather than its resolution. *Id.* at 14.

[4] *See* Donoghue v. Stevenson, [1931] UKHL 3, [1932] A.C. 562 (H.L.) [31] (appeal taken from Scot.) (establishing a rule indistinct from a rule that might be established in a civil code).

[5] A timely illustration of the political nature of adjudication—some would argue for multiple reasons—is provided by Animal Defenders International v. United Kingdom, ECHR App. No. 48876/08,. para. 362.

I have two aims in this paper. First, I propose to set out my own thoughts as to the meaning of a political constitution, and for this purpose I will take as a starting point not the obvious point that all constitutions are political, but the less obvious point that within liberal democracies there are some constitutional arrangements that can be characterized as political and others as legal, with the British constitution being the paradigm example of the former. The United Kingdom is a species of political constitution within the wider genus of political constitutions. Far from being eclipsed by recent constitutional reforms, the British species of political constitutionalism remains in rude health, in part because this recent period of re-balancing the constitution in the direction of the legal has been a conspicuous failure, not least because the legal is highly contestable at a political level and the subject of an apparent attempt at capture by the political.

Such failure of the supposedly expanding legal constitution is hardly surprising for anyone who knows anything about the history of crises and the response of the courts thereto. Modern legal history is a series of crises punctuated by calm, rather than the reverse. In all of these crises, the courts have generally responded to the needs of the government.[6] But perhaps the position is now different, in light of profound changes of the political context within which the legal aspects of the constitution operate. With the end of the electoral competition between Left and Right that underpinned Griffith's seminal paper on this question,[7] it is perhaps arguable that the courts are now performing a more positive role in holding government to account. While there are those who appear to believe this to be true, nevertheless there is a tendency to overlook the real truth, that the major source of this pressure on government has been the European Court of Human Rights, not the Supreme Court of the United Kingdom, which for the most part is able to read the script.

The intervention of the European Court of Human Rights has been controversial and has been seen as a direct threat to the British government. The latter has complained bitterly about the construction of the treaty well beyond anything that had been contemplated by its authors,[8] and certainly well beyond anything likely to have been contemplated by those

[6] Indeed, the modern legal history has been a history of crisis as we lurched from the crisis of the First World War, to the crisis of post war austerity, to the crisis of fascism in the 1930s, to the crisis of the Second World War, to the crisis of the Cold War from the 1940s until the 1980s, to the crisis of Thatcherism in the 1980s, to the financial crisis in the 1990s, to the crisis of the "War on Terror" in the first decade of the twenty first century, and to the crisis of austerity in the second. In other words, there has been a state of perpetual crisis, which now extends to the EU where there is also a cavalier regard for legality in the context of austerity.

[7] According to Griffith: "No one nowadays doubts that the Conservative party exists primarily to promote the interests of private capital and the Labour party the interests of organised trade unionism." Griffith, *supra* note 2, at 12. This could not be written with such equivocation today, at least in relation to Labour.

[8] According to Lord Chancellor Grayling:

> The fundamental problem here is that the European Court of Human Rights has moved a long way from the views of the originators of the conventions back in the 1950s. The original European convention on

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conservative supporters of liberal rights – such as Lord Hailsham – whose proposals had so animated Professor Griffith in his important article. This is true in particular in relation to prisoners' right to vote and the extradition of a terrorist suspect, neither of which are issues of as great significance to the body politic as they are to the relatively small number of individuals affected.[9] Nevertheless, a second aim of this paper is thus to examine the political measures proposed by the Conservative party in particular to address the unwelcome consequences of the political process of adjudication. To what extent can the legal constitution be captured by the political constitution?

B. The Political Constitution

As already suggested, the starting point for a discussion of political constitutionalism as used by British scholars is Griffith's Chorley lecture.[10] It is striking that the title of the lecture/article never appears in the text and is therefore never clearly defined. Perhaps it does not need to be: Everything is political from (1) the ends of the constitution, to (2) its means, to (3) its outcomes:

> The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.[11]

Often overlooked in the accounts of this work is the first of these three dimensions, namely the ends of the constitution, referred to as "parliamentary in structure," but seeking to "secure a particular set of political and economic ends."[12] What these ends

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> human rights was a laudable document written by conservatives after the holocaust, when Stalin was in power in Russia and people were being sent to the gulags without trial. Over the period since then, the jurisprudence of the European Court of Human Rights has, in my view, moved further and further away from the original intention and purpose of that convention. There is an urgent need for reform of the court and a return to its roots.

JUSTICE COMMITTEE, UNCORRECTED TRANSCRIPT OF ORAL EVIDENCE, 2012-13, H.C. 741-i, para. 81 (U.K.), *available at* http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/uc741-i/uc74101.htm.

[9] *See* Hirst v. United Kingdom (No. 2), ECHR App. No. 74025/01 (Oct. 6, 2005); *see also* Othman v. United Kingdom, ECHR App. No. 8139/09, (Jan. 17, 2012). On the latter, see K.D. Ewing, *What Is the Point of Human Rights Law?*, *in* EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS 37 (Rob Dickinson et al. eds., 2012).

[10] *See also* Graham Gee, *The Political Constitutionalism of J.A.G. Griffith*, 28 LEGAL STUD. 20 (2008).

[11] Griffith, *supra* note 2, at 9.

[12] *Id.* at 3.

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might be is not directly addressed, though the following passage perhaps leaves little room for imagination:

> What we wanted to know in the thirties was where the reality of political and economic power lay. We were not surprised to discover that the trappings of democracy concealed rather than adorned the body politic. But who was pulling the levers, where the levers were being pulled, who were the puppets and who the puppet—masters, these were questions to which we sought answers. We are still seeking them.[13]

I. Responsible and Accountable Government

Political sociologists tell us that much of the foregoing would be true of all constitutions: They exist to serve economic interests, with most political sociologists being less coy than constitutional lawyers about revealing explicitly whose interests they have in mind.[14] In this sense then the distinctive feature of the political constitution is about means rather than ends, and to that extent it may be wondered what all the fuss is about. Why does it make any difference whether the ruling elite governs through its control of politics rather than through its control of law, or through its control of both politics and law? In that sense the political constitution is just as pessimistic a creature as the legal constitution, all the more so for the fact that Griffith appears to be writing principally about the constitution as a source of restraint on government rather than a source of empowerment of the governed. Thus, while "only political control, politically exercised, can supply the remedy" for the former,[15] the potential of the latter appears to have attracted the following uncompromising response:

> It is still quite common to hear the constitution described-even lovingly described -as a piece of machinery cleverly and subtly constructed to enable the will of the people to be transmitted through its elected representatives who make laws instructing its principal committee the Cabinet how to administer the affairs of

[13] *Id.* at 5.

[14] Notably RALPH MILIBAND, THE STATE IN CAPITALIST SOCIETY (1969); RALPH MILIBAND, CAPITALIST DEMOCRACY IN BRITAIN (1982).

[15] Griffith, *supra* note 2, at 16.

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> the State, with the help of an impartial civil service and under the benevolent wisdom of a neutral judiciary.[16]

It may, nevertheless, be a mistake to see the evolving and dynamic political constitution operating in the Westminster tradition as simply reflecting a preference for a particular form of government, though clearly it does just that. At least as expressed by Griffith, it was a preference rooted in principle in the sense that "political decisions should be taken by politicians. In a society like ours this means by people who are removable."[17] "It is an obvious corollary of this" he continued, that "the responsibility and accountability of our rulers should be real and not fictitious."[18] This presumably distinguishes a political constitution from other constitutional arrangements (such as those of the United States) where neither the ultimate rule nor the ultimate rule—maker could easily be changed. What is interesting about this defining feature of the political constitution, however, was not its appeal to representative and democratic government, but its appeal to responsible and accountable government. To this end, the political constitution is not necessarily a democratic constitution, though as will be discussed below it may equally be regarded as the most advanced form of liberal democracy.

II. Representative and Sovereign Parliament

The practice of a political constitution having its roots in representative rather than democratic government is highlighted by Mackintosh in his book on the *British Cabinet*, which is a broadly sympathetic account of the world inhabited by Griffith.[19] Mackintosh wrote about the high-water mark of this version of the political constitution as being in the late 1890s/early 1900s, a time in which the franchise had been extended but was still some way short of full adult universal suffrage, and indeed still some way short of full male universal suffrage. It was nevertheless a period in which the executive was responsible to an independently-minded Parliament with full legal authority, a time in which Parliament had not fallen prey to the iron law of party discipline, which some seem to think disfigures our modern political constitution.[20] There is no doubt that from one point of view party discipline is a restraint on the effectiveness of Parliament, though the judgment about the impact of party on the effectiveness of Parliament depends in large measure on our

[16] *Id.* at 6.

[17] *Id.* at 16.

[18] *Id.*; *see also* ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION (2005).

[19] *Compare* JOHN MACKINTOSH, THE BRITISH CABINET (3d ed., 1977), *with* JOHN MACKINTOSH, THE GOVERNMENT AND POLITICS OF BRITAIN (4th ed., 1977) (expressing exasperation with strong government and indicated support for more legal controls).

[20] *Compare* TOMKINS, *supra* note 18, *with* Danny Nicol, *Professor Tomkins' House of Mavericks,* 2006 PUB. L. 467.

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understanding of the constitutional function of Parliament, which is not simply to hold government to account.[21]

The foregoing rather suggests that there is another purpose of the political constitution, which is not just about removing "them" but also about empowering "us."[22] Thus, there is the sense that the political constitution is not only capable of facilitating the gradual emergence of the democratic age, but also of adapting to the expectations of the citizens it was designed to serve. Thus it is a purpose of the political constitution—perhaps greater than the purpose of holding government to account—that it allows for the wishes of citizens to be realized and for these wishes to be translated into law. The great virtue of the *openness* of the political constitution is not only its ability (1) to facilitate the emergence of semi—democratic structures, and (2) to provide for popular demands to be met without formal limit. The other virtue is (3) its latent transformative potential, which made it so attractive to a generation of progressive politicians (and lawyers).[23] But although there were brief periods in which such optimism seemed well—founded, the neo-liberal counter-revolution has revealed as well the brutal capacity of the political constitution to develop political restraints to contain that popular power, and any such latent transformative potential.[24]

C. The Political Constitution and the Role of Law

Nevertheless, the idea of a political constitution appears initially to be an oxymoron, at least in a constitutional system grounded in legality. Does it mean that there are no legal constraints on the power of government? No. Does it mean that there are legal constraints but that the constraints are supervised by political institutions rather than enforced by the courts? Not always. It is at this point perhaps that the idea of a political constitution is most vulnerable, for there can be no constitutional government without law.[25] There has to be some law. But how much law? Where should the limits of legality be set, and why? Not only that: There is also something of a contradiction here, if as argued above the purpose of a constitution is to empower government as well as restrain it. Government will need both legal authority for its actions and to be constrained when it exceeds that

[21] A point on which Jennings is especially important. *See* K.D. Ewing, *The Law and the Constitution: Manifesto of the Progressive Party,* 67 MOD. L. REV. 734 (2004).

[22] This important dimension is developed most powerfully in Adam Tomkins, *In Defence of the Political Constitution,* 22 O.J.L.S. 157 (2002). *See also* Griffith, *supra* note 2.

[23] *See* Ewing, *supra* note 21.

[24] *See* Marco Goldoni, *Two Internal Critiques of Political Constitutionalism,* 10 INT'L J. CONST. L. 926 (2012); RALPH MILIBAND, PARLIAMENTARY SOCIALISM: A STUDY IN THE POLITICS OF LABOUR (1961); V.I. LENIN, THE STATE AND REVOLUTION (1917).

[25] *See* Gee & Webber, *supra* note 1.

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authority. The legal principle of the sovereignty of Parliament provides both the source of legal authority, and the source of legal restraint of the power of government in a political constitution.

I. Legal Authority

The principle of parliamentary sovereignty is a product of revolution. Not a revolution to emancipate the peasants, but to disempower the Crown in the interests of a narrow class within the community, which for this purpose did not include women. It was nevertheless a revolution that was a necessary precondition of any notion of popular sovereignty and with it any notion of popular sovereignty vested in *all* the people. As such the legal principle of parliamentary sovereignty—as the core legal principle of the political constitution—evolved in such a way as to become no more and no less than the legal principle underpinning the political principle that in a democracy there should be no legal limit to the wishes of the people. This is subject only to the proviso that the people's representatives express themselves in the manner recognized by law, which in our case is an Act of Parliament the procedures for the making if which are the sole responsibility of Parliament itself.

It is frustrating that Griffith makes little reference to this legal principle, for it is difficult to see how a political constitution could operate without it, even in the sense emphasized by Griffith as relating principally to responsible government. As suggested, however, the principle of parliamentary sovereignty not only underpins the power of Parliament, but also the power of the government, which must act within the boundaries of the authority conferred upon it. Judicial review to prevent government from exceeding the powers conferred upon it is not so much a usurpation of the sovereignty of Parliament as its vindication, to the extent that the courts do not permit ministers or others to stray beyond their parliamentary mandate. The problem arises of course when the courts exceed their judicial mandate, as during the 1960s and 1970s when the government's social and economic programme was undermined by the self-indulgence of the courts, insisting that progressive legislation should be washed through with the common law values it was designed to replace.[26]

II. Legal Restraint

But not only does the political constitution presume a strong Parliament which would be both a source of legal authority as well as a forum for representation and responsibility, it also presumes a realistic—though powerful—notion of legality. As already suggested, such a principle is necessary to vindicate the authority of Parliament, though there are other

[26] *See generally*, J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY (5th ed. 1997).

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reasons why a government must have legal authority or its actions. For many, these reasons are rooted in ideas of the rule of law, a bequest denounced by Griffith as:

> [A] fantasy invented by Liberals of the old school in the late nineteenth century and patented by the Tories to throw a protective sanctity around certain legal and political institutions and principles which they wish to preserve at any cost. Then it is become a new metaphysic, seeming to resolve the doubts of the faithful with an old dogma.[27]

Throwing out the rule of law nevertheless does not mean throwing out the requirement of legality:

> If the Rule of Law means that there should be proper and adequate machinery for dealing with criminal offences and for ensuring that public authorities do not exceed their legal powers, and for insisting that official penalties may not be inflicted save on those who have broken the law, then only an outlaw could dispute its desirability.[28]

But although closely related to the principle of parliamentary sovereignty (indeed its necessary corollary), as already suggested the principle of legality is not just about ensuring government does not exceed the authority given to it by the legislature (though it is not clear what else it is about). In the British system, however, the principle otherwise has been of limited application, with legal authority being either unnecessary,[29] or easily secured under the guise of the common law or the royal prerogative, it being possible to exercise the latter in many cases without legal or political scrutiny. It was also a power the boundaries of which were uncertain, and the exercise of which invariably took place in secret, at least for much of the period celebrated by Griffith and others of like mind of his generation. As a result, although from time to time it is possible to encounter concerns by civil servants during the Cold War period about whether a course of action was constitutional, little thought was given to the legality of government action, presumably

[27] Griffith, *supra* note 2, at 15. *See also*, Ewing, *supra* note 21 (discussing Jennings on the rule of law). Now, the Constitutional Reform Act 2005, c. 4, s 1 (U.K.), which has a capacity for great menace in the hands of a crusading judge, with a potential to go way beyond the implied restrictions, as suggested in R (Jackson) v. AG, [2005] UKHL 56, [2006] 1 A.C. (H.L.) 262 (appeal taken from Eng.). *See also*, Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67 (2007).

[28] Griffith, *supra* note 2, at 15.

[29] Malone v. Metro. Police Comm'r, [1979] CH. 344, [1979] 2 All E.R. 620.

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because there was no need to do so. This would be particularly true of the measures taken to deal with the threats posed during the Cold War, where an entire surveillance system—which was nothing if not arbitrary—was constructed without any express legal authority.[30]

D. The Political Constitution and Political Freedom

My understanding of a political constitution then is that it is not only about a preference for responsible and accountable government, but that it is also about a preference for a representative and sovereign legislature as the ultimate site of political struggle.[31] This inevitably entails a role for law, though legal rules empowering a sovereign legislature do not exhaust that role in a political constitution. Law is a necessary source of the sovereignty of the people, in the sense that there must be some legal recognition of the right to vote and to take part in elections. To this end, legislation is necessary to define who can vote and in what circumstances. As recognized by Griffith, law will play other indeterminate parts, as for example in regulating the freedom of the press, which paradoxically he saw as an essential means of holding government accountable:[32] Government thus being accountable to private as well as public interests, unless we are implausibly to see the modern press as a conflation of the two.[33] One of his few forays into this kind of territory saw Griffith argue that "the freedom of the press should be enlarged by the amendment of laws which restrict discussion. Governments are too easily able *to* act in an authoritarian manner."[34] Note however, freedom by removing (presumably common law and statutory) restraints, not by creating rights.

I. Responsible Government and Political Freedom

Recognition of the importance of political freedom does not mean that it must be enshrined in law. But it does mean that it should be enshrined as a matter of constitutional practice (which law alone is unable to guarantee). There can be no accountable government if government cannot be replaced, and there can be no representative Parliament if certain interests are excluded. So much appears to have been acknowledged at least on occasion by political actors in the British Constitution, even if this acknowledgement has been deeply submerged and meaningfully expressed in private. A good illustration is nevertheless provided by the post-war discussion of whether or not to

[30] *See* PETER HENNESSY, SECRET STATE: PREPARING FOR THE WORST 1945–2010 (2010).

[31] An important dimension of responsible government is not only that the government should be responsible to Parliament, but also that Parliament should be responsible to the people.

[32] Griffith, *supra* note 2.

[33] This idea of the corporate press as a watchdog may need to be revised in the light of the naked use of private power for private ends.

[34] Griffith, *supra* note 2, at 16.

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ban the Communist Party of Great Britain (CPGB),[35] following the example of the United States where the ban was upheld by the Supreme Court notwithstanding the First Amendment's commitment to free speech.[36] In those days the Home Office saw itself as being responsible in part for the protection of liberty, unlike today when it appears to revel in its *de facto* role of Ministry of Internal Security, the liberty function having been shoveled off to the inaptly named Ministry of Justice. At a Cabinet meeting in 1949, it is recorded that the question was raised whether the Government should accept the recommendation to take "such action as might be necessary to discredit the Communist Party in the eyes of the people within Great Britain." It appears, however, that there was general agreement that:

> [F]rom the *constitutional* point of view, it would be very difficult for the Government to take official action of this kind against a political party which had not been declared to be an illegal organization and was in fact represented in the House of Commons.[37]

In reaching this agreement, it is not to be thought that it reflected any common cause between the then Labour government and the communists. Both Attlee and Bevin hated the communists with a passion; but they were neither stupid nor illiberal, however much they thought the dangers of communist infiltration to be. The liberal values underpinning the government were again on show at the afore-mentioned Cabinet meeting, the Home Secretary recorded as saying that his department was still obliged to preserve the peace at Communist meetings and to enable Communist speakers to "secure a fair hearing for their views."[38] Although there is much about which to be critical of the government in the Cold War, this is but one of many examples in which ministers and civil servants were clearly guided by competing principles, which it is true were on many occasions submerged by

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[35] *See generally*, Joan Mahoney, *Civil Liberties in Britain During the Cold War: The Role of the Central Government*, 33 AM. J. LEGAL HIST. 53 (1989).

[36] *Compare* Dennis v. United States, 341 U.S. 494 (1950), *with Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 (Austl.). The position in the United States changed after 1956: *see* Yates v. United States, 354 U.S. 298 (1957).

[37] See Mahoney, supra note 35 for a full discussion..

[38] This was a stand taken not only by Labour ministers. In May 1954, the Prime Minister was asked in the Commons whether he would cooperate with the governments of Australia and the United States with new anti-communist initiatives. In agreeing that Her Majesty's Government would always give support to "any country in the free world that desires it in seeking to counter the insidious attacks of Communist propaganda," Mr Churchill continued by saying that: "We must, however, be free in this country to pursue the methods we judge best suited to our traditions and circumstances. They do not seem to have worked too badly so far." 527 PARL. DEB., H.C. (5th ser.) (1954) 2292 (U.K.).

reasons of expediency, public order and national security. As the heat of the Cold War intensified, so the influence of the latter would prevail over the former, and where questions of illegality arose, government law officers were on hand to advise on how any legal risks could be avoided, for example by opportunistic use of Crown and other privilege, which offered wide immunity when required.

Law and Order

This is not the only example of there being a sense of "right and wrong," or of an allusion to "constitutional" constraints. A very different example is provided by a memo from the law officers on 27 September 1962 about proposed amendments to the Public Order Act 1936, which had been made by Monty Woodhouse, then a junior minister at the Home Office. Woodhouse had been concerned by the rising tide of fascist activity and the limitations of the 1936 Act to deal with it, and proposed that the scope of the Act should be extended to deal with incitement to cause racial antagonism, and to deal with fascist publications such as a fascist leaflet "Hitler was Right" then in circulation.

Following consultations with lawyers, MPs and others, including Arthur Goodhart, Woodhouse also proposed that there should be a power to ban political meetings, in the same way that the 1936 Act contained a power to ban political processions. Much of this today would seem largely unexceptional, and indeed Woodhouse by his memo revealed himself to be a generation ahead of his time. It nevertheless generated a remarkable response from the law officers, expressing concern that Woodhouse had raised "one of the most difficult problems of the art of government, namely, to hold the balance firmly and fairly between the rights of free speech and the need to keep law and order."

What followed was a brief but powerful defense of free speech that could have been written by Justice Black of the United States Supreme Court, or indeed by J.S. Mill himself. We ought of course to be mindful of who was being defended by this remarkable vindication of freedom of expression, and who the victims of such contested speech were likely to be. Nevertheless, according to the law officers: "Free speech means nothing if the freedom is limited to saying only what is generally agreeable and acceptable. Socrates and Galileo did not need the right to say what most people accepted, but to say what was wholly detestable to the vast majority of their fellow countrymen".

And so it goes on: If democracy and freedom are to mean anything in this country, there must be "a constant and courageous upholding of the difficult view that perverse and erroneous opinion must be tolerated to the fullest extent, provided reason and truth are left free to answer." Although no doubt striking many as extraordinarily disingenuous, this view appeared to prevail, the authors noting also "luckily for this country" that "juries have thought freedom of speech more important than the suppression of exaggerated views and are always very reluctant to convict for mere expressions of opinion, however extreme, relating to public affairs."[39]

[39] This account draws from Memorandum from Monty Woodhouse (Sept. 27, 1962), and a letter from the Attorney General to the Home Secretary, Sept. 27, 1962). It is a pity that this powerful rhetoric was deployed to protect the racist speech of fascists.

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II. Political Freedom and Procedural Fairness

This unspoken and indeterminate commitment to freedom was not confined to questions of substance (such as rendering illegal the Communist Party). It also applied to questions of procedure, in the sense that restrictions on political freedom would have to be accompanied by procedural safeguards. Again the treatment of the Communist Party and its members provides an illustration, for although the Party was not banned in the United Kingdom, a number of active steps were taken to monitor and contain its activities. One of the measures taken was the exclusion of Communists and Communist sympathizers from employment in certain civil service positions that involved access to secret work. Party members and sympathizers would be known to the government, as a result of the intense surveillance and infiltration of the Party by the security service, as we now know.[40] The principle of legality then in operation meant that it was enough to announce the ban to Parliament, with the details of the scheme set out in a parliamentary written answer.[41] There appears to have been no question of the need for legislation to introduce this scheme, which was already in operation before the government's announcement, or that legislation was necessary to protect individuals from abuse in its operation, for example by being wrongly branded as a communist or a communist sympathizer.

However, unconstrained government did not necessarily mean government without constitutional limits. It is a striking feature of the controls introduced on communists by the exercise of administrative rather than legislative power that it was felt necessary to introduce the procedural restraints of the kind alluded to, the care being taken to avoid abuse being all the more striking for the fact that in the United States and elsewhere, the Communist Party was banned altogether. It is true that the safeguards put in place did not provide for judicial scrutiny of the decision to remove an individual from a sensitive position as part of the communist purge, complaints being made to a body of Three Advisers, whose understanding of procedural justice would no doubt fall some way short of the more exacting modern standards.[42] But this procedure is to be judged by the standards of the time, rather than the standards of today and at the time the courts would have offered little if anything by way of meaningful scrutiny.[43] As it is, the work of the Three Advisers was sufficiently robust to lead a Conference of Privy Councilors in an unpublished report in 1956 to complain that they showed less concern for national security

[40] The personal files of leading Communists available at the National Archives are a fascinating read, revealing a great deal about the conduct and methods deployed by the Security Service.

[41] 448 PARL. DEB., H.C. (5th ser.) (1948) 1703 (U.K.).

[42] *See* 448 PARL. DEB., H.C. (5th ser.) (1948) 3418 (U.K.).

[43] Indeed, there was no divine intervention that dictated that the work of the Three Advisers should be beyond judicial scrutiny so much as a self-imposed restraint of the courts themselves.

than for the interests of the individuals whose cases they dealt with.[44] That was never a complaint that could be made against the courts.

E. The Political Constitution and The Neo-Liberal Assault

The idea of a political constitution thus appears to be one that conveys a preference for political rather than legal checks on government; it is one underpinned by legal principle designed to ensure that political rather than legal checks will apply; and it is one which may nevertheless be infused with certain freedom-based values desirable if government is to be accountable. It has been suggested, however, that the conditions in which the political constitution operated have so radically changed that an idea that was once thought to reflect the values of the Left is now unsustainable for the Left. This is because it is claimed that we now live in a neo-liberal world in which the socialist ideal has been eclipsed, and that we must now make common cause with the Liberals against our common foe. The emerging new orthodoxy on the soft metropolitan Left implores us to accept (1) that we need a new legal framework for the constitution, (2) that as part of that new legal framework it is necessary to restrict the power of government by tighter legal controls such as those in the HRA, and (3) that the judges—now more radical than their forbears—will use the HRA to intervene to provide the necessary corrective to protect the individual from nasty ideological regimes. Although mindful of the weaknesses of the political constitution, I remain unconvinced and believe that this new orthodoxy seized by some with alacrity and relief is based on three contestable assumptions.

I. Political Constitution and Liberalism

The first of these contested assumptions is that the political constitution is somehow the property of the Left, an assumption perhaps made because of the political constitution's popularization by Griffith, though he by no means is the sole proponent of the idea.[45] In truth, the so-called political and legal constitutions simply offer rival (open and closed respectively) visions of liberalism, with the underlying principles of the former being consolidated in the Westminster system in the 19th century. As we have seen, the first of these underlying principles is the idea of responsible and accountable government. This is a liberal principle, the virtues of which were extended as a model of liberal constitutional practice to other Commonwealth countries, with Canada adopting a constitution said by its preamble to be "similar in principle to that of the United Kingdom." The same is true of Australia where responsible government is "part of the fabric on which the written words

[44] *See also* RADCLIFFE COMM., SECURITY PROCEDURES IN THE PUBLIC SERVICE, 1962, Cmnd. 1681 (U.K).

[45] See DAVID CARLTON, ANTHONY EDEN: A BIOGRAPHY (1981), for the views attributed to AJP Taylor, admittedly also a man of the Left.

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of the constitution are super-imposed."[46] More recently—in the context of a written constitution which by representative government was said to "denote sovereign power which resides in the people"[47]—it was also said that responsible government was not simply "an assumption on which the constitution was based, but an integral element of it."[48]

The transportation of the British model to Australia (and with it the idea of a constitution without the protection of certain core liberal values) has never led to serious claims about the entrenchment of Left values in Australian government. Nor can it seriously be claimed that the second of the foregoing features of the political constitution—the principle of representative government—is the property of the Left. On the contrary, in the British system the term is applied in a weak sense to be found in the writings of Burke and Locke that once elected, it is the duty of the representative to act in the national interest rather than a local interest, or a sectional interest, or a class interest,[49] rather than in the radical sense that the representative with a mandate has a duty to act on that mandate (and to be recalled if he or she does not).[50] Indeed the liberal nature of this principle was on display in the famous *Osborne* judgment in 1909,[51] when the House of Lords held that trade unions could not lawfully fund the Labour Party. One of the reasons for the decision was that trade union sponsored MPs were bound by an obligation to their union to accept the Labour Party whip, an obligation that was said to be "unconstitutional," the constitutional obligation inspired in part by Locke's concern that:

> For the people having reserved to themselves the choice of their representatives, as the fence to their properties, could do it for no other end but that they might always be freely chosen, *and so chosen freely act and advise*, as the necessity of the commonwealth and

[46] *Australian Capital Television Party v. Commonwealth* (1992) 177 CLR 106, 135 (Austl.) (quoting *Commonwealth v. Kreglinger & Fernau* (1926) 37 CLR 393, 413 (Austl.)).

[47] *Id.* at 137 (Mason CJ).

[48] *Id.* at 135 (Mason CJ).

[49] Amalgamated Soc'y of Ry. Servants v. Osborne, [1910] A.C. 87 (H.L.) 106–16 (Lord Shaw of Dunfermline)(citing Edmund Burke, Speech to the Electors of Bristol (Nov. 3, 1774)).

[50] *See* KARL MARX, THE CIVIL WAR IN FRANCE (1871) (analyzing the Paris Commune). It is also the case, however, that the recall is not a uniquely Marxist principle, having been adopted by liberal democratic regimes as well, of which California is perhaps the best-known example.

[51] Burke, *supra* note 49.

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> the public good should upon examination and mature debate be judged to require.[52]

II. Legal Constitution and Liberalism

The political constitution is in some respects the apotheosis of liberalism, providing a site for discussion and debate, and the reconciliation of conflict. It is a recognition that everyone matters, that there is no monopoly of wisdom on ideas, and that differences can be reconciled in a deliberative assembly. It can accommodate the politics of both post-war socialism and modern day neo-liberalism. The legal constitution offers a different vision of liberalism, but one in which certain values are privileged and entrenched. Again, this question of form is not an argument of Left versus Right, for it would be perfectly possible to contemplate a legal constitution which entrenched not only certain liberal values, but entrenched also certain social democratic values. That is to say a constitution that entrenched social and economic rights alongside civil and political rights.[53] The dangers of a legal constitution that included only rights of the former kind were well recognized at the time the ECHR was being negotiated, with Labour ministers expressing concern about the dangers of the Convention to the programme of a progressive government at a stage when it was too late to do anything about it. According to the Cabinet minutes, however:

> The Convention had originally been conceived as a statement of the rights which western civilisation preserved for the individual, in contrast to the absence of such rights in Communist-dominated countries; but, if the Convention were adopted in its present form, this country could be pilloried for infractions of its provisions which would be unavoidable in the course of economic planning. The draft Convention would be acceptable only to those who believed in a free economy and a minimum amount of State intervention in economic affairs.[54]

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[52] Lord Shaw of Dunfermline, *supra* note 49 (quoting JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT para. 222 (1689)).

[53] *See* K.D. Ewing, *Social Rights and Constitutional Law*, 1999 PUB. L. 104 [hereinafter *Social Rights and Constitutional Law*]. *See also* K.D. Ewing, *Economic Rights*, *in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1036 (Michel Rosenfeld & András Sajó eds., 2012) (giving an account of the embedding of social and economic rights in constitutional law, contrasting liberal democratic and social democratic visions).

[54] CABINET MEETING (U.K.), 1 AUGUST 1950. One of the other objections to the Convention was that it would prevent the Labour government from taking measures against the Communist Party.

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The legal constitution is thus very different, starting from the assumption that there are certain questions that are uncontestable and insulated from the political process. These questions reflect certain fundamental values or truths that are held by some members of the community that are imposed on all members of the community, incapable of removal if they disagree with them or disagree with their application in particular cases. The operation of these entrenched values is typically in the hands of judges and lawyers (who of course do not actively promote the legal constitution for reasons of naked self-interest), an elite group within the body politic who in the liberal democratic tradition cannot easily be removed. Their position is the antithesis of the elected, representative and responsible politician, though there seems to be no reason in principle why judges should not be elected, given the multiple legislative roles they perform, not least in the development of the common law.[55] This might be thought to be a *closed* or conservative liberalism in the sense that it reduces the space for contestation and disagreement about what may be core questions and allows differences to be settled by unelected—in contrast to the more open and liberal form of constitutionalism that the political constitution reflects. The concern, however, is not only with process but also with outcomes, for although legal constitutionalism is likely to operate as a constraint on governments of Left and Right, the experience of history suggests that it is governments and institutions of the Left that are more likely to encounter difficulties, at least in common law jurisdictions.[56]

F. The Politics of the Legal Constitution

If anything, the political constitution tilts to the Right (albeit not as far as the legal constitution), and is now under the control of the Right. The second assumption of the emerging new orthodoxy referred to above, however, is that the legal constitution armed with the HRA will restrict the power of the Right in government. If the first assumption was based on a contestable understanding of the political constitution, the second seems in turn to be based on a disarming naiveté, underestimating the extent to which the new process will be captured by the very forces whose power was thought to make it necessary in the first place. Although they have won a great victory at least for the time being, the neo-liberals have an insatiable demand for more. If their position is to be underpinned by a legal statement of values, it must be exclusively their values, and it must not be polluted by European social democratic values. It must, moreover, deliver outcomes of which they approve, even on matters of little overall consequence (except of course to the alleged victims in the cases concerned)—such as whether a few thousand prisoners should be entitled to vote, or whether certain disagreeable individuals should be deported or extradited. Matters of this kind have acquired a political currency well beyond their general political significance, human shields in a dirty war about Europe. There is

[55] *See generally* K.D. Ewing, *A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary,* 38 ALTA. L. REV. 708 (2000).

[56] I am mindful here of the storm in a teacup manufactured over the Abu Qatada affair in 2012–13.

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nevertheless a determination to contain and control these institutional arrangements in one of two ways.

I. The Domestic Attack

It is recognition that judicial review is a site of political struggle that judicial appointments in many countries are now a matter of sharp political contestation. The political Right currently dominates several of the world's highest courts, while others are at best a home for the bland. Readers will have to make up their own minds on whether the United Kingdom's unique and bizarre system of senior judicial appointments—whereby judges can appoint people in their own image—has led to a pre-dominance of conservative or vanilla justices. But the other way by which the process can be undermined politically is by challenging those who have responsibility to operate it, with ministers acting as cheer-leaders for the poisonous tabloid press (despite having discovered (*sotto voce*, while putting the boot into everyone else) post-Leveson that they too have human rights). These attacks on the judges are now being led by ministers despite their statutory duty (which the traditional political constitution did not need) to uphold the independence of the judiciary,[57] a duty reinforced by the Lord Chancellor's additional duty to defend that independence.[58] It is to be presumed that when on 16 February 2013, the Home Secretary attacked the immigration judges because of their refusal to follow Home Office guidance;[59] the Lord Chancellor intervened privately to remind the Home Secretary of her legal responsibilities.[60]

The other and more important way of ensuring that entrenched liberal values are wrapped in the union jack is to take control of the substance of the rights which entrench these values, as revealed by the creation by David Cameron of the Commission on a Bill of Rights in 2010, with a mandate to determine whether the United Kingdom needs a Bill of Rights.[61]

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[57] Constitutional Reform Act 2005, c. 4, s 3(1) (U.K.).

[58] *Id.* s 3(6).

[59] Theresa May, *It's My Job to Deport Foreigners Who Commit Serious Crime—And I'll Fight Any Judge Who Stands in My Way, Says Home Secretary*, MAIL ONLINE, Feb. 16, 2013, http://www.dailymail.co.uk/debate/article-2279828/Its-MY-job-deport-foreigners-commit-crime--Ill-fight-judge-stands-way-says-Home-Secretary.html. According to Mrs. May, an unnamed judge asserted "he can ignore the unanimous adoption by the Commons of new immigration rules on the grounds that he thinks this is a 'weak form of parliamentary scrutiny.'" She found "it difficult to see how that can be squared with the central idea of our constitution, which is that Parliament makes the law, and judges interpret what that law is and make sure the executive complies with it." As a first year student might pick up, Mrs. May's understanding of the constitution seemed rather contestable.

[60] It is to be regretted that the correspondence that is presumed to exist was not made public, as a reminder of "the existing constitutional principle of the rule of law," to say nothing of "the Lord Chancellor's existing constitutional role in relation to that principle." Constitutional Reform Act 2005, c. 4, s 1(a)–(b).

[61] For more information, see http://www.justice.gov.uk/about/cbr.

The government's conduct in this affair has been wholly cynical but also wholly predictable—it is about disciplining the legal to the power of the political. True, the Commission of QCs was unable to produce a unanimous report,[62] though seven of the nine members of the Commission were reported by one of their number to be "in favour of a UK Bill of Rights written in language which reflects the distinctive history and heritage of the countries within the UK, and is different from the Human Rights Act."[63] This appears to have alarmed the two prominent dissidents, who saw either a hidden agenda or unintended consequences, which would be a weakening of the impact of the ECHR in British law. Why this matters is because the marginalization of the ECHR is a direct threat to the integrity of human rights protection, in view of the higher standard of protection promoted by the judges of the ECtHR than by their counterparts in the UK Supreme Court. Control over content is about control over outcome. This fight has only just begun.

II. The ECHR

Whether or not the HRA will be repealed without being replaced by something substantially similar remains to be seen. But human rights have been politicized not only in domestic law, with attempts also being made to take greater political control of the content of the Convention itself, and the manner of its operation and application. This is revealed most clearly in the political attacks on the Strasbourg Court, and the political initiative in the form of the "Brighton Declaration" designed to rein it in, at the time of the fortuitous British presidency of the Council of Europe.[64] While some of the concerns addressed by the Declaration are unexceptional, the manner by which others were addressed is reported as having irritated the President of the Court, offended by politicians with a direct interest in the decisions of the ECtHR now telling the judges how to do their job.[65] Some of the proposals for treaty "clarification" as a result of this political interference (or pressure) certainly reveal a poor understanding of the principle of judicial independence on which the legal constitution is supposed to stand, though it has surprisingly nevertheless not attracted more criticism from the legal constitutionalists, who are either asleep or relieved that the interference is not more substantial.

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[62] The only non-Q.C. member (apart from the Chair) resigned before the Commission reported. *See* Conal Urquhart, *Bill of Rights Commissioner Resigns over Bypass of Commons*, THE GUARDIAN, Mar. 11 2012, http://www.theguardian.com/law/2012/mar/11/uk-bill-of-rights-kenneth-clarke.

[63] *British Bill of Rights Commission Fails to Reach Agreement*, BBC NEWS, Dec. 18 2012, http://www.bbc.co.uk/news/uk-politics-20757384.

[64] High Level Conference on the Future of the European Court of Human Rights, Apr. 19–20, 2012, *Brighton Declaration*, *available at* http://hub.coe.int/20120419-brighton-declaration.

[65] Joshua Rozenberg, *Draft Brighton Declaration Is a Breath of Fresh Air*, THE GUARDIAN, Apr. 19, 2012, http://www.theguardian.com/law/2012/apr/19/draft-brighton-declaration-sensible.

One of the main thrusts of the Brighton Declaration is that human rights cases should be dealt with by national courts, which in the British context would mean operating a diluted human rights standard: The Brighton Declaration is about reducing not enhancing human rights protection. This objective is to be met in a number of ways, including revising the admissibility criteria,[66] and by amending the ECHR to reinforce the Court's obligation to reinforce the principle of subsidiarity and the doctrine of the margin of appreciation in its jurisprudence, said to reflect the fact that "the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions."[67] From the point of view of the legal constitutionalist, however, surely even more alarming is the proposal for "dialogue" between the Court and State parties "as a means of developing an enhanced understanding of their respective roles in carrying out their shared responsibility for applying the Convention." This is to include particularly dialogues between the Court and:

> (1) The highest courts of the States Parties;
> (2) The Committee of Ministers, including on the principle of subsidiarity and on the clarity and consistency of the Court's case law; and
> (3) Government Agents and legal experts of the States Parties, particularly on procedural issues and through consultation on proposals to amend the Rules of Court.

[66] Thus:

> [A]n application should be regarded as manifestly ill-founded within the meaning of Article 35(3)(a), *inter alia*, to the extent that the Court considers that the application raises a complaint that has been duly considered by a domestic court applying the rights guaranteed by the Convention in light of well-established case law of the Court including on the margin of appreciation as appropriate, unless the Court finds that the application raises a serious question affecting the interpretation or application of the Convention; and encourages the Court to have regard to the need to take a strict and consistent approach in declaring such applications inadmissible, clarifying its case law to this effect as necessary.

Brighton Declaration, *supra* note 64, s 15(d).

[67] Moreover, "[t]he margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation." EUR. PARL. ASS., *Draft Protocol 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms—Explanatory Report*, Doc. No. 13093, para. 9 (2013).

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This is a process with which no self-respecting judicial body should engage. Rather than participate in secret conversations in the name of an "open dialogue," any request for such a dialogue should be met with dispatch by immediate return of a copy of the Council of Europe's Recommendation on Judicial Independence of 2010,[68] an admirable document produced by the very ministers who now want to muzzle the Strasbourg court. If any dialogue is to take place between ministers and the court, it should only be in the open forum of legal proceedings, not least because this would be a most one—sided dialogue, with the Brighton Declaration making no provision for NGO's or victims' groups to be party to this proposed conversation on the construction of the treaty.

G. The Ineffectiveness of the Legal Constitution

It ought to be clear by now that human rights are by no means beyond the political fray. There are issues about who gets to make political decisions while clothed in judicial garb and the political spin they will bring to the process, and there is the question of the substance of these rights, an important question which simply by its creation the Commission on a Bill of Rights reveals with unusual clarity.[69] This brings us to the third of the contested assumptions identified above, which is that judges will intervene to protect the individual and to provide the necessary corrective against nasty neo-liberal ideologues. The extent to which this assumption is sufficiently well grounded to be taken seriously may depend on who is making the decisions. Given the history of civil liberties in the United Kingdom, there is no reason initially for much confidence. British judges have also displayed a conservative approach to human rights protection under the HRA, and it is presumably for this reason that the Conservatives would like as many decisions as possible to be taken in London rather than Strasbourg: It is the ECHR and not the HRA that is the problem. But even the former is greatly exaggerated in terms of its impact, with sceptical legal historians in the future likely to debunk the HRA and the ECHR on two grounds.

I. Limits of the HRA

The first is that despite its potential to do so, the Human Rights Act 1998 did not represent a break with the past after all. In terms of the role of the courts are concerned, the most important change in the development of the judicial role was the procedural change to judicial review in 1979, which unleashed the modern administrative law. At the time of

[68] *Recommendation CM/Rec (2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities*, COMM. OF MINISTERS, https://wcd.coe.int/ViewDoc.jsp?id=1707137 (last visited Nov. 12, 2013).

[69] There is also an explosive issue that will have to wait for another day that straddles considerations of "capture" and "effectiveness," which is simply the refusal of the government to implement Court decisions. How many prisoners have now been denied their human right to vote and on how many occasions? Not only does this raise the ultimate question of the futility of the HRA, but it also raises even more fundamental questions about the Constitutional Reform Act 2005, s 1. What now for the "existing constitutional principle of the rule of law"?

writing, the main achievement of the Human Rights Act 1998 has been simply to provide a new head of review to the three already established (illegality, irrationality and procedural impropriety). Indeed it may do no more than simply add to the first of the three heads of liability famously enunciated by Lord Diplock (illegality). Although there is an opportunity to use human rights principles as a restraint on private power, so far that has been done largely in the interests only of the already powerful, who have been able to use the Act to prevent the scrutiny of their private lives.[70] But as no more than a logical extension of the existing powers of judicial review, the HRA has been much less effective and has had much less impact on the powers of government than have the other grounds for judicial review, for any one of a number of reasons about which we might speculate.

Indeed when compared with the approach of the courts in the early days of the modern era of administrative law, the impact of the HRA looks modest if not meagre. We tend to forget that under a Labour government in the late 1970s, the courts used powers from administrative law in judicial review proceedings to undermine key policies in the fields of transport, education and industrial relations.[71] In a decade remembered for the three day week but not the fact that the inequality gap was at its lowest ever before or since in British history, by their intervention the courts also contrived to undermine the very institutions that contributed to that closing of the inequality gap. Trade unions in particular felt the full force of a hostile judiciary wedded to the common law principles that are supposed to have inspired the HRA. But so too did statutory agencies that were thought to get above themselves, including notably ACAS (charged with a statutory duty to promote collective bargaining), and the Commission for Racial Equality (charged with a statutory duty to promote the elimination of racial discrimination, before its abolition and the transfer of its powers to the Equality and Human Rights Commission).[72] In contrast, the HRA has yet to reveal any transformative impact in the other direction.

[70] *See, e.g.*, Associated Newspapers Ltd. v. HRH Prince of Wales, [2006] EWCA (Civ) 1776, [2008] CH. 57 (Eng.)

[71] GRIFFITH, *supra* note 26.

[72] K.D. Ewing, *The Politics of the British Constitution,* 2000 PUB. L. 405.

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The Politics of Convention Rights

The highly politicized nature of the process of adjudication and the ineffectiveness of rights in the hands of British judges in particular is highlighted by the contrasting positions of the British courts and the ECtHR in relation to Art 11 cases. In a dramatic move in 2008, the Grand Chamber of the ECtHR held in *Demir and Baycara v Turkey* that the right to freedom of association (including the right to form and join trade unions for the protection of one's interests) was to be interpreted to include the right to bargain collectively,[73] the ECtHR consciously over-ruling an earlier line of authority to the contrary. Moreover, in a series of subsequent decisions, the protection of the right to bargain collectively was extended to include the right to strike, as logically it had to be, though there is yet to be a decision of the Grand Chamber endorsing this latter development. In reaching this decision, the ECtHR adopted has been referred to as the "integrated" approach to interpretation, whereby it relies on other international treaties for guidance when interpreting Convention rights.[74] In this case, the treaties in question were ILO Convention 98, the European Social Charter, and the EU Charter of Fundamental Rights, which at least in this context the ECtHR took more seriously than did the ECJ less than a year earlier. Nevertheless, by integrating these treaties in this way, the ECtHR has achieved an important measure of socialization of liberal rights.

Cue the British courts, confronted with *Demir and Baycara* and its immediate progeny on the right to strike in 2009. Unlike many of the former social democracies of the EU where trade union rights are constitutionally entrenched,[75] in the United Kingdom we have started from the common law presumption that trade union action is unlawful: A restraint of trade, or a conspiracy to injure; or when engaged in industrial action a violation of the employer's rights by inducing members to break their contracts of employment. In order to overcome the most egregious effects of common law liability, trade unions in the United Kingdom have a measure of legal protection which takes the from of an immunity from legal liability when engaged in certain kinds of trade union action. Partly as a result of the Thatcher—inspired changes since 1979, the immunity is tightly restricted and has been found by the relevant supervisory bodies of the ILO and the Council of Europe to violate ILO Convention 87 and the European Social Charter. When invited to construe some of these restrictions incompatible with Convention rights in light of the findings of the international supervisory bodies and the developments in the Strasbourg court, the response of the Court of Appeal was to subvert the whole point of entrenching certain fundamental values, holding that in this case the rights in question were to be determined by the process from which they were supposed to be protected:

"The present state of the legislation is noteworthy in that it derives from provisions made first under a Conservative Government, but it has been amended twice under a Labour Government; in the respects relevant to this appeal the recent changes have been of important details but they have left the main structure of the legislation intact. It seems to me that this is an interesting example of the practical operation of a Member State within the scope of the margin of appreciation."[76]

[73] Demir v. Turkey, ECHR App. No. 34503/97, 2008 EUR. CT. H.R. On this case, see generally K.D. Ewing & John Hendy Q.C., *The Dramatic Implications of Demir and Baycara*, 39 INDUS. L.J. 2 (2010).

[74] Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, 13 HUM. RTS. L. REV. 529 (2013).

[75] Ewing, *Social Rights and Constitutional Law*, *supra* note 53.

[76] Metrobus Ltd. v. Unite the Union, [2009] EWCA (Civ) 829, [56] (Eng.). *See also* Ruth Dukes, *The Right to Strike Under UK Law: Not Much More Than a Slogan?*, 39 INDUS. L.J. 82 (2010). For a gentle corrective, see Nat'l Union of Rail, Mar. & Transp. Workers v. Serco Ltd. [2011] EWCA (Civ) 226.

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II. Containing the ECHR

The second response of the sceptical legal historian looking back on the modern era is likely to be that it was the ECtHR that offered the only serious legal restraint on the power of government. But the historian who digs deeper may be likely to conclude that this too does not amount to very much. It is true that there have been many cases since the introduction of the HRA in which the Strasbourg court has second-guessed the House of Lords and the SCUK. And it is also true that these were cases in which the government (principally the Home Office) was required to alter rather than abolish policy initiatives, whether it be on the DNA database, or stop and search under anti-terrorism powers. The stop and search powers perhaps provide a good example of this, with the European Court of Human Rights in *Gillan and Quinton* holding that the powers of random stop and search under the Terrorism Act 2000 violated Art 8 of the ECHR.[77] Rejecting the view of the House of Lords (led by apparently our most liberal judge since time immemorial, if not before) that the stop and search powers of the police were trivial (a view similarly adopted in relation to the DNA database), the ECtHR held robustly that the safeguards in domestic law identified at length by Lord Bingham in the House of Lords did not "constitute a real curb on the wide powers afforded to the executive."[78]

But although the stop and search powers were thus held to be a breach of the ECHR, Art 8, the replacement legislation offers only a little by way of improvement, despite the observation by Lord Brown in the House of Lords that the original section 44 "radically . . . departs from our traditional understanding of the limits of police power."[79] True, in contrast to the original provisions of section 44 which allowed an authorization to be made where it was considered "expedient to prevent acts of terrorism", the replacement power provides that an authorization may be invoked only where a senior police officer "reasonably suspects that an act of terrorism will take place," and also that the authorization is "necessary to prevent such an act." It is true too that there are tighter temporal and geographical factors now to be considered in making an authorization, while the replacement power retains an equivalent to the original legislation restricting the power of stop and search to "be exercised only for the purpose of searching for articles of a kind which could be used in connection with terrorism." But so far as Lord Brown's pertinent observation is concerned, it remains the case nevertheless that the 2012 Act retains the power of random stop and search, which was perhaps the greatest departure in

[77] Gillan v. United Kingdom, ECHR App. No. 4158/05, 2010 EUR. CT. H.R.

[78] *See id*., para 79.

[79] R (Gillan & Quinton) v. Metro. Police Comm'r, [2006] UKHL 12 (H.L) [74] (appeal taken from Eng.).

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TA 2000, s 45 "from our traditional understanding of the limits of police power."[80] To the victim of the exercise of this insidious power, it is of little consequence that there are now greater safeguards before the power can be used, especially as these safeguards look only a little less flimsy than those they replaced.

H. Conclusion

Returning to where I started, this exercise has helped to clarify at least my understanding of what is meant by a political constitution. Having started from the assumption that all constitutions are political, it is clear that within this genus of political constitutions there are different species, though there appears to be a lot of interaction between them. There is, however, a species of political constitution within the wider genus of political constitutions in the sense that there is a preference for governments to be held accountable in a political process rather than a legal process. And there is a species of legal constitution within the wider genus of political constitutions in the sense that there is a preference for governments to be held accountable in the courts in accordance with pre-determined legal restraints.

The political constitution as a species of the wider genus of political constitutions is one rooted in core liberal values, though it is also one that is most flexible and adaptable for the implementation of other values, which helps to explain the attraction to the Left of this particular model of political constitutionalism. The main focus of this model is with constitutional procedures: Participation, representation and accountability, and to the extent that it has a legal input the function of the latter is to underpin and give substance to these constitutional procedures. The underlying legal principle is the principle of parliamentary sovereignty, which is no more than a legal principle underpinning the idea of popular sovereignty, whereby the people through their elected representatives and accountable government should be free to determine the rules by which they are governed.

This is not to deny that there are other values also present in a political constitution, with considerations of principle guiding the conduct of governments and legislatures of the kind we saw on display during the discussions about whether the Communist Party should be banned or not. The problem of course is that these principles are rather informal, though it was subsequently the case that compliance with the ECHR was written into the Ministerial Code (then referred to as Questions of Procedure for Ministers), some time before the HRA was passed. It is also the case that when operating these principles, governments tended

[80] *See* Terrorism Act 2000, c. 11, s 47A(5) (amended by the Protection of Freedoms Act, 2012, c. 9, s 61) ("But the power conferred by such an authorisation may be exercised whether or not the constable reasonably suspects that there is such evidence."). *Cf.* Terrorism Act 2000, c. 11, s 45(1)(b) (permitting the power of stop and search to be exercised "whether or not the constable has grounds for suspecting the presence of articles of that kind"), *available at* http://www.legislation.gov.uk/ukpga/2000/11/pdfs/ukpga_20000011_en.pdf.

to work in secret, with the result that the rigor and integrity with which these principles were applied from case to case were never challenged. The balance between liberty and security was, moreover, sheltered from scrutiny by the prerogative.

Nor is it to deny that a political constitution as a species of the wider genus will have a legal element. If the people are to be sovereign, the government must act in accordance with the law made by their Parliament. The law thus has a secondary or residual but nevertheless important role. The legal constitutionalists in contrast appear to favor a more intense role for the law and lawyers, though again I do not understand this to be to the exclusion of political forms of accountability, control and restraint. It is a matter of tilting the balance and reinforcing existing procedures for judicial control of government. The legal constitutionalists offer a competing vision of liberalism in which both the people and their Parliament cease to be sovereign but constrained by a body of pre-determined liberal values mediated by a traditionally conservative institution in the form of the judiciary.

The arrogance of the legal constitutionalists lies in their failure to acknowledge the political nature of the legal constitution: The infusion of law does not remove so much as compound the politics. It simply opens up a new arena of political contestation: The question of who becomes a judge and why certain individuals become judges are political question affecting decisions in individual cases; while the question of what values are to be entrenched by law is a political question, not only in terms of what is excluded (as in the case of social and economic rights) but also in terms of the precise content of those rights which are favored, in order to steer decisions in certain directions. Thus, should we have a nationalistic body of rights entrenching the narrow minded and highly ideological values of the common law, or do we want something that may allow for the infusion of social democratic values?

The final area of political struggle under a legal constitution is the judicial decision itself. The political nature of the process of adjudication hardly needs to be rehearsed, nor do the obvious political implications of the outcomes of that process. The process generally yields conservative outcomes and rarely leads to significant challenges to major areas of government policy in areas where the individual rubs against the State in its mightiest. So the domestic courts were content with the DNA database, the stop and search powers of the police, the swingeing restrictions on the right to strike, the use of house arrest under control orders and immigration powers, and the proposed extradition of a man to stand trial in a regime where there was a real risk that evidence obtained by torture would be used against him. It is far from clear quite why this is worth defending.