

Reshaping Constitutionalism

*Murray Hunt**

Introduction

Traditional ideas of constitutionalism in the UK have been shaped and constrained by the concept and language of parliamentary sovereignty. This essay seeks to contribute to the debate about the need for a radically reshaped notion of constitutionalism which distances itself from the doctrine of sovereignty and which reflects the changing nature and locus of power in the modern polity. In so doing, it takes as its starting point the powerful critique of orthodox constitutional thinking put forward by Morison and Livingstone in their 1995 book, *Reshaping Public Power*.¹ The central theme of this work was that even those interested in reforming the constitution had failed to appreciate the fundamental nature of the changes which had been taking place: the emergence of new forms of international and supranational legal order, the leakage of public power to new and diffuse sites, and the extent to which power formerly exercised by the State was now in the hands of private entities regulated only by the contractual terms on which they happened to be engaged. The challenge thrown down for public law scholarship was that, to revive democratic and constitutional values, it was now necessary to move beyond the traditional narrow focus on curbing a domestic executive by traditional parliamentary mechanisms, and to undertake a more radical rethinking of constitutional premises. This essay aims to offer a partial snapshot of how well our public law has responded to this challenge.

The essay is in four parts. First, it argues that the very concept of 'sovereignty' has continued to be the biggest obstacle to any reshaping of our notions of constitutionalism. Secondly, it considers the concept of a 'culture of justification' as an alternative to sovereignty as an organizing concept in contemporary discussions

* The views expressed in this essay are personal to the author and do not purport to represent the views of any other person or institution.

¹ John Morison and Stephen Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (1995).

about constitutionalism, and what progress has been made towards such a culture of justification in the UK in the last few years, in particular since the coming into force of the Human Rights Act (HRA) in 2000. Thirdly, it considers what role can be played by Parliament's Joint Committee on Human Rights (JCHR) in that shift. Finally, it briefly considers what should be the role of parliamentary debates about fundamental rights in a culture of justification.

The 'Sovereignty' Problem

In my view it has been the very idea of 'sovereignty' which has been the central obstacle to progress towards the radical reshaping of constitutionalism envisaged in Morison and Livingstone's work. English lawyers have shown a persistent weakness for the alluring idea of 'sovereignty' as a foundational concept. The conceptual neatness of sovereignty-derived thinking too readily seduces us into a conceptualization of public law in terms of competing supremacies, which in fact bears little relation to the way in which public power is now dispersed and shared between several layers of constitutional actors, all of which profess an identical commitment to a set of values which can loosely be termed democratic constitutionalism. The very language of our constitutional discourse therefore permits the co-existence of what should be the radically opposed narratives of democratic positivism (rooted in the sovereignty of Parliament) and liberal constitutionalism (rooted in the sovereignty of the individual and the courts' task in protecting that sphere).

A review of both the literature and of court judgments concerning the HRA reveals a mixture of utterances from a democratic positivist's perspective on the one hand, with its formalistic notion of the separation of powers and romantic attachment to the idea of parliamentary sovereignty, and a liberal constitutionalist's perspective on the other, with its equally romantic judicial supremacism about the priority of individual rights and the sovereignty of the courts as their ultimate guardian. From the democratic positivist's perspective, Parliament remains the supreme law-giver in our constitutional arrangements and is therefore the final arbiter of the meaning of Convention rights, and can exercise its sovereignty by defining what those rights mean in particular contexts.² For the democratic positivist it is only an expression of the same foundational premise that in this legal universe Parliament can also delegate to executive and administrative decision-makers a zone of decision-making which is beyond the reach of judicial review because it is within some irreducible core of discretionary judgment. From

² See eg K. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) MLR 79; J.A.G. Griffith, 'The Common Law and the Political Constitution' (2001) LQR 43.

the liberal constitutionalist's perspective, on the other hand, the courts are the final arbiter of whether a Convention right has been or is being violated, as they are the guardians of the area of inviolability into which public authorities cannot step, and there is therefore no room for judicial deference to democratic decision-makers, including Parliament.³

More interesting by far, however, than the existence of this spectrum of views is the fact that, despite their radically different theoretical underpinnings, the two views are often espoused by the same judge or commentator, depending on the issue they are addressing or whether they are seeking to justify judicial interference or abstention in a particular case. Many examples could be cited, but for present purposes it suffices to contrast Lord Hoffmann's invocation of liberal constitutionalism in his robust defence of the sovereign role of the courts in defending the individual's personal sovereignty against invasion by the majority,⁴ and his invocation of, amongst other things, democratic positivism as a justification for treating as non-justiciable by the courts certain decisions 'entrusted by Parliament' to executive or administrative decision-makers.⁵ Although Jowell does not agree with Lord Hoffmann's view that courts should defer on democratic grounds to the legislature on matters of public policy, the reliance on both democratic positivism and liberal constitutionalism is also evident in his account, in which the courts' constitutional role is said to be derived not from the very nature of democracy itself but from an exercise of Parliament's sovereign will in enacting the Human Rights Act.⁶

This is the contemporary manifestation of our Diceyan inheritance: a constitutional discourse which selectively invokes democratic positivism and liberal constitutionalism in order to justify or explain a particular decision, but which lacks an overarching coherent vision of democratic constitutionalism in which the apparent contradiction of these foundational commitments is explicitly confronted and an attempt made to reconcile them without resort to the language of sovereignty. So long as we are dependent on crude notions of sovereignty and authority for our underlying conceptions of law and legality, our public law will remain condemned to this perpetual lurching between democratic positivism and liberal constitutionalism.

³ See eg R. Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' (2001) EHRLR 504; I. Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' (2002) PL 265.

⁴ See eg *R v Secretary of State for the Home Dept., ex p. Simms and O'Brien* [2000] 2 AC 115; 'The Separation of Powers' (2002) JR 137, paras 12, 13 and 17.

⁵ See eg *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2001] 3 WLR 877; *Alconbury Developments Ltd. v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389; 'The Separation of Powers', n 5 above, paras 9–11.

⁶ Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' (2000) PL 672.

A 'Culture of Justification'

It is clear that both the Government and Parliament in 1998 intended the HRA to bring about change of the order of a cultural transformation. But what type of 'human rights culture' did the HRA envisage?

The HRA is an experiment in combining both judicial and legislative models of rights protection, aiming to escape the confines of either legislative supremacy on the one hand or judicial supremacy on the other. One of the most important features of the HRA is that it begins from the premise that in today's conditions both the courts and the political branches share a commitment both to representative democracy and to certain rights, freedoms and basic values, including those which are enshrined in the ECHR. The important role accorded to Parliament in the scheme of the Act is an important feature of the Government's chosen model for giving effective protection to Convention rights and is a significant indicator of the type of human rights culture which the Act contemplates.

The Act therefore has the potential to be the foundation for a more coherent vision of constitutionalism, one which combines an important role for courts in articulating and furthering the fundamental values to which society is committed at the same time as giving a meaningful role to the democratic branches and the administration in the definition and furtherance of those values. Obviously, change of the order of a cultural shift can only take place over time. What signs are there that the Act has begun to bring about such a shift?

In my view probably the greatest success which can be claimed for the HRA is the enormous progress which has been made towards what I will describe (following David Dyzenhaus) as a 'culture of justification'—a legal culture in which all exercises of power which impinge upon fundamental rights, interests or values require public justification by reference to reasons, that is, rational explanations for why a particular action or decision has been taken, or why there has been an omission to act. The HRA has the potential to accelerate a long overdue reconfiguration of our public law around this important concept of justification, reconceiving our conceptions of law and legality away from formalistic concepts such as the historic will of Parliament, the separation of powers and *ultra vires* towards more substantive concepts of value and reason.⁷ Such a shift could equally well be described as the embrace of an attitude of 'constitutionalism'—or what Lord Steyn has described as 'our country becoming a true constitutional state'.

The first important step towards such a culture of justification was taken by the House of Lords in *Daly*.⁸ Superficially, the decision in *Daly* merely established the

⁷ See the work of David Dyzenhaus, and in particular his efforts to build on Etienne Mureinik's conception of legality as 'a culture of justification': see eg Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 SAJHR 11.

⁸ *Daly v Secretary of State for the Home Department* [2001] 2 WLR 1622.

relatively unremarkable proposition that under the HRA courts reviewing the legality of executive or administrative interferences with Convention rights must apply a proportionality test and not the traditional, deferential *Wednesbury* approach or even the more recent higher intensity 'anxious scrutiny'. This was unremarkable because so much had been obvious since the decision of the European Court of Human Rights in *Smith and Grady v UK*,⁹ holding that the inadequacy of judicial review for the purposes of determining the applicants' Article 8 claim in *Smith v MOD*¹⁰ was in breach of the right to an effective remedy under Article 13 ECHR. But the real insights in *Daly*, I would argue, are twofold and are crucially interrelated.

First, Lord Steyn explicitly recognized that, although applying the proportionality approach may only make a difference to the outcome in a handful of cases, it will not be possible to identify those cases unless the approach itself is properly applied. It is therefore crucial to the effective protection of Convention rights that the highly structured proportionality approach is properly understood and applied by both decision-makers and reviewing courts wherever Convention rights are in play.¹¹ The real point is, as Lord Steyn makes clear, that proportionality is not so much a 'test' or a 'standard' as a new type of approach to adjudication which subjects the justification for decisions to rigorous scrutiny in order to determine their legality. Understood in this way, *Daly* is a major landmark on the road to the development of a true 'culture of justification'.

The second insight in *Daly* is in the crucial observation that there is nevertheless still a difference between a proportionality approach and a full 'merits review'. This is of the utmost significance, because it preserves the very basis on which the legitimacy of both constitutional and administrative review depend in a democratic state: the recognition by judges that on judicial review they do not have primary responsibility, but a secondary responsibility to ensure that the primary decision-maker has acted in accordance with the requirements of legality.¹² *Daly* delivers this crucial insight, but leaves entirely open the question of how it should be worked out in practice. Public law's big task for the next few years will be how to give practical effect to this second insight in *Daly*, in a way which does not forfeit the first.

There is, in my view, one other towering landmark in this progress towards a culture of justification: the House of Lords decision in the derogation case.¹³ The House of Lords held, by a majority of 8:1, that the UK's derogation from the right to liberty in Article 5 ECHR, and the power in section 23 of the Anti-terrorism

⁹ (2000) 29 EHRR 493. ¹⁰ [1996] QB 517.

¹¹ Para. 28: 'It is therefore important that cases involving Convention rights must be analysed in the correct way'.

¹² See Dyzenhaus, n 8 above, 24–25 for a salutary reminder, from a South African perspective, that an instrumentalist approach to the justification for judicial review (contingent on whether the legislature or executive are good or bad at a particular point in time) will lead to inconsistency on this point.

¹³ *A v Secretary of State for the Home Department* [2005] 2 WLR 87.

Crime and Security Act 2001 to detain without trial foreign nationals who were suspected international terrorists, were incompatible with the Convention. It upheld the Government's claim that there is a 'public emergency threatening the life of the nation',¹⁴ but held that the indefinite detention without trial of foreign nationals who were suspected international terrorists was not justified for two reasons. First, the measures were not 'strictly required by the exigencies of the situation', as required by Article 15(1) ECHR—they were disproportionate because they restricted the right to personal liberty more than was necessary to achieve the legislative objective of protecting security. Secondly, the measures were discriminatory because they only permitted detention of suspected international terrorists who are foreign nationals.¹⁵

The great significance of the case for present purposes lies in the majority's response to the Government's argument that the courts had no business judicially reviewing its anti-terrorism measures. The Attorney-General argued that as it was for Parliament and the Executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public; these were matters of a political character calling for an exercise of political and not judicial judgment; and it was not for the courts to usurp authority properly belonging elsewhere. Had that argument succeeded, it would have struck a serious blow to the development of a culture of justification. But it was roundly rejected by the majority. Lord Bingham did not accept the distinction drawn between democratic institutions and the courts. But most significantly of all, he did not invoke the HRA as being the source of the court's authority to review the legality of the measures. Rather, he relied on the very nature of democracy itself. He said:

'... the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.'

This response was therefore impeccable in its articulation of a non-sovereignty-derived justification for the legitimacy of the judicial role in testing the justification offered for a measure with a drastic impact on individual liberty.

Only a few years ago it would have been unthinkable that courts would subject the Government's response to a threat to national security to such a rigorous process of public justification. Although in my view (and it appears Lord Bingham's) the jurisdiction to do so does not derive from the HRA, let us be in no doubt that the

¹⁴ By 8 votes to 1, Lord Hoffmann holding that the threat of serious terrorist outrages did not constitute a threat 'to the life of the nation'.

¹⁵ It is important to note that, although disproportionality and discrimination were distinct grounds on which the House of Lords found the derogation to be incompatible with the Convention, the different treatment of British nationals was treated by the House of Lords as one of the indicators of disproportionality—the fact that British nationals who were suspected international terrorists could not be detained suggested that indefinite detention without trial was not strictly required in order to meet the threat of terrorism.

Act has accelerated the arrival of the day when our highest court feels sufficiently confident in its own legitimacy to take this important step towards a proper culture of justification.

The Role of the JCHR in Bringing about a Culture of Justification

Parliament's Joint Committee on Human Rights has a potentially important role to play in bringing about the desired transformation to a culture of justification.

As part of its work, the JCHR examines every Government Bill presented to Parliament. As is well known, the HRA requires Ministers to certify to Parliament in respect of every Government Bill they introduce that they are satisfied that its provisions are compatible with the Convention rights. There was widespread disappointment at the time of the Act's passage that this provision did not go further and require Ministers to give their reasons for their view that the Bill is compatible with Convention rights. This was compounded when, to begin with, the standard form certificate of compatibility was accompanied in the Explanatory Notes to a Bill by a formulaic statement that the Minister had considered the implications for Convention rights and signed a statement of compatibility.

In practice, the JCHR has succeeded in going behind section 19 statements of compatibility in two ways. First, by asking carefully targeted questions of the Minister as to the reasons why a particular measure is considered to be compatible. Secondly, by persuading the Government to issue guidance to departments encouraging much fuller disclosure of views about Convention compatibility in the Explanatory Notes which accompany a Bill. But what evidence is there that the JCHR's legislative scrutiny work has made any contribution to the realization of a culture of justification?

Government departments do sometimes accept that there is a human rights compatibility problem when they respond to a letter from the Chair of the Committee about a Bill. This usually results in an undertaking to introduce an amendment to the Bill or, more frequently, to introduce further procedural safeguards in regulations, codes of practice or other guidance which the Bill in questions empowers the Minister to make. Occasionally amendments have been introduced to Bills as a direct result of questioning from the JCHR or criticism in its reports.

But measuring the success of the JCHR in helping to bring about a culture of justification by reference to concrete examples of Government measures having been dropped or amended would be too narrow. Two other, less tangible, criteria are surely relevant to judging the impact of the JCHR's work. First, to what extent has its work influenced the policy-making process within Government departments, thereby preventing measures being brought forward which raise serious compatibility issues? Secondly, to what extent has the work of the JCHR succeeded

in flushing into the open the justifications relied on by the Government for interfering with human rights, thereby improving the quality of parliamentary debate of measures which engage human rights, and taking an important step towards the culture of public justification on which the effective protection of human rights ultimately depends?

On both these scores the evidence suggests that the JCHR has already made a significant impact on the greater protection of human rights. On the first measure, David Feldman, writing recently in the *Statute Law Review*, argues that Government departments are now more sensitive to human rights standards than they were previously, and that as a result the number of legislative measures raising significant issues of compatibility with human rights has reduced.¹⁶ On the second, it is certainly the case that the JCHR's reports are increasingly referred to in parliamentary debates on Bills, and there is now an expectation that the Government should respond to criticisms by the JCHR and that the response should be available to Parliament when it is debating the Bill. There are some signs that more members are now prepared to take up human rights compatibility questions, with the assistance of JCHR reports, and less deterred by the misconception that human rights compatibility is a highly technical legal question on which only lawyers can speak with authority.

But one of the real constraints on the contribution so far made by the JCHR towards a culture of justification has been the very limited extent to which its reports are used in the course of litigation concerning the human rights compatibility of legislation on which it has reported, or of executive or administrative action taken under such legislation. It remains the case that reports of the JCHR are only rarely referred to in cases in the higher courts. Greater use of JCHR reports by both lawyers and judges, where relevant to compatibility issues, could make a significant contribution towards a culture of justification. It is not that the views of the Committee necessarily have any great claim to deference from the courts, although as the product of careful deliberation amongst a group of parliamentarians with extensive experience and expertise in human rights those are certainly worthy of *some* respect. But the reports and their appendices contain an extensive record of the Government's public justifications for interferences with Convention rights, as well as a human rights analysis of the adequacy of those justifications. This is material that might well be of use when courts are determining compatibility questions.

However, this raises a tricky question for those who would advocate reshaping constitutionalism around the notion of a culture of justification: what is the relationship between judicial and legislative scrutiny of the human rights compatibility of legislation in such a culture of justification?

¹⁶ David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 *Statute Law Review* 91.

The Role of Parliamentary Debates in a Culture of Justification

Should a court which is considering the human rights compatibility of legislation regard reports of scrutiny committees and subsequent parliamentary debates about compatibility as being of any legal relevance to the issues it has to determine? In particular, are such debates and reports relevant to the question of whether the court should defer to the judgment of the legislature, and if so, how? In my view, parliamentary materials such as Committee Reports and parliamentary debates about compatibility must be relevant to courts when they are assessing the human rights compatibility of legislative measures.

The issue was considered by the House of Lords in *Wilson*.¹⁷ It held that when determining the ECHR compatibility of legislation it would be permissible for a court to have regard to matters stated in Parliament, as recorded in Hansard, as a source of background information to enable the court, for example, to understand the nature and extent of the social problem at which the legislation is aimed. However, such legitimate reference to parliamentary materials was to be distinguished from reference to such debates in order to ascertain the reasons which led Parliament to enact a particular statutory provision. Lord Nicholls said:

‘Beyond this use of Hansard as a source of background information, the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made *ex tempore* in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which ‘counts against’ the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister’s exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute.’¹⁸

To a human rights lawyer, this has an air of unreality about it. Much human rights adjudication is about evaluating in a principled way the cogency of the

¹⁷ *Wilson v First County Trust Ltd. (No. 2)* [2003] UKHL 40.

¹⁸ *ibid.*, para 67.

justifications offered for interfering with rights. The ECHR frequently considers the quality of the reasoning relied on in support of a legislative measure when deciding compatibility questions. In *Hirst v UK*, for example, the ECHR considered the compatibility of the UK's blanket disenfranchisement of convicted prisoners with the right to vote guaranteed by Article 3 of Protocol 1 ECHR.¹⁹ The UK Government argued that a wide margin of appreciation was to be allowed to Contracting States in determining the conditions under which the right to vote was exercised, and that the policy of a blanket ban on convicted prisoners had been adhered to over many years with the explicit approval of Parliament. The Court rejected this argument:

'As to the weight to be attached to the position adopted by the legislature . . . in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.'²⁰

In my view the approach of the Court in *Hirst* is to be preferred to the approach of the House of Lords in *Wilson*. In a culture of justification, Parliament should be required to earn judicial deference from the courts on human rights questions, by demonstrating the quality of its reasoned judgments on compatibility, not entitled to expect it by virtue of its sovereign position in the constitution. But courts, for their part, must entertain the possibility of giving due deference to Parliament's legislative decision because of the quality of those reasons.

Conclusion

That brings me to consider briefly why all this matters. What harm is there in conducting our constitutional discourse in the apparently respectful language of competing sovereignties? Three examples of why it matters should suffice. The first was the proposal to oust the jurisdiction of the higher courts in asylum and immigration matters brought forward by the Government in 2003. The second was the proposal to legislate to require judges to follow the approach of the minority in the ECHR in *Chahal v UK*, which presupposes a willingness to deport on grounds of national security even where there is a real risk of torture. The third is the current suggestion that the HRA may need amending to make clear that public safety is the paramount consideration and trumps any reliance on human rights.

¹⁹ Application no. 74025/01 (judgment of 6 October 2005).

²⁰ *ibid*, para 79.

Would such proposals ever have been brought forward by the Government in any version of constitutionalism worthy of the name? By continuing to use the language of parliamentary sovereignty and the entire doctrinal edifice constructed upon it, the courts encourage the Government, and to some extent Parliament also, to believe that fundamentals such as access to court, or the prohibition on deportation to torture, are in their gift, and that judges can be required by legislation to act incompatibly with fundamental values. In this way we condemn ourselves to repeated constitutional crises and unnecessary confrontations between the courts and the political branches.

I have argued in this essay that the considerable progress which has been made towards a culture of justification in this country in the last five years is a genuine cause for celebration. However, I have also argued that the deeper lesson of the operation of the HRA in practice is that our constitutional and administrative law is built on inherently unstable foundations which condemn it to lurch perpetually between parliamentary supremacy on the one hand and judicial supremacy on the other. The reshaping of our received ideas of constitutionalism is blighted in particular by the continuing grip of the idea of 'sovereignty'. The very idea of sovereignty, I have argued, is inimical to true constitutionalism. The achievement of a reshaped constitutionalism of the kind envisaged in the work of Morison and Livingstone requires reconfiguring our public law around the concept of public justification, and away from sovereignty and all its related doctrines. The price to pay for not doing this is to condemn ourselves to repeated constitutional crises such as that over the ouster clause in recent years, and currently being witnessed in the arguments about deportation to torture. Finally, I have argued that the JCHR, although inescapably a piece of Westminster constitutional machinery, nevertheless has a potentially important role in this reconfiguration. For this role to be fully realized, however, courts must overcome their traditional reticence about evaluating the quality of the reasoning advanced in support of legislation, and make more use of the Committee's reports when determining the human rights compatibility of legislation on which it has reported, or of executive or administrative action taken under such legislation.

