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Defending the Scotland Act 1998 as a ‘third way’ Bill of Rights

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This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree

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Abstract

This thesis seeks to defend the claim that the Scotland Act 1998 operates as a 'third way' Bill of Rights. It argues that 'third way' theory is a useful lens through which to view rights-protection because it emphasises the importance of different governmental branches having a role in the protection of human rights and it highlights how rights can be protected in better and more democratically-legitimate manner when these institutions interact.

The claim that the Scotland Act 1998 adopts the 'third way' model might be seen as controversial because unlike 'core' 'third way' Bills of Rights, the Act does not include a parliamentary override. However, by critically analysing 'third way' theory and assessing the design and operation of 'core' 'third way' Bills, the paper demonstrates that not all 'third way' accounts view the existence of a parliamentary override to be essential to the model and that, relatedly, there is little evidence of parliamentary overrides being used to facilitate dialogue in practice.

It develops an account of the 'third way' model that merges the 'legislative rights review' associated with Hiebert with Young's 'democratic dialogue'. The Scotland Act 1998 is in conformity with this account because it includes numerous provisions that engender legislative rights review and because a combination a judicial deference and provisions in the Scotland Act that encourage remedial deference allow the legislature and the court to work together to protect rights.

Analysis of the operation of Scotland's model shows that the judicial perspective risks being over-prioritised to the detriment of the legislative perspective. This could lead to Scotland's model becoming unbalanced. Parliament is in a particularly weak position to fulfil its institutional role under the model. Despite this, opportunities for democratic actors to contribute to the settling of rights-questions remain and these opportunities can be made greater with reform.

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Chapter One: Introduction

The question of which branch of government is institutionally best placed to protect human rights has been subject to much debate in constitutional scholarship. This debate has traditionally been conducted through the binary of political and legal constitutionalism. On one side, political constitutionalists argue that politics and the political process is the best and most legitimate means by which the rights and interests of individuals in a society can be determined and ordered. Its proponents therefore advocate for a system of legislative supremacy – where legislatures have the ultimate legal authority to determine how rights should be protected. On the other, for various reasons legal constitutionalists argue that the judiciary is uniquely placed to ensure that the fundamental rights of individuals and of minorities are protected from majoritarian forces. Proponents of legal constitutionalism therefore advocate that the judiciary should be constitutionally empowered to set-aside legislation that unlawfully interferes with fundamental rights.

However, this zero-sum, oppositional approach to rights protection has been challenged by the emergence of a new 'third way' constellation of rights documents that aim to emphasise the role of all branches of government in the protection of human rights. Under such documents, the executive, comprised of politicians that command support of a plurality of voters and which is primarily responsible for initiating legislation, is required to consider the potential effect of its policy proposals on rights before introducing legislation into parliament. Parliamentarians, in turn, are encouraged to use their authority as directly elected representatives to ensure that the legislation is scrutinised on the basis of the rights and interests of voters, including those voters not represented in government. Finally, courts provide a further channel by which citizens are able to challenge governmental action on the basis that it fails to take proper account of their fundamental rights. The judiciary is required to use its institutional capacities, for example its independence from the political process and its technical expertise in interpreting the law, to make an independent judgment as to whether the legislation respects the rights of the citizen as set out in the state's Bill of Rights. If it considers that the legislation does not sufficiently respect the citizen's rights, it is empowered by the Bill to declare so, without having the final say on whether the legislation remains in force. It is argued that if each branch of government fulfils its imagined role under this theory, then the fundamental rights of citizens are likely to be protected in a stronger and more legitimate manner than is possible under accounts of political or legal constitutionalism.

Some scholars have termed this new model of rights protection 'constitutional' or 'democratic' 'dialogue'. Others have questioned whether this metaphor is appropriate. Originally coined in relation to the Canadian Charter of Rights and Freedoms 1982, the metaphor of dialogue has also been used extensively in academic discussion of the United Kingdom's Human Rights Act 1998 (HRA) as well as statutory Bills of Rights in New Zealand and Australia.[1] Alongside descriptive accounts of these new Bills of Rights, there has been a bourgeoning academic literature that has aimed to advance a normative case for the 'third way' model including by setting out 'ideal types' of the model working in practice. On the other hand, there exists a large amount of literature that criticises the 'third way' model both as a normative account of constitutionalism and as unreflective of practice in the states that have adopted this model.

Despite having several similarities to the manner in which the Human Rights Act 1998 protects 'Convention rights', there has never been a comprehensive attempt to reflect on whether Scotland's devolved model of rights protection in the Scotland Act 1998 can be considered alongside this 'third way' family of rights documents. This is partly a result of the fact that under the Scottish model, senior Scottish courts are empowered to set-aside legislation that they deem to be incompatible with Convention rights. This 'strong' form of judicial review is considered by some 'third way' scholars to be incompatible with their account of the model under which legislatures are empowered to override judicially interpreted rights by ordinary majority vote. Despite this, not all 'third way' scholars consider that the existence of strong-form review is fatal for ensuring that underlying aims of 'third way' theory are fulfilled. It has been argued that if courts generally refrain from exercising their powers of review when faced with contestable or watershed rights-questions through the doctrine of due deference, then, particularly where other 'third way' features are present, a state with strong-form review can still belong to the family of states with 'third way' bills of rights.

The purpose of this thesis is to fill the gap in the existing literature by questioning in detail the extent to which the Scottish model of rights protection can be considered belong to the broader family of rights documents that adopt 'third way' features. This is a worthwhile exercise because insights that scholars have made about 'third way' bills of rights give us a more nuanced set of analytical tools to evaluate the appropriate relationship between the different branches of government in the protection of rights than the traditional bipolar categories. Characterising the Scottish model of rights protection as straightforwardly an example of legal

[1]The New Zealand Bill of Rights Act 1990 (NZBORA), Australian Capital Territory Human Rights Act 2004, Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter)

constitutionalism because it empowers courts to set-aside legislation on Convention rights-grounds obscures the provisions in the Scotland Act 1998 that explicitly foresee a role for the executive and parliament in contributing to the resolution of rights-questions. These provisions give the Scottish Government and to a lesser extent the Parliament considerably greater control over how Convention rights are protected in practice than would be the case if they did not exist. Further, exclusive focus on the judicial override in Scotland overlooks a constitutional culture where the courts have been reluctant to use this power as well as provisions in the Scotland Act which encourage courts to defer to legislators when remedying rights incompatible legislation.

At the same time, the functioning of these provisions are undoubtedly shaped by the existence of strong-form review. It means that certain institutional behaviours that are open to legislators in states without a judicial-set-aside, for example re-enacting legislation notwithstanding a judicial finding of incompatibility with rights, are not open to Scottish legislators. The existence of strong-form review can also bleed into expectations about the appropriate role of the different branches of government in relation to the protection of rights. If members of the government and parliamentarians consider that courts are the sole authority on determining the meaning of rights – they are more likely to conceive of their contribution to rights-scrutiny as nothing more than ensuring that legislation does not fall foul of judicially-interpreted rights. This runs contrary to the aims of 'third way' scholars who believe that executive and parliamentary scrutiny of legislation on rights-grounds should contribute something *more* to rights-protection.

Assessment of practice in states that have retained parliamentary supremacy will demonstrate that practice in these states does not deviate much from Scotland in this regard. Further, although expectations that 'third way' features would lead to an open debate amongst the different branches of government and wider society about the appropriate relationship between rights and legislation have not come to pass, there is proof in Scotland and elsewhere that democratically elected officials are able to contribute to the resolution of rights-questions in other, more subtle, ways. However, the risk that Bills of Rights with nominally 'third way' features but which place too much stock in how courts resolve rights-questions will collapse into strong-form review remains. This thesis will argue that these risks are not inevitable and will demonstrate the means by which a unique executive/parliamentary voice on rights can be retained.

Argument outline

This introduction aims to put the thesis argument in context, by setting out the traditional debate between legal and political constitutionalists and explaining how 'third way' theorists seek to overcome it. It will consider the main constitutional features that 'third way' scholars have suggested the new model comprises of and consider the normative case(s) for different conceptions of the model. Criticism of 'third way' theory will be briefly considered before I introduce the question of whether the Scotland Act 1998 can considered to fall within in the broad family of rights-documents that possess 'third way' features. I will argue that an account of 'third way' constitutionalism which merges the 'legislative rights review' associated with Janet Hiebert and 'democratic dialogue' achieved through the alternative route of judicial deference is consistent with the model of rights protection in Scotland.

In the forthcoming chapters I will aim to give further detail to this argument. In chapter two, there will be a focus and assessment of the constitutional structure and practice of rights protection in Canada, New Zealand, the UK, Victoria and the ACT. Building on arguments made in the introduction, it will be argued that practice in these states diverges widely depending on the design of the document and how the Bill interacts with broader constitutional features. Indeed, these other features can have as an important role in determining the operation of the Bills of Rights than the existence of particular 'structural' features. This conclusion will lead to the introduction to the Scotland Act 1998 as a potential 'third way' Bill of Rights in part one of chapter three.

Part two of chapter three will consider the functioning of the structural features of the Scotland Act which aim to enhance the role of executive and parliamentary actors in advancing and scrutinising legislation on the basis of rights. It will argue that these features have led to serious engagement with rights on behalf of executive and bureaucratic actors. However, the seriousness with which parliamentarians engage with rights-issues is determined to a greater extent by other non-structural factors such as evidence given to parliamentary committees. Additionally, partly as a result of the existence of strong-form review, thus far the approach to rights-questions by political actors has been closely tied to judicial determinations on rights-questions. Executive pre-enactment rights-review is very much a bureaucratic process where Ministers will drop proposals if legal advisers/government officials consider that they are likely to be found by the courts to be incompatible with Convention rights. Likewise, for the most part, parliamentarians have not considered their role in rights-scrutiny as challenging judicial

formulations of rights. Although this tendency can also be seen in some 'third way' states that have adopted weak-form review, it will be argued that this practice removes a key normative benefit of the 'third way' model. As shall be seen, one of the claimed normative benefits of the 'third way' model is that it takes the best elements of legal and political constitutionalism to create a form of rights protection that is both more protective of rights and more democratically legitimate. The proper functioning of the model requires that political actors use their institutional competences and democratic legitimacy to make a distinct contribution to the resolution of rights-questions. Where political actors are failing to make this contribution, as a result of deference to legal actors, then a key normative model is lost and the form of rights protection is skewed too much in favour of judicially-protected rights. It will be argued that – although this practice can be observed in Scotland and is perhaps encouraged by the existence of strong-form review – it is not inevitable. The nature of the Convention rights and certain principles of interpretation used by the European Court of Human Rights (and the courts passing these doctrines onto parliament at the domestic level) means there is more room for manoeuvre to determine the resolution of rights-questions than many legislators realise. Further, the Scottish Parliament's broader duty in relation to human rights means that, if it communicates its policy proposals in line with a broader range of rights than it is required to abide by under s.29(2)(d), courts may be less likely to find that it's proposals are unlawful. As discussed in the case studies in the final chapter, there are some suggestions that the Scottish Government is beginning to follow this approach.

Part three of chapter three will then consider the operation of the features in the Scotland Act that are said to grant the judiciary an increased role in relation to the protection of Convention rights, whilst at the same time leaving some room for rights-determination by democratically representative institutions. It will be argued that alongside certain structural features that ensure that maximum respect is granted to democratic decision makers, the judiciary's conservative use of their powers of strong-form review so far has meant that the existence of strong-form review has, subject to a few exceptions, not limited the ability of the government of the day to pass legislation in areas of its choosing. Admittedly, the form of protection adopted in Scotland loses some of the key benefits of the 'third way' model proposed by some 'third way' scholars, particularly those that favour a contestatory form of constitutional dialogue, because there is less opportunity for open disagreement between the courts and parliament on rights-issues – which can engender a societal discussion about the boundaries of rights. However, if one of the key elements of the 'third way' model is the protection of rights in a manner that gives

proper respect to democratic decision-making, I argue that this can be observed in the Scottish model in practice.

In the final chapter, two instances where the courts have used their power to strike down legislation on Convention rights-grounds[2] will be considered in detail. By looking at the legislation throughout its lifespan, from the Bill's formulation and passage through the legislative process, to the judicial finding of incompatibility and finally to the legislature's response to the strike down, it will be possible to see at a granular level how the Scottish model of rights protection works in practice. Linking back to some of the claims of 'third way' theorists, it will be argued that both examples demonstrate that some aspects of the model are working as intended but that again the fact of judicial supremacy colours the contributions of the different actors and removes a key normative benefit of the model – that political actors are empowered to bring their distinct institutional insights into the protection of rights, including on the balancing and content of rights. That said, it will be cautioned that the two examples, by their nature as two of the small number of examples where legislation has been struck down by the courts, are likely to skew the picture overall. Further, as already mentioned, longer term legislative responses to these examples suggest a potential new approach by legislators where potential interferences with Convention rights are explicitly justified in broader rights language in the hope that this is taken into account by the courts if the legislation is challenged. If the courts accept this new approach, then the equilibrium between the courts and parliament in the resolution of rights-question might be more appropriately balanced.

My application of 'third way' theory to the Scotland Act 1998 will contribute to the existing literature in two ways. Firstly, I believe that viewing Scotland's constitutional design and practice through the prism of 'third way' theory will allow us to view the current equilibrium of political and legal controls in Scotland and to reflect on whether it is appropriately balanced. Such an enterprise is worthwhile because, if it is found that the current equilibrium is unbalanced, this may have some long-term effects for the legitimacy of the model of rights protection in Scotland. The second proposed original contribution to knowledge is that by providing a detailed account of the Scottish model working in practice, more evidence might be added as to the nature and operation of 'third way' bills of rights. What effect does strong-form review have on the operation of structural features that are designed to encourage executive and legislative ownership of rights? Does the existence of strong-form review

[2] *Salvesen v Riddell* [2013] UKSC 22; *Christian Institute v Lord Advocate* [2016] UKSC 51

inevitably lead to a decreased legislative role? Or is it possible for democratic actors to contribute to the settling of rights-questions *despite* the existence of strong-form review? It is hoped that this thesis will help to answer these questions.

Background: Beyond the legal v political constitution debate

Contention around which governmental institution is best placed to determine the nature and scope of constitutional or statutory rights stems from the fact that such rights are drafted in vague, open-textured language. This means that, although there is often (but not always) consensus that such rights should exist, there is considerable debate over how they should operate in practice. Depending on their theoretical standpoint, scholars have tended to claim that either courts or parliament are best placed to decide how rights should be determined when reasonable disagreements arise.

Political constitutionalists

Broadly conceived, political constitutionalists argue that politics and the political process is a better forum for advancing rights and resolving rights-issues than legal institutions. There are numerous accounts of political constitutionalism and each account advances a different argument. However, two important tendencies of the tradition as they relate to the role of political institutions in the protection of rights will be sketched out here. The first is the empowering of the democratically-elected branches of government to enact policies that enjoy popular support. The second is a defence of parliament - as a body that is both able to substantively protect rights and able to do so in a manner that commands political legitimacy. As a result, both of these tendencies argue against empowering the judiciary to set-aside legislation on the basis of fundamental rights – either derived from the common law or contained in a constitutional bill of rights.

Empowering political branches

An important early proponent of political constitutionalism, and from whose article the term derives, was JAG Griffith. Griffith sought to launch a defence of the United Kingdom's constitution and its system of supreme parliamentary government from those that wished to limit its power through law.[3] He considered that the reality of politics is that there is permanent, universal and inevitable conflict about how society should be ordered. In any society comprised of people with rights, interests and principles, held both individually and collectively, there

[3] Griffith, J.A.G. (1979). 'The Political Constitution' *MLR Vol 42(1)* pp1-21

will be multiple, inevitable conflicts with others who also hold these rights, interests and principles. These conflicts are continuous and will never be permanently settled.[4] Despite this, it is necessary for some of these conflicts to be temporarily settled in order that society can agree on a common plan of action. The ordinary political process, through democratic elections and majority vote by representative institutions is the most legitimate forum for temporarily settling these conflicts.[5] However, crucially, because these conflicts are never permanently settled, the democratic nature of decision-making means that they can be later settled in an alternative manner if the majority considers that it is more appropriate.

For these reasons, Griffith considered that the British constitution should be defended for its ability to allow the Government of the day to govern. He claimed that the only limits that the Government should be subject to are that it acts with express legal authority and that it requires parliamentary assent when enacting new laws.[6] Any additional legal limits to the Government's powers, for example by empowering the judiciary to strike down legislation on the basis of human rights, would be to deny the essentially contestable nature of these questions and place them in the hands of a body with less legitimacy to resolve them.[7] For Griffith, removing these conflicts from political branches by placing them in the hands of the judiciary would not alter their political character. It would simply take the decision-making away from democratic actors and award it to unrepresentative and unaccountable judges.

Ewing, like Griffiths, advances a form of political constitutionalism that is about enabling the Government of the day to govern.[8] However, he builds on Griffith's descriptive account of the UK's political constitution by launching a normative defence of it. For Ewing, underlying the fundamental legal principle of the political constitution, the principle of parliamentary sovereignty, is a belief in democracy and the free democratic choice of citizens to have the policies that they wish for.[9] Because the principle of parliamentary sovereignty places few limits on democratic decision-making, it is a normatively more desirable form of government than one where parliament's powers are limited by law.[10] On the other hand:

> The legal constitutionalists offer a competing version of liberalism in which both the people and their Parliament cease to be sovereign but constrained by a body of

[4] Ibid, p3
[5] Ibid, p19
[6] Ibid, p15
[7] Ibid, p16
[8] Ewing, K.D. (2013) 'The Resilience of the Political Constitution' *German Law Journal Vol 14(12)* p2117
[9] Ibid
[10] Ibid, p2118

pre-determined liberal values mediated by a traditionally conservative institution in the form of the judiciary.[11]

Defence of political forms of accountability in ensuring the protection of rights

Another important trend in political constitutionalism is a defence of the ordinary legislative process in its ability to protect rights as compared with the judicial process. Such accounts aim to demonstrate that claims made by defenders of strong-form judicial review that the courts are a superior forum for protecting fundamental rights are unfounded.

Waldron agrees with Griffiths that individuals will inevitably reasonably disagree about the extent and content of fundamental rights and that these conflicts need to be temporarily settled in order that society can agree on a common course of action.[12] He claims that the legislature is a more legitimate forum for resolving these disagreements than the courts. He reaches this conclusion by considering common arguments based on outcomes and process that are advanced in favour legislative or judicial protection of rights.

In terms of outcomes, Waldron concedes that there are arguments that favour judicial protection but notes that there are also arguments that favour legislative protection. Arguments that have traditionally been advanced in favour of strong-form judicial review of legislation on rights-grounds are that (1) as a result of their institutional independence courts are better able to protect the rights of unpopular minorities; (2) courts are able to observe in concrete cases how legislation affects the rights of individuals, the legislature is likely to miss these effects when it legislates for general conditions; (3) by empowering courts to review legislation on the basis of its compatibility with a Bill of Rights, disputants are better able to focus on the abstract rights-issues at stake in a dispute; and (4) judicial decisions are required to be explicitly reasoned and as such decisions are more likely to be considered to be legitimate.[13]

However, Waldron suggests that each of these arguments is not as straightforwardly in favour of strong-form judicial review as has been suggested. For example, (1) the claim that legislatures 'blindly empower the majority'[14] is unfounded. All democratic legislatures limit the franchise to ensure that there is a degree of mature judgement at the polls and are designed in a manner that ensures that the voices of different individuals and groups are taken into

[11] Ibid, p2136
[12] Waldron, J. (2006) 'The Core of the Case Against Judicial Review' *The Yale Law Journal 115* p1366
[13] Ibid, p1376-1386
[14] Ibid, p1378

account when legislation is considered[15]; (2) the idea that judges in higher courts have a clear impression of individual applicants 'is mostly a myth[,]'[16] as by the time the dispute reaches that stage 'almost all trace of the original flesh-and-blood right-holders has vanished, and argument such as it is revolves around the abstract issue of the right in dispute.'[17] Further, the legislative process contains opportunities for individuals and groups to be heard through lobbying, in committees, and in debate[18]; (3) focusing on the written formulations of a Bill of Rights can lead to 'a certain rigid textual formalism'[19] where focus on the text leads the right to be considered in a limited or stunted manner, this is not the case for legislators who can reason about the issue in a freer way whilst also taking into account rights that might not be contained in the original Bill of Rights[20]; (4) legislators also advance reasons for passing legislation and this form of reasoning is often more likely to focus directly on the issues at stake, as opposed to being required to focus on precedent or the language of the Bill of Rights.[21] Thus, on the basis of outcomes, Waldron argues that the claim that strong-form judicial review of legislation is more likely to protect individual rights than weak-form or no judicial review is not as clear cut as has been advanced by defenders of strong-form review.

On the other hand, on process-related reasons the argument heavily weighs in favour of legislatures having the final say on rights. On the basis that Waldron assumes that there is likely to be reasonable disagreement about the resolution of rights-issues, he argues that these disagreements need to be resolved in a manner so that individuals accept the outcome, even if they disagree with that outcome. A legislature can make this claim to legitimacy because as a democratically-elected body it represents the views of every voter and ensures that every view is given equal standing. Because decisions are made by majority voting, the legislature's decision will be in line with the viewpoint that is most acceptable to the majority of people. On the other hand, courts can only take into account the views of those before the court. Indeed, under judicial review the views of these individuals are at risk of being 'double-counted' given that such views will have already been represented during the legislative process. [22]

[15] Ibid
[16] Ibid, p1379
[17] Ibid, p1379-1380
[18] Ibid, p1380
[19] Ibid. p1381
[20] Ibid, p1380-1381
[21] Ibid, p1382-1386
[22] Ibid, p1386-1395

Waldron therefore argues that because the outcome-related reasons are not clear cut but the process-related reasons weigh heavily in favour of legislatures having the final say on rights-issues, this should count strongly against strong-form judicial review, although he concedes that there may be some arguments for weak-form review.[23]

Bellamy agrees with Waldron that the reality of politics is that there will be reasonable disagreement over rights. Bellamy's account differs from Waldron however in that it is not the legislative process itself that justifies legislative supremacy but rather the fact that legislative supremacy is based on the principle of political equality.[24] Bellamy argues that the political process, based on the accountability of legislators to the electorate, gives 'citizens political equality as autonomous reasoners and sources of information about rights, strengthening their sense of ownership of rights decisions and enabling them to ensure that the full range of concerns is taken into account and appropriately weighed.'[25] Further, '[t]he electoral incentive of parties to build a coalition of voters capable of commanding a majority and either to criticize and offer an alternative to the incumbent parties to defend themselves against such criticisms means that a continuous balance of power exists between government and opposition. This balance serves to aid consideration of alternatives and curb abuses of power.'[26] In other words, the ordinary democratic political process, by ensuring that every person's voice is heard and equally-weighed during the process of decision-making, is less likely to lead to domination either by a powerful political elite or a constitutional court made up of non-representative judges.[27]

Tomkins, like Bellamy, considers that political constitutionalism is the form of government most likely to ensure that citizens are free from domination.[28] However, unlike Ewing and Griffiths above, Tomkins argues that the political constitution ensures the most likely protection from domination by the government.[29] By reconsidering historical and contemporary defences of the common law constitution, he suggests that these accounts both over-emphasise the strength of the judiciary and under-emphasise the strength of the legislature to hold the government to account.[30] Critiquing the contractarian conception of the relationship

[23] Ibid, p1354
[24] Bellamy, R. (2007) *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* Cambridge University Press, Chapter four
[25] Bellamy, R. (2011) 'Political constitutionalism and the Human Rights Act' *ICON Vol 9(1),* p91
[26] Ibid
[27] Bellamy (n24), p152
[28] Tomkins, A. (2005) *Our Republican Constitution* Oxford: Hart Publishing
[29] Ibid, p87-109
[30] Ibid, Chapter 3

between the individual and state that many liberal constitutionalists hold – in which the courts are empowered to determine whether the government has unlawfully interfered with citizens' rights – Tomkins adopts an alternative account of the relationship between the governers and the governed which is based on trust. This account of freedom requires that citizens are highly engaged and active in the political process so that governments are alerted and required to change tack whenever they unacceptably violate fundamental rights, interests and freedoms.[31] The role of public law therefore is to ensure that the working of government is sufficiently open so that this form of accountability can effectively operate. [32]

What these scholars have in common then, is a defence of the ordinary political process as the means by which it is most likely that the fundamental rights and interests of citizens are advanced. This might be because of the 'dignity of legislation'[33], or because equality of input ensures freedom from domination or that the political process is a more effective means of holding the government to account. Similarly each of these scholars agree that the normative benefits of the ordinary political process are corrupted or stunted by empowering courts to set-aside legislation on the basis of fundamental rights. Here there is a fundamental disagreement with those from the legal constitutionalist tradition.

Legal constitutionalists

Like political constitutionalism, legal constitutionalism is a broad school of thought. There are two broad forms of legal constitutionalism, out of which normative accounts have been based. First, is a tradition that is most prominently associated, in the English-speaking world at least, with American-style constitutional supremacy. Under this model, constitutional courts are given (or have given themselves) ultimate authority to interpret constitutional norms including those contained in a constitutional Bill of Rights. Second, common law constitutionalism, is a tradition that originated in states that have traditionally eschewed a written constitution and a constitutional Bill of Rights, particularly the UK. Under this account, governmental actions are rightly subjected to and constrained by legal principles that have been developed by courts through the common law. These two forms of legal constitutionalism differ therefore on the source of higher law that legitimates judicial limitation of legislative power – for the first form of legal constitutionalism it is a written constitution; for common law constitutionalism it is judge-made common law principles. However, both forms of legal constitutionalism agree that

[31] Tomkins, A. (2002) 'In Defense of the Political Constitution' *O.J.L.S. Spring Vol 22(1),* p174-175
[32] Ibid
[33] Waldron, J (1999) *The Dignity of Legislation* Cambridge: Cambridge University Press

it is the proper role of courts to subject ordinary government acts to a form of higher law, which generally comprises of fundamental rights. On this basis, they favour a form of judicial supremacy.

American-style constitutional supremacy

The literature defending the American-style form of constitutional supremacy is vast – and it is impossible to do it justice here. However, two relatively modern theoretical defences of judicial review that reply directly to Waldron's critique of judicial review come from Richard Fallon and Harel and Kahana.

In his 'uneasy core case for judicial review' Fallon departs from the traditional legal constitutionalist starting point that 'courts are more likely than legislatures to make *correct* decisions about how to define vague rights of the kind commonly included in bills of rights'.[34] Instead, for Fallon, the best justification for strong-form judicial review is that both the courts and the legislature have a role in protecting fundamental rights and that both should have powers to veto legislation that might be considered to violate rights. This is because the fundamental nature of individual rights means that a system that over-protects rights is preferable to a system that under protects rights.

Fallon accepts that if the four assumptions about a reasonably democratic society that Waldron adopts[35] are correct, courts are in no way better placed to determine the meaning of morally-based constitutional rights.[36] However, he suggests that Waldron's argument against strong-form judicial review on the basis of process-related reasons is based on a fallacy. According to Fallon, even if it is accepted that courts are no more likely than legislatures to determine rights-questions correctly, if the society accepts that it is important for fundamental rights to be protected, then there is no reason not to allow both courts and legislatures to have a veto of rights-infringing governmental action.[37] This might lead to the overprotection of rights but such a risk is less serious than the under protection of rights, which is at risk by denying the courts the opportunity to review legislation on rights-grounds.[38] Fallon argues that courts have at least two institutional competences that will complement the legislature's protection of rights. The

[34] Fallon, R.H. (2008) 'The Core of an Uneasy Case *for* Judicial Review' *Harv.L.Rev Vol 121(7),* p1695
[35] (1) That the society's democratic institutions are in reasonably good working order; (2) That the society's judicial institutions are in reasonably good working order; (3) That there is strong commitment on the part of most members of the society to the idea of individual and minority rights and; (4) That there is substantial disagreement as to what rights there are and what they amount to. See Waldron (n12), p1361-1369
[36] Fallon (n34), p1696-97
[37] Ibid, p1698-99
[38] Ibid, p1699

first is the ability to decide cases on the basis of concrete facts which legislatures may not have foreseen. The second is that judges' professional training gives them a focus and knowledge of rights that is different to that of legislators.[39]

Further, although Fallon accepts that judicial review may lack democratic legitimacy, this is not to say it does not lack broader political legitimacy. He suggests that one good reason for a citizen to respect a political decision with which she does not agree, aside from the principle of political equality as espoused by Waldron, is that the decision has come from a body 'that is reasonably designed to improve the substantive justice of society's political decisions by safeguarding against violations of fundamental rights'.[40] Thus – even if it is conceded that judicial review lacks democratic legitimacy – so long as other elements of the system make up tor this lack of democratic legitimacy and judicial review contributes to the overall political legitimacy of the system by contributing to the protection of fundamental rights, the lack of democratic legitimacy of judicial review is not as big a problem for legitimacy as is sometimes presented.[41] Fallon underlies his defence of strong-form judicial review with the following four assumptions:

> (1) Even if courts are not better overall at identifying rights violation than are legislatures, courts have a distinctive perspective that makes them more likely than legislatures to apprehend serious risks of rights violations in some kinds of cases. (2) Legislative action is more likely to violate fundamental rights than legislative inaction. (3) Some rights are more important than others and, accordingly, are more deserving of protections against infringement. (4) A system of judicial review can be so designed that the moral costs of such overenforcement of rights as judicial review would produce will likely be lower than the moral costs that would result from such underenforcement of rights as would occur in the absence of judicial review.[42]

Because his argument rests on these, and other, contestable assumptions – his defence of strong-form review remains 'uneasy'.[43] Further, Fallon restricts his argument to 'the kinds of fundamental rights characteristically protected in bills of rights' and counsels that courts should

[39] Ibid. p1709
[40] Ibid, p1734
[41] Ibid, p1715-26
[42] Ibid, p1699-1700
[43] See eg Dworkin, R (1977) *Taking Rights Seriously* Massachusetts: Harvard University Press; Black, C (1997) *A New Birth of Freedom: Human Rights, Named and Unnamed* New York: G.P.Putnam

exercise deference to the legislature's judgment in cases where there is a conflict between rights (although he imagines that genuine 'zero-sum' conflicts are rare). Fallon's defence of strong-form judicial review is therefore perhaps not as full-throated as some of the other scholars considered – although his account does ultimately lead to the same final result, that courts should be empowered to veto government action that they consider violates fundamental rights.

In their 'easy core case for judicial review' Harel and Kahana aim to advance a more positive case for strong-form judicial review.[44] They begin with an acceptance that instrumentalist justifications for judicial review, for example that it more likely to protect rights[45], promote democracy[46] or maintain stability[47] are unlikely to succeed. They reach this conclusion on the basis of three reasons. First, they argue that instrumentalist accounts tend to make unreliable assertions about the better performance of courts in achieving the above goals than parliaments and other institutions. Second, that even if it can be shown that courts are better at achieving the above goals, they are still required to respond to Waldron's argument that strong-form judicial review undermines the right to equal participation. Finally, their arguments tend to incorrectly conceptualise the debate about the merits of judicial review as 'a technocratic debate about the likely quality of decision-making or other consequences of different forms of institutional design'[48] when it is in fact about political/moral institutional design – ie what justification individuals are entitled to when they believe (correctly or not) that their rights are at stake.[49] Instead they argue in favour of judicial review on the basis that it is the institutional manifestation of the right to a hearing, which comprises of 'the opportunity to voice a grievance, the opportunity to be provided with a justification for a decision that impinges (or may have impinged) on one's rights, and the duty to reconsider the initial decision giving rise to the grievance.'[50] On this basis judicial review is defensible not because of the instrumental features it generates but rather intrinsically because its benefits derive from its inherent procedural characteristics.[51]

Common Law Constitutionalism

[44] Harel, A. & Kahana, T. (2010) 'The easy core case for judicial review' *J.Legal Analysis 2(1)* pp227-255
[45] See eg Ely, J.H, (1980) *Democracy and Distrust: A Theory of Judicial Review* Cambridge, MA: Harvard University Press
[46] See eg Alexander, L & Schauer, F. (1997) 'On Extrajudicial Constitutional Interpretation' *Harv.L.Rev Vol 110,* pp1349-1387
[47] Harel & Kahana (n44) p235-238
[48] Ibid, p235
[49] Ibid, p238-247
[50] Ibid, p238-239
[51] Ibid, 247-252

Alongside the above defences strong-form review under a system of American-style constitutional supremacy, sits a body of literature that aims to defend judicial supremacy in states without a written constitution, particularly the United Kingdom. Given that 'third way' theorists have primarily focused on states that have traditionally eschewed a constitutional bill of rights, it makes sense to consider the justifications for judicial supremacy within this tradition. According to Poole's account of common law constitutionalism in English Law, there can be seen to be three overarching themes of common law constitutionalism.[52]

The first, associated with Sir John Laws, is that it is the role of the court to protect fundamental normative principles and values such as those associated with human rights.[53] According to Laws, the Kantian principle of autonomy is the basic criterion of human existence. The law should serve to uphold this principle. Laws acknowledges that human beings are likely to act in ways that interfere with the autonomy of others. Further, the legislature, whose function is to determine and enact policies that further particular goals, may not always do so in a manner that takes proper account of the autonomy of individuals. As a result, courts since they 'have no programme, no mandate, no popular vote',[54] are able to prioritise autonomy when deciding cases between different parties. The role of the courts, in ensuring that laws respect autonomy, is what gives them their legitimacy. As such Laws favours strong-form review of legislation on rights-grounds.[55] Other legal constitutionalists, for example Dawn Oliver, agree with Laws' basic argument but introduce other fundamental values linked to rights, such as dignity, respect, status and security as the values that are essential to the human condition that should be shielded from political decision-making. [56]

An alternative account of common law constitutionalism which does not necessarily rely on the natural law thinking of Laws and Oliver, is one that suggests that judicial decision making is an 'exemplar of public reason'.[57] This account is best associated with TRS Allan. For Allan, it is the manner in which the courts decide cases which makes them uniquely suited to protect fundamental values such as rights. Judicial proceedings are led to by the two parties to a dispute, who are free to frame their argument in a manner of their own choosing. This gives

[52] Poole, T. (2003). 'Back to the Future: Unearthing the Theory of Common Law Constitutionalism' *O.J.L.S. 23(3),* pp435-454
[53] Ibid, p440
[54] Laws, J. 'Wednesdbury' in Forsyth, C. & Hare, I. (eds) (1998) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* Oxford: Clarendon Press, p190
[55] Poole (n52), p440-441
[56] Ibid, p441
[57] Ibid, p442

judicial review a collaborative essence similar to democracy, granting it legitimacy.[58] Allan's conception of politics is based on republicanism, where 'all strive to articulate and further a conception of the common good'.[59] Courts are the best forum for the republican ideal of public reason through which individuals 'conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that others can reasonably be expected to endorse'.[60] This form of debate is best conducted by interested individuals in the adjudicative process.

Linked to this second conception of common law constitutionalism is a third account, which suggests that common law reasoning on rights derives its legitimacy from its longevity and organic development. According to this account, as the common law develops, led by the reasoning of parties to a case, it will be build up a body of values that are necessarily linked to the values or morality of the political community over which it rules. The values of the common law are therefore likely to be based on the wisdom of numerous generations and authentically linked to the community. [61]

These different forms of common law constitutionalism say something similar about the role of the courts *vis a vis* the legislature in protecting fundamental rights. For the 'essentialist' account favoured by Laws, while democracy is the form of political rule most likely to respect autonomy because it gives an equal voice to individuals in the decision-making process, where, for whatever reason, the result of democratic decision-making is that a particular individual or group's autonomy has not been respected, courts (who as described are institutionally better equipped to determine what autonomy requires) should be empowered to set-aside legislation on that basis.[62] In this sense, Laws argument is linked to the 'tyranny of the majority' argument advanced by Tocqueville, who argues that majoritarian law-making might not take account of minorities and that courts should protect minority rights from violation by the majority.[63] In states with an enacted Bill of Rights, strong-form judicial review is granted greater legitimacy because courts are required to review legislation on the basis of rights and values that have

[58] Ibid, p443
[59] Allan, T.R.S. 'Common Law Constitutionalism and Freedom of Speech' in Beatson, J & Cripps, Y. (eds) (2000) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* Oxford: Clarendon Press, p226
[60] Rawls, J (1996) *Political Liberalism* New York: Columbia University Press, p226 quoted by Allan, T.R.S. (2001) *Constitutional Justice: A Liberal Theory of the Rule of Law* Oxford: Clarendon Press, p24
[61] Poole (n52), p444-447
[62] Ibid, p448
[63] See L Tocqueville, A *Democracy in America* (First published 1835, 1994) London: David Campbell

been deemed to be fundamental by sovereign popular institutions.[64] Alternatively, legal constitutionalists that favour the 'public reason' or 'historical development' justification of strong-form judicial review, contrast the 'litigant driven and inherently rational'[65] process judge-made law which organically develops over time with legislation passed by temporary majorities, which may not even have the support of the majority of the population.[66] It is argued that the former is more likely to take proper account of the fundamental values of the population and ensure that they are protected.[67] Thus, for the above reasons and others, legal constitutionalists argue that courts should be empowered to review legislation on the basis of fundamental rights and, if necessary, declare that such laws are invalid so far as they are incompatible with rights.

'Third way' theories: How do they differ from political/legal constitutionalism?

'Third way' theorists accept many observations that both legal and political constitutionalists make about the risks/benefits of prioritising either judicial or parliamentary protections of rights. Thus most 'third way' theorists would accept the political constitutionalist argument that the executive and legislature have an important role to play in the enforcement of rights. This role is not reserved to translating abstract rights into concrete protection through legislation but also requires a role in formulating and defining rights and determining certain rights-questions. On the other hand, most 'third way' scholars would also accept that the ordinary legislative process contains some blindspots that can be identified by the process of judicial review.[68] As a result, 'third way' theorists support a model that encourages increased executive and legislative input into rights-questions than is generally considered in traditional accounts of legal constitutionalism whilst allowing for a greater role for the courts in determining whether legislation is compatible with rights than is generally accepted in traditional accounts of political constitutionalism. Further, 'third way' theorists argue that the different branches of government, by using their respective institutional capacities in relation

[64] Fallon (n34) p1726
[65] Ibid, p449
[66] Ibid, p449-450
[67] Kavanagh, A. (2003) 'Participation and Judicial Review: A Reply to Jeremy Waldron' *Law & Phil 22(5),* p482
[68] See eg Gardbaum, S. (2013) *The New Commonwealth Model of Constitutionalism: Theory and Practice* Cambridge University Press, Chapter3; Young, A.L. (2017) *Democratic Dialogue and the Constitution* Oxford:Oxford University Press, Introduction; Bateup. C (2006) 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' *71 Brook.L.Rev*, p11090-1180

to rights protection and by being aware of their blindspots, should work collaboratively to ensure that rights are both better and more legitimately protected in their jurisdiction.

In the next section, I will briefly set out some of the key accounts of 'third way' constitutionalism. By using the term 'third way', I have cast the net deliberately wide in order that I can capture a number of accounts that do not necessarily use the same language or espouse the same theory.[69] This allows me to consider, in addition to other theories, the 'New Commonwealth Model of Constitutionalism' associated with Stephen Gardbaum, 'Legislative Rights Review' advanced by Janet Hiebert and 'Constitutional Dialogue' as espoused by Alison Young and others.

Which Bills of Rights are generally regarded to be 'third way' Bills of Rights?

As explained in the introduction, 'third way' constitutionalism grew out of observations that scholars made about Bills of Rights adopted in Canada, New Zealand, the United Kingdom and in the Australian states of Victoria and the ACT. Each of these states share a similar constitutional heritage based around parliamentary sovereignty and aimed to adopt a bill of rights that allowed for greater protection of individual rights whilst preserving legislative supremacy.[70] Exactly how each jurisdiction achieves this balance differs, and some have additional features that are said to enhance the model, but all share at least two features that are said to encompass the new model.

Which features do these Bills of Rights share?

Executive reporting requirement

The first is a requirement on the initiators of legislation to report on the rights-compatibility of proposed bills before their introduction into parliament. Importantly, those reporting are generally empowered to issue either a positive statement – that, in the initiator's opinion, the legislation is compatible with rights; or a negative statement – that, in the initiator's opinion,

[69] See for example, Young,(n68)*;* Hickman, T., (2005) 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' *P.L. Sum*; Nicol, D., (2003). 'The Human Rights Act and the politicians' *Legal Studies,* Roach, K. (2001). *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue,* Toronto: Irwin Law*;* Other scholars have used alternative terms such as 'collaboration'; Joseph, P.A., (2004) 'Parliament, the Courts and the Collaborative Enterprise' *K.C.L.J. 15;* 'deliberation', Fredman, S. (2013) 'From dialogue to deliberation: human rights adjudication and prisoners' rights to vote' *P.L. Apr;* or the 'New Commonwealth Model', Gardbaum, S. (2013), 'The Case for the New Commonwealth Model of Constitutionalism'. *G.L.J. 14(12),*

[70] Hiebert, J.L. 'Parliamentary bills of rights: have they altered the norms for legislative decision-making?' in Jacobsohn, G & Schor, M (Eds) (2018) *Comparative Constitutional Theory* Edward Elgar, p123

the legislation may be incompatible with rights but that they wish to proceed with the legislation nonetheless.

It was hoped that this feature would allow for improved compatibility of legislation with rights by requiring the government to explicitly consider the rights-implications of, and potentially make changes to, legislation before it is proposed to parliament. Additionally, it was hoped that the executive reporting requirement would increase parliamentary scrutiny of legislation on rights-grounds by indicating to parliament the government's position on the compatibility of the legislation with rights, prompting parliamentarians to scrutinise this further. A final important potential benefit of the executive reporting requirement was that it would ensure that human rights were considered in relation to all legislation, and not just those bills which happened to be challenged in the courts. At the same time, the possibility of making a negative statement protects the supremacy of parliament by ensuring that the legislature can continue to make laws notwithstanding their potential incompatibility with judicially interpreted rights, but only when parliament does so knowingly and accepting of any resultant political cost.[71]

In this sense, the executive reporting requirement has features that appeal to both political and legal constitutionalists. For political constitutionalists, the reporting requirement gives increased ownership to the executive and parliament in framing and settling rights-questions. Further, by allowing government to propose and parliament to enact legislation that it acknowledges may be inconsistent with judicially interpreted rights, the executive reporting requirement protects parliamentary supremacy. On the other hand, for legal constitutionalists, the reporting requirement ensures that fundamental rights and values are taken properly into account during the legislative process. This should improve the rights-compatibility of legislation by (1) encouraging legislators to reframe their proposals in a manner that respects rights and (2) in extreme cases, encouraging legislators to drop proposals that are deemed likely to be contrary to rights.

Thus by stimulating increased executive and legislative ownership of rights whilst feeding legal norms into the legislative process, the executive reporting requirement merges aspects of political and legal constitutionalism to create a hybrid model that aims to address the deficiencies in both models.

Weak-form Judicial Review

[71] Gardbaum (n68) p26

The second key feature of the 'third way' model, is empowering courts to review legislation for compatibility with rights whilst maintaining the possibility that the legislation remains in force. This feature gives citizens a forum in which their claims that legislation has unacceptably interfered with their rights can be heard and tested. Where courts consider that the legislation violates the rights of that individual, they have the power to declare as such. Such a declaration will notify the legislature and, if the legislature agrees with the reasoning of the court (or otherwise feels bound to follow the judgment), will stimulate a change in law. In this way, this feature improves rights protection by introducing an additional forum in which rights-scrutiny of legislation can take place – a forum that may be better at hearing certain voices and concerns than the legislative forum. However, at the same time, because it, in Gardbaum's words 'decouples judicial review from judicial supremacy'[72], this feature ensures that while judicial review better informs legislators (and voters) about the rights-effects of legislation, it does not veto particular forms of legislative action.[73]

Again weak-form judicial review merges features of political and legal constitutionalism. From legal constitutionalism, it takes the review of legislation by courts on the basis of prescribed fundamental rights. Because no government or parliament will want to be seen as a violator of rights – it assumed that judicial review will lead to more serious engagement with rights during the legislative process and that any finding that legislation is contrary to rights will, at the very least, be reconsidered seriously by the government and parliament. On the other hand, for political constitutionalists, by leaving it up to parliament to decide whether the remedy the incompatibility, weak-form review protects parliamentary supremacy and ensures that parliament can enact the laws it wishes. Indeed as Gardbaum points out, more than merely offering something to legal and political constitutionalists, the 'third way' model can help to advance the legitimacy of the legislative and judicial protection of rights. For example, because under the 'third way' model, judicial review does not mean judicial supremacy – arguments against judicial review on the basis that it is non-democratic are significantly weakened. On the other hand, if one of the major criticisms of parliamentary protection of rights is that it parliament as an institution is incapable of understanding how its legislation will affect individuals in concrete cases, then introducing a process by which these cases can be heard and communicated to parliament allows this argument to be weakened.[74]

[72] Gardbaum (n68) p26
[73] Ibid, p26-27
[74] Ibid, p68

In addition to the two 'core' features that are said to key to the new model, many of the Bills of Rights discussed share other structural features that 'third way' scholars have suggested encourage shared and collaborative protection of rights.

Strong interpretive powers

One these features, which is present in all of the above Bills of Rights aside from the Canadian Charter, is equipping courts with a strong interpretive power to interpret legislation in a manner that is consistent with rights.

Like the above features, this power has functions that speak to both political constitutionalist and legal constitutionalist concerns. For legal constitutionalists, this power allows courts to protect fundamental rights and values by granting judges a large degree of scope to change the meaning of an Act if it *prima facie* violates fundamental rights. Further, as this power is contained in a Bill of Rights passed by parliament that explicitly empowers the court to do so, challenges over democratic legitimacy are more easily answered. On the other hand, for political constitutionalists, the power ensures that a larger number of Acts remain on the statute book than would be the case under traditional Bills of Rights with strong-form review. Moreover, while the interpretative power is strong, it is generally qualified with the provision that the court's interpretation cannot do damage to the fundamental features of the legislation. As such, it is hoped that any changes made to the Bill will be done in line with the overall legislative purpose. Finally, because, under the 'third way' model the legislature retains the ability to re-enact legislation notwithstanding a court's judgment, where the legislature is unhappy with the court's interpretation of an Act, it has the power to re-enact that legislation making clear that it intends it to operate in a specific manner.

Parliamentary human rights committee

An additional feature that is less common in states that have a 'third way' bill of rights, but is promoted as a feature that is likely to enhance the model, is a specialist human rights committee. A popular example of a well-functioning specialist human rights committee is the United Kingdom's Joint Committee on Human Rights. Specialist human rights committees have generally been established in recognition of the relative weakness of legislatures *vis a vis* the executive in Westminster systems. Such Committees are generally composed in such as way so to be bipartisan, where members are expected to bring a greater independence of mind than is usually expected in plenary proceedings. A key element of function of these committees, is ensuring that proposed Bills are compatible with rights, including by questioning the

executive further on their compatibility assessments. Generally individual parliamentarians do not have access to legal advice and are therefore ill-equipped to scrutinise government statements that Bills are compatible with rights. A specialist human rights committee, usually assisted by a legal adviser, can bridge this gap by scrutinising the government over its legislation in detail and signalling to parliamentarians more generally whether the Committee is of the belief that the Government's position is plausible.[75]

Again, a specialist parliamentary human rights committee can be said to offer features that are attractive to both political constitutionalists and legal constitutionalists. For political constitutionalists, review of legislation by parliamentary committee provides a more democratically legitimate form of review than review by courts. [76] Human rights committees are equipped to hear from a larger number of witnesses as to the potential effect of the legislation on rights than courts and in many cases are able to take into account a broader range of human rights, for example social and economic rights, which might not be included in the Bill of Rights. As such, input to committee is more likely to respect the principle of equal participation and its reasoning is likely to be less focused on legal norms and more focused the broader political or moral arguments that underlie the rights and legislation as they relate to all people. For legal constitutionalists, a committee that is designed specifically to consider the compatibility of legislation with rights is more likely than the ordinary parliamentary process to identify and resolve any potential rights-issues. This is particularly the case because the committee is assisted by a legal adviser who can ensure that judiciary's perspective is understood by committee members and fed into the process of parliamentary scrutiny.[77] A combination of these factors means that the government is more likely to take rights seriously in the legislative process and that ultimately there will be less rights-infringing legislation on the statute book.

How do these features create a distinct model of rights protection?

New Commonwealth Model

According to Gardbaum, the above features (particularly the executive reporting requirement and weak-form judicial review) constitute a novel account of constitutionalism, which he terms

[75] Hiebert, J.L. (2006) 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' *4 Int'l.J.Cons.L 1,* p14-17
[76] Campbell, T 'Parliamentary Review with a Democratic Charter of Rights' in Campbell et al Eds (2011) *The Legal Protection of Human Rights: Sceptical Essays* Oxford: Oxford University Press
[77] Hiebert (n75) p19

the 'New Commonwealth Model of Constitutionalism'. This is because the new model takes 'something (though not everything) from both legal and political constitutionalism and creates something new in between.'[78] It is a 'hybrid' model that fits in between the poles of political and legal constitutionalism. Importantly, although particular features of the model are novel, it is not these features themselves which make the new model. Rather, what makes the model new, is the combination of the features and how they interact with each other.[79] For example, he argues that if Bills of Rights have an executive reporting requirement but parliament is not empowered to enact legislation that is contrary to judicial interpretation of rights, then executive and parliamentary rights reasoning is likely to collapse into the second-guessing of judicial decisions. One of the major normative benefits of Gardbaum's model is that executive and parliamentary consideration improves the protection of rights by adding insights to rights protection that judicial reasoning does not:

> [P]re-enactment review is intended to provide a forum for the type of freer, unrestricted political and moral deliberations about relevant rights-issues that… may only be practically possible *before* a specific and potentially constraining or framing legal decision is handed down by the judiciary.[80]

Thus, if legislators feel that rights protection is squarely within the judiciary's jurisdiction, political pre-enactment rights review is simply a process to ensure that legislation will not be struck down by courts – removing a key normative benefit of the provision. On the other hand, if initiators of legislation are required to report on the rights-effects of legislation but there is no prospect of judicial review - there is little incentive for legislators to take these statements seriously and the model is likely to collapse into traditional political constitutionalism. Again, this removes a key normative benefit of Gardbaum's model - that courts are able to use their institutional characteristics to ensure that legislation takes proper account of fundamental rights.[81]

For Gardbaum '[t]he critical, and distinctive, hybrid feature of the new model is the legislative power to override the exercise of constitutional review by the courts.'[82] He concedes that other constitutional mechanisms such as 'popular constitutionalism may also ensure that the judiciary does not have the final say on all issues. However he argues that the legislative

[78] Garbaum (n68) Chapter 2 p44-45
[79] Ibid, p45
[80] Ibid, Chapter 4, p81
[81] Ibid, Chapter 2, p54
[82] Ibid, Chapter 1, p45

override remains distinct because it is designed to be the general form of review under the Bill of Rights, ie that it is not designed to only be triggered when the judiciary oversteps it's powers or in extreme circumstances, as is the case with the other mechanisms. Additionally, the specific mechanism, such as the notwithstanding clause under s.33 of the Canadian Charter or the declaration of incompatibility under s.4 of the HRA were novel constitutional mechanisms when they were designed. Finally, the particular model where judicial review is the penultimate stage of the legislative process, where parliament has the ability to respond to the court's judgment, differs from the other forms because, for example, in popular constitutionalism it is the people, rather than parliament who has the final say. As such 'the new model's distinctive allocation of powers provides a far more tangible and concrete institutional mechanism of non-finality than is present in most versions of popular constitutionalism...'[83] Gardbaum therefore does not consider that bills of rights with executive reporting mechanisms but which lack a parliamentary override of judicial decisions on rights can be considered to subscribe to his model.

Third 'wave'

Elsewhere, Francesca Klug, who helped to draft the HRA, has described the Act and its Canadian and NZ precursors as constituting a 'third wave' model of rights protection. The key distinguishing feature of the 'third wave' from previous 'waves' is its emphasis on 'participation or mutuality'[84] by requiring the active participation of all branches of governments (as well as others) in rights protection.[85] Klug argues that for the human rights regime to be properly enforced, 'then it has no future as the sole preserve of judges, lawyers and human rights pressure groups.'[86] Instead all actors, from parliamentarians and those responsible for executing policy, to private corporations, and even private individuals, should be encouraged to think about the human rights implications of the actions that they take.[87]

For Klug, a factor that makes the HRA a 'third wave' bill of rights is the fact that courts have no power to strike down primary legislation as this allows for 'dialogue' to be established between the courts, parliament and the government which in turn makes space for any interested person to engage in discussion about the appropriate boundaries of rights.[88] The

[83] Gardbaum (n68) p29
[84] Klug, F. (2001). 'The Human Rights Act – a "'third way'" or "third wave" Bill of Rights', *E.H.R.L.R. 4,* p369
[85] Ibid, p361-372
[86] Klug, (n84), p369
[87] Klug, (n84), p369
[88] Ibid, p370

need for parliament to be pro-active in protecting rights is considered to be particularly important due to the expensive, time-consuming and complex process of legal action which makes it out of reach for a large number of people.[89] Parliament as, at least in theory, a democratically accountable institution that ensures political equality is thus an important vehicle for ensuring that such people's voices are heard and rights protected.[90]Thus, for Klug, both the process of mainstreaming human rights principles into public institutions and the opportunity for parliament to disagree with courts over the meaning of rights is crucial for the creation of a new wave of rights protection.

Legislative Rights Review

Another important 'third way' scholar is Janet Hiebert. She describes the above rights documents as 'parliamentary bills of rights'. Hiebert suggests that these documents innovate from traditional models of constitutionalism in two ways. First, is the attempt to extend the scope of rights review beyond judges to include executive, legislative and other public actors. The second 'is the creation of dialectical tensions between the government and Parliament, and between the judiciary and Parliament, when determining if legislation is compatible with rights or, alternatively is warranted despite judicial declarations of incompatibility.'[91] She argues that these features combine to encourage greater consideration of legislation from a wider number of actors than is usually associated with a bill of rights.[92]

Hiebert is unique in the 'third way' scholars discussed in that she, along with her co-author Christopher McCorkindale, has explicitly discussed the Scottish model of rights protection in 'third way' terms.[93] In contrast to Gardbaum, Hiebert argues that the executive reporting requirement, which facilitates 'legislative rights review'[94] is the most important distinguishing feature of the 'third way' model. This is because whereas courts powers of review under Bills of Rights are only likely to be exercised in relation to a small number of bills enacted by parliament, the executive reporting mechanism is required for all proposed legislation, meaning that human rights norms will be considered for a far greater number of bills than under Bills of

[89] JCHR, 'The Case for a Human Rights Commission', *Sixth Report of Session 2002-2003,* para 17
[90] Ibid, para 25
[91] Hiebert (n75), p5
[92] Ibid
[93] McCorkindale, C. & Hiebert, J.L. (2017) 'Vetting Bills in the Scottish Parliament for Legislative Competence' *Edin.L.R 21.3*,pp319-351
[94] Hiebert, J.L. & Kelly, J.B. (2015) *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* Cambridge: Cambridge University Press, Introduction

Rights where this feature is absent.[95] If exercised in the manner intended by drafters, Hiebert considered that legislative rights review would 'fundamentally alter the norms of legislative decision-making'[96] in the relevant jurisdictions. That said, it should be noted that Hiebert's belief that in the transformative potential of this new feature has waned as she has observed practice in the UK, New Zealand and Canada.[97]

Constitutional Dialogue

Probably the most popular descriptive or theoretical account of 'third way' constitutionalism is the theory of democratic or constitutional dialogue. The term dialogue was originally used in as descriptive sense by Hogg and Bushell[98] in the Canadian context. It has since become the predominant means by which scholars describe the model of rights protection in Canada.[99] Hogg and Bushell claimed that the Canadian Charter contained a number of provisions, for example the 'notwithstanding' clause in section 33[100] and the 'reasonable limits' placed on rights in section 1[101], that enabled the Canadian courts to adjudicate upon constitutional rights whilst at the same time leaving it up to the legislature to ultimately overturn the decision.[102] They defined dialogue in the following terms:

> Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue.[103]

The authors argued that dialogue would lead to judicial decisions playing a greater role in the public debate on Charter rights than they would if courts were not allowed to adjudicate upon rights, as judicial decisions would force the legislative body to react in a way that took proper account of the Charter rights whilst still being able to achieve the initial objective of the legislation.[104] By surveying decisions of the Canadian Supreme Court that set-aside rights infringing legislation and then looking at the subsequent responses from legislatures, Hogg and

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[95] Ibid, p6-8
[96] Ibid, p4
[97] Hiebert, J.L. 'Legislative Rights Review: Addressing the Gap between Ideals and Constraints' in Hunt et al (Eds) (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit* London: Hart Publishing, pp39058
[98] Hogg, P.W., & Bushell, A., (1997) 'The Charter Dialogue Between Courts and Legislatures (or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)' *35 Osgoode Hall L.J. 75*
[99] Gardbaum, (n68), p179
[100] Canadian Charter of Rights and Freedoms, Constitution Act 1982, Part 1. s.33
[101] Ibid s.1
[102] Hogg and Bushell (n98), p79
[103] Ibid
[104] Ibid, p80

Bushell found that in most cases the legislature managed to pass a new law that achieved the intended purposes of the initial law whilst better protecting rights.[105] They thus argued that dialogue between the courts and parliament led to improved governance.

Although Hogg and Bushell's use of the term dialogue was descriptive, a number of scholars began to outline dialogue in a more theoretical manner. According to one of these scholars, Alison Young, what makes the 'third way' distinct from political and legal constitutionalism is that at its core it asks a different set of questions and makes a different set of assumptions than the other aforementioned theories. In contrast to political constitutionalists, whose assessment of the constitution tends to begin with focus on political controls and the importance of democracy, and in contrast to legal constitutionalists, whose assessment of the constitution tends to begin with legal controls and how they restrict the executive and legislature, democratic dialogue's initial focus 'shifts away from merely asking whether we should use legal or political controls and asks a further question – how should these legal and political controls interact with one another?'[106] By building on accounts of the relative advantages of legal and political controls, dialogue asks whether value can be gained from encouraging interaction between these different forms of control, and if so, considering what types of interaction are most likely to achieve this greater value.[107]

Young's account of democratic dialogue is less dependent on particular structural features than Gardbaum's New Commonwealth Model. What matters for Young is that there is opportunity for 'constitutional counter-balancing' and 'constitutional collaboration' in a constitutional system.[108] Constitutional counter-balancing mechanisms ensure that neither the courts nor the legislature always has the 'final say' when it comes to the resolution of rights-questions. Constitutional collaboration mechanisms allow the courts, legislature and government to combine their respective institutional advantages when it comes to reasoning about rights to achieve a better and more legitimate resolution of rights-issues.[109] Young explicitly advocates for structural 'third way' features because she considers that these features are more likely to engender constitutional collaboration and constitutional counter-balancing. However, she notes that is not strictly necessary for a constitutional system to include all of these structural features

[105] Ibid, p98
[106] Young (n68) Chapter 3, p84
[107] Ibid
[108] Ibid, p101
[109] Ibid, p222-226

for democratic dialogue to occur.[110] Thus Young opens the possibility that bills of rights that do not share all of the features considered crucial to the operation of the model by Gardbaum, in particular a parliamentary override, may still constitute a 'third way' model of rights protection. In states without a parliamentary override, democratic dialogue may still occur if the judiciary exercises deference to the judgement of the legislature in the determination of particular rights-questions.[111]

The above discussion demonstrates that not every account of 'third way' constitutionalism is identical. Notwithstanding the different terminology used to describe the new model – the accounts differ on, amongst other things, the normative benefits of the new model, the features necessary for the model to function and how the model should function in practice. That said, the above discussion demonstrates that what unites 'third way' scholars is that they support a model that encourages all branches of government (and wider society beyond this) to have a role in the protection of rights. Such a shared role allows each institution to use their institutional competence to contribute something unique to the protection of rights. Further, by communicating in the same language – the branches can more easily work together and ensure that their institutional contribution leads to the optimum protection of rights.

A particularly important difference for the purposes of my argument is the debate over whether the 'third way' model requires a formal parliamentary override. As I have shown, Gardbaum has argued that Bills of Rights that do not include this mechanism cannot be included in his model. On the other hand, for Young, although the existence of a parliamentary override is more likely to facilitate democratic dialogue than judicial supremacy, democratic dialogue may still occur in states with strong-form review through the doctrine of due deference. In fact – both scholars acknowledge that there is overlap between the different models of constitutionalism. Gardbaum argues that the 'third way' model sits in the middle of constitutional continuum where pure legal and political constitutionalism sit at either poles. Within this, the Canadian Charter sits closer to the poll of legal constitutionalism whilst the NZBORA sits closer to the poll of political constitutionalism. Thus, the notion of pure distinct theories of constitutionalism has always been an over-simplification.[112] Where Young and I, disagree with Gardbaum is that particular structural features are the decisive factors that should be used to determine where a bill of rights sits on the constitutional continuum. Rather, it is

[110] Ibid, p226
[111] Ibid, p229
[112] Gardbaum (n68) p38

important to consider both structural features and broader constitutional factors which determine the practical application of the powers. It may be the case that a state with nominally strong-form review, because of constitutional culture and the behaviour of the courts, may in fact allow greater room for political actors to determine rights-questions than a state where parliament may formally override judicial decisions on rights but neglects to do so.

Critics of 'third way' theory

'Third way' theory is not without its critics. Broadly, there appears to be two strands of criticism. First, some critics claim that in order to present it is a 'novel' model that sits between the poles of legal and political constitutionalism, advocates of 'third way' theory have created hyperbolised accounts of these models that misrepresents the views of actual legal and political constitutionalists. They argue that in reality, there is no middle ground for a 'third way' model to adopt and therefore the 'third way' model, is in Young's words, more of a 'placebo' than a 'panacea'.[113] Secondly, and linked to the first criticism, some scholars have noted that practice in the states that are said to adopt a 'third way' model have collapsed into political or legal constitutionalism. They argue that the 'third way' model is therefore inherently unstable.

As a normative model

One conceptual critique of 'third way' bills of rights is that the new model is not in fact novel but is instead an alternative account of either political or legal constitutionalism. Thus, some scholars have claimed that, for example, since the HRA retains the principle of parliamentary sovereignty, the UK's constitution remains ultimately a political constitution.[114] On the other hand, Elliott has argued that the tying of the HRA to the European Convention of Human Rights (ECHR) means that s.4 of the Act has come to resemble 'a de facto judicial power to procure amendment of legislation which unlawfully qualifies fundamental rights'.[115] This is because individuals who have secured a declaration of incompatibility under the HRA, but where parliament has not changed the law in line with the judgment, are likely to take their case to the European Court of Human Rights (ECtHR). The ECtHR is very likely, given it is interpreting the same substantive rights in line with the same principles and jurisprudence, to also find that the legislation violates Convention rights. In the event of this, the UK would be bound by international law to change the law in line with the ECtHR's judgment. Thus

[113] Ibid, p2
[114] Bellamy (n24)
[115] Elliott, M. (2002) 'Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention' *Legal Studies 22,* p349

according to Elliot, this ultimate consequence means there is de facto judicial supremacy under the HRA.[116]

Gardbaum challenges this latter point by claiming that, in some senses, the practice that has developed in relation to declarations of incompatibility in the UK is irrelevant, given that parliament formally retains the power to ignore declarations of incompatibility and, ultimately, to repeal the HRA (and also to withdraw from the ECHR). This legal fact means that suggestions that the HRA has developed into de facto judicial supremacy are overstated.[117]

On the first point, Gardbaum concedes that if one boils political constitutionalism down to the ultimate fact of legislative supremacy – then, by preserving parliamentary supremacy, his New Commonwealth model is an account of political constitutionalism. However, he argues that this is an impoverished understanding of political constitutionalism. The new model remains distinct because it offers a different division of legislative and judicial power – imbibing the courts with greater power and responsibility over fundamental rights than is usually imagined in ideal accounts of political constitutionalism.[118]

Gardbaum's response in this area speaks to a criticism of dialogue theory that is identified by Geiringer and Young. Geiringer has argued that the only way that 'third way' theorists have been able to present 'third way' bills of rights as something new and different from traditional accounts of constitutionalism is by 'freezing in time' these historical constitutional systems.[119] Similarly, Young notes that, dialogue theory's own account of its distinctiveness, that it merges legal and political protections of rights and emphasises inter-institutional interaction in protecting rights is in fact not distinctive at all.[120] She notes that all accounts of political and legal constitutionalism foresee a role for both parliaments and courts in the protection of rights in a manner that requires different institutions to interact.[121]

Indeed, she draws on the similarities in accounts of the appropriate role for courts in human rights protection of scholars like Tomkins and Kumm, who would consider themselves to be on opposite sides of the political/legal constitutionalism debate, to demonstrate that a clear intermediate position between legal and political constitutionalism does not exist.[122] Both

[116] Ibid
[117] Gardbaum (n68) Chapter 2, p43
[118] Ibid, p44
[119] Geiringer, C. (2019) '"Something new under the sun?" A NZ-centric critique of comparative constitutional law scholarship on the Anglo-Commonwealth "model" of human rights protection" *CCS Brownbag*
[120] Young (n68) Chapter 1
[121] Ibid, p52
[122] Ibid Chapter 1, p57

political and legal constitutionalists acknowledge that there is room for both political and legal controls in the protection of rights. The key difference is therefore not the form of control but the extent to which these different controls are balanced and interact with one another. This calls into question the novelty of, or space for, and intermediate 'third way' model of constitutionalism.

Despite this, Young argues that even if the distinction between political and legal constitutionalism is vague – leaving minimal room for a third account of constitutionalism – that it is still possible to consider 'third way' model as a distinct form of constitutionalism. This is because, as discussed above, 'third way' constitutionalism has a different focus and asks a different set out questions to either legal or political constitutionalism.[123] The question for 'third way' scholars is not, 'which set of controls, political or legal, are more likely to lead to the protection of rights that is in line with the wants and needs of the whole population', but rather 'how can political and legal controls interact to ensure that rights are protected in a manner that is democratically legitimate but protective of fundamental constitutional values.'[124] Young's defence of the 'third way' model of constitutionalism is therefore perhaps more limited and qualified than some of the other accounts. However I agree with her that a 'third way' 'lens' is a more helpful means by which to view the operation of legal and political protections of rights in constitutional law.

Instability in practice

Another criticism of 'third way' theory is that it is inherently unstable. For example, Mark Tushnet argues that 'third way' bills of rights have in practice tended to operate as orthodox bills of rights or otherwise have had little effect on legislative output.[125] He therefore suggests that the existence of 'third way' bills as a novel form of constitutionalism has been overstated. Tushnet's claims will be investigated in greater detail in chapter one. However, his broader point, that it is capable of operating 'third way' bills of rights in a manner that advances political or legal constitutionalism will be elaborated on further here.

To do so, I will reflect on two major proponents of the 'third way' model in the UK, Danny Nicol and Tom Hickman. Nicol and Hickman's accounts how s.3 of the HRA, which grants courts strong interpretive powers to read legislation in manner that is in accordance with

[123] Ibid Chapter 3, p84
[124] Ibid
[125] Tushnet, M. (2003). 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-based Worries' *38 Wake Forest Law Review*, p*831-837*

Convention rights, and s.4 of the HRA, which grants courts the power to issue a declaration of incompatibility where it considers that legislation is incompatible with rights, should be used by the courts and responded to by legislators indicates how one's underlying justification for dialogue can influence the operation of 'third way' structural features.

If one was to imagine a continuum in which legislative supremacy was placed at one end and judicial supremacy the other, the 'third way' scholar who is closer to the legislative supremacy pole is Danny Nicol. Nicol argues that the UK's historic subscription to the doctrine of parliamentary sovereignty places it in a good position to adopt a 'culture of controversy' when it comes to determining the scope of rights.[126] He argues that most rights throw up questions that lead to intense political debate, where reasonable people often disagree, and thus it should be the people's representatives who should ultimately responsible for defining them.[127] Under this model, the role of the courts is to flag up what they deem to be statutory violations of rights and it is then up to the political branches of government to decide what (if anything) should be done in response.[128] This would mean that declarations of incompatibility would be the primary remedial measure for courts' ruling on statutory violations of Convention rights. Nicol contrasts this model with a 'culture of compliance'. Here, he argues that all debate about rights is shone through the prism of constitutionality; where political actors use rights language in order to advance their competing visions and debate is kept within the confines of what the Supreme Court deems to be acceptable.[129] Although he acknowledges that dialogue exists under this model, he notes, quoting Stone Sweet, that 'in the end, governing with judges means governing like judges.'[130] In other words, conducting debate through the confines of what is judicially acceptable leads to the impoverishment of debate as certain positions are seen as unacceptable. As judges hold their own prejudices and often reflect a certain strata of society, it is by no means certain that the positions of the judges are in fact infallible and thus should be closed off from criticism.[131] As a result, for Nicol it is preferable that inherently political issues are decided in the political arena but that courts are given an opportunity to outline their position formed as a result of their institutional competencies.[132] He thus advocates a form of dialogue in the UK in which Section 4 HRA is the primary remedial measure.

[126] Nicol (n69), p454-455
[127] Ibid, p454
[128] Ibid, p455
[129] Ibid
[130] Sweet Stone in Ibid, p453
[131] Ibid, p454
[132] Ibid

Closer to the judicial supremacy pole in the above continuum is Tom Hickman who criticises Nicol's recommended approach as 'recasting the courts as a privileged political pressure group.'[133] Hickman argues that by favouring the use of Section 4 HRA in most cases, Nicol's 'weak'[134] dialogue is effectively asking courts to forget their role as defenders of the law offering remedies in concrete cases and instead becoming a body used merely to facilitate debate.[135] The acknowledgement that judicial decisions are contestable weakens the power of the already weakest branch of government and implies that judicial decisions do not need to be followed.[136] Hickman instead supports what he terms 'strong-form' dialogue in which in the majority of cases Section 3 HRA is applied.[137] He argues that courts have an important constitutional function of protecting fundamental principles from populist sentiment and that any form of dialogue should not seek to change this.[138] Instead, he envisions a role for the political branches of government in helping the courts to develop these fundamental principles and by increasing their popular support.[139] For this, the courts and political branches must show that they can be pragmatic and able to make compromises.[140] The role of the courts is to ensure that the political branches are aware of the effect that the concrete application of general laws is having on fundamental rights whilst allowing the legislature and government the space to pursue their political goals within the bounds of these fundamental principles.[141] Hickman claims his approach to the role of the courts under the HRA is consistent with the Diceyan vision of the common law.[142] Here, the courts gradually develop principle as cases come before them but such principles are flexible enough to move with society.[143] In a similar manner, under strong-form dialogic review the courts are able to insulate fundamental rights from popular sentiment whilst at the same time acknowledging that there can be some movement, pragmatism and persuasion in their interaction with the politically accountable branches in order that the principles are able to develop as society develops.[144] Hickman does concede that Section 4 may be used in certain circumstances, as a way for courts to express their dissatisfaction with a piece of legislation, thus excluding it from the nobility of the law or,

[133] Hickman, T., (2008). 'The courts and politics after the Human Rights Act: a comment' *P.L. Spr*, p100
[134] Ibid, p86
[135] Ibid, p87
[136] Ibid, p93
[137] Hickman (n69) p307
[138] Ibid, p334-335
[139] Ibid, p318
[140] Ibid, p317
[141] Ibid
[142] Ibid, p322
[143] Ibid
[144] Ibid, p326

instead, as merely a means to indicate to parliament that they have not managed to meet the threshold that Convention rights' require with the expectation that parliament legislates again to ensure compatibility.[145] Thus for Hickman, although Section 3 should be used in the majority of cases under the HRA, a maximalist approach where every statute is given Convention compliance should be avoided and there is room for the use of Section 4.

Hickman and Nicol's vastly differing accounts of the legitimate uses of Section 3 and 4 of the HRA to a certain extent demonstrates Tushnet's point that is possible to have a 'third way' bill of rights but yet be committed to either a political or legal constitutionalist position in terms of how these features operate. In Nicol's account, the legislature retains the whip hand in authoritatively settling-rights-questions. In Hickman's account, the courts have the principal role in determining the content of rights. Again therefore, it looks like the distinctiveness of 'third way' bills of rights may not be as clear as has been theorised by some. This fact undoubtedly refutes the claims made by some 'third way' scholars that a 'third way' Bill of Rights will magically ensure the optimum equilibrium between government, parliament and the courts in the protection of rights. However, for 'third way' scholars who make more modest claims – that there is value in emphasising the role of all branches of government in the protection of rights and in these branches working together to ensure the better protection of rights – the fact that there are differing accounts of the appropriate role of each branch of government does not detract from the fact that underlying assumptions of 'third way' theory are different and that viewing the constitution from the basis of these assumptions is a worthwhile exercise.

The account of 'third way' constitutionalism adopted in this thesis

Perhaps the person who has formulated the most detailed account on how inter-institutional dialogue should work under the HRA is Alison Young. She appears somewhere between Hickman and Nicol in the above continuum. Like Hickman and Nicol, Young accepts that the different institutional capacities of the legal and political branches of government place them in respectively better positions to have the final say on rights (or rights-issues) in different situations.[146] The judiciary is independent of political pressures and has the ability to apply teleological thinking to cases whereas the legislature is able to provide a forum for the expression and debate of a multitude of viewpoints and is more representative of public

[145] Ibid, p327
[146] Young, A.L. (2008) *Parliamentary Sovereignty and the Human Rights Act* Oxford: Hart Publishing, Chapter 5, p121

opinion.[147] This means that the judiciary should have the assumed power to settle non-contestable rights-issues whereas parliament should resolve rights-issues that are contestable.[148] According to Young, dialogue can only work if there is an acceptance that there is a need to protect rights around which there is sufficient consensus whilst, at the same time, there is flexibility to debate rights around which no consensus has been reached.[149] She defines contestable rights-issues as a question concerning a right in where it is reasonable to disagree that the Convention right has been violated or the best manner in which to ensure that legislation is rights compatible. Thus, non-contestable rights-issues are when there is no reasonable disagreement as to the above.[150]

When the rights-issue is contestable, Young argues that courts should issue a Section 4 declaration and parliament should respond by conducting a genuine, free and detailed debate in order to answer the question.[151] It is here, primarily, where Young sees an opportunity for dialogue. When the rights-issue is non-contestable, she offers that in the majority of cases courts should make a Section 3 interpretation and resolve the issue according to the long-standing principles of rights found in the ECtHR case law and the UK constitution.[152]

Although Young argues that in most cases concerning a non-contestable rights-issue the courts should make an s.3 interpretation, she notes two exceptions to this rule, where an s.4 declaration would be more appropriate.[153] Firstly, where due to its superior institutional competence parliament is able to provide a more effective remedy.[154] This could be where a Convention-compatible reading required more than an interstitial change to the law; where a Convention-compatible reading would require the development of a procedural or administrative mechanism that could lead to unintended consequences for other areas of the law, for example mechanisms that have budgetary consequences; and where there are more than one Convention-compatible interpretations of the Statute and there is reasonable disagreement over which interpretation is preferable.[155] Secondly, where making a Convention-compatible interpretation would violate a fundamental feature of the Statute.[156] Young points out this area

[147] Young, A., (2011). 'Is dialogue working under the Human Rights Act 1998' *P.L. Oct.*, p774-775
[148] Ibid, p775
[149] Young, (n146), p127
[150] Ibid
[151] Young (n147), p777
[152] Ibid ch5
[153] Ibid, p777-778
[154] Ibid
[155] Ibid
[156] Iibd, p777

as another opportunity for dialogue as it allows parliament to amend the statute so that it achieves the original aim while being more respectful of Convention rights.[157]

One criticism of Young's ideal account of democratic dialogue is that it is merely a complex theory of the separation of powers. Such a criticism is most prominently made by Aileen Kavanagh.[158] However, Young also acknowledges that in certain circumstances the legislature should still feel free to act even if it should normally feel bound to follow the courts judgment.[159] For example, if a Court makes a s.3 interpretation on a non-contestable issue but Parliament feels it has a legitimate reason for legislating contrary to this rights-issue it should be empowered to do so but only if it openly admits and fully justifies its position and thus is open to face the potential political consequences of the decision.[160] Legal constitutionalists may still complain that the political branches retain the legal power to trample on rights but the power of this political safeguard should, in my opinion, not be underestimated. Young's account thus clarifies the case for dialogue beyond other more generalised calls from other scholars. As well as pointing out the provisions in the HRA where dialogue is hypothetically possible, by highlighting the areas where she thinks it is legitimate for Parliament to debate or contest the courts' notions of rights as well as where parliamentary interference requires far greater justification, she indicates the instances where engaging in contestation is legitimate.

Although Young explicitly says that she would prefer the HRA to be operated in the manner above, she concedes that this has not happened in practice. She notes that where courts are faced with contestable or watershed rights-issues, they have not tended to issue a declaration of incompatibility under s.4 of the Act. Instead, they have generally refrained from passing judgment as to what the content of the right requires arguing that this is the responsibility of the legislature. Young argues that when the courts exercise deference to legislatures in such a manner, varying the levels of deference they show to the legislature depending on their assessment of the legislature's reasoning process etc, then democratic dialogue can operate through this alternative mechanism. Further, Young argues that this alternative method to achieve democratic dialogue allows for states with strong-form judicial review to achieve democratic dialogue.[161] Thus for Young, and some of the other 'third way' scholars mentioned

[157] Ibid, p778
[158] Kavanagh, A. (2009) *Constitutional Review under the UK Human Rights Act*, Cambridge: Cambridge University Press p130
[159] Young (n168), p777
[160] Ibid
[161] Young (n68), p223

above, the model of rights protection in Scotland can be considered in 'third way' terms despite the existence of strong-form judicial review.

This thesis will adopt an account of 'third way' constitutionalism that merges Alison Young's alternative route for 'dialogue' between the courts and legislators with Hiebert's 'legislative rights review'. As discussed above, Hiebert considers that it is the executive reporting requirement that is the feature of 'third way' bill of rights that most distinguishes it from other forms of constitutionalism. This is because, without granting courts hegemony over the interpretation of rights, it:

> imposes obligations and pressures on those in power to reflect upon the implications of their decisions for fundamental rights, to conceive of alternative and less restrictive ways to accomplish important social objectives and, where, rights are adversely affected, to explain and justify the merits of legislative decisions.[162]

Further, because the obligation exists with respect to all proposed legislation, the reporting requirement ensures that all bills are checked for the compatibility with rights and not just those that are subsequently challenged in the courts.[163]

The Scotland Act 1998

Why is it generally not considered to be a 'third way' bill of rights?

Thus far, attempts to link the Scotland Act 1998 – the document that sets out the relative powers of Scotland's devolved branches of government in the protection of rights – to the 'third way' model have been rare. McCorkindale and Hiebert explicitly discuss the Scotland Act 1998 in 'third way' terms[164] whilst McCorkindale, McHarg and Scott describe the Supreme Court's remedial approach under the Scotland Act as 'dialogic'[165]. However, there has been no comprehensive attempt to set the various structural and non-structural features of rights protection in Scotland against the 'third way' as a normative model of constitutionalism.

[162] Hiebert, J.L. (2005) 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review' *British Journal of Political Science 35:2,* p243
[163] Ibid
[164] McCorkindale, & Hiebert (n93), p323-325
[165] McCorkindale, C., McHarg, A. & Scott, P.F. (2017) 'The Courts, Devolution, and Constitutional Review' *UQLJ 36(2),* p296

As McCorkindale and Hiebert note[166], the lack of literature describing the Scottish model of rights protection in 'third way' terms can partly be explained by the fact that under the Scotland Act 1998, the UK Supreme Court has the final say on the compatibility of legislation with Convention rights.[167] As already mentioned, for Gardbaum, the lack of existence of a parliamentary override is enough to exclude the Scotland Act from his New Commonwealth model.

However, while recognising that the absence of a legislative override has quite significant effects for the nature of the relationship between legislators and the judiciary in Scotland, it is possible, and useful, to analyse rights protection in Scotland through a 'third way' lens. In this sense, I agree with McCorkindale and Hiebert – who, as noted, consider that the most important novel feature of 'third way' Bills of Rights is that the executive reporting requirement stimulates legislative rights review.[168] However, my conception of the 'third way' model is perhaps slightly broader than theirs is. I consider, in line with Young, that the 'third way' requires both legislative rights review and 'weak' forms of judicial review. However, in absence of formally weak powers, such as a legislative override, I argue it is possible to achieve the benefits of the 'third way' model through the doctrine of due deference. This is further supported where the judiciary is empowered to defer to the legislature in terms of remedy. In this way, there can be a shared protection of rights in Scotland consistent with the aims of 'third way' scholars.

Why do I think that it should be?

As I will demonstrate in chapter three, the Scotland Act 1998 contains multiple structural features that aim to ensure that rights protection is a shared endeavour between the executive, legislature and the courts. In particular, I will assess the features in the Scotland Act that engender legislative rights review and the internal and external features which have encouraged the courts to be deferential to legislatures in spite of formally strong powers of review. I will argue that these features, together, make it possible to conceive of the Scotland Act 1998 as a 'third way' bill of rights.

At the same time, I do not wish to overemphasise the significance of this claim. Like Young, I consider that 'third way' model of rights protection where parliament is empowered to override

[166] McCorkindale and Hiebert (n93), p325
[167] The Scotland Act 1998, s.29(2)(d)
[168] McCorkindale and Hiebert (n93), p325

judicial declarations of rights grants greater opportunities to the legislature to contribute to the settling of rights-questions. This is the case, even though I note that, as a result of the UK's membership of the ECHR, the practical differences of adopting a parliamentary override in Scotland would be minimal. I argue that, despite the aforementioned judicial minimalism, the existence of strong-form review in Scotland can cast a long shadow over how the 'third way' features are operated in practice.

However, although I acknowledge that the existence of strong-form review in Scotland can encourage legislators to take a defensive posture towards rights, I do not think that is an inevitable outcome of the Scottish model of rights protection. The Convention rights that the Scottish Parliament is subject to are deliberately designed to be flexible and to take into account variances in member states' understandings of rights. The flexibility that the ECtHR shows to contracting parties in its interpretation of the Convention can (and should) be passed on by domestic courts to national parliaments. This is particularly the case where, as result legislative rights review, Convention rights have been taken seriously during the legislative process. Further, the Scottish Parliament's moves to domestically recognise a greater number of human rights, such as those in the International Convenant on Economic, Social and Cultural Rights, might help to re-balance the scales in the fulfilment of all human rights by helping to change the expectations of constitutional actors as to what their appropriate institutional role in human rights realisation entails. Indeed, as shown later, the Scottish Government is increasingly defending Convention-rights engaging legislation in the language of socio-economic or children's rights. Justifying legislation in this manner allows lawmakers to communicate directly with courts by drawing their attention to a broader range of rights that must be balanced when considering whether the legislation violates rights. Considering that the courts have already been willing to show significant deference to the legislatures on rights-questions – I believe that is not fanciful to suggest that this approach, so long as it carried out in good faith, will allow political actors to strengthen their role in the protection of rights in Scotland.

Conclusions

This introduction has sought to give some context to my overall argument, which is that the Scotland Act 1998 can be considered alongside a broad family of rights documents that are said to adopt 'third way' features. The account of 'third way' that I have adopted merges 'legislative rights review' associated with Hiebert with democratic dialogue operating through the alternative mechanism of deference, theorised by Young.

I began by giving some background to the traditional debate between political and legal constitutionalists and setting out how 'third way' theory aims to surpass this debate. While the differences between the three theories is more vague and nuanced than is sometimes presented, I agree with Young that the key difference between 'third way' theories than the other forms of constitutionalism is their focus. By starting from the position that both legal and political controls have something to offer in the protection of rights, and by increasing the opportunities for political and legal branches to work together in protecting rights – a state is more likely to have a better-balanced constitutional system. Like Gardbaum and Young, I consider that particular structural features are more likely to ensure this constitutional balance be maintained. However, I disagree with Gardbaum that a formal parliamentary override is *absolutely essential* to ensure this balance. In the absence of a formal parliamentary override, the doctrine of due deference can help to ensure that parliament is able to help settle rights-questions in a system with strong-form review. It is therefore possible to consider the Scotland Act 1998 alongside other, more conventional 'third way' bills of rights, particularly given that it contains several provisions that engender legislative rights review.

In the following chapter, I will explore in more detail the practice of rights protection in states that have adopted a 'third way' bill of rights. I will argue that, just as important as structural 'third way' features, such as an executive reporting requirement and a parliamentary override, are broader constitutional factors, such as parliamentary design and the relationship between the bill and international human rights law. These wider constitutional factors often determine how these structural features operate in practice. Further, although they arguably increase the likelihood that a rights-protection in a state will fulfil 'third way' aims, it is not essential that a bill of rights adopts every so-called 'third way' feature in order to be considered through that lens. The insights from this chapter will allow me to build my overall argument in the following chapters, that it is possible and worthwhile to consider the Scotland Act 1998 as a 'third way' bill of rights

Chapter 2: Assessing the Operation of 'Core' 'third way' Bills of Rights

Introduction

The origins of 'third way' theories of constitutionalism are well known. Historically Commonwealth states that adopted the 'Westminster' model of government eschewed a constitutional bill of rights with a judiciary empowered to set-aside incompatible legislation. Instead, parliament was trusted to protect and vindicate the rights and interests of the population when making laws and the common law, particularly through the notion of residual liberty, allowed the courts protect the individual freedom from unlawful governmental interference. However, confidence in these constitutional arrangements was undermined by the increasing prevalence of rights discourse both at international and regional levels. This led to growing calls for the creation of a domestic bill of rights in these states. What emerged was a compromise, an attempt to merge the benefits of judicially protected human rights with Westminster-style parliamentary supremacy.

The 1960 statutory Bill of Rights in Canada was the first of such documents – with a requirement that the Federal Government report to the legislature where it considered that proposed legislation was incompatible with the rights contained in the Bill.[1] However, this legislation had little impact and was replaced by the constitutionally entrenched Canadian Charter of Rights and Freedoms in 1982.[2] The Charter adopted a similar reporting requirement but additionally empowered Canadian courts to set-aside legislation on the basis of Charter rights-incompatibility. At the same time, legislative supremacy was retained by granting the legislature the final word on the operation of bills by allowing it to declare that they remain in force 'notwithstanding' any judicial finding of incompatibility.[3] Such declarations would last for five years but could be renewed. It is these two features (or at least variations of them) – the executive reporting requirement and the parliamentary override of judicial invalidations of legislation - that are said to form the core of the new 'third way' model of rights protection. Such features, in addition to others, were adopted in statutory Bills of Rights in New Zealand[4],

[1] Canadian Bill of Rights (SC 1960, c.44), s.3(1)
[2] Constitution Act 1982 (CA), Part I, Canadian Charter of Rights and Freedoms, (Canadian Charter)
[3] Ibid, s.33
[4] The New Zealand Bill of Rights Act 1990 (NZBORA)

the United Kingdom[5] and, at subnational level, the Australian Capital Territory[6] and the Australian state of Victoria.[7] What began as an attempt to bridge the gap between two forms of constitutionalism, legal and political constitutionalism, that had previously been considered to be incompatible was increasingly referred to by scholars, and for the later bills, drafters, as a novel and potentially normatively superior model of constitutionalism. By creating a distinct role for each of the branches of government in the protection of rights and by requiring each of these branches to interact and engage with one another, it was suggested that these new rights documents could ensure the optimum protection of rights, whilst doing so in a democratically legitimate manner.

The previous chapter of this thesis considered the origins, features and theories of the 'third way' model of constitutionalism in detail. The aim of this chapter is different. By comparing and assessing the operation of the bills in the aforementioned states, it hopes to shed greater light on whether the claims that theorists and drafters made about these bills have actually come into fruition. I will argue that there is some evidence that elements of the bills are operating consistently with the aims of 'third way' proponents in each of the jurisdictions considered. However, at the same time, the operation of each of the bills is determined by multiple factors, some resulting from the design of 'third way' features and others resulting from factors such as the constitutional structure and political system that bill operates in, which means that each bill operates extremely differently and in some cases inconsistently with 'third way' accounts.

This wide variation in design and practice has led many scholars to reject the 'third way' model as a novel account of constitutionalism.[8] I agree that some of the more radical claims of 'third way' scholars have not come to pass. However, I believe that there is sufficient evidence to suggest that each of these bills of rights have changed constitutional practices in their respective states and in ways that 'third way' scholars would recognise. Further, the variation in design and the importance of the broader constitutional context in determining how a bill is operated in practice creates sufficient room for the inclusion of bills of rights that share some features

[5] Human Rights Act 1998 (HRA)
[6] Australian Capital Territory Human Rights Act 2004 (ACTHRA)
[7] Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter)
[8] See e.g. Geiringer, C. (2019) '"Something new under the sun?" A NZ-centric critique of comparative constitutional law scholarship on the Anglo-Commonwealth "model" of human rights protection" *CCS Brownbag*; Tushnet, M. (2003) 'New Forms of Judicial Review and the Persistence of Rights – and Democracy – Based Worries' *38(2) Wake Forest L Rev 813;* Meanwhile, Janet Hiebert has suggested that she is increasingly sceptical that 'legislative rights review' can 'fundamentally reorient political behaviour and legislative decision-making in a manner commensurate with this idealised notion of proactive rights protection – at least any time soon.' Hiebert, J.L. 'Legislative Rights Review: Addressing the Gap between Ideals and Constraints.' in Hunt et al. Ed (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit* London: Hart Publishing, p40

with the aforementioned bills, but not all, to be viewed through a 'third way' lens. This conclusion allows me to consider the Scottish model of rights protection through a 'third way' lens in the remainder of this thesis.

The chapter intends to advance the above argument by reflecting on the design and operation of some of the key 'third way' features of the bills of rights. In particular, it will consider the executive reporting requirement – a feature that encourages the executive to consider the rights-implications of its legislation before it is introduced to parliament. This feature was designed to encourage the executive to advance its policy goals in a manner that pays proper regard to rights or alternatively to openly acknowledge that it considers its policy goals to be necessary notwithstanding their effect on rights. It will be shown that the aim of mainstreaming human rights considerations into the policy process has broadly been a success in most of the states considered, although this task has principally been undertaken bureaucratic officials. This practice has been criticised by some as eliminating a key purported benefit of the feature, the increased ownership of rights-questions by democratic actors. Further, whilst the executive reporting requirement effectively works as a trigger for serious consideration of rights pre-introduction, its success in advancing a fruitful dialogue between the legislature and the government on the rights-compatibility of legislation after introduction has been weaker. This is down to a number of factors, some common to all states, others unique to particular states, but largely stems from the relative weakness of parliament *vis-a-vis* the executive that is a characteristic of the Westminster system of government. Reflections from the jurisdictions that have a specialist human rights-scrutiny committee will show that this feature can enhance the parliamentary role, but success is again coloured by some of some of the characteristics of the Westminster system.

Discussion of the role and relationship of executive and parliamentary actors will then give way to discussion of features that are said to encourage a relationship between the judiciary and legislators. Here, Tushnet's claim that 'third way' bills of rights necessarily collapse into parliamentary or judicial protections of rights will be shown to have some merit – although I will argue that there is some evidence that the bills have made a modest change to traditional constitutional dynamics (although, as yet, not in every state). Before consideration of some of the supposed similarities of the bills of rights however, there will be a brief analysis of some of the outside factors that influence the manner in which the bills are operated. These factors play a hugely influential role in determining how nominally similar structural features can operate extremely differently.

By demonstrating the ways in which the features of the legislation interact with broader constitutional factors to determine how the bills are operated in practice, the insights from this chapter will provide a key set of standards that can be applied to the Scottish model in subsequent chapters.

The Jurisdictions examined

The bills of rights in the five jurisdictions examined - Canada, New Zealand, the United Kingdom, the Australian Capital Territory and Victoria - are commonly considered together as having the necessary features to adopt a 'third way' of rights protection.[9] A sixth jurisdiction, the Australian state of Queensland, adopted a statutory bill of rights that adopted a number of features of its commonwealth antecedents in 2019.[10] However, because this Bill is still in its infancy, it is still too soon to engage in an assessment of its operation. For this reason, this chapter will continue to focus on practice in the longer-standing five Bills.

It is common to analyse these five Bills on the basis that they comprise a novel, distinct form of constitutionalism. For example, Gardbaum has argued that the five bills are all examples of what he terms the 'New Commonwealth Model of Constitutionalism' – a 'third way' model that merges aspects of political and legal constitutionalism to create something new.[11] Similarly, Hiebert considers each of the five Bills of Rights to engender 'legislative rights review' – because they encourage an increased role for executive and parliamentary actors in ensuring that legislation is compatible with rights.[12] Other scholars have suggested that these five bills help to facilitate constitutional or democratic dialogue – in that they contain structural features that encourage inter-institutional interaction on rights-questions which leads to a better and more democratic protection of rights.[13]

However, it should be noted that not all scholars believe that each of the bills contains sufficient similarities to be viewed as constituting a new model. For example, Claudia Geiringer has noted that the earlier two documents, the Canadian Charter and the New Zealand Bill of Rights

[9] See eg Gardbaum, S. (2013) *The New Commonwealth Model of Constitutionalism: Theory and Practice* Cambridge University Press; Hiebert, J.L. 'Parliamentary bills of rights: have they altered the norms for legislative decision-making?' in Jacobsohn, G. & Schor, M. Ed (2018) *Comparative Constitutional Theory: Research Handbooks in Comparative Constitutional Law series* Cheltenham: Edward Elgar Publishing, Chapter 7

[10] Human Rights Act 2019 (Act no.5 of 2019) (Queensland)

[11] Gardbaum (n9)

[12] Hiebert, J.L. (2004) 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?' *82 Tex. L. Rev. 1963*

[13] See eg Young, A.L. (2017) *Democratic Dialogue and the Constitution* Oxford: Oxford University Press

Act 1990 (NZBORA), lack some of the core features of the British and Australian Acts. Unlike the other four Bills, the Canadian Charter is an entrenched constitutional bill of rights where the judiciary is empowered to set-aside legislation on the basis of Charter rights. Although section 33 of the Charter allows parliament to override these findings of incompatibility, this declaration only operates for five years (although it is renewable). Thus according to Geiringer, the temporary nature of the notwithstanding clause makes it substantively different to the bills where a judicial finding of incompatibility has no effect on the operation of the statute.[14] On the other hand, Geiringer notes that the NZBORA (for now) contains no explicit power to allow courts to declare that legislation is contrary to rights. For 'third way' proponents that emphasise the importance of 'dialogue' between the courts and legislators on the meaning and extent of rights, this initial exclusion potentially excludes the NZBORA from the model.[15] Additionally, Geiringer notes that contrary to the British and Australian Bills, the Canadian and NZ Bills lack the appropriate mechanisms, such as a parliamentary human rights-scrutiny committee, to stimulate a unique parliamentary role in the process of rights protection.[16]

Another important variation in the Canadian and NZ bills with the latter three Bills is their origins. It contrast to the later three Bills, the drafters of the Canadian Charter and the NZBORA did not conceive of the Bills in 'third way' terms. The inclusion of the notwithstanding clause in the Canadian Charter was a political compromise that the Federal Government struck with certain provincial Premiers who were concerned that a Bill of Rights would threaten their ability to pursue their legislative agenda in their provinces.[17] Similarly, in New Zealand, the NZ Government had originally intended that the Act would constitute a supreme bill of rights but was forced to substantially water-down its proposals in light of significant opposition. As a result, Geiringer notes that the NZBORA 'was enacted less as constitutional innovation than as consolation prize.'[18] On the other hand, there is clear evidence that drafters in the UK, the ACT and Victoria conceived of the legislation as promoting the shared institutional responsibility for the protection of rights.

In the UK, the government was assisted in devising the Human Rights Act model by Francesca Klug. As seen in the previous chapter, Klug explicitly described the Human Rights Act as a

[14] Geiringer (n8), p3-4
[15] Ibid, p2
[16] Ibid, p4
[17] Hiebert, J.L. 'The Notwithstanding Clause: Why Non-use Does Necessarily Equate with Abiding by Judicial Norms' in Oliver, P et al Eds. (2017) *The Oxford Handbook of the Canadian Constitution* New York: Oxford University Press, p697
[18] Geiringer (n8), p2

'third way' or 'third wave' Bill of Rights. She argued that this "third wave" was characterised by 'a growing emphasis on participation or mutuality'.[19] The Human Rights Act served these aims through its model.

> [T]he courts cannot strike down primary legislation under the HRA. Instead a dialogue is established between the courts, Parliament (with its new Joint Committee on Human Rights) and Government (whose Ministers have to make human rights impact statements when introducing new bills). More importantly, this tripartite approach creates the space for any of us to join the debate about where the line should be drawn when rights collide. This is different from the second wave approach which tends to assume that this is the concern only of judges or UN enforcement bodies.[20]

Klug's understanding of the HRA as a 'third way' bill of rights appears to have been shared by senior members of the Government at the time. On introducing the Human Rights Bill to Parliament, then Lord Chancellor Lord Irvine said that the Act would help a 'human rights culture' to develop throughout society.[21] In evidence to the JCHR in 2001, he elaborated:

> What I mean and I am sure what others mean when they talk of a culture of respect for human rights is to create a society in which our public institutions are habitually, automatically responsive to human rights considerations in relation to every procedure they follow, in relation to every practice they follow, in relation to every decision they take, in relation to every piece of legislation they sponsor.[22]

Lord Irvine's calls for a human rights culture were quoted approvingly by the Australian Capital Territory's (ACT) Attorney General, Jon Stanhope, as he spoke in favour of the Human Rights Bill proposed by his state government in the ACT Legislative Assembly. He expanded, claiming:

> The ACT bill will promote human rights by making rights more transparent and require them to be taken into account in the development and interpretation of the

[19] Klug, F. (2001). 'The Human Rights Act – a "'third way'" or "third wave" Bill of Rights', *E.H.R.L.R. 4*, p369
[20] Ibid, p370
[21] Lord Chancellor, Lord Irvine of Lairg, *Hansard*, HL col.1228 (November 3, 1997).
[22] Lord Irvine, Evidence to the JCHR, *JCHR HL 66-ii HC 332-ii*, (March 19, 2001)

> law. It will encourage Canberrans to see themselves as having rights as well as the responsibility to respect the rights of others.[23]

Similarly, in its final report to the ACT Government, 'Towards an ACT Human Rights Act', the ACT Bill of Rights Consultative Committee said that it was,

> persuaded that the protection of rights will be best achieved if the three branches of government – the legislature, the executive and the judiciary – can have an ongoing and public dialogue about rights.[24]

The Victorian Human Rights Consultation Committee also explicitly conceived of the Victorian Charter in terms of constitutional dialogue and the shared institutional protection of rights.[25] These calls were echoed by MLA Ann Barker as the Charter progressed through the Legislative Assembly:

> I believe it will encourage a human rights culture in Victoria and, importantly, will provide and educative role both in the community and across government. The charter also provides that the delivery of government services to all Victorians will be strengthened and improved by incorporating human rights considerations into the development of legislation policy and programs. As has been made clear, every policy, law and decision must be looked at in terms of our democratic rights and freedoms by every government department, local council, statutory body and public official.[26]

The above evidence demonstrates that, initially at least, the Canadian and New Zealand bills were not considered in 'third way' terms and that they lack some of the key 'third-way enhancing' features of the UK and Australian Bills. However, for numerous reasons I believe that is still worthwhile to suggest that both bills are examples of 'third way' bills of rights.

Firstly, although neither Bill was initially conceived in 'third way' terms, there is clear evidence that shows that the earlier Bills influenced the later Bills. As Hiebert and Kelly note, the Canadian model of rights protection provided an early example for the other jurisdictions that wished to adopt a bill of rights whilst maintaining parliamentary

[23] Jonathon Donald Stanhope MLA, *Hansard ACTLA* p530, (March 2, 2004),
[24] ACT Bill of Rights Consultative Committee, Towards and ACT Human Rights Act, at 3.50
[25] Victorian Human Rights Consultation Committee, Rights, Responsibilities and Respect, at ii, 67-68, 86
[26] Ann Barker MLA, Hansard (2006) Hansard *VLA, p1995,* (June 13, 2006)

supremacy.[27] Indeed, the former Prime Minister of New Zealand Geoffrey Palmer, decided to include an executive reporting requirement in the NZBORA after hearing about the feature on a visit to Canada.[28] Similarly, the policy documents of the HRA, the ACTHRA and the Victorian Charter all explicitly referred to the earlier bills when justifying their particular model.[29] The Canadian and NZ Bill may have been 'primitive exemplar[s]'[30] that lacked all of the features of the later bills, but they were exemplars nonetheless.

Secondly, although they might not have been originally conceived as 'third way' bills of rights, there has been some evidence that some judicial actors in Canada and New Zealand now conceive the operation of their bills through this lens. In Canada, there have been numerous judicial references to the concept of dialogue by judges.[31] Similarly, in New Zealand, the High Court justified its finding that it had the power to issue a 'declaration of inconsistency' with the rights in NZBORA in dialogic terms,[32] whilst recent proposals to require a parliamentary response to such declarations suggest that the government also conceives of the relationship between parliaments and the courts in this manner.[33] That is not to say that 'dialogue' is the dominant or even primary conception of the Bills amongst judges in Canada and New Zealand (indeed as it not in the UK, the ACT or Victoria). However, that some official actors conceive of the operation of the Bill in such a way, provides evidence that they might fit within the broader model.

Finally, I believe that Canadian and NZ Bills can be understood in 'third way' terms, despite lacking some of the features of the later Bills, because my conception of 'third way' bills of rights is looser than other conceptions. As explained in the previous chapter, I believe 'third way' theory is a useful lens through which to assess bills of rights because it asks a different set of questions and begins with a different set of assumptions than legal/political constitutionalism. Rather than asking, "which branch of government is best placed to have the final say on constitutionality?" 'Third way' theory asks, "how can each branch of government work together so that their respective institutional capacities allow for the

[27] Hiebert, J.L. and Kelly, J.B. (2015). 'Parliamentary Bills of Rights: The Experiences of the New Zealand and the United Kingdom'. *Cambridge University Press: Cambridge,* p1-2
[28] Ibid, p5
[29] UK Government White Paper, (1996) *Rights Brought Home: The Human Rights Bill*, Cm.3782, at 1.13, 2.11; ACT Bill of Rights Consultative Committee (n24) at 3.52., 4.18, 4.46-448; Victorian Human Rights Commission Committee (n25), at ii, 10-12, 82-83
[30] Geiringer (n8), p3
[31] See eg *Vriend v Alberta* [1998] 1 SCR 493, para 138-19, Iacobucci J.; *R v. Hall* [2002] 3 S.C.R. 309, para 43, Mclachlan, C.J.
[32] *Attorney-General v Taylor* [2017] NZCA 215, paras 149 and 155
[33] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (Bill no 230-1)

optimum protection of rights in a way that best serves democracy?" While certain structural features can help to better achieve this constitutional balance, they are not the only means by which an appropriate balance can be obtained. This allows me to consider both the Canadian and NZ Bills through the 'third way' lens, because they contain several features in common with the other 'third way' Bills of Rights, even though they lack strong features that help to promote legislative scrutiny of government bills on rights-grounds. At the same time, it allows me in the remainder of the thesis to consider the Scotland Act 1998 through the 'third way' lens, because it contains several features in common with other 'third way' Bill of Rights even though it does not contain a parliamentary override.

Non-Structural Features that influence the operation of the bills

Before focussing on the particular 'third way' structural features of the five Bills of Rights, it is important to note that a number of important constitutional and cultural differences also influence the manner in which the rights documents operate. The five states all share a common dominant cultural heritage and trace the operation of their political system to the Westminster model. However, it is also important to recognise that there have always been important deviations in constitutional structure and context. While space forbids an extensive discussion of the constitutional differences of the jurisdictions under examination, a number of important variances that have an important effect on the operation of the rights documents can be set out.

The Constitutional Status of the Bill of Rights

As previously mentioned, a key difference between the Canadian Charter and the other bills is that the Canadian Charter is constitutionally entrenched. For the Charter to be amended, it requires the approval of both the Senate and the House of Commons[34] as well by resolutions of the legislative assemblies of at least two-thirds of the provinces amounting to at least fifty percent of the population of Canada.[35] Further, under the Charter, the Canadian judiciary is empowered to set-aside primary legislation that fails to comply with rights.[36] These constitutional features and the country's geographical proximity to the United States has led Hiebert to conclude that expectations about the proper role of different institutional actors with regard to the definition and enforcement of rights in Canada is similar to the attitudes in the US.[37] Therefore, use of the mechanisms in the Canadian Charter that are said to be capable of

[34] Canadian Charter (n2), s.38(1)(a)
[35] Ibid, s.38(1)(b)
[36] Ibid, s.32
[37] Hiebert, (n13) p1986

giving Canadian political actors a greater say in the protection of rights such as the 'notwithstanding clause' have been considered by political actors and many academics as illegitimate.[38] As a result, the mechanism has never been used at the Federal level.

On the other hand, the ACTHRA and the Victorian Charter are statutory bills of rights passed by territory/state legislatures in a federal system. The territorial division of powers in Australia has meant that aspects of these bills have been questioned on the basis of their constitutional validity.

As I shall discuss later, in the much-criticised *Momcilovic*[39] decision of the High Court of Australia, a number of conflicting opinions issued by the judges as to questions of interpretation and constitutionality of the Victorian Charter led to widespread confusion about what the *ratio* of the judgment was and its implications for the Charter going forward.

Chen argues that the confusion that has reigned since the *Momcilovic* decision has contributed to a reluctance on behalf of litigants in Victoria to found their claims on the Charter and a conservatism by the courts in their use of Charter powers.[40] The decision has similarly infected use of the ACTHRA because it contains similar provisions to those in the Charter that were under question in *Momcilovic.* Thus, because both Australian bills are statutory bills of rights that must abide by the terms of the Australian constitution and because certain features of the Australian bills have been questioned on constitutional grounds – the Acts' powers have grown into disuse.

What the above two examples tell us is that the constitutional context in which a bill of rights is enacted can have an extremely important influence on how the legislation is operated. In both contexts, the constitutional status of the bill of rights has meant that a key 'third way' feature of the bill, in Canada the notwithstanding clause and in the Australian states the enhanced powers of the judiciary to consider the rights-compatibility of legislation, have grown into disuse. This fact serves as a warning to advocates of the 'third way' model - that particular structural features are insufficient to ensure that the bills are operated in the manner that fulfils 'third way' objectives.

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[38] See eg respo=2nse to recent uses of clause in the provinces of Quebec and Ontario – Sigalet, G. & Woodfinden, B. 'Opinion: Doug Ford's use of notwithstanding clause stands up for democracy' (15 June 2021) *National Post* Available at https://nationalpost.com/opinion/opinion-doug-fords-use-of-the-notwithstanding-clause-stands-up-for-democracy (Accessed 26/07/2021)

[39] *Momcilovic v. The Queen* (2011) 245 CLR 1 (Austl)

[40] Chen, B. (2021) 'The Quiet Demise of Declarations of Inconsistency under the Victorian Charter' *Melbourne Law Review* 44(3) (advance)

Constitutional/Parliamentary Design

This conclusion can also be made when one considers the effect of constitutional/parliamentary structure on the operation of the model.

Hiebert and Kelly's analysis has shown that the design of New Zealand's unicameral parliament is not conducive to effective parliamentary scrutiny of legislation on rights-grounds. This is partly down to the fact that, compared to the HRA and the Australian Bills, the NZBORA lacks some clear structural features, such as parliamentary human rights-scrutiny committee, that can encourage this form of scrutiny.

However, the authors note that the failure is also unintentionally caused by New Zealand's change from the Single Member Plurality (SMP) to the Mixed-Member Proportional (MMP) voting system. The MMP voting system ensures that parties are represented in parliament roughly in proportion to the total votes they have received.[41] As a result, since the MMP system has been adopted, no party has been able to obtain a majority of seats in the House of Representatives.[42] Coalitions or confidence and supply agreements between different political parties have therefore typically become the basis for governments. However according to the authors,

> [w]hile MMP has altered the composition of governing arrangements, it has not addressed the problem of executive domination of the parliamentary arena.[43]

They note that governments are generally predicated on agreements that commit the government to support certain policies. The preordained nature of coalition agreements reduces the likelihood that the government will be amenable to parliamentary rights-based scrutiny. This is because, by entering into a coalition, the government is likely to have the votes to force through the policy. Additionally, dropping or amending a policy might have an effect on the stability of the coalition. Parliamentary rights-based scrutiny has therefore suffered as a result of the change to the NZ voting system. [44]

Alternatively, in the UK, it is generally accepted that the House of Lords exhibits numerous qualities that make it particularly well suited to scrutinising legislation on the basis of human rights. As it is an unelected body, the Lords has largely been stripped of its law-making and

[41] Hiebert and Kelly (n27), p84
[42] Ibid, p85
[43] Ibid, p87
[44] Ibid, p87-88

censuring powers.[45] Instead, it is now widely considered to be a body whose principal function is the scrutiny of legislation. Lords are often appointed for political reasons or on the basis of expertise, which means that it is made up of many are ex-MPs highly versed in parliamentary scrutiny as well as a number of lawyers and barristers. Although most sit according to party lines, there exists a not-insubstantial number of crossbenchers, which means that a significant numbers of members not bound by party positions. Further, Lords' security of tenure means that they are often more independently-minded than MPs. It is these factors that lead Klug and Wildbore to suggest that the Lords in uniquely suited to carry out parliamentary scrutiny of legislation on the basis of Convention rights.[46] Evidence cited by Kavanagh suggests that this assertion is correct – human rights are discussed more often in Lords and usually in a more authoritative manner.[47] It has also been suggested that the formation of the JCHR as a jointly constituted committee of members from the Commons and the Lords has improved the expertise of the Committee and has reduced the likelihood of it operating in a partisan manner – both attributes that make it more effective in scrutinising legislation on rights-grounds.[48] The role of the House of Lords may therefore mean that the UK Parliament is in a better position to undertake rights-based scrutiny.[49]

Relationship with international human rights law

Another extremely important factor that dictates the extent to which there is room for a dialogue between the courts and parliament on rights-questions is the closeness of the relationship between the bill and the jurisdiction's international human rights commitments.

The UK's status as a signatory to the European Convention on Human Rights places it in a considerably more complex position with regard to the freedom of parliament to disagree with the courts than the states that created purely national or subnational rights. Since 1966, individuals who consider that their rights have been violated in the UK have been able to apply to the European Court of Human Rights.[50] If found to have infringed a right, the UK is bound

[45] Parliament Act 1911; Parliament Act 1949
[46] Klug, F., and Wildbore, H. (2007). 'Breaking new ground: the Joint Committee on Human Rights and the Role of Parliament in human rights compliance'. *E.H.R.L.R. 3,* p242
[47] Kavanagh, A. (2015). 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog'. in Ed. Hunt, M., Hooper, H.J., and Yowell, P. (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit.* London: Hart Publishing, p133
[48] Klug & Wildbore (n46), p235
[49] Although, the Lords' stronger engagement with Convention rights questions undermines arguments about the democratic contribution parliamentarians can make to rights-vindication.
[50] Declarations recognising the competence of the European Commission of Human Rights to receive individual petitions and recognising the compulsory jurisdiction of the European Court of Human Rights, *Strasbourg, (*14 Jan 1966)

by the terms of the Convention to provide redress for the infringement.[51] The Committee of Ministers, the body in charge of the enforcement of judgments, works with the state in question to decide the proper form of redress.[52] Often, if the state's violation was directly a result of the application of a statute, redress includes a requirement to amend the law in that area.[53] The dualist nature of the UK constitution means that the UK's duty to abide by the terms of its international agreements remains within the discretion of the UK executive and such agreements have no direct force in UK law. However, that the UK state, as a matter of UK law, is not formally required to enforce its international agreements does not mean that a lack of enforcement is regarded to be a legitimate course of action. The UK government's record of implementation of judgments of the ECtHR is generally very good.[54]

The fact that the HRA transplanted the rights in the ECHR into UK law has meant that those responsible for enforcement have in practice found it difficult to interpret the rights differently from the Strasbourg Court. One of the stated aims of the Government in passing the HRA was so that it could 'bring rights home'[55] by obviating the need for British citizens to take 'the long and… road to Strasbourg'[56] in order to enforce their rights.[57] Thus, it has been argued that the Government intended the rights in the HRA would have roughly the same meaning.[58]

The court's interpretation of section 2(1) of the HRA suggests that in practice, subject to some exceptions, British courts largely subscribe to the notion that they should follow Strasbourg jurisprudence. Section 2(1) of the HRA requires that UK courts 'take into account' jurisprudence from the ECtHR when interpreting Convention rights under the HRA. Strasbourg does not operate according to the doctrine of precedent and the UK is only bound to respect judgments to which it is a party. However, recognition that the court is likely to respond similarly in similar cases means that in reality UK courts pay close attention to Strasbourg jurisprudence. The original approach of the courts to section 2(1) is what has been known as

[51] European Convention of Human Rights 1951, Article 13
[52] Ibid, Article 46
[53] Amos, M. (2017). 'The Value of the European Court of Human Rights to the United Kingdom'. *E.J.I.L 28(3),* p766
[54] JCHR. 'Human Rights Judgments', *Seventh Report of Session 2014-15,* para 2.12
[55]*Rights Brought Home: The Human Rights Bill,* (n29)
[56] Ibid, para 1.17
[57] Sales, P (2012) 'Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine' *P.L. Apr,* p258
[58] Draghici, C (2014) 'The Human Rights Act in the Shadow of the European Convention: are copyist's errors allowed?' *E.H.R.L.R 2,,* p156

the ‘mirror principle’. Formulated by Lord Bingham in *Ullah*[59] the mirror principle is the proposition that:

> “The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.”[60]

Although this principle has been weakened by subsequent judgments which have set out some important exceptions, broadly UK interpretations of Convention rights remain closely linked to those of the ECtHR.

Thus, there is a degree of fusion between European and British interpretations of Convention rights. This means that when a court decides to issue a declaration of incompatibility, the court has usually considered European jurisprudence and has come to the conclusion that it is likely that the Strasbourg court would have found a violation. As a result, the spectre of a negative decision at Strasbourg, where the UK takes its obligations seriously, means that the UK parliament may feel bound to remedy the offending legislation even if it considers that it does not violate rights – or that the legislation should remain in place despite its impact on rights.[61] Thus, the ability of UK parliament to disagree with UK courts over the protection of rights is significantly weakened, undermining a key feature of the ‘third way’ model. Indeed, Mark Elliot has suggested that the above factors mean that section 4 HRA, originally intended as a measure that would preserve the sovereignty of parliament, has come

> in substantive (but not, of course, formal) terms, to resemble a de facto judicial power to procure the amendment of legislation which unlawfully qualifies fundamental rights.[62]

It is unarguable that the relationship between the HRA and the ECHR has reduced the space for parliament to openly disagree with the courts over rights-questions. However, despite this relationship, there is a good deal of evidence to suggest that an independent parliamentary view of rights can be retained in the UK.

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[59] R. (on the application of Ullah) v Special Adjudicator [2004] UKHL; [2004] 2 AC 323
[60] Ibid, para 20
[61] Leigh, I, and Masterman, R. (2008), ‘Making Rights Real: The Human Rights Act in its First Decade’, *Hart Publishing, Oxford and Portland, Oregon,* Chapter 2, p41
[62] Elliot, M. (2002) ‘Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention’ *Legal Studies* p349

Firstly, the UK Government's foot-dragging on the implementation of the *Hirst*[63] judgment indicates the UK's tolerance of ECtHR decisions where it disagrees may not be unlimited. The decision, which found that the UK's blanket ban on prisoner voting violated the right to vote,[64] was handed down in 2005. Despite this, the UK Government did not resolve the issue until 2017.[65] Even then, it is widely recognised that it did the bare minimum to abide by the judgment and that the Committee of Ministers, alive to concerns that the UK could use the judgment as a justification for withdrawing from the Convention, was particularly lenient in accepting the UK's remedy.[66] For those that believe that it is legitimate for the UK to occasionally fail to implement Strasbourg's judgments this has served as an important counter-example.

Another reason that the relationship between the UK and Strasbourg does not necessarily eradicate all room for an independent parliamentary role in protecting Convention rights is because the Convention and the Strasbourg court has adopted numerous principles of interpretation that place the responsibility for rights-protection at the domestic level. The Convention operates by the principle of subsidiarity.[67] Under this principle, states are said to have the primary responsibility for the protection of Convention rights. This principle is reflected in the Court's admissibility criteria under which applicants must 'exhaust domestic remedies'[68] before applying to the Court. The principle is also reflected in the court's use of the 'margin of appreciation'.[69] Under this principle, the Court will defer to the judgements of states in situations where it considers that the domestic authority is better placed to act. For example, where there is reasonable disagreement as to the appropriate balancing of rights and legitimate interests or where there is no consensus as to the content of a right. Indeed, in *Animal Defenders International v UK*, on the basis that the UK parliament had thoroughly and seriously debated the issue of political advertising and had reached a mature and rights-respecting position, the Court was willing to deviate from its previous judgments and find that the legislation was compatible with Article 10 ECHR.[70]

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[63] Hirst v. UK (No. 2) App No. 74025/01, (2005)
[64] ECHR (n51), Protocol 1, Article 3
[65] Rt Hon David Lidington MP 'Secretary of State's oral statement on sentencing' (02 November 2017) *UK Gov: Ministry of Justice* Available at https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-sentencing (Accessed 21/04/21)
[66] See eg Adam, E. 'Prisoners' Voting Rights: *Case Closed?*' (30 January 2019) *UK Constitutional Law Blog* Available at https://ukconstitutionallaw.org/2019/01/30/elizabeth-adams-prisoners-voting-rights-case-closed/ (Accessed 21/04/21)
[67] ECHR (n51), Preamble (As amended by Protocol No.15) (CETS No.213)
[68] Ibid, Article 35(1)
[69] Ibid, Preamble
[70] *Animal Defenders International v United Kingdom* App no 48876/08, judgment of 22 April 2013, para 114-116

President of the ECtHR Robert Spano, has suggested that in recent years 'the Court has to a considerable extent recalibrated the methodological parameters of its jurisprudence towards a more democratically-incentive review mechanism.'[71] In this new so-called 'Age of Subsidiarity':

> When national authorities have in good faith balanced competing interests, in other words, themselves adequately assessed the necessity of an interference into qualified rights, the Court is increasingly ready to apply the rule that it will require strong reasons for it to substitute its judgment for the one adopted by the national authorities.[72]

If this margin of appreciation is appropriately passed on to legislators by the UK courts, then there remains room for an independent parliamentary role in the protection of rights – albeit one that is ultimately overseen by the Strasbourg court.

In the other jurisdictions, the relationship between the Bills of Rights and the jurisdictions' obligations under international human rights law is substantially weaker. This is not necessarily a result of the legislation itself. Both the Victorian Charter[73] and the ACTHRA[74] empower courts to 'consider' relevant international and foreign judgments when interpreting legislation – although the courts have interpreted this power extremely conservatively.[75] The NZBORA and the Canadian Charter are silent on the relevance of international judgments when interpreting rights, but in both cases the courts have found that international law does have relevance in the interpretation of domestic rights. The Canadian courts have found that 'the Charter should generally be presumed to provide protection at least as great as that offered by similar provisions in international human rights documents which Canada has ratified.'[76] Similarly in New Zealand, the courts have found that, unless aspects of aspects of the International Covenant on Civil and Political Rights (ICCPR), were deliberately left out of the

[71] Spano, R. 'The Democratic Virtues of Human Rights Law – A Response to Lord Sumption's Reith Lectures' (20 February 2020) *The Inaugural Bonavero institute Annual Human Rights Lecture,* Available at https://echr.coe.int/Documents/Speech_20200220_Spano_Lecture_London_ENG.pdf, (Accessed 27/07/21), p11
[72] Ibid, p11-12
[73] Victorian Charter (n7) Section 32(2)
[74] ACTHRA (n6) Section 31(1)
[75] See Chen (n40), p30-32
[76] *Reference re Public Service Employee Relations Act (Alta) ("Alberta Reference")* [1987] 1 SCR 313, para (Opinion of Dickson, C.J.) para 59

NZBORA, the ICCPR and associated interpretive guidance can be used to interpret NZBORA rights.[77]

The main reason that the other bills have a far weaker relationship with international law is that their Bills are derived from the ICCPR rather than the ECHR. The enforcement mechanisms of the ICCPR differ from and are generally considered to be far weaker than the protection system under the ECHR. The result is that the ICCPR has far less influence on domestic courts' interpretation of rights.

Overall, the substantially weaker relationship between the other bills of rights and international law reduces the pressure on legislatures to abide by judicial interpretations of rights compared with the UK. In theory, this should create greater room for legislators in determining the extent to which judicially-interpreted rights should constrain their policy choices.

Westminster Factors

A final set of factors that determine how the Bills work in practice is the political system in which they operate. As discussed above, the jurisdictions share a common constitutional heritage. Hiebert notes that the five jurisdictions have traditionally operated on the basis of the Westminster-system of government, characterised by the doctrine of parliamentary supremacy, executive domination of the legislative process, the convention of responsible government (where the executive must retain the confidence of parliament to continue to function) and the centrality of strong cohesive political parties that are crucial to determining how parliament functions.[78] Such features:

> [A]llow the executive to dominate legislative proceedings, introduce legislation at an advanced stage of development, and regularly exert sufficient power over members of the governing party to support the government and overcome opposition attempts to defeat the government's agenda, particularly in those frequent situations where government has an electoral majority or a stable coalition.[79]

As shall be seen, these features generally dictate that, while the executive might take its role in ensuring that legislation is compatible with rights in the pre-introduction phase of policy

[77] See *R v Barlow* (1995) 2 HRNZ 635 (CA), para 65 & *Hamed v R* [2011] NZSC 101, para 36
[78] Hiebert (n9), p126-127
[79] Ibid, p127

development seriously, it is generally reluctant to engage with parliamentary rights-based scrutiny after a bill has been introduced.

Parliamentary scrutiny of legislation is further undermined by the centrality of political parties in framing a parliamentarian's response to a bill. In Westminster systems, parliamentary scrutiny is generally organised along party lines. One of the jobs of the Opposition is to appear as an alternative government. As a result, for the Opposition, successful scrutiny is not necessarily always aimed at improving Government legislation but rather at defeating it. On the other hand, most parliamentarians in the ruling party view their role primarily as supporting the government – this is largely down to ideology and personal ambition (the prospect of being a member of the government themselves one day). As such, in most Westminster systems, the most important division of power is not between parliamentarians and members of government but rather government supporting parliamentarians and non-government supporting parliamentarians.[80] In this dichotomy, detailed scrutiny of legislation on rights grounds is unlikely unless the Opposition sees it to be a potent vehicle through which to defeat the government.[81] Of course, it would not be politically prudent for the Opposition to appear needlessly confrontational and Opposition parties will often work with the Government.[82] Similarly, it does not always serve a backbencher to unquestionably support the government - constructively criticising the government on a particular issue is one way to demonstrate a parliamentarian's talents and principles The point is that the effect of the party system in determining legislative scrutiny *complicates* the extent to which parliamentarians are likely to use human rights as the basis for their scrutiny of legislation.

Westminster factors are therefore influential in determining the relationship between the executive and legislature in the operation of the bills. Although it would be an overstatement to say that Westminster factors prevent the Bills of Rights from being operated in a manner that allows for a strong parliamentary role – one must be aware that these factors tend to reduce the likelihood and effectiveness of parliamentary rights-based scrutiny.

[80] Lijphart, A. (2012). 'Patterns of Democracy: Government Forms and Performance in Thirty Six Countries'. *Yale University Press: London, Second Edition.* Chapter 2 – The Westminster Model of Democracy; See also Webber, G. (2017) 'Loyal Opposition and the Political Constitution' *O.J.L.S. 37:2,* p370-371
[81] Hiebert (n9), p138
[82] Webber (n80) p377-378

Structural 'third way' features

The above analysis demonstrates that any discussion of 'third way' bills that focuses on the particular structural features of the bill in abstraction will form an incomplete and misleading picture of how the bill operates in practice. As previously discussed, Tushnet and Geiringer have questioned whether the effect that the above individual contextual factors have on the operation of the Bills make it worthwhile to group them together as a distinct model of constitutionalism. I still consider that it is a worthwhile exercise. Each of the above factors do play a major role in determining how the bills are operated, sometimes in unexpected ways. However, there is evidence in each of the jurisdictions that the Bills have favourably altered the equilibrium between the protection of rights and democracy as compared with when they were enacted. This of course does not mean that the equilibrium is perfectly balanced in every context. However, whilst being realistic about their ability to fundamentally alter existing constitutional practices, the above Bills do provide mechanisms which have allowed for a more constitutionally-balanced protection of rights.

Executive pre-legislative scrutiny of rights

The 1960 Canadian Bill of Rights was the first to include pre-legislative rights review and a reporting mechanism.[83] The subsequent Canadian Charter, which largely superseded the 1960 Bill, considered to be largely ineffective, and the four other instruments examined also include such a mechanism.[84] Although these mechanisms differ greatly both in design and in operation, broadly they place a statutory duty on those responsible for bills to declare to parliament that their legislative proposals are consistent with rights (statement of consistency), and if they cannot do so, to indicate that they would like to proceed with the legislative proposal regardless (a 'nevertheless' declaration). It is argued that this mechanism reflects the desire of the drafters to mainstream human rights into executive practices as well as to allow space for governments and parliaments to disagree with courts on the meaning of rights.

Firstly, the mechanism was designed to require the drafters of Bills to engage with the rights ramifications of the proposed bill during the drafting process and before the bill is introduced to parliament.[85] This, it was hoped, would allow drafters to claim ownership of rights and

[83] Canadian Bill of Rights, (n1), Part 1, s3
[84] Department of Justice Act (CA), R.S.C., 1985, c.J-2, s4.1(1); NZBORA (n4), s7; HRA (n5), s.19; ACTHRA (n6), s37; Victorian Charter (n7), s28
[85] *Rights Brought Home* (n29) para 3.4

achieve their policy objectives in a way that respected rights.[86] Thus, human rights were to be considered at the beginning, and throughout, the legislative process and not merely at the end, when the legislation was challenged in the courts. The need for Ministers to consider the human rights implications of a bill before its introduction to parliament was considered by Hiebert to be especially important due to the executive dominance of parliament.[87] She argues that governments are more likely to yield to rights-based concerns prior to a bill's introduction to parliament because any amendments after introduction could be framed as a defeat for the government.[88]

A second common feature of this pre-enactment scrutiny of Bills is that, upholding the principle of parliamentary supremacy, drafters of bills are able declare to parliament that their bill is potentially not rights-compliant but that they think that the bill should be enacted nonetheless. Within this mechanism is the recognition that democratically elected politicians are sometimes better placed to decide whether or not a bill is in the public interest regardless of its potential impact on rights.[89]

Assessment of Practice

Despite the common objectives that led to the inclusion of instruments for executive scrutiny and compatibility statements of bills in these rights documents, it is important to note that the five states' mechanisms have been designed and operate extremely differently. Thus, for example, in the ACT and New Zealand compatibility reports are made by the Attorney General, in Canada the report is made by the Justice Minister and in the UK and Victoria the requirement is on the Minister sponsoring the Bill. In the UK, the ACT and Canada only government bills are subject to compatibility reports whereas in New Zealand and Victoria all bills must be checked for compatibility. Finally in the UK, the ACT and Victoria every bill must be accompanied with either a positive or negative statement of compatibility whereas in New Zealand and Canada, a report is only necessary if it is considered that the bill might be contrary to judicially interpreted rights. Some of these specific qualities, in conjunction with other factors such as parliamentary design and the influence of Westminster features, operate to either to discourage or encourage legislative rights review.

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[86] Leigh, I, and Masterman, R. (2008), 'Making Rights Real: The Human Rights Act in its First Decade', *Hart Publishing, Oxford and Portland, Oregon,* Chapter 2, p31
[87] Hiebert (n9), p133 -137
[88] Ibid
[89] *Rights Brought Home* (n29), para 3.3

UK

In the UK, a tight legislative agenda where governments are eager to push through their programme and the high political costs of the Government losing a vote in Parliament means that the Government is highly reluctant to openly admit to Parliament that bills may be inconsistent with rights.[90] Thus far, a Minister has introduced legislation with a 'nevertheless' declaration on only two occasions.[91] This is despite the courts subsequently finding that the legislation is incompatible with rights on numerous occasions, in some cases clearly.

UK pre-introduction review officially operates according to the '51 per cent rule' – where Ministers are expected to make a 'nevertheless' declaration where policy officials and government lawyers consider that the courts are more likely than not to find the legislation incompatible with Convention rights.[92] However, in reality, Hiebert's research has found the officials will often present Ministers with arguments on either side of the case for compatibility and that this allows Ministers to push forward with the legislation and make a positive statement of compatibility even in situations where officials consider that there is a higher than 50% chance that the legislation will be found by the courts to be incompatible with Convention rights.[93] The confidential nature of legal advice means that it is difficult to prove that a Minister has proceeded with a risky compatibility assessment. Further, the lack of requirement to give reasons why proposed legislation is consistent with Convention rights and the lack of independent legal advice for parliamentarians means that parliament often must take the ministerial statement at face value. That said, the JCHR has been successful in convincing the Government to give reasons for their declarations in order that it can give advice to parliamentarians about the soundness of ministerial declarations.[94] However, as shall be discussed below, the JCHR's assessment often comes too late in the legislative process to have any impact.

Despite the risk taking tendencies of Ministers, Hiebert and Kelly have found that the reporting requirement has made a difference to the development of legislation. In particular, the reporting requirement has led to increased engagement with Convention rights by civil servants – who of who often do much of the 'leg-work' when it comes to drafting bills. They argue that the culture of working amongst the civil service is such that they tend to pay much attention to

[90] Hiebert (n9) p131-133
[91] Communications Act 2003; House of Lords Reform Act 2014
[92] Home Office (2000), 'Human Rights Act Guidance for Departments'. *2nd Edition,* Para 36
[93] Hiebert (n9) p131-132
[94] Ibid

statutory obligations and thus take the duty to ensure Bills are compatible with rights seriously.[95] In addition, the fear that a negative report from a parliamentary scrutiny committee would damage their professional reputation, leading to embarrassment and potentially damaging their working relationships with Ministers, further strengthens the seriousness of which civil servants will ensure that legislation they are drafting is compatible with human rights.[96] Interviews conducted by Hiebert and Kelly also found that civil servants take the obligation to ensure that bills are compatible with Convention rights seriously as a way to save them further work in the long-term. A vigorous rights-scrutiny committee that asks Ministers (and thus civil servants) for further clarification of certain aspects of a proposed bill forces them to revisit issues and either to explain and justify what was meant or to reassess the issue entirely. This takes up valuable time and effort and thus civil servants would like to avoid having to do so if possible.[97]

Practice in the UK therefore suggests that the executive reporting requirement has led to an increased focus by the executive on the rights-compatibility of legislation before it has been introduced to parliament. However, this focus comes largely from civil servants and policy officials as opposed to Ministers.

Canada

Similarly, in Canada, Hiebert suggests that the political costs for governments (at the Federal level at least) in openly admitting that their legislation may be contrary to Charter rights pre-introduction outweigh the political costs associated with failing to admit that the legislation risks rights where the courts subsequently find an incompatibility.[98]

There is some evidence that judicially interpreted Charter rights can influence the development of policy before it is proposed. Government lawyers and officials in the Department of Justice officials will review proposals for Charter rights-compatibility by considering previous case law and will suggest changes to proposed legislation in order that it is less likely to meet judicial censure – such suggestions are often accepted by Ministers.[99] These checks mean that the Government is often highly aware of the likely compatibility or otherwise of their proposed legislation with Charter rights before introduction. However, despite several judgments that

[95] Hiebert and Kelly (n27), p19
[96] Ibid
[97] Ibid, p19-20
[98] Hiebert (n17), p705
[99] Hiebert (n9) p130

have found that legislation is incompatible with Charter rights, the Justice Minister has never issued a negative report in Canada.[100] The test that Canadian governments use for determining whether to issue a negative report is that the bill is "not manifestly unconstitutional" or that "a credible argument exists in support" of the bill.[101] Given the vague, abstract and contestable nature of the Charter rights and the ability of proposers to distinguish judicially interpreted rights on the basis of facts – it is extremely easy for a government to find a legal argument that satisfies the above two tests. This means that, in all but extreme cases, government decisions on whether to issue a negative report tend to be based on political considerations.

Political factors dictate that the costs in openly admitting that legislation potentially infringes rights (and perhaps even passing a pre-emptive 'notwithstanding' clause to that fact) are much higher than shielding the potential rights incompatibilities from parliament. Hiebert argues that the popularity of the Charter and public confidence in the Supreme Court's role in interpreting the Constitution means that any explicit recognition that legislation may fall foul of rights is likely to be controversial and will require the Government to expend significant energy in defending it.[102] On the other hand, where no statement as to the incompatibility of the legislation is made, the Government increases the chances of (at the very least) a short-term victory of ensuring that its legislative agenda is implemented. Any subsequent finding of incompatibility with Charter rights is not likely to occur for several years after the enactment of the legislation – and may even come when the Government of the day is no longer in office. Further, even if the Government is required to pass remedial legislation, it can escape the political consequences of upsetting its electoral base by blaming the remedial legislation on the judiciary. [103] Further still, the Government may engage in what Kelly and Hennigar have described as 'notwithstanding-by-stealth'[104] – by passing remedial legislation which nominally remedies the rights-incompatibility but which in fact fails to abide with the spirit of the judgment, in the hope that the judiciary is reticent to strike down the democratically-enacted legislation for the second time (a reticence that the authors suggest has been seen in practice on a number of occasions).[105]

[100] Ibid
[101] Hiebert (n17) p708
[102] Ibid, p706
[103] Ibid
[104] Kelly, J.B. & Hennigar, M.A. (2012) 'The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review within a Constitutional Charter of Rights, *10 Int'l J Const L 35,* p36
[105] Ibid, p38--43

Kelly and Hennigar outline an additional reason for the failure of Canadian Governments to issue a negative compatibility report. The Canadian Justice Minister is currently responsible for issuing compatibility reports. Kelly and Hennigar argue that the political nature of the Justice Minister's role and the fact that she is subject to the principle of collective cabinet responsibility means that the Justice Minister bows to the aforementioned political pressures to take risks in relation to potentially-rights violating Government Bills. The authors argue that this practice undermines a key benefit of the reporting requirement, which is to allow for dialogue between the government and parliament as to the rights-effects of legislation. This is because this tendency means that parliamentarians, who are not in receipt on independent legal advice, are not given sufficient information to scrutinise the Justice Minister's decision not to issue a report.[106]

The authors therefore argue that the functions of the MoJ and the Attorney General should be separated, with the Attorney General being given responsibility for issuing compatibility statements. Further, the authors argue that the law should be amended so that the Attorney General is required to issue compatibility assessments for all Bills. They argue that the former proposal would reduce the risk of political factors influencing the compatibility process whilst the latter would improve parliamentary rights-scrutiny by giving parliamentarians a greater amount of information on questions of compatibility.[107]

The tools available to the judiciary to ensure that legislation is compatible with rights in the UK and Canada means that in both jurisdictions, governments tend to take rights seriously. In both states, after the Supreme Court has declared that legislation is contrary to rights the Government tends to respect that decision, by amending the statute in the UK and neglecting to use the parliamentary override in Canada. However in both states, the Governments' approach to pre-legislative scrutiny indicates that in the event of a finding that proposed legislation may be incompatible with rights, the Governments would sooner drop the proposals completely, amend the legislation before introduction or take the risk by indicating that the legislation is compatible with rights, than issue a negative report. If one of the aims of the reporting requirement was that it encourages government actors to openly admit that it wishes to pursue legislation that might not be compatible with judicially-interpreted rights, opening up an institutional and societal dialogue about the appropriate relationship between legislation

[106] Ibid p48-50
[107] Ibid, p66

and judicially-protected rights, it appears that Westminster factors preclude this from occurring in Canada and the UK.

New Zealand

The process of determining whether legislation is likely to be compatible with rights in New Zealand is less directed by judicial norms than it is in the United Kingdom or Canada. Rather than determining the compatibility by considering the likelihood of judicial censure, the executive conducts an investigation into whether bills are likely to consistent with rights by looking at general principles derived from relevant jurisprudence.[108] If after this investigation the Attorney General is of the opinion that the legislation could be inconsistent with rights, a 'nevertheless' declaration is made.[109] Some scholars have attributed the increased instances of 'nevertheless' statements in New Zealand to the fact that the duty to conduct the assessment and issue the statement is placed on the Attorney General rather than the Minister sponsoring the Bill.[110] They argue that this makes the process less partisan as the Attorney General has a specific duty to uphold the rule of law, has greater independence than other government ministers and has less direct interest in seeing the bill passed than the Minister responsible for its creation.[111] Scholars also point to the fact that since 2003 all legal advice given to the NZ Government and the authors of such advice has been published.[112] This reduces the likelihood of lawyers succumbing to Government pressure to offer advice in accordance with the Government's wishes, something which has been seen in the UK.

However, while the role of the Attorney General in NZ's reporting requirement has undoubtedly contributed to a larger number of negative reports, this factor only tells half the story. The other major reason that there has been such a high number of negative reports in the NZ, is that, in comparison with the UK and Canada, the political costs of proposing legislation that it considers may be contrary to rights in the NZBORA are much lower. Hiebert suggests a number of that factors that influence the low political cost of passing legislation that has received a negative report. Most important is NZ's adoption of the MMP voting system. As mentioned previously, this has led to a higher number of coalition governments, where the stability of the Government depends on legislative agendas agreed in advance, reducing the likelihood of Government climb-downs. The adoption of MMP has also increased the

[108] Hiebert (n9) p133-134
[109] Ibid
[110] Kelly & Hennigar (n104) p65
[111] Leigh and Masterman, (n86), p32
[112] Gardbaum (n9) p134

importance of the party vote, which has reduced the ability of independently minded parliamentarians to challenge legislation on rights-grounds, especially since their perceived disloyalty may result in a demotion on the party list for the next election.[113] The reduced capacity of individual parliamentarians to challenge legislation on rights-grounds is compounded by the fact that Opposition leaders have not general seen much political value in using a rights-lens through which to criticise the Government. The low political value in challenging legislation on rights-grounds is doubtless helped by the fact that NZBORA grants no explicit power to the judiciary to set-aside legislation on rights-grounds. Although the courts have now found that this power exists notwithstanding an explicit provision in the NZBORA, it may be that the long-term position that rights-conflicting legislation in NZ is constitutionally legitimate means that these declarations do not have the same effect on political behaviour as in the UK and Canada.

Victoria

According to Kelly, in Victoria,

> the institutional setting with the greatest possibility of substantive Charter dialogue – is within the bureaucratic arena and the pre-introduction phase of the legislative process.[114]

He notes that there have been considerable steps taken by the Victorian Government to ensure that proposed legislation is vetted on the basis of Charter rights. This has led to the emergence of a culture of rights within the government bureaucracy where different bureaucratic actors engage in a 'vigorous dialogue'[115] about the rights-effects of proposed legislation. Throughout the different stages of policy various bureaucratic actors, such as the sponsoring department, the Human Rights Unit at the Department of Justice, the Office of the Chief Parliamentary Counsel, the Victorian Government's Solicitor's Office and the Legal Branch at the Department of Premier and Cabinet are involved in discussions as to the compatibility of the proposal with rights.[116] Boughey's more recent review also suggests that executive rights

[113] Hiebert (n9) p134
[114] Kelly, J.B. (2011) 'A Difficult Dialogue: Statements of Compatibility and the Victorian *Charter of Human Rights and Responsibilities Act' Australian Journal of Political Science* 46:2 p264
[115] Ibid
[116] Ibid

review has been the largest success of the Charter so far.[117] That said, Hiebert suggests that large cuts to the public service in Victoria have recently undermined the quality of reports.[118]

All accounts however suggest that the reporting requirement under section 28 of the Charter has successfully led to increased executive and bureaucratic scrutiny of legislation on rights-grounds. Unlike the practice under the Canadian reporting requirement, where increased executive rights-scrutiny has not led to the admission by the Canadian Federal government that legislation may not be compatible with Convention rights, there have been 8 statements of incompatibility under the Victorian Charter.[119] Thus, on the face of it, Victorian executive rights review appears to be working well. Indeed, the design and operation of section 28, under which Ministerial reports are required to be accompanied with reasons in order to assist parliamentary scrutiny, has led to the JCHR to suggest that its approach be adopted in any future British Bill of Rights.[120] However, as will be shown later, the success of executive/bureaucratic rights review in Victoria has in fact undermined effective parliamentary scrutiny on rights-grounds.

ACT

Section 37 of the ACTHRA requires that the Attorney General issues a compatibility statement for all government bills as they are introduced to the Legislative Assembly. The Attorney General is empowered to issue both positive compatibility statements and negative compatibility statements. Negative compatibility statements must be accompanied with an explanation of 'how [the bill] is not consistent with human rights'[121]. Although not required by the legislation, in line with a commitment it made after the first statutory five-year review of the Charter, the Government has included human rights analysis of legislation in its explanatory statements to bills. Following guidance issued by ACT's human rights-scrutiny committee, every government bill is accompanied with an accompanying statement that includes (1) an identification of any of the ACTHRA rights engaged by the bill; (2) the specific sections of the bill that engage these rights; (3) whether the bill limits those rights; and (4) an analysis of whether the limits are reasonable in line with the factors set out section 28 of the ACTHRA.[122]

[117] Boughey, J. 'The Victorian Charter: A Slow Start or Fundamentally Flawed' in Groves, M., Boughey, J. & Meagher, D. Eds (2019) *The Legal Protection of Rights in Australia* Oxford: Hart Publishing p226
[118] Hiebert (n9), p136
[119] Chen (n40), p22
[120] JCHR *A Bill of Rights for the UK?* Twenty-ninth Report of Session 2007-08 p225
[121] ACTHRA (n6) s.37(3)(b)
[122] ACT Human Rights and Discrimination Commissioner (2014) *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004*, p16

Human rights advisors in the Justice and Community Safety Directorate generally direct executive pre-enactment rights-scrutiny. These officials advise the Attorney General about which compatibility report they should make and analyse explanatory statements provided by sponsoring departments. Where compatibility concerns are raised, the officials will speak with relevant department officials about how to fulfil the policy aims in a rights-compliant-manner. If, after that dialogue, the officials are not convinced the legislation is rights-compatible, they will warn departments that they are not willing to advise the Attorney General that she can make a positive compatibility statement.[123]

By all accounts, pre-enactment executive rights-scrutiny of legislation under the ACT has been moderately successful. To date, there has been no negative statement of compatibility.[124] Hiebert's suggests that this is down to the fact that government officials feel a strong incentive to amend legislation where the threat of a negative report is raised. The incentive is largely based on the ACT executive's genuine commitment to rights and a lack of unified opposition to the idea that rights should be able to restrict government decision-making.[125] That said, according to the first five year review of the Act's operation – the development of a human rights culture in the ACT executive has been uneven. Some departments show a

> very high level of engagement with the HRA and scrutiny process, and had a sophisticated understanding of the Act and the human rights-issues raised by the policies and legislation they were responsible for developing.[126]

On the other hand

> others… had less engagement with the Act, considering that detailed human rights-scrutiny and analysis remained the responsibility of the HRU.[127]

In some departments at least then, it appears that a genuine human rights culture where policy officials and Ministers themselves have a sense of ownership of rights exists in the ACT, although elsewhere pre-enactment scrutiny remains in the hands of officials and bureaucrats.

The relative success of the ACTHRA executive pre-introduction process is undoubtedly down in a large part to the efforts immediately after the legislation was passed to make changes to

[123] Hiebert (n9) p135
[124] Ibid
[125] Ibid
[126] The ACT Human Rights Research Project (2009) *The Human Rights Act 2004 (ACT): The First Five Years of Operation* Report to the ACT Department of Justice and Community Safety, p42
[127] Ibid

the culture of the policy development process. Additionally, it might be down to the statutory requirement to review the implementation of the Act one, five and ten years after its entry into force.[128] This has ensured that any perceived areas where the act was not operating as intended, for example in relation to the practice in relation to giving reasons for positive compatibility statements, could be identified and amended accordingly. A third reason may be that the political party that introduced the act, the Labour party has remained in power (albeit in governing coalitions) since the bill was enacted. Government members that are responsible for and believe in the legislation are generally more likely to take their commitments under the legislation seriously (a fact further bolstered by the inclusion of the Green Party, who are strongly in favour of the Act, in recent governments).[129] A final explanation of the Act's success in this area may be the extremely small size of the Legislative Assembly. The small size of the parliament means that a higher proportion of members are likely to have served in the executive (and a higher proportion is likely to have served on the parliamentary human rights committee) which may mean there are a higher number of members with a degree of experience in working with rights principles.

Conclusions

To conclude, the executive reporting requirements in the above bills have generally been successful in their aim of 'mainstreaming' human rights into the development of government legislation. The reporting requirement is most likely to influence legislation as it is being drafted – with evidence in each of the jurisdictions suggesting that human rights norms have been 'mainstreamed' into the policy process by bureaucratic officials.

However, despite improved engagement with rights by these officials, Hiebert suggests that there is little evidence that human rights concerns form a central component of or are likely to fundamentally constrain the governments' legislative agenda. She claims that the parliamentary bills of rights have 'not fundamentally altered the key institutional and political dynamics that shape how these Westminster political systems function.'[130] Thus, in the UK and Canada, Governments either prefer to drop potentially rights-infringing proposals before introduction or prioritise the short-term win of passing legislation over its long-term sustainability. In New Zealand and Victoria, judicially interpreted rights remain incidental enough so as not to prove fatal to a government's legislative agenda even if the Attorney

[128] ACTHRA (n6) s.43 & 44
[129] Hiebert (n9) p135
[130] Hiebert (n9) p138

General decides that the bill is not guaranteed to be rights compliant. In ACT, the evidence is less clear, given that the Attorney General has yet to make a 'nevertheless' declaration but where there have been very few judicial findings of incompatibility.

Thus whilst executive reporting requirements have ensured that rights considerations are factored into the legislative process, this is primarily due to the work legal and bureaucratic officials. Hiebert and McCorkindale have been critical of this practice because it undermines a key normative aim of the mechanism – which is to encourage increased ownership of rights-questions by democratically elected officials. They note that the practice of government lawyers determining the potential compatibility of legislation with rights by the second-guessing of judicial decisions means that the executive is missing its opportunity to help to define and settle particular contestable rights-questions. This ultimately gives the courts the monopoly on determining such issues – which is precisely what the new model was supposed to prevent.[131] Additionally by failing to use the 'nevertheless' mechanism in contexts where there is doubt about the compatibility of the legislation, the executive removes the possibility of the reporting requirement being used to initiate an open and accessible debate about the extent to which rights should constrain legislative goals – another key aim of drafters and 'third way' theorists.[132]

Whilst seeing some merit in this perspective, Kelly is not as pessimistic. He argues that the above conclusion underplays that the reporting requirement has improved government attempts to explicitly link legislative aims to human rights commitments. This has influenced the courts understanding of the government's aim when reviewing the legislation on rights-grounds.[133] Further, he argues that Hiebert fails to consider that bureaucratic assessments are often not framed in terms of the legislation's relationship to rights but rather whether the limitation is can be justified in a free and democratic society – these standards are not necessarily legal standards (and indeed courts often defer to parliaments on these issues) which means that attempts to consider whether legislation is compatible with rights is 'more than simply bureaucratic attempts to anticipate judicial positions.'[134]

[131] See eg Hiebert, J.L. (2006) 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' *4 Int'l J. Const. L.* p8; McCorkindale, C & Hiebert, J.L. (2017) 'Vetting Bills in the Scottish Parliament for Legislative Competence' *Edin. L. Rev. 21:3,* p351
[132] McCorkindale & Hiebert (n131) p351
[133] Kelly (n114), p266
[134] Ibid

Parliamentary Protection of Rights

As already noted, scholars that emphasise the desirability of political rights protection do so on the basis of its superior democratic legitimacy in comparison to a strict legal protection of rights. To greater or lesser extents, each of the five bills anticipates an enhanced role for parliament in protecting rights compared to traditional bills of rights. A common expectation is that parliamentarians reflect on issues of rights as part of their scrutiny of proposed legislation. Indeed, the expectation of parliamentary scrutiny was one of the alleged motivations for legislative drafters in ensuring that a bill is consistent with rights.

However, as mentioned above, certain aspects of the Westminster model of government such as executive dominance of the legislature and the centrality of strong, partisan political parties has meant that, in the states under focus, parliament is in a weak position to hold the government to account generally and thus also according to human rights principles. For the most part, the new parliamentary bills of rights have not led to a strengthening of parliament *vis-à-vis* the executive in the jurisdictions examined.[135] While the government can rely on vast resources, the civil service and confidential legal advice for assistance in its formulation of policy and the determination of its rights implications, individual parliamentarians, largely unrehearsed in rights, have no such resources.[136] Even without the Westminster factors, this would make parliamentary human rights-scrutiny immensely difficult. Convincing individual parliamentarians to incorporate human rights principles into their scrutiny of legislation is made even more difficult in jurisdictions where traditional discourse has focused on the notion of residual liberty and where parliamentary sovereignty is still regarded as the primary principle on which the constitution is based, as can be seen in New Zealand and the United Kingdom in particular.[137]

A way in which drafters and scholars have attempted to overcome the damaging Westminster factors that hamper parliamentary protection of human rights is to propose the creation of a parliamentary human rights-scrutiny committee. They argue that such a body, properly constituted, has the capability of redressing *inter alia*, the lack of independence, partisanship,

[135] Hiebert, J.L. (2012) 'Governing under the Human Rights Act: the limitations of wishful thinking' *P.L. Jan,* p44
[136] Bynoe, I. and Spencer, S. (1999) 'Mainstreaming Human Rights in Whitehall and Westminster'. *IPPR. London,* p49
[137] Young (n13) Introduction

lack of expertise and restraints of time that currently restrict parliaments' ability to scrutinise governments according the human rights principles.[138]

Assessment of Practice

Canada

Under the Canadian model, Hiebert has suggested that parliament has generally played a minor role in scrutinising legislation on rights-grounds. She suggests this is down to two main factors. The first is, for the reasons discussed above, that the Justice Minister has never issued a negative report for proposed legislation. This meant that parliament is effectively cut out of the process of rights-scrutiny because it is given no real information from the Government on the ways in which the legislation is compliant or otherwise with rights. The second reason is that the Canadian parliament has so far decided not to create a specialised parliamentary human rights committee which could assist parliamentarians in determining whether the Government is correct in its assessment that the legislation is not contrary to rights.[139] There does exist a committee in both houses of Parliament that assesses Bills that have legal and constitutional implications. However these committees do not receive independent legal advice on Charter questions and the Lower House committee tends to be dominated by the governing party and is operated in a partisan fashion – qualities which do not lend themselves to effective rights-scrutiny.

New Zealand

Similarly, in New Zealand, despite the Attorney General being far more willing to issue a report that indicates that legislation may not be compatible with the rights in NZBORA, parliament plays a similarly marginal role in scrutinising legislation on rights-grounds. Alongside the factors mentioned above, Geiringer notes that this marginal role can be explained by two factors. The first is that, as in Canada, the Attorney General is only required to issue a report when she considers that the legislation may not be compatible with rights. This means that in situations where the Attorney General is satisfied that the legislation is compatible with rights but where her assessment is contestable, parliamentarians are not given information that would prompt them to question her conclusions further.[140] It should be noted that this oversight is perhaps not as serious as in Canada, because the Attorney General is more likely to issue a

[138] Klug and Wildbore (n46)
[139] Hiebert (n10) p131
[140] Geiringer (n8) p4

negative report in cases of contested compatibility, but the contestable nature of rights-questions means it is likely that on occasion the Attorney General will neglect to issue a negative report in cases where there is an arguable case of rights-incompatibility – cutting parliament out of the process.

The second factor is that, similar to Canada, there is no dedicated parliamentary human rights committee responsible for determining the compatibility of legislation with rights.[141] It should be noted that since 2014, any negative report issued by the Attorney General is referred to a select committee. However, the absence of a specialised committee reduces the ability of parliament to build up expertise on rights-questions. Further, the fact that only negative reports are referred to committees leads to the same problem with contestable arguments described above.

UK

Most scholars consider that the UK's Joint Committee of Human Rights is a strong example of an effectively functioning rights-scrutiny committee.

The JCHR is a 'Joint Committee' comprised of an equal number of politicians for the House of Commons and the House of Lords. This feature has helped to enhance the independence of the Committee – given that Lords operate in a less partisan manner than MPs.[142] Further, Klug and Wildbore argue that the scrutiny functions of the JCHR are 'complementary to the role and expertise of the House of Lords as a revising chamber.'[143] Evidence from Norton suggests that although parliamentary engagement with rights has increased since the coming into force of the HRA in the UK, this has largely occurred in the House of Lords, with Commons mentions being largely confined to members of the JCHR.[144]

The Committee is also assisted by a legal advisor, who, amongst other things, provides the Committee with expertise on the legal definitions of rights and assessments of how legislation may impact on such rights.[145] Bellamy has noted caution over the potential overreliance of the JCHR on its legal advisor – on the basis that parliamentary scrutiny of legislation on rights-

[141] Ibid
[142] Kavanagh, A. (2015). 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog'. in Ed. Hunt, M., Hooper, H.J., and Yowell, P. (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit.* London: Hart Publishing, p118
[143] Klug and Wildbore (n46), p242
[144] Norton, P., (2013). 'A Democratic Dialogue? Parliament and Human Rights in The United Kingdom' *21 Asia Pac. L. Rev. 141,* p161
[145] Evans, S. and Evans, C. (2006). 'Legislative scrutiny committees and parliamentary conceptions of human rights.' *P.L. Win,* p804

grounds is supposed to be a broader exercise than merely the second-guessing of judicial decisions.[146] Kavanagh is more positive about the relationship. In contrast to casting legal and political methods of human rights enforcement as in opposition to one another, she argues that they can in fact be complementary.[147] Although she would agree with Bellamy that the members of the JCHR should have some latitude to take an independent position she notes that '[l]ike it or not, these are legal documents which have a body of jurisprudence built up around them.'[148] It is therefore only proper that legal advice that sets out the current state of Convention rights jurisprudence and highlights any areas of bills that could potentially come into conflict with such jurisprudence should be the essential first step in any rights committee's scrutiny of bills.[149] From there, the JCHR can go on to consider whether other factors might necessitate the need for the legislature to depart from such jurisprudence in the specific circumstance.

An area that illustrates both the effectiveness and limits of the JCHR in enhancing a political culture of rights is its approach to scrutinising ministers' s.19 declarations of compatibility. As mentioned above, section 19 of the HRA places no obligation on Ministers to provide reasons for their declaration that a bill is consistent (or not) with rights. However, the JCHR views one of its primary functions as scrutinising such declarations.[150] In doing so, it has criticised the lack of transparency from the Government and has succeeded in changing Cabinet Office Guidelines to the effect that government departments are now advised to provide the reasoning behind their declarations in the explanatory notes of the Bill.[151] Kavanagh further notes that government departments are increasingly supplementing these explanatory notes with a highly detailed human rights memorandum.[152] With this increased information, the JCHR is in a better position to outline the compatibility of the bill with rights as it is able to compare the Minister's reasoning with its own assessment.

The JCHR's assessment of the government's declaration is included in its assessment of the bill overall and provides parliamentarians with valuable alternative information that can be used in deciding on whether or not to vote for the bill. Lester has gone as far as to describe the JCHR as Parliament's 'legal adviser on rights.'[153] Feldman claims that in this way the JCHR

[146] Bellamy, R. (2011). 'Political constitutionalism and the Human Rights Act'. *9 Int'l J. Const. L. 86,* p100
[147] Kavanagh (n142), p131
[148] Ibid
[149] Ibid
[150] JCHR, First Report, Session 2000-2001, *HL 69/HC 427*
[151] Hiebert (n135), p38
[152] Kavanagh (n142), p126
[153] Hiebert (n131), p22

contributes to the mainstreaming of human rights amongst public officials as they must ask themselves not only '[a]re we going to be able to make statement where this is compatible, but are we going to be able to justify the statement if we get questioned on it by the [JCHR]?'[154]

However, although JCHR reports are highly respected and do carry great weight in parliament, research by Hiebert has found that JCHR reports of bills, including those that cast doubt on the Minister's compatibility assessment, often do not lead to significant changes to that bill.[155] Indeed, Harriet Harman MP, at the time Minister of State for Constitutional Affairs (and ironically now the Chair of the Joint Committee on Human Rights), gave evidence to the JCHR in 2006 in which she claimed that the JCHR's scrutiny of ministerial statements of compatibility did not represent 'added-value' to the parliamentary process.[156] Some have suggested that JCHR reports are published too late in the parliamentary process to have an impact on the legislation. Politicians from the governing party are keen to have their programme implemented as quickly as possible and potentially wide-ranging amendments to bills can slow this process down.[157] Again, this confirms Hiebert's conclusion that the HRA has 'not fundamentally altered the key institutional and political dynamics that shape how [the UK's] Westminster political systems function[s].'[158]

Although Kavanagh agrees with Hiebert's broad conclusion that critical JCHR reports do not often lead to significant changes to bills, she signals caution about using this fact as the only benchmark for which to determine the success of the JCHR's scrutiny of bills. Citing Russell and Benton's recent research on the impact of parliamentary select committees[159] she notes that other forms of committee influence include,

> influencing policy debate (both in Parliament and in the media); spotlighting issues and altering policy priorities, 'raising them up the departmental and ministerial agenda'; brokering in policy disputes and aiding communication and transparency within and between government departments, providing expert evidence; holding government to account by subjecting government proposals to close examination

[154] Feldman in ibid, p21
[155] Hiebert (n135), p39
[156] JCHR, Oral Evidence and Memoranda (2005-2006), *HC 143/HC 830-I* (Harriet Harman, Minster of State Department of Constitutional Affairs, January 16, 2006)
[157] Hiebert (n135), p39
[158] Hiebert (n9) p138
[159] Russell, M. and Benton, M. (2009). 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Approaches' *Paper for PSA Legislative Studies Specialist Group Conference, 24th June 2009, UCL,* available at www.ucl.ac.uk/constitution-unit/research/parliament/policy-impact (accessed 16/11/17)

> and sustained questioning, exposure of poor decision making by using the power of publicity; and generating fear so that governments might amend a legislative proposal before it becomes a bill in order to make its 'as committee-proof as possible'.[160]

As Kavanagh notes, much of the JCHR's work and influence stems from off-the-record meetings with civil servants working on bills. Such influence is obviously extremely difficult to quantify but will doubtless have an important effect especially if these meetings take place early in the legislative process or where a potential provision can easily be amended in order that it is compliant with rights.[161] This point is reinforced by the testimony of Feldman, a former advisor to the JCHR, who experienced Departments willing to make amendments during a bill's preparation even when they did not agree that there was a possibility of incompatibility.[162]

Victoria

Victoria and the ACT differ from the rest of the models discussed in that their bills explicitly direct that a parliamentary committee must scrutinise proposed legislation on human rights-grounds. Section 30 of the Victorian Charter appoints the Scrutiny of Acts and Regulation Committee (SARC) to this role. One of the key roles that SARC undertakes is that it scrutinises section 28 Ministerial statements of compatibility. The Committee's role is assisted by the requirement in s.28 that positive statements must include an explanation of 'how [the legislation] is compatible'[163] whereas a negative statement must state 'the nature and extent of the incompatibility'.[164] After its assessment, during which it can ask the Minister for clarification and call on advice from its legal advisor, SARC issues an Alert Digest to Parliament that outlines its assessment and raises issues for further scrutiny by parliamentarians and the government.[165] The Victorian Charter thus contains explicit structural requirements aimed at ensuring that parliament, and the SARC specifically, fulfils its imagined role in the protection of Charter rights.

However, Kelly suggests that ironically, the proper functioning of one aspect of the Victorian Charter, executive rights review, in fact has a negative effect on the ability for parliament to

[160] Kavanagh (n142), p135
[161] Ibid p137
[162] Feldman, D. (2004). 'The Impact of Human Rights on the UK Legislative Process' *Statute Law Rev 22(2):*, p108
[163] Victorian Charter (n7) 28(3)(a)
[164] Ibid 28(3)(b)
[165] Kelly (n114) p260

successfully scrutinise legislation on rights-grounds. He notes that the vigorous nature of the executive rights-review that occurs prior to introduction means that the Government is usually highly confident that its legislation is rights-compliant when the Bill is introduced into Parliament. As a result, it is extremely difficult for the SARC to convince the Government that the proposed legislation might be potentially incompatible with Charter rights.[166] At the time of writing, Kelly noted that despite the SARC disagreeing with the Government's assessment of a Bill's compatibility of legislation with rights on numerous occasions, there was no example of the Government amending the legislation in line with the SARC's concerns.[167]

Kelly suggests that there are numerous reasons for the inability of the SARC to influence government proposals on rights-grounds. A key explanation is that legislative rights review in Victoria is similarly hampered by the existence of Westminster factors that have negatively affected rights-scrutiny elsewhere. Unlike the JCHR, which is a parliamentary committee on which the government does not have a majority, the SARC is a government-controlled committee with the Committee Chair and a majority of its members being drawn from the governing party. The relatively small size of the Victorian parliament (128 members) means that it is more difficult to find members who possess the independence of mind to vote against their party line, as there is a higher likelihood that all parliamentarians may one day be asked to serve in the government.[168] In the event that the SARC does produce a report that suggests that legislation might be incompatible with Charter rights, the same factors mean that parliamentarians do not generally allow this to alter their decision to vote according to party lines. The SARC therefore lacks sufficient independence from Westminster factors necessary for effective rights-scrutiny.

Additionally, as recognised by Carlo Carli MP, the first chair of SARC, because the SARC is only able to begin its scrutiny of the legislation after it has been introduced to parliament, which is in fact a relatively late-stage of the Bill's development and where the government has already engaged in a detailed consideration of its rights-effects, it is generally very difficult to change the Government's mind at that stage.[169] This is compounded by the fact that the SARC,

[166] Ibid, p263
[167] Ibid
[168] Ibid, p270-271
[169] Carlo Carli MP (2009) 'Scrutiny and the Charter of Rights and Responsibilities' *Paper presented at the Australia-New Zealand Scrutiny of Legislation Conference: Scrutiny and Accountability in the 21st Century, Parliament House, Canberra*, quoted in Boughey (n117), p213

comprised of only nine members who have other parliamentary obligations to fulfil and assisted by one legal advisor, is generally given two-four weeks to:

> analyse a bill, request clarification on the statement of compatibility by the sponsoring minister, reflect on a ministerial response to SARC's concerns (though the minister is not required to respond), and write a report to Parliament.[170]

Considering that the process of policy proposal may have taken significantly longer than this two-four week period, it becomes clear that this factor seriously undermines the ability of SARC to influence the government's proposals.

Kelly's analysis therefore suggests that the SARC has not been able to operate as parliament's voice on rights in that way that was intended by drafters of the Victorian Charter. However, similar to Kavanagh's analysis of the JCHR, Boughey suggests that the SARC may influence government proposals in other more modest ways. For example, she concedes that very existence of s.30 and the prospect of scrutiny by the SARC might encourage governments to take rights-scrutiny more seriously when it is formulating bills – although she acknowledges that this is very difficult to measure.[171] Further, she cites Carlo Carli MP, who has suggested that past SARC reports sometimes influence governments when composing future legislation in a similar area.[172]

ACT

Like the Victorian Charter, the ACTHRA explicitly requires that a parliamentary committee scrutinises legislation on rights-grounds.[173] The Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (CJCS(LSR)), comprised of three members, currently undertakes this role. However, in contrast to the Victorian Charter, parliamentary scrutiny on rights-grounds has been a success story under the ACTHRA. Indeed, according to the ACT Human Rights and Discrimination Commissioner:

> [T]he HR Act's main influence remains clearest within the legislature, where there are signs that it has made a genuine cultural difference to the way the Assembly

[170] Kelly (n114), p271
[171] Ibid p213
[172] Carlo Carli MP (n169) in Ibid, p213
[173] ACTHRA (n6), s38

> goes about its work. The Act and the standards it upholds are frequently invoked in parliamentary debates by members across the political divide.[174]

The Commissioner's 2014 report found that the legislative scrutiny committee's reports are regularly referred to during the second reading debates of bills and are commonly cited as the reason for Government amendments to bills. Indeed, during the year of 2014, the Commissioner suggested that 'almost 100 Government amendments in relation to 7 bills were moved, ostensibly in response to comments made by the committee'.[175] This suggests that the Government is far more willing to engage in a dialogue with the legislative assembly in the ACT than in the other jurisdictions – something that can be also be seen in the Government's decision to aid the legislative scrutiny committee's task by supplementing positive statements of compatibility with further justification in the explanatory statements to Bills.[176]

Not much has been said in terms of an explanation for why a more fruitful dialogue seems to occur between the ACT executive and Legislative Assembly compared to other jurisdictions. Hiebert has suggested that the comparatively larger size and involvement of the Green Party, which is more likely to raise rights-compatibility issues than other parties might partly explain the improved relationship.[177] Relatedly, the tendency for CJCS(LSR) reports to be picked up by individual members in the legislative process could possibly be down to the small size of parliament where members are more likely to be all-rounders and where parliamentarians may have a closer working relationship.

Conclusions

The above evidence demonstrates that the existence of an executive reporting requirement is not sufficient to create a genuine dialogue between the executive and legislature on the rights-compatibility of legislation.

However, experience from the ACT and Victoria demonstrates that a more robust reporting requirement in which governments are expected to report on the rights-compatibility of all proposed legislation and crucially provide reasons for their conclusions can aid parliamentary scrutiny. Further, a parliamentary human rights-scrutiny committee is usually the most effective vehicle for ensuring that there is a unique parliamentary perspective on rights. The

[174] *Look Who's Talking* (n122), p13
[175] Ibid
[176] Ibid
[177] Hiebert (n9) p135

more independent the committee is from party political pressures or the weaker the Westminster factors more generally – the more effective the committee is likely to be. Evidence from the UK, Victoria and the ACT all suggests that human rights committees do have some effect on the seriousness with which the government (or at least civil servants) take their responsibility in ensuring legislation is compatible with rights.

However, evidence in Victoria and the UK demonstrates that this effect tends to be unseen and therefore difficult to measure. Westminster factors dictate that legislation tends to be close to its final form when it is introduced to parliament and, having already made its mind up about the rights-compatibility of legislation before introduction, government tends not to be receptive to amendments that Committees recommend. However, committee scrutiny of legislation can have an effect on the executive as it prepares its legislation for introduction – either by incentivising drafters to consider how they will defend the legislation at the committee or because previous committee reports influence the drafting of later legislation.

By all accounts, the ACT committee has been even more successful in holding the government to account in that its reports have led to amendments to legislation on numerous occasions. Although the effect of the committees on legislation in the UK and Victoria is less tangible than in the ACT, and perhaps operates differently from how some drafters/theorists imagined it would, this does not mean that it should be discounted as a failure. One of the aims of 'third way' theorists is that parliament has a unique voice in determining how legislation abides by rights. The above evidence shows that this role is being fulfilled in the UK and Victoria, even if in more modest ways than some hoped.

That said, in terms of changes to broader parliamentary culture, the evidence from every jurisdiction aside from the ACT is bleaker. If one of the aims of 'third way' bills of rights is that it leads to regular open debate in parliament about the human rights-compatibility of legislation, thus far, although there have been a few positive examples, this aim cannot be seen to have come into fruition.

Weak-Form Judicial Review

The third, and final, arena where 'third way' bills of rights anticipate the scrutiny of legislation on rights-grounds is the courts. However, the form of judicial review under these bills of rights tends to be (formally at least) weaker than American-style constitutional bills of rights. This weaker form of review tends to be comprised of two features. First, a mechanism which ensures that the legislature has the final say on the operation of legislation notwithstanding a judicial

finding of incompatibility. Second, an interpretative power, stronger than ordinary powers of statutory interpretation, to interpret legislation in manner that is compatible with rights. This weaker form of review is purported to allow the judiciary to use its institutional capacities to determine whether legislation is compatible with rights whilst respecting the democratic right of the parliament and government to govern.

Legislative Override

Although the strength of such mechanisms vary, from Canada's 'notwithstanding' clause, which has never been used by the Federal Government, to (until recently) the exclusion of a judicial power to declare legislation inconsistent with rights in New Zealand, the five bills of rights considered all adopt a mechanism that allows for some sort of legislative override of judicial declarations on rights.[178]

The inclusion of a mechanism that allows for legislative override of judicial declarations again stems from the recognition that the legislature is institutionally better placed due to its superior democratic credentials to decide what is best for the electorate, even if this decision overrides rights. Further, in Victoria there may be some scope to argue that there is an acceptance that neither the judiciary nor the legislature have a monopoly on the proper interpretation and definition on rights. The language of a declaration of 'inconsistent interpretation' used in Victoria seems to reflect Nicol's conception of constitutional dialogue in which the judiciary and parliamentarians are free to offer different understandings of rights, both of which are legitimate, but where the legislature as a body has the ultimate authority to decide which should prevail.[179] Compare this with the language of the 'declaration of incompatibility' in the UK[180] and the ACT[181], 'declaration of inconsistency' in NZ[182] as well as with the more traditional judicial set-aside based on unconstitutionality as exists in Canada.[183] Here it is clearer that while parliament may legitimately override rights on the basis that there are other important public considerations (including perhaps other rights not included in the legislation) that

[178] Canadian Charter (n2) s.33, HRA (n5) s.4, Victorian Charter (n7) s.31 (Override) and s.36(inconsistent interpretation) ACTHRA (n6) s32, For NZBORA see *Taylor v. Attorney General* (n32)
[179] Nicol, D., (2003). 'The Human Rights Act and the politicians' *Legal Studies*, p454-455
[180] HRA (n5), s.4
[181] ACTHRA (n6), s.17
[182] *Taylor v. Attorney General* (n32); However in New Zealand at least this has been contested, with Geiringer coming up with at least three interpretations of the constitutional meaning of a declaration of inconsistency – see Geiringer, C (2017) 'The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor' 48 VUWLR,*
[183] Canadian Charter (n2), s.24(1)

require rights to be restricted, ultimate authority for the interpretation of rights lies with the judiciary.

As has been seen with the operation of features that were purported to engender legislative rights review, the existence of a particular structural feature does not say much about its operation. Again, the broader constitutional factors outlined above will be seen to have an effect on how the features operate.

Canada

In Canada, the 'notwithstanding' clause allows the legislature to declare that legislation it passes will operate regardless of its impact on the Charter rights, limited by renewable periods of five years, thus effectively allowing parliament to override judicial declarations of rights.[184] However, the clause has been used relatively sparingly, the Federal legislature has never issued a 'notwithstanding' declaration, despite there being numerous judicial strike-downs of legislation on the basis of Charter rights incompatibility. That said, any discussions of the death of the clause at Federal level must be accompanied with the recognition that there have been around twenty declarations at state level. [185]

The lack of use of the clause at federal level has led Tushnet to claim that in reality, Canada operates a system of strong-form review.[186] Hiebert argues that the lack of use of the clause is a result of two factors. Firstly, the constitutional status of the Charter and the fact that the override requires the parliament to actively contest the judicial decision means that incentives to use the mechanism are lower. Secondly, American constitutional ideas have infected rights discourse in Canada to the extent that mainstream actors and politicians cannot see past judicial hegemony when it comes to rights interpretations and resolution of conflicts.[187]

Kelly and Hennigar offer an alternative analysis. Although the authors accept that Canadian governments are reluctant to openly disagree with judicially interpreted rights by invoking the notwithstanding clause, they argue the governments adopt a number of other techniques to ensure that the judiciary does not always have the final say on rights. A key example of this is what they term 'notwithstanding by stealth' – where the government will respond to Charter-

[184] Canadian Charter (n2), s.33
[185] Sigalet & Woodfinden (n38)
[186] Tushnet, M. (2003), 'Judicial Activism or Restraint in a Section 33 World' *The University of Toronto Law Journal, 53:1,* p95
[187] Hiebert, (n12), p1986

based invalidations of legislation by creatively re-enacting the legislation in a way that by-passes the original decision.[188] Although this risks a second judicial invalidation, the authors cite numerous examples where the judiciary has ruled that the remedial legislation is compatible with Charter rights, partly influenced by their reluctance to invalidate democratically-enacted legislation on more than one occasion.[189] An additional avenue by which weak-form review is protected in Canada is where the judiciary grants remedial deference to the legislature by suspending the effect of its declaration of invalidity for a period of 12 months (and sometimes longer) in order that the legislature can address the incompatibilities.[190] Although some may characterise this remedial deference as nothing more than paying proper respect to parliament's inherent function as legislator, experience with 'notwithstanding by-stealth' demonstrates that there might be greater room for legislatures to disagree with the courts than is sometimes appreciated.

Thus in Canada, on the face of it, Tushnet's prediction that section 33 would grow into disuse and that judicial review would collapse into strong-form review has, at the Federal level at least, appeared to come to pass. The political costs of openly admitting that legislation may be incompatible with Charter rights is just too high for governments to bear. However, Kelly and Hennigar's analysis demonstrates that weak-form review in Canada has persisted through alternative methods. Undoubtedly, these alternative methods lose a key benefit of the 'third way' model, which was supposed to encourage an open debate about the way in which rights are protected in legislation. However, on the other hand, another aim of 'third way' scholars, maintaining an equilibrium in which different branches of government are able to have the final say on rights, is retained through these alternative methods. The authors' analysis also opens up the possibility that states with nominally strong-form review, but where courts are deferential to legislatures in 'second-look' cases might also be considered to subscribe to the model.

New Zealand

The NZBORA contains no explicit clause that empowers the judiciary to declare that legislation is inconsistent with rights. However, after a number of years of equivocation, the NZ Court of Appeal handed down the judgment of *Taylor v. Attorney General* which confirmed

[188] Kelly & Hennigar (n104), p38-44
[189] Eg *R v Seaboyer* [1991] 2 S.C.R. 557; *R v Mills* [1999] 3 S.C.R. 668; *R v. Pearson* [1992] 3 S.C.R. 665; *R v Morales* [1992] 3 S.C.R. 771 – see Ibid, p38-44
[190] Hiebert (n9) p128

that this power exists notwithstanding its absence from the NZBORA.[191] In the *Taylor* decision, the court issued a DOI in relation to legislation disqualifying prisoners from voting – the only DOI issued by the courts to date. This decision was subsequently confirmed by the NZ Supreme Court.[192]

In the Court of Appeal decision, there was the explicit suggestion that a court's 'declaration of inconsistency' was supposed to initiate a 'dialogue' between the courts and parliament, and that parliament should be prompted to reconsider its legislation in light of the court's finding.[193] However, the Supreme Court judges appeared to row back from this position claiming that the only purpose of a declaration of inconsistency was to vindicate rights. In other words, the purpose of the declaration of inconsistency was to grant individuals whose rights had been unjustifiably interfered with a declaration to that effect – without necessarily prompting parliament to reconsider the legislation.[194]

Regardless, the underlying purpose of a declaration of inconsistency may be clarified if the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill, which is currently before the NZ Parliament's Privileges Committee, is enacted. The Bill gives parliamentary recognition to the *Taylor* decision by requiring that the Attorney General brings any declaration of inconsistency made by the courts to the attention of parliament within six sitting days of the decision becoming final.[195] Further, the Bill's explanatory notes suggests that the Standing Order Committee should consider making changes to the standing orders of the NZ Parliament so that that the parliament is required respond to the Attorney General's notification in some manner.[196] These changes are a result of the worry that declaration of inconsistency's made by the courts could be ignored by the government and parliament, which would undermine the authority of the judiciary and reduce compliance with the rule of law in NZ.[197] By requiring the Attorney General to report on any declarations, and by requiring parliament to respond in some manner, it is hoped that parliament is more aware of any declarations that have been made and required to either propose amendments to the legislation or justify why it considers that the legislation should remain in force, notwithstanding the

[191] *Taylor v. Attorney General* (n32)
[192] *Taylor v. Attorney General* [2018] NZSC 104
[193] *Taylor v. Attorney General* (n32) para 149
[194] *Taylor v. Attorney General (SC)* (n193), para 107
[195] New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill (Bill no 230-1), s4
[196] Explanatory note to the New Zealand Bill of Rights (Declaration of Inconsistency) Amendment Bill (Bill no 230-1)
[197] Ibid

declaration. This improves the force of a declaration of inconsistency and enhances the role of parliament in responding to it – which should improve the openness with which parliament justifies legislation.

The proposed legislation seems to have been cautiously welcomed by academics, NGOs and the New Zealand Human Rights Commission. However, there have been some criticisms that the Bill neglects the role of the NZ Government in responding to the declaration of inconsistency. Both Knight[198] and Geiringer and Geddis[199] suggest that the Attorney General's notification should be accompanied with a duty on the executive to respond formally to the judgment in parliament within a specified period:

> Part of the logic of the model of inter-branch "dialogue" that is sometimes said to be promoted by statutory bills of rights such as the NZ Bill of Rights is that it places incentives to participate in that dialogue on both the legislative *and* the executive branch. Each has a distinct role to play. In seeking to enhance the former, this bill unnecessarily dilutes the latter.[200]

As the authors note, the bill's failure to include a role for the executive, runs against the above findings that it is executive rights review that tends to be more successful in ensuring that legislation is compliant with rights – particularly given that it is the executive, rather than parliament, that is able to formulate effective policy proposals.

UK

Section 4 of the Human Rights Act 1998 empowers a higher court to issue a 'declaration of incompatibility' where it considers that legislation is incompatible with Convention rights. It is intended to be a measure of 'last resort' and only issued where a rights-compatible interpretation of legislation under s.3 of the Act cannot be found. [201] In its 2020 report to the JCHR on its response to human rights judgments, the UK Government reported that the courts had issued thirty-two final declarations of incompatibility since the coming into force of the

[198] Knight, D *Submission to Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill* (11 August 2020) Available at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_96241/tab/submissionsandadvice (Accessed 09/08/21)
[199] Geiringer, C & Geddis, A. *Submission to Privileges Committee on New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill* (August 2020) Available at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_96241/tab/submissionsandadvice (Accessed 09/08/21)
[200] Ibid, p3
[201] See eg *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 para 50, Lord Steyn

HRA.[202] Of these, all but four had been addressed by the government or parliament (fifteen of which by primary or secondary legislation), and the remaining four were under consideration. The present Government has not indicated that it will refuse to change the law in response to any of the declarations. It is therefore fair to conclude that legislators in the UK have felt bound to change the law in the event of a declaration of incompatibility – even where there is evidence that it has strongly disagreed with the judgment.

The most important explanation for this tendency is the aforementioned closeness in relationship between the HRA and the ECHR. This relationship gives the Government a strong incentive to change the law where a DOI is made, because where the offending law remains in force, the applicant is likely to lodge a successful application to the ECtHR and the UK Government will be bound to respect that judgment.

However, despite this relationship, there remains a considerable degree of latitude for executive/legislative actors to determine how rights should be protected. Firstly, as mentioned above, exclusive focus on parliament's response to DOIs fails to consider the opportunities for parliamentary input to rights-questions that occurs during the court's assessment of whether the legislation is compatible with rights. As the JCHR's response to the Government's Independent Review of the Human Rights Act noted, the courts are very familiar with applying the 'doctrine of due deference' in order to give the legislature and government latitude in determining rights-questions that it considers they are in a better position to determine.[203] Secondly, although DOIs have been resolved by Parliament or the Government on every occasion – those institutions tend to have a lot of room for manoeuvre in determining the appropriate response. The UK Government's eventual response to the DOI issued in relation to prisoner votes discussed above demonstrates this point. Thirdly, because a court 'may' rather than 'must' issue a DOI, the courts on a number occasions have neglected to use their power to issue a DOI even in situations where judges have considered that legislation is contrary to Convention rights. For example in *Nicklinson*[204], a challenge to the UK's law on assisted

[202] There have been 43 overall, but 9 have been overturned on appeal. See Ministry of Justice (December 2020) *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020* UK Government CP 347, Annex A: Declarations of Incompatibility

[203] See e.g. Joint Committee on Human Rights (23 June 2021) *The Government's Independent Review of the Human Rights Act* Third Report of Session 2021-22 HL Paper 31 HC 89, at 64

[204] R (Nicklinson) v Ministry of Justice [2014] UKSC 38

suicide, the majority felt that it was inappropriate to issue a declaration of incompatibility on the basis that parliament was the more legitimate forum to resolve the question.[205]

Thus, while the tendency of UK legislators to resolve DOIs as a matter of course might disappoint those that wished the power to be used to spark an open dialogue between the courts and the parliament about rights-questions, there is a good deal of evidence to suggest that there remains good deal of room for democratic voices to contribute to the protection of rights in the UK.

Victoria

Section 36 of the Victorian Charter grants higher a Australian Courts the power to issue a 'declaration of inconsistent interpretation' where it considers that legislation unacceptably interferes with rights in the Charter. Where a court is considering making such a declaration it must first notify the Attorney General in order that she has the opportunity to intervene in the proceedings.[206] Where the Attorney General fails to convince the court that the legislation is compatible with rights, the court can issue a DOII.[207] The Attorney General must then report the DOII to the relevant Minister 'as soon as reasonably practicable'.[208] Finally, the relevant Minister is required to issue a written statement to parliament within six months of the DOII, setting out how the Government intends to respond the judgment.[209]

Additionally, s.31 of the Charter empowers the Government to issue a 'notwithstanding' clause in relation to legislation. This can be pre-emptive, which forbids the courts from considering the consistency of the legislation with rights, or reactive, which signals to parliament and the public that the government intends that the legislation remains in force notwithstanding the court's declaration.[210] Section 31 was designed to used only in 'exceptional circumstances' and must be accompanied with a statement by the person introducing the clause 'explaining the exceptional circumstances that justify the inclusion of the override declaration'.[211] S.31 of the Charter has no legal effect because Australian courts do not have the power to set-aside legislation that they consider is contrary to rights. However, according to Williams & Williams, the notwithstanding clause has an important political function because it highlights the

[205] Ibid, See the opinions of Lord Neuberger, Lord Sumption, Lord Clarke, Lord Reed and Lord Hughes.
[206] Victorian Charter (n7) s.36(3)
[207] Ibid, s.36(6)
[208] Ibid, s.36(7)
[209] Ibid, s.37
[210] Ibid, s.31(1)
[211] Ibid, S.31(3)

supremacy of parliament and provides an explicit way in the Charter for this be exercised. Additionally, the authors argue that it provides an 'escape valve for political pressure'[212] where there is fundamental disagreement between the executive/legislature and the courts as to the importance of legislation that may not comply with Charter rights. The need to supply reasons for invoking the clause should help with political accountability.[213]

The Victorian Charter therefore sets out specific roles for the executive, legislature and the courts in the making of and responses to judicial findings of inconsistency. Section 36 can be seen to be particularly dialogic because it foresees a role for each of the executive, the legislature and the courts in rights-scrutiny. On the other hand, section 31 excludes the courts (especially when used pre-emptively) and only foresees a dialogue between the legislature and the executive.

However, as noted above, the potential of s.36 as a feature that enhances democratic dialogue has been undermined by the reluctance of the Australian courts to issue a DOII. The only DOII ever issued was by the Victorian Court of Appeal in *Momcilovic v the Queen*[214] but this was overturned by the High Court of Australia.[215] Indeed, in the High Court decision, the question of whether s.36 was constitutionally valid was only narrowly decided in its favour, with three of the four judges in the minority on another question in the judgment. This has made it extremely difficult to determine the judgment's *ratio*.

Chen has suggested that the failure of the Victorian courts to issue a DOII can be explained by numerous factors. First, is the aforementioned uncertainty about the provision's constitutional validity – which discourages applicants from seeking a DOII as a remedial measure and courts from issuing a declaration, for fear of re-opening the debate about the provision's constitutionality.[216] Second, because s.36 guarantees no concrete remedy to an applicant, it is often used as a subsidiary to s.32, which empowers courts to read legislation consistently with rights. However, as shall be observed, the courts have interpreted this power restrictively which means that 'there is not much incentive to raise it as the primary submission, together with a declaration as the 'fall back' submission.'[217] Third, a lack of clarity in the courts in relation to the role and constitutional validity s.7(2) of the Charter, which provides a justification and

[212] Williams, A. & Williams, G. (2016) 'The British Bill of Rights debate: lessons from Australia' *P.L Jul,* p480
[213] Williams, G. (2006) 'The Victorian *Charter of Human Rights and Responsibilities:* Origins and Scope *Melbourne University Law Review 30,* p899-900
[214] [2010] VSCA 50
[215] *Momcilovic* (n39)
[216] Chen (n40), p14-15
[217] Ibid p15

proportionality test for limiting the rights in the Charter, and whether it should be applied at s.32 or 36 of the Charter has led to a reluctance in its use in Victorian Courts.[218] Fourth, Chen argues that the requirement to notify and give the opportunity to intervene to the Attorney General and the Victorian Equal Opportunities and Human Rights Commission inhibits litigants from seeking a s.32(1) declaration because it further complicates a process for which there already exists no concrete remedy.[219] Finally – the use of the override power in s.31 may also have influenced the lack of use of s.36 because the government has pre-emptively issued notwithstanding clauses for legislation which, had a pre-emptive clause not been issued, would have likely been challenged in the courts on Charter rights-grounds.[220]

Overall Chen argues that these specific factors are influenced by an exceptionalism that exists in Australia with regard to judicially enforced human rights. There is no national bill of rights in Australia and the Victorian Charter has been criticised in many circles for its constitutional impropriety. Further, although Australia has ratified the ICCPR, its engagement with the enforcement mechanisms of that document has been described by Chen as 'remarkably poor'.[221] This scepticism of rights at the domestic level and international level has led to a constitutional culture which is not conducive to a more activist use of s.36 by the Australian judiciary.[222]

ACT

Section 32 of the ACTHRA empowers the ACT Supreme Court to issue a 'declaration of incompatibility' where 'it is satisfied that [a] Territory law is not consistent with [a] human right'.[223] In the event of making such a declaration, the Attorney General is required to notify parliament within six sitting days.[224] The Attorney General is also required to respond to the declaration within six months of presenting to parliament.[225]

Like the Victorian Charter, the ACTHRA foresees distinct roles for and interaction between the courts, parliament and the government in the making and response to declarations of incompatibility.

[218] Ibid, p16-17
[219] Ibid, p20-21
[220] Ibid, p23
[221] Ibid, p30
[222] Ibid, p24-26 & 30-32
[223] ACTHRA (n6), s.32(2)
[224] Ibid, s.32(4)
[225] Ibid, s.33(3)

However, also like the Victorian Charter, the ability to determine whether sections 32 and 33 facilitates inter-institutional dialogue has been hampered by the ACT courts' conservative use of the power. To date, the ACT Supreme Court has only issued one declaration of incompatibility with respect to a Territory law.[226]

Further ,the finality of this decision, and the ACT Government's response to it[227], was thrown into doubt by the Australian High Court's *Momcilovic* decision, which suggested that the approach taken by the court in the ACT case as to the appropriate relationship between the general limitation clause, the interpretive power and the DOI in the ACTHRA was misguided. Although the Government has in theory suggested that it is willing to comply with judgment,[228] the incompatible legislative provision is still in force.

Conclusions

The above evidence demonstrates that in none of the jurisdictions has the parliamentary override operated in a manner that facilitates a clear and open dialogue between the courts and the legislature as to the resolution of rights-questions. In the UK and Canada, broader constitutional factors have meant that politicians do not tend to feel that openly disagreeing with the judiciary is an option that is available to them. However, an independent political perspective on rights has been heard elsewhere – through clauses in the bills that allow for the proportionate limitation of rights, through the doctrine of due deference and through the ability of lawmakers to test the resolve of the courts by reintroducing legislation that closely resembles its rights-conflicting predecessor. Such methods fall foul of the aims of dialogic scholars that conflicts between the courts and parliament are conducted in the open – with the opportunity to bring in broader society. However, they arguably fulfil the more modest aim of ensuring that no branch of government has a monopoly over the resolution of rights-questions.

On the other hand, the experience of the Australian states demonstrates that it can be extremely difficult to change the constitutional culture of a state that is sceptical of the utility of judicially protected rights. The two Australian bills, because they foresee clear roles for the courts, executive and parliament in the making of and response to declarations of inconsistency, are

[226] In the Matter of an Application for Bail by Isa Islam [2010] ACTSC 147
[227] Simon Corbell MLA *Declaration by the ACT Supreme Court that section 9C of the Bail Act 1992 is not consistent with section 18(5) of the Human Rights Act 2004: Government Response* Tabled in the ACT Legislative Assembly on 28 June 2011
[228] Simon Corbell MLA *Declaration by the ACT Supreme Court that section 9C of the Bail Act 1992 is not consistent with section 18(5) of the Human Rights Act 2004: Final Government Response* Tabled in the ACT Legislative Assembly in May 2012

probably the best equipped to facilitate an open debate about the appropriate boundaries of rights. However, because the courts have thus far been unwilling to open that dialogue, there is very little evidence of how the government and parliament would respond.

The development of a power to declare legislation inconsistent with rights in New Zealand is intriguing, especially since the government looks like it has welcomed the power and has proposed steps to encourage the parliament to respond to declarations. The factors that have led to expectation that DOIs be automatically resolved in the UK and Canada are not present (at least to the same extent) in New Zealand. The operation of this power will thus likely tell us more about whether Tushnet's prediction about the instability of 'third way' bills of rights is correct.

Strong Interpretive Powers

If the inclusion of mechanisms that allow for legislative override of judicial decisions can be viewed as trying to engender a culture in which rights are considered to be a legitimate forum for disagreement and thus open to democratic politics, the inclusion of a mechanism that strengthens courts' interpretive powers with regards to human rights can be considered as an attempt to ensure that the judiciary can uphold rights whilst protecting the integrity of legislation.

There is no strong interpretative power in the Canadian Charter. However, the British, New Zealand, ACT and Victorian Bills, to differing degrees, allow for the consideration of human rights in the interpretation of primary legislation by providing courts with powers that allow them to favour human rights compatible readings of legislation where possible. The UK[229], ACT[230] and Victorian[231] bills empower courts to interpret legislation in a manner that is consistent with rights 'so far as it is possible to do so'. The Australian Bills qualify this with the requirement that any interpretation is made 'consistently with [statutory] purpose'. In New Zealand, the language is a little different, stating that if legislation can be given a meaning that is consistent with rights then this meaning should be preferred to other meanings.[232]

UK

[229] HRA (n5), s.3(1)
[230] ACTHRA (n6), s.30
[231] Victorian Charter (n7), s.32
[232] NZBORA (n4), s.6

The interpretive obligation in s.3 of the HRA is probably the strongest of the interpretive powers in the bills considered. In the highly-influential *Ghaidan v Godin-Mendoza* judgment, the House of Lords explained its approach to the power:

> In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, this is, depart from the intention of the Parliament which enacted the legislation… It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.[233]

The courts have thus interpreted section 3 as requiring them to use quite radical powers of interpretation to read legislation in a manner that is compatible with rights. At the same time however, the Lords suggested that in passing s.3, parliament could not have intended that the courts would 'adopt a meaning inconsistent with a fundamental feature of legislation"[234] and that only interpretations that "go with the grain of the legislation"[235] would be permitted by s.3 HRA.

Despite this qualification, some commentators have suggested that s.3 has the ability to massively expand the courts' role in rights-protection at the expense of the other branches of government. This is because the courts have interpreted it as empowering them to effectively re-write legislation in order that it fits with their preferred understanding of rights.[236] However, aside from a few more extreme examples,[237] this concern appears not to have come into fruition.

In their recent submission to the UK Government's Independent Review into the Human Rights Act 1998, Florence Powell and Stephanie Needleman surveyed the courts use of s.3 HRA from 2013-2020. They found that over that period the power had been used infrequently and that

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[233] *Ghaidan v Godin-Mendoza* (n201) paras 30-32
[234] Ibid, para 33
[235] Ibid
[236] See e.g. Ekins, R. & Gee, G. (2018) *Submission to the Joint Committee on Human Rights: 20 Years of the Human Rights Act* Available at https://policyexchange.org.uk/wp-content/uploads/2018/10/JPP-submission-to-the-JCHR-inquiry-18-September-2018.pdf (Accessed 10/08/21), at [18]; Nicol, D (2006), 'Law and politics after the Human Rights Act', *P.L. Win*, p748
[237] *R v. A (No2)* [2001] UKHL 25

when it had been used it had been used in a way that was compatible with parliament's intention. Further, the power was often used in a supplementary fashion when the courts had already used ordinary principles of statutory construction to reach the same result.[238] They therefore concluded by suggesting that s.3 'is not a radical judicial law-making tool that poses a threat to the rule of law.'[239] This evidence therefore suggests that the courts use of s.3 has not been as radical as suggested in *Ghaidan* and as feared by some.

New Zealand

In the first twenty years of the bill's history, the NZ courts use of the interpretive power in NZBORA was beset with difficulties arising from confusion as to appropriate relationship between this power and s.5 of the Act, which allows proportionate limits on rights - a tendency also seen in relation to the Australian Acts.[240] Broadly, two positions have been sketched out by the courts. The first is that when exercising their interpretive power under s.6, the court should avoid any interpretations of the legislation where rights are limited, even where these limitations are proportionate. The second is that courts should only avoid interpretations of legislation that would see the legislation disproportionately limit rights.[241] The 2007 *Hansen*[242] decision of the Supreme Court appeared to have resolved this question in favour of this second position. However, since then, there has been continuing instability in the way that lower courts have followed this decision.[243]

Paul Rishworth has suggested that the instability of the interpretive provision stems from conflicting understandings of the underlying purpose of NZBORA. Scholars who favour the first reading, the 'constitutional' narrative, view the Act as occupying the place as NZ constitutional bill of rights, similar to the role of traditional bills of rights albeit without the power of judicial invalidation that is normally associated with such bills. Under this narrative, s.6 of the Act must incorporate a proportionality analysis in order that courts can exercise their function of ensuring that legislation does not fall below a certain standard in protecting rights. On the other hand, the ordinary law narrative treats the NZBORA as any other act of the NZ Parliament. The role of NZBORA is therefore not necessarily to change the relationship

[238] Powell, F. & Needleman, S. (2021) 'How Radical an instrument is Section 3 of the Human Rights Act 1998?' *UKCLA Blog* Available at https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/ (Accessed 10/08/21)
[239] Ibid
[240] Geiringer (n182), p159
[241] Ibid
[242] *Hansen* [2007] 3 NZLR 1
[243] Geiringer (n182) p160

between the courts and the parliament so that the courts are able to introduce a proportionality assessment which determines whether the legislature has fallen below a judicially-set baseline on rights protection. S.5 of the NZBORA is therefore for parliament alone to exercise and assess.[244]

Victoria

Courts are empowered by section 32 of the Victorian Charter to interpret legislation compatibly with Charter rights 'so far as it is possible to do so consistently with their purpose'. In *Momcilovic,* the Victorian Court of Appeal argued that s.32 does not empower Victorian courts to emulate the purportedly radical techniques of interpretation adopted by the UK courts under s.3 HRA. [245] In contrast to s.4 HRA, which was intended to be a measure of last resort, the declaration of inconsistent interpretation under the Victorian Charter 'was treated in the [Victorian Parliamentary] debates as epitomising the intended relationship between the courts and the legislature.'[246] In other words, the DOII, rather than the interpretive power in s.32 was supposed to be the primary measure in which an individual's rights was vindicated under the Charter. S.32 therefore did not grant the courts special powers of (re)interpretation.[247] The Court of Appeal's decision was confirmed in the Australian High Court's maligned *Momcilovic* decision discussed above. Since then, the courts have found that s.32 simply places the common law 'principle of legality' on statutory footing and applies it to the rights in the Victorian Charter.[248]

This limited reading of s.32 has meant that courts have used the power sparingly – with courts tending to use ordinary principles of statutory construction to find a rights-compliant meaning of legislation, whilst indicating that an s.32 interpretation would have led to the same result.[249] One might expect that the sparing use of the interpretative obligation in s.32 would lead to an increased number of declarations of inconsistent interpretation under s.36. Indeed, it appears that a number of the Court of Appeal judges in the *Momcilovic* case intended that this be the case:

[244] Rishworth, P (2010) 'The Bill of Rights and "Rights Dialogue" in New Zealand: After 20 Years, What Counts as Success? *Paper Presented at the University of Sydney Workshop on Judicial Supremacy or Inter-Institutional Dialogue: Political Responses to Judicial Review* discussed in Ibid.
[245] *Momcilovic* (n214), paras 69, 71 and 74
[246] Ibid para 92
[247] Ibid, paras 30-31
[248] Chen (n40) p15
[249] Boughey (n117), p213

> In our view, the making of a declaration of inconsistent interpretation accords more closely with this conception of dialogue, and in particular with the avowed purpose of "giving Parliament the final say" than would an expanded view of "interpretation" which allowed courts to depart from the plain meaning of a statutory provision and the intent thereby conveyed.[250]

However, shown above, this has not proven to be the case. There has only been one DOII under the Victorian Charter and this was overturned on appeal. Indeed, Chen suggests that the limited interpretation of s.32 has, along with other reasons, reduced the likelihood of a DOII because it has decreased the incentives for litigants to challenge legislation on the basis of Charter rights.[251] Geiringer has argued that, like the NZBORA, there exists an underlying confusion about the meaning of the Victorian Charter which has led to the confusion about the appropriate relationship between the interpretative obligation, the declaration of inconsistency/inconsistent interpretation and the general limitation clauses. Depending on the particular judge/scholars perspective of the underlying purpose of the Bill of Rights – as a tool to advance dialogue or otherwise – they will have a very different perspective on how each of these features should interact.[252]

ACT

The interpretive power in section 30 of the ACTHRA appears to have been similarly affected by conservatism and confusion in the courts. The ACT Court of Appeal had initially taken a contrasting decision to its Victorian counterpart in *R v. Fearnside,* where it found that when exercising its interpretive power, it should consider whether the legislation reasonably limits rights under section 28 of the Act.[253] However, in the subsequent *Isa Islam* judgment the ACT Supreme Court departed from this approach and followed the approach taken by the Victorian courts in the *Momcilovic* case.[254]

As Costello notes, the result of this decision has meant that

[250] *Momcilovic* (n39), para 94*;* Although the High Court of Australia was more sceptical and at points hostile to the notion that the Charter should be read in manner so as to engender inter-institutional dialogue. See Chen (n40) p25
[251] Chen (n40), p14-15
[252] Geiringer (n182) p164-168
[253] *R v Fearnside* (2009) 3 ACTLR 25
[254] *Isa Islam* (n226)

> the potential for human rights legislation to be used to 'read in' human rights to existing laws has diminished significantly, particularly compared to the high watermark of the United Kingdom.[255]

On the rare occasions that they have been asked to use their powers in s.30 to interpret legislation compatibly with rights, the courts have tended to prefer to make such readings under existing common law principles of interpretation.[256] Indeed, making a speech 10 years after the coming into force of the Act, ACT Chief Justice Helen Murrell notes that

> the HRA has had little direct impact on the outcome of cases despite the significant number of cases in which the HRA has been mentioned, there are very few in which it has made a difference to the outcome.[257]

This, she suggested had led to the declining use of the HRA by litigants.

There have not been many attempts to explain the conservative use by the ACT courts of their powers under s.28 and 32 of the Act. As observed in relation to the Victorian Charter, Geiringer has suggested that conservative use of s.28 and 32 might result from a lack of clarity on the underlying purpose of the legislation.[258] Elsewhere, the factors that Chen has suggested are at play for the conservative judicial use of the Victorian Charter, such as the lack of clarity as to the appropriate interplay between the interpretative, limitations and declaration of incompatibility powers and Australian exceptionalism are undoubtedly also at play in the ACT.[259]

Conclusions

The above analysis again demonstrates the central argument of this chapter – that structural features of 'third way' bills of rights do not, in themselves, tell us whether the features will be operated in a manner that accords with 'third way' aims. The debate about the most appropriate interplay between the judicial override and the judicial power to declare that legislation is

[255] Costello, S. (19 November 2010) 'Is a Presumption Against Bail Consistent with Human Rights? ACT Supreme Court Rules on Human Rights and the Interpretation of Legislation' *Human Rights Law Centre* Available at https://www.hrlc.org.au/human-rights-case-summaries/in-the-matter-of-an-application-for-bail-by-isa-islam-2010-actsc-147-19-november-2010 (Accessed 11/08/21)
[256] Rice, S '"Culture, What Culture?" Why We Don't Know if the ACT Human Rights Act is Working.' In Groves, M., Boughey, J., & Meagher, D. Eds. (2019) *The Legal Protection of Rights in Australia* Oxford: Hart Publishing, p190
[257] Chief Justice Helen Murrell, 1 July 2014 'The Judiciary and Human Rights', speech to the conference *Ten Years of the ACT Human Rights Act: Continuing the Dialogue* 10th Anniversary of the Human Rights Act, Australian National University
[258] Geiringer (n182) p164-168
[259] Chen (n40)

incompatible with rights was discussed in the previous chapter in the context of the UK. That chapter demonstrated that depending on one's underlying understanding of the appropriate roles of the courts and parliament in ensuring that legislation is compatible with rights, one is likely to have a differing perspective on the contexts in which the courts should use their interpretive function and their declaratory function.

Analysis of the use of the court's interpretive powers in New Zealand, Victoria and the ACT demonstrates a similar point, but on this occasion in relation to the appropriate interplay between the interpretive, declaratory and limitation clauses of the legislation. It is clear therefore that labelling the interpretive obligation as a straightforwardly 'third way' feature is misleadingly simplistic. Instead, it is more appropriate to say that courts powers to read legislation in a manner that is compatible with rights *can* be used to forward 'third way' aims, but that because of underlying understandings of the purposes of these bills of rights, that *they may not necessarily be used in this manner*. In terms of the factual question of whether the interpretive obligations *have* been used in a manner that forwards 'third way' aims, the recent assessment of practice by Powell and Needleman in the UK perhaps gives the greatest cause for optimism. Their evidence that the power has been used sparingly, conservatively and in a manner that protects rights without doing damage to the overall scheme of the legislation accords most with Alison Young's proposed use of section 3 set out in the previous chapter. The picture in New Zealand is less clear, whilst practice in ACT and Victoria suggests that so far the interpretive powers have had very little impact on court's interpretation of legislation.

Conclusions

This chapter has attempted to build on the first chapter by assessing the operation of features that are said to comprise the 'third way' model of rights protection in practice. To do so, it considered the operation of five bills that are commonly (though not universally) said to adopt 'third way' features – the Canadian Charter, NZBORA, the UK's HRA, the ACT's HRA and the Victorian Charter – and questioned whether these features were operating according to the aims of 'third way' theorists and drafters.

It found that certain constitutional factors, such as the constitutional status of the bill, parliamentary design, the relationship between the bill and international human rights law and so-called Westminster factors, strongly influence the manner in which the 'third way' features of the bills are operated in practice. Some of these broader constitutional factors improve the possibility of the bills of rights being operated according to 'third way' theory. For example,

the existence of the UK's House of Lords has made it uniquely suited to carry out independent parliamentary scrutiny of legislation on rights-grounds. Other features complicate 'third way' aims. For example, the executive dominance of the legislature which is an essential characteristic of the Westminster system of government, places parliament in a weak position to carry out effective scrutiny of the government on rights-grounds. Only with a proper understanding of each of these factors and how they influence the operation of the bills is it possible gain an insight into how 'third way' bills of rights operate in practice. Further, the process of identifying these factors and considering how they influence the operation of 'third way' features gives us a set of analytical comparators that can be used when assessing the operation of the Scottish model of rights protection in the remainder of the thesis.

After considering the broader constitutional factors that determine how the bills work in practice, the chapter then considered the design and operation of particular statutory features that are said to be essential to the 'third way' model.

First, it considered the executive reporting requirement, which is the primary means by which the government is able to contribute to rights-protecting legislation according to 'third way' theory. The executive reporting requirement is said to have two aims, the better protection of rights and, by protecting parliamentary supremacy, fostering a societal wide discussion about rights-protection. The assessment of the operation of the executive reporting requirements in the five bills considered found that the first aim is largely being met but that the second is not.

There is clear evidence in every state considered that, largely as a result of the work of bureaucratic officials, human rights norms do influence the way in which policy proposals are formulated. Indeed, in some instances, governments are willing to drop policy proposals on the basis of purported incompatibilities with rights. However, in jurisdictions where judicial norms have an important effect on government policy, such as the Canada and the UK, Westminster factors and faults in the reporting requirements' design, mean that Governments are extremely unlikely to openly admit that a Bill potentially unacceptably interferes with rights. This obscures doubts about the rights-compatibility of legislation to parliamentarians and the public, preventing a transparent discussion about the appropriate relationship between rights and legislation. On the other hand, in states where judicial norms do not majorly constrain government policy, such as New Zealand, open use of the 'nevertheless' declaration does not lead to greater discussion about rights – because rights-norms are not strong enough to warrant further parliamentary scrutiny.

The evidence appears to suggest therefore that the mainstreaming aim of theorists has come to pass but that the dialogic aim has not. Further, the role of bureaucratic officials in pre-enactment review has been said to lead to judicial norms having too much of an influence over the process. There is some merit in this claim. However, at the same time, such analysis fails to take into account the evidence that shows that governments are willing to take risks with legislation and that these risks sometimes pay off. If, by improving the capacity of governments to explain in rights-language why their bills are compatible with rights (including by referring to non-legal standards that justify the limitation of rights), executive reporting requirements have helped to convince courts of the compatibility of legislation with rights – then this fact is sufficient to show that the executive reporting has led a greater executive input into the interpretation of rights. This contribution is perhaps more modest than some scholars imagined, particularly dialogue scholars, but it is an important input nonetheless.

Second, the parliamentary role under 'third way' bills of rights was interrogated. Here, it was found that the existence of Westminster factors, particularly the executive dominance of parliament and the centrality of partisan political parties to how parliament proceedings, hinders effective parliamentary rights-based scrutiny. Reasoned compatibility statements and a parliamentary human rights-scrutiny committee can improve parliamentary rights-scrutiny. The former gives parliamentarians greater information about the how the Government considers its Bill affects rights which helps to form the basis for further scrutiny, the latter improves parliament's institutional expertise on rights-questions and helps to build a unique parliamentary voice on rights. However, with the exception of the ACT, whose rights-scrutiny committee has seen considerable success in amending government legislation, the success of parliamentary rights-scrutiny committees tends to be unseen and therefore difficult to measure. Further, the effective functioning of rights-scrutiny committees is again determined by Westminster factors. Committees where government-supporting parliamentarians comprise the majority of members and where parliament size and party discipline means that members operate in a partisan fashion are unlikely to be effective scrutinisers of legislation on rights-grounds. Again, therefore, the existence of broader constitutional factors has meant that the intentions of 'third way' scholars that parliament becomes a strong independent scrutiniser of legislation on rights-grounds, leading to government amendments and defeats has not come to pass. This does not mean that in every case parliamentary rights-scrutiny has been a failure, but that its successes tend to be more modest and unseen.

Finally, this chapter considered the role of the judiciary in scrutinising legislation under 'third way' bills of rights. Two features in particular were considered: the power to declare that legislation is inconsistent with rights without necessarily effecting the operation of the legislation and the special power to interpret legislation in a manner that accords with rights. According to 'third way' scholars, the first feature in particular was supposed to encourage an equal and open dialogue between the courts and legislators about the extent to and manner in which rights should constrain policy choices.

However, in not one of the jurisdictions considered has the declaratory power been used to engender such a relationship. In the UK and Canada, broader constitutional factors mean that legislators do not feel like they are able to openly take an independent position on rights from the courts. In the Australian jurisdictions, questions about the constitutional validity of the power and a broader constitutional culture that is sceptical of judicially protected rights has meant that the declaratory power has been seldom used. It seems therefore that Tushnet's claim that 'third way' bills of rights tend to collapse into legal or political constitutionalism has some merit in relation to judicial review.

However, exclusive focus on the use of the parliamentary override obscures how weak-from review exists the UK and Canada in alternative ways. Although in these jurisdictions, legislators are unwilling to *openly* contest judicial rights-perspectives, politicians are given some say in the resolution of rights-questions by alternative means. The first way is through the doctrine of judicial deference – where the courts will defer to the judgment of politicians on the basis of their superior competence when considering particular rights-questions. The second is through remedial deference – where governments/parliaments are given a large margin of discretion to determine the appropriate legislative response to a judicial finding of incompatibility. A third approach is 'notwithstanding by-stealth' – where legislators reintroduce rights-incompatible legislation whilst paying lip service to the court's judgment. Again, broader constitutional factors have militated against the use of 'third way' bills of rights for open dialogue and debate about the appropriate boundaries of rights. However, the more modest aims of 'third way' scholars, that each branch of government is able to bring a unique perspective to the protection of rights and that no-branch has a monopoly in determining rights-questions has been achieved in these states via alternative means.

Overall therefore, although there is evidence in all jurisdictions that the Bills have changed aspects of institutional behaviour, the impact is often uneven and manifests itself in

unpredictable ways. This has led Tushnet to conclude that 'third way' bills of rights are inherently unstable and eventually collapse into legal or political constitutionalism. However, although evidence in each of the jurisdictions to some extent vindicates Tushnet's claims, his conclusion misses some of nuances of rights protections in these states. Although existing constitutional culture infects the manner in which the bills are operated, the above evidence shows that bills themselves also contribute to and change that existing culture, even if only sometimes in subtle ways. While some of the more radical expectations of 'third way' scholars/drafters have not come to pass, 'third way' theories of rights protection still contribute to our understanding of these bills of rights because they promote the shared and interactive institutional protection of rights and provide a lens through which to determine whether a state's model of rights protection is appropriately balanced.

This chapter demonstrates that structural 'third way' features can help to engender increased rights-ownership from the different branches of government. At the same time, it also demonstrates that 'third way' features by themselves will not necessarily lead to the form of rights protection envisaged by 'third way' scholars – broader constitutional factors have an extremely important effect on how these features operate in practice. Finally, the 'third way' features discussed above are not the only way to achieve a model of rights protection that has balanced input from the three branches of government. Other means to reach the same result can be used, even in states with nominally strong-form review. This conclusion paves the way for the consideration of the Scottish model of rights protection to be viewed through a 'third way' lens because it combines structural 'third way' features with a constitutional culture that has led to its formally strong powers of judicial review being exercised in a relatively weak manner. This claim will be sketched out and tested further in the forthcoming chapters.

Chapter 3: The Scotland Act 1998 as a 'Third Way' Bill of Rights: Design and Operation

Introduction

The Scotland Act 1998 received royal assent on 19 November 1998, ten days after the Human Rights Act 1998 was enacted. Both Bills were conceived of and delivered by a New Labour Government, keen on radical reform of the United Kingdom's constitution, whilst at the same time tethered by its historical grundnorm, the principle of parliamentary sovereignty. Both Bills were intended to resolve similar underlying problems in the United Kingdom's constitution that had been thrown into full view by the previous Conservative administrations, particularly that of Margaret Thatcher. Faced with a premiership that favoured a strong centralised executive, concerns grew about the responsiveness and accountability of the government to those it governed. The New Labour response was to call for a greater division of power both between the citizen and the state and geographically between central government and the nations and regions of the UK. From such demands, the Human Rights Act 1998 and the Scotland Act 1998 (as well as the other devolution Acts) were created. Indeed, in the preface to both the Scotland Bill and the Human Rights Bill, Prime Minister Tony Blair tied the two acts, along with others, by opening with the same paragraph:

> The Government are pledged to clean up and modernise British politics. We are committed to a comprehensive programme of constitutional reform. We believe it is right to decentralise power, to open up government, to reform Parliament and to increase individual rights.[1]

The HRA, for the first time, allowed individuals to challenge acts of the British state, including primary legislation, in domestic courts on the basis that they unlawfully interfered with their Convention rights. The Scotland Act 1998 established a Scottish Parliament that was competent to legislate for Scotland in all areas apart from those specifically reserved to Westminster[2] or where there was an incompatibility with Convention rights or EU law.[3] Again, this granted courts the power to review Scottish legislation on the basis that it strayed beyond competence in these areas. However, unlike the HRA, where the courts found that Scottish legislation had

[1] The Scotland Office. (1997). *Scotland's Parliament,* White Paper Cm 3658, Preface, UK Government White Paper, (1996) *Rights Brought Home: The Human Rights Bill*, Cm.3782 Preface
[2] The Scotland Act 1998, s.29(2)(b) and (c)
[3] Ibid, s.29(2)(d)

transgressed these constitutional boundaries, the effect was that the legislation would not be considered to be legally effective.

Enhanced powers of judicial review were not the only innovations that the two Bills introduced to improve the accordance of legislation with rights. Favouring democratic means, the two Bills place obligations on actors in the legislative process to engage in legislative rights review. Much work has been done on the effectiveness of such safeguards at UK level whilst literature at the Scottish level is just beginning to catch up. As discussed in chapters one and two, a popular theory of the HRA is that it, along with Bills of rights in Canada, New Zealand and the Australian territories of Victoria and the ACT, constitutes a novel 'third way' form of rights protection. 'Third way' bills of rights adopt particular structural features aimed towards ensuring the different branches of government collaborate in protecting rights, whilst ensuring no branch has a monopoly on settling-rights questions.

In comparison with the five Bills explored in the previous chapter, there have been fewer attempts to characterise the Scotland Act 1998 as belonging to the constellation of Bills of Rights with a 'third way' model of rights protection. This is partly due to the existence of strong-form review for Scottish legislation deemed to be incompatible with Convention rights - something that distinguishes it from the other states considered. However, it has been established that not all 'third way' scholars consider that the parliamentary override is the most distinguishing feature of 'third way' bills of rights. Hiebert claims that what distinguishes these bills of rights from other forms of constitutionalism is the executive reporting requirement and other features that engender 'legislative rights review'. By inculcating human rights into the legislative process, Hiebert claims that the legislative reporting requirement grants the executive and legislature greater control over how human rights are protected in legislation whilst ensuring that rights-implications are considered for all Bills and not just those that are challenged in the courts.[4] Further, Young has argued that the existence of a parliamentary override is not essential to ensure that there is appropriate room for the executive, legislature and courts to have a shared role in settling-rights-questions. She argues that such a result can be achieved in states with strong-form review through the alternative route of judicial deference.[5]

[4] See eg Hiebert, J.L. 'Legislative Rights Review: Addressing the Gap between Ideals and Constraints' in Hunt et al (Eds) (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit* London: Hart Publishing,
[5] Young, A.L. (2017) *Democratic Dialogue and the Constitution* Oxford: *Oxford University Press;*

This thesis adopts an account of 'third way' constitutionalism that merges Hiebert's 'legislative rights review' with Young's judicial deference as dialogue. In doing so, it aims to assess the extent to which the Scottish model of rights protection can be said to adopt this form of rights protection. In line with Hiebert and Young, I consider that viewing the Scottish model through a 'third way' framework is a more useful lens through which to analyse how human rights are protected in Scotland. By starting from the position that all branches of government have a role in the protection of rights (including in the interpretation of rights) and giving a more nuanced account of when it is legitimate or otherwise for a particular branch to settle a rights-question – a fuller picture of the roles and relationship between the different branches of government in rights-protection begins to emerge. Further, if the assessment of practice finds that current protections are inappropriately skewed towards a particular branch, then 'third way' theory can provide a basis of critique and a potential source of reform for the Scottish model.

The aim of this chapter is to defend the claim that the Scotland Act 1998 falls within broader family of bills of rights with 'third way' features. To do so, the chapter will be split into three parts. Part one will briefly sketch out the model of rights protection in Scotland and explain its 'third way' promise. It will be argued that the Scottish model of rights protection shares many structural features of the 'third way' bills of rights discussed in the previous chapters – particularly features that engender legislative rights review. However, at the same time, it will note that, in terms of design, the Scottish model deviates from these bills because it does not contain a clause allowing parliament to override judicial declarations on Convention rights. However, I will argue that particular internal and external pressures on the judiciary to defer to the legislature on Convention-rights questions means that democratic dialogue occurs via this alternative mechanism.

After considering the design of the Scottish model through a 'third way' lens, the chapter will then go on to assess the operation of model in practice. Part two will consider the aspects of the Scottish model that engender 'legislative rights review'. It will be argued that human rights reporting requirements have led to serious engagement on behalf of executive and parliamentary officials with rights-questions when drafting legislation. Indeed, the PO's reporting requirement and the Law Officer's referral has led to real, concrete dialogue between executive (UK and Scottish) and parliamentary officials on the Convention rights-consistency of legislation. However, consistent with practice in the jurisdictions considered in the previous chapter, this practice is mainly carried out by bureaucratic officials rather than democratically elected politicians. The central role of bureaucratic officials, particularly since ASPs are subject

to judicial invalidation, means that assessments are at risk of being dominated by judicial norms, undermining a key aim of 'third way' scholars - that representative politicians are able to contribute to the interpretation of Convention rights. However, despite this risk, I argue that Ministers still do contribute to the interpretation of Convention rights in Scotland. In particular, Ministers are able to contribute to rights-questions that are novel or contestable. Further, by encouraging a Bill's proponents to explicitly justify the Bill's interference with Convention rights in the language of the Convention, the reporting requirement can help legislators to set the terms of the discussion about the rights-consistency of legislation if it is subsequently challenged. This, in turn, can reduce the likelihood of a finding of incompatibility.

Part two will also evaluate the Scottish Parliament's role in parliamentary rights review. It will analyse the legislative history of eighteen ASPS, seventeen of which were challenged on Convention rights-grounds and one which was not challenged before repeal but was widely considered to have engaged Convention rights,[6] to consider how parliament's scrutiny of bills on Convention rights-grounds operates in practice. I will argue that MSPs do consider that Convention rights-based scrutiny is part of their role. However, numerous factors, such as the initial failure to establish a specialist human rights-scrutiny committee, unreasoned compatibility assessments and Westminster factors have undermined parliamentary rights review.

After considering the practice of legislative rights review in Scotland, part three of the chapter will then consider the court's powers to review legislation on rights-grounds. Part three will review the courts' approach to twenty-one Convention rights-based challenges to ASPs to demonstrate that, despite the existence of strong-form judicial review for ASPs on Convention rights-grounds, the judiciary's role is significantly weaker than appears at face value. This is a result of internal and external pressures on the judiciary to defer to or collaborate with legislators in protecting Convention rights.

Thus, by combining legislative rights review with judicial deference, I will argue that the Scotland Act 1998 operates similarly to the core 'third way' bills of rights discussed in the previous chapter – particularly the Canadian Charter and the HRA.

[6] Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012

PART ONE: The Scottish Model

The Scottish Parliament does not share the sovereign quality of its creator, the Westminster Parliament. Section 28 of the Scotland Act 1998 empowers the Scottish Parliament to make laws, subject to legislative constraints. Section 29 of the Act lists those constraints, including where the law 'relates to' matters reserved to the Westminster Parliament,[1] where the Bill would amend certain Westminster protected statutes[2] or, most importantly for the purposes of my argument, where the Bill is 'incompatible with any of the Convention rights'.[3] If a senior court finds that a Bill strays beyond one of these (or other) boundaries of competence it is required to find that the Bill or a provision of it is 'not law'.[4]

That said, there exists numerous safeguards in the Scotland Act 1998 that aim to reduce the likelihood of the courts exercising their powers to strike down legislation on competence grounds.

Pre-introduction

First, section 31(1) of the Act requires that, before introduction, the person in charge of proposed legislation makes a statement confirming that in their view the Bill's provisions are within the legislative competence of the Scottish Parliament.

As discussed during the legislative passage of the Scotland Bill, s.31 aims to reduce the number of Bills lacking competence that are introduced to Parliament by ensuring that sponsors of Bills (usually Government Ministers) have checked the Bill for competence prior to introduction.[5] The provision is therefore similar to the executive reporting requirements that are said to be a key feature of 'third way' bills of rights.

However, unlike the other five bills considered, because the Scottish Parliament is not empowered to enact legislation that is incompatible with Convention rights, s.31(1) does not empower the Bill's sponsor to issue a 'nevertheless' statement. This reduces (without removing) the likelihood that the provision will be used to engender a dialogue between the executive and the other branches of government about the boundaries of rights and the extent to which they should constrain legislation. The design of s.31(1) therefore clearly limits the

[1] Scotland Act (n2), S.29(2)(b)
[2] Ibid, s.29(2)(c)
[3] Ibid, s.29(2)(d)
[4] Ibid, s.29(1)
[5] HL Deb 28 July 1998, vol 592, col 1353, Baroness Ramsay of Cartvale

Scottish Government's options in a way that the other ministerial reporting requirements do not. It takes away an important lever of constitutional counter-balancing where the Government can assert the importance of legislation notwithstanding a potential finding by the courts of the bill's incompatibility with Convention rights. In doing so, it reduces the ability of Scottish legislators to open up a broad debate about the extent to which judicially-interpreted Convention rights should constrain legislative choices.

Additionally, Rule 9.3.3(d) of the Parliament's Standing Orders requires Government Bills must be accompanied by a policy memorandum containing 'an assessment of the effects, if any, of the Bill on equal opportunities, human rights, island communities, local government, sustainable development and other matter which the Scottish Ministers consider relevant.'[6]

Similar to the reporting requirement, this provision encourages Ministers to consider the human rights implications of their Bills prior to introduction and sends a signal to parliament about the areas where the Minister considers the legislation implicates rights. The provision is thus clearly capable of engendering a dialogue between the Minister and parliament about the rights-compatibility of legislation.

Another feature with dialogic potential is section 31(2) of the Scotland Act. This provision requires that the Scottish Parliament's Presiding Officer (PO) also issues a statement about the legislative competence of a Bill on its introduction to Parliament. However, the PO's reporting requirement differs from the sponsor's reporting requirement in that the PO may issue either a positive or negative statement of competence.

S.31(2), a unique feature which does not exist in the bills of rights considered in the previous chapter, is designed to ensure that there is a distinct parliamentary voice that advises parliamentarians on the potential compatibility of a Bill with rights. Most MSPs are not lawyers and will not to have the ability or time to adequately decipher such information without expert guidance. The parliament has far fewer resources than the Scottish Government and thus individual parliamentarians are unable to hire lawyers to provide such guidance – the PO's statement of competence, which as shall be seen is formed on the basis of legal advice, therefore fulfils this requirement. In response to the PO's statement, particularly where a negative statement is issued, Parliament should engage in detailed scrutiny of the legislation on competence grounds. However, because Parliament is not bound by the PO's statement, where

[6] Standing Orders of the Scottish Parliament, 6th Edition, 2nd Revision (30 June 2021), Rule 9.3.3(d)

Parliament ultimately disagrees that the legislation is likely to be incompatible with Convention rights, it may pass the legislation notwithstanding the negative statement. In this way, the PO's statement is supposed to encourage dialogue between the executive and parliament about the extent to which legislation is compatible with Convention rights.

That s.31(2) aims to engender legislative rights review can be seen by the fact that the UK Government defeated attempts in the Lords to amend the provision to give the PO a veto over legislation that she considered was incompatible with Convention rights.[7] Lord Sewell defended the provision in the following terms:

> This is similar to the requirement placed on a member of the Scottish executive when introducing a Bill. It will ensure that the parliament is aware of the presiding officer's views on the vires of any Bill. This gives the parliament important guidance about the competence of the parliament and allows the presiding officer to express his concerns if he has any[.][8]

S.31(2), and indeed s.31(1), were therefore seen by high profile members of the Government at the time as provisions directly oriented towards providing parliament with different perspectives on the rights-compatibility of proposed legislation.

Post-introduction

The Scottish Parliament's Committee system was also designed to encourage increased parliamentary scrutiny of legislation on rights-grounds. As a counter-weight to the Parliament's unicameral nature, Scottish Parliamentary committees play a central role in the legislative process. As a result, the majority of work taken in Stage 1 (general principles) and Stage 2 (amendments) of the legislative process is undertaken by at least one nominated committee.

For its first four sessions, the Scottish Parliament did not have a specialist human rights committee, instead preferring to adopt a 'mainstreaming' approach. Under this approach all committees were expected to consider human rights when scrutinising legislation.

However, in the Scottish Parliament's fifth session, the Equal Opportunities Committee expanded its remit to include human rights. The committee has indicated that it intends to pilot a 'JCHR approach' of systematic scrutiny of government bills– although it is not clear that it

[7] HL Deb 28th July 1998, Vol 592, Col 1368-1272
[8] HL Deb, 9th November 1998, Vol 594, Col 532

has been given the required resources to do so.[9] The role of the Committee will be central to Scotland's model of rights protection going forward. However, given that my research focuses on legislation that was enacted prior to the expansion of the Committee's remit, the analysis will primarily focus on the work of the committees that were elected to lead the scrutiny of those bills.

Pre-royal assent

Section 33(1) of the Scotland Act 1998 empowers the Law Officers of the Scottish and UK Governments to refer a Bill to the Supreme Court for a decision on competence grounds within four-weeks of enactment. In the event that such a referral is made, the Bill is withheld from royal assent until the Supreme Court's judgment is made.

The purpose of the provision is to allow either the Lord Advocate or the Attorney General/Advocate General to give the Supreme Court the opportunity authoritatively resolve any specific questions on legislative competence prior to the Bill coming into force. It may be seen as a quasi-political measure, because the reference is made by a member of the Government (and because the threat of a reference is used by the law officers to influence pre-introductory review) but any ultimate decision is made by the Supreme Court.

The Law Officers' reference might be viewed as a 'third way' measure for numerous reasons. First, as shall be seen, the threat of a reference from a UK law officer can encourage a dialogue between the Scottish Government and UK Government around issues of competence before the Bill is introduced. Second, if made by the Lord Advocate, a reference to the Supreme Court might be used (a) where the Scottish Government is not clear what the position of the court is in relation to the protection of a particular Convention right or (b) to head off potential challenges to the legislation after royal assent has been given. The dialogic potential of the provision is further bolstered by the fact that, in the event of a finding of incompatibility, the Bill is returned to the Scottish Parliament. This allows the Parliament to make amendments to the Bill in order that it is brought within competence. This of course does not mean the Scottish Parliament is able to overturn the Supreme Court's decision but allows the Parliament to reassert its aims in a manner consistent with rights. Thus, while the Parliament does not have freedom to legislate contrary to rights, it maintains a significant degree of power to determine the manner in which rights are protected.

[9] Scottish Parliament Equalities and Human Rights Committee 'Getting Rights Right: Human Rights and the Scottish Parliament' *6th Report, 2018 (Session 5), SP Paper 43*, Recommendation 29 at 274

Post-royal assent

If the Law Officers' reference might be regarded to be a quasi-political measure, the final features of the Scottish model of rights protection that can be viewed through a 'third way' lens, are more straightforwardly judicial.

Although not a feature of the Scotland Act 1998, an extremely important feature of judicial review of Scottish legislation on rights-grounds is the courts use of the doctrine of due deference. As shall be explained in the second part of this chapter, thus far the Scottish Courts have been willing to show a considerable degree of deference to legislators when determining whether legislation is contrary to Convention rights. The need for the courts to show deference to parliamentary decision-makers is a crucial factor in ensuring that Scotland's model of rights protection can be viewed alongside the states with a 'third way' bill of rights. If the Scottish Courts were not willing to be deferential, then it would be difficult to justify the Scottish model as one which grants each of the branches of government a degree of input into how rights-questions are resolved. Thus, following Young, the existence of judicial deference in Scotland, alongside the structural features that encourage legislative rights review, allows it to be considered as a 'third way' bill of rights.

A provision in the Scotland Act 1998 itself that calls into question the conclusion that the Act is straightforwardly a model with strong-form rights review is section 101. S.101 of the Scotland Act 1998 provides that an ASP 'which could be read in such a way as to be outside competence'[10] should 'be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly'.[11]

This provision, which has similarities with the interpretive powers in the NZ, British, ACT and Victorian Acts, aims to minimise the occasions on which an ASP will be found to be outside the competence of the Scottish Parliament by encouraging courts to read the Act 'narrowly'. S.101 of the Scotland Act 1998 thus reduces the occasions on which the courts are required to openly assert their supremacy by setting aside legislation. Whilst courts retain their ability to define the meaning of Convention rights, if they can find a way to give effect to parliament's intention in a manner that is consistent with rights, they will do so. This is consistent with Klug's understanding of rights protection as a 'joint enterprise'.

[10] The Scotland Act (n2), s101(1)(a)
[11] Ibid, s101(2)

A second provision in the Scotland Act 1998 that encourages the courts to collaborate with the legislature in Convention rights protection is section 102. The provision provides that when an ASP has been found to be outside the competence of the Parliament,

> the court or tribunal may make an order – (a) removing or limiting any retrospective effect of the decision, or (b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.[12]

The effect of s.102 is that where a Court finds that an ASP is outside competence, it may suspend the effect of its decision in order that parliament is able to decide a suitable remedy.

S.102 does not go as far what Gardbaum described as 'decoupling judicial review from judicial supremacy'.[13] The decision of whether to suspend the effect of the decision is firmly within the judiciary's hands - the provision says 'may' not 'must'. Further, under s.102, the Scottish Parliament's legislative options are lesser than, for example where a court has issued a declaration of incompatibility, because the remedial legislation must abide by the court's judgment. However, s.102, if used regularly, allows for a large degree of legislative control over how legislation that is contrary to Convention rights is remedied – particularly if the courts are deferential to the legislative response in the event that a subsequent challenge is made.

Scotland's Model - Conclusion

Overall therefore, a brief sketch of the model of rights protection under the Scotland Act 1998 demonstrates that there are possibilities for executive, legislative and judicial input into the protection of rights. Crucially, such an input is not merely reserved to implementing rights but also to interpreting particular rights (although for legislators, this role is perhaps smaller, in theory at least, than in states with a parliamentary override).

It is clear that the Scotland Act 1998 has mechanisms to engender legislative rights review. There are also some provisions in the Act which encourage the judiciary to collaborate with the legislature in setting the remedy for *prima facie* legislative-rights violations. Where Scotland's 'third way' model goes beyond the structural features in the Scotland Act however, is in relation to deference shown to the legislature in the settling of rights-questions. Whilst it is important to assess the operation of the Scotland Act's 'third way' mechanisms, it is particularly important to determine the extent of content deference in Scotland. This will help

[12] Ibid, s101(2)(a) and (b)
[13] Gardbaum, S. (2013), 'The Case for the New Commonwealth Model of Constitutionalism'. *G.L.J. 14(12),* pp2230

to determine whether Scotland's model is one that merely allows the political branches of government to help to protect judicially-interpreted rights or whether these branches of government can contribute to the settling of rights questions.

That said, even if the courts have been willing to defer to legislators on the content of some Convention rights questions, I should be clear about the form of dialogue that is likely to take place under the Scottish model. The lack of existence of a parliamentary override in Scotland means that there does not exist a mechanism for legislators to openly disagree with courts on Convention rights-questions. Disagreement can still occur, but is likely to manifest in quieter, more subtle ways. The result is that accounts of dialogue that emphasise the model's ability to harness institutional disagreement to engender a broader societal debate about particular rights-questions[14] is less likely to come into fruition in Scotland. However, the other aim of 'third way' scholars, that the different branches of government work together to protect rights in a more effective and democratically legitimate manner is possible under Scotland's model. Further, as the previous chapter demonstrated, even under Bills with a parliamentary override the above contestatory account of dialogue has not really come into fruition. Indeed, in Canada and the UK, whose models probably operate in a manner that is most similar to Scotland's, dialogue has tended to occur through alternative mechanisms such as through the doctrine of due deference and 'notwithstanding by stealth'.[15]

[14] Eg Nicol, D., (2003). 'The Human Rights Act and the politicians' *Legal Studies* p455; Garbaum, S. (2013). 'The New Commonwealth Model of Constitutionalism: Theory and Practice' *Cambridge: Cambridge University Press* p45

[15] Kelly, J.B. & Hennigar, M.A. (2012) 'The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review within a Constitutional Charter of Rights, *10 Int'l J Const L 35,* p36

PART TWO: Legislative Rights Review and the Scottish Parliament

Having assessed the design of Scotland's 'third way' model, this chapter will now assess its operation. Part three will consider judicial deference under the Scotland Act, whilst this second part will consider the operation of the features that engender legislative rights review.

However, before a more thorough discussion of the various provisions in the Scotland Act 1998 that are said to encourage legislative rights review, it is important to consider broader constitutional factors that might influence the manner in which it operates. As was acknowledged in the previous chapter, factors such as parliamentary/constitutional design can play a significant role in determining how the provisions operate in practice.

The Scottish Parliament's design

The previous chapter demonstrated how the Wesminster system of government can undermine parliamentary rights review.

The extent to which the Scottish system of government adopts the 'Westminster' model is a complicated question. On one hand, grassroots campaigners for a Scottish Parliament expressed a desire for a machinery and culture that was the antithesis of Westminster, 'more participative, more creative, less needlessly confrontational.'[1] On the other, as Cairney and Johnston point out, the body that made devolution a reality, the UK Government, had a different focus, which was the decentralisation of power in forms that retained traditional forms of accountability.[2] The Scottish Parliament must therefore be viewed in terms of both the desire of some its early proponents to be different from Westminster as well as from its Westminster ancestry.

Particular features of the Scottish Parliament would be considered to fall within the 'consensus model' outlined by political scientist Arend Lijphart.[3] It has a proportional voting system, AMS, which is designed to prevent any one party from gaining a majority of seats in the Parliament.[4] This safeguard is strengthened by a comparatively large number of political parties capable of winning a significant proportion of seats – four political parties have been

[1] Scottish Constitutional Convention, (1995). 'Scotland's Parliament, Scotland's Right'. Available at https://paulcairney.files.wordpress.com/2015/09/scc-1995.pdf (Accessed 10.05.18), p11
[2] Cairney, P. and Johnston, J (2014). 'What is the Role of the Scottish Parliament' *Scottish Parliamentary Review, 1:2 Winter,* p95-97
[3] Lijphart, A. (2012). 'Patterns of Democracy: Government Forms and Performance in Thirty Six Countries'. *Yale University Press: London, Second Edition* Chapter 3 – The Consensus Model of Democracy
[4] Shephard, M., McGarvey, N., and Cavanagh, M. (2001). 'New Scottish Parliament, New Scottish Parliamentarians?' *Journal of Legislative Studies, 7:2,* p80

represented at every parliamentary session and have had at one time held more than seventeen of the fifty-nine available seats. However, as experience in New Zealand has demonstrated, where a change to a non-majoritarian voting system is not supported with a broader change to a state's political system, it is unlikely to make much of a difference to the relationship between government and parliament – particularly where the government is based on a coalition agreement. In four of the six Scottish Parliamentary sessions so far, there has been either a majority government or a coalition. During the sessions where the Government operates with a majority or in a coalition, it is expected that parliamentary rights-based scrutiny will be less effective because the Government does not need to rely on opposition votes to enact legislation. Alternatively, where the Government governs with a minority, parliamentary scrutiny might be more effective. This hypothesis will be evidenced when the legislative sequel to the *Christian Institute* judgment is discussed in chapter four.

The Scottish Parliament contains a number of features that are consistent with the Westminster model. The executive is drawn from parliament and the system operates on the basis of government dominance of parliament – with the Government dominating the legislative agenda.[5] Initial expectations for a slower and more considered legislative process were frustrated by the Scottish Government's decision to announce its programme yearly, rather than taking the complete parliamentary term, with obvious implications for the time for and effectiveness of parliamentary scrutiny.[6] In terms of political culture, again Holyrood seems to have taken its cue from the Westminster Parliament. McCorkindale and Hiebert cite both empirical research and their own anecdotal evidence to suggest that there is an expectation that MSPs prioritise party loyalty over independent scrutiny.[7] Again, this does not bode well for parliament's capacity for legislative rights review – especially if political parties do not see Convention rights as effective vehicles through which to shape their opposition.

Additionally, there are unique characteristics of the Scottish Parliament that put it at a disadvantage at legislative rights-scrutiny when compared with other jurisdictions. Whilst the House of Commons has been much maligned for its practice in holding the Government to account on the basis of Convention rights, the House of Lords has received some praise.[8] The

[5]McCorkindale, C. & Hiebert, J.L. (2017), 'Vetting Bills in the Scottish Parliament for Legislative Competence', *Edin.L.R. 21:3*), p328
[6] Cairney and Johnston, (n2), p118
[7] McCorkindale and Hiebert (n5), p328
[8] Kavanagh, A. (2015). 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog'. in Ed. Hunt, M., Hooper, H.J., and Yowell, P. (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit.* London: Hart Publishing, p133

Scottish Parliament, however, is unicameral. Critics have argued that this means it lacks the sufficient capacity to engage in effective scrutiny.[9] It was hoped that the central role played by committees in the Scottish Parliament would help to counteract the lack of a second chamber. However, conversely, their centrality may have in some ways hindered their ability to scrutinise effectively. Lord Hope has argued that making committees central to the official legislative process, including at Stage 2, where committee members can lodge amendments, risked undermining their scrutinising role.[10] In addition, perhaps more importantly, a combination of a relatively low number of available parliamentarians and a tight legislative schedule has meant that committees are often pressed for time and resources to sufficiently scrutinise legislation.[11] As Arter puts it, committees have become 'part of the legislative sausage machine.'[12] The centrality of the Scottish Parliament's committee system to the legislative process, which raises the stakes of committees' deliberations, as well as the small size of Scotland's parliament, which, as seen in other jurisdictions, can lead to a lower number of independently minded parliamentarians, means that committees tend to operate in a partisan fashion.[13] This can harm the extent to which the government is willing to listen and yield to committees' scrutiny of legislation on Convention rights-grounds.

Overall therefore, it has been shown that the Westminster factors that Hiebert and others have argued are not conducive to effective parliamentary rights review are relatively strong in Scotland. This, as will be shown, has a negative effect on the ability of the Scottish Parliament to scrutinise legislation on Convention rights grounds.

Pre-introduction review

(A) Statement of Competence from person in charge of the Bill

All Bills promoted in the Scottish Parliament are required to be accompanied with a statement of competence. This means that Government and other Bills must have a statement of competence attached. S.31(1) says that the statement must be given 'on or before introduction',

[9] The Rt Hon. The Lord Hope of Craighead. (2004). 'What a Second Chamber Can Do for Legislative Scrutiny'. *Statute Law Rev 25(1),*
[10] Ibid
[11] Cairney, P. (2011) 'The Scottish Political System Since Devolution: From New Politics to the New Scottish Government' *Exeter: Imprint Academic,* p45
[12] Arter, D (2002) 'On Assessing Strength and Weakness in Parliamentary Committee Systems: Some Preliminary Observations on the New Scottish Parliament', *Journal of Legislative Studies, 8(2),* p105
[13] This has led to calls for the Committee system to be reformed. See eg – Mitchell, J. 'Comment: We need institutional reform to live up to the original ideals of the Scottish parliament' *Holyrood Magazine* (27 February 2021) Available at https://www.holyrood.com/comment/view,comment-we-need-institutional-reform-to-live-up-to-the-original-ideals-of-the-scottish-parliament (Accessed 19/08/21)

which means that the statement of competence comes at the start of the legislative process and does not need to be reasserted at the end. As discussed in the *Salvesen* case study in chapter four, this means that Bills that have been substantially amended to the point that they no longer are likely to comply with rights will pass with the affirmative statement of competence intact.[14]

According to McCorkindale & Hiebert's research, the key players involved in determination of the competence of bills on the Government side are the Minister in charge of the Bill, the Scottish Government's legal advisors, and the Lord Advocate and his/her Legal Secretariat. Ministerial checking for competence may be said to have two stages, an initial check by the SGLD and then a further check by the Legal Secretariat to the Lord Advocate.[15]

The Minister's overarching concern tends to be with ensuring that a Bill reflecting their policy goals becomes law.[16] The level of direct ministerial involvement in competence vetting depends on the obviousness of any potential problems with competence. Where policy goals themselves are clearly within competence but the manner in which they are realised may not be – the Minister and his/her advisors tend to leave competence checks to the SGLD. On the other hand, where the policy goals themselves come into contact with the limits of legislative competence, the Minister's team will work more closely with the SGLD as well as the Legal Secretariat and the Parliamentary Counsel's Office in order to ensure, as far as is possible, that the Bill is likely to be compliant with Convention rights. When a Bill cannot be given effect to in a way that is likely to remain within competence it is generally withdrawn - Ministers tend to be deferential to their legal advisors in this respect and will not push a Bill against legal advice. The test to determine whether the Minister may make a positive competence statement is that the bill will 'more likely than not' be found to be within the competence of the Scottish Parliament.[17]

The Ministerial Code requires that the statement of competence is cleared with the Law Officers.[18] A copy of the Bill along with a detailed summary on legislative competence is therefore sent to the Legal Secretariat to the Lord Advocate (in addition to the OSSP and the OAG) three weeks before it is introduced to parliament.[19] The LSLA will take account of the

[14] For example, the provision of the Agricultural Holdings (Scotland) Act 2003 that was found in *Salvesen v Riddell [*2013] UKSC 22 to be incompatible with Article 1 of the First Protocol ECHR, was an amendment introduced at Stage 3, and, as such, was not subject to review from the PO or responsible Minister.
[15] McCorkindale and Hiebert (n5), p332
[16] Ibid, p330
[17] Ibid, p330-331
[18] Ibid, p332
[19] Ibid

SGLD's position before forming a view of their own. If there are differences of opinion or need for clarification there will be a process of dialogue between the two offices until consensus is reached. This occasionally leads to amendment of the Bill – although only in the most serious cases. Whenever there is disagreement Ministers tend to defer to the position of the Lord Advocate, even when they are reluctant to do so. The test used by the LSLA to determine competence is two-fold, first they consult with the relevant jurisprudence to determine general principles. Second, using such principles the LSLA estimates whether on the balance of probabilities the Supreme Court would be likely to rule that the bill was outside the competence of the Scottish Parliament.[20]

What implications does the practice of pre-enactment checks have on Hiebert's conception of legislative rights review? First, it is important to highlight the centrality of bureaucratic officials in the determining of competence. While the statement is made in the Minister's name, and ultimately a Bill may not be placed before Parliament if the Minister believes it to be outside competence, the question of whether a bill is within competence requires consideration of the position of the courts which often leaves the Minister little room to disagree with his/her legal advisors.[21] This relationship is starker in the Scottish Parliament than it in the other jurisdictions because Scottish legislation that is outside competence is 'not law'. Elsewhere, the risks associated with making a positive statement of compatibility, which is subsequently found to be incorrect, are lower than in the Scottish Parliament. There exist fewer pre-enactment safeguards and a finding from a court that there is an incompatibility with Convention rights does not (apart from in Canada) change the law. In the UK and Canada, Ministers may therefore hide behind confidential legal advice and put pressure on lawyers to come up with a reading of the prospective legislation that makes it compatible with rights in order that they can make a positive statement.[22] In this manner, the existence of strong-form review for Scottish Legislation clearly does have effect on the process by which legislation is drafted. The fact that Scottish Ministers have to be more conservative when introducing Bills that engage Convention rights may lead to them to propose less radical policy solutions than elsewhere. Indeed, Bellamy would argue that the centrality of legal advice in Ministerial vetting for competence is normatively dangerous. It leads the judicial view to be double-counted and

[20] Ibid
[21] Ibid, p329
[22] Hiebert, J.L. 'Parliamentary bills of rights: have they altered the norms for legislative decision-making?' in Jacobsohn, G. & Schor, M. Ed (2018) *Comparative Constitutional Theory: Research Handbooks in Comparative Constitutional Law series* Cheltenham: Edward Elgar Publishing, p130-133

is contrary to the very purpose of political decision-making – which is to suggest the best possible solution to a problem.[23] However, at the same time, the extent to which judicial norms dominate the formulation of policy depends on there being a clear judicial view on a particular rights-question in the first place. The open textured nature of Convention rights (and the manner in which they have been interpreted by the Strasbourg court) means that there often will not be a clear, prescriptive judicial finding on the particular rights-issue(s) that the Bill engages. Officials can use previous case law to predict the courts' response but this is not an exact science. The inherent indeterminacy of these judgements means that Ministers will often be able to make the case for a particular policy even if it does not meet this 'more likely than not threshold'. In this way – democratic officials can make contributions to the resolution of rights-questions, even if pre-enactment review tends to focus on judicial views.

(B) Law Officers' Referral

Section 33(1) of the Scotland Act 1998 states that:

> The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament to the Supreme Court for decision.

A referral must come within four weeks from when the Bill has been passed.[24] The mechanism has been used three times so far, although never in relation to Convention rights.[25]

The decision of a Law Officer to refer a Bill to the Supreme Court comes after the Bill has been enacted by Parliament but before it receives Royal Assent. It therefore has no effect on parliamentary deliberation on rights aside from being an extra consideration that parliamentarians must consider when contemplating the rights effects of legislation and whether it will be challenged. However, as shall be seen, like the PO's statement of competence and the Ministerial statement of competence, much of the dialogue between different actors, in this case the Scottish and UK Governments, comes before the bill has been introduced. In this

[23] Bellamy, R. (2011) 'Political constitutionalism and the Human Rights Act' *ICON Vol 9(1),* p100
[24]The Scotland Act (n2), s.33(2)(a)
[25] *The UK Withdrawal from the European Union (Legal Continuity) Bill – A Reference by the Attorney General and Advocate General for Scotland* [2018] UKSC 64; Hearings for the other two Bills have been completed but the Supreme Court's decision has not yet been published; *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) (Scotland) Bill* Case ID 2021/0079; *Reference by the Attorney General and the Advocate General for Scotland – European Charter for Local Self-Government (Incorporation) (Scotland) Bill* Case ID 2021/0080

sense, it has an effect on the legislation even if this is not seen by outside observers, or indeed the parliament itself.

(i) UK Law Officers

As has been seen in relation to the PO's and Minister's Statements, the Legal Secretariat to the Lord Advocate (LSLA) and the Office of the Attorney General receives a draft Bill and a detailed note on its competence three weeks before the Bill is introduced to Parliament.[26] At this point, a 'constructive and lengthy dialogue' takes place between the OAG and the SGLD in order that any potential areas of disagreement are resolved.[27] In all but three cases, officials for both Governments have been able to reach agreement to ensure that the Advocate General does not need to make an s.33 reference to the Supreme Court.

Although it is not unfeasible that concern is expressed over Convention rights, it is far more likely that disputes between the Advocate General and the Scottish Government will centre on understandings of the fault-lines between reserved and devolved areas. Indeed, while the Advocate General reference of the Continuity Bill[28] was provisionally about its incompatibility with EU law, the real dispute was whether the Scottish Parliament could legislate in areas previously reserved to the EU but nominally areas within its competence after the United Kingdom left the European Union. In short, it was a dispute about the territorial distribution of powers. Thus, while s.33 could be described as a dialogic measure, in that encourages members of the Scottish Government and the UK Government to work together to resolve disputes about competence, it can less be described as a provision that is said to encourages improved parliamentary protection of rights.

(ii) Lord Advocate

Paragraph 33 of the Ministerial Code requires that the executive's statement of compatibility 'will have been cleared with the Law Officers'.[29] To aid this process, the SGLD will send the LSLA a draft Bill and a detailed note on its competence three weeks before the Bill is introduced to Parliament. The detailed note contains the SGLD's view on, *inter alia,* the compatibility of the Bill with Convention rights which is then analysed by the LSLA. Where the LSLA wishes to press the SGLD on its assessment of the Bill's compatibility with

[26] Hiebert & McCorkindale (n5), p332
[27] Ibid, p342
[28] *Continuity Bill Reference* (n25)
[29] Scottish Government, *Ministerial Code* (2016) para 3.3

Convention rights, the two parties will engage in a dialogue to explore the issues further. On rare occasions, this dialogue has led to the Bill being amended to reflect the LSLA's concerns. Although there is occasionally a degree of disagreement between the Minister's team and the Lord Advocate's team about the competence of particular provisions of legislation, ultimately where the Lord Advocate's team reaches a firm position – this position is respected.[30] Indeed, McCorkindale and Hiebert's research found that the Lord Advocate would threaten to resign if Minister's deliberately introduced legislation that was incompatible with Convention rights.[31]

The result of this detailed, iterative process between the SGLD and SLSA before the Bill is introduced is that (subject to significant amendments) the Lord Advocate's position on the Bill's compatibility with Convention rights is already well established when the Bill is enacted. The prospect of the Lord Advocate referring a Government Bill on the basis that she considered it outwith competence is vanishingly small. Instead, the only potential prospects of the Lord Advocate using their s.33 power, would be in relation to non-Government Bills and where the Lord Advocate seeks to refer the Bill to the Supreme Court defensively, in order to face off any potential challenges to the legislation post-enactment. McCorkindale and Hiebert note numerous factors that have meant that the power has not been used in this manner so far. These include the potential risk that the Supreme Court considers the Bill is outside competence,[32] the time impact the reference would have on the government's legislative agenda, the lack of foreseeability about which Bills might be challenged post-enactment, the loss in 'practical value'[33] that would result from bypassing the Outer House and Inner House and finally the poor political optics of a Scottish nationalist party bypassing the Scottish Courts to refer an issue to the UK's apex court.[34]

Thus, much as has been seen with other features that aim to improve executive and parliamentary rights-based scrutiny, the strength of the Law Officer's powers of referral tends to occur prior to the introduction of Bills rather than after enactment.

[30] McCorkindale and Hiebert (n5), p332-333
[31] Ibid
[32] For example, a defensive reference made by the Counsel General for Wales with respect to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill led to finding by the Supreme Court that the Bill was incompatible with Article 1 Protocol of the ECHR and was therefore beyond the competence of the (then) Welsh Assembly – *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales* [2015] UKSC 3, [2015] AC 1016
[33] McCorkindale and Hiebert (n5), p349
[34] Ibid, p348-350

The above evidence demonstrates that the input of the UK and Scottish Law Officers has led to a serious dialogue with the Scottish Government about *inter alia* the compatibility of legislation with Convention rights. Such a dialogue has undoubtedly led to fewer ASPs being successfully challenged on competence grounds. However, the seriousness with which the different actors engage in the process of review before introduction means that the public facing aspect of the power – the UK or Scottish law officer referring an ASP during the four-week period post-enactment - has been very rarely used. The UK law officers have referred an ASP to the Supreme Court on three occasions, but current political dynamics mean that all referrals have concerned disputes about the territorial division powers between the UK and Scottish Parliaments. The Lord Advocate has never referred an ASP to the Supreme Court for the various reasons discussed above. The political factors that have partly dictated the lack of use of the Law Officers' referral on Convention rights-grounds are, of course, subject to change. It would be premature therefore to conclude that the power *cannot* be used in a manner that facilitates the more open, contestatory aspects of 'third way' theory. However, practice so far clearly demonstrates that its virtue lies in the pre-introduction rather than the post-enactment stage of the legislative process.

(C) PO's Statement of Competence

As well as providing mechanisms through which the Government is encouraged to consider the rights implications of its acts in a proactive manner, the Scotland Act 1998 also provides mechanisms that are designed to encourage parliamentarians to consider issues of competence, and therefore Convention rights, before determining whether to vote for a proposed Bill. One particular mechanism is the PO's statement of competence.

The Presiding Office is considered to be the figurehead of the Scottish Parliament. They are an MSP, elected in the same manner as others, who is appointed at the start of a parliamentary term by the other MSPs.[35] The role of the PO is strictly non-partisan and any previous party allegiances must be not be taken into account when taking decisions.[36]

Of the five Bills to which a negative certificate has been attached, four did not make it onto the statute book,[37] whilst one, the Continuity Bill, was successfully passed by the Parliament but struck down in the Supreme Court after referral by the UK Government's Law Officers (albeit

[35] SP SO No 3.2
[36] Ibid, No 3.1.3
[37] Civil Appeals (Scotland) Bill 2006, Provision of Rail Passengers (Scotland) Bill 2006, Criminal Sentencing (Equity Fines) (Scotland) Bill 2008, Footway Parking and Double Parking (Scotland) Bill 2015

on different grounds to those set out by the PO).[38] This suggests that a PO's negative statement of competence operates as a significant limit on a Bill's legislative passage, but not one that is necessarily fatal.[39]

The PO forms a view on competence on the basis of legal advice from the Office of the Solicitor of the Scottish Parliament – the chief legal advisor to the Scottish Parliaments' institutions.[40] As has been described, the OSSP receives a note on competence from the SGLD three weeks prior to the introduction to the Bill. From there, in a similar manner to the dialogic process between the SGLD and Legal Secretariat to the Lord Advocate, the OSSP determines its own view of the competence of the Bill and responds to the SGLD asking for clarifications and highlighting any potential concerns. At the end of this process, depending on the extent to which the OSSP's concerns, if any, are resolved by the Scottish Government, the OSSP will recommend to the PO whether to issue a positive or negative certificate.[41]

McCorkindale and Hiebert suggest that the relatively short three-week time frame benefits the OSSP as the Government tends to err on the side of caution and agree with their assessments in order to achieve a positive certificate.[42] Further, some Government Ministers have grown frustrated with the Government's deference to the OSSPs legal advice, believing that formulations are "too legalistic" and the Government should be more willing to publicly disagree with the PO in order to pursue a more radical agenda.[43]

On the other hand, in situations where there is a lack of clarity as to whether a Bill is likely to be compatible with rights and thus in the competence of the Parliament, the PO tends to give the Bill the benefit of doubt, with the recognition that the judges are empowered to interpret the Bill in a rights consistent manner at a later stage.[44] Mead has been critical of a similar practice at UK level, arguing that Ministers may argue that a provision of a Bill operates in a certain manner in order to win the support of parliament, whilst in reality the provision operates differently, and in a manner not supported by a majority in parliament, when the courts come

[38] SP Bill 28-SLC UK Withdrawal From the European Union (Legal Continuity) (Scotland) Bill [statements on legislative competence] Session 5 (2018), p1-4; *Continuity Bill Reference* (n25)
[39] McCorkindale and Hiebert, (n5), p334
[40] Ibid, p326
[41] Ibid
[42] Ibid, p335
[43] Ibid, p336
[44] Ibid, p343

to interpret it in a rights-consistent manner. He argues that this is not an open and accessible process for the making of legislation.[45]

The current practice of preparing and determining the PO's statement of competence has important implications for the contributions of parliamentary actors to scrutiny of legislation on Convention rights-grounds. First, whilst clearly a dialogue between the executive and parliamentary officials does occur, especially during the three-week period between the OSSP receiving the Bill and the Bills introduction to Parliament, this occurs almost exclusively between bureaucratic officials and legal departments. Further, for various reasons, the design and practice of s.31(2) might do more to weaken than facilitate scrutiny of legislation on the basis of Convention rights from democratically-elected parliamentarians. Firstly, the fact that the positive statements of compatibility are not required to be accompanied with reasons means that parliamentarians are given very little information to work with when the PO grants a Bill a positive certificate. This lack of requirement for the PO to give reasons is made more serious given that the PO tends to give Bills where there are unanswered questions about competence the benefit of doubt. This doubt is effectively hidden from parliament and risks the prospect that the Government is not pressed further on the rights-effects of its legislation in these areas. McCorkindale and Hiebert have found that this potential gap in scrutiny is sometimes closed by the PO's legal office who will contact the clerk of the lead scrutiny committee to express any doubts that were hidden by the positive certificate in order that the committee can press the Ministerial team further.[46] However, because such concerns are expressed privately, it is difficult to know how often these discussions happen and what effect they have on parliamentary scrutiny.

Another reason that the requirement for the PO to issue a statement of competence might hinder rather than help scrutiny of legislation on right-grounds by parliamentarians is because it, alongside the various other forms of pre-introduction review, is likely to harden the resolve of the Government that the legislation is, at least arguably, compatible with Convention rights. This occurrence has also been observed by Kelly in Victoria.[47] The fact that the Government has engaged in a serious and lengthy discussion about the rights-compatibility with legislation prior to introduction means that it will, in most cases, already be aware of the aspects of the

[45] Mead, D., (2012). 'Talking about dialogue' *UK Const.L. Blog*, available at https://ukconstitutionallaw.org/2012/09/15/david-mead-talking-about-dialogue/, (Accessed 18.05.18)
[46] McCorkindale & Hiebert (n5) p340
[47] Kelly, J.B. (2011) 'A Difficult Dialogue: Statements of Compatibility and the Victorian *Charter of Human Rights and Responsibilities Act' Australian Journal of Political Science* 46:2, p260

Bill that engage Convention rights and will have made a calculation that it wishes the propose the provision(s) regardless. The inherently arguable nature of many rights-questions accompanied alongside the parliament's structural disadvantages when it comes to rights-expertise is unlikely going to be able to convince the Government that it's preferred position (especially if the Government is hostile that position for policy reasons) should be adopted. In this sense, parliamentary rights-scrutiny might be ineffective *because effective scrutiny has already occurred elsewhere.* Where this tendency poses risk for the equilibrium between the different branches of government in the settling of rights-questions is that review by the PO, whilst nominally a form of parliamentary scrutiny, is in fact carried out by bureaucratic officials on the basis of legal norms. The contribution that democratically-elected parliamentarians can make to the settling of such questions is therefore at risk from being excluded from this process – potentially leading to rights-interpretation becoming too skewed towards judicial perspectives.

Parliamentary review

Thus far, operation of provisions in the Scotland Act 1998 that have led to increased engagement with rights-question on behalf of executive and bureaucratic actors when drafting legislation have been considered. However, alongside increased executive rights-review, an important plank of legislative rights review is that parliament also has an advanced role in rights-scrutiny.

Assessment of practice of the five 'core' 'third way' Bills of Rights in the previous chapter found the anticipated role for parliament under Bills is an area which has been less successful than executive scrutiny. This was occasionally a result of design, particularly where executive reporting requirements were not required to be accompanied with reasons. Ineffective parliamentary scrutiny was also largely a result of the Westminster system of government that the Bills (to greater or lesser degrees) operate in. I argued that a specialist parliamentary human rights committee could enhance parliament's role in contributing to the manner in which legislation protects rights. However, the effectiveness of these committees is still influenced by Westminster factors such as partisanship and government domination of parliament. The latter factor in particular means that human rights committees have not been particularly successful (with the exception of in the ACT) at causing the Government to amend its legislation on rights-grounds. Instead, committee scrutiny of legislation on rights-grounds influences legislation in unseen, and subtler ways. When evaluating the effect that operation

the Scotland Act's 'third way' features have had on the Scottish Parliament's scrutiny of legislation on rights-grounds, a similar picture can be seen.

(A) How central are Convention rights to parliament's legislative scrutiny?

Most commentators have been dubious about the Scottish Parliament's role in protecting rights. They have argued, for example, that parliamentarians lack sufficient expertise to effectively scrutinise government legislation on rights-grounds[48]; that the Ministerial and PO's statement of competence contains insufficient detail to allow for parliamentary scrutiny[49]; that the failure of the Parliament to establish a specialist human rights-scrutiny committee in its first four sessions has meant that there has been no unique parliamentary voice on rights-questions[50]; and finally that the Government is not open to parliamentary rights-scrutiny because pre-introduction checks have allowed it to reach a settled position on the rights-effects of the Bill before it has been introduced into parliament.[51] Some of these factors have already been discussed in this chapter. However, before evaluating the effectiveness or otherwise of the Scottish Parliament's approach to rights-scrutiny further, it is worth setting out the process by which parliamentary scrutiny tends to play out. The below observations were made by following the legislative history, from introduction to enactment, of eighteen Acts of the Scottish Parliament – seventeen[52] of which were subsequently challenged on competence grounds and one which was ultimately repealed by parliament (contrary to the Government's wishes) partly on the basis of its effect on human rights.[53]

Committees

The first thing that the evidence demonstrates is that MSPs clearly consider themselves to have some role in ensuring bills are in accordance with Convention rights. On every occasion, both

[48] O'Neill, A. 'Human Rights and People and Society'. In Sutherland, E.E. and Goodall, K.E. (2011). *Law Making and the Scottish Parliament,* Edinburgh: Edinburgh University Press, p44
[49] Adamson, B. 'The Protection of Human Rights in the Legislative Process of Scotland' in Hunt, M., Hooper, H.J. and Yowell, P. Eds (2015). *Parliaments and Human Rights: Redressing the Democratic Deficit,* London: Hart Publishing, p203
[50] O'Neill (n48), p44
[51] McCorkindale and Hiebert (n5), p339
[52] Mental Health (Public Safety and Appeals) (Scotland) Act 1999; Convention Rights Proceedings (Scotland) Act 2001; Sexual Offenses (Procedure and Evidence) (Scotland) Act 2002; Protection of Wild Animals (Scotland) Act 2002; Agricultural Holdings (Scotland) Act 2003; Criminal Justice (Scotland) Act 2003; Vulnerable Witnesses (Scotland) Act 2004; Adoption and Children (Scotland) Act 2007; Criminal Proceedings etc. (Reform) (Scotland) Act 2007; Damages (Asbestos-related Conditions) (Scotland) Act 2009; Protection of Vulnerable Groups (Scotland) Act 2009; Sexual Offenses (Scotland) Act 2009; Criminal Justice and Licensing (Scotland) Act 2010; Tobacco and Medial Services (Scotland) Act 2010; Alcohol (Minimum Pricing) (Scotland) Act 2012; Children and Young People (Scotland) Act 2014; Scottish Independence Referendum (Franchise) Act 2014;
[53] Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012

the Minister and the PO have agreed that the Bill was within the competence of the Scottish Parliament. However, such statements did not prevent closer parliamentary inspection. The vast majority of Parliamentary engagement with competence issues (especially Convention rights) came at Stage 1 of the legislative process, particularly in the Committees' evidence gathering phase.

The standard process of parliamentary scrutiny therefore has tended to look like this:

> **Step 1:** Bill is introduced to Parliament with the necessary accompanying documents (including the Policy Memorandum and the statements of competence) and the Lead Committee is decided upon.
>
> **Step 2:** Lead Committee submits a call for written submissions on the Bill.
>
> **Step 3:** After consideration of the written submissions, the Committee invites the Ministerial team to answer oral questions about the purpose and effects of the Bill, as well as some of the initial evidence received from the written submissions.
>
> **Step 4:** The Committee invites those that have provided notable written evidence and other relevant stakeholders to make oral submissions on the Bill to the Committee.
>
> **Step 5:** The Committee invites back the Ministerial team to give oral evidence and uses the evidence gained from the written and oral evidence to ask specific questions about the Bill.
>
> **Step 6:** The Committee drafts a report that includes any misgivings or comments they may have about the Bill and whether the Committee considers the Bill should progress to Stage 2.
>
> **Step 7:** The Bill is debated in the chamber where the Convener of the Committee is invited to summarise the Committees reflections. Individual members also have an opportunity to question the Government on competence issues. A decision is made whether the Bill's general principles should be agreed upon.
>
> **Step 8:** Stage 2 - The Bill returns to the Lead Committee where Committee members agree to its provisions line by line. Any MSP may propose an amendment for consideration by the Committee. The Bill as amended returns to the chamber to be agreed upon.

Step 10: Stage 3 - Members have another opportunity to suggest amendments which are considered by the Chamber as a whole. The final draft of the Bill is debated, and a decision is made whether it is agreed to or not.

Crucial to the quality of parliament's scrutiny of legislation on rights-grounds are steps 1 to 5. This is especially pronounced where the committee tasked with taking the lead role in scrutiny does not have a particular expertise with legal issues.

At the evidence giving stage, there appears to be a number of key players responsible for voicing concerns (or not) about potential competence issues, these include; legal organisations (the Law Society of Scotland and the Faculty of Advocates[54]), legal academics,[55] human rights organisations (the Scottish Human Rights Centre,[56] the Equality Network,[57] UNICEF[58]), the Scottish Human Rights Commission,[59] the Equalities and Human Rights Commission,[60] practitioners and others likely to use or be affected by the provisions,[61] private companies who feel their rights may be affected by the legislation (Scotch Whisky Association,[62] Diageo,[63] Japan Tobacco International[64]) and organisations that feel that their members rights might be affected by the legislation (Scottish Countryside Alliance,[65] Scottish Campaign Against Hunting with Dogs,[66] Scottish Police Federation,[67] Bishops Conference of Scotland[68]). Further, as mentioned above, the PO's legal office will occasionally contact the lead committee's Clerk where they have some doubts about a Bill's competence notwithstanding the issuing of a positive certificate.[69] The Bill's Policy Memorandum will also be considered, particularly where it gives detailed information about the Bill's effect on human rights.

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[54] Both gave evidence in relation to almost all of the Bills examined
[55] See eg Professor Gane's evidence to the Justice Committee in relation to the Convention Rights (Proceedings) (Scotland) Bill, SP OR J1, 14 Feb 2001;
[56] The Scottish Human Rights Centre played a particularly important role in highlighting potential Convention rights-issues before the establishment of the Scottish Human Rights Commission – see for example Convention Rights Proceedings Bill, SP OR J 30 January 2001; Criminal Justice (Scotland) Bill, SP OP J2 15 May 2002; and Sexual Offenses (Procedure and Evidence) (Scotland) Bill, SP OR J2 03 October 2001
[57] SP OR J 22 June 2011; SP OR J 11 Nov 2008; SP PR J2 03 Oct 2001
[58] SP OR EC 1 Oct 2013
[59] SP OR EC 1 Oct 2013; SP OR J 20 Nov 2011
[60] SP OR J 11 Nov 2008
[61] SP OR EC 17 Sep 2013
[62] SP OR HS 17 Jan 2012
[63] Ibid
[64] SP OR HS 20 May 2009
[65] SP OR RA 14 Nov 2000
[66] SP OR RA 19 Sept 2000
[67] SP OR J 21 June 2011
[68] SP OR J 13 Sept 2011
[69] McCorkindale and Hiebert (n5), p340

The extent to which the Scottish Parliament scrutinises legislation on competence grounds is therefore heavily dependent on the evidence it receives. Because most MSPs are not legal experts, this is unsurprising and demonstrates that parliament is acting as a forum for the exchange of alternative ideas in a way that promoters of a parliamentary rights review advance. Indeed, that non-government actors and those likely to be affected by legislation are able to influence parliamentary scrutiny in such a way demonstrates that Klug's vision of human rights as a shared-enterprise can be evidenced on occasion at the Scottish Parliament.

However, claims from political constitutionalists that a combination of increased parliamentary rights-scrutiny and strong rights review may harm the principle of political equality may also have resonance. For example, the evidence shows that organisations such as the Scotch Whisky Association[70] and the Scottish Countryside Alliance[71] have made significant representations during the legislative process to claim that a Bill before the parliament unlawfully interferes with their (or their members) Convention rights. The Scottish Parliament has disagreed with their assessment and the legislation has passed. The same organisations have then challenged the Bills in the courts on the same or similar arguments they made to parliament. In both of these examples, the courts found that parliament was correct to consider that the legislation did not unlawfully interfere with the members' rights of these organisations. Indeed, as shown later, the courts paid considerable deference to parliament on the basis that it had correctly and seriously considered the rights-implications of the legislation on the organisations (and others) during the legislative process. In some senses, the risk of democratic double-counting is therefore appreciated and factored into the courts assessment of legislation, reducing the potential undermining of the legislative process. However, as McCorkindale has noted, the delay that a legal challenge can cause to the implementation of legislation can incentivise such organisations to challenge legislation (an option, because of cost, which is not open to a high number of rights holders) in the knowledge that they are likely to benefit from non-implementation in the short-term – subverting the settled will of a democratically elected government and potentially harming the rights that the legislation was introduced to protect in the meantime.[72]

[70] SP OR HS 17 Jan 2012
[71] SP OR RA 14 Nov 2000
[72] McCorkindale, C. 'The New Powers of the Judiciary in Scotland – Part 1' *The Judicial Power Project* (29 April 2016) Available at http://judicialpowerproject.org.uk/the-new-powers-of-the-judiciary-in-scotland/ (Accessed 20/08/21)

Further, the need for rights concerns to be translated into complex legal arguments based on Strasbourg jurisprudence means in practice only those with sufficient resources to seek legal advice are able to have their voice heard directly in the parliament. It is hoped that such forces are offset by the evidence giving of the Scottish Human Rights Commission, experts and charities who represent individuals who face such structural disadvantages. However, there is a definite danger that focus on competence could lead to some voices being heard more loudly than others. This has obvious negative effects for the principle of political equality.

After receiving evidence, Committee members will then raise issues that have been highlighted with Ministers. At this stage there is a literal dialogue between the Committee and the Minister, with Minister aiming to assure members that the Bill is within competence and parliamentarians testing their claim. The success of the Committee in holding the Minister to account depends on the extent to which the Minister is willing to answer detailed questions on competence. On one or two occasions, the Minister has refused to say more than that the Government and PO consider the Bill to within the legislative competence of the Parliament.[73] On such occasions, Ministers are able to profit from the lack of legal requirement to provide reasons with their compatibility statements and shield their proposals from scrutiny behind the concept of legal confidentiality. Elsewhere, the Minister has been happy to go into more detail.[74] However, if the Minister is able to make a reasonable case that the Bill is within competence, (s)he is usually not pushed further. That this is the case is not surprising given most parliamentarians lack of expertise on rights-questions.

The 2018 report of the Scottish Parliament's newly constituted Equalities and Human Rights Committee (EHRiC) found that the overall parliamentary scrutiny of legislation on human rights-grounds is uneven. It recommended that the Scottish Government should produce a separate 'human rights memorandum' that would clearly set out the ways in which proposed legislation is likely to engage rights. This would improve parliamentary scrutiny of legislation on rights-grounds:

> The challenge for the Parliament is to make scrutinising legislation through a human rights lens more systematic, so that a robust human rights analysis is embedded into Parliament's processes and structures… a human rights impact

[73] For example Ailleen Campbell in response to Liz Smith during passage of the Children and Young People (Scotland) Bill – SP OR EC 25 June 2013, col 2635-2636

[74] For example Nicola Sturgeon in response to Members during passage of Scottish Independence Referendum (Franchise) Bill – SP OR 12 Sept 2013

assessments and human rights memorandums should increase the flow of information to Committees to facilitate such scrutiny.[75]

Further, the decision to mainstream Convention-rights based scrutiny into the Parliament's committee system has been criticised by some as ineffective. Research from the Glasgow Human Rights Network found that 'most Committees did not seize the opportunity to imbue human rights in their respective field of activities.'[76] There was particular concern about the Justice Committee, which the researchers considered should have had a particularly active role in taking into account human rights when scrutinising legislation, but that 'seem[ed] to be rooted, more often than not, in the discourses of criminal justice than human rights.'[77] The findings of the research were disputed by the then Convener of the Committee, Christine Grahame, who argued that the relatively short period of time on which the research was based meant that it portrayed a 'skewed snapshot' that did not reflect the Justice Committee's record on scrutinising rights-issues.[78]

My research into the extent to which the Scottish Parliament discussed issues of competence during the passage of eighteen bills would suggest that committees are better at competence scrutiny than has been recognised by others. While the depth and quality of scrutiny vary greatly, in every example there have been references to legislative competence, either directly or by reference to one of the areas in which competence is limited (for example Convention rights). This suggests that parliamentarians are at least aware of their role in ensuring bills are within the competence of the Scottish Parliament.

In some scenarios the committees engaged in detailed, prolonged scrutiny that referenced relevant case law. For example, during the legislative passage of the Sexual Offenses (Procedure and Evidence) (Scotland) Act 2002, which, amongst other things, aimed to restrict the circumstances in which a complainer's sexual history would be admissible evidence in rape cases, government officials, committee members and witnesses[79] all had a clear knowledge of *R v A* judgment[80] in England and Wales that dealt with a similar issue. Further, during the

[75] Scottish Parliament Equalities and Human Rights Committee 'Getting Rights Right: Human Rights and the Scottish Parliament' *6th Report, 2018 (Session 5), SP Paper 43,* at 267
[76] Allo A, MacLellan, C, Nash, S, Pearson, B, Reid, L, Woodford, R, and Young, J (2012) 'Scottish Parliament Committees' Perspective on Human Rights' *Glasgow, Glasgow Human Rights Network*
[77] Ibid
[78] Currie, B (10 May 2012) 'Record on human rights slammed' *Herald Scotland* Available at http://www.heraldscotland.com/news/13057395.Record_on_human_rights_slammed/ (accessed 22.05.18)
[79] SP OR J2 05 Sept 2001, Col 329
[80] *R v A (No 2)* [2001] UKHL 25

passage of the Scottish Independence Referendum (Franchise) Act 2014, members made multiple references to Convention jurisprudence on prisoner votes.[81] This example is particularly interesting as it demonstrated parliamentarians aiming to define rights beyond that which was strictly required by the Convention. While MSPs conceded that the Government were not required to extend the franchise to prisoners in referendums but only in elections, some, for example Patrick Harvie, Margo MacDonald and Liberal Democrat members, dismissed the distinction made by the government as artificial and argued that a more expansive understanding should be adopted.[82]

In other examples, usually when the competence issue concerned Convention rights, references were extremely vague and couched in non-Convention language. For example, during the passage of the Vulnerable Witnesses (Scotland) Act 2004, while there was some discussion of specific Convention rights at the committee stage, there was also considerable discussion of the need for rights to be 'balanced'. For the most part, members did not mention the need to balance specific Convention rights but the general need to balance the rights of two categories of people. Thus, while parliamentarians still indicated an understanding of the need to protect rights, this was done at a level of abstraction that perhaps was not helpful in terms of ensuring the Bill was within competence. There was also a reluctance of committee members to engage in rights-scrutiny during the passage of the Protection of Wild Animals (Scotland) Bill. Some members of the committee that had been selected to lead scrutiny of the Bill, the now defunct Rural Affairs Committee, felt they did not have the requisite expertise to scrutinise the Bill's provisions, including the Bill's compliance with the property rights of hunting dog owners.[83]

However, although my research contrasts the perceptions of others that MSPs have generally not taken their duty to scrutinise legislation on Convention rights-ground seriously, it is broadly consistent with the conclusions of commentators who have been critical of the *effectiveness* of committee scrutiny. Committee scrutiny is generally ineffective as a result of the Westminster factors identified above[84].

It is therefore possible to make few general observations about the effectiveness of committees in engaging in a dialogue with the government on issues of competence. First, the quality of the committees' scrutiny is inconsistent and dependent on a number of variables. Such

[81] SP OR 14 Nov 2013
[82] Ibid
[83] SP OR RD 04 Dec 2001
[84] Shephard, M.P. 'The committee system of the Scottish Parliament' in Hassan, G. (ed) *The Story of the Scottish Parliament: The First two Decades Explained.* (2019) Edinburgh: Edinburgh University Press, p97-104

variables include, but are not limited to, the committee involved, the expertise of the parliamentarians, the obviousness of the issue, the evidence (written and oral) given by witnesses, the extent to which the Minister and their team is open to questions, the complexity and legal nature of the potential competence issue, time available for scrutiny and the centrality of the potential issue to the bill.

Second, committees do not always take for granted a positive certificate but tend to give the government the benefit of doubt. In one or two scenarios, ministers responded to questions about competence by stating that the PO and Minister were satisfied that the bill was within competence without giving further reasons, this was enough to satisfy the committee.[85]This, along with the fact the legal advice to Ministers is confidential, leaves open the possibility that Ministers may use questions of competence as an excuse for action or inaction, which has obvious negative consequences for Government accountability.

Third, members are sometimes bolder about straying from a Convention compliant reading of a Bill than government members – on more than one occasion members asked questions or suggested amendments that ministers shut down on the basis that they would not Convention compliant or were not required by the Convention.[86]

Finally, strong discussion of competence issues does not always translate into improved legislation – ultimately the government can rely on their majority and the recognition that legal problems do not have concrete answers - to have their bills passed without amendment.

Therefore, although my research is perhaps not as pessimistic as others, I agree that Convention-rights based scrutiny by committees has been uneven and that the Scottish Parliament has so far been unable to develop Convention rights expertise. The extent to which the EHRiC might be able to provide this expertise will be considered further below.

Chamber

Compared with committees, there is far less discussion of competence questions in the Chamber. This is largely due to the design of the parliament's legislative process. Committees are considered to be better equipped for scrutiny whereas the Chamber is considered to be better for voting and debating general principles. However, questions of competence are not

[85] Johann Lamont in relation to the Criminal Proceedings etc. (Reform) (Scotland) Bill, SP OR J1 22 Nov 2006, col 4077;
[86] SP OR 02 Sept 1999

unheard of in the Chamber, and on a couple of occasions have been central to the debate.[87] It could be argued therefore that the Scottish Parliament is more alive to questions of Convention rights than some of the other parliaments considered. This may be because there are increased risks with passing legislation that is contrary to Convention rights which serves to focus members minds (both those that support government and those in opposition).

In addition, adding nuance to my discussion above, it may be down to the decision to require all committees to consider questions of competence when scrutinising legislation. Evidence from the UK House of Commons suggests mentions of Convention rights in the chamber comes mainly from members of the specialist human rights committee, the Joint Committee on Human Rights.[88] In Scotland, which has relatively few MSPs, most of whom sit on at least one committee, it is more likely that members will have some familiarity with Convention rights and experience of scrutinising bills on competence grounds. This may mean that members are able to articulate Convention rights concerns even when they do not sit on the lead committee responsible for scrutinising the Bill. That said, the importance of Convention rights in the chamber should not be overstated – only rarely are Convention rights central to debates.

After a Bill is supported at Stage 1, the number of questions about a Bill's competence tend to diminish. Occasionally amendments are lodged by opposition members with reference to Convention rights or other competence grounds but, as a result of the Westminster factors discussed above, these tend not to be supported.[89]

Overall therefore, the Scottish Parliament does consider itself to be responsible for scrutinising legislation on Convention rights-grounds. This scrutiny is most effective at Stage 1, where parliamentarians are able to harness the concerns of potential victims and experts and to engage in a face-to-face dialogue with the responsible Minister during the committee evidence sessions. However, if the purpose of parliamentary scrutiny is to lead to improvements in legislation, the Scottish Parliament's role cannot be considered to be particularly successful. Likewise, although it is potentially the case that parliamentary scrutiny can impact on government legislation in other ways, for example be focusing the government's mind during the pre-introduction phase or by the government reading past committee reports prior to introducing legislation, the (so far) dispersed approach to committee scrutiny on rights-grounds

[87] SP OR 12 Sept 2013 (Scottish Independence Referendum (Franchise) Bill); SP OR 07 Mar 2018 (UK Withdrawal from the European Union (Continuity) Bill
[88] Kavanagh (n8), p130-131
[89] SP OR REF 06 June 2013, col 518; SP OR FCC 13 March 2018 col 1; SP OR RD 04 Dec 2001,

probably reduces this likelihood. The relatively newly formed Equalities, Human Rights and Civil Justice might be able to enhance the effectiveness of parliament's role in this regard. The role of that Committee and calls for reasoned statements of competence as two potential reforms that could strengthens parliament's role will now be considered.

Calls for reasoned statements of competence

If the Minister and PO's statements of competence are to initiate a dialogue between the executive and parliament on the rights-compatibility of legislation, then parliament must not take the statements at face value. However, as discussed previously, the lack of requirement for the initiator and the PO's statements of competence to be reasoned undermines parliament's ability scrutinise their conclusions. This is something that has been acknowledged by MSPs for some time. For example, as far back as 2001, Lord James Douglas MSP complained that:

> It is not good enough that ministers assert in a one-line submission to the Scottish Parliament that a bill is compatible with ECHR. It should be incumbent on the executive to produce a full statement with a rigorous analysis, explaining the ECHR implication of its legislative proposals.[90]

More recently, James Kelly MSP,[91] Liz Smith MSP,[92] the Labour party generally[93] and the Scottish Human Rights Commission,[94] have called for the Scottish Government to publish its legal advice on competence in relation to bills. Such requests have received short shrift from Ministers, who have claimed that there are important reasons for legal advice to remain confidential. Alternatively, in 2018, the EHRiC called for the Government to produce detailed human rights memorandums when introducing Bills:

> It is clear to us that there is insufficient human rights information being provided in support of legislation. This impacts directly on the ability of Members to scrutinise legislation thoroughly, not only in relation to specific human rights-issues, but also in supporting members to take a human rights-based approach to scrutiny. Better human rights information will also help to increase the

[90] Lord James Douglas Hamilton, *The Scotsman,* 1 December 2001, quoted in Page, A. 'One Legal System, Two Legislatures: Scottish Law-Making After Devolution.' in McHarg, A. and Mullen, T. Eds, (2006) *Public Law in Scotland.* Avizandum Publishing: Edinburgh, pp110-131
[91] SP OR 28 Feb 2018, col 19
[92] SP OR EC 25 June 2013
[93] SP OR 12 Sept 2013
[94] Scottish Human Rights Commission 'Submission to the Commission on Parliamentary Reform February 2017' Recommendation x

> participation of stakeholders on human rights-issues that affect them, and supports a human rights-based approach by empowering individuals and organisations through increased knowledge.[95]

Such calls have been echoed by McCorkindale and Hiebert[96] and Adamson.[97] These scholars have made the similar point that the PO's statement of compatibility should also be accompanied with reasons as this would shed light on the cases where a positive certificate has been issued notwithstanding doubts about the rights-compatibility of a particular aspect on the legislation.[98] This would then allow parliamentarians to question Ministers further and make their own conclusions as to whether the Bill is within competence.

The Scottish Government rejected the EHRiC's recommendation that all bills should be accompanied with a detailed human rights memorandum. It noted that the extent to which a Bill engages Convention rights is

> highly context-dependent. In some instances these issues may be of considerable prominence. In others they could be very limited in scope.[99]

Instead, it committed to build on existing practice 'to enhance the human rights content of the Policy Memorandum accompanying every bill.'[100] Time will tell whether this commitment leads to more human rights information accompanying Bills. However, undoubtedly the inclusion of a new procedural requirement would have made it more difficult for the Government to resist supplying extensive human rights justifications in relation to Bills.

(B) Committee reform

Another institutional reform that might improve legislative rights review in Scotland is the establishment of a specialist human rights-scrutiny committee. As discussed above, such a committee was established in the Parliament's fifth session and at the beginning of the sixth session had its remit expanded to include 'civil justice'.

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[95] 'Getting Rights Right' (n75) at 242
[96] McCorkindale and Hiebert (n5), p340
[97] Adamson, (n49), p214
[98] McCorkindale and Hiebert (n5), p339
[99] Christina McKelvie MSP '*Getting Rights Right: Human Rights and the Scottish Parliament:* Government Response' *Scottish Government* Available at https://archive2021.parliament.scot/S5_Equal_Opps/EHRiC_Human_Rights_Inquiry_-_Initial_Scottish_Government_Response.pdf (Accessed 21/08/21) p5-6
[100] Ibid

O'Neill has claimed that the initial failure of the Scottish Parliament to establish a specialist human rights committee 'casts grave doubt on the extent to which a human rights culture has… taken root at the heart of Scotland's institutions of government.'[101] He goes on to say that 'when criticisms are made of Scottish government policy by the Scottish Parliament, these criticisms would be immeasurably strengthened if they were also couched on human rights-grounds'.[102]

In its 2018 report, *Getting Rights Right*, the EHRiC suggested that it would trial a 'JCHR' approach to scrutiny of legislation for the remainder of the fifth parliamentary session. To adopt this approach, it recommended that it be equipped with a legal advisor who would help to advise the committee on relevant human rights-issue and help the committee to determine which bills required close scrutiny by the committee.[103] However, the Scottish Government did not mention this recommendation when it responded to the report and it does not appear that a legal advisor has been appointed.[104]

Part two Conclusion

This part of the chapter has considered the design and operation of features in the Scotland Act 1998 that aim to encourage legislative rights review. It found that, consistent with legislative rights review in states with 'third way' bills of rights, the strongest element of this review comes at the pre-introduction phase of the process. Indeed the dialogue that occurs in Scotland before introduction is perhaps even more robust than in the previous jurisdictions considered. This is because the Scotland Act 1998 requires that a greater number of officials are involved in the process, not just the Bill team, but also the PO, the Lord Advocate and the UK Law Officers. At the same time, drawing on McCorkindale and Hiebert's work, it was found that pre-introduction Convention rights-based scrutiny is largely dominated by bureaucratic officials who base their determinations on their assessment of the likelihood that the bill will receive judicial censure. Such a tendency risks removing a key benefit of the 'third way' model, that democratically elected and accountable officials are able to contribute to settling Convention rights-questions.

The risk that democratically elected officials are frozen out of legislative rights review was also seen in relation to parliamentary scrutiny of legislation post-introduction. It was shown that parliamentarians clearly consider that scrutiny of bills on Convention rights-grounds is

[101] O'Neill, (n48), p44
[102] Ibid
[103] *Getting Rights Right* (n75) Recommendation 29 at 274
[104] *Getting Rights Right: Government Response* (n100)

part of their role. However, their ability to effectively exercise this role is undermined by a number of factors. First, because the Scottish Parliament broadly operates according to the Westminster system of government, parliament is generally in a weak position to effectively scrutinise legislation on the basis of Convention rights. This is partly a result of the Government domination of the legislative process (even when it governs as a minority) and partly a result of the partisan behaviour of MSPs in Holyrood's committees, which is where the majority of parliamentary scrutiny takes place. Second, similar to what was seen in Victoria in chapter two, the strength of the Convention rights-review that takes place prior to introduction tends to reduce the likelihood that the Government will be open to parliamentary Convention rights-scrutiny after introduction, as the robust pre-introduction review process will have helped the Government to reach a settled position on the Convention rights consistency of the legislation. This factor is compounded by the third factor, which is that the lack of requirement for the Government or the PO to provide reasons for positive statements of compatibility means that parliamentarians are not given sufficient information on which the ground the Convention rights-based scrutiny. This problem is made particularly acute where the PO and other officials give the green light to Bills notwithstanding some doubts about Convention rights-compatibility. The final factor that undermines the parliament's ability to contribute to legislative rights review was the initial failure to establish a specialist human rights-scrutiny committee. Such a committee, particularly if a legal advisor is appointed to assist its work, is likely to help to develop a unique parliamentary voice on Convention rights, which may make it more difficult for the Government to ignore its findings.

Despite the numerous challenges that democratic actors have faced in fulfilling their imagined role under legislative rights review, there still exists room for such actors to contribute the settling of Convention rights-questions. First, although bureaucratic review tends to look first at judicial determination of Convention rights-questions, Ministers are given more freedom to advance their preferred policy solution where the Strasbourg and UK courts position is not clear. This might be because the Strasbourg court tends to give states a margin of appreciation in relation to the Convention right and the domestic court tends to pass this on to the parliament or because the rights-question that legislation engages is watershed and has not yet been resolved by the courts. Further, legislative rights review can help to reduce a judicial finding of incompatibility by helping to demonstrate that the government has robustly considered the aspects of the legislation that engages Convention rights and has reached a well-reasoned and

justified position. As will be shown in part three of this chapter, the courts have generally been deferential to legislators when it legislative rights review has been of this quality.

Additionally, some factors have undermined parliamentary Convention rights-based review are eminently fixable. While the complications resulting from Westminster factors and the Scottish Parliament's committee system might require large structural and cultural change, requiring statements of competence to be reasoned and appointing a legal advisor to the Equalities, Human Rights and Civil Justice Committee would be relatively minor reforms that would have the potential to make a large difference to the strength of parliament's scrutiny.

Having considered legislative rights review in Scotland, the final and third part of this chapter will consider the role of the courts in Scotland's model. It will be argued that despite the existence of strong-form review, Alison Young's account of democratic dialogue can be seen to operate in Scotland, through the alternative route of judicial deference.

PART THREE: The Doctrine of Due Deference as 'Dialogue' under the Scotland Act 1998

Introduction

Reflecting on the recently established Scottish Parliament, Aidan O'Neill QC warned that the new powers of the judiciary in Scotland to strike down legislation that was contrary to Convention rights risked creating, 'a government of judges.'[1] The judiciary, by being asked to set-aside acts of a democratically elected, accountable and representative legislature on the basis of rights that were inherently vague and open to interpretation, risked being drawn into the political arena with negative consequences for their reputation as impartial upholders of the law.[2] Before his tenure as a Supreme Court justice, Lord Reed made a similar argument. He warned that empowering the courts to set ASP's on Convention rights-grounds could prove to be unpopular with the Scottish people who had 'voted for self-government', but 'are now governed, in a sense, by judges.'[3] A decade later, during which time the former had gained significant experience as a QC challenging ASPs for Convention rights-incompatibilities, O'Neill's initial warnings appeared to have been tempered, claiming that 'a radical constitution has been foisted onto an apparently conservative judiciary.'[4] In another piece he argued:

> But it should not be assumed that the giving of greater power to judges result in any stronger protection for fundamental rights in Scotland in comparison with the rest of the United Kingdom. If anything, the self-regarding complacency, the mulish resistance to change, the thrawn conservatism, which has for so long characterised the ruling elites of Scottish society, not only its judiciary and its lawyers but also its politicians, has meant that the promise of radicalism implicit in the new constitution for Scotland has not (yet) been fulfilled.[5]

O'Neill and Reid's original hypothesis appears therefore to have been quite significantly tested. What explains this movement in position and what does it say about the judiciary's position *vis a vis* legislators in Scotland with regard to the protection of Convention rights?

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[1] O'Neill, A. (1999). 'The Scotland Act and the government of judges'. *SLT 9,* p61-66
[2] Ibid
[3] Reed, R. Q.C., 'Devolution and the Judiciary' in Beaston, J. et al eds. (1998). *Constitutional Reform in the United Kingdom: Practice and Principles.* Hart Publishing: Oxford. pp 9-21
[4] O'Neill, A. (2009). 'Constitutional Constitutional review in Scotland – Some Recent Developments' *Paper given at Constitutional review Conference,* p290
[5] O'Neill, A. 'Human Rights and People and Society' in Sutherland, E.E. and Goodale, K.E. (2011). *Law Making and the Scottish Parliament.* Edinburgh University Press: Edinburgh. Chapter 3, p40-41

This third part of chapter three will argue that the courts' jurisprudence where ASPs have been challenged on Convention rights-grounds indicates that concerns that strong-form review would lead to a government of judges have not come to pass. It will argue that the judiciary, keenly aware of the risks of being drawn into the political arena, has shown significant deference to parliament, both in terms of determining the content of Convention rights and in terms of establishing a remedy for violations of Convention rights. Such deference has resulted from both external and internal pressures. Externally, s.102 of the Scotland Act 1998, which allows the judiciary to suspend or limit the retrospective effect of its decision in order that the legislature is able to determine the appropriate legislative solution, encourages the judiciary to defer to legislatures when determining the remedy for Convention rights-violations. Additionally, s.101 of the Act allows the courts to keep *prima facie* Convention-rights infringing legislation in force by empowering them to make a Convention-rights compatible interpretation. Internally, the courts' concept of due deference allows them to refrain from fully using their powers of review in order to allow legislatures to resolve questions about the content of particular Convention rights-questions. Thus to view the Scottish system of rights protection, as O'Neill and Reed initially seemed to, through the prism of institutional dominance therefore obscures the true nature of the process, which relies on constitutional balancing and institutional interaction to ensure that concerns of rights and democracy are both accounted for. 'Third way' theory, the account of democratic dialogue offered by Young, which acknowledges that dialogue can occur via the alternative route of deference, therefore offers an alternative and more appropriate lens through which to view Convention rights protection in Scotland.

Before assessing the operation of the three mechanisms that I consider engender dialogue in Scotland, I will consider whether the factors that led to ASPs being subject to strong-form review on Convention rights grounds.

Strong-form review under the Scotland Act 1998

History

As the New Labour Government went about turning its pre-election promises for Scottish devolution into reality, it explicitly ruled out granting the new Scottish Parliament the same power as the Westminster Parliament to legislate contrary to Convention rights:

> The Government has decided that the Scottish Parliament will have no power to legislate in a way which is incompatible with the Convention; and similarly that

> the Scottish Executive will have no power to make subordinate legislation or to take executive action which is incompatible with the Convention. It will accordingly be possible to challenge such legislation and actions in the Scottish courts on the ground that the Scottish Parliament or Executive has incorrectly applied its powers. If the challenge is successful then the legislation or action would be held to be unlawful.[6]

The result was section 29(1) of the Scotland Act 1998, set out in the following terms,

> An Act of the Scottish Parliament is not law so far as any legislative provision of the Act is outside the legislative competence of the Parliament.[7]

A Bill is outside competence if, amongst other things, 'it relates to reserved matters'[8], it conflicts with retained EU law[9] or, of more relevance to this thesis, where 'it is incompatible with any of the Convention rights'.[10]

Similarly, Section 57(2) of the Scotland Act states that '[a] member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.'[11]

There are multiple route by which an ASP can be challenged on Convention rights-grounds. As discussed in part two, bills can be challenged before they have received Royal Assent in a form of abstract review initiated by the Advocate General, Lord Advocate or Attorney General.[12] The Law Officers may also initiate challenges to competence post-enactment, including where 'devolution issues' arise in other proceedings, in which case the proceedings can be referred to a higher court.[13] Further, after amendment by the Scotland Act 2012,[14] an Act of the Scottish Parliament can be challenged where 'compatibility issues' - questions about the compatibility of a Scottish criminal law provision with Convention rights or EU law - are raised in ordinary criminal proceedings.[15] Finally, individuals and organisations may challenge an ASP post-enactment if they believe their Convention rights have been unlawfully

[6] 'Rights Brought Home: The Human Rights Bill', HC Bill (1997-1998), CM 3782, para 2.21
[7] Scotland Act 1998, c.46, s.29(1)
[8] Ibid, s.29(2)(b)
[9] Ibid, s.29(2)(d)
[10] Ibid
[11] Human Rights Act 1998, s.57(2)
[12] Scotland Act 1998, s.33(1)
[13] Ibid, Schedule 6
[14] Scotland Act 2012, s.34
[15] Scotland Act 1998, s.2887A(2)(b)

infringed.[16] When arguing that the ASP is contrary to Convention rights, post-enactment challengers must establish that they are a 'victim' according to the same criteria as Art 34 of the ECHR.[17]

Necessity

As Page notes, it was inevitable that some form of dispute resolution mechanism was established when the Westminster Parliament decided to create a Scottish Parliament with limited competence. If certain powers were reserved to the UK Parliament, and it was alleged that the Scottish Parliament had legislated in a manner that encroached on these reserved powers, then some sort of authority would have to determine whether this was the case. This could have been in the form of intervention of UK Ministers, but it was considered to be less politically controversial to grant this power to a court, initially the Joint Committee of the Privy Council and laterally the Supreme Court.[18]

Considerations from principle

However, the justification for the need for strong-form review to police the boundaries of the territorial allocation of powers does not automatically apply to the Convention rights constraints on the Scottish Parliament. Indeed, Lord Reed, pointed out at the time that the justifications[19] the UK Government had made to prevent the judiciary from having the power to set-aside UK acts of parliament on Convention rights grounds also applied to the Scottish Parliament.[20] Himsworth took his claim further:

> [I]t becomes particularly ironic that it is just at the time when one limb of the current constitutional project seeks to expand democratic decision-making by the devolution of legislative power to a Parliament made newly accountable to the Scottish people and which may, because of proportional representation and a fixed term, never become an 'elective dictatorship', that another limb of the project seeks to adhere to the old agenda of democratic failure by the super-imposition of a uniform and rigid human rights regime. The principal threats to the liberty of the people of Scotland do not come from the Scottish Parliament and Executive but from those whom it is the democratic mission of the Parliament to regulate and

[16] Ibid, Schedule 6
[17] Scotland Act 1998, s.100(1)
[18] Page, A. (2015). *Constitutional Law of Scotland.* W. Green: Edinburgh. Chapter 16 – Constitutional review.
[19] Rights Brought Home (n6) Para 2.13
[20]Reed (n3)

> control. The Parliament should be in a strong position to determine for itself how far judicially enforced rights should be part of its strategy.[21]

In other words, Himsworth argued that the Scottish Parliament, due to its superior representative character and counter-majoritarian design, was potentially better suited to holding the executive to account on Convention rights-grounds than the Westminster Parliament. He argued therefore that the need for strong-form constitutional review for Acts of the Scottish Parliament, was unnecessary in light of a stronger parliament.

Himsworth's diagnosis can be contrasted with the analysis in part one of this chapter. The Scottish Parliament might admittedly be more representative than the UK Parliament, but this has not translated into a stronger parliament. Indeed, the unicameral design of the parliament, the parliament's small size, the initial failure to establish a specialist human rights committee and the effect of Westminster factors have meant that the strength of parliamentary scrutiny might be particularly weak.

In addition to objecting to the existence of strong-form Convention rights review for ASPs on the basis of the strength and representative character of the Scottish Parliament, Himsworth also objected on the familiar democratic grounds expressed by the political constitutionalists in the introductory chapter.

However, the democratic critique of the judiciary's powers under the Scotland Act 1998, is complicated by the fact that, as Lord Reed notes in in *Imperial Tobacco Ltd v Lord Advocate,* it is derived from the Scotland Act 1998, legislation that is itself a product of a democratically elected and accountable parliament.[22]

Additionally, if, as I shall argue, the courts have tended to use their powers sparingly, deferring to parliament both in terms of settling particular Convention-rights-questions and in determining the remedy for judicial findings of incompatibility – then Himsworth's democratic objection to strong-form review might be tempered (if not overcome).

Practical considerations

The enabling by the legislature of a sub-unit of a state to make laws that are contrary to nationally protected rights can be observed in Canada, where both national and state

[21] Himsworth, C. 'The Hamebringing: Devolving Rights Seriously.' in Boyle, A. et al (2002). *Human Rights and Scots Law.* Hart Publishing: Oxford. pp19-39
[22] [2012] CSIH 9, para 58

legislatures may issue a 'notwithstanding clause' to enable the temporary enactment of legislation that is contrary to a judicial rights decision.[23] There therefore does not appear to be any practical reason why it could not also work in the UK.

Of course, the UK has an obligation under Article 1 the European Convention on Human Rights to 'secure to everyone with their jurisdiction the rights and freedoms,'[24] in the Convention and to ensure that judgments of the European Court of Human Rights are enforced.[25] However, this does not mean that the UK is under a duty to ensure Convention rights are protected centrally. There is nothing in the Convention that dictates the manner in which Convention rights are protected domestically. Indeed, as Himsworth observes,[26] there are points of divergence from the HRA in Northern Ireland's human rights regime[27] as well as the Isle of Man[28] and the Channel Islands.[29] Despite this, Himsworth suggests that when the HRA and Scotland Act were enacted, '[t]here was an underlying assumption... that the international treaty base of the rights demanded a high degree of harmonisation (if not uniformity) of observance and implementation of rights[.]'[30] The likelihood that the UK Government, bound internationally to ensure that judgments of the ECtHR are followed domestically,[31] and whose international reputation is at stake from a finding that Convention rights has been violated in its jurisdiction, would give the Scottish Parliament *carte blanche* to determine the scope of Convention rights was therefore remote.

Additionally, perhaps the most convincing explanation for the failure to grant the Scottish Parliament the power to override judicial findings of incompatibility with Convention rights is this is not a power that mainstream campaigners for a Scottish Parliament necessarily wanted.

Crick and Miller's influential pamphlet 'To Make the Parliament of Scotland a Model of Democracy'[32] recommended that the Scottish Parliament should be subject to strong-form

[23] Constitution Act 1982 (CA), Part I, Canadian Charter of Rights and Freedoms, (Canadian Charter) s.33(1)
[24] Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 1
[25] Ibid Article 46
[26] Himsworth, C. 'Rights Versus Devolution'. In Campbell, T. et al (2001). *Sceptical essays on human rights.* Oxford University Press: Oxford
[27] Northern Ireland Act 1998
[28] Human Rights Act 2001 (Isle of Man)
[29] Human Rights (Jersey) Law 2000; Human Rights (Bailiwick of Guernsey) Law 2000
[30] Himsworth, C. 'Devoluted human rights' in Gearty, C & Douzinas, C Eds (2011) *The Cambridge Companion to Human Rights Law* Cambridge: Cambridge University, Chapter 12 p232-233
[31] ECHR (n24) Article 46
[32] Crick, B and Miller, D. (1995). *To Make the Parliament of Scotland a Model for Democracy.* John Wheatley Centre: Edinburgh

review because 'national identity no longer requires a belief in sovereign power rather than in a more pluralistic, constitutionalised account of power, defined and limited by law.'[33]

In *Whaley v. Lord Watson of Invergowrie*, Lord Rodger made a similar observation. In response to arguments made by the respondent that subjecting the Scottish Parliament to constraints in the Scotland Act 'was somehow inconsistent with the very idea of a parliament'[34] he noted that

> many democracies throughout the Commonwealth… owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law. The Scottish Parliament has simply joined that wider family of parliaments.[35]

Subjecting the Scottish Parliament to constitutional constraints was generally not considered to be inappropriate because, as Lord Rodger acknowledged, it is in fact the Westminster Parliament with its principle of parliamentary sovereignty that deviates from the global constitutional norm. The fact that no such principle existed for the Scottish Parliament thus made it far less contentious to allow the courts to review its legislation on Convention rights-grounds.

Indeed, in the twenty or so years of the operation of the Scottish Parliament there has been no major calls from the Government or MSPs for the Parliament to be empowered to legislate contrary to Convention rights. Compared with Westminster, there has been an overwhelming acceptance of the courts' supervisory role over parliament and little protest when an ASP has been declared beyond competence.

The closest there has been to a controversy is the Scottish Government's response to the *Fraser*[36] and *Cadder*[37] cases, where the then First Minister Alex Salmond and his Justice Secretary Kenny MacAskill accused the Supreme Court of 'intervening aggressively'[38] in the Scottish justice system after it had found that particular aspects of Scots criminal procedure were contrary to Article 6 ECHR. However, even here, the controversy was less about Convention rights and more about nationalist sensitivities, with the Government and MSPs

[33] Ibid
[34] 2000 S.C. 340
[35] Ibid
[36] [2011] UKSC 24
[37] [2010] UKSC 43
[38] See Carrell, S. 'Alex Salmond provokes fury with attack on UK supreme court', *The Guardian* (01 June 2011), available at https://www.theguardian.com/uk/2011/jun/01/alex-salmond-scotland-supreme-court (Accessed 25/08/21)

taking more issue with the UK Supreme Court overruling the Scottish apex court in an area of law which has historically been distinctly Scottish.[39] Only a few MSPs, during the debate on the emergency bill that was introduced in response to the *Cadder* judgment, used to debate to criticise the status of the Convention rights in Scotland and the UK more broadly.[40]

Conclusions

Empowering the Scottish Parliament to override judicial findings of incompatibility with Convention rights was therefore clearly possible from a principled and practical perspective. However, the decision to empower the courts to set-aside ASPs on the basis of Convention rights-incompatibility was due to the combination of the UK Government's preference for country-wide human rights harmonisation and the recognition in Scotland that strong-form rights review is not a particularly controversial constitutional power.

The Judiciary's 'third way' powers under the Scotland Act

Which powers?

A potential reason that Scottish politicians have not found cause to question the judiciary's supervisory role is that they have not generally found that it has limited their ability to legislate. Of the over three hundred bills passed by the Scottish Parliament, twenty have been challenged on Convention rights-grounds (although some have been challenged more than once). Of these twenty-three challenges, the courts have found that the legislation is incompatible with Convention rights on only five occasions[41] (seven if s.101 interpretations[42] are included). In comparison, the UK courts have issued thirty-two final declarations of incompatibility in the same period. At least sixteen of these have related to legislation passed by the Westminster Parliament after the coming into force of the Human Rights Act 1998.[43] Of course, direct comparison with Westminster legislation is difficult, given that the Scottish Parliament has limitations on its competence that the Westminster Parliament does not have. It might be that reserved areas such as national security[44] are more likely to generate findings of Convention rights-incompatibility. That said, a comparison between Scottish and Westminster legislation

[39] Himsworth (n30) p244
[40] SPOR (27 October 2010), see, e.g., cols 29669-29670, Bill Aitken MSP
[41] *Salvesen v Riddell* [2013] UKSC 22; *Cameron v Cottam* (no 2) 2013 JC 12; *P v Scottish Ministers* 2017 SLT 27; *AB v HMA* [2017] UKSC 25; *Christian Institute v Lord Advocate* [2016] UKSC 51
[42] *Anderson v Scottish Ministers,* [2001] UKPC D5 & *DS v HM Advocate* 2007 SC UKPC 36
[43] Ministry of Justice (December 2020) *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020* UK Government CP 347, Annex A: Declarations of Incompatibility
[44] Scotland Act 1998, Schedule 5 Part II Heading B8

at least demonstrates that the Scottish courts have used their powers no more proactively than the UK courts, and in all likelihood have used their powers more conservatively.

The relatively low number of judicial findings that an ASP is incompatible with Convention Rights may be down to numerous factors. One factor may be that, as hinted at by O'Neill, the Scottish legal profession has been slow to make use of the new 'radical' powers in the Scotland Act 1998.[45] Additionally, I argue that the small number of findings of incompatibility is a result of the design and operation of the Scottish model of rights protection which encourages courts and legislators to work together to ensure that legislation does not fall foul of Convention rights standards. As discussed in part two of this chapter, the Scotland Act 1998 contains several provisions that encourage political pre-enactment rights review in order to ensure that Bills are compliant with Convention rights before they come into force. Such provisions, if working as intended, reduce the number of ASPs that are successfully challenged on competence grounds. At the same time, they provide legislators with the opportunity to set the terms of any future Convention-rights based challenge by explicitly justifying and scrutinising legislation on Convention rights-grounds. On the other side, there also exists forces, some internal to the judiciary and some externally created by the Scotland Act 1998, that encourage the judiciary to accommodate democratic decision-making even where the courts have found a *prima facie* Convention rights incompatibility.

External deference-encouraging features

Section 101(2) SA requires courts to read Acts of the Scottish Parliament that could be read in such a way as to be outside competence, 'to be read as narrowly as is required for it to be within competence, if such a reading is possible.'[46] This provision was designed to ensure that as many Acts of the Scottish Parliament could remain on the statute book as possible.[47] It equips courts with an 'interpretive obligation' to read statutes in a way that keeps them compliant with Convention rights, if such a reading is 'possible'. As McCorkindale notes, s.101 therefore possesses a 'bias in favour of devolution'[48] – meaning that Bills that unintentionally or clumsily violate rights can be kept on the statute book, so long as their overall purpose accords with

[45] O'Neill (n4) p290
[46] Scotland Act 1998, s.101(2)
[47] UK, HL, *Parliamentary Debates*, vol 592, col 791 (21 July 1998) (Lord Sewel).
[48] McCorkindale, C. 'Statutory interpretation and legislative competence: section 101(2) of the Scotland Act 1998' in Neudorf, L., Hunt, C., and Rankin, M. (Eds). (2018). *Legislating for Statutory Interpretation: Perspectives from the Common Law World.* Canada: The Carswell Company Ltd, pp157-182

Convention rights. The approach that the courts have taken to s.101 will be explored later in this chapter.

Section 102(2) SA was also drafted to alleviate potential tension between the legislature and judiciary. When a court has found that an ASP is incompatible with Convention rights and thus is 'not law', the provision allows the court to make an order '(a) removing or limiting any retrospective effect of the decision, or (b) suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected.' This power exists in a growing number of states with strong-form review[49] including Canada[50] where it has been described as the 'judicial notwithstanding clause'.[51]

S.102(2) acknowledges the seriousness of judicial strike down. It ensures that statutes that have been in force for a substantial period of time or which have had significant effects on the regulation of people's lives but which are subsequently found to be incompatible with Convention rights do not need to be disapplied immediately with the significant fallout that this would entail. Further, the power allows the courts to work together with parliament to ensure that Convention rights are protected in legislation. By decoupling judicial review from judicial remedy, s.102(2) allows the courts use its institutional capacities to determine that legislation fails to adequately respect Convention rights whilst leaving it up to parliament, as the superior (on institutional and democratic grounds) legislator, to determine the appropriate legislative solution. Further, section 102(2) arguably provides against legislative inertia by acting as insurance for parliamentarians in areas where Convention compliance is complex, either because the Strasbourg case law is unclear or because the legislature has reservations with Strasbourg's interpretation of the law. It allows the legislature to propose solutions in the knowledge that if such proposals are found by the judiciary to be incompatible with rights, then parliament is likely to be given space to propose an alternative solution. Mark Elliot has questioned the theoretical validity of s.102(2) on the basis that it appears to allow courts to keep legislation in force which they have recognised as 'not law'.[52] Despite these theoretical challenges, as Elliot acknowledges, there are good practical reasons why section 102 is

[49] See for example, The Constitution of the Republic of South Africa, Article 172(1)
[50] First used in *Re Manitoba Language Rights* [1985] 1 SCR 721, 19 DLR (4th) 1 [*Manitoba Language Reference]* discussed in Bird, B. (2019) 'The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity' *Manitoba Law Journal* Vol 42:1 p27
[51] Ibid
[52] Elliot, M. 'The Legal Status of Unlawful Legislation: Salvesen v Ridell [2013] UKSC 22' *Public Law for Everyone Blog* (25 April 2013) Available at https://publiclawforeveryone.com/2013/04/25/the-legal-status-of-unlawful-legislation-salvesen-v-riddell-2013-uksc-22/ (Accessed 03/09/21)

necessary. As noted above, the inclusion of such a mechanism can help the parliament and courts to work together to ensure that legislation protects Convention rights.

Internal deference-encouraging features

In addition to these two important external features that encourage the judiciary to respect legislative decision-making, the judiciary also internally demonstrates respect for legislative decision-making by applying the doctrine of 'due deference'. As discussed later, out of the acknowledgment that courts might not be best placed, on institutional and democratic grounds, to settle particular Convention-rights-questions, the courts have tended to refrain from exercising judgment when faced with legislation that engages these rights-questions. Instead they have argued that such questions are more appropriately within the 'discretionary area of judgement'[53] of the legislature.

The courts' exercise of deference is particularly important in the Scottish context given that the Scottish Parliament is not empowered to override judicial findings of incompatibility. It ensures that a key feature of the 'third way' model, that legislators are given authority to settle particular Convention rights-questions is retained, despite their inability to override the courts.

Additionally, the courts' use of deference is able to facilitate a degree of 'dialogue' between the courts and legislators because, in some cases, the courts will vary the degree of deference they show to parliament on the basis of the quality of legislative decision-making. Where parliament seems to have glossed over Convention rights-questions or where they have failed to demonstrate that a particular legislative solution justifies the incursion into a Convention right, the courts are more likely to find that the interference with the engaged right is unacceptable. On the other hand, where the parliament has engaged with Convention rights-questions explicitly and seriously during the legislative process, the courts are more likely to show greater deference to legislative decision-making. In this way, the courts can incentivise the Government and Parliament to engage seriously in legislative rights review on the basis that legislation that is seen to take Convention rights seriously is less likely to receive judicial censure.

Of course, the deference that courts are willing to show in these areas is not unlimited, and the courts will not hesitate to set-aside legislation that is clearly incompatible with Convention rights regardless of the quality of parliamentary deliberation. However, the inherently open-

[53] *Adams v Scottish Ministers*, 2004 S.C. 665, para 27

textured nature of many Convention rights-questions means that there remains considerable room for legislators to contribute to the settling of such questions under the above approach.

The three features above, in different ways, help to ensure that strong-form rights-review in Scotland does not collapse into the judicial monopolisation of Convention rights. As will be detailed further, the features give the courts appropriate levers to collaborate with the other branches of government in the protection of Convention rights whilst, at the same time, ensuring that there is a sufficient balance between each branch so that no branch monopolises the settling of Convention rights-questions. In this way, alongside the features that engender legislative rights review discussed in part two of this chapter, the Scotland Act 1998 can be seen to share many features of jurisdictions that are said to have a 'third way' bill of rights.

Applying the features to Young's theory of Democratic Dialogue

In chapter one, I explained that my understanding of 'third way' constitutionalism merges the legislative rights review associated with Hiebert with the 'democratic dialogue' associated with Alison Young. The second part of this chapter evaluated the design and operation of the features in the Scotland Act that are said to engender 'legislative rights review'. This part of the chapter will consider the features that engender 'democratic dialogue'. Before considering the operation of the provisions, it is worth recapping Young's account of 'democratic dialogue' and considering how, in theory at least, it might apply to the judiciary's powers under the Scotland Act.

For Young, democratic dialogue can occur in any jurisdiction which has sufficient mechanisms to engender 'constitutional collaboration' and 'constitutional counter-balancing'.

Constitutional collaboration, she explains, is based on the recognition that the judiciary and the legislature reason differently about rights. This leads them to have different institutional strengths and weaknesses in terms of protecting rights. Legislatures can reason about rights in a freer way, less restricted by legal doctrine, can take into account the views of a larger number of people than the courts and can claim to represent the views of the population on the basis of its democratic nature.

On the other hand, courts are well placed to evaluate the consistency of general legislation with overarching constitutional principles and, because they hear cases from individual applicants, can determine the effect of legislation on individual rights. Relatedly, courts are able to identify where the rights of minorities have not been taken into account by majoritarian legislatures.

Finally, courts have technical expertise in understanding and interpreting the law and can determine what a particular right requires (particularly where domestic rights are able to reflect on jurisprudence from an international human rights enforcement body).

In light of these broad institutional areas of expertise, courts and legislatures should work together to further their strengths and to mitigate their weaknesses.[54] This collaboration is enhanced if both institutions engage in deliberation by displaying their reasoning as they fulfil their respective roles.[55]

Constitutional counter-balancing focuses on maintaining a system of checks and balances between the judiciary and parliament and thus tends to draw out disagreement.[56] Young therefore suggests that constitutional collaboration mechanisms are more likely to lead to productive dialogue than mechanisms that ensure constitutional counter-balancing. However, this does not mean that she considers that constitutional counter-balancing has no place in a system that hopes to achieve democratic dialogue. She claims that for dialogue to occur there needs to be some degree of parity between the different branches of government in the settling of rights-questions. In other words, interaction between the different branches of government cannot be a monologue, with the courts talking and legislators listening. On occasion, the court must concede to parliament on the basis that is institutionally better equipped to determine particular rights-questions.[57] Further, because the underlying values of a society tend to change alongside broader societal progress, there needs to be a means by which democratically elected and accountable actors are able to insist on changing the fundamental values that the courts recognise. On the other hand, the courts need to be able to assert themselves when they consider that legislators are not paying proper respect to important constitutional and societal values. Constitutional counter-balancing mechanisms allow this institutional tension to be relieved as part of the state's overall constitutional framework – reducing the risk of constitutional crises. By ensuring that there remains sufficient balance in the constitution, constitutional counter-balancing mechanisms can thus be described as a 'backstop'[58] on the basis of which, constitutional collaboration can occur.

Young has argued some 'third way' features are particularly suited to engender either constitutional collaboration or constitutional counter-balancing. For example, she argues that

[54] Young, A.L. (2017) *Democratic Dialogue and the Constitution* Oxford: Oxford University Press p113-115
[55] Ibid, p158-160
[56] Ibid,
[57] Ibid,
[58] Ibid p160

the notwithstanding clause in section 33 of the Canadian Charter, is predominantly a feature for constitutional counter-balancing, because it empowers the legislature to override a judicial finding of Charter incompatibility.[59] However, she notes that some mechanisms may, in different contexts, be used to facilitate constitutional collaboration and constitutional counter-balancing. She cites Hickman's proposed dual use of section 4 of the Human Rights Act, discussed in chapter one, to demonstrate this.

Hickman argues that section 4 HRA should be used where the courts have found that legislation is *prima facie* incompatible with rights, but where it would be inappropriate to use their interpretive obligation under section 3. This might be because the legislation requires the balancing of rights and interests of many individuals, an exercise at which legislatures tend to have greater competence than courts. In response to the court issuing a DOI, the legislature would then be required to amend the legislation in line with the court's finding whilst using its superior competences as a legislature to provide an appropriate legislative solution. In this way, section 4 would be a tool of constitutional collaboration because it would allow the courts and legislature to use their respective institutional competence to ensure that Convention rights are better protected.

However, Hickman also argues that courts should issue a DOI in situations where it may be possible to interpret the Act in a Convention rights-consistent manner under s.3 but where the court wishes to scorn the legislature for its failure to protect Convention rights in legislation. When used in this manner – section 4 is more a tool of constitutional counter-balancing.[60] Thus, in different contexts, certain 'third way' features may be used either to facilitate constitutional collaboration or constitutional counter-balancing.

Young considers that structural 'third way' features such as a parliamentary override are more likely to ensure that there are sufficient opportunities for constitutional collaboration and constitutional counter-balancing when protecting human rights, particularly because the parliamentary override creates a legal mechanism for constitutional disagreement to be aired.[61] Further, she argues that the form of dialogue that occurs from open institutional disagreement about particular rights-questions can create space for a broader societal debate about the protection of human rights.[62] However, as noted in chapter one, she is less wedded to these

[59] Ibid, p158
[60] Ibid p158-159
[61] Ibid, p161
[62] Ibid p152-156

particular powers than, for example, Gardbaum. She notes that in states with strong-form judicial review dialogue can occur through the alternative mechanism of judicial deference.

Young notes that deference is more appropriately used when determining the content of rights, rather than when providing remedies. Thus in line with her account of dialogue above, she suggests that the courts should exercise deference towards the legislature when faced with contestable or watershed rights-issues, on the basis that the legislature is better equipped to answer these rights-questions.[63] That said, even when faced with contestable/watershed rights-questions, the judiciary may decide to decrease the extent to which it defers to the legislature on the grounds that it has detected a flaw in the legislature's reasoning process or because the court believes that for institutional reasons is better equipped to resolve the rights-question. In this way, especially where the judiciary is clear about its reasons for exercising deference or otherwise, democratic dialogue can be facilitated.[64]

Scholars critical of dialogue theory argue that 'dialogue', which implies a two-way conversation, is an inappropriate metaphor for the legislature and courts' joint effort in protection of rights. Carolan prefers the term collaboration.[65] Kavanagh also prefers this term, and suggests that what is termed dialogue is actually a more nuanced account of the separation of powers.[66] They argue that rather than the judiciary and legislature actively engaging with each other and trying to change the other's mind, when deference is shown, what in fact is happening is that the court is allowing parliament to determine issues that are rightly within the sphere of parliamentary decision-making.[67] Where the court does not show any deference, either by striking down laws or by exercising its section 101(2) power, it is exercising functions that are correctly in the sphere of the judiciary.

The response from Young is two-fold. First, the relationship between the courts and legislature can be described as dialogic where the courts vary the degree of deference they are willing to show the legislature depending on the quality of legislative reasoning. Where the Government has openly explained why its legislation interferes with Convention rights in the manner that it does, taking into account alternative possible legislative solutions and explaining why its approach is best favoured (or where it clearly sets out why it considers that its legislation does

[63] Ibid, p226
[64] Ibid, p226-229
[65] Carolan, E., (2016). 'Dialogue isn't working: the case for collaboration as model of legislative-judicial relations' *Legal Studies 36(2),*
[66] Kavanagh, A., (2009). 'Constitutional Review under the UK Human Rights Act' *Cambridge: Cambridge University Press,* p130
[67] Ibid

not engage Convention rights) and where parliament thoroughly scrutinises legislation on this basis, the courts should be more willing to defer to parliament's judgement. On the other hand, where the legislative scrutiny is of poor quality or where the courts can detect an error in the legislature's reasoning, then the courts should show less deference and should find that the legislation violates Convention rights. In this way, the courts can incentivise high quality legislative processes and can lead to the better protection of Convention rights.[68]

Relatedly, if both parliament and the judiciary provide extensive reasons when considering the rights-compatibility of a statute in order that each institution is able to better understand the others' position – then the two can work together to influence the others' thinking without forcing the other to adopt it's perspective.[69] In this way, Convention rights can be protected in a manner that accommodates the benefits of parliamentary and judicial reasoning.

Young's account of democratic dialogue provides the opportunity to consider the Scottish model as one that can engender dialogue. Both avenues for constitutional collaboration and constitutional counter-balancing can be evidenced in the law-making and reviewing processes in Scotland.

Section 101(2) of the Scotland Act 1998 gives the judiciary the power to, where possible, keep potentially rights infringing legislation on the statute book while broadly giving effect to parliament's intention. Such a power allows the judiciary to protect Convention rights in a manner that does not draw it into open conflict with Parliament and thus allows the judiciary and parliament to collaborate to ensure that legislation that is in force protects rights..

Elsewhere, section 102(2)(b) gives the judiciary the power to defer to the parliament on the appropriate remedy whenever Convention rights have been violated. Again, this power can be seen to encourage constitutional collaboration between the courts and parliament – the courts retain the competence to determine the content of rights, whilst parliament is able to use its superior capacity to draft legislation to ensure that the remedy to the breach does not lead to further problems. Section 102(2)(b) can engender dialogue between the judiciary and parliament, if the courts make suggestions (but not directions) as to how the defect may be remedied and parliament takes proper account of these suggestions.

In addition, there also exists within the Scottish model of government opportunities for constitutional counter-balancing. Whilst it is clear that the courts have ultimate authority to

[68] Young, (n54), p229
[69] Ibid,

determine the content of Convention rights, the judicial practice of deferring to the legislature in areas within parliament's 'discretionary of judgement' suggests that in practice neither the courts nor parliament have a monopoly in the determination of the content of rights. The courts tend to show deference to parliament when the Strasbourg court has failed to rule that a specific interest or behaviour falls within the scope of a Convention right or where the Convention allows for the limitation of a right in favour of broader societal interests and where parliament has already been seen to consider the Convention-rights-issue seriously. In the latter, deference is therefore shown when the court is considering whether the state is justified in interfering with a Convention right. Thus, in a manner similar to her use of section 4 HRA, the courts could decide to exercise deference to the legislature when faced with contestable (for example when deciding how best to balance competing rights) or watershed rights-issues. Such deference should be paid to the legislature on the basis of its democratic legitimacy and better ability to balance the rights and interests of a number of parties and to propose complex and detailed solutions to perceived problems. Constitutional dialogue will be enhanced if the court is clear about the reasons for such deference and the court should consider the extent of parliamentary debate on the issue before deciding whether deference should be shown.

Constitutional counter-balancing might also be facilitated where, in response to a judicial finding of incompatibility, either in relation to the specific legislation before it or in relation to future legislation that engages similar rights-questions – the legislature (re)enacts the legislation in a way that reasserts its initial position. Such a response comes with substantial risk, particularly given that the court may set-aside the law on a second occasion. However, a secondary judicial set-aside also presents risks for the courts as they may face increased challenges to their legitimacy on democratic grounds. The Canadian experience of 'notwithstanding by stealth' demonstrates that courts are alive to such risks and that legislative sequels are not necessarily guaranteed to be struck down.[70]

Thus, under both the Human Rights Act 1998 and the Scotland Act 1998 there exists appropriate levers that can facilitate constitutional dialogue. The below table sets out Young's ideal situation with regard to the Human Rights Act 1998 and applies it to the levers in Scotland.

[70] See Kelly, J.B. & Hennigar, M.A. (2012) 'The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review within a Constitutional Charter of Rights, *10 Int'l J Const L 35,* p36

	Human Rights Act 1998	Scotland Act 1998
No Deference - Court determines content of right and remedy – *Non-contestable/non watershed rights-issues + simple solution based upon long standing principles of UK Constitution*	S.3 HRA (S.4 if scorning parliament, parliament expected to repeal/amend legislation in light of judgment)	S.101(2) (s.29(d) if scorning parliament)
Remedial Deference Court determines content of right, parliament determines remedy *Non-Contestable/non watershed rights-issues + complex/structural solution*	S.4 (but expectation that parliament remedies the legislation in light of judgment)	S.102(2)(b)
Content Deference Parliament determines content of right, parliament determines remedy *Contestable/Watershed rights-issues*	S.4 or exercise of deference	Exercise of deference (with *obiter* discussion where courts wish to enter a dialogue with parliament)

To what extent is this theory of the relationship between the judiciary's powers currently reflective of the judiciary's actual use of such powers? The next section will answer this question by looking at twenty-one of the twenty-three challenges to the Acts of the Scottish Parliament on the basis of Convention rights that have been made so far.[71]

[71] *Queen v. Lord Advocate* [2020] CSIH 15 which unsuccessfully challenged Antisocial Behaviour etc. (Scotland) Act 2004, s.131(4)(b) on the basis of incompatibility with the appellants Art 6 ECHR rights & *XY,*

From Theory to Practice - How has the judiciary applied their powers in relation to the Scotland Act 1998?

Judicial Deference

Consideration of Parliamentary History

(i) Determination of parliamentary intent

As Young observes, for simple institutional interaction to be promoted to constitutional dialogue there has to be some deliberation between the bodies. Otherwise, what some scholars describe as 'dialogue', others would describe as a more nuanced account of the separation of powers. Thus, in order to determine whether the Scottish model of rights protection can be considered to be one that facilitates dialogue, the extent to which the courts and parliament refer to each other when carrying out their respective functions must be considered. One indication of this, is to consider if and how the judiciary considers the legislative process as a guide to the interpretation of a statute that has been challenged on Convention rights-grounds.

The extent to which judges consider legislative history as a guide to interpretation of legislation varies depending on the judge, and indeed, it seems, on the case the judge is presiding over. This confusion may largely be a result of squeamishness that results from judges being subject to the principle of parliamentary privilege for legislation from Westminster – even though the principle does not operate in the same manner at Holyrood.[72] However, objections to the courts' consideration of legislative history also stems from the principled position that government policy documents or parliamentary debate does not necessarily reflect the true expression of parliament – which can only be found in the statute itself. For example, in *DS v HM Advocate,* Lord Rodger noted that:

> The Board was favoured with a considerable amount of background material relation to sec 10, including consultation papers, the results of consultation, reports of committees of the Scottish Parliament and reports of proceedings in the Parliament itself. *For my part, I prefer to concentrate on the wording of the*

Appellant [2019] CSIH which unsuccessfully challenged Children's Hearings (Scotland) Act 2011 s.164(1) on the basis of incompatibility with the appellant's Article 8 ECHR rights were not considered because both judgments were published after the research was completed. That said, a brief look at both cases implies that the judgments are consistent with the overall findings of this chapter.

[72] Scotland Act 1998, s.41

> *provision which is – or should always be – the best indication of the effect of the legislation.*[73] [emphasis added]

Remarks similar to Lord Rodgers were made by Lord Hope in *Salvesen v Riddell,* where he criticised Lord Gill's use of ministerial statements to determine parliamentary intent in the Inner House. '[O]ne must be careful not to treat a ministerial or other statement as indicative of the objective intention of Parliament.'[74] Further, the Act should "be judged primarily by what the section provides, not by what was said by the deputy minister."[75]

Perhaps the pinnacle of this kind of judicial thinking is Lord Hope's statements in *Anderson v Scottish Ministers.* Commenting on the Ministerial and the PO's requirement to produce a statement of competence, he dismissed them as 'no more than statements of opinion that do not bind the judiciary.'[76]

Lord Hope is correct. Indeed, an amendment that would have made the PO's statement of competence binding during thing the passage of the Scotland Bill was rejected.[77] Nonetheless, his comments suggest that the courts view s.31 as primarily a provision aimed towards parliament and one that has little relevance to the courts. Perhaps one of the reasons that the Lord Hope views s.31 statements in such a way is that they are unreasoned. As shall be seen, courts have in practice tended to be more deferential to parliament when they consider that the legislation that interferes with rights has been the product of reasoned and wide-ranging debate with numerous solutions considered with proper justification for the preferred solution. If statements of competence are not accompanied by reasons, the courts have no way of knowing whether the legislation has been produced in such a manner.

Despite the above disquiet around the use of legislative history, in the vast majority of cases considered, the courts do tend to provide a summary of the legislative history of the challenged Act, at least as an indication of the material facts. Among the material discussed has been; previous legislation or judicial decisions that the new legislation altered,[78] government

[73] Lord Rodger in *DS v HM Advocate* 2007 SC UKPC 36, para 79
[74] Lord Hope in *Salvesen v Riddell* [2013] UKSC 22, para 37
[75] Ibid, para 39
[76] Lord Hope in *Anderson v Scottish Ministers* (n42), para 7
[77] UK, HL, *Parliamentary Debates*, vol 592, cols 1368-1373 (28 July 1998)
[78] Eg *AXA General Insurance Company ltd v. Lord Advocate* [2011] UKSC 46

reports,[79] consultation papers,[80] the policy memorandum,[81] parliamentary debates,[82] ministerial statements[83] and evidence given to committees.[84] In some circumstances, this legislative history has been utilised for more than 'context' and has been used to determine legislative intent.

In *DS v HM Advocate,* for example, Lord Hope noted that the complained of provision was introduced as an amendment at Stage 2 of the legislative process and that the Minister responsible had submitted a letter explaining the policy behind the amendment and why it was lodged at that stage.[85] Lord Hope then relied on this legislative history to determine the purpose of the provision.[86] On the basis of this presumed purpose, he made an s.101(2) interpretation to read the Act in a manner that made it within competence.[87] Thus, in *DS v HM Advocate,* for Lord Hope at least, legislative history was relevant to determine the purpose of legislation.

Similarly, in *Salvesen v Riddell,* in what could be considered as a display of constitutional counter-balancing, Lord Hope referred to statements made by the relevant deputy minister when the complained of provision was included in the Bill:

> A reader of what the deputy minister said during that debate might be forgiven for thinking that it displayed a marked bias against landlords. If there was, this a regrettable attitude for a minister to adopt in a system where both the legislature and the executive are required to act compatibly with Convention rights. As a minority group, landlords, however unpopular, are as much entitled to the protection of the Convention rights as anyone else[.][88]

Although he went on to claim that the ministerial statements did not contribute to his understanding of the purpose of the Bill, that Lord Hope was prepared to criticise the Minister in such stern language indicates that it was intended as a strong signal to the Government about their duty to respect Convention rights. This signal, in itself, could be considered dialogic as a method of constitutional counter-balancing. It suggested that the

[79] Eg *DS v HM Advocate,* (n73) para 6
[80] Eg *Flynn v HM Advocate,* 2003 JC 153
[81] Eg *Flynn v HM Advocate, AB v HMA* (n41)
[82] Eg *Adams v Scottish Ministers* (n53), *DS v HM Advocate* (n73)
[83] Eg *Salvesen v Riddell (n74)*
[84] Eg *AXA General Insurance Company ltd v. Lord Advocate,* (n78) para 12
[85] Lord Hope in *DS v HM Advocate,* (n73) paras 7-11
[86] Ibid, paras 31-43
[87] Ibid, para 52
[88] *Salvesen v Riddell,* (n74), para 38

government had over-stepped the mark in terms its justifications for violating rights in a manner the courts would not allow.

(ii) Proportionality assessment

Whilst there is still some contention about the courts considering legislative history in order to determine the meaning of a statute, one area where legislative history is relevant is in determining whether legislation represents a proportionate interference with a limited right. The ECHR was drafted in the acknowledgment that the rights contained within the Convention are not the only interests that are of importance to society. As such, the Convention allows states to interfere with certain Convention rights, as long as they do so 'in accordance with law', in aid of 'a legitimate aim' and in a manner that is 'necessary in a democratic society'.[89] In determining the latter, the court undertakes what is known as the 'proportionality assessment'. The British courts have elaborated on the proportionality assessment by breaking it down into four questions:

> (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,
>
> (2) whether the measure is rationally connected to the objective,
>
> (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
>
> (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.[90]

The courts have therefore found that it is necessary to consider legislative history in order to determine whether the Bill satisfies the different requirements of the proportionality assessment. In particular, courts are required to look at legislative history when considering questions (2), (3) and (4).

For example, in *Sinclair Collis,*[91] where the petitioners claimed that the blanket ban on cigarette vending machines in s.9 of the Tobacco and Medical Services (Scotland) Act 2010 violated,

[89] See Articles 8-11 ECHR
[90] *Bank Mellat* [2013] UKSC 29, Per Lord Reed, para 74
[91] *Sinclair Collis v. Lord Advocate*, 2013 SC 221,

inter alia, their Article 1 Protocol 1 Rights under the Convention, Lord Carloway quoted extensively from the policy memorandum and evidence sessions of the Health and Sport Committee to highlight that the petitioners had been extensively consulted and involved in that process.[92]

This suggested that the parliament had properly paid regard to the rights/interests of the petitioners and thus had fairly balanced such rights/interests against the rights/interests of society as a whole, as required by question (4) of the proportionality assessment. Further, the court noted that the alternative proposal put forward by petitioners, that the petitioners argued would have been a less significant interference with the right, had been discussed and rejected in parliament.[93] Although this would appear to run contrary to question (3) of the proportionality assessment, the court reiterated that (3) does not mean that the state is required 'to prove that there are no conceivable alternatives to the measure.'[94] As shall be seen, the court often gives a large degree of discretion to determine suitable legislative incursions into rights on the basis that this is within parliaments 'discretionary area of judgment'. The court merely requires that:

> In demonstrating proportionality, the onus is upon the Member state to justify the measure objectively. This is likely to involve demonstrating, by reference to extraneous materials, that the measure is capable of attaining the stated purpose.[95]

Thus, the court found it necessary to consider the legislative process, including the opportunity for input by different actors and the extent to which parliament had considered its proposals and others, to determine whether the legislation was a proportionate interference with Convention rights.

Therefore, while there is some debate around the use of parliamentary history to determine legislative intent, parliamentary history is required to be considered by the courts when carrying out the proportionality assessment. Consideration of parliamentary history is perhaps one of the more striking examples of constitutional collaboration and an opportunity to improve dialogue. As shall be seen, that the courts can vary the strength with which they carry out the proportionality assessment by utilising the principle of deference, rewarding legislatures that

[92] Ibid, paras 1-13
[93] Ibid, para 12
[94] Ibid, para 59
[95] Ibid, para 58; It should be noted that Lord Carloway's discussion of proportionality in Sinclair Collis relates to EU law. However, he argued that his analysis of proportionality in EU law in that case also applied to questions [3] and [4] of the proportionality assessment for Convention rights. – See para 65

take rights seriously (by speaking in the language of rights, considering case law, properly justifying incursions into rights, considering many proposals etc). Such behaviour should encourage both the executive and parliament to take rights more seriously; on the basis that legislation that properly considers rights is more likely to remain on the statute book. The extensive pre-legislative scrutiny and occasionally robust parliamentary scrutiny of legislation on Convention rights-grounds, discussed in part two, afford legislators numerous opportunities to legislate in this way. Although, given that pre-legislative review tends to be where the settled positon on Convention rights-questions is determined, the Government may find that the courts will be more deferential to its legislation if it sets out clearly why it considers that its legislation is compatible with Convention rights.

Content Deference

Scottish courts are often willing to defer to parliament on the content of particular Convention rights. The courts' position that the resolution of certain rights-issues falls within the parliament's 'discretionary area of judgment' stems from the ECtHR's principle of the 'margin of appreciation'. The margin of appreciation doctrine has been developed by the ECtHR in recognition that national authorities are primarily responsible for the protection of Convention rights and that the diverse Council of Europe member states differ as to the resolution of some rights-questions. As such, in certain areas, for example when there is no 'European consensus' on rights (e.g. questions such as abortion or euthanasia), or where rights required to be limited in aid of other legitimate interests (such as those in Arts 8-11 and Art 1 of the First Protocol), the ECtHR will accord a high degree of respect to national authorities' positions on these matters.

The doctrine of the margin of appreciation does not however require domestic courts to defer to the legislature on these issues. Despite this, UK courts have, out of respect for parliament's democratic legitimacy and superior law-making capabilities,[96] acknowledged that certain questions should be decided by parliament. In such scenarios, the courts have deferred to parliament's 'discretionary area of judgment.' The courts first recognised this concept in the Scottish context in *Brown v Stott*, where Lord Bingham noted that:

> Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to

[96] Lord Hope in *AXA General Insurance Company Ltd*, (n78) para 32

> them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies.[97]

However, as shall be seen, the courts do not automatically decide to defer to parliament whenever the Strasbourg court decides national authorities have a margin of appreciation. The courts' deference depends on the right at stake and whether parliament or the courts should more appropriately determine the Scottish position.

(i) Areas where the courts have shown deference

(a) Limited Rights

In *Adams v Scottish Ministers*, Lord Gill elaborated on what judicial deference means in practice in Scotland. The case concerned a challenge to the Protection of Wild Animals (Scotland) Act 2002, which amongst other things, criminalised foxhunting on the basis that it violated the petitioner's Article 8, 11 and Article 1 Protocol 1 rights. The petitioner took particular exception to Parliament's conclusion that foxhunting was cruel. Lord Gill reiterated that the courts will in some circumstances defer to parliament's 'discretionary area of judgment' and noted that:

> It will be easier for such an areas of judgment to recognised where, to a greater or lesser extent, the issues involve social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection.[98]

In the context before the court, Lord Gill accepted that, although courts would intervene if there was no adequate factual basis on which parliament had decided fox-hunting was cruel, the 'starting point' was 'that the prevention of cruelty to animals has for a century fallen with the constitutional responsibility of the legislature.'[99] Further, parliament was not required to be held to the standards of evidence required by a court, legislators were entitled to consider their 'personal knowledge' based on life experience and evidence from constituents and interested parties.[100] The court accepted that the legislation was a result of 'considered decision' by

[97] Lord Bingham in *Brown v Stott* 2000 SCCR 314 para 703
[98] *Adams v Scottish Ministers*, (n53) para 27
[99] Ibid, para 47
[100] Ibid, para 39

parliament and one that was 'pre-eminently' for MSPs.[101] The court therefore granted parliament a large margin of discretion and found that the Bill was within the competence of Parliament.

Areas that the courts have considered to be within parliament's discretionary area of judgment include the elimination of social injustices,[102] issues that involve social or economic policy[103] and the determination of general public interest (eg public health).[104] When the court determines that an issue is within the parliament's discretionary area of judgement, they will accept the legislative proposal unless it is 'manifestly without reasonable foundation.'[105]

Further, where the courts consider that parliament has superior institutional competence in deciding appropriate legislative solutions to issues involving rights, they may alter their standard of proof that determines whether that measure is disproportionate. For example in *AB v HMA,* Lord Hodge noted

> It is important to recall that the question of whether the Parliament could have used a less intrusive measure does not involve the court in identifying the alternative measure which is least intrusive. The court allows the legislature a margin of discretion and asks whether the limitation on the Art 8 right is one in which it was reasonable for the Parliament to propose.[106]

(b) Watershed or contestable rights-issues

Deference may not only be exercised in relation to limited rights. When faced with watershed rights-issues, the courts can decide to interpret the scope of the right narrowly. In this way, when the Strasbourg court has yet to determine that action falls within the scope of a right, the courts leave it to parliament to determine whether that action should be protected or not.

An example of this approach can be seen in *Moohan v Lord Advocate.*[107] In this case, the petitioners challenged Section 2 of the Scottish Independence Referendum (Franchise) Act 2013 that prevented them, as prisoners, from voting in the 2014 Scottish Independence Referendum. They alleged that this violated Article 3 Protocol 1 ECHR, which protects the

[101] Ibid, para 48
[102] *AXA General Insurance Company Ltd*, (n78) para 29
[103] *Brown v Stott* (n97), *Adams v Scottish Ministers* (n53)
[104] *Sinclair Collis,* (n91) para 33
[105] *AXA General Insurance Company Ltd,* (n78) para 31
[106] *AB v HMA,* (n41), para 37
[107] [2015] AC 901

right to vote. The question was whether Article 3 Protocol 1 extended to referenda like the Scottish Independence referendum or only applied to parliamentary elections. While the court agreed that the Strasbourg jurisprudence had only extended the right as far parliamentary elections, it was split on whether the right to vote in a referendum on the country's future political settlement should be considered to be within the scope of the right. According to the minority, the fundamental purpose of the right was to enable 'the free expression of the opinion of the people in the choice of the legislature'.[108] This of course meant allowing people to vote in regular elections,

> But a referendum on whether a country should become independent of others with which it has been united for centuries and whether, in consequence, it should have a radically different form of government is surely intimately associated with citizens' expression of opinion about the choice of legislature.[109]

Thus, according to the minority, independence referenda were within the scope of A3P1 and the Scottish Parliament was legislating beyond its competence when it prevented prisoners from voting.

The majority considered the question differently. Lord Hodge argued that Strasbourg's position was 'unequivocal',[110] and that A3P1's scope did not include referenda. He conceded that it was possible for the court to go further in the interpretation of Convention rights than Strasbourg but only where there was an indication that from Strasbourg's case law that it was going in a similar direction.[111] In this instance, he argued that there was no such indication and thus it was not for the court to provide such an interpretation.[112] Similarly, Lord Neuberger conceded that although it was possible for the court to interpret rights in a broader manner than Strasbourg, such interpretations would require sound justification that was not demonstrated in this case.[113]

In *Moohan,* it can be seen in the judgments of the majority that there is a reluctance on behalf of the court to interpret rights more broadly than is done at Strasbourg. As Baroness Hale explained in *DS v HM Advocate,* such reticence stems from the acceptance that it is more appropriately within the role of parliament to offer a more extensive understanding of rights,

[108] Lord Kerr in Ibid, para 65
[109] Ibid, para 68
[110] Lord Hodge in Ibid, para 14
[111] Ibid, para 13
[112] Ibid, para 15
[113] Lord Neuberger in Ibid, para 52

due to its superior democratic legitimacy. Remarking that it was 'a strong thing for any court to declare an enactment of a democratic legislature invalid,'[114] she claimed that:

> [W]e can only rely on the Convention rights as interpreted in Strasbourg as basis for invalidating the act of a democratic legislature, for it is only incompatibility with those rights which gives us ground for doing so. The legislature can get ahead of Strasbourg if it wishes and so can the courts in developing the common law. But it is not for us to challenge the legislature unless satisfied that the Convention rights, as internationally agreed and interpreted in Strasbourg, require us to do so.[115]

It should be noted that Lady Hale has since slightly modified her position and has argued that the courts in some contexts should be willing to interpret Convention rights beyond that which has been interpreted by the Strasbourg court – particularly where parliament has passed up opportunities to legislate in the area concerned. That said, where parliament has recently passed legislation relating to a watershed rights-issue, she remains of the opinion that court should interpret the right narrowly, given that the applicant retains the ability to apply to the Strasbourg court whereas the Scottish Government cannot appeal the Supreme Court's decision.[116]

(ii) Areas where deference is limited

The previous discussion has indicated that the Scottish judiciary has been willing to exercise deference to the legislature in a number of areas concerning Convention rights. However, this deference does not apply to all rights. Further, even where parliament has a wide margin of discretion, the courts have on occasion considered that it has still acted in a manner contrary to Convention rights.

(a) Rights where courts exercise less deference

Lord Gill in *Adams* acknowledged that the courts would more closely examine the interference with a right when that right is 'of high constitutional importance or where the courts are especially well placed to assess the need for protection.'[117]

DS v HM Advocate concerned the compatibility of an ASP,[118] which changed the rules of evidence in cases involving a sexual offence to require any defendant who wishes to rely on

[114] Baroness Hale in *DS v HM Advocate*,(n73) para 89
[115] Ibid, para 92
[116] Hale, B. (2012) '*Argentoratum Locutum:* Is Strasbourg or the Supreme Court Supreme?' *H.R.L.R. 12:1,* p75-76
[117] Lord Gill in *Adams v Scottish Ministers,* (n53) para 27
[118] Sexual Offences (Procedure and Evidence) (Scotland) Act 2002

the victim's previous sexual history to disclose their relevant previous convictions, with Art 6 ECHR. In that case, Lord Hope acknowledged that the Strasbourg court conferred on domestic authorities a wide margin of appreciation in relation to rules on evidence.[119] Despite this, he refused to grant the Parliament any leeway in determining such rules and decided to use s.101(2) to interpret the Act in a manner that he considered was compatible with Art 6. Such lack of leeway presumably stems from the position, seen in the Lord Gill's second example above, that the Court has superior institutional competence to determine what is required to ensure that the right to a fair trial is respected.

(b) The limits of deference

As noted, even in areas where the courts have accepted that they should show deference towards parliament, this deference is not unlimited. An example of where, despite the courts granting the legislature a degree of deference, the measure was still found to be disproportionate is *Salvesen v Riddell.*[120] This case concerned the applicability of the s.72(10) of the Agricultural Holdings (Scotland) Act 2003, which was an anti-avoidance measure inserted into the Act to prevent landlords from attempting to free themselves from the effect of the legislation before it came into force, with Article 1 Protocol 1 of the Convention.. In this instance, Lord Hope conceded that the legislative aim, which concerned social and economic policy, was an area where parliament has a broad margin of discretion.[121] However, he argued that, despite this, proportionality required that the provision be 'necessary' to achieve a legitimate aim.[122] In this instance, the legislative provision, which treated landlords that had served notice of cancellation of their tenancies during the passage of the legislation and those that did so after the legislation came into force differently had 'no logical justification'[123] and was therefore 'unfair and disproportionate'.[124] *Salvesen* therefore demonstrates that judicial deference to parliament, even in areas that the courts are usually deferential, has its limits.

As will be discussed in greater detail in the next chapter, the court's judgment in *Salvesen* may be considered to be an example of constitutional counter-balancing. The offending provision was a Stage 2 amendment to the Bill. As a result, it was not subject to the political pre-enactment checks required by s.31 of the Scotland Act. By limiting the degree of deference

[119] *DS v HM Advocate*, (n73), para 29
[120] See also Lord Hodge in *AB v HMA* (n41) para 38-45
[121] *Salvesen v Riddell*, (n74) para 36
[122] Ibid
[123] Ibid, para 44
[124] Ibid

that the court would have typically shown to parliament in this area due to a provision that was described by Lord Gill as 'not a model of draftsmanship either in structure or in expression[,]'[125] the courts were signalling to parliament to rushed, poorly drafted legislation that bypassed the usual constitutional checks and that interfered with rights is less likely to have been considered to have done so proportionately by the courts. Thus, if parliament wishes to pass legislation that *prima facie* interferes with Convention rights it must do so in a manner that properly justifies the approach it decides to take.

Conclusions

From the previous cases, a few broad conclusions can be drawn in relation to the concept of deference. The first, is that it applies only where the Strasbourg court has decided to grant national authorities a large margin of appreciation, either due to diversity of opinion within Council of Europe member states or the superior understanding of domestic authorities; or where the Strasbourg court has not yet decided whether the issue falls within the scope of the right. Secondly, the courts will tend to pass the margin of appreciation onto parliament in some circumstances (Article 8-11, A1P1 when the provision relates to social and economic policy or moral issues) but not in others (Article 6 or where the rights are of a high constitutional importance). Third, this deference is not unlimited, and the courts may decide that a provision in an area where parliament has a large degree of discretion may still be disproportionate.

It is the courts' position on this third conclusion that has the biggest impact on whether the relationship between the courts and legislature may be described as dialogic. For the most part, commentators accept that the Scottish judiciary have been particularly deferential to parliament when considering whether an interference with a Convention right has been proportionate. Adamson, for example, argues that:

> The Scottish courts clearly have confidence in the Scottish Parliament and acknowledge that is for the Parliament to determine the balance between rights. They have been hesitant to strike down legislation[.][126]

[125] *Salvesen v Riddell* [2012] CSIH para 61
[126]Adamson, B. 'The Protection of Human Rights in the Legislative Process of Scotland.' in Hunt, M. et al Eds, (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit*, London: Hart Publishing, p220

McHarg[127], Tierney[128] and O'Neill[129] also agree that the courts have been broadly deferential to parliament. O'Neill puts this deference down to what he describes as 'conservatism',[130] something that has been suggested by other scholars such a Page.[131] However, Adamson suggests that the reluctance on behalf of the judiciary to strike down ASPs might come from the principled position that the judiciary should respect legislation from a democratically elected parliament and only declare it 'not law' as a last resort.[132] There is certainly evidence from the judges that this appears to be the justification.[133]

However, alongside this impression that the courts have thus far shown a large degree of deference to parliament, comes the suggestion that the courts may be taking a progressively more robust role. Adamson argues that the courts 'are increasingly sending strong messages to the Parliament.'[134] Tierney concludes similarly that:

> A judiciary increasingly confident of its constitutional location and better satisfied with the processes in place for testing its own legitimacy may feel more inclined to expand its role in the development of on-going constitutional change.[135]

Further, McHarg, writing in 2012, claimed that in the comparatively more recent cases of *Cameron v Cottam* and *Salvesen v Riddell* the courts showed less deference to the parliament than in some of the earlier cases.[136] Elsewhere, Maxwell has argued that the Court of Session has been more willing to defer to the Scottish Parliament than the Supreme Court.[137] I would argue that McHarg, Adamson and Tierney's perceptions that the courts might be willing to show less deference to the Scottish Parliament as they became more used to reviewing legislation on Convention rights-grounds has not yet to come to pass. Indeed, the number of challenges to ASPs on Convention rights-grounds has begun to tail off in recent years, as

[127] McHarg, A. (2012). 'The Dog That Finally Barked: Constitutional Review under the Scotland Act' *UKCLA.* Available at https://ukconstitutionallaw.org/2012/06/26/aileen-mcharg-dog-that-finally-barked-constitutional-review-under-the-scotland-act/ (Accessed 06/09/18)
[128] Tierney, S. 'Constitutionalising the Role of the Judge: Scotland and the New World Order.' in Boyle, A. et al (2002). *Human Rights and Scots Law.* Hart Publishing: Oxford. pp57-83
[129] O'Neill (n5), p40
[130] Ibid,
[131] Page (n18), p268
[132] Adamson, (n126), p220
[133] Baroness Hale in *DS v HM Advocate,* (n73) para 89
[134] Adamson, (n126), p220
[135] Tierney, S. (n128), pp57-83
[136] McHarg, A. (n127)
[137] Maxwell, D.S.K. (2017). 'Case Comment: Article 1 of the First Protocol and a tenants right to compensation: McMaster v Scottish Ministers', *CSOH 46,* p486

conflicts about the Parliament's competence have moved from Convention rights to questions reserved/devolved boundary.

Regardless, a judiciary that is more assertive in its protection of Convention rights need not signify a problem for those that see the relationship between the judiciary and parliament in the protection of rights in Scotland as one that engenders dialogue. If the judiciary decides to use its powers to set-aside legislation in scenarios where it considers the Scottish Parliament has failed to adequately justify its incursions into Convention rights, without necessarily claiming that the legislative aim is illegitimate, it may improve dialogue with the parliament by improving parliamentary rights deliberation. This question will be further explored in the final chapter of this thesis. By considering Parliament's immediate and longer-term response to findings of incompatibility in *Salvesen* and *Christian Institute,* the question of whether legislators have interpreted these findings as 'red lights' or 'amber lights' will be further explored.

Section 101(2)

Thus far, focus has been on forms of deference and constitutional collaboration that the judiciary has shown of its own accord. However, the Scotland Act 1998 also places external pressures on the judiciary to respect the integrity of legislation. One such provision is s.101(2) of the Scotland Act 1998. Section 101(2) states that any Act of the Scottish Parliament that could be read in such a way as to be outside competence[138]:

> is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly[139]

The language used in s.101(2) initially caused confusion, with some arguing that the requirement to read the legislation 'as narrowly as is required' meant that, in contrast to s.3(1) HRA, the Scottish Courts could not use tools such as 'reading in' when interpreting legislation in a rights-compatible manner.[140]

During the legislative process, Lord Hope, sitting in his parliamentary capacity, suggested that 'the various rules which the court is being asked to apply in construing legislation (in both the Scotland Act and HRA) be cast in the same terms.'[141] However, this request was denied by the

[138] Scotland Act 1998, s.101(1)
[139] Scotland Act 1998, s.101(2)
[140] *DS v HM Advocate* (n73), para 22
[141] UK, HL, *Parliamentary Debates*, vol 592, col 788 (21 July 1998) (Lord Hope of Craighead).

UK Government, arguing that the narrow language was more 'appropriate' for Acts of the Scottish Parliament. Despite this, according to McCorkindale, Lord Hope 'was able to achieve from the bench (at least within limits) what he was unable to achieve for his seat as a legislator in the House of Lords'[142] in *DS v HM Advocate*. There, he noted that the language of s.101(2) was based on the fact that the provision did not apply just to Convention rights but also other questions of competence such as the list of reserved areas in Schedule 5 of the Scotland Act 1998.[143] However, when the competence issue concerned compatibility with Convention rights, the:

> proper starting point is to construe the legislation as directed by section 3(1) of the Human Rights Act. If it passes this test, so far as the Convention rights are concerned it will be within competence.[144]

S.101(2) of the Scotland Act 1998, in relation to Convention rights, therefore operates in exactly the same manner as S.3(1) of the HRA. Like the courts' powers under the HRA, Scottish courts are equipped with strong powers of interpretation; they must interpret legislation in a manner that brings it within competence, 'if such a reading is possible'. As Lord Hope surmised, '[t]he Court must prefer compatibility to incompatibility'.[145] However, again similar to the other interpretive obligations examined, such interpretative powers are not unlimited. In *Salvesen v Riddell*, Lord Hope accepted that a s.101(2) interpretation must:

> go with the grain of the legislation… It is not for the court to go against the underlying thrust of what it provides for, as to do this would be trespass on the province of the legislature.[146]

In *S v L*, Lord Reed clarified the courts approach to interpretation of ASPs. He noted that the court's role, first and foremost, is to determine the purpose of the legislation according to ordinary interpretive principles. If such a reading is *prima facie* incompatible with Convention rights, the courts will then consider 'whether the incompatibility can be cured by interpreting the legislation in the manner required by sec 3 [HRA]'.[147] The courts' overall approach as to the appropriate use of s.101(2) is likely to be given further clarity when the Supreme Court's

[142] McCorkindale (n48)
[143] *DS v HM Advocate*, (n73) para 23
[144] Ibid, para 24
[145] Ibid
[146] *Salvesen v Riddell*, (n74), per Lord Hope, para 46
[147] *S v L* 2013 SC (UKSC) 20, per Lord Reed, para 17

judgment in relation to the two Bills that were referred to it by the Advocate General is published, as the Law Officers have asked for guidance on this specific point. [148]

Thus far, there have only been two occasions where the courts have exercised their section 101(2) powers in order to cure an ASP of a Convention right incompatibility.[149] Additionally there have been two instances where the courts have considered that legislation is compatible with Convention rights on the basis of ordinary principles of interpretation but have said that if it was not, they would have made a Convention rights compatible interpretation under s.101(2).[150]

The first s.101(1) interpretation came in *Anderson v Scottish Ministers,* which concerned the compatibility of Section 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 with Article 5 of the Convention, which protects the right to liberty. The provision ensured the continued detention of mentally disordered patients 'in order to protect the public from serious harm.' One of the appellants wished not to be released from custody but transferred to a prison to carry out the rest of his prescribed sentence. He argued that prison did not fall within the definition of the 'public' and thus the legislation did not apply to patients like him. The court disagreed, however, and argued that 'public' was 'capable of meaning either the public in general or section of the public'[151] and thus that prisoners could be considered in this latter category. Therefore, the Act was not outside the competence of the Parliament.

Interestingly, despite finding that the legislation was within the competence of the Scottish Parliament, Lord Clyde indicated in his judgment that he did not consider the legislation be 'necessarily in its best or most appropriate shape.'[152] He noted that the legislation was passed using the emergency legislation procedure in order to deal with a perceived emergency and that since its passing there had been further reports and reviews on the area concerned. He therefore suggested that '[t]here may well be room for improvements in the present legislation.'[153] Lord Clyde's comments are interesting in that they operate as a signal to parliament of the court's

[148] *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) (Scotland) Bill* Case ID 2021/0079; *Reference by the Attorney General and the Advocate General for Scotland – European Charter for Local Self-Government (Incorporation) (Scotland) Bill* Case ID 2021/0080
[149] *Anderson v Scottish Ministers* (n42); *DS v HM Advocate* (n73)
[150] *AMI v Dunn* [2012] HCJAC 108; *Burns v Lord Advocate* [2019] CSOH 23
[151] *Anderson v Scottish Ministers* (n42), para 37
[152] Ibid, per Lord Clyde, para 75
[153] Ibid

concerns with the legislation without going as far as to setting it aside. His comments could be perceived as an attempt to engage in a dialogue with parliament, whereby he engages in judicial minimalism out of comity to parliament but indicates that such respect and minimalism is not necessarily unlimited.

The interpretive power was also used, as has been seen, in *DS v HM Advocate.* Here, the complainant argued that section 257A of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which required defendants accused of sexual offences to disclose to the court previous relevant convictions in order to rely on the victim's previous sexual history as evidence, was incompatible with their Article 6 rights. The court used section 101(2) to interpret the provision to 'read in' the power of judges to be able to direct juries about the appropriate way to deal with such evidence.

In *AMI v Dunn,* Lady Paton argued that the Vulnerable Witnesses (Scotland) Act 2004, on ordinary meaning, was compatible with Articles 6 and 8 ECHR. However, she claimed that if her reading of the legislation had been incorrect, she would have used Section 101(2) to interpret the legislation in this manner. A similar approach was taken by Lady Carmichael in *Burns v Lord Advocate.*[154]

It can be seen from the cases in which the courts have used their section 101(2) power, that they fall broadly within the areas that Alison Young considers appropriate for dialogue to occur. In all circumstances the rights-issue has been one that requires little content deference from the judiciary to the legislature. In addition, the solution to the *prima facie* rights-infringement has been relatively simple, or within the courts expertise to determine. The courts have therefore relied on their superior institutional capabilities to protect rights, while allowing the legislation to remain in place.

However, McCorkindale has identified a tendency in the Scottish Government's approach to the use of section 101(2) that places a potential risk to the scrutiny of legislation by parliamentarians after a Bill has been introduced. McCorkindale has found that the Scottish Government sees section 101(2) as 'an important card'[155] to play during the pre-legislative dialogue between the SGLD and the legal advisors to the Lord Advocate, Scottish Parliament and UK Law Officers. Where any of these bodies raise serious doubts about the Convention rights-compatibility of a provision of a Bill but where Government Ministers is not willing to

[154] [2019] CSOH 23, paras 55-60
[155] McCorkindale (n48)

make amendments to resolve the disagreement, the Minister's team will raise the prospect of the court making a section 101(2) interpretation as a way to convince the other party to give the Bill the benefit of doubt as to its legislative competence.[156]

This practice raises two concerns for resultant parliamentary scrutiny. Firstly, as mentioned earlier, there is a potential problem with presentation, which undermines democratic accountability. Where a Bill has been introduced with a provision which the Government explains will operate in a particular manner, but where the Government knows that it is possible that it may operate in a different manner, and in a manner that parliament nor the public may not necessarily support, the Government may be able to push through bills on false pretences. Such an approach raises clear issues for democratic accountability and constitutional propriety.[157] Secondly, and more relevant to our discussion of legislative rights review, is that the Government's ability to point towards section 101(2) to introduce legislation where Convention rights-compatibility doubts exist in combination with the lack of requirement for Ministers or the PO to provide reasons alongside their compatibility statements means that parliament is not given sufficient information to carry out effective scrutiny of the Bill on the basis of Convention rights. This is aggravated because there is no requirement to inform parliamentarians when a section 101(2) interpretation is made, which means that it is unlikely that they will be informed that legislation they considered was *prima facie* compatible with Convention rights was in fact not, and has been reinterpreted to apply in a different manner.[158]

Section 102(2)

Finally, s.102(2)(b) of the Scotland Act 1998 also may be exercised in a manner that is consistent with Young's account of dialogue.

S.102(2)(b) gives the court the power to show remedial deference to parliament. This may be for reasons of institutional competence, for example, where the solution to the legislative violation of Convention rights is complex and concerns a number of competing interests, or for reasons of democratic legitimacy and accountability. In this way, section 102(2)(b) works in a similar manner to those provisions that grant the power to parliament to determine the remedy for legislation that is contrary to rights in jurisdictions that are said to facilitate dialogue. This similarity was not lost on Lord Hope, who, while conceding that the provisions are not

[156] Ibid
[157] Mead, D., (2012). 'Talking about dialogue' *UK Const.L. Blog*, available at https://ukconstitutionallaw.org/2012/09/15/david-mead-talking-about-dialogue/, (Accessed 18.05.18)
[158] McCorkindale (n48)

identical, suggested that Section 102(2)(b) of the Scotland Act could act in a similar manner to section 4 HRA so that the court may indicate that legislation is contrary to rights whilst leaving it up to parliament to determine the appropriate legislative solution to resolve the incompatibility.[159]

Comparison between section 102(2)(b) SA 1998 and provisions that leave it up to the legislature to determine the appropriate response to a judicial declaration of incompatibility can only be taken so far. A crucial difference remains. The latter provisions operate as a constitutional counter-balancing mechanism in favour of the legislature, in that the legislature is free to retain the rights-infringing statute if it so chooses. Practice in states with such a mechanism suggest that such scenarios are rare, and it has been suggested that the tying of the HRA to the ECHR has largely nullified the open use of this power in the UK.[160] Nonetheless, the distinction remains.

The relatively few cases in which the courts have found that an ASP is incompatible with Convention rights means that there is not a large enough sample to draw reliable conclusions on whether the courts tend to favour using deferring to parliament on remedy under s.102(2)(b) when they have found an incompatibility.

Of the seven occasions that the court has found that an ASP is, according to ordinary statutory interpretation, incompatible with Convention rights, the judiciary has been able to find a Convention-compatible interpretation on two occasions.

On those occasions it has not been able to find such an interpretation, it has exercised its power to grant remedial deference to parliament on three occasions[161] and has once remitted the decision to the High Court of Justiciary.[162] Finally, in *Christian Institute,* as discussed in the final chapter, the Supreme Court considered that it was unnecessary for a s.102(2)(b) declaration to be made because the offending provisions had not yet come in to force and the Government had taken the decision to further delay their operation whilst it worked on a suitable remedy Additionally, in *Anderson,* where the court used s.101(2) to determine that the legislation was in accordance with Convention rights, Lord Hope indicated that if a

[159] The Rt Hon. The Lord Hope Of Craighead. (1999). 'The Human Rights Act 1998: The Task of Judges'. *Statute Law Rev 20(3),* pp185

[160] Elliot, M. (2013). 'The three dimensions of the relationship between UK law and the ECHR' *Public Law for Everyone Blog,* Available at https://publiclawforeveryone.com/2013/12/05/the-three-dimensions-of-the-relationship-between-uk-law-and-the-echr/ (Accessed 29/10/18)

[161] *Salvesen v Riddell,* (n74), *Cameron v Cottam* (no 2) 2013 JC 12 *& P v Scottish Ministers* (n41)

[162] *AB v HMA,* (n41)

Convention-compatible interpretation had not been made he would have exercised his s.102(2)(b) power to allow the parliament to cure the defect. It can thus be tentatively suggested that the courts will exercise remedial deference to parliament on the majority of occasions where an ASP has been deemed to be contrary to rights.

If the courts' use of s.102(2)(b) is to be considered capable of engendering dialogue and not merely proof of the division of powers between the courts and the legislature, then there must be deliberation between the two institutions. If the courts show remedial deference but neglect to give an indication of suitable legislative alternatives, then suggestions of dialogue are less defensible. However, if the judiciary gives reasons for finding the initial legislation incompatible with Convention and gives some indication as to potential legislative solutions, and parliament gives serious consideration to such judicial directions, then a productive dialogue can be observed.

In *Salvesen v Riddell*, which was the first instance that the court used its section 102(2)(b) power, the Supreme Court found that s.72(10) of the Agricultural Holdings (Scotland) Act 2003 violated the applicant's right to protection of his property.[163] It used its section 102(2)(b) power to suspend the decision for 12 months. Commenting on what was required to cure the statute of its incompatibility, Lord Hope stated:

> Any adverse effect on rights arising from tenancies to which sec 73 has been applied because the conditions set out in sect 72(10) were satisfied will need to be provided for. But I would leave that matter to the Scottish Parliament. Decisions as to how the incompatibility is to be corrected, for the past as well as for the future, must be left to Parliament guided by the Scottish Ministers. Both sides of the industry will need to be consulted, after the necessary research has been carried out and proposals for dealing with situation that respects the parties' Convention rights have been formulated. That process will take time, and the court should do what it can to enable it to be conducted in as fair and constructive a manner as possible.[164]

Lord Hope thus directed the parliament to what he considered to be the correct process by which the defect could be cured. However, apart from his reasons detailing why the statute had be incompatible with rights in the first instance, he remained silent on what would be required

[163] ECHR (n24) (Article 1, Protocol 1
[164] *Salvesen v Riddell* (n74) per Lord Hope, para 57

to ensure future legislation remained compatible with rights. In this judgment therefore, there was only a limited amount of direction.

In *Christian Institute v Lord Advocate* however, judicial direction was far more forthcoming. The case concerned the applicability of part 4 of the Children and Young People (Scotland) Act 2014 with, *inter alia,* Article 8 of the ECHR. In deciding to use their Section 102(2)(b) power to suspend the effect of the judgment in order that Ministers and parliament cure the lack of competence. Baroness Hale felt that '[i]t would not be appropriate for this court to propose particular legislative solutions.'[165] However, she continued by suggesting with a degree of specificity the exact provisions that the court considered would need to be reformed as well as hinting that minor changes to the act would be insufficient[166] By speaking directly to the Government and Parliament and giving a greater degree of detail about what the court would consider to be in violation or not in violation of Convention rights, the judgment in *Christian Institute,* opened the potential for a fruitful dialogue between parliament and the courts. Both *Salvesen* and *Christian Institute* will be considered in greater detail in the forthcoming chapters.

The potential for dialogue can also be observed in *P v Scottish Ministers.* In this case, the Outer House of the Court of Session found that the provisions of the Protection of Vulnerable Groups (Scotland) Act 2007 that required automatic disclosure of criminal convictions for those intending to work with vulnerable groups violated Article 8 ECHR. The court made an order under s.102(2)(b) suspending the effect of the judgment, except in relation to the petitioner, for a period of months in order that the defect could be corrected. In doing so, Lord Pentland acknowledged that '[i]t is not, of course, for the court to devise what it consider to be a scheme providing for sufficient safeguards; that is a matter for the executive and the legislature.'[167] However, similar to Lady Hale in *Christian Institute,* Lord Pentland went on to suggest a number of specific legislative responses that he would deem to be a justified interference with the Article 8 rights of those affected by the legislation.[168] The Scottish Government's response was The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 which amended the Bill much in line with what Lord Pentland had suggested. Again, Lord Pentland's extensive reasoning and suggestions, whilst leaving it up to parliament to determine the ultimate solution, appeared to an example of constitutional

[165] *Christian Institute* [2016] UKSC 51, per Baroness Hale, para 107
[166] Ibid
[167] *P v Scottish Ministers* (n41) per Lord Pentland, para 57
[168] Ibid

collaboration, with the courts determining that the Convention right had been violated whilst granting remedial deference to the legislature.

Part three conclusion

There is sufficient evidence from the cases examined above to demonstrate, at least, that Convention rights protection in Scotland is a joint enterprise between the courts and parliament. While courts have the ultimate authority to determine rights-questions, provisions of the Scotland Act 1998 and self-imposed restraint from the judiciary has ensured that parliament retains significant input with regard to the protection of Convention rights. Indeed, in some circumstances, for example where rights and interests conflict or where a rights-issue has not yet been determined by the ECtHR, parliament has scope to determine the content of Convention rights. Where courts have been less deferential on the content of Convention rights, they have nonetheless tended to respect legislative decision making, either by making a s.101 interpretation or by granting legislators remedial deference through s.102(2). However, as noted, if the institutional interaction observed in Scotland is to be described as dialogue, there must be evidence that the courts and parliament take into account and are capable of being influenced by the position of the other. Examples of this deliberation have been seen in some of the cases considered. First, when determining whether to exercise deference, the court takes into account the level and quality of debate at parliament including the extent to which the Convention right in question was discussed. The more seriously parliament takes the matter, the more deference the court will show. Second, if a court finds that an ASP is incompatible with rights but exercises remedial deference, the court should, in its judgment, give some indication to parliament of what is required to remedy the rights-violation. In response, the parliament should conduct an extensive consultation process and engage with all relevant interested parties, whilst paying close attention to the court's judgment. In this way, Convention rights are better protected whilst the policy response retains a sense of democratic legitimacy.

The above examples have shown that the courts have provided quite extensive suggestions as to how parliament should respond to their finding of incompatibility on some occasions but that they have been generally non-prescriptive on other occasions. In the final chapter of this thesis, the Government and Parliament's role in this court initiated dialogue will be considered. By considering two examples of legislative responses to a judicial finding of incompatibility, the way in which legislators have approached their role will be examined.

Overall conclusions

This chapter aimed to build on the previous two chapters by questioning the extent to which, in line with the theory considered in chapter one and in light of the assessment of practice of 'core' 'third way' Bills in chapter two, the Scottish model of rights protection could be seen to broadly fall within the 'third way' family.

It began by briefly sketching out the Scottish model of rights protection, largely established by the Scotland Act 1998. It noted that the Scotland Act 1998 shared many similarities with the 'third way' Bills in chapter two, particularly with its adoption of legislative reporting requirements. However at the same time, the Scotland Act 1998 differed in a key respect from the other Bills because it did not empower parliament to override judicial findings that legislation was incompatible with rights. Despite this, I argued that the Scottish model could still be considered through the 'third way' lens because weak-form review was sustained through a combination of internal and external pressures that encouraged the judiciary to respect and prioritise legislative contributions to Convention rights-questions when undertaking their supervisory role.

Part two of the chapter then considered the design and operation of features of the Scotland Act 1998 that I argued engender legislative rights review. Similar to the five bills considered in chapter two, legislative rights review tended to be most robust at the initial pre-introduction phase of the legislative process. Indeed, legislative rights review under the Scotland Act 1998 was particularly robust given that the Act requires that the Ministerial team, the PO, the Lord Advocate and the UK Law Officers are all involved in the process. Although this process leads to a real deliberative process amongst these various actors, in line with the observations made in chapter two, the process tends to be dominated by bureaucratic officials and thus largely conducted on the basis of judicial norms.

I argued that the robustness of the pre-introduction bureaucratic review also helped to undermine parliament's role in the process because it helps the government to reach a settled position on the Convention rights' consistency of its Bill and thus reduces the likelihood that parliamentary scrutiny has any tangible effect (i.e. through amendments) on Bills. The Scottish Parliament's ability to effectively scrutinise legislation on Convention rights-grounds is further undermined by factors similar to those discussed in chapter two. The Scottish Parliament's adoption of particular institutional Westminster features undermines the emergence of independent parliamentary voice on Convention rights-questions. The emergence of such a

voice is further undermined by the design of the Ministerial and PO reporting requirements, as Bills with positive certificates are not required to be accompanied with reasons, and thus do not give MSPs sufficient information on which to base their scrutiny. Although it may have improved the Convention rights experience and knowledge of a wider number of MSPs, the decision to 'mainstream' Convention rights-scrutiny through all parliamentary scrutiny committees, and not initially to adopt a specialist human rights scrutiny-committee, may also have undermined the ability of parliament as an institution to build human rights expertise and to develop a unique voice on Convention rights.

That said, despite these challenges, part two argued that legislative rights review under the Scotland Act 1998 does not collapse into the second-guessing of judicial decisions. This is because, even if pre-introduction review is largely based on judicial norms, there are large areas which touch on Convention rights where the courts are either silent or are explicit about the primacy of legislative judgement. Further, the very process of legislative rights review has helped to keep the number of judicial findings of incompatibility low, because it encourages legislators to more explicitly signal why they consider that legislation is compatible with Convention rights and this signal helps them to set the terms of any future Convention rights challenge. This latter conclusion will be explored further in the final chapter.

The findings in part two were further developed in part three of the chapter which considered the design and operation of the court's powers to review and strike down legislation on the basis of Convention rights incompatibility. It was argued that the UK Government's decision not to allow the Scottish Parliament to override judicial findings of incompatibility has an effect on the type of constitutional dialogue that is possible under the Scottish model. 'Third way' accounts that promote the model on the basis of its ability to harness constitutional disagreement over how rights should be protected in order to engender a societal debate about the meaning of rights will find less in the Scottish model to defend. Because it does not contain a mechanism that allows parliament to override judicial findings on Convention rights, the Scotland Act 1998 lacks an institutional mechanism through which institutional disagreement can be publicly and legitimately aired. Instead, institutional disagreement over Convention rights in Scotland is more likely to be manifested in subtler ways. For example, where legislators lean on the courts' lack of democratic legitimacy to introduce legislation in areas where the courts have had misgivings in the past but where the legislature considers that the legislative solution has popular support. The final chapter of this thesis indicates that this practice might be beginning to develop in Scotland. This form of dialogue is less likely to

engender a societal debate because s.31 of the Scotland Act 1998 dictates that the Scottish Government cannot openly pursue potentially Convention-rights conflicting legislation. Instead the Government must do so quietly, whilst arguing that it considers that the legislation is compatible with Convention rights.

However, whilst an open, contestatory form of dialogue may be less likely under the Scotland Act 1998, other normative benefits such as the better and more democratically legitimate protection of Convention rights are possible and have occurred under the Scottish model of rights protection. This is because mechanisms for, in Young's words, constitutional collaboration and constitutional counter-balancing exist in Scotland, notwithstanding the lack of a parliamentary override. A combination of the courts, by their own volition, deferring to legislators when deciding particular Convention rights-questions and features in the Scotland Act 1998 that encourage the courts to work with parliament to ensure that legislation respects rights ensures that there are sufficient opportunities for constitutional collaboration and constitutional counter-balancing under the Scottish model.

A review of twenty-one challenges to ASPs on Convention rights-grounds found that the courts have generally been highly deferential to legislative decision-making. Deference is particularly shown where the courts consider that parliament is better equipped for institutional or democratic reasons to resolve the rights-question, for example where the rights-issue requires the balancing of rights and interests or where the resolution has budgetary implications, or where the rights-issue is watershed. Importantly, there is also evidence of increased deference to legislators where the courts are satisfied that legislators have properly considered questions of proportionality during the legislative process. This final form of deference allows the courts to influence the behaviour of legislators by providing incentives for taking Convention rights seriously during the legislative process.

On the relatively few occasions that the courts have considered that legislation was *prima facie* incompatible with Convention rights, the courts have again shown respect for legislative decision-making. Twice, the courts have been able to save the ASP from judicial set-aside by making a Convention rights interpretation under s.101(2). On the other five occasions, the courts are willing to use their powers under s.102(2) to defer to parliament on the Bill's remedy. Both of these powers have been criticised on the basis of constitutional propriety but undoubtedly allow the courts and parliament to collaborate in ensuring that the government achieves its policy goals whilst Convention rights are respected. S.102 further serves dialogue

where the courts are clear about their reasons for finding the legislation incompatible with Convention rights and, without being overly prescriptive, making some suggestions as to how the incompatibility might be resolved. Parliament is then required to respond by embracing the various forms of legislative review, whilst keeping the court's judgment keenly in sight. The extent to which parliament has been able to achieve this vision will the focus of the next and final chapter of this thesis – which will review the legislative sequels to findings of incompatibility in *Salvesen* and *Christian Institute.*

Chapter 4: Case Studies

Introduction

The previous chapter developed my core argument that the Scottish model of rights protection can, and should, be considered alongside bills of rights that adopt variants of the 'third way' model. To do so, its focus was necessarily broad. I began by setting out the design of the Scotland Act 1998 before analysing the operation of Scotland's model on the basis of my two core features of the 'third way' model – legislative rights review and democratic dialogue operating through the alternative route of judicial deference. Whilst the obtaining of a broad impression was necessary in order to demonstrate how the different features have tended to work in practice in Scotland, two important qualities that are necessary to determine whether the Scotland Act 1998 operates as 'third way' Bill of Rights were not examined at that stage.

The first was consideration of how parliament responds to a judicial finding that an ASP is incompatible with Convention rights. I argued in the previous chapter that s.102(2) allows the court to collaborate with parliament in ensuring that legislation protects Convention rights, by separating judicial review from judicial remedy. Where the court considers that the legislature has overstepped the mark on Convention rights-grounds, it can nonetheless respect legislative decision making by giving parliament the time and space to determine the appropriate legislative solution. However, the chapter did not consider how parliament has actually responded in these cases. To understand this is important for assessing Scotland's 'third way' model because it will tell us whether s.102(2) is simply a feature of constitutional collaboration, with the courts determining the scope of the Convention right and parliament giving effect to that right in legislation or whether, alternatively, legislative sequels can be used as a method of constitutional counter-balancing.

The second quality, and linked to the first, that this chapter will explore further is how Scotland's model of ensuring that legislation protects Convention rights operates *as a whole.* Whilst the previous chapter demonstrated how legislative rights review and judicial review have generally operated in Scotland – how these two forms of Convention rights protection have *interacted with one another* and thus *how the whole of the Scottish model operates in practice* has yet to be fully explored. By gaining an insight into how the different institutions engage with each other, including by adapting their own approach in response to the approach

taken by the other, a more complete picture of Scotland's 'third way' model will begin to emerge.

To further enhance our understanding of the above features of Scotland's system of Convention rights protection, this chapter will consider the legislative episodes, from original enactment, to judicial strike down, to legislative response, of two ASPs that were found by the courts to be incompatible with Convention rights.

The chapter will therefore take the form of two case studies. The first case study will reflect on the legislative response to *Salvesen v. Riddell*[1], which found that s.72(10) of the Agricultural Holdings (Scotland) Act 2003 was incompatible with the petitioner's and others' rights to property under Article 1 Protocol 1 of the Convention. The second case study will reflect on the legislative response to *Christian Institute v. Lord Advocate*[2] which found that the information-sharing provisions of the Children and Young People (Scotland) Act 2014 were incompatible with the applicants' and others Article 8 ECHR rights. Both case studies will consider the legislative episodes chronologically, from the introduction of the rights-infringing provision, to the judicial finding of incompatibility, to the legislative sequel and beyond.

Legislative Rights Review

Analysis of the two case studies will give further insights into Scotland's 'third way' model. In terms of legislative rights review in Scotland, it will be argued that each case study demonstrates in different ways how gaps in design of the pre-introductory reporting requirements can lead to Convention-rights violating provisions being missed during the legislative process.

The provision of the Agricultural Holdings (Scotland) Act 2003 that was found by the Supreme Court to be in violation of A1P1 was introduced as an amendment at Stage 2 of the legislative process. This means that the amendment was not subject to same bureaucratic competence checks that it would have been had it been in the original bill. The finding of incompatibility in *Salvesen* therefore demonstrates an important gap in pre-enactment Convention rights review in Scotland – because a bill's provisions that have been introduced as an amendment are not subject to the full process of legislative rights review.

[1] [2013] UKSC 22
[2] [2016] UKSC 51

Analysis of legislative rights review prior to the enactment of the Children and Young People (Scotland) Act 2014 highlights another defect in the design of the s.31 statements of competence – albeit this defect has already been highlighted. It will be shown that MSPs did engage in extensive Convention rights-based scrutiny of the Children and Young People (Scotland) Bill. However, parliament's scrutiny originated from expert evidence to the Lead scrutiny committee rather than from the non-reasoned positive statements issued by the Minister and the PO. Whilst the lack of information accompanying the positive certificates was ultimately not a barrier to further scrutiny in this case, the example adds to the already strong base of evidence that the statements' of competence are failing to engender one of their anticipated aims – to act as a catalyst for scrutiny of bills on Convention rights-grounds by parliamentarians. Thus, the evidence from the Children and Young People (Scotland) Bill's legislative history adds further authority to the argument that s.31 statements should be accompanied with reasons in order to assist parliament in undertaking it's scrutinising role.

Review of the parliamentary scrutiny of the Children and Young People (Scotland) Bill will tell us another familiar story about parliamentary rights-scrutiny under 'third way' models. Although in many ways parliamentary scrutiny of the Bill bucked the trend in that Convention rights did form an important plank of parliamentarians' scrutiny, the familiar Westminster factors that undermine the *effectiveness* of parliamentary scrutiny can be readily seen.

At the same time, in relation the Bill's legislative sequel, it will be shown how a change in parliamentary dynamics can strengthen parliament's role. A change in parliamentary arithmetic meant that the lead committee was able to delay the passage of the Bill – which ultimately contributed to its demise. The legislative sequel to the 2014 Act might therefore provide an important counter-example to the overall impression that parliamentary rights review has tended to be ineffective in Scotland and other states with 'third way' Bills of Rights.

Dialogue: Deference

The case studies also supply some important insights as to whether the relationship between the court and parliament may been seen to be dialogic, in line with Young's account of the theory. In terms of showing deference to the Scottish Parliament in the settling particular Convention rights-questions, the very selecting of these two cases - as examples where the courts have considered that the Act was incompatible with Convention rights - indicates that the courts exercised less deference here than in some of the other examples discussed in chapter three. It would be wrong therefore to use as these case studies as a snapshot of the court's

general approach to deference when reviewing legislation on Convention rights-grounds. What these examples can add to our understanding of the courts approach to deference however, is to understand *why* the courts did not exercise deference in these cases.

In *Salvesen,* the court found that the legislation disproportionately interfered with the right to property. The finding of incompatibility was in spite of the courts' acknowledgment that legislatures generally have space to interfere with this right in the pursuit of a legitimate aim. However, at both instances the court considered that the legislature had stepped beyond the bounds of this space by failing to demonstrate the provision's proportionality. *Salvesen* may therefore be seen as a textbook example of the courts scorning the legislature for failing to take Convention rights seriously. As was discussed in the previous chapter, the exercise of (or failure to exercise) deference in this manner can be interpreted as an attempt by the courts to improve the quality of legislative rights-scrutiny by incentivising proper engagement with the process.

On the other hand, the Supreme Court's finding of incompatibility in *Christian Institute* did not relate to a substantive feature of the legislation. The finding of incompatibility was a result of the decision of the Scottish Government to include safeguards in the extraneous guidance to the rather than the Bill itself, which meant that the Court found that the interference was not 'in accordance with law'. Such questions are not typically areas where courts are likely to show deference.

Dialogue: Legislative sequels

In addition to adding to our insights about the courts' approach to deference when reviewing ASPs on Convention rights-grounds, the chapter will also explore parliament's remedial approach to legislation which has been found by the courts to infringe Convention rights. In both *Salvesen* and *Christian Institute,* the court indicated a willingness to suspend the effect of the judgment under s.102(2) of the Scotland Act 1998 in order that the legislature was able cure the defect. There is therefore a clear willingness on behalf of the court to work collaboratively with legislators to protect Convention rights – the court making the finding of incompatibility and the legislature curing the defect. Further, in *Christian Institute,* the Supreme Court helped to initiate a dialogue between itself and parliament by elaborating further on the aspects of the legislation that would require amendment in order to cure the incompatibility. From the court's side at least therefore, there is a clear willingness to work

with parliament to ensure that their judgments are not interpreted as 'red lights' to democratic legislation but rather 'amber lights' to ensure that legislation better protects Convention rights.

Where these examples might indicate that the Scotland's 'dialogic' model is defective however is in terms of the immediate legislative sequel. In neither case, can the 'win-win' benefit of dialogue championed by some scholars be observed. In *Salvesen,* legislators felt severely constrained by the judgment. They ultimately developed a proposal which they did not seem particularly happy with and which caused significant consternation amongst some of those whom it affected, the public and in the press. In *Christian Institute,* although a result of a number of factors not necessarily resulting from the court's judgment, the Government ultimately felt that it could not find a suitable legislative solution and abandoned the policy in its legislative form.

Thus the idea of constitutional dialogue - where the courts help parliament to formulate legislation that achieves policy goals but better respects Convention rights - is not observable in either of these examples. This of course does not mean that this relationship might not be achievable in other contexts. However, it at least demonstrates that the idea that there is never a trade off in terms of Convention rights protection and the pursuit of a Government's democratic agenda is not necessarily realistic.

That said, the longer-term response of the Scottish Government to the *Salvesen* judgment will be seen to be more promising in terms of the dialogue between the courts and legislators. While the *Salvesen* judgment initially discouraged the Scottish Government from legislating further in the area of land reform, eventually the Government re-entered the legislative arena with a new approach to its human rights-based justification of its legislation. As I will show, the Government's new approach more explicitly justified the legislative aim in human rights terms, including by arguing that the legislation restricted the Convention rights of some in order to protect the broader human rights of others. I will argue that this approach has the potential to strengthen the Government's role in helping to settle Convention rights-questions. Indeed, the Scottish Government's approach to the Land Reform (Scotland) Act 2016 can be interpreted as a delayed learning experience from the *Salvesen* judgment - which undoubtedly, in its finding of incompatibility, was influenced by the failures in parliamentary Convention rights-scrutiny processes resulting from the offending provision being a late stage amendment.

Overall, the findings of the case studies in this final chapter of the thesis will help to add further colour to our understanding of the operation of Scotland's 'third way' system of rights

protection. The case studies confirm some of the findings of the early chapters of the thesis whilst adding nuance to others. Additionally, the case studies add an additional layer of understanding to argument, because they reflect on the operation of the model as whole and the nature of legislative sequels in greater detail than in previous chapters.

Case Study 1 - What does the response to *Salvesen v. Riddell* say about the operation of the 'third way' model in Scotland?

Introduction

Salvesen v. Riddell[3] was the second occasion on which an Act of the Scottish Parliament was found by the courts to be 'not law' due to its incompatibility with Convention rights. In this case, s.72 of the Agricultural Holdings Act 2003 was found by the Court of Session, and laterally the Supreme Court, to be incompatible with Article 1 of the First Protocol to the European Convention on Human Rights which protects the peaceful enjoyment of property. However, rather than immediately set-aside a statutory provision that had been in force for around ten years at the time of the judgment, the Supreme Court decided to, in accordance with s.102(2)(b) of the Scotland Act 1998, suspend the effect of its judgment for a year in order that the legislative defect could be cured by the Scottish Parliament.

The focus of this case study is to consider the response to the judgment in *Salvesen.* It will examine the steps the legislature took to resolve the incompatibility and consider how the judgment and its response were received by the press, stakeholders, academics and the wider public. The subsequent response of the legislators to that reaction will also be examined. Events will therefore be considered (broadly) chronologically, in order to demonstrate how different legal and political pressures pushed legislators in different directions. It is hoped that, by demonstrating the interplay between different constitutional and extra-constitutional forces, a more nuanced account of rights protection in Scotland can be revealed. One where strong-form review casts a long shadow over the manner in which Convention rights are discussed but where there is more room for political contestation than it is sometimes assumed.

In the aftermath of *Salvesen,* it will be argued that the immediate objective of the Scottish Parliament (led by the Scottish Government) was to remedy the legislation in a manner that would do least damage to the overall operation of the legislation whilst ensuring that the judgment was complied with. However, the Scottish Parliament's response, whilst accepted as necessary by most, was criticised in its failure to recognise the right of compensation to general partners who had their tenancy abolished as a result of the order, eventually leading to further legal action.[4] It will be argued that the short-term response to *Salvesen* demonstrates that strong-form constitutional review that forces parliament to alter legislation against its wishes

[3] [2012] CSIH 26; [2013] UKSC 22
[4] *McMaster v Scottish Ministers* [2018] CSIH 64

can generate gaps in political accountability. Further, the short-term response to *Salvesen* suggests that, in this case at least, although the protection of Convention rights in Scotland can be said to be a shared endeavour, there was little room for an overlap in powers between the different institutions of government. The courts were responsible for the determination of the boundaries of Convention rights, while parliament was responsible for ensuring that judicially defined rights were protected in coherent law. That said, the courts' judgment in that case might be seen to be an example of constitutional counter-balancing, where the courts scorned the legislature for its failure to properly take into account Convention rights during the legislative process. Such a failure stemmed from the origin of the defective provision because it was introduced as a late stage amendment and which meant that it was not subject to the same pre-enactment political checks on competence than it would have been had it been included in the original bill. On this reading, the judgments of both the CSIH and the Supreme Court can be seen to be dialogic because, by scorning the legislature for their failure to properly considering Convention rights during the initial legislative process, the courts sent a signal to parliament that Convention rights-engaging legislation which did not demonstrably take rights seriously would be set-aside by the courts. Such an approach arguably influenced the approach of the Scottish Government in relation to future attempts to legislation in the area of land reform.

The chapter will therefore consider the effect of the *Salvesen* beyond the immediate legislative sequel. It will be argued that, in the years after the judgment, the Scottish Government felt constrained in its plans to secure further land reform, leading it to drop more radical proposals. However, widespread discontent with the current system of land reform and moral outrage at Government's response to *Salvesen*, amongst other factors, meant that the SNP Government was pressured to advocate for more radical reforms. The need to justify more radical proposals required the Scottish Government and Parliament to change the manner in which they conceived of and discussed human rights, linking interferences with property to the protection of social and economic rights. In doing so, parliament potentially developed a novel approach to rights-protection in Scotland. By speaking explicitly in the language of rights, parliament communicated directly with the court in the hope that it could convince it that any incursions into Convention rights were necessary and proportionate. It remains to be seen whether the courts will accept this new approach, although there is evidence from previous case law that they might. If the courts are open to this approach, then claims made in previous chapter about how the courts can incentivise high quality legislative rights reasoning by varying the levels of

deference they are willing to show to the legislature on the basis of the quality of legislative rights review can be more clearly evidenced.

The Judgment in Salvesen v. Riddell

The Agricultural Holdings (Scotland) Bill was initially proposed in response to a common practice that had grown in relation to agricultural tenancies in Scotland. Landlords, not wishing to grant tenants the full set of rights available under the Agricultural Holdings (Scotland) Act 1991, only offered to lease land to tenants via limited partnerships.[5] This availed the landlords of the requirement to grant tenants certain rights, including security of tenure. The Bill therefore intended to enhance the rights of tenants by abolishing this form of tenancy and replacing it with a statutory form of limited duration tenancy which gave tenants security of tenure. However, in response to such plans, and to parliamentary remarks that hinted that there might be some sympathy towards granting tenants an absolute right to buy,[6] many landlords issued notices cancelling existing leases as the Bill was still being debated in order to evade the effect of the proposals. Frustrated by the cynicism of this move, Ross Finnie MSP, Minister for Rural Affairs, introduced an amendment at Stage 2 that translated any limited partnership tenancies that were dissolved between 16th September 2002 and 30th June 2003 into full tenancies under the 1991 Act. This meant that landlords that issued a termination notice between these dates were placed in a different, inferior, position to those that issued a termination notice after the legislation had come into force.

In *Salvesen v. Riddell*, the question was whether the difference in treatment was justifiable on Convention rights-grounds. The Scottish Government justified the difference in treatment on the basis that section 72 of the Act was an anti-avoidance measure. The Inner House rejected this conclusion and instead quoted ministerial statements in which the acts of the landlords were described as 'immoral' to determine that the purpose of the provision was to punish landlords.[7] The punitive nature of s.72 meant that the legislation did not pursue a legitimate aim. Further, such an aim was not related to the overall aims of the legislation. Therefore, the provision was contrary to Article 1 Protocol 1 of the Convention.[8]

Whilst agreeing that the provision was contrary to A1P1 of the Convention, the reasoning of the UK Supreme Court was slightly different. Lord Hope, who wrote the lead judgment, was

[5] Ibid (n3) para 8
[6] As quoted in Ibid, para 9
[7] [2012] CSIH 26, para 90
[8] Ibid, 97

clearly troubled by some of the language used in the parliamentary process. Commenting on the parliamentary debate, he suggested that one 'might be forgiven for thinking that it displayed a marked bias against landlords'[9] who '[a]s a minority group… however unpopular, are as much entitled to the protection of Convention Rights as everyone else.'[10] However, he was at pains to note that statements made during the parliamentary process were not to be taken as parliamentary intent, which only the legislation itself could be.[11] Lord Hope was satisfied that the provision's aim, an anti-avoidance measure on a Bill that advanced social and economic policies, was legitimate. However, he argued that there was no logical justification for the difference in treatment of landlords that served dissolution notices before the legislation came into force and those that served notices after.[12] As such, the legislation was 'discriminatory' as well as 'unfair and disproportionate' and the provision was contrary to A1 P1 of the Convention, although he limited his finding to s.72(10) of the Act.[13]

In determining the appropriate remedy, Lord Hope noted that '[a]ny adverse effect on rights arising from tenancies to which sec 73 has been applied because the conditions set out in sec 72(10) were satisfied will need to be provided for.'[14] However, beyond that and some general directions as to the process of how the law should be changed,[15] he decided to leave the matter to parliament. He did so by exercising the court's power under s.102(2)(b) of the Scotland Act 1998. He gave the Parliament one year to remedy the defect but indicated the court may be open to extending that time-period if required.[16]

Failure of Legislative Rights Review

By drawing on the work of McCorkindale and Hiebert, the previous chapter argued that the provisions in the Scotland Act 1998 that are designed to encourage pre-enactment scrutiny of Bills by the Government and parliamentarians were working well – at least in relation to bureaucratic pre-introduction review. An obvious question arising from the *Salvesen* case therefore, is why was the defective provision not caught during these checks on compatibility? The answer to this question is that, for the most part, the provision was not subject to these compatibility checks. S.31 of the Scotland Act 1998 requires that the Person in charge of the

[9] *Salvesen* (n3) para 38
[10] Ibid
[11] Ibid, para 39
[12] Ibid, para 44
[13] Ibid, para 45
[14] Ibid, para 57
[15] Ibid
[16] Ibid

Bill and the PO issue a compatibility statement 'on or before introduction of the Bill in Parliament[.]' There are no requirements that either the person in charge of the Bill or the PO provides a compatibility statement again at the end of the legislative process. The result of the design of s.31 is that any amendments that are made during the legislative process, as s.72(10) of the Agricultural Holdings Act 2003 was, are not subject to the same compatibility checks as the provisions in the original Bill. The failure for the incompatibility to be spotted during the legislative process was therefore partly as a result of a loophole in the design of section 31 SA.

Of course, it could be argued that, even if amendments are not subject to executive pre-introduction rights review that parliament should have been capable of spotting the Convention rights implications of the Government's amendment. However, as explained in the previous chapter, individual parliamentarians are generally ill-equipped to spot potential Convention rights inconsistencies of their own accord. The lack of ability of parliamentarians to spot potential Convention rights inconsistencies with legislation is a result of numerous factors. Most importantly for the present context, individual parliamentarians and parliament as a whole lacks the institutional expertise to independently scrutinise legislation on Convention rights-grounds. Most MSPs are not legal experts and at the time of the passing of the Agricultural Holdings Act 2003, no specialist human rights committee had been established in the Scottish Parliament. The previous chapter demonstrated that these issues can be assuaged where human rights and legal experts and potential human rights victims of the legislation communicate concerns about the legislation's impact on Convention rights during the legislative process. However, such concerns tend primarily to be heard at Stage 1 of the legislative process, during the lead committee's evidence sessions. Again therefore, it appears that the introduction of the defective provision came too late in the legislative process for parliamentarians to be able to identify the issue.

One final possibility for the Bill's incompatibility to have been spotted would have been during the four week period in which the Law Officers may refer the Bill to the Supreme Court on competence grounds. Indeed, had one the Law Officers referred the Bill, the Bill and its subsequent invalidation would not have been able to do the damage it did to those it affected in the subsequent ten years. However, discussed in the previous chapter, neither the Lord Advocate nor the UK Law Officers appear to have been minded so far to refer an ASP to the Supreme Court on the basis of Convention rights-compatibility. McCorkindale and Hiebert's research suggests that the UK Law Officers' teams (particularly the Legal Secretariat to the Lord Advocate) play their biggest role in terms of Convention-rights based scrutiny of Bills,

during the pre-introduction deliberations.[17] Their analysis also suggests that the political incentives for the Lord Advocate in the making of a defensive reference are low.[18] On the other hand, the UK Law Officers have thus far been much more concerned about the devolved/reserved competence boundary than they have been about Convention rights.[19] Nonetheless, the example above demonstrates that the Law Officers perhaps should be more vigilant of ASPs were there have been major amendments during the legislative process, in the acknowledgement that such provisions have not gone through the same competence checks as bills when introduced.

The finding of incompatibility in *Salvesen* therefore demonstrates a clear gap in the executive and parliamentary scrutiny of legislation on Convention rights-grounds. An amendment to s.31 so that both the PO and the Minister are required to issue a statement of compatibility at the end of the parliamentary process (or at least, after Stage 2) could potentially close this gap in accountability. Alternatively, the Equalities, Human Rights and Civil Justice Committee could make the scrutiny of amendments to Bills a key part of its work.

Immediate Reaction

(a) Press

Despite *Salvesen* being only the second occasion (and the first by the UKSC) on which an ASP was struck down on the basis of Convention rights incompatibility, newspaper reports of the decision tended to focus on the effect of the decision on land law and not on its constitutional implications.[20] Subsequently, reports focused on the tragic story of the respondent Andrew Riddell, who committed suicide a few weeks before he was due to be evicted as a result of the ruling.[21] Most articles did not pass comment on the judgment itself.

[17] McCorkindale, C. & Hiebert, J.L. (2017), 'Vetting Bills in the Scottish Parliament for Legislative Competence', *Edin.L.R. 21:3*, p341-350
[18] Ibid, p349
[19] *The UK Withdrawal from the European Union (Legal Continuity) Bill – A Reference by the Attorney General and Advocate General for Scotland* [2018] UKSC 64; *Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) (Scotland) Bill* Case ID 2021/0079; *Reference by the Attorney General and the Advocate General for Scotland – European Charter for Local Self-Government (Incorporation) (Scotland) Bill* Case ID 2021/0080
[20] 'Court of Session backs landlord in quit case' *The Herald* (16 March 2012); 'Court of Session ruling adds to tenant farmers fears' *The Herald* (30 April 2012)
[21] Dinwoodie, R. 'Farm Tragedy: Row over land reform pledge, *The Herald* (10 October 2012); O'Leary, D. 'Land fight farmer found dead after final harvest', *The Scotsman* (05 October 2012); 'Farmer Commits Suicide after Losing legal battle over land', *Daily Record* (06 October 2012)

Only one, an article by Robbie Dinwoodie in the Herald on the 10th October 2012, indicates that there was serious discontent with the court's judgment. It quotes Angus McCall, chairman of the Scottish Tenant Farmer's Association (STFA), who expressed his 'incredulity' over speculation that the SNP Government might not appeal the decision.[22] Further, it noted that the Government and the 'land reform lobby' were 'shocked' by the decision, quoting land Andy Wightman who stated that:

> It is right that human rights are observed and that laws are subject to judicial intervention. Unfortunately in this case, not enough was done early on to prevent landowners circumventing the law.
>
> Attempts to do so retrospectively have now proved unlawful. It is now time for the Scottish Government to decide whose side it is on in the unequal class struggle between landlords and tenants.[23]

Even in Wightman's comments however, criticism seems to be reserved for the Government, present and past, for potentially refusing to appeal and for failing to prevent 'landowners circumventing the law'. There is no ire directed towards the court for coming to decision that it did. Indeed, Wightman explicitly accepts the need for judicial oversight of Scottish legislation.

A more strongly worded statement came from the STFA, who in a press release on the 27 November 2013 noted that many tenants 'find it ironic that they now face losing their homes and businesses as a result of European court legislation designed to protect basis human rights.'[24] However, for Cochrane, writing a few years after the judgment, at fault was 'a piece of cack-handed legislative draughtsmanship by the Scottish Government's lawyers'.[25]

Therefore, while a number of media reports and commentators expressed dissatisfaction with the result and sympathy with the tenants, there seems to be a broad acceptance of the legitimacy of the courts' decision. The low-key response of the media and the general tendency to blame the Government and not the courts for the decision might have suggested to the Scottish

[22] McCall in Ibid
[23] Wightman in Ibid
[24] Scottish Tenant Farmers Association News Release 'Salvesen v Riddell Legal Fix Must Not Create More Casualties' STFA (27 November 2013); available at http://www.tfascotland.org.uk/author/tfadmin/page/13/ (Accessed 08/07/19)
[25] Cochrane, A. 'There's more to the Stoddart case than just lairds versus tenants' *The Telegraph (*22 November 2015), available at https://www.telegraph.co.uk/comment/12010173/Theres-more-to-the-Stoddart-case-than-just-laird-versus-tenant.html (Accessed 13/06/19)

Government that it would lack popular support if it decided to radically depart from the judgment in its legislative sequel.

The reaction of the press and campaigners to the *Salvesen* judgment gives further evidence to the conclusion in the previous chapters about the lack of controversy that the courts supervisory role has in Scotland. Even where the courts set-aside legislation to protect the rights of, in Lord Hope's language an 'unpopular minority group', there was no observable backlash against the courts' powers. The reaction also says something about the broader Convention rights dialogue that occurs in Scotland. If, the press and campaigners do not generally feel that it is their place to engage with or criticise the courts' Convention rights decisions, then democratically accountable actors are less likely to feel legitimised to take issue with the judgments either. As shall be seen, this has an effect on the legislative response, because legislators will feel greater pressure to strictly abide by the terms of the court's judgment.

The expectation on the Government to respond to the judgment in this manner can also be seen by the reaction of backbench MSPs.

(b) Parliamentarians

Salvesen was not discussed a great deal in parliament, with only a few MSPs making mention of it. Overall, most MSPs expressed regret[26] that the Inner House and the Supreme Court came to the conclusion that they did, without necessarily criticising the judgments. Perhaps the strongest critique was from David Gibson MSP, who during Stage 1 of the Agricultural Holdings (Amendment) Scotland Bill claimed that the judgment meant that the law was 'sending out the wrong messages to wealthy and powerful landlords.'[27] Most other discussion of the case focused on the Government's plans to remedy the legislation, focusing on the need for consultation[28] and to ensure that advice from the Supreme Court about re-considering both sections 72 and 73 of the Act was being followed.[29] In a question that hinted to the long-term lessons that would be learned from the judgment (see below), Roderick Campbell MSP asked the Cabinet Secretary for Rural and Environmental Affairs Richard Lochhead MSP the lessons

[26] Jim Hume MSP, SP OR 28 Mar 2012, Col 7780 ; David Gibson MSP, SP OR 28 Mar 2012, Col 7776; Richard Lochhead MSP, SP OR 30 Apr 2013, Col 19116; Claire Baker MSP, SP OR 30 Apr 2013, Col 19116
[27] David Gibson MSP, SP OR 28 Mar 2012, Col 7776
[28] John Scott MSP, SP OR 30 Apr 2013, Col 19117
[29] Claire Baker MSP, SP OR 30 Apr 2013, Col 19116

that could be learned from the decision, focusing in particular on 'the importance of the proportionality test'.[30] To which the Cab Sec responded:

> In relation to the ECHR and light of the judgment, it is clear that ministers must carefully define and articulate the public interest, balancing that with the safeguarding of individual rights. As the judgment illustrates, the court took the view that Parliament overstepped the mark in trying to prevent an avoidance measure. The court thought that the steps that were taken were disproportionate. We have to strike a careful balance, but I am sure that the Parliament wants to put the public interest first. How we do that will determine the extent of our success in taking in the issue forward.[31]

Therefore, the position of the Government seems to be an acceptance that Parliament was at fault for failing to effectively articulate its policy goals in relation to the legislation. The judgment itself, despite suggestion by some academics that it overstepped the mark both in its failure to grant the legislature appropriate deference and in its scathing criticism of ministerial comments,[32] is not criticised. This, again, suggests that Scottish Parliamentarians broadly accept the Court's supervisory role in relation to, *inter alia*, Convention rights. Although it would be unwise to make an overarching conclusions on the basis of this one example, the response of MSPs might also provide some evidence that Scottish Parliamentarians do not feel equipped or consider it appropriate that the courts' interpretation Convention rights could be wrong.

I noted in the previous chapter that forms of constitutional dialogue that encourage open disagreement between the courts and parliament over the interpretation of rights are unlikely to come into fruition in Scotland. This is because parliament lacks the institutional mechanism, such as a parliamentary override, to openly contest judicial findings of incompatibility. Indeed, as chapter two demonstrated, even in states where such an override exists, but judicial norms are strong, for example Canada and the UK, politicians do not feel like openly disagreeing with the courts on rights is an option that is politically open to them. That MSPs were generally accepting of the courts' judgment in *Salvesen* is therefore unsurprising. The reaction of MSPs to the *Salvesen* therefore demonstrates the *strength* of strong-form review in Scotland – given

[30] Roderick Campbell MSP, SP OR 30 Apr 2013, Col 19117
[31] Richard Lochhead MSP, SP OR 30 Apr 2013, Col 19117
[32] McHarg, A. (2012). 'The Dog that Finally Barked: Constitutional Review under the Scotland Act', *UK Constitutional Law Association*, Available at https://ukconstitutionallaw.org/2012/06/26/aileen-mcharg-dog-that-finally-barked-constitutional-review-under-the-scotland-act/ (Accessed 08/07/19)

that, where the courts do use their powers to set-aside legislation on Convention rights-grounds, in the short term at least, legislators feel bound to closely abide by the decision.

(c) Academia

Academic response to the judgment was varied. While most expressed sympathy for the tenant farmers who were dispossessed as a result of the judgment, several commentators placed the blame solely at the feet of legislators. When the legislation was initially passed, Fox suggested that the inclusion of s.72 was a 'knee-jerk reaction' which meant that the legislation as it was passed was a 'very different animal to the Bill which Ross Finnie introduced'.[33] Carr described s.72(10)'s breach of A1P1 as 'patent'[34] and considered that '[c]onfirmation that the impugned provision was in violation of the Convention – and clearly so – [was] not surprising'.[35] Further he admonished the failure of the legislature to spot the incompatibility despite several pre-enactment checks:

> Some cover might be found in the convoluted drafting of the section, but it is hard to resist the conclusion that the safeguards operated as an ineffective rubber-stamping exercise, or alternatively people were asleep at the wheel. By any standard this was not the Parliament's finest hour in terms of legality.[36]

He conceded that it was correct that the courts should exercise a large degree of deference to the legislature in relation to A1P1 but 'provisions which are unfair, disproportionate and lacking in logical justification are outwith the parameters of the legislature's discretion'.[37]

Similarly, Campbell criticised the decision of the Minister to suggest that he had 'not yet closed [his] mind' to extending anti-avoidance provisions planned for future tenancies to existing limited partnership tenancies. Campbell suggested that it was 'unsurprising'[38] that this led landlords to issue dissolution notices and that the judgment 'ought to serve as a reminder to Ministers that politically charged rhetoric when speaking to legislation may well produce critical juridical effects in subsequent litigation about that legislation.'[39] Maxwell also placed

[33] Fox, A (2003), 'How the Leopard Changed it's Spots', *Journal of the Law Society of Scotland 48(5),* Available at http://www.journalonline.co.uk/Magazine/48-5/1000027.aspx#.XSMugOhKjIU, (Accessed 08/07/19)
[34] Carr, D.J. (2013) 'Not law (but not yet effectively not law)'. *Edin. L.R. 17(3),* p375
[35] Ibid, p371
[36] Ibid, p375
[37] Ibid
[38] Campbell, K. (2017). 'At the Intersection of Scottish Agricultural History and Constitutional Law: *Salvesen v. Riddell* and the Legislative Competence of the Scottish Parliament', *Statute Law Review 38:3, p300*
[39] Ibid, p309

the blame at the feet of the Scottish Government, consistently describing the provision as the Scottish Government's 'mistake'.[40]

On the other hand, some scholars criticised the judgments of the Inner House and the Supreme Court as being insufficiently deferential to parliament and for failing to recognise the rights of tenants were also at stake. Combe acknowledged that while the provision was not drafted perfectly, the wide margin of appreciation afforded to domestic states for regulating property by the ECtHR should have been passed on to the legislature. The courts should therefore have accepted the provision unless it was 'manifestly without reasonable foundation',[41] a test the Combe implied would not be met in this circumstance.[42] His argument is worth looking at in more detail,

> [O]ne might try to extrapolate that in the context of the 2003 Act the Scottish Parliament felt those who sought to remove (presumably productive) land from tenanted farming were not necessarily worthy of unfettered control of something valuable to society. Whilst landowners who served notices on 3 February 2003 did not act to avoid any existing law, their conduct could be deprecated as "not cricket". To attain the effect of protecting productive land already in use, the legislature should have expressed those aims clearly. No one will argue against the fact that such clear expression would be desirable, but is it always realistic? To continue the cricketing analogy, a bowler may attempt a particular delivery and not execute it perfectly, but if it hits the stumps the batsman is still out. Salvesen might be an invitation for judges to ask quite a lot of the politicians in the unicameral Scottish Parliament and the draftpersons who serve them. Whether or not that is a good thing is a question left for another day.[43]

According to Combe, the court should have exercised greater deference towards parliament when determining whether the legislation was contrary to Convention rights. Although the Bill was not perfectly drafted, it was successful in achieving the overarching legislative aim, which was to ensure the protection of in use productive land. As the court had accepted that this was a legitimate reason to interfere with property rights, it should have not concerned itself with

[40] Maxwell. D.S.K. (2018). 'Mistaken rights to property, agricultural tenancies, and good governance: McMaster v Scottish Ministers.' *J.P.L. 10*
[41] Combe, M.M. (2012). 'Case Comment: Human rights, limited competence and limited partnerships: Salvesen v Riddell'. *S.L.T. 32,* p198
[42] Ibid, p198-199
[43] Ibid, p198

the means that parliament used to achieve the aim, unless those means were 'manifestly without reasonable foundation.'

McHarg makes a similar argument. She claims that the courts were less deferential towards the Scottish Parliament in *Salvesen* than they have been in previous competence challenges to Bills on Convention Rights-grounds.[44] She suggests that the courts were too focused on the rights of landlords in the case and failed to take into account the overall context of the legislation, which was about re-balancing the scales towards tenants in an area where landlords had historically had vastly superior power and resources.[45] She argues that the courts could have exercised greater deference at the 'necessity' stage of the proportionality assessment, acknowledging that accounts about the nature of the property relationship were contested and that the legislature could have legitimately formed an understanding that differed from traditional accounts based on the notion of freedom of contract. This would have allowed the legislature to advance an understanding of the limited partnerships as not agreements entered into by two equal parties, but instead one where the landlord had vastly more power than the tenant and could essentially dictate terms.[46] Further, the difference in treatment between landlords that served notices before and after the legislation came into force could be justified on the basis that the decision to dissolve tenancies whilst the Bill was being debated placed tenants in positions of far greater uncertainty than those that had their tenancies dissolved after the Act came into force. In addition, the provision could be justified on the basis that the economic power that comes with ownership of land carried with it responsibilities, which had been shirked when the landlords made the decision to dissolve the tenancies in order to try to avoid the Act's obligations[47].

Perhaps unsurprisingly, due to the complexity of the judgment, academia is the one arena where there was criticism of the court's judgment in *Salvesen.* However, even there, criticism of the offending provision was unanimous, with scholars accepting that the provision had been rushed and that the Government could have been clearer about its legislative aims. That said, that some academics were able to find faults in the court's reasoning process does at least demonstrate that the almost universal acceptance of the correctness of the judgment by parliamentarians and the press was not necessarily a result of the intuitive correctness of the judgment. Instead, it

[44] McHarg, (n32)
[45] McHarg, A. 'Salvesen v. Riddell' Presentation at The Scottish Feminist Judgments Project: An Insight, hosted by the Scottish Public Law Group, (08 Nov 2013), Available at https://splg.co.uk/the-scottish-feminist-judgments-project-an-insight/ (Access 09/07/19)
[46] Ibid
[47] Ibid

could be argued that neither the press nor parliamentarians felt that they had the sufficient expertise to properly engage with the judgment. This has important implications for the 'third way' model because it again indicates that parliament does not have the appropriate tools to fulfil its role under the model.

Conclusions

The response of the press, civil society, backbench MSPs, academic commentators[48] and, ultimately, the public, to the judgment in *Salvesen* is important as each of these voices could have placed political pressure on the Government and influenced its response. In addition to this political pressure, academic criticism that questions the interpretation of the law by the judiciary could have encouraged lawmakers to test the resolve of the courts a second time. Therefore a combination of the muted response to the judgment from Scottish civil society and consensus amongst legal commentators that the additional provision was indeed poorly drafted (in addition to other factors) likely contributed to the Scottish Parliament responding to the judgment in the conservative manner that it did.

Parliament's Response

The Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014

(a) Process

Before considering the substantive changes that were made to remedy the defect in the legislation, it is worth considering the process by which the law was changed. Such consideration will indicate the extent to which different actors were able to shape the process of legislative change. The greater input from parliament as a whole and broader civil society, the more likely that an effective dialogue will take place.

The Scottish Government decided that the most appropriate approach to cure the defect would be by Remedial Order as permitted by section 12 of the Convention Rights (Compliance) (Scotland) Act 2001. The Act gives Scottish Ministers the power to make an order that they believe is required to cure provisions of legislation that have been found to be incompatible with Convention rights. Ministers must be satisfied that there are compelling reasons for making the Order instead of the ordinary legislative process.[49] Remedial Orders are made by a

[48] Although it should be noted that some of the academic criticism was not published until after the Government had responded to the judgment with the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014
[49] Convention Rights Compliance (Scotland) Act 2001, s.12(2)

super-affirmative parliamentary procedure.[50] Under this procedure, the proposed order and a statement of reasons for making it must be laid before Parliament for a consultative period of a minimum of 60 days, during which representations on the proposals can be made. At the end of the consultation period, the Ministers are required to consider any written submissions that were made during that period. The Ministers may then lay an updated order before the Parliament for approval with a statement summarising the submissions that were made to the Scottish Ministers, any changes that have been made to the order and the reasons for making these changes. Parliament can then finally determine whether to approve the order.

The Remedial Order does not side-step scrutiny by parliamentary committees. The Rural Affairs, Climate Change and Environment Committee and the Delegated Powers and Law Reform Committee were both involved in scrutiny of the Order, with the former taking a leading role. RACCE heard evidence on the order in four meetings[51] and met with the Cabinet Secretary for Rural Affairs and the Environment, civil servants, the STFA, Scottish Land and Estates, the National Farmers Union, the Royal Institute of Chartered Surveyors, the Scottish Agricultural Arbiters and Valuers Association and the Law Society of Scotland. Most of these bodies had previously submitted written evidence to the Committee. The Delegated Powers and Law Reform Committee considered the Remedial Order over three meetings[52] and received oral evidence from Scottish Government civil servants in a meeting on the 14th January 2013. Both produced reports[53] which were responded to by the Scottish Government. The Government made a few (mainly technical) changes to the Order before it was agreed to by the Parliament on the 2nd April 2014, coming into force the following day.

Other options that would have been available to the Scottish Government to respond to the decision would have been to enact ordinary or emergency legislation. In evidence to the Delegated Powers and Law Reform Committee, the Scottish Government indicated that it had considered other approaches to curing the defect but decided that a Remedial Order was the most appropriate approach for a number of reasons.

[50] Ibid, s.13
[51] SP OR RACCE, 04th Dec 2013; SP OR RACCE, 18 Dec 2013 and SP OR RACCE, 15 Jan 2014, SP OR RACCE, 29 Jan 2014
[52] SP OR DPLR, 14 Jan 2014; SP OR DPLR 21 Jan 2014; SP OR DPLR 28 Jan 2014
[53] Rural Affairs, Climate Change and Environment Committee 1st Report, (2014), 'Report on the proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014' *SPP 473* ; Delegated Powers and Law Reform Committee 9th Report, (2014), 'Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014, *SPP 462*

It noted that the UKSC judgment had been explicit in suggesting that there should be extensive consultation with stakeholders. The Government therefore argued that the super-affirmative procedure, with its opportunities for extensive consultation, would ensure that this requirement was fulfilled.[54] When the Committee pointed out that the court had clearly stated that the solution was for parliament to determine and that under the process of making the Remedial Order, parliament was unable to table any amendments, the Scottish Government responded by noting that although parliamentarians were unable to table amendments, the Minister was required to respond to all views expressed in the consultation period. Further, parliament had a final say on whether to decline or approve the proposal.[55] In addition, the Government suggested that it found the tabling of amendments to be unsatisfactory as it might lead to 'unintended consequences' that would upset the delicate balance of interests that were required to be maintained in the solution.[56] Considering that the provision in the Agricultural Holdings (Scotland) Act 2003 that was found to be contrary to Convention Rights was itself an amendment, which as discussed meant that it was not subject to the same competence checks as the rest of the Bill, the Scottish Government's reluctance to accept amendments in the making of the Remedial Order is perhaps understandable. Finally, the Government suggested that a Remedial Order was appropriate as it most neatly fitted into the timeframe suggested by the Supreme Court in which to find a legislative solution.[57]

Overall, the Committee agreed that the use of a Remedial Order was a suitable approach to remedy the defect, but it was relatively thorough in ensuring that the Government properly justified its approach.[58]

The Scottish Government's approach to the process of remedying the legislation therefore seems to be in line with what Lord Hope had directed. Use of a Remedial Order as opposed to ordinary legislation allowed the Scottish Government to expedite the process and to bypass any potentially tricky amendments. This suggests that the Scottish Government's approach to the Order was to view it as largely a technical fix and not something that should be open to collaboration from parliament more widely. That said, the super-affirmative procedure that was used at least allowed for consultation with relevant actors and for scrutiny by two Parliamentary committees (which the Government was required to respond to) as well as giving Parliament

[54] Delegated Powers and Law Reform Committee Report (n53), para 29
[55] Ibid, para 30
[56] Ibid, para 31
[57] Ibid, para 33
[58] Ibid, para 38

the final say on whether to agree to the Order. Given the highly technical nature of the provision and the need to consider a delicate balance of interests of those affected by the order, use of the order to remedy the defect was probably appropriate (as the Delegated Powers and Law Reform Committee accepted). However, although there was a degree of parliamentary scrutiny, this was undoubtedly weakened by parliament's inability to propose amendments and by the failure to allow the parliament as a plenary to debate the Order. This may have limited the available options for reform and perhaps insulated the government from wider criticism. In this way dialogue between the parliament and wider society may have been inhibited by the Government's decision to cure the defect by passing the Remedial Order.

(b) The Order

The draft Remedial Order provided landlords who had served dissolution notices to end the limited partnership tenancies between 16th September 2002 and 30th June 2003 a vehicle through which to recover vacant possession. It did so, broadly, by converting the tenancies under the old section 72 of the Act to tenancies under section 73 of the Act, although how this was done depended on the particular circumstances of different individuals. The Remedial Order did not apply to landlords who had reached separate bilateral agreements or had subsequently sold their farms. It also provided a period of notice for affected tenants, offered mediation services for tenants and landlords to encourage them to come to a mutually beneficial resolution as well as a 'cooling off' period to allow for the rights and interests of tenants and landlords to be balanced and to support the transition in their relationships.[59]

(c) Scrutiny

In relation to parliament's scrutiny of the order, there were three broad matters that are of interest in terms of Convention rights. First, was a question mainly asked by Nigel Don MSP, about whether the Government had considered legislating in a manner that would allow the tenants to retain possession of the land. The second, which was generally asked by Claudia Beamish MSP, was how the Government intended to balance the rights of the tenants with the rights of the landlords. The third related to whether landlords that had reached bilateral agreements or sold the land before the order came into force were denied their A1P1 rights due

[59] Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014

to their failure to be included in the order. Each question and the response of the Government and other witnesses will be considered below.

(i) Whether the proposed remedy was the only considered?

Nigel Don MSP asked several of the witnesses whether the Scottish Government's proposed order could have cured the defect without allowing landlords to recover vacant possession.[60] It appears that the basis of his concerns was that the Order focussed too strongly on the rights of landlords, without considering the rights of tenants. He highlighted examples of sons of tenants returning to farms on the assumption that they had secure 1991 tenancies and suggested that to dispossess them and farmers like them as a result of a judgment that was supposed to protect human rights did not seem 'fair'.[61] He seemed to be encouraging the Government to consider human rights beyond the immediate requirements of the *Salvesen* judgment and to find a solution that more fairly balanced rights.

Don's approach to rights-scrutiny has an echo of Nicol's 'culture of controversy'[62] approach to rights-scrutiny that was briefly sketched in the thesis introduction. Under a 'culture of controversy', parliamentarians are encouraged to take ownership of rights-questions and feel free to advance alternative conceptions to those of the judiciary. Such an approach is more likely in states with a parliamentary override because it gives parliament an institutional and lawful mechanism through which to vent its disagreement with the courts. However, such an approach is also possible in states with strong-form review, so long as legislators explicitly justify their alternative definition in Convention rights terms. That said, given that courts have the final say on the competence or otherwise of the provision, there is far less incentive for parliamentarians to engage in a 'culture of controversy' in Scotland than there might be in states with a parliamentary override.

When asked about why the Government proposed to cure the defect in the manner it did, David Balharry, the project team leader for European Convention on Human Rights Compliance Orders, suggested that '[t]he Supreme Court ruling requires that landlords be allowed a clear route to vacant possession.'[63] Further, when questioned about whether he considered that the rights of the tenants had been infringed more greatly than those of the landlords as a result of

[60] Eg, Nigel Don MSP, SP OR RACCE, 04 Dec 2013, col 3097
[61] Nigel Don MSP, SP OR RACCE, 18 Dec 2013, col 3151
[62] Nicol, D. (2003), 'The Human Rights Act and the politicians', *Legal Studies,* p452
[63] Balharry, D., SP OR RAACE, 04 Dec 2013, col 3095

the order, he agreed that, 'the people who thought that they had full 1991 tenancies(…)'[64] had been harmed, '[h]owever, what the Supreme Court has asked us to do was to rectify the legal defect, which is what the order seeks to do.'[65]

Thus, the Government clearly did not consider that, given the court's judgment, it would have been possible for it to have pursued a strategy that would have allowed tenants to retain their rights over the land. Instead, it considered that it only had scope to decide on the best means to allow vacant possession to be recovered. Thus, according to the Government, the Court, in using its power in s.102(2)(b), was deferring to the legislature on the grounds of its superior institutional competence in finding an appropriate solution to the defect and not on grounds that, the parliament, as a democratically representative and accountable institution should have capacity to find a broader solution that, while not discriminating between different landlords, could have still tried to re-balance the scales between landlords and tenants.

Indeed, the Scottish Government's conclusions appeared to have been accepted by a number of the bodies that gave evidence to the Committee including the Law Society of Scotland, the National Farmers Union and even the STFA. The latter, despite previous suggestions that it believed the Government could have legislated in an alternative manner,[66] admitted that '[w]e are not particularly happy with the legal fix, although we understand that is probably the only route that is open to the Scottish Government.'[67] This was in spite of the fact the body thought the order had significantly deprived tenants of their rights.[68]

Nigel Don's attempt to consider alternative solutions to the defect therefore appears to run up against the constitutional reality that the Scottish Parliament is unable to legislate contrary to Convention rights, and that it is ultimately a matter for the courts to determine the scope of Convention rights. Thus, when the Scottish Government believes it is required by the courts to resolve a finding of incompatibility in a certain manner, even if it is not happy with the outcome, it has no choice but to do so.

(ii) How are the rights of tenants and the rights of landlords balanced?

[64] Ibid, col 3098
[65] Ibid
[66] Scottish Tenant Farmers Association Written Submission to RACCE Committee on Agricultural Holdings (Scotland) Act 2003 Draft Remedial Order 2014, p2
[67] Angus McCall, SP OR RACCE, 18 Dec 2013, col 3132
[68] Ibid, col 3133

Claudia Beamish MSP noted that the Supreme Court's judgment in *Salvesen* required that the remedial legislation 'must achieve fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[69] She asked whether the order had achieved this.[70]

The Scottish Government's response was two-fold. First, similar to its response in relation to Nigel Don's questions, it noted that the response in the Order was the only that was available to the Government as a result of the Supreme Court judgment.[71] Second, it highlighted the Government's proposal of a 'cooling off period' and the offer to provide mediation services as a way of ensuring that the tenants could have some chance of having the matter resolved in a manner that did not completely, and instantly, starve them of tenancies and livelihoods as evidence of a solution that had due regard to the rights of tenants.[72]

For most of the other witnesses,[73] the solution in achieving an appropriate balance lay in providing the tenants that were affected with suitable compensation. The Government's response was that it was inadvisable and impossible to provide a generic compensation scheme.[74] However, it accepted that it might be open to providing compensation in certain cases depending on the merits of the claim, the Cabinet Secretary indicating that the Government's approach would be 'sympathetic and responsible'.[75] However, he reiterated that the Government's preferred route would be to make use of mediation without any further intervention from the Government.[76] If that was unsuccessful, compensation would be on the table, but he did not agree that provision for compensation should be included in the order.[77] Most witnesses accepted the Scottish Government's point about the difficulty of setting up a generic compensation scheme. However, the STFA asked for assurances that tenants without 'deep pockets' for litigation would have access to compensation.[78] Beyond the generic assurances above, this was not given, and no compensation was provided for in the order.

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[69] *Salvesen v. Riddell* (n2), para 33
[70] Eg Claudia Beamish MSP, SP OR RACCE, 18 Dec 2013, col 3150
[71] Richard Lochhead MSP, SP OR RACCE, 15 Jan 2014, col 3180
[72] Ibid
[73] Malcolm Taylor, Royal Institution of Chartered Surveyors, SP OR RACCE, 18 Dec 2013, col 3153; Martin Hall, Scottish Agricultural Arbiters and Valuers Association, SP OR RACCE, 18 Dec 2013, col 3150; Angus McCall Scottish Tenant Farmers Association, SP OR RACCE, 18 Dec 2013, cols 3143-3144, Richard Blake, Scottish Land and Estates, SP OR RACCE, 18 Dec 2013, col 3143, Mike Gascoigne, Law Society of Scotland, SP OR RACCE 18 Dec 2013, col 3150
[74] David Balharry, SP OR RACCE, 04 Dec 2013, col 3100
[75] Richard Lochhead MSP, SP OR RACCE, 15 Jan 2014, col 3187
[76] Ibid
[77] Ibid
[78] Angus McCall, SP OR RACCE, 18 Dec 2013, col 3143

(iii) Does excluding landlords that reached bilateral agreements or that sold the land before the order came into force from the order amount to unjustifiable discrimination?

The final issue of note, initially raised by Scottish Land and Estates in its response to the consultation, was that the order potentially discriminated against landlords that were affected by the original provision but that had subsequently come to a bilateral agreement with the tenant or had sold the land. They claimed that these landlords had also been affected by the provision and the order should have ensured that they were also able to benefit in some way from the Order.[79]

When this point was put the Cabinet Secretary, he responded by saying that since landlords in the two scenarios mentioned had effectively moved on from the immediate circumstances, that to include them in the scope of the Order might cause needless destruction to the new tenant-landlord relationships.[80] The Committee accepted this point but suggested that the aforementioned landlords should perhaps be allowed to benefit from the Order in a manner similar to other landlords so that the order was Convention rights-compliant.[81]

(d) Reflections on Parliament's scrutiny

In its report on the Remedial Order, the RACCE Committee found it necessary to express 'regrets'[82] that the legislation was found to be incompatible with the ECHR. It noted that the legislation was passed 'in good faith, and with the best intentions,'[83] and that rectifying the defect 'may have distressing consequences for some of those affected.'[84] Despite this, the Committee acknowledged that the order was necessary and agreed that it broadly achieved the outcome required by the Supreme Court.[85] However, it argued that the payment of compensation may be required for those that suffered financial or personal loss as a consequence of the defect and its remedy.[86]

[79] Scottish Land and Estates Written Submission to RACCE Committee on Agricultural Holdings (Scotland) Act 2003 Draft Remedial Order 2014, p2-3
[80] Richard Lochhead MSP, SP OR RACCE, 15 Jan 2014, col 3183; Paul Cackette, SP OR RACCE, 15 Jan 2014, col 3184
[81] RACCE Committee Report (n53), para 58
[82] Ibid, para 1
[83] Ibid
[84] Ibid
[85] Ibid, para 2
[86] Ibid, para 7

The impression one gets from reading the Committee report and indeed from the evidence sessions is that the Committee, particularly members Nigel Don MSP and Claudia Beamish MSP, were deeply unsatisfied with the outcome of *Salvesen.* It is apparent that there was strong sympathy towards the tenants and resistance to the outcome that landlords should be able to recover vacant possession of their property. Despite this, all members of the Committee appeared to be resigned to the fact that the Government had little choice but to respond in the manner in it did, given the Supreme Court's judgment. Again, this suggests that these parliamentarians felt that they had little choice but to follow the law, even if they strongly disagreed with its consequences. However, that parliamentarians considered alternative responses however suggests that in other scenarios, where the solution to a finding of incompatibility is perhaps not as clear, the legislature will try advance solutions that consider balancing the rights of affected parties in a manner that they consider to be more just.

The Response of Parliament to Salvesen beyond the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014

It has been argued that the *Salvesen* judgment has had wider implications for the law in Scotland beyond the Agricultural Holdings (Scotland) Act 2003. Some scholars and politicians have suggested that the judgment was interpreted by lawmakers as meaning that A1P1 ECHR was a 'red light' to further reform of land ownership in Scotland.

The purported need for land reform in Scotland stems from the present concentration of ownership of a large percentage of the land to an extremely small percentage of the population – said to be the most concentrated in the Western world.[87] It is argued that this pattern of land ownership has decreased the productivity of the land,[88] inhibited local enterprise, caused depopulation in certain areas and resulted in environmental degradation.[89] Aside from this, it is argued that inequality of ownership itself has had negative effects on the Scottish political community and that land, as a natural resource, should be subject to democratic governance.[90]

For these reasons and more, land reform has been on the agenda of the Scottish Parliament since its creation. For Jenni Davidson, writing in Holyrood Magazine, 'reform of Scotland's

[87] Scottish Affairs Committee Briefing Paper, (2013), 'Towards a comprehensive land reform agenda for Scotland' (2013), *Edinburgh: The Stationary Office,* para 2.1
[88] Combe (n41), p198
[89] Maxwell, D.S.K. (2019). 'Broadening the human rights discourse, realising socio-economic rights, and balancing rights to property: moving beyond the rhetoric of socio-economic rights and Scottish land reform', *P.L. Jan,* p125
[90] Combe, M. (2016). 'The Land Reform (Scotland) Act 2016: another answer to the Scottish land question". *Jur. Rev.* p291

highly concentrated pattern of land ownership was perhaps the defining issues of the early days of the new Scottish Parliament and remains unfinished business today.'[91]This can be seen in the several Acts of the Scottish Parliament that have been passed that attempt to deal with the issue, from the Abolition of Feudal Tenure etc. (Scotland) Act 2000, to the Land Reform (Scotland) Act 2016, with several statutes passed and Government commissions established in between.

However, that the issue has been live for the Scottish Parliament since its creation and remains an issue today indicates that the problem has been extremely difficult to satisfactorily resolve. One important reason for this is the purported unfeasibility for 'radical' change as a result of landlords A1P1's rights under the ECHR.

A1P1 rights of landlords were always a concern for legislators in their proposals for land reform in Scotland. However according to Maxwell, '[c]onfidence in the Scottish Government's ability to "radically" alter property rights was shaken'[92] by the judgment in *Salvesen,* adding that '[t]he significance of this decision cannot be underestimated[.]'[93] He notes Michael Russell MSPs comments during Stage 3 of the Land Reform Bill in 2016 as symptomatic of the Scottish Government's attitude:

> Land reform in Scotland is hard to do at this time because of the European convention on human rights. I am not in any sense against the ECHR, but as we heard at the start of the debate, land reform post-ECHR tends to be focused on individuals' property rights… That does not mean we should not try to undertake radical land reform in Scotland – of course we should. Our constituents want it – my constituents want it and people across the country want it – but it is hard to do.[94]

In a similar vein, former MSP Rob Gibson noted that 'we're up against the power of the European Convention of Human Rights being used by very rich men'.[95]

According to land reform campaigner Lesley Riddoch, this notion that A1P1 is a barrier to land reform has had a tangible effect of legislative proposals. She claims that the Scottish

[91] Jenni Davidson, 'Scottish Parliament at 20: the unfinished business of land reform' *Holyrood Magazine,* 28 February 2019 – available at https://www.holyrood.com/articles/inside-politics/scottish-parliament-20-unfinished-business-land-reform (Accessed 20/06/19)
[92] Maxwell, (n89), p125
[93] Ibid
[94] Michael Russell MSP, SP OR, 16 Mar 2016, Cols 49-52
[95] Rob Gibson in (n80)

Government rejected proposals from the Land Reform Review Group in 2014 to introduce a right for tenants to buy land[96] on the basis that it would lead to a further legal challenge by landlords on A1P1 grounds (as well as for reasons of cost).[97]

Additionally, Shields suggests that the decision in *Salvesen* led the Scottish Parliament to take what she describes as a 'risk mitigation approach'[98] to human rights-scrutiny:

> The leading human rights-question was not '*Does this [proposed law/policy/action] risk infringing human rights?* But instead *'Does this risk infringing ECHR rights?'* As the right to property is expressly included in the ECHR (but the ESC rights mentioned are not), this question was reduced to; *'Does this risk infringing the right to property?*[99]

The Scottish Government's immediate reaction to *Salvesen* corresponds with Nicol's 'culture of compliance'.[100] In contrast to the 'culture of controversy' discussed above, a parliamentary 'culture of compliance' very much sees parliament's role in relation to the protection of rights as one where parliament gives effect to judicial interpretations of rights. Parliament might be able to help contribute to protection because it has superior capacities as a legislator, but where the court has reached a clear position in relation to rights, parliament should give effect to this and should not deviate from the judicial position. Nicol's 'culture of compliance' largely accords with Young's 'constitutional collaboration'. Such approaches are less about ensuring that there is room for democratic actors to contribute to the settling of rights-questions, and more about legislatures and executives helping the courts to ensure that all legislation accords with judicially interpreted rights.

In relation to their response to *Salvesen*, the Scottish Government and Parliament had a role in ensuring that the remedial legislation was in accordance with A1P1, whereas interpretation of the right itself was left exclusively to the courts. Thus, again in the short term, the form of constitutional dialogue that occurred between the different institutional actors was one in which there was little overlap of powers, room for respectful disagreement and the ability for one institution to change the others mind. The Scottish Government's response is particularly

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[96] 'The Land of Scotland and the Common Good: Report of the Land Reform Review Group' (2014) *Scottish Government*
[97] Riddoch, L. 'Time to tackle 'Scotland's Shame'', *The Scotsman* (08 Nov 2015)
[98] Shields, K. (2018). 'Human Rights and the Work of the Scottish Land Commission', *Scottish Land Commission,* p8
[99] Ibid
[100] Nicol, D. (2003), 'The Human Rights Act and the politicians', *Legal Studies*

striking as it has been noted that in *Salvesen* the Supreme Court did not consider the aims of the legislation themselves to be incompatible with A1P1, only the means used to achieve them.[101] Arguably more radical legislative policy solutions, but which did not unjustifiably 'discriminate' against landlords would have been open to the Scottish Government. At the same time however, that the court was willing to set-aside an act of a democratically elected parliament, in its own words 'a strong thing'[102] to do, to protect the property rights of landlords perhaps sent a strong signal to parliament that this was an area where the courts would be robust. Such robustness can certainly be seen in Lord Hope's statements about the rights of landlords as a minority and the 'marked bias'[103] against them.

However, an alternative reading of the court's judgment in *Salvesen* is possible. As discussed above, the provision of the Agricultural Holdings Act 2003 that was found to violate the property rights of landlords was passed as a Stage 2 amendment to the bill which meant it was not subject to the complete process of legislative rights review.

It has been shown that the courts are willing to exercise greater deference to parliament where the courts consider that the government and parliament have seriously considered the Convention rights-compatibility of the legislation during the legislative process. However, on the other hand, where it appears that legislators have not seriously considered the Convention rights implications of their legislation or where the link between the legislative aim and the policy proposal is not clearly demonstrated, the courts are likely to show less deference to parliament.

Salvesen might be seen as a textbook example of the courts failing to show deference on the basis of a failure of parliamentary rights-scrutiny. The lesson from *Salvesen* therefore might not be that the courts do not consider that parliament is able to contribute to the settling of rights-questions that engage A1P1. Indeed the Supreme Court explicitly said that, in relation to land reform, the legislature generally has a 'broad area of discretion'[104] to determine whether social and economic policy necessitates the interference with property rights. The lesson from *Salvesen* should have been that the courts are unwilling to countenance legislation that interferes with A1P1, unless the legislature has demonstrated the necessity of the provision and has shown that the interference is proportionate. Although it is debatable whether the courts

[101] *Salvesen v. Riddell* (n2), para 40
[102] *DS v HM Advocate*, 2007 SC UKPC 36, para 89, per Baroness Hale
[103] *Salvesen v. Riddell* (n2), para 38
[104] *Ibid*, para 36

were correct to find that s.72(10) of the Act failed to properly respect the landowners A1P1 rights, I think it is clear that the fact the amendment was rushed through and justified with a lack of clarity contributed to the court's finding of incompatibility. The judgment therefore demonstrates how courts can use their powers of strong-form review to incentivise legislators to properly defend, justify and scrutinise legislation on Convention rights-grounds.

In its immediate legislative response to the *Salvesen* judgment, there is less constitutional contestation and more constitutional collaboration. Legislators clearly felt that the only way to cure the defect was to ensure that the landowners recovered possession of the land. Parliament's role was therefore not to challenge the courts but to use their superior competences as legislators to formulate a legislative remedy that respected the court's judgment. Moreover, in the years following the judgment, the Government behaved as if it had viewed the judgment as meaning that A1P1 was a barrier to land reform. However, as a result of political pressure to be more radical on land reform, longer term the Government took from the judgment the latter lesson, that land reform is possible under the Convention but that legislators must properly demonstrate why interferences with A1P1 are required in the public interest. Section III of this case study will consider this change of approach in greater detail.

The Reaction to Parliament's Response

Reaction the Remedial Order

(a) Legal Reaction - McMaster v Scottish Ministers

In the period after the Remedial Order came into force, it became clearer to the affected tenants that, despite indicating previously that it would look at their claims sympathetically, the Scottish Government was unwilling to compensate them for the loss of their tenancies as a result of the Order. Angus McCall of the STFA commented that, [i]t would appear that these tenants are in danger of being hung out to dry.'[105] Indeed, Convener of the RACCE Committee, Rob Gibson MSP sent a letter to Cabinet Secretary for Rural Affairs, Food and Environment, Richard Lochhead MSP urging him to 'tackle the lack of progress' made on compensation since the order came into force, noting that:

[105] McCall, A. 'STFA calls on Government to properly compensate tenant farmers', *The Herald* (6 Feb 2014)

> The Scottish Government committed at the outset to playing a central role in trying to minimise any negative impact on tenant and landlords, and to fully fund and participate in the mediation process. But this did not appear to happen.[106]

As a result of this inaction, several of those affected initiated proceedings against the Scottish Ministers, suggesting that they had suffered loss, injury and damage as a result of the Remedial Order and that under A1P1 they were entitled to compensation for such loss.

In *McMaster v. Scottish Ministers,*[107] Lord Clark agreed that A1P1 had been violated and recognised the right of compensation to some of the petitioners as a result of the loss of their tenancies arising from the Remedial Order:

> In principle in circumstances such as the present, the state should compensate individuals for loss directly arising from reasonable reliance upon defective legislation passed by it, which was then remedied by further legislation which interfered with the individuals' rights.[108]

However, he limited this finding to those that were former general partners. He claimed that their descendants did not have a 'legitimate expectation' to rights of succession and thus were not entitled to compensation for the loss of these rights as a result of the order. Further, compensation was limited to loss of the tenancies and not for loss of economic interests or distress. He also decided to reduce compensation on the basis that the petitioners had 'enjoyed several more years of holding a tenancy than they would have enjoyed but for the enactment of section 72(10)'.[109]

In restricting the right to compensation for the losses incurred as a result of the Remedial Order, Lord Clark showed significant deference to the Scottish Ministers and Parliament. He noted that the courts had an established practice, following the doctrine of margin of appreciation developed by the ECtHR, of giving a high degree of weight to the 'representative legislature' and 'democratic government' on issues of social or economic policy.[110] He noted that the decision not to include a compensation scheme in the Remedial Order had been clearly agreed to by the Parliament.[111] Thus, the Remedial Order itself did not violate the A1P1 rights of the

[106] 'Letter from Committee Convener to the Cabinet Secretary' Rural Affairs, Climate Change and Environment Committee *SP RACCEE News Release* (28th Sept 2015)
[107] [2017] CSOH 46; [2018] CSIH 40
[108] [2017] CSOH 46, para 190
[109] Ibid, para 180
[110] Ibid, para 167-168
[111] Ibid, para 168-169

petitioners,[112] only the subsequent actions of the Ministers in failing to award former general partners compensation for loss of their tenancy. The petitioners attempted to rely upon statements from the Cabinet Secretary given during the making of the order that he would be sympathetic to claims for compensation made by tenants as well as the Committee's expectation that the Scottish Government would follow through on its statements as proof that the will of parliament was that claims for compensation should be met.[113] However, Lord Clark suggested that in spite of these indications there was no clear promise in the order that individual applicants would be entitled to compensation.[114]

Lord Clark was also at pains to note that 'compensation for deprivation of property has less force when what is being done is rectify an unlawful piece of legislation'.[115] Maxwell has suggested that this statement is based on a worry, that in recognising the rights of the petitioners to compensation, the court would be establishing precedent for general right to compensation whenever the legislature is required to cure legislation that has been found to be incompatible with A1P1.[116] He argues however that the court's approach is out of step with the jurisprudence of the ECtHR, which argues that the principle of 'good governance' means that individuals that rely on defective legislation in good faith should not bear losses that are incurred when the state cures a legislative defect.[117]

The decision to show less deference towards the legislature in the *Salvesen* at the expense of tenants, followed by the decision to show a high degree of deference to the legislature in *McMaster* at the expense of the tenants, understandably felt like a double insult to those affected. Maxwell suggests that the failure of the Scottish Parliament to enact legislation that complied with A1P1 in the first instance should have had a material impact on the amount of deference shown towards the Parliament in making the Remedial Order.[118]

> What in effect the Court of Session is doing is asking the Scottish Ministers to set out compensation rules for loss that was suffered as a direct result of their own incompetence.[119]

[112] Ibid, para 170
[113] Ibid, para 174
[114] Ibid, para 175
[115] Ibid, para 181
[116] Maxwell, D.S.K. (2017). 'Case Comment: Article 1 of the First Protocol and a tenants right to compensation: McMaster v Scottish Ministers', *CSOH 46*, p484-485
[117] Ibid, p483
[118] Ibid, p485-486
[119] Ibid, p486

The petitioners appealed the decision to the Inner House where Lord Clark's decision was upheld.[120] They then attempted to appeal to decision at the Supreme Court but leave for appeal was refused.[121] The next step would be a complaint to the European Court of Human Rights, something that the petitioners have indicated a willingness to pursue in the past,[122] so the issue may not yet be fully resolved.

(b) Reaction from media, civil society and the public

While there was not much discussion of the Remedial Order itself in the press, a number of reports were scathing in their criticism of the failure of the Scottish Government to pay compensation to tenants that had been dispossessed as a result of the order.

STFA chairman Christopher Nicholson was quoted as saying that:

> [m]any of [the tenants] find it ironic that they now face losing their homes and businesses as a result of European court legislation designed to protect basic human rights. STFA will be lobbying government for a fair deal and a future for the victims of a previous government's mistakes. Politicians must not shirk their responsibilities and ensure there no more casualties of this political mess.[123]

A number of reports[124] focus on Andrew Stoddart, one of the petitioners in the *McMaster* case, who despite investing twenty-two years and about £500,000 in the farm on which in he was a tenant, was due to be evicted as a result of the order. A report in *The Times* described Stoddart as a 'victim of changing legislation'[125]. It further quotes the Trustees of the farm that had decided to evict Mr Stoddart and his family in saying:

> The disappointment and frustration that Mr Stoddart is now experiencing is not due to the actions of the Coulston Trust but because of an unprecedented legislative failure which has affected many tenants and landlords.[126]

Stoddart seems to agree, claiming that:

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[120] [2018] SC 546
[121] [2018] CSIH 64
[122] Maxwell (n40), p1089
[123] 'Bitter Legacy of Salvesen v. Riddell' *Legal Monitor Worldwide* (29 Nov 2013)
[124] Riddoch (n97)
[125] Swerling, G and McIntosh, L. 'Family face eviction from after 'mistake' by the Scottish parliament'. *The Times* (2 Nov 2015)
[126] Ibid

> At the end of the day, we have lost everything down to the government and the lack of consideration of our human rights. They only considered landlords[.][127]

Libby Brooks of the Guardian however appropriates blame to 'land-owner greed and government incompetence'.[128]

A petition calling on the Government to prevent Stoddart's eviction collected more than twenty thousand signatures[129]and was delivered during a rally outside the Scottish Parliament on the 9 November 2015. Michelle Wood, one of the protesters noted that the eviction, 'might be legal but it is morally repugnant.'[130]

Overall therefore, there was a highly negative reaction to the Remedial Order, both in terms of allowing landlords to evict tenants and because the Scottish Government failed to compensate tenants that were led to believe they had 1991 Act tenancies. However, while most of the ire was directed towards the Government (and for holding out on compensation despite suggesting it would look at claims sympathetically, the criticism is certainly justified) it was also well recognised that the Supreme Court left the Government with little choice in how to respond to its finding. Therefore, the response is perhaps better understood as a delayed reaction to the *Salvesen* judgment – although whether the judgment is the fault of the landowners who cancelled leases, the legislature or the courts is a matter for the beholder.

What the legislative response to *Salvesen* does demonstrate however, is how a parliamentary override might be able relieve this vacuum in accountability for the final decision. If the Scottish Parliament had been able to override or ignore the decision in *Salvesen,* the legal position of the tenants would have stayed the same. Of course, there would be a high degree of political pressure on parliament to respond the judgment (particularly given the likelihood that the petitioners would apply to the ECtHR) and there is a strong chance that the Government would have buckled to this pressure. However, that the final decision on whether to remedy the decision was in the hands of parliament, which is an institution which is directly accountable to the population, would have at least transferred the final decision to a body that could be held to account for making it. The position post-*Salvesen* where the current Government (who, incidentally, were of a different political stripe to the Government that

[127] Ibid
[128] Brooks, L. 'Campaigners call for land reform as Scottish farmer faces eviction', *The Guardian* (10 Nov 2015)
[129] Swerling, G. 'Farmers in tenancy row unite to sue government' *The Times* (23 Jan 2016);
[130] Brooks (n128)

passed the initial Act) were able to respond to criticism of their response by blaming the previous Government and claiming (probably correctly) that their hands were tied by the courts decision, leaving the ex-tenant's anger with nowhere to go, might therefore have been avoided had the option of a parliamentary override been available to legislators.

Reaction to Parliament's wider response

Thus far, it has been argued that the *Salvesen v. Riddell* judgment had an inhibiting effect on the Scottish Parliament's plans for further land reform, both in its immediate response to the legislative defect, and in relation to other proposals.

However, as both Shields and Maxwell have argued, as the Land Reform (Scotland) Act 2016 was being debated, a shift took place that resulted in a change of approach in legislators' thinking about human rights. Before considering this change in approach, it is worth examining the factors that led to it. It is argued here, that a combination of the criticism that the Scottish Government received in the wake of the Remedial Order (see above), the Scottish Government's success in other challenges to legislation on competence grounds, increasing awareness about the importance of economic and social rights and their compatibility with Convention rights and pressure on the party of Government, the SNP, both internally and externally, to be more radical on land reform (amongst other factors) all contributed to the Scottish Government's change in approach.

(a) Political pressure on the SNP

The latter of these factors will be considered first. In wake of the campaign for Scottish Independence, which was unsuccessful but which enhanced political engagement in Scotland, there was a substantial increase in the membership of the SNP. This new membership was considered to be largely to the left of the leadership on several issues and carried their enthusiasm from the independence campaign into 'bread and butter' issues. An example of the newly enlarged membership flexing its muscles can be seen at the SNP Annual Conference in 2015, where delegates voted to force the leadership to re-consider the party's proposed land reform bill.[131] One delegate, Nicky Lowden MacCrimmon stated that, 'When the package is radical, we'll support it'.[132] Such a move was the leadership's only defeat at the conference and

[131] 'SNP Conference 2015: Delegates vote for more radical land reform plans' *BBC News* (16 Oct 2015) Available at https://www.bbc.co.uk/news/uk-scotland-scotland-politics-34555773 (Accessed 09/07/19)
[132] Brooks, L. 'What next for land reform in Scotland?' *The Guardian* (19 Oct 2015) Available at https://www.theguardian.com/uk-news/scotland-blog/2015/oct/19/what-next-for-land-reform-in-scotland (Accessed 09/07/19)

unprecedented in a party whose leadership has typically exerted tight control over its grassroots.[133]

Other campaigns that grew out the movement for independence but were formally independent from the SNP also put pressure on the party to be more radical on land reform. *Our Land*, established after the referendum, was an initiative developed by groups that supported Scottish Independence from a broadly leftist perspective.[134] It sought to highlight and campaign on the 'problems of dereliction in cities and emptiness in the countryside that flow from an elitist system of land ownership.'[135] Writing in the *Scotsman* a month after the SNP Conference, group member Lesley Riddoch argued that it was 'time to tackle Scotland's shame':

> Indeed, the greater lesson [of *Salvesen v. Riddell]* would seem to be that half measures don't work, and a tenant farmer's right to buy is the only long-term solution… [t]he Scottish Government's lawyers and civil servants must get over their paralysing fear of re-entering the legal arena[.][136]

Elsewhere, the group claimed that they 'want[ed] the Scottish government to show the same courage that they with minimum alcohol pricing when they took on the challenge from the alcohol industry all the way to the European court[.]'[137]

There was therefore pressure on the Scottish Government both from SNP activists and from broader civil society to be more radical on land reform.

(b) Scottish Government's success in other challenges to Acts of the Scottish Parliament

As highlighted by *Our Land* above, *Salvesen v. Riddell* was not the only Act of the Scottish Parliament to have been challenged on competence grounds. Indeed, between the *Salvesen* judgment and the introduction of the Land Reform (Scotland) Bill in June 2015, there were decisions on three other challenges to Scottish legislation on the grounds that the particular bill was beyond the parliament's competence; two on the basis of Convention rights[138] and one on the basis of Convention rights and EU law.[139] In each of these decisions, the relevant court

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[133] Mitchell. J. 'How the SNP's post-referendum membership has changed the party – and what has stayed the same', *Democratic Audit UK* (07 Jun 2018), Available at http://www.democraticaudit.com/2018/06/07/how-the-snps-post-referendum-membership-has-changed-the-party-and-what-has-stayed-the-same/ (Accessed 09/07/19)
[134] Common Weal, Women for Independence, Scottish Land Action Movement, Radical Independence, Lesley Riddoch and Andy Wightman MSP, see http://ourland.scot/
[135] Ibid
[136] Riddoch (n97)
[137] Brooks (n132)
[138] *AMI v Dunn* [2012] HCJAC 108; *Moohan and another v Lord Advocate* [2014] UKSC 67
[139] *Sinclair Collis Ltd v Lord Advocate* [2013] CSIH 80

found that the Scottish Parliament had legislated within its competence. The most relevant judgment is *Sinclair Collis*, which concerned a challenge s.9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 on the grounds that it violated tobacco machine vendors' A1P1 rights as well as Article 34 of the TFEU. In that case, Lord Carloway quoted both the policy memorandum of the Bill and from the parliamentary record to demonstrate that the Scottish Parliament had seriously considered the implications of the proposal it decided to adopt as well as potential alternatives.[140] As such, in conjunction with the fact that interferences with A1P1 is an area where courts tend to pay a high degree of deference to parliament,[141] he found that the Bill was a proportionate and therefore justifiable interference with the pursuers' A1P1 rights[142] and that the legislation was therefore within the competence of the Parliament.

The judgment in *Sinclair Collis* may therefore have indicated to the Scottish Parliament that A1P1 need not be an insurmountable barrier to changing the law in order to protect the public interest. As Lord Carloway's judgment demonstrated, the courts are likely to be deferential to parliament if they consider that the legislative provision has been properly considered and justified. That the Scottish Parliament decided to be bolder in its proposals for land reform and indeed on alcohol minimum pricing, both potential incursions to A1P1, after the *Sinclair Collis* judgment is therefore probably not a coincidence.

(c) Growing understanding of importance of ESC rights

Another factor that may be responsible for the Scottish Government and Parliament's approach to human rights when considering the Land Reform (Scotland) Bill was an increasing recognition throughout academia and politics of the importance of protecting economic and social rights. The Scotland Act 1998 states that the protection of human rights contained in treaties to which the UK is a signatory is within the competence of the Scottish Parliament.[143] This includes the International Covenant of Economic, Social and Cultural Rights as well as number of other documents that place obligations on states to protect ESC rights of citizens.

That the Scottish Government was demonstrating an enhanced understanding of the need to protect ESC rights can be seen from a number of other initiatives it has proposed or has been involved with. One such initiative was Scotland's National Action Plan for Human Rights, developed by the Scottish Human Rights Commission in 2013. SNAP drew upon a number of

[140] Ibid, paras 1-13
[141] Ibid, paras 63-65
[142] Ibid, para 65
[143] Scotland Act 1998, Sch 5, Pt 1, para 7(2)(a)

rights that the UK is obliged to protect, placing a large emphasis on ESC rights, and aimed to develop targets to measure whether and how the Scottish executive could ensure that such rights were being fulfilled.[144] SNAP was just one of many initiatives by the SHRC on ESC rights. The SHRC has campaigned for the better protection of ESC rights since it was established. Shortly after the enactment of the Land Reform (Scotland) Act 2016, the Scottish Government announced that it was working on proposals to recognise a right to social security, another key ESC right. That the plans were announced in 2017, so soon after the 2016 Act, suggests that the Government was considering proposals around the same time as the 2016 Act was being debated. The proposals were eventually introduced to the parliament as the Social Security (Scotland) Bill which was enacted as the Social Security (Scotland) Act 2018.

The change in thinking about human rights in Scotland came after many years of international academic discussion about how best to ensure the protection of ESC rights. Such debates were also taking place in Scotland, with high profile academics and practitioners involved in debating the merits and methods of incorporating ESC rights into Scots law. One example of such was a lecture given by James Wolffe QC, then Dean of the Faculty of Advocates and later the Lord Advocate, on International Human Rights Day 2014, in which he considered a number of proposals for the incorporation of ESC rights into Scots law.[145] Indeed such proposals have since progressed further, with the Government currently working on introducing a new human rights bill, which will incorporate several UN Human Rights treaties, including the ICESCR into domestic law.[146]

That the above debates were taking place at the same time as the passage of the Land Reform (Scotland) Bill will have undoubtedly affected the Scottish Government's approach to the Bill and the Parliament's scrutiny of it. Indeed, as Shields notes, it was during the evidence phase of Stage 1 of the Bill, where it was made clear that the Scottish Parliament had the competence to protect ESC rights and that such rights need not conflict with A1P1 rights, that the Parliaments approach to scrutiny changed.[147]

(d) Conclusion

[144] See http://www.snaprights.info/ (Accessed 12/07/19)
[145] Wolffe, J. QC, (2014). 'Economic and Social Rights in Scotland: Lessons from the past; options for the future, A Lecture on International Human Rights Day 2014', *Edinburgh School of Law*
[146] 'New Human Rights Bill' *Scottish Government* (12 March 2021) Available at https://www.gov.scot/news/new-human-rights-bill/ (Accessed 19/08/21)
[147] SP OR, 07 October 2015, cols 3-51

While it is not possible to quantify exactly the factors that led to the change in approach of the Scottish Government and Parliament to human rights-scrutiny during the Land Reform (Scotland) Bill debates, that the factors discussed above all occurred around the same time as the Bill was being discussed provides strong circumstantial evidence. Indeed, even if the factors were not explicitly communicated by policy makers, it is likely that, combined, they created a situation where the Scottish Government felt it had to be more radical on land reform whilst being more confident in its ability to pass legislation that the courts would accept as interfering with A1P1 rights in a proportionate manner.

Parliament's response to that reaction

There is some precedent for parliamentarians arguing for a broader approach to human rights in the Scottish Parliament before the Land Reform (Scotland) Bill. In 2013, for example, Rob Gibson MSP, argued that 'we have to consider the general interest in Scotland to have more secure and sustainable farms of a tenanted and owned nature. Unless we are able to move to that position, through the application of the ECHR, that argument will be used against the development of farming in Scotland, as the case of Salvesen v Riddell shows.'[148] It can also been seen in the response of the Cabinet Secretary for Rural and Environmental Affairs to Roderick Campbell MSP's question on the lessons learned from *Salvesen* above.

However, as Shields demonstrates, evidence of a real shift of thinking can be found by looking at the passage of the Land Reform (Scotland) Act 2016. As noted above, the approach of the Scottish Parliament and Government to human rights and land reform in the immediate aftermath of *Salvesen* was one of 'risk mitigation'. However, as the RACCE committee heard evidence at Stage 1 of the legislative process,[149] rights came to be considered more broadly. Shields contrasts the types of questions that were asked initially (above) with the questions that came to be asked:

> In the passage of the LR(S) Act to debate stage the question then became; *'Does this [law/policy/action] risk infringing the right to property and can that interference be justified in the pursuit of the public interest?'* Put another way, the question became: *'Is there a public interest argument for infringing the right to property?'*[150]

[148] Rob Gibson MSP, SP OR 07 June 2012, cols 9931-9933
[149] SP OR, 07 October 2012
[150] Shields (n98), p8

From there, on the basis that the ECtHR gives states a wide discretion to determine public interest it was considered that the protection of economic and social rights would fall within this public interest. As such, the new question became:

> *'Is there an ESC rights argument for infringing the right to property?*[151]*'*

As a result of such questions, the Land Reform (Scotland) Act 2016 contained a duty on the Scottish Government to produce a 'Land rights and responsibilities statement',[152] twelve months after the legislation entered in to force which would have regard to 'promoting respect for, and observance of, relevant human rights'.[153] Human rights were defined as including Convention rights[154] but also 'other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom, including the International Covenant on Economic, Social and Cultural Rights'.[155] Ministers would then have a responsibility to promote this statement when undertaking obligations under the Act.[156]

By asking this question, linking the justification of land reform explicitly to the protection of human rights, albeit not those contained in the ECHR, the Scottish Parliament attempted to the reclaim its role in helping to determine the boundaries of rights protection. The result was an unambiguous parliamentary statement, reflected in statute, that the legislation, in changing the law in the way it did, was doing so in order to protect both the A1P1 rights of landlords as well as the ESC rights of others. Further, that such a statement was included in the legislation means that it could not be written off by the courts as not indicative of parliamentary intent.

Thus, the Government's change in approach to defending legislation that interferes with Convention rights, developed during its defence of the Land Reform (Scotland) Bill may have signalled a new dawn for human rights protection in the Scottish Parliament. The Scottish Government and Parliament, by speaking explicitly in the language of human rights and by justifying their interference with some rights with the protection of others clearly hope to influence judicial thinking, if, and when, its proposals are challenged. The former head of the SHRC and chair of the First Minister's Advisory Group on Leadership, which developed

[151] Ibid
[152] Land Reform (Scotland) Act 2016, s.1
[153] Ibid, s.1(3)(a)
[154] Ibid, s.1(6)(a)
[155] Ibid, s.1(6)(b)
[156] Ibid, s.3

proposals for Scotland's new human rights law, Prof Alan Miller, has also observed a change in the Government's approach,

> over the years, and especially recently, that reactive approach has developed incrementally into a more proactive approach that considers the broader range of rights – economic, social and cultural, and environmental.[157]

This change in approach, if accepted by the courts, would indicate that the ultimate outcome of the *Salvesen* case has been to contribute to an awakening of Scottish legislators, allowing them to become more actively involved in determining the boundaries of rights protection in Scotland.

However, as Maxwell notes, despite this change in approach, the fundamentals of rights protection in Scotland remain unchanged.[158] The Courts are required to set-aside Scottish legislation that they consider to be contrary to Convention rights. This means that the rights contained in the Convention trump those that are not. If the Court considers that proposals for land reform unjustifiably interfere with the A1P1 rights of landlords, the legislature has no choice but to abide by that decision. At the same time, the Courts' ability to take into account a broader range of rights is hampered because such rights have been given legal effect in Scots law. As will be discussed in the conclusion, this may change in the near future. The extent to which the system of rights protection in Scotland can truly be considered to be one in which the definition and protection of rights is shared depends on how the court responds to this change in approach by the Scottish Parliament.

Conclusion

The judgment in *Salvesen v. Riddell* and the subsequent response by the Scottish Government and Parliament illustrates well the nuances of rights protection in Scotland. The first conclusion to draw from the saga would be that there should be no doubt as to the ultimate authority of the courts to set-aside legislation that they consider unjustifiably interferes with Convention rights. When this occurs, legislators clearly feel politically and legally bound to respond to the judgment in a manner that the court has directed. However, despite some academic criticism of the judgment in *Salvesen* on its failure to pay sufficient deference to the Scottish Parliament, the judgment may have proven to be an important moment of learning for legislators. It made clear that interferences with Convention rights that are rushed, poorly drafted or insufficiently

[157] Prof Alan Miller, SP OR EHRiC 3 May 2018 Col 4
[158] Maxwell (n89), p137-138

justified will not be tolerated by the courts. The immediate response of the Scottish Parliament was to be put off legislating in that area altogether. However, gradually, as several push and pull factors indicated that the Scottish public would not be satisfied with weak plans for land reform and that the Scottish Parliament *could* legislate in a manner that promoted general interests over individual rights in a manner that did not unjustifiably interfere with those rights, the Scottish Parliament regained its confidence in pursuing radical land reform. That the courts in other cases have indicated that they are open to incursions of the property rights so long as they are sufficiently justified gives the Parliament some encouragement that their use of ESC rights to justify interferences with property in the Land Reform (Scotland) Act 2016 may be deemed to be acceptable by the courts.

Salvesen also indicates that the position of different institutions in relation to rights protection is not fixed. While the courts have the power to scorn parliament for legislating in a manner that unjustifiably interferes with rights, this is seen as a measure of last resort, with the courts preferring to defer to decisions of a democratic parliament wherever possible. On the other hand, while parliament may refrain from legislating in an area where it has been rebuked by the courts in the short-term, if sufficient pressure builds on it to legislate in that area again, then it is likely to bow to that pressure. Strong-form judicial review in the Scottish context may therefore operate as an opportunity for the parliament to (re)think its legislative proposals, but not to abandon them altogether.

Case Study 2 - What does saga over the Named Person legislation say about the operation of the 'third way' model in Scotland?

Introduction

The Children and Young People (Scotland) Bill was introduced to the Scottish Parliament by Alex Neil MSP on 17 April 2013. The Bill had almost universal support across parliament. No member voted against the motion, with 103 members voting in favour and 15 members abstaining. However, this apparent unity masked underlying division over the Bill's so-called 'Named Person' provisions. Under these proposals, every child and young person in Scotland would be allocated a named individual, usually a practitioner in health or education, who would be responsible for supporting the wellbeing of the child. To assist with these functions, Named Persons were required by the Act to share and receive information relevant to the child's wellbeing with other support services.

To the Bill's proponents, the Named Persons provisions were nothing more than the crystallisation of already occurring good practice that would allow public authorities across Scotland to support children and families in a proactive and simplified manner. To the Bill's loudest detractors, the provisions were a totalitarian ploy to undermine parents' primary role in the upbringing of children. Over the next six years, the contest over the Named Person provisions would grow to become one of the longest running and bitterly fought sagas of the Scottish Parliament's short life so far, with numerous parliamentary questions and debates, a vociferous public campaign against the policy, a partially successful legal challenge (that both sides claimed vindicated their position) and a protracted and ultimately unsuccessful attempt to revive the policy in its legislative form.

The aim of this second case study is to look at the Named Person legislation saga in detail, from development to desertion, to consider what it tells us about how Scotland's 'third way' model of rights protection operates in practice. To that end, it will reflect on insights made in previous chapters and make comparisons to the other high-profile example of an ASP being struck down by the courts on Convention rights-grounds, the Agricultural Holdings (Scotland) Act 2003 – which was the focus of the first case study. It will argue that the present case gives us different reflections to the latter, in that, unlike the offending provision in the Agricultural Holdings (Scotland) Act 2003, the Named Persons provisions were the result of careful policy development and central to the aims of the legislation. This meant that, arguably, the policy had stronger democratic legitimacy and that the Government was more committed to ensuring

that the policy could work. The fact that the proposal was dropped, in its statutory form at least, suggests that the Supreme Court's finding of incompatibility on the basis of Article 8 ECHR undermined the policy to a greater extent than was admitted to at the time – even allowing for the complications that resulted from forthcoming changes to data protection law. That a landmark piece of Scottish legislation was partially derailed by the Supreme Court on Convention rights-grounds underlines the strength of strong-form review in Scotland. The present example also differs from the previous in that in this instance, the question of Convention rights compliance became a key plank of rival parties' opposition to the Bill. This challenges previous assumptions made about the ability and interest of parliamentarians in Westminster systems in holding the Government to account on human rights-grounds.[1]

Ultimately, it will be argued that a combination of strong political opposition to the Bill and difficulties in ensuring that the legislation was both workable and compliant with legal constraints meant that the Bill was ultimately dropped. The former sapped the political will and energy of the Bill's proponents to deal with the latter. By considering the history of the Named Person's legislation at a granular level, a much clearer picture of how the different sites of Convention rights-scrutiny operate and interact with one another will emerge. Some of the conclusions in chapter three, for example the ineffectiveness of the PO and Ministerial statements of competence in engendering parliamentary scrutiny on Convention rights-grounds, will be reaffirmed. However, other conclusions, for example the success of the Scottish Parliament in effectively holding the Government to account on Convention rights-grounds will be challenged, or at least qualified. This helps to build a more nuanced picture of the operation of Scotland's 'third way' model.

Named Person: Policy and Provisions

The Named Person policy is an important part of the Scottish Government's wider 'Getting it Right for Every Child' (GIRFEC) approach – which has been developed over several years by multiple governments.[2] Broadly, the GIRFEC policy aims to improve the wellbeing and life

[1] McCorkindale, C. & Hiebert, J.L. (2017), 'Vetting Bills in the Scottish Parliament for Legislative Competence', *Edin.L.R. 21:3*, p328

[2] See eg Scottish Executive (2001) *For Scotland's Children,* Scottish Executive, Available at https://www2.gov.scot/Resource/Doc/1141/0105220.pdf (Accessed 21/05/2020), p90, Action Point 4; Scottish Executive (2002) "*It's everyone's job to make sure I'm alright": Report of the Child Protection Audit and Review*, Scottish Executive, Available at https://www2.gov.scot/Resource/Doc/47007/0023992.pdf (Accessed 21/05/2020), p15, Recommendation 10; Scottish Government (2009) *Changing Professional Practice and Culture to Get it Right for Every Child*, The Scottish Government, Edinburgh, Available at https://www.webarchive.org.uk/wayback/archive/20180530075035/http://www.gov.scot/Publications/2009/11/20094407/12 Accessed (21/05/2020),

opportunities of children and young people in Scotland by requiring the various organisations providing child services to work together to provide a single system of service planning and delivery.[3] Alongside this, is a shift in focus in delivery of children's services from 'welfare' to the broader 'wellbeing', the latter being the language used by the United Nations Convention on the Rights of the Child (UNCRC). The Scottish Government defines wellbeing through eight indicators: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included (SHANARRI).[4]

In order to advance these goals, under the 2014 Act, a 'Named Person' would have been appointed for every child and young person under the age of eighteen in Scotland.[5] This individual would have, according the Government, acted as a single point of contact for children and families, helping them to access services that could have potentially improved the child's wellbeing and intervening early to prevent difficulties escalating.[6] The Government argued that important to the working of the Named Person service, particularly in relation to its aim of early prevention, was the cooperation of relevant public authorities with the Named Person. To fulfil this aim, the Act included a duty to share information between relevant public authorities and the Named Person where there was a concern about the wellbeing of the child or young person.[7]

Prior to the introduction of the Bill, the Named Person scheme, including the sharing of information, was already being implemented in some areas of Scotland. However, the Government felt that implementation was 'inconsistent and patchy'[8] and that the practice should be employed throughout Scotland. It was also considered that the legal framework for information sharing was deficient, as it was not sufficiently clear about when information could be shared without the consent of children and families.[9] Further, the threshold for sharing information under the non-statutory service, where the child was "at risk of significant harm", was not sufficiently broad to allow information about less serious concerns relevant to the child's wellbeing to be shared. As a result, the Bill introduced provisions so that practitioners would be required to share information with the Named Person where there was 'concern about

[3] SP Bill 27 Children and Young People (Scotland) Bill [Policy Memorandum] Session 4 (2013), para 55
[4] Children and Young People (Scotland) Act 2014 (The 2014 Act) s.96(2)
[5] Ibid, s.19(1)
[6] Ibid, s.19(5) (ii)
[7] Ibid, s.26
[8] Policy Memorandum, (n3), para 69
[9] Ibid, para 75

the wellbeing' of the child.[10] The Named Person was required to reciprocate with other relevant public bodies if necessary to address concerns.[11] To assist the practitioners in their role and to ensure that the practice of information-sharing was in compliance with the law (ie on the Data Protection Act 1998, EU law and Convention rights), relevant authorities were required by s.28 of the Act to 'have regard' to guidance published by Ministers on the Named Persons provisions.

The Children and Young Person (Scotland) Bill – Legislative Scrutiny

Before the Bill was introduced to the Scottish Parliament, the Scottish Government announced a 12-week public consultation process. Analysis of consultation responses found that 72% of respondents who provided a view on Named Persons, supported the policy.[12]

Competence Checks

The Policy Memorandum, as required by Rule 9.3.3(d) of the Scottish Parliament's Standing Orders, set out the potential effects that the Bill would have on *inter alia,* human rights. It suggested that the information-sharing provisions of the Named Person scheme were likely to engage Article 8 ECHR, but considered that they complied with that Article on the basis that they had a legitimate aim, were proportionate and had appropriate safeguards in place.[13] The bases for these conclusions were not further elucidated. In addition, the Bill received positive certificates from both the Minister responsible for the Bill and the PO, confirming that they were satisfied that the Bill was compatible with Convention rights.[14] These statements were not accompanied with additional reasons.

The present example therefore adds to doubts raised in chapter three that the competence checks are failing to engender parliamentary rights-based scrutiny. Since Ministers and POs do not tend to provide reasons when issuing a positive certificate, parliamentarians are given very little information with which to work. McCorkindale and Hiebert argue that this omission is made more serious because the PO will occasionally issue a positive certificate even where

[10] Ibid, para 76
[11] The 2014 Act (n4) s.26
[12] Scottish Government (2013) *The Scottish Government Response to 'A Scotland for Children: A Consultation on a Children and Young People Bill',* The Scottish Government, Edinburgh, available at https://www.gov.scot/publications/scottish-government-response-scotland-children-consultation-children-young-people-bill/pages/3/, Accessed (07/08/2020), p5
[13] Ibid, para 154
[14] SP Bill 27 Children and Young People (Scotland) Bill [Statements on Legislative Competence] Session 4 (2013)

there is some doubt as to the competence of the Bill.[15] As has been pointed out, this can hinder parliamentary scrutiny by falsely reassuring parliamentarians that the Bill is likely to be within competence even where this conclusion is not definite.[16] On occasion, the PO has confidentially conveyed concerns about the competence of legislation that has nonetheless been granted a positive certificate to the lead committee[17] – but the confidential nature of this advice means that it is impossible to know whether this was given in relation to the present Bill. The issue is further compounded where, as was the case in relation to the present Bill, the Government's policy memorandum contains very little information on the Convention rights-compatibility of the Bill. Again, without giving parliament some sense of the Government's reasoning as to the Bill's effect of Convention rights, parliament's ability to scrutinise the legislation on Convention rights-grounds is made considerably more difficult.

Therefore, the present example confirms the conclusions in chapter three that the official pre-introduction competence checks are failing to enhance parliamentary scrutiny of legislation on Convention Rights-grounds. This does not mean that there was no parliamentary scrutiny of the Bill on Convention rights-grounds. In fact, there was extensive questioning of the compliance of the Bill on the basis of Convention rights during the legislative process. This scrutiny, however, tended to feed from evidence given to the lead Committee by stakeholders during Stage 1 of legislative process.

Stage 1

Education and Culture Committee

The Education and Culture Committee was tasked with the primary role of scrutinising the legislation at Stage 1. As the Committee received evidence, it became clear that there were significant concerns about the compatibility of some of the Bill's provisions with Convention rights.

The most serious charge against the legislation – expressed, significantly, by the Faculty of Advocates, was that the Named Persons policy as whole potentially violated Article 8 of the ECHR. In its written submission to the Committee the Faculty suggested that the policy 'dilutes

[15] McCorkindale and Hiebert (n1), p340
[16] Adamson, B. 'The Protection of Human Rights in the Legislative Process of Scotland.' in Hunt, M. et al Eds, (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit*, London: Hart Publishing, p203
[17] McCorkindale and Hiebert (n1), p340

the legal role of parents'[18] and 'provides a potential platform for interference with private and family life in a way that could violate Article 8 of the European Convention on Human Rights.'[19] Further, on the information-sharing provisions: 'The open transfer of data contemplated by the Bill represents a serious intrusion on individual rights.'[20]

Others focused less on the overall policy but shared some of the Faculty's concerns about the information-sharing provisions of the Bill. It was suggested that s.26 of the Bill, which provided that information that "might be relevant" to the child's wellbeing "ought" to be shared would allow for the sharing of information that could disproportionately interfere with children and families' private life under Article 8 ECHR.[21] Family Law expert Professor Kenneth Norrie agreed with these conclusions. He suggested that the information-sharing provisions could be 'the most difficult part of the whole bill' and that there were 'huge ambiguities in the drafting of the bill, which if passed in its current form, will only lead to lots and lots of litigation.'[22] As well as section 26, Professor Norrie criticised section 27, which stated that:

> The provision of information under this Part is not to be taken to breach any prohibition or restriction on the disclosure of information.

He suggested that this could be read to mean that officials were empowered by the Bill to share information even if it was in breach of data protection law, Convention rights and other laws that regulated private information.[23] This position was shared by many others, including Professor Alan Miller, then head of the Scottish Human Rights Commission, who suggested that statutory guidance would be required to detail further the relationship between the provisions and the ECHR.[24]

When giving evidence to the Committee in the final evidence session, the Minister refused to go into greater detail about the Scottish Government's legal advice on the competence of Bill, including in relation to the Named Person provisions, compounding the problem of the lack of

[18] Faculty of Advocates (2013) 'Education and Culture Committee Children and Young People (Scotland) Bill: Faculty of Advocates' available at http://www.parliament.scot/S4_EducationandCultureCommittee/Children%20and%20Young%20People%20(Scotland)%20Bill/FacultyofAdvocates.pdf Accessed (07/08/2020), p39
[19] Ibid, p40
[20] Ibid
[21] See eg SP OR EC 03 September 2013 cols 2688-2690 per Susan Quinn and John Stevenson ; SP OR EC 17 September 2013 col 2801 per Clare Mayo ; SP OR EC 01 October 2013, cols 2905-2908, per Julliet Harris, Sam Whyte and Tam Baillie
[22] SP OR EC 03 September 2013 cols 2690-2691 per Prof Kenneth Norrie
[23] Ibid
[24] SP OR EC 01 October 2013 col 2906 per Prof Alan Miller

information given in the Bill's accompanying documents.[25] When questioned by Liz Smith MSP, the Minister said that she disagreed with the Faculty of Advocates submission. She said that the Named Person in the vast majority of cases would only provide additional support with the family's consent and that in the minority of cases where there were more serious issues expressed, the law already allowed for intervention.[26] In relation to the information-sharing provisions, the Minister confirmed that the Bill would empower practitioners to share information even where the consent of parents was not given, if there were concerns that a risk to a child's wellbeing might lead to harm, as long as the sharing was proportionate and considered. In response to a suggestion that the Bill would leave responsibility to individual professionals to determine whether information-sharing was compliant with the ECHR, the Minister pointed towards the statutory guidance, which she explained would ensure clarity of application to empower professionals to make the appropriate judgements on information-sharing.[27] Finally, when asked about the concerns raised by Professor Norrie and others on the drafting of sections 26 and 27 of the Bill, the Minister responded that she would look carefully at the points made. However, it was denied that s.27 empowered practitioners to share information notwithstanding existing laws on data protection – as to do so would be outwith the parliament's competence.[28]

Overall, the Education and Culture Committee's Stage 1 report supported the general principles of the Bill, including (with the exception of Liz Smith MSP) on Named Persons. However, the report reiterated the concerns expressed by Professor Norrie and others about the drafting of sections 26 and 27 of the Bill, and the need for clear statutory guidance. It suggested that necessary safeguards be introduced at Stage 2 to reflect these concerns.[29]

Delegated Powers and Law Reform Committee

The Delegated Powers and Law Reform Committee also heard evidence and produced a report at Stage 1. It focused on sections 28 and 29 of the Bill as introduced, which *empowered* Ministers to issue guidance and directions to service providers about how the Named Persons

[25] SP OR EC 08 October 2013 Col 2945-2946
[26] Ibid, cols 2946-2947
[27] Ibid, cols 2949-2950
[28] Ibid, cols 2951-2953
[29] Education and Culture Committee, 11th Report 2013, 'Stage 1 Report on the Children and Young People (Scotland) Bill (SPP 421)

provisions should be exercised. The Committee recommended that the Bill should be amended to *require* Scottish Ministers to publish such guidance.[30]

Chamber

During the plenary Stage 1 debate, the Minister acknowledged the Committee's comments about the areas where implementation of Named Persons required further clarification. She committed to clarify, principally through guidance, the issues raised.[31] Some of the concerns raised by MSPs during the Committee's evidence sessions were raised again, including on the definition of 'wellbeing', which, it was suggested, could lead to the disproportionate sharing of individual's private information.[32] At Decision Time, all parties voted in favour of the general principles of the legislation, apart from the Scottish Conservatives, who abstained principally on the basis of its opposition to the Named Person provisions.[33]

Stage 2

Successful amendments

At Stage 2, the Scottish Government introduced a number of amendments designed to 'tighten up'[34] the Bill in order to reflect some of the criticisms made of the Bill at Stage 1.

First, in section 26 (and other relevant sections), it was proposed that the provision that allowed for information that 'might be relevant' to the exercise of the Named Person functions to shared, should be changed to 'is likely to be relevant'. The Minister explained to the Education and Culture Committee that the amendment hoped to further enlighten the context in which the professional should make the decision to share information.[35] The Government inserted lines to require the information holder to 'ascertain and have regard to' the views of the child when deciding to share information, taking into account the child's age and maturity and only providing the information if the likely benefit to the wellbeing of the child would outweigh any potential adverse effect on the child's wellbeing. Such amendments were designed to assuage the fears of those that had felt the original Bill allowed for the routine sharing of information

[30] Delegated Powers and Law Reform Committee, 50th Report 2013, 'Children and Yong People (Scotland) Bill' (SPP 398), p5
[31] SP OR 21 November 2013, col 24793 per Aileen Campbell MSP
[32] Ibid, cols 24802-24803 per Liz Smith MSP; col 24812 per Liam McArthur MSP; col 24820 per Joan McAlpine MSP
[33]Ibid, col 24804 per Liz Smith MSP
[34] SP OR EC 07 January 2014 Col 3244 per Aileen Campbell MSP
[35] Ibid

without first consulting with the child – potentially in breach of data protection law and the right to privacy under the ECHR.[36]

For section 27, in response to the issues highlighted by Professor Norrie, the Government introduced an amendment that clarified that information could be shared in breach of confidentiality, but only if they satisfied the tests in section 26 and complied with the Data Protection Act 1998, Convention rights and other laws governing private information.[37]

In relation to section 28, the Government successfully introduced amendments, as recommended by the Delegated Powers and Law Reform Committee, to require Scottish Ministers to publish guidance on the Named Persons provisions and that relevant authorities must 'have regard to' that guidance.[38]

Finally, the Government committed to working with the Information Commissioner and others in producing clear guidance which would further enhance the application of the information-sharing provisions in practice. On this point, at the Delegated Powers and Law Reform Committee, the Conservative MSP John Scott presciently expressed concerns that, since much of the directions as to how the information-sharing provisions should operate would be included in the guidance issued under section 28, that the Committee could not be sure the Bill would be compliant with Article 8 of the Convention.[39] To this, other Committee members acknowledged this possibility, but suggested that this issue was 'probably quite common to bills, because it is always possible to draft powers that might step outside the ECHR.'[40] Overall, it was agreed that the Bill itself complied with the Convention and that since the Committee would have the opportunity to consider the guidance later, they were content to allow the Bill to progress at that stage.[41]

Failed Amendments

Liz Smith lodged amendments so that the information-sharing provisions would be left out of the Bill altogether, or if this amendment failed, that the threshold for sharing information would be increased from 'wellbeing' to 'welfare'.[42] However, these were rejected. The Minister claimed that the amendments would defeat an important purpose of the legislation – to spot

[36] Ibid, Cols 3244-3245
[37] Ibid
[38] Ibid cols 3252-3253
[39] SP OR DPLR 18 February Col 1306 per John Scott MSP
[40] Ibid, per Stewart Stevenson MSP
[41] Ibid, col 1307
[42] SP OR EC 07 January 2014, Col 3246 per Liz Smith MSP

issues with children's wellbeing early so that they did not develop into something more serious.[43]

Stage 3

Amendments

At Stage 3 of the Bill, Liz Smith again moved amendments that would limit the role of Named Persons under the Bill. She suggested that her amendments, which would reduce the contexts in which the Named Person was responsible for the child or young persons and give parents an opt-out of the scheme, were more targeted and proportionate. This was to reduce the risk, raised by Aidan O'Neill QC and others, that the Bill would not survive a legal challenge on Article 8 ECHR grounds.[44] However, the amendments were again defeated, with the Minister suggesting that they would defeat the purpose of the legislation – which was that the scheme should be universal.[45]

On information-sharing, an amendment was lodged by Scottish Liberal Democrat MSP Liam McArthur to require the consent of the child for information to be shared subject to exceptions. Unless his amendments were accepted, he suggested that these provisions might be incompatible with Article 8 ECHR.[46] The amendments were supported by the Scottish Liberal Democrats, Scottish Labour and the Scottish Conservatives. However, the SNP which had a majority of MSPs in the parliament, voted against and the amendments were defeated. Members that spoke against the amendment suggested that such provisions would potentially lead to situations where the Named Person would be unable to share information that was necessary to safeguard the child's wellbeing and that the statutory guidance would be sufficient to ensure that the child's privacy rights would be respected.[47]

Debate

In the Stage 3 debate in Parliament, despite supporting the policy, Liberal Democrat and Labour MSPs criticised the Government for what they considered to be 'arrogance'[48] in a failure to properly articulate the policy and for failing to work collaboratively with other parties

[43] Ibid, Col 3251
[44] SP OR 19 February 2014, Col 27792 per Liz Smith MSP
[45] Ibid, Col 27799, per Aileen Campbell MSP
[46] Ibid, Col 27811 per Liam McArthur MSP
[47] Ibid, Col 27812 per Stewart Maxwell MSP
[48] Ibid, Col 2922 per Kezia Dugdale MSP

to improve the Bill,[49] including on the information-sharing provisions. It was suggested that the Government would have to draft the guidance on Named Persons extremely carefully in order to prevent further opposition and legal challenges.[50] Liz Smith agreed that the Scottish Government had not engaged with opposition parties and some stakeholders and reiterated that the Scottish Conservatives would abstain from voting for the legislation, on the basis that it could not support the Named Persons provisions.[51] The Minister had initially pointed to the amendments to the Bill to indicate that the Government had listened to concerns of MSPS and stakeholders.[52] At this point it was becoming clear that there was serious opposition to the Named Persons provisions inside and outside of parliament. SNP members who spoke in favour of the Bill suggested that this opposition was based on misunderstanding of the policy caused misrepresentation by the press and the Scottish Conservatives.[53]

Law Officers' Pre-Assent Reference Power

A week before the 2014 Act was passed by the Scottish Parliament, the Christian campaigning group, Christian Institute, wrote to the Scottish and UK Law Officers requesting that the officers refer Part 4 of the 2014 Act to Supreme Court using their powers under Section 33(1) of the Scotland Act 1998. The Group referred to a legal opinion drafted by Aidan O'Neill QC that suggested that the provisions of the Act may unlawfully interfere with Article 8 ECHR on the basis that 'the blanket nature of the provision constitutes a disproportionate and unjustified interference with the right to respect for individual families' private and family life and home.'[54] Further:

> the provisions of Part 4 of the Bill would appear to fail the test of being in "accordance with the law" in the sense of having qualities of accessibility, foreseeability and precision which would provide proper protection against arbitrary and oppressive use of the powers. This is because the functions, duties and powers of – and crucially the limitation on – the named person are not set out in terms in this legislation.[55]

[49] Ibid, see also Col 29224 per Liz Smith MSP and Col 27928 per Liam McArthur MSP
[50] Ibid, Col 2921 per Kezia Dugdale MSP
[51] Ibid, Col 29224 per Liz Smith MSP
[52] Ibid, Col 27915 per Aileen Campbell MSP
[53] Eg Ibid, Col 27930 per Joan McAlpine MSP
[54] Sam Webster (12 Feb 2014) 'Children and Young People (Scotland) Bill Referral to the UK Supreme Court: Letter to the Rt Hon Frank Mulholland QC – The Lord Advocate' *Christian Institute:* Available at https://www.christian.org.uk/wp-content/uploads/named-person-frank-mulholland.pdf (Accessed 21/08/20)
[55] Ibid

This latter concern would eventually be vindicated by the Supreme Court, at least in relation to the information-sharing provisions of the 2014 Act. In response to the letter, the Lord Advocate's Office replied that it had 'taken account of the points raised in [the] letter' but had 'not considered it appropriate to make a reference.'[56] The responses of the Attorney General and Advocate General have not been published – but both also refused to make a reference.

At the time of the group's letters, the Law Officers' power of referral under Section 33(1) SA had never been used. The Officers' refusal to refer the Bill to the Supreme Court therefore probably did not come as a surprise. Nonetheless, one might question why a UK Government headed up by the Conservative Party might not support the position of their Scottish Conservative colleagues and block the Bill/refer the Bill to the Supreme Court?

One important explanation might be that, as already highlighted, the subsequent (and only) three referrals of Bills to the Supreme Court by the UK Law Officers have mainly focused on whether the bills have encroached on reserved matters. This indicates that the UK Government is highly sensitive to encroachments onto reserved matters but is less concerned (at least in terms of making a reference) about questions of competence around Convention rights.

Additionally, the failure of the Law Officers to refer the Bill might be explained by the factors that McCorkindale and Hiebert have identified, which were discussed in greater detail in chapter three. According to their research, the Law Officers' reference powers are more likely to have an effect on legislation at the pre-legislative stage than post-enactment.[57] The authors offer a number of potential reasons why a Law Officer may not refer a Bill even if there are some doubts as to its competence. Amongst these include a referral being considered a 'nuclear option', the need for political sensitivity, and the option of a post-legislative challenge where the concern about compatibility is not clear.[58]

All of these factors could explain the failure of the Law Officers to make a referral. Additionally, of the two grounds that the letter suggested may lead the provisions to breach Article 8, only the second argument was successful. Thus, the legal position taken by the letter was not clearly correct and there was room for disagreement about the law.

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[56] Legal Secretariat to the Lord Advocate (20 March 2014) 'Children and Young People (Scotland) Bill: Response to Christian Institute' *Scottish Government:* Available at https://www.christian.org.uk/news/scot-gov-legal-advisor-prevented-lengthy-named-person-battle/ (Accessed 21/08/20)
[57] McCorkindale and Hiebert (n1), p342
[58] Ibid, 345-346

What does pre-legislative scrutiny tell us about the culture of rights in Scotland?

As can be seen from the pre-legislative scrutiny, the provisions of the Children and Young People (Scotland) Act 2014 that were eventually found by the Supreme Court to be incompatible with Article 8 of the Convention were discussed at great length at each stage of the legislative process. That Convention rights formed such a central part of discussion indicates that parliamentarians do consider that Convention rights are relevant to their scrutiny of legislation, and that they are not always willing to give Bills that have received positive certificates of competence the benefit of doubt. From the present example therefore, it can be suggested that the Scottish Parliament takes its rights-scrutinising role seriously, fulfilling the role prescribed under 'legislative rights review'.

Extent and Form of Rights-scrutiny

The Scottish Parliament's scrutinising role to some extent reflects what Nicol has described as a 'culture of compliance'.[59] Building on Stone Sweet's survey of parliamentary rights-scrutiny in continental Europe, Nicol described a 'culture of compliance' as a form of parliamentary rights-scrutiny where parliamentarians 'express their differences in terms of conflicts about the nature of rights, so that debates as to the wisdom of legislation have been replaced by debates about constitutional compliance.'[60] Thus, the Scottish Conservatives attempted to draw support to defeat the policy on the basis that, following evidence from the Faculty of Advocates, it altered the relationship between the family and the state in a way that would be contrary to Article 8 ECHR. Similarly, the Liberal Democrats and Labour, following evidence from legal experts, questioned the information-sharing provisions on the basis that they potentially disproportionately interfered with the privacy of children and families. In both contexts, Convention rights were introduced as a potential threat to the successful operation of the legislation – without questioning whether, if the courts came to this conclusion, the legislation should be pursued nonetheless. This form of rights-scrutiny, in which opposition parties (informed by stakeholders) anticipate the judgment of the courts, has the potential benefit of ensuring that legislation is more likely to be compatible with Convention rights as interpreted by the courts.

However, Nicol has been critical of this 'culture of compliance' because it diverts parliamentary attention from questions of policy and means that parliamentarians

[59] Nicol, D. (2003). 'The Human Rights Act and the Politicians' *LS*, p453
[60] Ibid

unquestioningly accept judicial interpretations of rights.[61] On the first charge, it should be noted that alongside scrutiny on Convention rights-grounds, parliamentarians also scrutinised the Bill on the basis of ideology, political factors and concerns about implementation and cost. The idea that increased parliamentary scrutiny on Convention-rights-grounds leads to parliamentarians "governing like judges[62]" - does not take into account the ability of parliamentarians to scrutinise legislation on multiple grounds. On the second charge, it should be noted that MSPs really have no choice but to accept judicial interpretations of rights because courts are empowered to set-aside ASPs on Convention rights-grounds. There remains some room for parliamentarians to shape the meaning of rights, especially if the right is limited or where the rights-question has not yet been determined by the courts, but ultimately the court's interpretation is the only authoritative interpretation of the Convention right (especially where it is based on Strasbourg jurisprudence). Nicol's preferred rights culture, 'a culture of controversy', where parliamentarians feel free to expansively determine the meaning of rights[63], is therefore not feasible in the Scottish context, at least as part of their ordinary approach to Convention rights-based scrutiny.

Effectiveness of rights-scrutiny

What then, of the effectiveness of the Scottish Parliament in scrutinising the legislation on Convention rights-grounds? As discussed, Hiebert has suggested that the most persuasive explanation for the failure of 'third way' Bills of Rights to engender more effective parliamentary scrutiny of legislation on rights-grounds is that the Bills,

> have not fundamentally altered the key institutional and political dynamics that shape how… Westminster political systems function.[64]

Hiebert notes that typical features of a Westminster political system create conditions that are not conducive to effective parliamentary scrutiny on rights-grounds. These characteristics allow the government to have almost a monopoly over legislative proceedings, to introduce legislation that is almost already fully formed and to exert considerable power over the governing parties' parliamentarians to support government legislation.[65] Meanwhile,

[61] Ibid,
[62] Nicol quoting Stone Sweet in Ibid
[63] Ibid, p454
[64]Hiebert, J.L. 'Parliamentary bills of rights: have they altered the norms for legislation decision-making' in Jacobsohn, G. and Schor, M. (2018) *Comparative Constitutional Theory: Research Handbooks in Comparative Constitutional Law:* Cheltenham: Edward Elgar Publishing Ltd, Ibid, p138
[65] Ibid, P127

opposition parliamentarians generally do not consider their role as improving legislation but as blocking legislation and acting as an alternative government. Hiebert suggests that these factors are not conducive to parliamentary rights-scrutiny because where Government has a majority or is backed by a stable coalition, party unity means that the Government can rely on party members to vote in favour of its legislation. Further, unlike elsewhere, opposition parties in these states 'have not generally accepted the merits of a rights or compatibility-based framework in their perpetual challenge to present their party as the alternative to government.'[66]

In previous chapters, it has been shown that these Westminster features are strongly present in the Scottish Parliament. As discussed above, the vast majority of the preparation for the Children and Young People (Scotland) Bill came before its introduction – where the Government had already made up its mind about the compatibility of the legislation with Convention rights. Thus, although it made some minor alterations to some of its provisions after warnings from experts about Convention rights-compatibility, the essential purpose of and powers in the legislation remained the same. The ability of the Government to resist parliamentary scrutiny was compounded by the fact that it had a parliamentary majority and thus did not have to rely on opposition votes for the Bill to be enacted. Further, I have suggested that a feature of the Scottish Parliament's design - that Parliamentary Committees were given a more powerful, formal role in the legislative process in place of an upper chamber – has in fact often decreased the effectiveness of parliamentary scrutiny on Convention rights-grounds.

These factors meant that at Stage 1 and Stage 2 – where the Education and Culture Committee had a majority of SNP MSPs and in the chamber – the Government was able to resist amendments by opposition MSPs. Indeed, the Government's failure to work with the opposition during the passage of the Bill was commented on by MSPs at Stage 3 – who accused it of 'arrogance'.[67] These factors meant that the one feature that did differ from Hiebert's analysis in other contexts; that in the present case, the opposition parties did place considerable focus on the compatibility of the legislation with Convention rights, had little effect on the outcome of the Bill as SNP MSPs were able to outvote the opposition.

The defeated opposition amendments would not have cured the Bill the incompatibility with Article 8 ECHR found by the Supreme Court. Although there had been warnings about the

[66] Ibid, p138
[67] SP OR 19 February 2014 Col 2922 per Kezia Dugdale MSP

importance of the guidance produced by the Government to the proportionality of any interference with Article 8, the specific point – that Government Guidance was not binding - was not picked up on during the legislative process. Indeed, many of the amendments suggested by Liz Smith MSP turned out not to be necessary to make the Bill compliant with Convention rights. That said, arguably, if Liam McArthur's amendment was passed, it would have influenced the Supreme Court in its finding that the Bill could potentially lead to information-sharing that disproportionately interfered with children and families' privacy. The Government's refusal to entertain opposition amendments, even from those who supported the Bill, may therefore have harmed the prospects of the Bill's success. Partly in terms of the legal challenge, but more importantly, it meant that opposition parties would be far less willing to give the Government the benefit of doubt when considering the remedial legislation.

Legal Challenges to 2014 Act

Outer House

Although the Children and Young People (Scotland) Act received Royal Assent in 2014, the Named Person provisions (Part 4) were not brought immediately into force. Instead, enforcement of the provisions was delayed, initially to August 2016, in order that the Scottish Government had the opportunity to consult on and issue statutory guidance (as required by sections 28 and 29 of the Act) on how the provisions would work in practice.

Regardless, Part 4 of the Act was challenged by seven petitioners, four charities and three parents tied to the NO 2 Named Persons campaign (discussed later). The petitioners claimed that the Part 4 of the Bill was 'not law' on the basis that it was incompatible with the statutory limits on competence, including reserved matters, Convention rights and EU law. The focus of this case study will be on the Convention rights arguments made by the petitioners, particularly in relation to Article 8 ECHR.

Convention rights Arguments

The petitioners argued that the Named Person provisions violated Articles 8, 9 and Article 2 of the First Protocol of the Convention.[68] However, the majority of the discussion of Convention rights was reserved to Article 8.

[68] *The Christian Institute & Others v Lord Advocate [*2015] CSOH 7, para 40

The petitioners made two general arguments. Firstly, it was argued that the Named Person policy was, in itself, contrary to the aforementioned Convention rights. Therefore, the whole of Part 4 should be challenged as beyond the competence of the Scottish Parliament. The petitioners argued that as all children would automatically be allocated a Named Person without the consent of the child or their parents, with no assessment of whether there was pressing social need to justify the appointment, it was not necessary to demonstrate that the exercise of Named Person functions in a particular case violated Convention rights.[69] Broadly, the petitioners argued that the Named Persons provisions represented an unlawful interference with Convention rights on the basis that (1) the consent of the child or their parents was not required for the Named Person scheme to operate and there was no way to 'opt out' of the scheme; and (2) that the universal appointment of Named Person meant that the scheme would operate even when it was not necessary to promote the legislative aim.[70]

The petitioners also suggested that the interference with Convention rights that the Named Person scheme would require was not 'in accordance with law' as required by Arts 8(2) and 9(2) ECHR. They suggested that the framework laid down by Part 4 of the legislation, was 'insufficiently transparent, accessible and predictable'[71] and 'conferred unduly broad discretionary powers on named persons'[72] which meant that there was insufficient protection against arbitrary interference.[73]

Policy as a whole

As is the norm for determining whether an act unlawfully interferes with a limited Convention right, Lord Pentland considered whether Part 4 of the Act engaged (or was capable of engaging) the right in question and if so, whether the interference was lawful, necessary and proportionate.

Without saying much about whether the legislation engaged Article 8, Lord Pentland considered the question of whether the named person provisions had a 'legitimate aim'. He characterised the aim as generally promoting and safeguarding the wellbeing of all children and young people in Scotland. He claimed that the furtherance of this aim was in the sphere of social policy and child welfare, an area where the courts had continuously accepted that the

[69] Ibid, para 42
[70] Ibid, para 43
[71] Ibid, para 44
[72] Ibid
[73] Ibid

executive and legislature are given wide scope to determine the best polices suited to contemporary society.[74] Lord Pentland suggested that the petitioners' characterisation of the only 'legitimate' aim as 'child protection' misunderstood the purpose of the legislation, and unduly narrowed the role of the legislature in relation to the wellbeing of children.[75] Thus, the decision to appoint a Named Person on a universal basis was 'pre-eminently a matter for the legislature',[76] highlighting the careful, inclusive and thorough development of the policy over the previous decade. Overall, he concluded on the issue of whether a legitimate aim had been pursued that

> it seems to me that whether the right course was to introduce a named person service on a near-universal basis was quintessentially a judgment based on considerations of social policy and one that, for this reason, fell squarely within the margin of discretionary decision-making entrusted to the Scottish Parliament. It is not the type of judgment which is appropriate for the court to review.[77]

The Lord Ordinary then moved onto the question of proportionality. On this question, he noted the 'fundamental difficulty facing the petitioners in the present case[,]'[78] namely that as the Named Persons scheme was not yet in force, arguments were made on 'an abstract and theoretical level.'[79] He pointed out that Part 4 of the Act was never designed to operate as 'freestanding scheme'. Before it came into force, it would be supplemented by subordinate legislation, statutory guidance, and advice from agencies such as the Information Commissioner. Since these supplementary materials had not yet been published, Lord Pentland considered that it would wrong to declare that any of the Convention rights invoked had been violated by the legislation:

> To do would be to strike down statutory provisions on an abstract and theoretical basis at a stage when the legislative landscape has not been fully formed and when important practical steps and measures likely to be highly relevant to the assessment of compliance with Convention rights remain to be taken and put in place.[80]

[74] Ibid, paras 45-46
[75] Ibid, para 48
[76] Ibid
[77] Ibid
[78] Ibid, para 50
[79] Ibid
[80] Ibid

On this basis, the Lord Ordinary considered it was impossible at that time to carry out a proportionality assessment. Having said that, he argued that on a preliminary assessment he would consider that the proposals were a proportionate interference with Article 8.[81]

On the question of whether the provisions were in accordance with law, as required by Art 8(2), Lord Pentland disagreed with the petitioners that the rules were not sufficiently precise and accessible to allow individuals to foresee with a reasonable degree of accuracy how they would be affected by the legislation. He claimed that the provisions in Part 4 provided a sufficiently clear and accessible framework for understanding how the service would be designed. In terms of practical operation, he conceded that this would not be known until the statutory guidance and other guidance materials were published. However, he suggested that the *Olsson v. Sweden* judgment of the ECtHR had found that steps taken in the area of child protection based on general legislation that conferred a large amount of discretion to the decision-maker could still be in accordance with the law.[82]

Therefore, Part 4 of the Children and Young People (Scotland) Act, taken as a whole before the statutory guidance on operation was published, did not violate the Convention.

Information-sharing

Although the petitioners' arguments mainly focussed on Part 4 as a whole, they also made some specific complaints about the information-sharing provisions of the policy, contained in sections 26 and 27 of the Act. Lord Pentland dealt with these points briefly but said they he did not consider that such sections were likely to be contrary to Convention rights for the same reasons as the general scheme would not.[83]

Analysis

Overall, Lord Pentland's judgment showed significant deference to the Scottish Parliament. By repeatedly emphasising the careful and collaborative development of the policy over a number of years, as well as suggesting that the subject matter of the legislation was 'quintessentially' within the sphere of parliamentary decision-making, he emphasised that it would be wrong for the court to substitute its views with those of experts and democratic elected representatives, in area where it had no particular expertise. In addition, by taking a restrictive approach to standing and refusing to conduct a proportionality assessment because the Bill's challenged

[81] Ibid, para 54
[82] Ibid, para 55
[83] Ibid, paras 56-58

provisions had not yet come into force, the Lord Ordinary showed a reluctance to set-aside legislation unless there had been a concrete violation of Convention rights. To some, Lord Pentland's judgment may be considered to be conservative in its failure to properly exercise the judicial function in relation to Convention rights – to the detriment of the protection of Convention rights in Scotland. However, on the other hand, it could be said that the Lord Ordinary's extensive discussion of the development of the process indicates an appreciation of the importance of technocratic and democratic decision-making in areas where the court may not have particular expertise.

This latter reading creates more incentives for governments and parliamentarians to engage in pre-legislative rights review as the more rights have been taken seriously initially, the more deference the courts will exercise towards them if challenged. It is perhaps ironic that Lord Pentland praised the collaborative nature of policy process given that opposition MSPs had chastised the Government for failing to productively engage with them during the legislative process. It appears that the collaboration that Lord Pentland was endorsing was at the pre-introduction phase, where the Government engaged extensively with interested parties and built the policy on the basis of existing practice. Regardless, Lord Pentland's findings again demonstrate that the judiciary has been willing to defer to the judgment of Government and Parliament where it considers that these institutions have superior competence to determine how the Convention right should be protected and where the policy appears to have been carefully developed. This conclusion adds to the evidence in chapter three - that Scotland's form of judicial Convention rights review is perhaps weaker than appears at face value.

Inner House

The petitioners appealed the decision to the Inner House. Clan Childlaw, an organisation that provides advocacy and legal services for children and young people, was granted leave to intervene.[84] It contended that the information-sharing provisions of the Act were incompatible with children's rights under Article 8 of the Convention but principally under EU law and the DPA.[85]

Policy as a whole

The petitioners' appeal on Convention rights-grounds rested on five issues. Firstly, it was suggested that the Lord Ordinary had 'mischaracterised' the petitioners challenge as being

[84] *Christian Institute v Lord Advocate* 2016 S.C. 47, para 1
[85] Ibid, para 8

about the practical operation of the Named Person service rather than a challenge to the basic principle of the named person policy which violated rights.[86] However, the Inner House disagreed that the appointment of a Named Person, by itself, would be a violation of Article 8. It said that the service:

> no more confuses or diminishes the legal role, duties and responsibility of parents in relation to their children than the provision of social services or education generally. It has no effect whatsoever on the legal, moral or social relationships within the family. The assertion to the contrary, without any supporting basis, has the appearance of hyperbole.[87]

On this basis, the court held that the petitioners' argument that the Named Person service, *per se,* violated Article 8 of the Convention should fail.

Considering the proportionality of the scheme in practice, the Court again undertook the structured assessment as required by Art 8(2). It found that the Named Person provisions were set out in detailed legislation and were therefore in accordance with the law. It said that the aim of the legislation was the promotion of child welfare, which is a legitimate aim under Art 8(2) of the Convention. On the question of 'necessity' or whether the provisions were responding to a 'pressing social need', the Court agreed with the Lord Ordinary that the legislature has a 'margin of appreciation' in areas concerning social or welfare issues. That said, it conceded that this margin was narrower than the margin given by the ECtHR to states and restricted further when 'intimate or key' rights, for example as the respect for family life, were engaged. Despite this narrower margin of appreciation, it was not the role of the court to substitute a less intrusive measure for the one adopted by the legislature, but rather to consider whether the measure 'was reasonable for the legislature to impose'.[88] Overall, the Court found that Part 4 satisfied the four-part proportionality test.[89]

Information-sharing

[86] Ibid, para 27
[87] Ibid, para 68
[88] Ibid, para 73
[89] Ibid, para 72-76

On information-sharing, the court emphasised that the 2014 Act did not introduce information-sharing into the area of child welfare law. Instead, the Act aimed to clarify existing legal powers in the context of Convention rights and data protection law.[90]

The Court noted that information could be shared in only certain defined circumstances, principally on the basis that sharing information would help the Named Person to advise the child or young person, help them to access appropriate services or raise a matter about the child to a relevant service provider. Further, under section 26(7) of the Act, there was a discretion left to the service provider so that the professional could determine whether the benefits of sharing information would outweigh any potential adverse effect. This discretionary power was necessary for the system to be sufficiently responsive to any potential problems that could arise from the operation of the scheme. Therefore, the specific challenge that the information-sharing provisions were a disproportionate interference with children's rights was rejected by the court.[91]

Analysis

Again, in finding that Part 4 of the Act as a whole, as well as the information-sharing provisions were in accordance with Article 8 of the Convention, the Inner House showed a degree of deference to the legislature. This can be seen in the court's discussion of legislative aim, where the judges accepted that the legislature's aim was legitimate even if the margin of discretion was narrower than the Outer House had suggested. Further, the Inner House repeated the Lord Ordinary's conclusion that the test for whether the Bill's provisions were 'rationally connected' to the legitimate aim was limited to assessing the 'reasonableness' of the provision and not a more detailed substitution of the court's view for that of the legislature's.

Supreme Court

The petitioners were granted leave to appeal the decision to the Supreme Court.[92] During the period between the Inner House judgment and the Supreme Court hearing, the Scottish Government published revised draft statutory guidance (RDSG) under Section 28(1) of the Act, setting out the manner in which Part 4 was intended to be put in to practice.

The basis of the petitioners' challenge (on Convention rights-grounds) mirrored those at the previous two instances. First, there was a broad challenge to Part 4 as a whole, on the basis that

[90] Ibid, para 102
[91] Ibid, para 103
[92] *Christian Institute* [2016] UKSC 51

the compulsory appointment of a Named Person to a child violated the Article 8 rights of parents in the absence of consent or where the appointment is necessary to protect the child from significant harm.[93] The narrow challenge focused on the information-sharing provisions of the Act.[94] It was suggested, in arguments put forward principally by Clan Childlaw, that the information-sharing provisions allowed for the disclosure of personal information in too broad circumstances, which would violate the privacy of children and young people. This could potentially lead to situations where children would be less willing to divulge confidential information to the authorities, negatively affecting child protection.[95]

In answering both questions, Lady Hale, who wrote the unanimous judgment, suggested that four questions should be answered:

> (i) what are the interests which Art 8 of the ECHR protects in this context; (ii) whether and in what respects the operation of the Act interferes with the Art 8 rights of parents or of children and young people; (iii) whether that interference is in accordance with the law; and (iv) whether that interference is proportionate, having regard to the legitimate aim pursued.[96]

Question (i)

On the first question, Lady Hale suggested that the legislation clearly engaged private and family life as protected by Article 8.

On family life, she emphasised that international human rights law acknowledged the importance of protecting diverse forms of upbringing:

> The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world.[97]

In addition, the ECtHR had defined the best interests of the child as ensuring that a child's ties with a family should be maintained in all but the most exceptional circumstances. However, parents could not rely on this right where contact would harm the child's health and development.

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[93] Ibid, para 68
[94] The 2014 Act (n4) s.26 and 27
[95] *Christian Institute* (UKSC) (n92),para 69
[96] Ibid, para 70
[97] Ibid, para 73

Lady Hale also noted that it was well established by the ECtHR that the privacy of children was protected under Article 8. This protection covered the disclosure of personal information, including information about the child's health, criminal offending, sexual activities and other personal matters. She claimed that the ECtHR had found that protection of personal information was an important aspect of personal autonomy and that states were required to respect the confidentiality of such information.[98]

Overall therefore, the provisions of the legislation clearly engaged children and parents' family and private life under Article 8 ECHR.[99]

Question (ii)

On the second question, Lady Hale suggested that while the provisions in Part 4 clearly engaged Art 8 rights, many elements of the legislation did not involve an interference with these rights. Thus, the Named Persons' functions to provide advice, information and support and to help parents or the child in accessing this support would not usually be considered to interfere with Article 8. However, she claimed that it was clear that the sharing of data between different relevant public authorities was crucial to the operation of the Named Person service and that it was plausible that this could constitute and interference with the Art 8 rights of the person to whom the information related. These interferences would therefore have to be justified under Article 8(2).[100]

Question (iii)

The next question to be decided by the Supreme Court was whether the legislation was 'prescribed by law' as required by Article 8(2) of the Convention. Lady Hale explained that the Strasbourg court did not merely require that the measure have some basis in domestic law, which the information-sharing provisions clearly did, but also that the law should be 'accessible to the person concerned and foreseeable as to its effects.'[101] These requirements meant that the rule should be formulated with sufficient precision to enable any individual, if need be, to regulate his or her conduct in line with the rule. In addition, the rule should be sufficiently precise to give legal protection against arbitrariness. She pointed towards the Supreme Court's judgment in *R(T) v Chief Constable, Greater Manchester Police,*[102] which had found that

[98] *Z v Finland* (1998) 25 EHRR 371
[99] *Christian Institute* (UKSC) (n95), paras 67-77
[100] Ibid, para 79
[101] Ibid, para 76
[102] [2014] UKSC 35

protection against arbitrary interference required safeguards to ensure that the proportionality of any interference could be assessed. In all of these questions, Lady Hale noted that the legislature did not have a margin of discretion as questions of legality were crucial to the operation of the rule of law.[103]

Accessibility

In terms of accessibility, it was accepted that both formal legislation and official guidance could be considered to be 'law' for the purposes of Article 8(2). Despite this, it was noted that section 28(1) of the Act merely required public authorities to 'have regard to' official guidance published by the Scottish Ministers. There was therefore no compulsion to follow the guidance, and thus the RDSG could not be considered to be 'law' in the formal sense.[104]

Additionally, it was noted that the RDSG gave very little guidance on how the Bill's provisions should be implemented in light of requirements in the Data Protection Act 1998 (DPA) and Article 8 ECHR. The court went on to list in detail the specific provisions of the Act, which *prima facie* enabled the sharing of information but which in fact would be significantly curtailed by different restrictions in the DPA 1998 – and noted that the RDSG had not clarified how these provisions would operate in practice.[105] Thus there were 'very serious difficulties in accessing the relevant legal rules when one has to read together and cross refer between Pt 4 of the 2014 Act and the DPA and work out the relative priority of their provisions.'[106]

Safeguards

In relation to the safeguards required to ensure that the proportionality of an interference with Article 8 rights could be adequately examined, the court expressed 'even greater concern.'[107] It noted that s.26(5) of the legislation required the information holder to 'have regard to the views of the child or young person' when deciding whether the share information under section 26(1) or 26(3) of the Act but that the same requirement did not apply to the service provider's power to share information under section 26(8).[108] Further, there was no statutory requirement to inform parents about the decision to share information, with the RDSG merely suggesting that this was 'routine good practice'. This meant that discretion was left to the individual

[103] Christian Institute (UKSC) (n95), para 80
[104] Ibid, paras 82 and 85
[105] Eg The 2014 Act (n5), Sections 23(2)(b), 26(1), 26(3) and 26(8) see ibid, para 83
[106] Ibid, para 83
[107] Ibid, para 84
[108] Ibid

information-holder to decide whether to involve the parents and children. As a result, it was possible that confidential information including information about contraception, pregnancy and sexually transmitted disease could be shared under section 26 with a wide number of public authorities without 'either the child of young person or his parents being aware of the interference with their Art 8 rights, and in circumstances in which there was no objectively compelling reason for the failure to ascertain and have regard to their views.'[109]

Overall, therefore, the information-sharing provisions of the Act and the RDSG were not considered to be 'in accordance with the law' as required by Art 8(2) of the Convention.

Question (iv)

Despite finding that the information-sharing provisions of the Act were not 'in accordance with law' and were therefore incompatible with Article 8 ECHR, the court went on to consider the proportionality of Part 4 of the Act.

At this stage, the Court felt it necessary to distinguish between the 2014 Act itself and its operation in individual cases.[110] The court reiterated that many of the Named Person functions under section 19(5) of the Act would not give rise to an interference with Article 8 but that the information-sharing provisions potentially would. Further, the operation of the Act in individual cases would give rise to situations where the use of powers may or may not represent a proportionate interference with Art 8 rights.

In relation to the Act itself, the court reiterated that *ab ante* challenges to the validity of legislation on proportionality grounds have a high hurdle to cross. If a Bill's provisions are capable of being exercised in Convention rights compliant manner in all or almost all occasions, then the court will not consider that the legislation is incompatible with Convention rights. In this case, the Court found that the petitioners' challenge to the legislation did not reach this high hurdle. [111] The legislation, by itself, did not violate Article 8.

However, it was conceded that, in practice, information-sharing under the Act was likely to give rise to disproportionate interferences with Art 8 rights, unless the information holder carried out a 'scrupulous and informed assessment of proportionality'.[112]

[109] Ibid
[110] Ibid, para 87
[111] Ibid, para 88
[112] Ibid

The Court noted that the purported aim of the legislation, the promotion of children's wellbeing, was not a 'legitimate aim' listed in Article 8(2). It was likely that a decision to share information about a child in an individual case could be linked to one of the legitimate aims in Article 8(2) such as 'the protection of health or morals' or 'the prevention of disorder or crime'. However, if important personal information was shared on the basis of one of the SHANARRI indicators used to indicate 'wellbeing' with only a 'tenuous' link to these aims, then it would be more difficult to accept that the interference was proportionate.[113]

Applying the four-part proportionality test, on the first question, the Court conceded that Part 4 of the Act pursued legitimate aims:

> The public interest in flourishing of children is obvious. The aim of the Act, which is unquestionably legitimate and benign, is the promotion and safeguarding of the wellbeing of children and young persons.[114]

This aim did not, as the petitioners contended, run counter to the primary responsibility of parents to promote the wellbeing of their children.

On the second question, the Court agreed with the previous judgments that the Named Person provisions were rationally connected to the aims pursued. Similarly, the legislature had a margin of discretion to determine the most suitable measure and the court was only required to determine whether that measure was 'reasonable' – which it agreed that it was.[115]

However, on the final question there was greater discussion. The court again reiterated that it was unlikely that the Named Persons' power to give advice, information and support[116] or to help the child, young person or parent access a service or support[117] would generally give rise to a disproportionate interference.[118] That said, the latter power, despite involving no compulsion, could lead to a disproportionate interference unless it was made clear that any support offered to parents and children was optional, and that refusal would not itself be considered to be evidence of harm towards the child.[119] In addition, the provisions of the Act that required information to be shared would raise 'difficult questions of proportionality in

[113] Ibid, para 89
[114] Ibid, para 91
[115] Ibid, para 92
[116] The 2015 Act (n5) , S.19(5)(a)(i)
[117] Ibid,
[118] Christian Institute (UKSC) (n95), para 94
[119] Ibid, para 95

particular cases',[120] where the information holder would have to carefully consider whether the circumstances require the information to be shared. This task was 'a daunting one'[121] because neither the legislation nor the RDSG provided much guidance on the factors that the information holder should take into account. The Court suggested that the Act's provisions, without supplementary guidance, currently suggested a too permissive standard for disclosure. This was because the concept of wellbeing, the basis on which information holders could share information, was defined by 'very broad' SHANARRI principles.[122] Therefore it was possible under the legislation to share sensitive personal information about a child or young person among a number of public authorities, allowing an intrusive inquiry into the child or young person's wellbeing, without the sharing of that information being necessarily sufficiently important to that child's wellbeing to be shared. This risk was heightened by the fact that the legislation did not require the consent (with reasonable exceptions) of the child or young person for the information to be shared, or in some cases, even for the child or their parents to be consulted.[123]

How to respond

The Court therefore found that the information-sharing provisions of the Act were incompatible with the Art 8 ECHR rights of children, young people and parents because they were not in accordance with the law and could in practice lead the disproportionate sharing of personal information. Moreover, the provisions could not be interpreted in a Convention rights consistent manner under s.101 SA.[124]

Lady Hale considered that it was inappropriate for the court to propose any particular solutions that would be required to cure the lack of competence.[125] However, unlike Lord Hope's judgment in *Salvesen,* she went to spell out in detail the areas of the legislation that would have to be reconsidered.

On the form of solution, she noted that it would not be sufficient merely to redraft the RDSG and that changes to the legislation would be necessary.[126] More specifically, she suggested the following:

[120] Ibid, para 96
[121] Ibid, para 97
[122] Ibid
[123] Ibid, para 98
[124] Ibid, para 106
[125] Ibid, para 107
[126] Ibid

- Section 28 should be amended so that authorities were required to follow guidance issued by the Scottish Ministers, rather than merely to 'have regard to' it.
- The relationship between the various information-sharing provisions of the Act and the non-disclosure provisions of the DPA should be clarified.
- The guidance should clarify the circumstances where the child, young person or parent should be informed of the sharing of information or where consent should be obtained for the sharing of information, including confidential information.
- If parliament intended that the law would allow for the sharing of sensitive personal data (contrary to the court's understanding), the law should make it clear that the sharing of such information can only be done with compelling justification and ensure appropriate safeguards are in place for this assessment to be made.

However, she claimed that the exact nature of the reforms 'involve policy questions which are the responsibility of the Scottish Ministers and the democratic legislature.'[127]

The Court suggested that it was open to issuing an order under section 102(2)(b) of the Scotland Act, to delay the effect of the judgment until the Scottish Ministers and Parliament had the opportunity to correct the defect identified.[128] However, this proved unnecessary, since the Scottish Government announced that it would delay the commencement of Part 4 of the Act until it had passed remedial legislation.

To what extent did the courts' approach to the 2014 Act show respect for parliament?

The Supreme Court's judgment therefore differed from the previous instances in that it considered that the information-sharing provisions were contrary to Article 8 of the Convention and therefore outside the competence of the Scottish Parliament. As David Scott notes, the divergence between the two Court of Session judgments – which claimed that the legislation was compatible with Convention rights – and the unanimous judgment of the Supreme Court, which did not, is striking.[129] However, he suggests that the Supreme Court's divergence from the Court of Session judgments can be explained by two factors. Firstly, the intervention by

[127] Ibid
[128] Ibid, para 109
[129] Scott, D. (2016) 'Scottish Government's Named Persons scheme incompatible with Article 8' *UK Human Rights Blog,* available at https://ukhumanrightsblog.com/2016/07/29/scottish-governments-named-persons-scheme-incompatible-with-article-8/#:~:text=Scottish%20Government's%20Named%20Persons%20scheme%20incompatible%20with%20Article%208,-29%20July%202016&text=The%20Supreme%20Court%20has%20today,see%20our%20previous%20coverage%20here) (Accessed 20/08/20)

Clan Childlaw, which was not allowed during the Outer House hearing and which had greater focus on EU law at the Inner House hearing, placed stronger emphasis on the imprecision of the information-sharing provisions and their potential incompatibility with Convention rights. Secondly, the UKSC's judgment relied a great deal on the RDSG which had not been published at the time of the previous judgments. Therefore, the Court had a more concrete basis on which to criticise the operation of the Bill. [130]

Overall therefore, it was not necessarily the case that the Supreme Court took a vastly different approach to the Court of Session to the legislation. Indeed, importantly, the Supreme Court agreed with the Inner House that the broader challenge, that the Named Persons policy *per se* contradicted Article 8 rights of children and parents, should fail. This argument had been repeatedly put forward by the Conservative Party in parliament and had formed the central plank of criticism of the policy by the NO 2 Named Persons group and in the press. That said the Supreme Court's finding that the information-sharing provisions of the Act were not 'in accordance with law' might have some implications for the approach to the Government and other actors in pre-legislative scrutiny going forward. McCorkindale and Hiebert's research found that members of the Scottish Government were sometimes critical of the Office of the Solicitor to the Scottish Parliament's insistence that Convention rights safeguards were included in Bills rather than extraneous guidance as being 'too legalistic'.[131] Although these complaints were general, and did not necessarily relate to this specific bill, that the approach taken by the OSSP was vindicated by the Supreme Court in the present case might send a signal to the actors involved in pre-introduction scrutiny that leaving the heavy lifting to be done on Convention rights-scrutiny after the legislative process will not fly and that Convention rights safeguards are required to be included the Bills themselves.

As discussed in previous chapters, Young considers that her model of 'democratic dialogue' can only occur in systems where both 'constitutional collaboration' and 'constitutional counter-balancing' can take place.[132] The former ensures that courts and the executive/parliament can work together to ensure that their respective institutional competences in relation to law-making to guarantee that all laws respect rights.[133] In previous chapters, I have said that provisions such as s.31, s.101(2) and s.102(2)(b) can engender constitutional collaboration.

[130] Ibid
[131] McCorkindale and Hiebert (n1), p336
[132] Young. A.L. (2017). *Democratic Dialogue and the Constitution.* Oxford: Oxford University Press, see Chapters 4 and 5
[133] Ibid

The former two provisions because they are intended to reduce the contexts in which legislation is considered to be contrary to Convention rights. The latter because it blunts the edges of a courts finding of incompatibility by suspending the effect of the decision until parliament has reconsidered the legislation. Young notes that where the Court gives some direction to parliament about how to cure the incompatibility – constitutional collaboration is further enhanced.[134] Thus in the present case, Baroness Hale's decision to set out in detail the aspects of the legislation that would have to be reconsidered in order to comply with the judgment can be considered to be an example of constitutional collaboration. Lady Hale's approach differs from Lord Hope's approach in *Salvesen,* where he gave far less detailed directions. In this sense, McCorkindale, McHarg and Scott agree that the Supreme Court's approach was 'dialogic' in that it constructively directed parliament to remedy the Bill's incompatibilities.[135]

For Young, however, mere constitutional collaboration is insufficient for her model of democratic dialogue to work. It is also necessary that there is 'constitutional counter-balancing'. According to Young 'constitutional counter-balancing mechanisms are designed to ensure that no one institution is consistently able to authoritatively resolve rights-issues.'[136] Where one institution consistently settles rights-questions, then interactions between the courts and parliament can more appropriately be described as a monologue, with one body talking and the other listening. There must therefore be some formal mechanisms or informal practices to ensure that neither body always has a monopoly over rights-questions. Young concedes that 'constitutional counter-balancing' measures are more likely to exist in jurisdictions where parliament is empowered to enact legislation notwithstanding a judicial finding of incompatibility.[137] Nonetheless, Young suggests that these measures can exist in states with strong-form review –through judicial deference. Thus, where courts are on occasion willing to defer to the judgement of parliaments when determining whether a right has been violated by legislation– then parliament will retain a degree of control over the determination of rights-questions and rights protection will not become a monologue.[138] The two contexts in which Young imagines that courts may defer to parliament when resolving rights-questions are where there is a 'watershed issue' – where the courts have not yet been asked to consider whether a particular interest falls within the scope of a Convention right – or where the rights-issue is

[134] Ibid, p223
[135]McCorkindale, C., McHarg, A. & Scott, P.F. (2017) 'The Courts, Devolution, and Constitutional Review' *UQLJ 36(2),* p296
[136] Young, (n132), p101
[137] Ibid, p230
[138] Ibid, p226

contestable – where the Convention right is qualified and there is a degree of debate over the extent to which a right can be limited in the particular circumstance.[139]

In the present case, the court at every instance accepted that the information-sharing provisions of the legislation were likely to interfere with the Article 8 rights to privacy of children and their parents. The courts clearly did not consider therefore that the present issue was a 'watershed' issue. However, given that Article 8 is a qualified right, it could be said that the questions of whether the legislation interfered with privacy rights in a manner that violated Article 8 was a contestable rights-issue. At the first two instances, a combination of deference shown to parliament in answering several of the questions on proportionality and the fact that the legislation was not yet in force meant that the courts were not willing to determine that the legislation violated the petitioners' rights. At the Supreme Court, again the judges did not say that the legislation allowed information to be shared in a manner that disproportionately interfered with Article 8. However, relying on the RDSG, it was suggested that some aspects of the legislation and guidance could lead to contexts where information could be shared that disproportionately interfered with Article 8 rights. In this sense, although it had more information than at previous instances, the Supreme Court can be said to have shown less deference to the legislature than at previous instances.

However, the more significant finding of the Supreme Court judgment – that the information-sharing provisions were not 'in accordance with law' – was, by its nature, not a question where it would be expected that the courts would show deference to parliament. Indeed, the Supreme Court explicitly said this, when it said that the 'in accordance with law question' was not one in which the courts could give a margin of discretion to the legislation because it concerned the operation of the rule of law.[140]

The *Christian Institute* decision therefore only says so much about the degree to which the courts have been willing to defer to the Scottish Parliament when determining rights-questions. It could be argued that the Supreme Court could have exercised a greater degree of deference to the Scottish Parliament when determining that it was likely that information-sharing under the 2014 Act could lead to disproportionate information-sharing. However, the more fundamental question, about the legality of the provision, did not concern a rights-question that was really up for debate. Indeed, if the court had decided to determine that the legislation and

[139] Ibid, p226
[140] Christian Institute (UKSC) (n95), para 80

code of practice was 'in accordance with law', or if the Scottish Parliament had the power to overrule the court's judgment, it is likely that the Scottish Government would have found for itself very quickly that the issues the court identified with regard to the information-sharing provisions – that the guidance was unclear, that it could lead to differential practice, and potentially practice that would disproportionately interfere with Convention rights – were indeed issues that needed to be resolved. The Supreme Court's finding of incompatibility therefore could be interpreted as a blessing in disguise for the Scottish Government, giving it time to assess how to fix the problems before the statutory Named Person service was rolled out.

Government's response – Children and Young People (Information-Sharing) (Scotland) Bill

Both parties could be said to be relatively satisfied with the Supreme Court judgment, described by Tickell as 'a Pyhrric victory, a Pyhrric defeat'.[141] The petitioners achieved a headline-grabbing declaration that the legislation violated the Article 8 rights of children and would make much of the excerpts in the judgment that discussed the 'totalitarian' threat to family difference. On the other hand, the Government could claim the policy, the aims of which were 'legitimate and benign', was not in itself contrary to Convention rights. The Government could proceed with the operation of the legislation albeit in a manner that more clearly defined the role of information holders.

In September 2016, John Swinney gave an update on the named person policy to Parliament – now in its fifth session. At the 2016 Scottish Parliament elections, the SNP Government had lost its majority and would govern as minority government in the fifth session – a fact that would prove to be very important in terms of the Government's success in passing the remedial legislation. Swinney reiterated the Government's commitment to the policy had 'not wavered'[142] and highlighted the Supreme Court's finding that its aims were 'unquestionably legitimate and benign'.[143] However, he said that he accepted the Court's finding that there needed to be greater clarity in relation to the information-sharing provisions. He suggested that there should be 'clear consensus across Scotland on how information-sharing should operate'[144] and announced a 'three-month period of intense engagement'[145] where he would

[141] Tickell, A. (28 July 2016) 'Named Persons: a Phyrric Victory, a Phyrric defeat', *Lallands Peat Worrier Blog,* Available at http://lallandspeatworrier.blogspot.com/2016/07/named-persons-pyrrhic-victory-pyrrhic.html, (Accessed 10/12/20)
[142] SP OR 08 September 2016, Col 45
[143] Ibid, Col 44
[144] Ibid
[145] Ibid

consult with various stakeholders. In the meantime, commencement of Parts 4 and 5 of the Act was delayed until a solution was found.

Pre-introduction process

At the end of the three-month engagement period, the Government found that, predictably, there was a divergence of views.[146] Importantly, there was divergence on whether the effective operation of the Named Person provisions required new information-sharing provisions to be enacted, although there was consensus that greater clarity on lawful information-sharing would be helpful.

In March 2017, Swinney announced in Parliament that the Government would bring forward a Bill that would:

> provide consistency, coherence and confidence in the approach to sharing information below the threshold of risk of significant harm, where the named person's role is so important in supporting families to get assistance when they need it.[147]

However, the originally mooted date of August 2017 was scrapped in order that Parliament be given the 'full and proper opportunity to legislate on these issues.'[148]

The Bill

The Scotland and Young People (Information-sharing) Scotland Bill was eventually introduced on the 19th June 2017. Broadly, the Bill sought to change the duty to share information under sections 23 and 26 of the Act to a duty to consider whether to share information, and a power to share information in certain contexts.[149] It also removed the power to share information in breach of confidentiality in section 27,[150] and placed additional emphasis on the requirement to share information in line with data protection law and Convention rights. Finally, the Bill required Scottish Ministers to publish a binding code of practice for persons conferring

[146] 'GIRFEC Engagement on information-sharing. Meeting with information-sharing stakeholder reference group' (22 Nov 2016) *Scottish Government*, Available at https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/0051/00514982.pdf (Accessed 10/12/20)
[147] SP OR 07 March 2017, Col 17
[148] Ibid
[149] The Children and Young People (Information-sharing) (Scotland) Bill (The 2017 Bill), s.1(2), (3) and (4)
[150] Ibid, s.1(5)

functions under the Act.[151] An illustrative code of practice was published alongside the Bill, setting out how the provisions might work in practice.

The Policy Memorandum attached to the Bill gave an insight into how the Government considered the Bill would resolve the issues identified by the Supreme Court judgment. It listed the provisions of the 2014 Act that the Supreme Court considered (potentially) infringed Article 8 ECHR before setting out how the remedial legislation would cure these incompatibilities.[152] In relation to the human rights implications of the present Bill, the Memorandum again conceded that the right to respect for private and family life could be engaged by a decision to share information but the new provisions were 'a proportionate means of achieving a legitimate aim, accompanied by appropriate safeguards.'[153] Thus, the Scottish Government was satisfied that the Bill was compatible with the ECHR and had dealt with the points made by the Supreme Court in *Christian Institute.* Perhaps to serve as a reminder that Convention rights were not the only human rights that the legislation aimed to engage, the Memorandum also set out in detail the ways in which the Act's provisions would comply with the UNCRC.[154] This may have been an attempt, as the Government attempted in relation to the Land Reform Bill, to explicitly justify interferences with Convention rights with reference to the protection of human rights contained in other instruments that the UK has signed. By doing so, Shields has suggested that the Scottish Government was signalling directly to the courts that the interferences themselves should be considered as aiming to protect human rights – in an attempt to effect the balance the proportionality scales. [155]

As had been the case with the 2014 Act, the Bill received positive certificates of competence from both the Minister and the PO.[156]

Legislative scrutiny of 2017 Bill

The Education and Skills Committee was tasked with leading the scrutiny of the Bill. After considering its written evidence, it heard oral evidence over seven sessions. During these sessions the Committee heard from thirty three evidence givers, amongst whom were the Law

[151] Ibid, s.1(4)
[152] SP Bill 17 Children and Young People (Information-sharing) (Scotland) Bill [Policy Memorandum] Session 5 (2017), paras 8-15
[153] Ibid, para 47
[154] Ibid
[155] Shields, K. (2018). 'Human Rights and the Work of the Scottish Land Commission', *Scottish Land Commission*
[156] SP Bill 17 Children and Young People (Information-sharing) (Scotland) Bill [Statements on Legislative Competence] Session 5 (2017),

Society, Faculty of Advocates, the Information Commissioner's Office and numerous organisations representing practitioners, charities and organisations, including Clan Childlaw and the N2NP campaign. As is customary, the Committee also heard evidence from Government officials and the Minister, during the initial and final evidence sessions.

Scottish Government – Session 1

At the first evidence session on the 6th September, Committee members asked Government Officials to clarify a number of aspects of the Bill. Unsurprisingly, given the Supreme Court judgment, the need for the Bill to be compliant with Article 8 ECHR and to address the issues identified in the judgment were at the forefront of Committee members' questions.

Firstly, Liz Smith MSP and Daniel Johnson MSP focussed on how the Bill would operate in practice. Hinting at the Supreme Court's judgment that the decision to share information was likely to be 'a daunting one',[157] Liz Smith pointed towards the evidence the Committee had received that had suggested that under the Bill and associated guidance, the decision to share information would continue to be an extremely complex process.[158] Daniel Johnson's questions reinforced this point by asking whether those making these judgments had the sufficient expertise to do so.[159]

Members then went on to question the illustrative draft guidance, where there was a considerable degree of scepticism. It was asked why the Government had taken the decision to merely publish an illustrative draft code and not one which was binding. The Official responded that it was not necessary to publish a code of practice at this stage but the Minister had taken the decision to give parliament, practitioners and the public a sense of the factors that information holders would have to consider when deciding whether to share information.[160] Oliver Mundell MSP asked whether the process for publishing the biding code - where the code would be laid before parliament for 40 days, after which Ministers would be required to 'take into account' parliament's views - was sufficient to allow proper scrutiny of the Order.[161] Additionally, Johann Lamont MSP asked whether it was possible for MSPs to scrutinise the legislation without a binding draft code, since the detail of the code would be crucial to the operation of the legislation and that the binding code could differ significantly from the

[157] Christian Institute (UKSC) (n95), para 97
[158] SP OR EC 06 September 2017, Cols 8-12 per Liz Smith MSP
[159] Ibid, Cols 13-14 per Daniel Johnson MSP
[160] Ibid, Col 17 per Ellen Birt
[161] Ibid, Col 19 per Oliver Mundell MSP

illustrative code.[162] Officials replied that Members were not required at that stage to scrutinise the code but merely consider whether parliament should give Ministers the power to issue a code, and that there was later opportunity for the scrutiny of the draft binding code. Members appeared to be unimpressed with this response, suggesting that the code and Bill could not be considered separately, and that the parliament did not have the power to vote on the code under the process set out for its making.[163]

Legal Experts and Commissioners

At the next evidence session, Janys Scott of the Faculty of Advocates said she agreed with written evidence submitted by Clan Childlaw, who had suggested that the Bill was an attempt from the Government to 'abdicate responsibility'[164] in that it made it the responsibility of the individual information holder to ensure that the sharing of information was compliant with laws on data protection and privacy rights.[165] She additionally suggested that the Bill's definition of 'wellbeing' continued to be vague and would lead to differential practice. She considered that it would be very difficult to draft a Code of Practice that would be both clear to practitioners and compliant with the various data protection laws. Taking all of this into account, it was highly likely that there would be further legal challenges.[166] On process, she and Kenny Meechan of the Law Society suggested that the Bill's process for making the Code of Practice gave parliament insufficient opportunity to scrutinise the Code. Extensive parliamentary scrutiny was necessary to ensure that the Code was compatible with Convention rights- especially given the Supreme Court's judgment.[167]

Another important factor that arose during the Committee's Stage 1 scrutiny was the failure of the illustrative draft code to consider the effect of the changes to data protection law prompted by the EU's General Data Protection Regulation. When giving evidence to the Committee, the Information Commissioner's Office said that it considered that the proposed Bill would be compliant with data protection law. However, it noted that the illustrative draft code did not take cognisance of GDPR and would therefore not be 'fit for purpose'[168] when the law

[162] Ibid, Col 20 per Johann Lamont MSP
[163] Ibid, Col 20-22
[164] *Children and Young People (Information-sharing) (Scotland) Bill: Written Evidence for Clan Childlaw* (23 Aug 2017) Clan Childlaw, Available at https://www.parliament.scot/S5_Education/Inquiries/Clan_Childlaw_Evidence_230817.pdf (Accessed 18/03/21), p7
[165] SP OR EC 20 September 2017, Cols 1-2 per Janys Scott QC
[166] Ibid, col 13
[167] Ibid, cols 9 and 16 per Janys Scott QC and Kenny Meechan
[168] SP OR EC 04 October 2017, Col 22 per Maureen Falconer

incorporating GDPR would come into effect. John Swinney MSP defended the Government's failure to refer to the GDPR in the illustrative draft guidance on the basis that the legislation that would operationalise the GDPR in UK law, what is now the Data Protection Act 2018, was the responsibility of the UK Parliament and had not been introduced when the illustrative draft code was drafted.[169]

Practitioners

Amongst practitioners there was a consensus that the Bill and guidance lacked sufficient clarity to be practicable. All suggested that illustrative code of practice was drafted in excessively technical language and would need to be redrafted in order that it was easily understandable for practitioners. It further was suggested that there was a lack of knowledge about the operation of the final provisions to give a clear answer on support for the legislation. Although many continued to support the aims of the Named Person scheme, most suggested that debates around the operation of the provisions had become a political football. As a result, practitioners in areas that were already operating the Named Person scheme had reverted to 'defensive practice'.[170] Clear, robust and easy to operate legislative provisions (or, failing that, Government guidance) would be needed for this practice to change and for information-sharing to work as intended.

Third Sector Organisations

The Committee also heard evidence from a number of third sector organisations. Again, there was agreement that any Code of Practice would have to be drafted in a more practitioner-friendly manner. Aberlour Care and Crossreach considered that it would be possible to draft practitioner-friendly guidance that would comply with the Supreme Court judgment.[171] Others, however, were more sceptical. Clan Childlaw suggested that the remedial legislation was an unnecessary means by which to resolve the deficiencies identified in the Supreme Court judgment because the Bill did not give information holders any further powers over information-sharing.[172] Further, it suggested that 'wellbeing' remained an overly broad criterion to trigger the duty to consider sharing information and that it could lead to 'disproportionate and unnecessary' information-sharing.[173] Regardless, it suggested that if the

[169] SP OR EC 08 November 2017, Col 4 per John Swinney MSP
[170] SP OR EC 20 September 2017, Col 26-28
[171] SP OR EC 01 November 2017, Col 3 per Sheila Gordon (Crossreach)
[172] Ibid, col 24 per Alison Reid (Clan Childlaw)
[173] Ibid

Government was to progress with the legislation, the Code of Practice would be difficult to draft and should be subject to extensive parliamentary scrutiny as it was very likely that the Code would be challenged on Convention rights-grounds.[174]

Scottish Government – Session 7

Two days before he was due to give evidence to the Committee, John Swinney MSP wrote to the Committee acknowledging that there had been significant concern on behalf of stakeholders and members of the committee about the utility of the illustrative code of practice. He reiterated that the illustrative draft code was not a final version but was supposed to reassure stakeholders by demonstrating what a code might look like. However, he acknowledged that his 'approach had not had the intended effect'.[175] He said that any future code would incorporate the changes that the UK Parliament's Data Protection Bill would make to data protection law. Further, he committed to lodge an amendment at Stage 2 that would give Parliament final approval of the Code of Practice. Finally, he announced the establishment of the GIRFEC Practice Development Panel, with an independent chair and stakeholder membership, responsible for drafting 'workable, comprehensive and user friendly'[176] Code of Practice and Statutory Guidance.

Members of the Committee took the opportunity to question Mr Swinney and Scottish Government officials on the contents of this letter and other matters that arose during Stage 1 at the final session on the 8th November.

Liz Smith MSP asked the Minister about the legal advice the Government had received when preparing the Bill. She noted that the Scottish Government had insisted that the 2014 Act was lawful, despite warnings from independent legal advisers who had highlighted the Article 8 ECHR issues identified by the Supreme Court. In that context, she asked the Minister what legal advice had been given for the present Bill.[177] The Minister replied that the legal advice given in relation to the 2014 Act was an accurate assessment of the law at the time. However, he noted that the Supreme Court's decision that the legislation was not 'in accordance with the law' relied on a point of interpretation that emanated from judgments that followed the passing

[174] Ibid, col 32 per Alison Reid
[175] John Swinney MSP, Deputy First Minister and Cabinet Secretary for Education and Skills *Letter to Convener of the Scottish Parliament's Education and Skills Committee* (06 November 2017) Scottish Government; available at https://archive2021.parliament.scot/S5_Education/Inquiries/20171106In_Ltr_from_Cab_sec_to_convener_re_info_sharing.pdf (Accessed 06 April 2021)
[176] Ibid
[177] SP OR EC 08 November 2017, Col 5 per Liz Smith MSP

of the 2014 Act – and that therefore the legal advice could not have taken these judgments into account.[178] He reiterated this point by highlighting that both the Outer House and Inner House had considered that the Bill was within the competence of the parliament. On that basis, the Minister asserted his confidence that the legal advice he had received in relation to the present Bill was correct.

Liz Smith then raised the evidence given by the Faculty of Advocates and others that the Bill did not fully address the issues raised by the Supreme Court judgment.[179] The Minister responded that the judgment had raised two issues, the first on whether the legislation was in accordance with law and the second on proportionality. He said that the Bill would resolve the first question by making the guidance issued under the legislation binding on practitioners, and by making that guidance sufficiently accessible. On proportionality, he said that the Bill had changed the duty to share to a duty to consider whether to share, with clarity on the operation of that duty set out in the guidance. He acknowledged that the Faculty of Advocates and others were not convinced that this was sufficient to resolve the issues raised by the Supreme Court, but that others, including the Law Society were. Debate over the legality of legislation would always exist, but the Government was convinced that it had taken the necessary steps to address the Supreme Court's judgment.[180]

Another significant part of the Members' scrutiny lay with the illustrative draft code. It was suggested that the Committee could not make a decision on whether to support the Bill at Stage 1 because it had not seen the draft code of practice. To this, the Minister replied that Members were only required to approve the general principles of the Bill at Stage 1 and would have the opportunity to have a final say on the contents of the Code at a later date. [181] This did not appear to satisfy members, Tavish Scott MSP noting that 'the code of practice is core to the bill […] so it must therefore be the fundamental starting point for how the committee considers the bill.'[182] When asked about the likelihood that the Code of Practice could be drafted in a manner that was both accessible and legally watertight, the Minister suggested that it was possible – pointing to existing practice in certain parts of the country.[183] He said that the Practice

[178] Ibid, col 6 per John Swinney MSP; The Minister did not name the judgments but it appears he was referring to *R (T) v. Chief Constable of Greater Manchester Police,* [2015] A.C. 49; and *R.(Roberts) v. Commissioner of Police of the Metropolis,* [2016] *1 W.L.R. 210*
[179] Ibid, cols 6-7 per Liz Smith MSP
[180] Ibid, cols 7-8 per John Swinney MSP
[181] Ibid, cols 22-23 per Jon Swinney MSP
[182] Ibid, col 23, per Tavish Scott MSP
[183] Ibid, cols 27-28 per John Swinney MSP

Development Panel would begin its work assuming the Bill progressed to further stage of parliamentary scrutiny.[184]

It would be fair to say that the Minister was unsuccessful in his attempts to ease the concerns of the Committee. Capturing the Committee's general mood, Johann Lamont remarked that:

> The committee is now in the position that is expected to support a bill that has only conditional support from its strongest advocates, who, in [the joint] letter, contemplate the possibility that it will not succeed. Do you accept that is a dilemma for the committee?[185]

Committee's decision to delay the passage of the Bill

After a few weeks of deliberating, a majority of the Committee decided that it could not take a decision to approve the Bill at Stage 1 until it was able to scrutinise an authoritative draft of the code of practice. The Committee considered that its role at Stage 1 was to scrutinise the policy intentions of the Bill, but also to consider whether the Bill would be workable in practice. Since the Code of Practice was 'vital to the effective implementation of [the] bill',[186] and that '[i]ndeed some organisations have suggested that their support for the bill is contingent upon the contents of the code[,]'[187] the Committee considered it could not allow the Bill to progress to Stage 2 until the draft code had been scrutinised. The Committee therefore sought an extension to its Stage 1 deadline so that it could receive and scrutinise the Code. At the same time, members of the Committee who voted to delay the Stage 1 report made it clear that this did not mean that they did not support the wider GIRFEC approach.[188] The Parliament agreed to an open-ended extension to the Stage 1 on the 13th December 2017.

Responding the Minister said that he 'very much regret[ted]'[189] the Committee's decision.

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[184] Ibid, col 21 per John Swinney MSP
[185] Ibid, col 31 per Johann Lamont MSP
[186] James Dornan MSP *Letter from Convener to Cabinet Secretary for Education and Skills* (10 November 2017) Scottish Parliament, available at https://archive2021.parliament.scot/S5_Education/Inquiries/20171110Out_ltr_to_Cab_Sec_from_Conv_re_implication_of_commencement_provisions.pdf (Accessed 07 April 2021)
[187] Ibid
[188] James Dornan MSP *Letter from Convener to Cabinet Secretary for Education and Skills* (07 December 2017) Scottish Parliament, available at https://archive2021.parliament.scot/S5_Education/Inquiries/20171207Out_Ltr_to_Cab_Sec_re_stage_1_bill.pdf (Accessed 07 April 2021)
[189] John Swinney MSP *Response from Cabinet Secretary* (30 November 2017) Scottish Parliament, available at https://archive2021.parliament.scot/S5_Education/Inquiries/20171130In_Ltr_from_DFM_re_stage_1_information_sharing.pdf (Accessed 07 April 2021)

> By taking the decision to suspend Stage 1 of the Bill, and therefore not express support for the principles of the Bill, the Committee is casting doubt over the value [the ordinary legislative] process, and significantly delaying the implementation of the legislation. I fear that this could undermine stakeholder confidence in the principle of the Named Person approach, and prolong the uncertainty many in the sector feel in the aftermath of the Supreme Court's judgment of July 2016.[190]

At the same time, he announced that Ian Welsh OBE, Chief Executive of the Health and Social Care Alliance had agreed to act as the chair of the Practice Development Panel. The PDP would commence work on the draft code immediately.[191]

Practice Development Panel

Process

Alongside Professor Welsh, the PDP was comprised of members from the education, health, third sector and legal professions. Complementing its general work, the Panel decided to appoint a Legal Focus Group to provide legal expertise. The Panel's remit was to produce an authoritative draft Code of Practice (and other materials) by consensus. It sought to do this by using the members' and others stakeholders' expertise to ensure that the draft Code properly reflected relevant legal requirements and was 'workable, comprehensive and user-friendly for children and young people, parents and practitioners'.[192]

The PDP was originally given the target of autumn 2018 to present its findings to the Minister. However, this was extended in October 2018[193] and then again in January 2019[194], in order that

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[190] Ibid
[191] Ibid
[192] Welsh, I (2019) 'Getting It Right For Every Child Practice Development Panel: Final Report' *The Scottish Government*, at 2.3
[193] Welsh I, *GIRFEC Practice Development Panel Update: Letter to Cabinet Secretary* (October 2018) The Scottish Government, Available at https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2018/11/girfec-draft-code-of-practice-letter-to-deputy-first-minister/documents/girfec-practice-development-panel-update---october-2018/girfec-practice-development-panel-update---october-2018/govscot%3Adocument/GIRFEC%2BPractice%2BDevelopment%2BPanel%2Bupdate%2B-%2BOctober%2B2018.pdf (Accessed 07 April 2021)
[194] John Swinney MSP, *Letter from John Swinney to Professor Ian Welsh* (17 January 2019), The Scottish Government, Available at https://www.gov.scot/binaries/content/documents/govscot/publications/correspondence/2019/01/girfec-practice-development-panel-letters-january-2019/documents/letter-from-john-swinney-to-professor-ian-welsh-17-january-2019/letter-from-john-swinney-to-professor-ian-welsh-17-january-2019/govscot%3Adocument/Letter%2Bfrom%2BJohn%2BSwinney%2Bto%2BProfessor%2BIan%2BWelsh%2B-%2B17%2BJanuary%2B2019.pdf (Accessed 07 April 2021)

the panel could digest UK Government guidance on the new data protection rules and so that the panel could consult on the draft code.

Findings

In September 2019, the Panel's final report was published. The Panel claimed that it was not possible to draft a Code that fulfilled its aims of being clear and authoritative. On the first standard, this was because that the Supreme Court judgment required the Code to be binding, which meant that the Code would need to be detailed in terms of how information-sharing would interact with data protection law, human rights law, the law in relation to confidentiality and other areas of the law. This would make it difficult for practitioners and the public to understand.[195] On the second standard, it was considered that the fledgling nature of the Data Protection Act 2018 meant that legal understanding of many of the implications of the Act was still limited and untested by case law.[196]

Overall therefore, the Panel considered that, while it would be possible to produce a draft Code of Practice that would comply with legal requirements, it was 'neither necessary nor desirable'[197] to do so because such a Code would not be user-friendly. It suggested that the Government should not pursue a binding Code. Instead, the Government should rely on official guidance issued on GDPR and the DPA 2018, which could provide the legal framework and safeguards required to support proportionate and necessary information-sharing within the GIRFEC approach.[198]

Government Response

In his response, the Minister said that the Government completely accepted the findings of the panel. He noted that the introduction of the DPA 2018 had meant there were important changes to the legal landscape since the remedial legislation was introduced in 2017. If the 2017 Bill was to be pursued, it would have to take into account these changes. Given the lack of clarity about the implications of some aspects of the DPA 2018, the Government would need time to consider these changes. The process of resolving the Supreme Court's judgment had already taken a significant amount of time and energy and the Government felt that there was little appetite for further complex legislation. Therefore, the Government decided to withdraw the

[195] Welsh (n192) p7-9
[196] Ibid, p10
[197] Ibid, p12
[198] Ibid

2017 Bill and focus on the drafting of improved guidance for the *ad hoc* existing named person scheme.[199] Further, he announced the Government's decision to repeal Parts 4 and 5 of the 2014 Act.[200] Importantly, this would mean that it was no longer a legal requirement that every child and young person be appointed a Named Person. Instead, local authorities would retain the option to appoint a Named Person using existing powers.

What does parliamentary scrutiny of the 2018 Bill tell us about the operation of Scotland's 'third way' features?

Extent

As the above discussion shows, much of the Scottish Parliament's scrutiny of the 2017 Bill focused, directly or indirectly, on the Bill's compliance with the Supreme Court judgment. Again, members of the Education and Skills Committee did not take for granted the Government and PO's statements that suggested that the Bill was compatible with Convention rights. Throughout the evidence sessions Committee members focused on various questions raised by the *Christian Institute* judgment – both in terms of the 'in accordance with law' question and on proportionality. Ultimately, a majority of members did not consider that it was possible to allow the Bill to progress to Stage 2 without having seen a draft binding code of practice. The above evidence again suggests that parliamentarians do clearly consider that ensuring legislation is compatible with Convention rights is an important part of their role. In the present case, this is perhaps not surprising, given that the 2017 Bill was introduced as a response to the Supreme Court's judgment in *Christian Institute.* Regardless, the present example can serve as evidence that the Scottish Parliament can fulfil its imagined role in theories that imagine a prominent parliamentary role in the protection of rights. Again, the approach taken by the Committee members can be seen to follow the 'culture of compliance' described by Nicol. At no point was it suggested by the Government or committee members that parliament could do anything but comply with the Supreme Court judgment. Therefore, Members' questions focused on ensuring that the Bill complied with the judgment.

Effectiveness

Analysis of parliamentary scrutiny of the 2014 Act suggested that, for that legislation, there also was significant parliamentary scrutiny on Convention rights-grounds. However, due to the

[199] *GIRFEC Practice Development Panel Report: Scottish Government Response* (September 2019) The Scottish Government, p6-11
[200] Ibid, p10

Westminster factors that as explained in previous chapters are not conducive to rights-scrutiny[201] - the most important of which was the Government's majority during the fourth session - parliamentary rights-scrutiny did not have a major effect on final version of the Bill.

However, when the 2017 Bill was being considered the Government no longer had a majority in the Scottish Parliament. This lack of majority was reflected in the Education and Skills Committee – which was comprised of six opposition MSPs and five SNP MSPs. This non-government majority was crucial in preventing the Bill from progressing to Stage 2 until a binding Code of Practice was published.

Of course, evidence from the 2014 Act demonstrates that a Government majority is not always necessary for legislation to pass. One feature of the Scottish Parliament's model that does not fit neatly into the Westminster features identified by Hiebert is that the Parliament contains a number of parties with a significant number of MSPs. This has meant that many parties will often work together in policy areas where they share common ground. Thus, during the passage of the 2014 Act, both Scottish Labour and the Scottish Liberal Democrats supported legislation and suggested amendments in spirit with the original aims of the policy. Indeed, even during the passage of the 2017 Bill, despite opposition parties, Labour in particular, taking a cooler position on the Bill – three of the four opposition parties represented in the Education and Skills Committee continued to support Named Persons in principle.

It would be unfair therefore to describe the decision of a majority of the Committee to refuse to allow the Bill to progress to Stage 2 as a bad faith attempt to defeat the Government. The Committee had received a mountain of evidence that suggested that major concerns with the Bill remained and, given the importance of the code of practice to the functioning of the Bill, quite legitimately decided that it did not have enough information to produce an authoritative report on the Bill until the code of practice had been published.

As previously mentioned Hiebert[202] and others have suggested that parliament exercising its power to prevent the progression of legislation (partially) on rights-grounds is rare in systems that have 'Westminster' features, as indeed it is in Scotland. However in the present case, both because the Government did not have a majority and because, due to Supreme Court judgment, doubts over the compatibility of the legislation with Convention rights were extremely well-

[201] Hiebert, (n64), p138
[202] Ibid

known to parliamentarians – the features in Westminster systems that Hiebert suggests are not conducive to right-scrutiny were not as prominent in this case.

Therefore, in many ways, the Education and Skills Committee's approach to the 2017 Bill represented a rare example of parliament effectively fulfilling its role as scrutiniser of legislation on Convention rights-grounds. Indeed, in this example at least, that the Education and Skills Committee was able to pause the progression of the legislation is testament to the particular strength of the Committees in Scotland's unicameral system. The present case study therefore perhaps demonstrates an important counter-example to the general conclusions of this thesis and to discussions of 'third way' Bills of Rights more generally, that parliament has been unable to fulfil its imagined role in the model, and demonstrates how the Scottish Parliamentary system might in some cases be particularly well-equipped to ensure effective parliamentary scrutiny of legislation on Convention rights-grounds.

Informal and External Political Pressure on the Policy

Thus far, focus on the role of rights in defeating the Named Person policy has been on the formal parliamentary and legal mechanisms that were used. However, arguably as important to the eventual defeat of statutory Named Persons was the political pressure exerted on the Scottish Government by the campaign against the policy in parliament, civil society and the press. The PDP's finding that the code of practice could not be drafted in an authoritative and clear manner may have been the final nail in the coffin for Named Persons in its statutory form. However, the long-term loss of support in the legislation inspired by campaign against the policy and the Government's inability to effectively counter it meant that the proposal, once a flagship government policy, became easy for the government to abandon. The forthcoming section will explore what this political pressure says about the prospect of 'third way' features operating in the foreseen manner in Scotland.

Press and Civil Society

No2NP

Almost immediately after the Children and Young Persons (Scotland) Bill was introduced to the Scottish Parliament in 2013 it became clear that it would be vehemently opposed by a number of organisations and elements of the press. This campaign can be contrasted with the press coverage of the Convention rights violation in *Salvesen*, which, while critical, was largely reactive and confined to reporting on the judgment. The NO 2 Named Persons (N2NP)

campaign group was extremely active in opposing the Named Persons provisions. The group was comprised of third sector organisations and individuals. These included Liz Smith MSP, who spearheaded the campaign against the policy in parliament, and several of the organisations that challenged the legislation in court. Its voice amplified by the media, the campaign managed to garner significant public support, holding public meetings in 33 towns and cities across Scotland and setting up a petition which was eventually signed by 35,000 people.[203]

Press

As mentioned, the relationship between NO2NP and the press was strong. There was consistently negative coverage of 2014 Act from its introduction in May 2013[204] to September 2019, when statutory named persons was dropped.[205] In between, a very large number of newspaper articles, editorials, radio and television reports, debates and other forms of media discussed 2014 Act. In the period between the enactment of the legislation and the Supreme Court judgment, news stories about Named Persons were an almost weekly occurrence. This suggests that there was a high level of public awareness of, and interest in, the provisions.

Although the objections were numerous – the general tenor of the coverage of the Act was that it was a totalitarian ploy to undermine the role of the family in children's upbringing. At different points, the Scottish Government's proposal was likened to North Korea[206], 'Nazi Germany, Soviet Russia, Maoist and Post Mao China'[207]and East Germany[208]. Others preferred a literary reference, describing the policy as 'Kafka-esque'[209], 'Orwellian'[210]- and a 'big-

[203] 'Victory! Supreme Court Strikes Down Named Person Scheme' (2016) *No 2 Named Persons Blog*, Available at https://no2np.org/victory-supreme-court-strikes-named-person-scheme/ (Accessed 12 April 2021)
[204] Borland, B. 'SNP bill to spy on parents is criticised by families' (19 May 2013) *The Express* Available at https://www.express.co.uk/news/uk/400779/SNP-bill-to-spy-on-parents-is-criticised-by-families (Accessed 12 April 2021)
[205] Meikle B. 'Controversial 'Named Person' laws 'to be scrapped by Scottish Government' as John Swinney set to announce repeal today' *The Sun* Available at https://www.thescottishsun.co.uk/news/4737510/named-person-scottish-government-john-swinney/ (Accessed 12 April 2021)
[206] McKenna, K. 'Scottish children don't need these government spies' (23rd Feb 2014) Available at 'https://www.theguardian.com/commentisfree/2014/feb/23/scottish-children-government-appointed-guardians (Accessed 12 April 2021)
[207] Massie, A. 'Why the Named Person proposal is deplorable' (2013) *No 2 Named Persons Blog* Available at https://no2np.org/allan-massie-named-person-proposal-deplorable/ Accessed (12 April 2021)
[208] Murray, P. 'Big Brother becomes a surrogate Mum or Dad' (22 June 2014) *The Sunday Express* Available at https://no2np.org/sunday-express-big-brother-becomes-surrogate-mum-dad/ (Accessed 13 April 2021)
[209] Grant, G. 'Is there anything more chilling than the state laying claim to children before they are born?' (26 February 2015) *The Scottish Daily Mail* Available at *l* https://no2np.org/graham-grant-children-will-subject-orwellian-official-audits-happiness-well/ (Accessed 13 April 2021)
[210] Ibid

brother style interference'[211] with the First Minister being satirised as 'Big Sister'.[212] Elsewhere, the policy and the Government's attempts to promote it were described as 'scary',[213] insidious',[214] 'meddling',[215] 'authoritarian',[216] 'illiberal',[217] 'blood chilling',[218] 'uninvited, unwelcome and undemocratic'[219], 'achingly politically correct nonsense'[220], 'social engineering',[221] a 'Snoopers Charter',[222] a 'menace',[223] 'the Nanny State at its worst'[224], and as establishing a 'surveillance system'.[225] The Government was accused of having 'spies in the family home'[226] and it was suggested that the policy was a 'dreadful extension of the State's tentacles into family life'.[227]

Not all press reports were negative. Television and radio broadcasters held several debates on the policy in which both sides were heard. There were also many articles that simply noted that the legislation had been challenged and reported its outcome.[228] There was even the occasional

[211] Borland (n204)
[212] Tomkins, A '*Big Sister: Inside Nicola Sturgeon's one-party state'* (17 October 2015) *The Spectator*, p14-15
[213] 'Lawyers slam 'insidious' plans to give every child a named person' (2015) *STV News*
[214] Ibid
[215] Malcom, E 'Stop meddling with parents' children' (16 February 2014) *The Scotsman* Available at https://www.scotsman.com/news/opinion/columnists/euan-mccolm-stop-meddling-parents-children-1544922 (Accessed 13 April 2021)
[216] Borland, B 'State spies already snoop on thousands of families' (16 February 2014) *The Sunday Express* Available at https://www.express.co.uk/news/uk/460054/State-spies-already-snoop-on-thousands-of-families (Accessed 13 April 2021)
[217] 'Named person' (15 February 2015) *Scotland on Sunday* Available at https://www.scotsman.com/news/opinion/columnists/leaders-named-person-murphys-matron-call-1512629 (Accessed 13 April 2021)
[218] Waiton, S. 'Sinister law the will chill the blood of every family' (05 March 2016) *The Scottish Daily Mail* Available at https://no2np.org/dr-stuart-waiton-sinister-law-will-chill-blood-every-family/ (Accessed 13 April 2021)
[219] Peterkin, T. 'Supreme Court will rule on SNP plans for named guardians' (24 October 2015) *The Scotsman* Available at https://no2np.org/supreme-court-hear-legal-challenge-8-march/ (Accessed 13 April 2021)
[220] 'Theatre group gets primary kids signing from SHANARRI song sheet' (2016) *No 2 Named Persons Campaign* Available at https://no2np.org/theatre-group-gets-primary-kids-singing-shanarri-song-sheet/ (Accessed 13 April 2021)
[221] Ibid
[222] Meikle (n205)
[223] Waiton (n218)
[224] Peterkin, T. 'There's trouble in the SNP ranks' (29 January 2015) *The Scotsman* Available at https://www.scotsman.com/news/opinion/columnists/tom-peterkin-theres-trouble-snp-ranks-1999004 (Accessed 13 April 2021)
[225] Massie, A. 'State guardians for an untrustworthy society' (02 February 2016) *The Times* Available at https://no2np.org/named-persons-based-dubious-philosophy-warns-scots-editor/ (Accessed 13 April 2021)
[226] Appleton, J. 'Named persons: spies in the family home' (25 June 2014) *Spiked* Available at https://www.spiked-online.com/2014/06/25/named-persons-spies-in-the-family-home/ (Accessed 13 April 2021)
[227] 'Guardian bill set to face legal hurdles' (20 February 2014) *The Press and Journal* Available at https://www.pressandjournal.co.uk/fp/news/44671/guardian-bill-set-to-face-legal-hurdles/ (Accessed 13 April 2021)
[228] Eg 'Named person' plan faces legal challenge – Tories' (19 February 2014) *The Scotsman* Available at https://www.scotsman.com/news/politics/named-person-plan-faces-legal-challenge-tories-1544570 (Accessed 15 April 2021)

attempt to support the policy.[229] However, even for those that were ambivalent or sympathetic towards the policy, its implementation was described as 'clumsy and overblown'[230] and 'a presentational fiasco'.[231]

That at every instance the courts had found that the main charge in the press about the policy, that it was a totalitarian attempt to undermine the role of the family, was hyperbolic – did not appear to change the nature of the reporting. Indeed, in wake of the Supreme Court judgment, which clearly found that the Named Person policy was no threat to Article 8 right to family or private life, many press reports chose to focus on the section of the judgment that discussed historical targeting of the family by 'totalitarian regime[s]'.[232]

As Tickell has suggested:

> The casual reader, leafing through the paper and spotting these stories, would be lead to understand that the Supreme court had criticised the SNP government in general, and the Named Persons scheme in particular, as 'totalitarian.'[233]

However, this part of the judgment was not referring to the Act's provisions but instead contextualising the development of the right to private and family life in international human rights law. Regardless, some have suggested that the judgment's inclusion of such language, even if it was intended as 'bone dry judicial background[,]'[234] was 'politically insensitive'[235] given the tenor of the press coverage prior to the judgment. It gave critics of the policy the opportunity to continue to advance the narrative that the policy represented a totalitarian threat to the family – when the judgment had in effect said the opposite.

The persistent negative coverage of Named Persons clearly impacted public and parliamentary support for the policy. The policy very quickly became toxic in the eyes of the public which in

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[229] Garavelli, D 'Scare tactics put children's lives at risk' (12 March 2016) *The Scotsman* Available at https://www.scotsman.com/news/politics/dani-garavelli-scare-tactics-put-childrens-lives-risk-1480660 (Accessed 15 April 2021)
[230] Donalson, D. 'Scotsman Letter: Guard against 'named person' notion' (06 July 2015), *The Scotsman* Available at https://www.scotsman.com/news/opinion/letters/guard-against-named-person-notion-1998225 (Accessed 15 April 2021)
[231] Naysmith, S. 'Named persons turning into a PR disaster for ministers' (06 July 2015) *The Herald* Available at https://www.heraldscotland.com/opinion/13415843.named-persons-turning-pr-disaster-ministers/ (Accessed 15 April 2021)
[232] Christian Institute v Lord Advocate (UKSC) (n95), para 73
[233] Tickell A. '"Hated Named persons scheme blasted as 'totalitarian''…"' (29 July 2016) *Lallands Peat Worrier Blog* Available at http://lallandspeatworrier.blogspot.com/2016/07/hated-named-persons-scheme-blasted-as.html (Accessed 15 April 2021)
[234] Ibid
[235] McCorkindale et al (n135), p309

turn undermined parliamentary support. Although support for the policy remained amongst most children's charities, polls consistently show high levels of public opposition.[236] This opposition was translated into action, with many MSPs reporting that they had been contacted by a large number of constituents concerned about the policy.[237] Ultimately, the continued negative coverage undermined the legitimacy of the Named Person scheme, regardless of its legality. Public support remained low and practitioners were put off by the threat of negative press coverage. This made it extremely difficult, even for a Government determined to remedy the legislative defects, to move forward with the policy. The Government's decision to scrap the statutory Named Person scheme, going further than the recommendations made in the PDP, suggests that it felt the toll of the previous years of attrition.

According to Klug, whose 'third wave' account gives us one of the clearest ideas on how societal pressure is supposed to influence the behaviour of the Government, Parliament and the Courts under the 'third way' model, human rights are at risk of being delegitimised if they are 'the sole preserve of judges, lawyers and human rights pressure groups.'[238] Therefore 'rights have to come out from the law court and be understood and even contributed to by a growing circle of people.'[239] She suggests that the HRA, which had been designed to create a dialogue between the courts, Parliament and Government on how to best to protect rights, 'creates a space for any of us to join in the debate about where the line should be drawn when rights collide.'[240] Viewed through one lens, the campaign against Named Persons can be seen to be an example of this approach working well. Rather than being confined to parliament and the courts, the debate over the legislation moved to the public sphere – with public pressure helping to defeat the policy. Indeed, it could even be argued that the present context demonstrates that Nicol's 'culture of controversy' can exist in Scotland, despite strong-form review, since the public/press considered that a policy unacceptably interfered with family and private life even if the courts did not.

However, alternatively, the campaign against Named Persons may in fact demonstrate a reality that Klug's conception of rights protection overlooks. For reasons such as time, complexity

[236] 'Poll: 64% of Scots say named-person policy is an 'unacceptable intrusion'' (06 June 2016) *The Herald* Available at https://www.heraldscotland.com/news/14539070.poll-64-scots-say-named-person-policy-unacceptable-intrusion/ (Accessed 15 April 2021)
[237] E.g. SP OR 02 December Col 36 per Stewart Maxwell MSP; SP OR 01 March 2016 Col 3 per Elaine Smith MSP; SP OR 08 June 2016 Col 50 per Douglas Ross MSP, Col 61 per Douglas McMillan MSP & Col 67 per Gillian Martin MSP
[238] Klug, F. (2001) 'The Human Rights Act a "'third way'" or "third wave" Bill of Rights' *E.H.R.L.R. 4*, p369
[239] Ibid
[240] Ibid, p370

and access, the vast majority of individuals do not receive information about parliamentary proceedings and challenges to legislation from the source. Instead, the press, campaigners and social media platforms are relied on as intermediaries. Where a large amount of press coverage misreports or misrepresents both the nature of the policy and the outcome of the Convention rights challenge – the ability to have a debate over the policy based on 'reasonable disagreement'[241] diminishes. It is conceded that the campaign against the policy would not have been so effective had there been clearer messaging from the Government. The policy lost support not just of large sections of the public but also of practitioners – who had been extremely positive about the benefits of the policy when it was introduced. Regardless, the concept of a 'culture of rights' that includes citizen input is less likely operate successfully if the policy and rights-based arguments are not communicated in good faith.

Therefore, for defenders of the notion of a 'culture of rights', the press coverage of the Named Person provisions provides a number of complications. In the previous chapter, it was shown that the press coverage of *Salvesen* was limited, reactive and did not focus on Convention rights. In the present case, press coverage was extensive, proactive but misleading. Neither example demonstrates the model working as intended.

Parliament

In addition to the campaign against the policy in the press and civil society, the Scottish Conservatives actively campaigned against the policy in parliament. Conservative members opposed the Named Person provisions during the formal scrutiny of the legislation. However, beyond the formal legislative process, Conservative members used various parliamentary procedures to promote their opposition to the policy. Over the six years in which the provisions were contested, Conservative MSPs lodged motions so that three full parliamentary debates were held over the policy. This was in addition to numerous questions raised at First Minister's Questions[242], General Question Time[243] and in other debates.

The Tories' opposition was ideological – they considered that the scheme had an 'unmistakably statist philosophy'[244] based 'on the insistence that it is the state rather than parents and families

[241] Waldron, J. (2005-2006) 'The Core of the Case Against Judicial Review' *115 Yale L.J. 1346*
[242] Eg SP OR 23 April 2015 Col 16 per Ruth Davidson MSP; SP OR 14 May 2015 Col 23 per Liz Smith MSP; SP OR 23 March 2016 Col 50 per Ruth Davidson MSP; SP OR 16 June 2016 Col 13 per Ruth Davidson MSP; SP OR 21 September 2017 Cols 10-13 per Ruth Davidson MSP; SP OR 07 December 2017 Col 10 per Ruth Davidson MSP; SP OR 19 September 2019 per Jackson Carlaw MSP
[243] SP OR 26 February 2015 Col 2 Per Liz Smith MSP
[244] SP OR 25 September 2013 Col 22906 per Liz Smith MSP

that has the primary obligation to look after the child'.[245] However, alongside these arguments based on ideology, Conservative members attacked the policy on numerous other grounds including cost, issues with implementation and lack of public support. Another important ground of attack was that the legislation violated Convention rights. This argument was made both explicitly[246] and implicitly, within the general charge that policy interfered with family life.[247]

The Conservative party's arguments against the policy developed as the challenge to the legislation made its way through the courts. While at first it was suggested that policy itself violated the right to private and family life protected by Article 8 ECHR,[248] when this argument was rejected by the courts, (and while still making noises about the totalitarian aspects of the policy), Conservative focus moved onto more specific allegations such as the threshold of 'wellbeing' made the policy a disproportionate interference with family life[249] and that the information-sharing provisions interfered with private life.[250] Indeed, after the Inner House had rejected the petitioners' appeal – the Tories issued a motion calling for a 'pause' in the policy rather than its abandonment.[251] The Tories' use of Convention rights arguments when opposing Named Persons should perhaps be described as instrumentalist – in that there were advanced in a way so as to defeat the overall policy.

A consistent charge of non-Conservative MSPs in debates about the Named Person policy was that Conservative members were whipping up fears about the legislation as part of their campaign to become the second largest party in the Scottish Parliament. Members attacked as 'disgraceful'[252] and 'cynical'[253] newspaper articles published by Conservative leader Ruth Davidson and Adam Tomkins MSP, which had suggested that universal nature of Named Persons could lead to the state failing to spot at risk children – linking the policy to recent high-profile deaths of children.[254] It was conceded that much of the public had concerns about the

[245] Ibid, Col 22908 per Liz Smith MSP
[246] Eg SP OR EC 08 October 2013 per Liz Smith MSP; SP OR DPLRC 18 February 2014 Col 1306 per John Scott MSP; SP OR 19 February 2014 Col 27792 per Liz Smith MSP
[247] Eg SP OR 21 November 2013 Col 24826 per Mary Scanlon MSP
[248] SP OR 19 February 2014 Col 27792 per Liz Smith MSP
[249] SP OR EC 08 November 2017 Col 15 per Liz Smith MSP
[250] Ibid, Cols 5-9 per Liz Smith MSP
[251] SP OR 08 June 2016 cols 31-89
[252] SP OR 02 December 2015 cols 28 per Iain Gray MSP & 52 per Malcolm Chisholm MSP
[253] Ibid, Cols 25 and 69 per Aileen Campbell MSP
[254] 'Ruth Davidson: 'Named person' for every child could lead to another Baby P tragedy' (29 November 2015) *The Herald* Available at https://www.heraldscotland.com/news/14111244.ruth-davidson-named-person-every-child-lead-another-baby-p-tragedy/ (Accessed 16 April 2021)

policy, but this was blamed on the 'misrepresentation' in the media and by the Conservatives in parliament.

Clearly therefore opposition to the Bill, including using Convention rights arguments, became a major part of the Conservatives general opposition to the Government. This again provides an exception to Hiebert's general observation that in states with Westminster-type political systems about the use of opposition parties use of 'compatibility-lens' when scrutinising legislation. [255]

However, even if the current example provides an exception to Hiebert's specific point about reluctance of opposition parties to use rights-based arguments when opposing the Government, her broader point – that Westminster features do not provide fruitful conditions for effective scrutiny on rights-grounds – stands. As Hiebert notes, in Westminster systems, the primary role of opposition parties is to promote themselves as an alternative government.[256] This means that they do not tend to view their parliamentary role as helping to improve legislation, but instead to defeat it. While this is clearly a generalised and simplistic description of party behaviour in Westminster systems, I think it provides a fair explanation for the Conservatives' approach to the Named Persons provisions. For the Conservatives, Convention rights arguments were used as a means to contribute to the policies' defeat. Thus, because they disagreed with the Conservative Party's assessment of the policy on Convention rights-grounds and considered that Conservative members were using such arguments in bad faith, the Government often failed to engage with the arguments themselves and instead focused their attack on what they considered to be the Tories' underlying aims. Again therefore it has been shown that Westminster features complicate the manner in which parliamentary scrutiny of legislation on Convention rights-grounds operates in practice. The highly partisan nature of political debate and scrutiny at Holyrood has meant that Convention rights arguments will often be used to defeat, as opposed to improve the legislation. This has a knock on effect for the Government's likelihood to listen to Convention rights based arguments raised by parliamentarians during the legislative process.

One can also see a change in the position of the other parties in the parliament as the opposition to the policy grows. The Scottish Labour Party and the Scottish Liberal Democrats had voted for the legislation in 2014, and for the next few years would continue to do so. Moreover, both

[255] Hiebert, (n64) p138
[256] Ibid

parties agreed that the Conservative attack on Named Persons misrepresented the policy for cynical ends (particularly given that the UK party had led an assault on Convention rights in previous years).[257] However, as public and practitioner support for the legislation began to decrease – the parties, particularly Labour, became increasingly critical of the Government's handling of the policy. On 2 December 2015, during a Conservative debate on the policy, Iain Gray MSP suggested that Labour had supported the legislation despite some misgivings about implementation but 'the Government simply banked our support for the principles and squandered the goodwill behind it.'[258] The increasingly critical stance of Labour towards the policy can be seen by the fact that its leader Kezia Dugdale called for a 'pause' in the implementation of the policy during the 2016 Scottish Parliamentary elections.[259] Labour MSPs later explained this change on the basis that the policy had been raised by numerous voters during the campaign and due to concerns raised by various unions and practitioners' organisations.[260]

Conclusions

What then, does the saga over the Named Persons legislation tell us about the operation of Scotland's 'third way' model of rights protection?

Firstly, the abandonment of the remedial legislation was caused by a combination of smaller factors which, on their own, may not have led to the statutory scheme to be scrapped. The fact that the scheme could continue to exist in a non-statutory form, the unfortunate timing of the changes to data protection law, the extremely negative and effective campaign against the policy and the changes in parliamentary arithmetic created a perfect storm in which the best option seemed to be to drop the remedial legislation. Still, I think that is possible to take some general observations about what the saga says about the extent and form of culture of rights in Scotland.

Parliamentary rights-scrutiny

[257] SP OR 02 December 2015 cols 28 per Iain Gray MSP, 52 per Malcolm Chisholm MSP & 38-40 per Liam McArthur MSP
[258] Ibid, Col 29 per Iain Gray MSP
[259] 'Scottish Labour calls for named person 'pause'' (31 March 2016) *BBC News* Available at https://www.bbc.co.uk/news/uk-scotland-scotland-politics-35933371 (Accessed 16 April 2021)
[260] SP OR 08 June 2016 Col 56 per Monica Lennon MSP

Firstly, in some ways, the example defies previous claims about the willingness and ability of Scottish parliamentarians to engage in scrutiny on rights-grounds.[261] For both the 2014 Act and the 2017 Bill, MSPs extensively and consistently questioned the compatibility of the legislation with Convention rights. That there was greater parliamentary rights-scrutiny of the Named Person provisions than for some of the other ASPs that have been challenged on Convention rights-grounds was, initially, probably down to the wealth of evidence received by experts and stakeholders and the campaign against the policy outside parliament. The present example confirms that the formal competence checks – whilst improving the compatibility of legislation with rights before introduction – do not by themselves engender greater parliamentary scrutiny of legislation on Convention rights-grounds.

Further, Westminster factors, in particular the tendency for strong government, have an extremely important impact on the effectiveness of parliamentary rights-scrutiny. Thus, despite extensive Convention-rights-scrutiny of both the 2014 Act and the 2017 Bill – it was only in relation to the latter that this scrutiny was able to impact the progression of the Bill. Even in the latter case, Westminster factors continued to be extremely influential on the nature of rights-scrutiny. At no point during the progression of the 2014 Act or 2017 Bill through parliament did a parliamentarian vote against the position of his/her party. Thus, scrutiny was primarily determined by party allegiance. This problem is less severe in the Scottish Parliament where there are relatively high number of parties and opposition parties are comfortable with voting for legislation introduced by the Government. Nevertheless, the tendency of the Scottish Conservatives to use rights-arguments as conduit through which to attack the policy overall – does not fit with the more productive role imagined for parliament by Klug or Young. On the other hand, the majority SNP Government's early decision to ignore more friendly warnings and amendments from other parties damaged its ability to have Convention rights-compatible provisions enacted during the process for the legislative sequel. In this sense, the Named Persons saga might serve a lesson to the Government to work more collaboratively with parliamentarians when it appears that concerns raised are in good faith and reasonably founded.

Judicial deference to lawmakers

Analysis of the Court of Session judgments suggests that there remains in those courts a preference to show a high level of deference to parliamentary law-making when determining

[261] O'Neill, A. 'Human Rights and People and Society' in Sutherland, E.E. & Goodall, K.E. Eds (2011) *Law Making and the Scottish Parliament* Edinburgh University Press, pp35-57

the rights-compatibility of ASPs. However, it would be incorrect to conclude that the Supreme Court, in finding that the 2014 Act violated Article 8 ECHR, was significantly less deferential. As explained, the major difference between the Supreme Court and the previous instances, was that the Supreme Court had access to the RDSG and that Clan Childlaw had placed far greater emphasis on Convention rights in its intervention on the information-sharing provisions. While it could be said that it would have been possible for the court to exercise greater deference to parliament on the question of proportionality, the areas where the court found that the Act had violated Article 8 were not questions where courts tend to exercise deference. In this sense, the *Christian Institute* judgment only tells us a limited amount about the extent to which the courts are willing to show deference to the Scottish Parliament on rights-questions. That said, the fact that the Supreme Court found that the Named Person policy, in itself, did not violate Article 8 and Lady Hale's detailed deliberations on how to fix the defects – indicates a willingness on behalf of the court to work productively with the parliament to ensure that the policy could be made to work in a Convention rights-consistent manner.

Relationship between the courts and parliament.

In Hogg and Bushell's original formulation of 'constitutional dialogue' in Canada, they sought to show how the judiciary and legislature could use their respective institutional competences to ensure that legislation was compliant with constitutional rights.[262] Where the courts had found that legislation was contrary to Charter rights, they could use their power to delay the effect of the decision, so that the legislature could re-write the provision in a rights-friendly manner. As described by Masterman and Leigh in the UK context this approach 'has something for everyone. Politicians are reassured they can nevertheless achieve their objectives, whereas human rights advocates can claim credit for having improved the policy and legal process resulting.'[263] Hogg and Bushell's claim was descriptive – in that it attempted to explain actually occurring practice in Canada. However, despite similar provisions to those in Canada existing in Scotland, as with the short-term response to *Salvesen*, the response to *Christian Institute* does not show a compromise between the advancement of their policy objectives and the better protection Convention rights. Despite receiving clear judicial directions on how to resolve the legislative defects, parliament was unable to draft a workable solution. Of course, this was partly down to unlucky timing – with it not being clear how the DPA 2018 would operate in

[262] Hogg, P.W. & Bushell A.A. (1997) 'The *Charter* dialogue between courts and legislatures' *35 Osgoode Hall L.J. 75*
[263] Leigh, I, and Masterman, R. (2008), 'Making Rights Real: The Human Rights Act in its First Decade', *Hart Publishing, Oxford and Portland, Oregon,* Chapter 2 page 31

practice. However, the fact that on both occasions the purported ‘win-win’ nature of dialogic rights-review has not borne out in practice indicates that the assumption that it is possible to marry judicial protection of rights with democratic law-making may not necessarily always hold true.

Conclusions

This final chapter built on chapter three by adding detail and nuance to our understanding the operation of Scotland's 'third way' model of rights protection. By taking a close look at the legislative episodes of two ASPs which were found by the courts to be incompatible with Convention rights, it shone a light on two aspects of the Scottish model which have been thus far underexplored. The first was the way in which legislators have responded when re-drafting legislative provisions that have been subject to a judicial finding of incompatibility. The second was a more holistic understanding of Scotland's rights model, which could be seen by viewing the way in which the various actors involved in the process of ensuring that legislation protects Convention rights interact with and respond to each other over one legislative episode.

These findings help to add further clarity to how Scotland's 'third way' model of rights protection –namely legislative rights review and deference as dialogue - operates. They help to answer the question of whether, to use Young's language, there exists mechanisms for constitutional collaboration and constitutional counter-balancing to enable Convention rights to be protected in Scotland in a manner that allows fundamental norms to be protected whilst having sufficient flexibility to ensure that the interpretation of these principles develops in line with societal progress.

I have argued in previous chapters that, although it is not unique in this regard, Scotland's 'third way' system of rights protection risks over-prioritising the judicial perspective on Convention rights-questions. This is for multiple reasons including the centrality of bureaucratic officials to pre-introduction competence checks, the weakness and lack of expertise of parliament as an institution in reviewing legislation on Convention rights-grounds and the fact that the courts have the ultimate say in determining whether legislation that they consider violates Convention rights remains in force. At the same time, I have suggested that there remains numerous opportunities for legislators to contribute to the settling of Convention-rights-questions through the process of legislative rights review and the courts' exercise of deference.

The evidence from the case studies confirms – and adds to – the mixed picture observed in the previous chapter. Indeed, the two case studies chosen are particularly enlightening because they tell us slightly different things about the operation about aspects of Scotland's rights model.

Legislative Rights Review

Salvesen and *Christian Institute* demonstrate in different ways how legislative rights review in Scotland can be defective. *Salvesen* highlights a default in the design of pre-legislative Convention rights review in Scotland because s.31 only applies when the bill is introduced – which means that amendments are not subject to the same compatibility checks. This default is particularly grave given what was demonstrated in chapter three – that parliamentary rights review in Scotland is weak and the Law Officer's referral tends not to be used in relation to Convention rights.

The *Christian Institute* case study calls attention to a different defect in the design of the statements of compatibility under s.31. Although there was a large amount on Convention rights-based scrutiny of the Bill by MSPs on competence grounds, this was mainly a result of evidence provided by expert witnesses, rather than the s.31 statements of competence and associated documents. Thus, whilst the previous chapter indicated that s.31 works well in getting the Government and bureaucratic officials to take the Scottish Parliament's Convention rights obligations seriously, the case studies illustrate again that it is failing (and in some cases undermining) the ability of parliament to scrutinise legislation on Convention rights-grounds.

Whilst unreasoned statements of competence reduce the likelihood that parliamentarians will be able to spot the Convention rights-issues the legislation engages, Westminster factors affect the *effectiveness* of parliamentary rights-scrutiny. The legislative process leading to the enactment of the Children and Young People (Scotland) Act 2014 bucked the trend in terms of parliamentarians engaging with Convention rights-questions as a key part of their scrutiny of the Bill. However, the existence of Westminster factors meant that the Government was not minded, nor required, to be amenable to parliamentarians' Convention rights-based scrutiny. That said, the changed parliamentary arithmetic during the legislative process of the 2017 Bill which ultimately allowed opposition party committee members to delay the passage of the Bill (and ultimately contribute to its withdrawal) demonstrates that the institutional power of parliament *vis a vis* the Government is not fixed and that parliament on some occasions can effectively undertake its scrutinising role.

Deference as dialogue

The *Salvesen* and the *Christian Institute* judgments, as two of the few examples where the courts have considered that legislation is incompatible with Convention rights, should not be seen as archetypes of the general approach the courts have taken to deference. However, both

cases improve understanding of the courts' approach because they give an indication of why the courts have decided not to exercise deference.

Although some academics have criticised the *Salvesen* judgment for being insufficiently deferential towards the Scottish Parliament, it is relatively clear that part of the reason for this lack of deference was the rushed and poorly drafted nature of the defective legislative provision. The courts' approach in *Salvesen* can be seen to be in line with Young's constitutional counter-balancing, because the courts were signalling to parliament that legislation that unjustifiably discriminates between two classes of people or fails to accord with a legitimate legislative aim will fall foul of the courts. In this way, *Salvesen* can be seen to be an example of the courts taking the 'stick' approach to the 'carrot and stick' of varying their levels of deference depending on the quality of legislative decision-making.

On the other hand, the Supreme Court's finding of incompatibility in *Christian Institute* confirms that there are some areas where, regardless of parliamentary reasoning, courts are unwilling to show deference to legislators. Whether a legislative provision is sufficiently 'in accordance with law' appears to be one of these areas. That the courts are less willing to be deferential in this area is not necessarily a threat to the democratic settling of rights-questions because it focuses less on the content of the Convention right and more on the procedural qualities of the law.

One of the largest contributions that these case studies have made to the understanding of the operation of Scotland's 'third way' model is in relation to legislative responses to judicial findings of incompatibility. It was argued in the previous chapter that s.102(2) can be seen to potentially operate as a 'third way' feature because it allows the courts to defer to parliament on remedy even where they have not deferred to parliament on the content of Convention rights. Moreover, the courts can aid the collaboration between the legislature and the courts by setting out clearly why the legislation was incompatible with Convention rights and indicating in detail, without proscribing, how the legislature could cure the incompatibility. In the *Salvesen* case, although the Supreme Court suspended the effect of the decision under s.102(2), Lord Hope was relatively brief in terms of setting out his suggestions to legislature for curing the incompatibility. In *Christian Institute*, a s.102(2) declaration proved to be unnecessary, but Lady Hale went into considerable detail as to the nature of the incompatibility and what would be required to cure it. In both cases therefore there was an openness on behalf of the courts to

use their powers under s.102(2) to blunt the effects of the judgment and lean on parliament's superior abilities as lawmaker to cure the incompatibility.

The extent to which section 102(2) and legislative sequels more generally tend be simply tools of constitutional collaboration or can also be used for constitutional counter-balancing requires consideration of the legislative sequels themselves. In neither the legislative sequel to *Salvesen* nor the legislative sequel to *Christian Institute* can the ability of parliament to re-assert its policy goals in a way that better respects Convention rights be particularly observed. In *Salvesen* legislators felt tightly constrained by the judgment. The remedial legislation was considered by many MSPs to be a necessary but difficult pill to swallow. The legislation also caused consternation amongst some of those it affected, the press and the public, although this was exacerbated by the government's failure to grant compensation to those who had lost out as a result of the order.

In *Christian Institute,* despite suggesting after the judgment that the legislation required no more than a technical fix, the Government ran into significant problems in drafting a workable legislative response. This was down to a number of factors, some to do with unfortunate timing and others to do with the loss of political support of the Bill and changes in parliamentary arithmetic. This led, ultimately, to the Government abandoning the remedial legislation and the Named Person scheme in its statutory form altogether.

That in response to both *Salvesen* and *Christian Institute,* the Scottish Government was unable to achieve a satisfactory legislative response reiterates the findings in previous chapters that dialogue theories that emphasise the 'win-win' nature of legislative responses are not always reflective of the picture on the ground. This is not to say that it is not possible that legislative responses to judicial findings of incompatibility could operate this way in Scotland but merely that it is incorrect to say that there will never be a trade off in terms of protecting Convention rights and the achievement of a Government's policy goals. The response in the *Salvesen* case in particular also shows that, in this case at least, the Government very much saw its role in remedying the legislation as one in which it was giving effect to the court's judgment. The admittedly very small samples used here therefore suggest that s.102(2) is more likely to be used as a tool of constitutional collaboration rather than constitutional counter-balancing.

That said, the longer term response to *Salvesen* is perhaps more promising in terms of the Scottish Government learning from the court's judgment and being more pro-active in its defence of legislation on human rights-grounds. As Shields and Miller have both observed, in

its introduction of the Land Reform Bill, the Scottish Government was much more forthright about why it considered that the Bill's potential incursion with the right to property under the Convention was justified. Indeed, the Scottish Government explicitly justified its incursions on the basis of other international human rights that it has responsibility for, in an attempt to speak directly to the court and to influence the court's thinking any future challenge to the legislation on the basis of Article 1 Protocol 1. This proactive approach, if accepted by the courts, allows the Government to re-balance the scales in terms of the settling of rights-questions. Indeed, as reflected on in the thesis conclusion, this approach might work particularly well, given that the Scottish Government intends to incorporate a larger number of rights into domestic law in the sixth parliamentary session.

Conclusion

> The Scotland Act and The Human Rights Act, taken together, transformed the context in which human rights issues are considered and decided in Scotland.
>
> In my view, human rights has been one of the undoubted successes of devolution. Over the last 20 years the Scottish Parliament has consistently acted to strengthen human rights protections…
>
> [In 2018], I established the Human Rights Leadership Group, which will determine how best to extend human rights protections. *That is entirely in keeping with the original devolution settlement.*[1][emphasis added] – Nicola Sturgeon MSP

This thesis has sought to explore and justify the claim that the Scotland Act 1998 operates as a 'third way' bill of rights – understood as a merger of the legislative rights review associated with Hiebert and with the account of democratic dialogue set out by Young. I have argued that viewing the Scotland Act through a 'third way' lens is a more productive way to consider rights-protection in Scotland because it emphasises the shared role that the different branches of government have in vindicating human rights and gives a better understanding of how inter-institutional interaction can enhance the protection, and democratic legitimacy, of rights. In this final, concluding, chapter I will aim to re-emphasise my core argument and conclusions. I will then offer some recommendations for how the design of Scotland's model could be altered so that risks that involvement from democratically representative and accountable actors, particularly parliamentarians, are cut out of the process are reduced. Finally, I will offer some thoughts on how the plans to adopt a new human rights law in Scotland, which will incorporate a broader range of human rights contained in international human rights documents that the Scottish Government is responsible for, might fit in with Scotland's existing model.

Outline of Argument

The introductory chapter of the thesis explored 'third way' constitutionalism as a descriptive account of bills of rights which contain particular structural features and as a normative account of constitutionalism. It noted that 'third way' bills of rights grew out of attempts by Commonwealth states to introduce domestically enforceable bills of rights whilst maintaining

[1] Speech at the University Strathclyde Conference on Human Rights Innovation, 14 November 2018 available at https://www.gov.scot/news/human-rights-sacred/ (accessed 28/09/21)

the principle of parliamentary supremacy. Observing the design of such bills, scholars (and for later bills, drafters) began to argue that the Bills might offer a 'third way' of constitutional rights protection – one that moved beyond the traditional debate about constitutional finality between political and legal constitutionalism. In the language of triangulation that so defined the era in which the Bills were enacted, it was argued that the new Bills would be able to merge the benefits of increased judicial protection of rights and the ability of democratically representative and accountable legislatures to pursue legislation in line with the population's preferences. Moreover, by granting all branches of government a role in the administering of human rights, each branch would have the ability to contribute a unique perspective on how the right should be protected and would be able to enter into a dialogue with the other branches, so that human rights were protected in a better and more democratically-legitimate manner.

Two features, in particular, were said to engender this 'third way' form of rights protection. The first was a requirement on the executive to review and report on the rights-compatibilities of proposed legislation before its introduction to parliament. The second was enabling the courts to review the compatibility of legislation with rights whilst preserving the power of parliament to insist that the legislation remained in force. Both of these powers had dialogic potential because they required parliament to scrutinise the assessment made by the executive or the judiciary. Beyond these powers, in the later Bills in particular, numerous other 'third way' mechanisms were established – designed to strengthen the role of particular institutions (particularly parliament) and to further deepen the inter-institutional protection of rights. Such mechanisms included the establishment of specialist human rights committee and placing an 'interpretive obligation' on the judiciary to make human rights compatible readings of legislation where possible. The former would strengthen parliament's role in rights protection by allowing it build the necessary rights-expertise required for effective scrutiny. The latter, by introducing a presumption towards compatibility, would ensure that rights would be protected whilst leaving the maximum number of acts of parliament in force.

As the number of 'third way' bills and features increased, so did the number and depth of theories that suggested that such bills advanced a novel and normatively superior account of constitutionalism. Particularly influential were Gardbaum's 'New Commonwealth Model of Constitutionalism', Hiebert's 'legislative rights review' and the various accounts of constitutional or democratic 'dialogue' first introduced by Hogg and Bushell but expanded and normatively underpinned by scholars like Alison Young. Like all broad models of constitutionalism, the various accounts faced internal and external critique.

Internally, scholars like Gardbaum have criticised dialogue theory as being at the same time overly broad – because not all interactions between the courts and legislatures could be considered to be dialogic and under-inclusive – because dialogue can be observed in states without 'third way' features such as a parliamentary override. Similarly, Gardbaum has resisted the tendency to include states without the 'non-core' 'third way' features, executive compatibility statements and the parliamentary override, within his model.

Externally, critics attacked 'third way' theory on the basis of its claim that it occupies space as a 'third way' between polarised accounts of legal and political constitutionalism. Such scholars argued that all models of constitutionalism foresee a role for the executive, legislature and judiciary in ensuring that legislation complies with rights, that these branches interact with one another and that there is some 'dynamic' space for the meaning of rights to progress in line with changing societal perspectives. As Geiringer has suggested, 'third way' theorists thus draw upon hyperbolised accounts of legal and political constitutionalism in order to create sufficient space between the accounts for 'third way' theory to occupy. Other external criticisms were more practical. Mark Tushnet has argued 'third way' bills of rights are inherently unstable and that in practice have tended not to operate in the way that 'third way' scholars imagine – instead collapsing into either legal or political constitutionalism.

Although there is undoubted merit in both of these critiques, in line with Young, I consider that it remains worthwhile to view particular bills of rights through a 'third way' lens. Although it might be the case that all forms of rights protection and all accounts of constitutionalism foresee a role for the different branches of government in rights protection, allow institutions to interact and allow space for fundamental norms to develop, 'third way' theory, by beginning with different assumptions and asking different questions, allows us to *prioritise* these three objectives. By starting off from the position that each branch of government has something worthwhile to contribute to rights protection and that protection might be advanced by emphasising the value of inter-institutional interaction where different branches have the capacity at different points to insist on their interpretation of the right – 'third way' theory allows us to advance beyond the argument about constitutional finality and move towards a more insightful lens through which to view rights protection.

This, perhaps more modest, account of 'third way' theory is also more accommodating in divergences between different models of rights protection. By acknowledging that the underlying aims of 'third way' theory can be achieved in states without all (or even any) of the

core ‘third way’ features, it opens up the benefits of viewing rights protection through a ‘third way’ lens to a broader number of bills of rights. In particular, as Young has argued, states without a parliamentary override may be able to obtain the benefits of democratic dialogue through the alternative route of judicial deference.

At the same time, as was explored in the second chapter, particular ‘third way’ features can help to encourage the different branches of government to perform their role in line with the aims of scholars. In particular, in line with Hiebert, I consider that ‘legislative rights review’ can make an important difference to rights protection in a given state. This is because, by requiring that all that all bills are subject to review on the basis of their compatibility with rights norms, and not just those that are subsequently challenged in the courts, a far greater number of bills are likely to be subject to rights scrutiny than the states without this requirement. On the other hand, the executive reporting requirement can help to improve the human rights compliance of bills by encouraging their promoters to speak directly in the language of rights which should help them to set the terms of any future rights-based challenge to the legislation.

The introduction concluded by explaining that it would adopt an account of the ‘third way’ which merges Hiebert’s legislative rights review with Young’s democratic dialogue, achieved through the alternative route of judicial deference. I conceded that this account is less likely to achieve the objectives of some accounts of ‘third way’ theory – particularly those that emphasise the ability of the model to lead to a more open societal debate about the relationship between rights and legislation. However, other dialogic aims, such as allowing the different branches of government to collaborate for a better protection of rights; and the creating of space for democratically elected branches of government to develop the content of rights in line with societal progress whilst empowering courts to protect fundamental values, can be achieved under this model.

If the introduction was about clarifying and defining the account of ‘third way’ constitutionalism adopted in this thesis, the second chapter was about assessing the practice in jurisdictions with ‘core’ ‘third way’ bills of rights thus far. In line with Young’s thesis that:

> [D]emocratic dialogue depends as much on how powers are exercised as it does on the legal powers given to different institutions of the constitution[][2]

[2] Young, A.L. (2017) *Democratic Dialogue and the Constitution* Oxford: Oxford University Press, p305

I argued that the operation of the different bills varied widely depending on the Bill's design and the constitutional context in which they operated. In particular constitutional factors such as the constitutional status of the Bill of Rights, the relationship between the Bill and the jurisdiction's international human rights obligations, the design and composition of parliament and the influence of the Westminster system of government in determining how parliament operates all influenced the way in which the nominally 'third way' features of the bills operated. For example – it was shown how the decision to tie the interpretation of the 'Convention rights' in the Human Rights Act 1998 to the Strasbourg Court's interpretation of the ECHR increased the force of domestic courts' declarations of incompatibility and reduced the degree with which the Government/Parliament felt able to fail to respond to them. Alternatively, it was shown how doubts over the constitutionality over the 'declaration of inconsistent interpretation' and other provisions of the Victorian Charter allied with a broader scepticism about judicially-protected rights in Australian constitutional culture meant that this provision had grown into disuse. Indeed such questions also bled into the use of similar provisions in the ACTHRA. Importantly, in all of the jurisdictions considered, the dialogue between the executive and parliament on rights questions was strongly shaped by the Westminster model of government - which all the considered jurisdictions, to a greater or lesser extent, adopt. Westminster features such as the government dominance of the legislative agenda and the centrality of highly partisan political parties in determining how parliament operates reduced the effectiveness of parliamentary rights-based scrutiny by weakening parliament's power and reducing the likelihood that there would be an independent parliamentary position on rights-questions.

On the other hand, aspects to do with the design of particular 'third way' features could also increase or decrease the extent to which a Bill could operate according to 'third way' aims. In Canada and New Zealand, Parliament's role in legislative rights review was undermined by the failure to establish a specialist human rights scrutiny committee. Additionally in Canada and initially in the UK, the failure to require that executive reporting requirement is accompanied with reasons undermined the iterative process between the government and parliament because parliament was not given enough information on which to base its scrutiny.

Despite these complications, I argued that in all of the jurisdictions there was some evidence that the Bills had changed the constitutional protection of rights in a way that 'third way' scholars anticipate.

The feature that had almost universal success in relation to at least one of its objectives was the executive reporting requirement. In all of the jurisdictions considered, the executive reporting requirement led to heightened scrutiny of all bills on rights grounds. Such review had increased the rights-consistency of legislation. However, there was concern that the review process, which was primarily undertaken by bureaucratic officials, who typically form their position on the basis of the predicted outcome of the success of the legislation in the courts, risked over-prioritising judicial rights-reasoning compared with political rights-reasoning. Such a process risked cutting political reasoning out of the process, to the detriment of one of the aims of legislative rights review, which is to allow political actors to make contributions to the settling of rights-questions.

The risk of 'the political' being hollowed out of the process of legislative rights review could also be seen by the relative weakness of parliamentary rights-based scrutiny of legislation. For numerous interlinking reasons such as Westminster factors, lack of expertise and the failure of some executive reporting requirements to be reasoned, parliamentary rights review in all jurisdictions (with the exception of the ACT) was the weakest element of the 'third way' model. Practice in the UK, ACT and Victoria demonstrated that specialist human rights scrutiny committees and reasoned statements of competence can improve parliament's expertise on rights and improve the degree of iteration between the parliament and government. However, ultimately, even here Westminster factors meant that parliament's successes in rights-based scrutiny tended to be less about amending legislation and more about influencing pre-legislative assessments.

Despite these challenges, I argued that legislative rights review did still present greater opportunities for legislators to contribute to the settling of rights questions than would have been the case had such features not existed. Executive actors had greater scope to settle rights questions where the judicial position in relation to a particular question was not clear or where the courts had in the past explicitly recognised the validity of political judgment in determining how or the extent to which the right should be protected. Further, the very process of undertaking pre-enactment compatibility assessments allowed the government to explicitly justify its interferences with rights in rights-language thereby reducing the risk of a subsequent judicial finding of incompatibility. Likewise, although parliamentary rights review generally did not lead to large amount of concrete amendments to legislation, there was evidence that the expectation of scrutiny from parliamentarians and past reports from human rights scrutiny

committees would be taken into account during the pre-introduction stage and could lead to the Government altering its approach.

In relation to democratic dialogue, where dialogue could be observed, it tended to occur in unexpected ways. In Canada and the UK, the courts had used their power to declare that legislation was inconsistent with rights on numerous occasions, however, for differing reasons, the strength of judicial norms meant that political actors felt that they were unable to insist that the legislation remain in force. As a result, in terms of central government at least, the parliamentary override had grown into disuse. On the other hand, in the ACT and Victoria, a combination of doubts about the constitutional validity of the power to declare legislation inconsistent with rights (as well as other powers) and a rights-sceptic constitutional culture contributed to the powers falling into disuse. In none of the jurisdictions considered therefore could the parliamentary override be seen to be used as an open dialogic mechanism.

Instead, in Canada and the UK, dialogue tended to occur via alternative means. For example, in Canada, dialogue more commonly occurred where the courts would use powers to suspend the effect of judgments to allow the legislature to respond and also where the legislature would 'strike back' at a court finding of rights-inconsistency by responding to the judgment in a way that failed to resolve the issue determined by the court. In the UK, dialogue tended to occur through the doctrine of due deference.

Thus in relation to both legislative rights review and democratic dialogue, none of the bills operated exactly in the way that 'third way' scholars anticipated – particularly those like Nicol whose account of dialogue relies on open institutional contestation. However, in each of the states considered, it was seen how the institutional 'third way' features engendered substantial constitutional collaboration and counter-balancing below the surface.

Having assessed the theory and practice of 'core' 'third way' bills of rights, in chapters three and four I considered whether the Scotland Act 1998 fits within the model.

Chapter three began by setting out the model of Convention rights protection under the Scotland Act 1998. I argued that through sections 31 and 33 of the Scotland Act, the Scottish model had significant opportunities for legislative rights review. Additionally, although the Scotland Act 1998, differed from the 'core' 'third way' bills because s.29(2)(d) empowered the judiciary to set aside legislation on the basis of Convention rights incompatibility without empowering the parliament to override such findings, there existed features, some derived from

the Scotland Act 1998, such as s.101 and s.102, and some internally employed by the judiciary that allowed dialogue to occur through the alternative mechanism of judicial deference.

Parts two and three of chapter three then analysed the operation of Scotland's 'third way' model. Part two considered legislative rights review in Scotland. Drawing on McCorkindale and Hiebert's research, it noted that pre-introduction legislative review on Convention rights grounds was functioning well. Indeed, pre-introduction review in Scotland was particularly robust given that a greater number of actors, for example the Presiding Officer and the Scottish and UK Law Officers were involved in the deliberations. That said, I noted that the process was dominated by bureaucratic actors and, similar to the conclusions in chapter two, political actors and arguments risked being under-included to the process.

Similarly, by considering the legislative history of eighteen Convention rights-contentious ASPs, I argued that the Scottish Parliament was the weakest institutional actor in Scotland's 'third way' model. Although there was clear evidence that Scottish Parliamentarians did consider it as part of their role to scrutinise legislation on Convention rights grounds, numerous factors limited the effectiveness of their scrutiny. Many of these factors were common to those explored in chapter two and some were unique to the Scottish model. In terms of the design of Scotland's 'third way' model – two factors were said to undermine parliamentary Convention rights based scrutiny of legislation. The first was the lack of requirement of positive statements of competence to be reasoned. The second was the failure in the first four sessions to establish a specialist human rights scrutiny committee. The first factor undermined the dialogue between parliament and the government because it allowed the government to obscure its reasons for considering that legislation was compatible with Convention rights. The second factor meant that parliament failed to develop institutional expertise in terms of rights questions. The result was that parliamentary scrutiny of legislation on Convention rights grounds, through the 'mainstreamed' committee approach, was heavily dependent on externally received evidence during Stage 1 of the legislative process. This source of information, whilst welcome, could be inconsistent, leaving gaps in Parliament's human rights scrutiny. Further, despite aims that the Scottish Parliament would operate differently from the UK Parliament, I found that Westminster factors similarly undermined the effectiveness of parliamentary rights-based scrutiny.

Again however, despite the risk that legislative rights review in the Scottish Parliament could collapse into merely the second-guessing of judicial decisions, I argued that there was some

space for legislators to contribute to the settling of rights questions. Much like was observed in chapter two, Scottish legislators were able to contribute to the settling of watershed and contestable rights-questions. Further, the process of legislative rights review could help to convince the courts that the government and parliament had taken rights seriously when the courts undertook the proportionality assessment in relation to limited rights. In this area, the courts could incentivise the government to properly engage with parliamentary scrutiny by varying the degree of deference they were willing to show on that basis when they were reviewing legislation for Convention rights compatibility.

In part three, the claim that the rights protection in Scotland could be considered to be dialogic, albeit through the alternative mechanism of judicial deference was examined. By considering twenty-one challenges to ASPs on Convention rights grounds, it was found that the Scottish Courts had generally been deferential to Scottish lawmakers on Convention-rights questions. There were three sites of deference from the courts to the legislature, one internally adopted by the judiciary and two externally encouraged by the Scotland Act 1998. Internally, for the most part, the judiciary had been willing to defer to the legislature on the settling of certain rights questions. In particular, the courts were willing to defer to the judiciary where the rights-issue was watershed; where the Strasbourg court recognised that the state had a margin of appreciation to determine how a particular rights-issue is decided and the court, for democratic or institutional reasons, considered that this margin of appreciation should be passed on to legislators; and where the court considered that the reasoning process of legislators was sufficiently robust to suggest that the legislation proportionately interfered with Convention rights. On the other hand, less deference was shown in relation to rights-questions that were already clearly settled; where the courts considered that they had stronger institutional capacity to resolve the rights-question; and where the court considered that the legislature had failed to justify its incursion into limited rights. I argued that the latter of these forms of deference had the ability to engender dialogue because it allowed the courts to take a 'carrot and stick' approach to incentivise improved legislative rights review.

Externally, s.101 and 102 Scotland Act 1998, encouraged the judiciary to work with legislators to ensure that legislation complied with rights even in cases where the courts considered that the legislature has *prima facie* violated Convention rights. S.101, which has been used by the judiciary on two of the seven occasions where an ASP has been found to be *prima facie* incompatible with Convention rights, allowed the courts to preserve the integrity of legislation by making Convention rights-compatible readings of Acts to save them from judicial censure.

S.102 allowed the courts to defer to the legislature on the remedy to a Convention rights-breach even where it had not deferred on the content of the right. That the courts had been willing to exercise this power in the five other occasions where an ASP had been found to incompatible with Convention rights suggested that the courts preferred to take this collaborative approach to the protection of Convention rights. Indeed, on a few occasions the courts had further enhanced the dialogic potential of s.102 by giving extensive suggestions (but not prescriptions) about how parliament might remedy the incompatibility.

Ultimately, I argued that a combination of legislative rights review and judicial deference were responsible for the low numbers of ASPs that have been considered to be incompatible with Convention rights so far. The Scotland Act 1998 could therefore be considered to be a 'third way' Bill of Rights – albeit one that exhibited many of the incongruences that were shown to exist in the 'core' 'third way' Bills in chapter two. In Scotland, the risk of the 'political' being lost was particularly stark given parliament's formal inability to insist that rights-conflicting legislation remains in force. That said, practice so far suggests that judicial review in Scotland is no stronger than in the UK and Canada, and in some ways, might in fact be weaker.

The final chapter of the thesis aimed to add two additional insights to the operation of Scotland's 'third way' model. First, how did legislative rights review and democratic dialogue operate together under Scotland's model? And second, how had legislatures responded to a judicial finding that an ASP was incompatible with Convention rights? The chapter considered two legislative episodes, where an ASP had been struck down on Convention rights grounds, to answer these questions.

In relation to the first question, it was shown how different failures in the legislative rights review process led to the judicial finding of incompatibility. In *Salvesen* the introduction of the offending provision as a late stage amendment meant that it by-passed legislative rights review. This led to the court finding that parliament had failed to demonstrate the proportionality of its interference with the right. In *Christian Institute,* the Government's preference for including Convention rights safeguards in extraneous guidance rather than in the Bill itself lead to the court concluding that provisions of the Bill that would engage Convention rights were not sufficiently 'in accordance with law'. In both cases therefore, the judicial role became stronger in response to oversights during the legislative review process.

In relation to the second question, admittedly by looking at a small sample, I demonstrated that the 'win-win' nature that some dialogue scholars have attempted to present did not occur in

either case. In response to *Salvesen,* legislators felt extremely constrained by the court's judgment and considered that only one remedial path was ultimately open to them. In response to *Christian Institute,* despite the productive approach of the court, multiple factors, some Convention-rights related and others less so, led to the Government's policy being dropped in its legislative form. Thus, the notion that remedial deference always leaves parliament with a large amount of room to respond to the courts' judgment appeared not to have come into fruition in either of these contexts.

That said, both cases, but *Salvesen* in particular, might have been an important learning opportunity for Scottish legislators. *Salvesen* demonstrated that Convention-rights engaging legislation which is not subject to full legislative rights review process and which is less clear about its legislative aim is less likely to meet the proportionality threshold of the court. Partly as a result of the court's approach in *Salvesen* and partly as a result of other factors, in the longer term the Scottish Government changed its approach to legislating in areas which engaged Convention rights. Rather than taking a defensive approach whereby Convention rights were seen as a 'red light' to particular legislative proposals, the Government moved towards a more pro-active approach where it was clearer about its legislative aims. Indeed, under this approach, the Government sought to justify its incursion on the Convention rights of some by explicit reference to the protection of human rights of others. This approach was a clear attempt to influence the judiciary's thinking in relation to proportionality in the event of a Convention rights-based challenge to the legislation.

Recommendations

Broadly, I have argued that Scotland's 'third way' model of rights protection functions well – if not perfectly. Under Scotland's model, the executive and the courts in particular have been able to carve out clear roles in the overseeing of Convention rights. However, the success of parliamentary rights-based scrutiny has been weaker – if not non-existent. Part of the weakness of parliament's role is a result of factors to do with the Scottish Parliament's design, for example, Scotland's small unicameral parliament and the influence of Westminster factors. Changing these factors would require broader institutional and cultural change which is perhaps not realistic in the short-term.

However, it would be possible to strengthen the role of parliament in Scotland's 'third way' system by making some relatively minor changes to the design of Scotland's model.

The first change would be to require that the statement of compatibility from the Presiding Officer and the person in charge of the Bill is reasoned. This could be achieved by requiring that Bills are accompanied with a detailed human rights memorandum as suggested by the Equalities and Human Rights Committee in *Getting Rights Right* and by changing the Parliament's Standing Orders to require that the Presiding Officer's statement be reasoned. Reasoned statements of compatibility would have the ability to improve the iterative process between the Scottish Government and the Parliament, by giving greater information on which to base its scrutiny and by allowing it to more directly dissect the Government's explanation that the legislation is compatible with Convention rights. The Government has of course indicated that is resistant to such a change in the past, on the basis that enhanced reasoning might provide a signpost to potential post-enactment challengers. However, as discussed above, increased government justification of Bills can also improve the likelihood that those challenges will not succeed because the courts have shown greater deference to legislators when reviewing bills that have been clearly justified and strongly scrutinised.

A second way to enhance parliament's role under the 'third way' model would be for the Government to accede to the Equalities and Human Rights Committee's request in *Getting Rights Right* to supply it with the necessary resources and support, including the appointment of a legal advisor, for it to take a 'JCHR' approach to legislative scrutiny. This would not require that the 'mainstreaming' approach of the Scottish Parliament's committees be abandoned, instead the EHRiC would add an additional layer of scrutiny. A more prominent and 'beefed up' EHRiC committee would help to improve parliament's institutional expertise in dealing with rights-questions – something that has been unable to develop thus far.

Neither of these recommendations are a 'silver bullet'. As noted in relation to the other bills, issues to do with the Scottish Parliament's size and Westminster factors are still likely to play an important part in determining the effectiveness of parliamentary rights-based scrutiny. However, both would at least give the parliament greater tools at its disposal for it to undertake its role. The introduction of a new human rights bill might provide the perfect opportunity for parliament's role to be strengthened.

New Human Rights Bill

The increased attention that the Scottish Government gave to ESC rights during the passage of the Land Reform Act 2016 has been part of increasing efforts on behalf of the Scottish Government to recognise a broader range of human rights that is responsible for in the domestic

context.[3] Alongside the Land Reform Act, the Government has increasingly referred to its obligations under UN Human Rights documents such as the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child when introducing legislation.[4] Additionally, the Scottish Government has brought forward a number of proposals aimed at recognising these rights in domestic law. The Social Security Act 2018 recognised social security as a (non-justiciable) human right in domestic law.[5] The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, which has been passed by the Parliament but is currently subject to referral to the Supreme Court by the Advocate General, seeks to incorporate the UNCRC into Scots Law including by giving rights-holders to challenge legislation on the basis of its incompatibility with child's rights.[6]

More fundamentally, in 2018, Scotland's First Minister Nicola Sturgeon appointed an Advisory Group on Human Rights Leadership tasked, in light of the United Kingdom's withdrawal from the European Union and the UK Government's plans to repeal the Human Rights Act 1998, with making recommendations to ensure that Scotland led by example in protecting human rights, including economic, social, cultural and environmental rights. The Group's Final Report recommended that a new human rights bill, which would incorporate a large number of human rights, including Civil and Political, Economic, Social and Cultural and Environmental rights, be enacted by the Scottish Parliament.[7] The Group suggested that Bill should take 'multi-institutional'[8] approach to rights protection. To this end, the group's recommendations are worth further consideration.

In recommendation 11, the Group suggested that the Bill should make provision for 'enhanced' pre-legislative scrutiny of bills on human rights grounds. It suggested that the current duty on the person in charge of the bill and the Presiding Officer to report on the Convention rights compatibility of legislation should be broadened to include the full suite of human rights

[3] The Scottish Parliament has legislative competence to observe and implement international obligations in areas where it has broader legislative competence – See Scotland Act 1998, Sch 5, Paras 7(1) & (2)
[4] The Children and Young People (Scotland) Act 2014; The Community Empowerment (Scotland) Act 2016; and The Social Security (Scotland) Act 2018.
[5] The Social Security (Scotland) Act 2018, s.1
[6] The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, s.20 & 21
[7] Miller, A. et al First Minister's Advisory Group on Human Rights Leadership (FMAGHRL), *Recommendations for a new human rights framework to improve people's lives* Report to the First Minister (December 2018) Available at https://humanrightsleadership.scot/ (Accessed 28/09/2021), p32-33
[8] Boyle, K. (2020) *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* New York: Routledge, p240

contained in the new Bill.[9] The report also recommended that the Equalities and Human Rights Committee be given a far more prominent role in pre-legislative scrutiny and suggested that Committee should be supported by a legal advisor and be able to draw upon human rights and constitutional experts when undertaking its work. The committee's work would not replace the role of the lead committees. Instead, it would be given a coordinating role to ensure that Bills are complying with the various human rights in the new Act. The committee's findings and evidence should be published to improve dialogue and transparency. In this vein, the Committee's findings would not be binding, but should carry sufficient weight in parliament and could be referred to by the courts in subsequent legal challenges to the legislation. The Group also suggested that the Committee be involved in observing Scotland's continuous progress in giving effect to rights, by encouraging the Government to bring forward legislation in necessary areas.

The Group's recommendations in relation to creating an enforceable legal right also emphasised the inter-institutional nature of protection. The Group stressed that challenging the legislation judicially should be a 'measure of last resort' but that international law highlighted the need for rights-holders to have access to a remedy.[10] It argued that rights-holders should be empowered to challenge an ASP on the basis of its incompatibility with human rights and that the courts should rely on existing standards of 'reasonableness', 'proportionality' and 'due deference to legislature' when considering the nature of a the states human rights obligations under the Act.[11] Further, courts should be given an interpretive obligation to read legislation compatibility with the rights in the Act where possible.[12] Where such an interpretation could not be made, the court should be empowered to issue a declaration of incompatibility or (if such a power was within legislative competence to create) be able to strike down the Act – with the court being empowered with an s.102-like power to suspend the effect of its judgment whilst legislators drafted the appropriate remedy.[13] The report also recommended that the court should be empowered to issue a 'structural interdict' in relation to structural or systemic human rights violations, where the court could identify the rights-violation and direct parliament to

[9] FMAGHRL (n7) p34-35
[10] Ibid, p32-33
[11] Ibid, Annex A: Frequently Asked Questions, p52-53
[12] Ibid, p32-33
[13] Ibid, p34-35

propose a legislative solution within a particular time-frame or require that a particular form of procedure is followed before the legislative solution is found.[14]

The First Minister responded to the report by welcoming its recommendations and appointing a task force to oversee its implementation.[15] It is expected that a Bill that implements the Group's recommendations will be introduced in the sixth parliamentary session.

Since the Group's report, the enactment of the UNCRC Bill, which incorporates the UNCRC into domestic law, has given a sense of what the powers to legally challenge legislation on the basis a human rights compatibility under the new human rights bill are likely to look like. Section 20 of the Bill empowers higher courts to issue a 'strike down declarator' for legislation that was enacted *prior* to the UNCRC Bill coming into force. In such cases, the court would have the power to suspend the effect of the declarator until the defects in the legislation were remedied.[16] For Bills that are enacted *after* the UNCRC Bill comes into force, the courts will be empowered to issue an 'incompatibility declarator'[17] which must be responded to by Ministers six-months after it is issued.[18]

If the new human rights bill aligns with the recommendations of the Advisory Group and the Scottish Government proposes a form of incorporation similar to the UNCRC Bill, then it will fit nicely with Scotland's existing model of rights protection. As seen above, the Group's recommendations foresee a shared role for the Scottish Parliament, Government and Courts (as well as other actors) in implementing the bill. The incorporation of a broader range of human rights, including ESC rights, might help to change expectations about the proper role of the different branches of government in rights protection.

In response to the historical charge that ESC rights cannot be made justiciable because the courts are not institutionally equipped and lack democratic legitimacy to make decisions that have resource implications, ESC rights scholars have developed a more nuanced account of the different roles that the three branches of government can play in protecting ESC and indeed all human rights.[19] This theory suggests that all human rights, regardless of their nature, engender different obligations. Courts are better equipped to recognise and protect some of the duties,

[14] Ibid
[15] Nicola Sturgeon MSP 'Enhancing human rights – Announcement from the First Minister' *Scottish Government* (December 2020) Available at https://humanrightsleadership.scot/ (Accessed 28/09/21)
[16] UNCRC Bill (n6) s.20(5)
[17]Ibid, s.21
[18] Ibid, s.23
[19] See Boyle (n8), Chapter 2

whilst others are left more appropriately to the sphere of legislative decision-making.[20] Thus, by recognising the need for multi-institutional protection for all rights and by more clearly drawing out the institutional competences of different branches of government in relation to particular rights-obligations – ESC rights scholarship has challenged traditional understandings that only courts should be constitutionally responsible for human rights protection. By incorporating ESC rights into law, and by requiring the Government, the Presiding Officer and parliamentarians to consider the implications that legislation has for all of these human rights – the new bill might emphasise to these actors (as well as the courts) the importance of the political perspective in the protection of human rights and reduce the present temptation to defer to the judicial perspective.

Further, the Group's recommendations for an enhanced role for the Equalities and Human Rights Committee would help to improve the Scottish Parliament's institutional expertise in relation to human rights. Although there should be caution about even an enhanced Committee's ability to fundamentally alter the relationship between the Government and Parliament in relation to human rights protection – practice elsewhere has shown that a strong, well-resourced and independently minded committee can positively affect how human rights are protected in a jurisdiction.

The Group's recommendations (and the provisions of the UNCRC Bill) also fit well with and have the potential to further advance Scotland's existing dialogic model of rights protection. By including a general limitations clause in the Bill and foreseeing that the courts use standards of review such as reasonableness, proportionality and the doctrine of due deference when determining whether legislation is compatible with the rights in the Bill, the Advisory Group's report demonstrates a recognition that the determination of many rights questions will be more appropriately left to the legislature, with the courts only stepping in where parliament has acted unreasonably or disproportionately.

Further, the Advisory Group's report (and the UNCRC Bill) includes multiple recommendations aimed at ensuring the different branches of government can collaborate when it comes to remedying rights violations. The strike down power and s.102-type remedy are of course already well-established under the Scottish model. The introduction of a power to issue declarations of incompatibility (which must be responded to by the Scottish Government) and

[20] Ibid

structural interdicts would open up further possibilities for constitutional collaboration and constitutional counter-balancing under the Scottish model.

In many ways, therefore the proposed new human rights bill in Scotland fits well with the 'third way' account of rights protection I have defended. Indeed, I am not the only person to have noticed the mutually reinforcing scholarship of 'third way' theorists and defenders of 'justiciable' ESC rights. Mark Tushnet has argued that weak form judicial review might be the most appropriate method for enforcing ESC, and indeed *all* human rights, because it is able to facilitate institutional disagreement about how a particular human right should be protected in practice and because it reduces the risks associated with 'both unchecked political processes and unchecked judicial power in arriving at the best specifications of what constitutional provisions mean.'[21] Similarly, Boyle and Hughes argue that:

> Rather than view adjudication of ESC rights as a threat to the separation of powers, the constitution could reflect a multi-institutional system where compatibility with ESC rights is shared between the legislature, the executive and the judiciary – where one holds another to account and the judiciary acts as a means of last resort.[22]

The authors go on to cite Canada's notwithstanding clause, and the power suspend the effect of a judgment in order to give the legislature the time and space to comply with the judgment, as mechanisms that could potentially facilitate this 'multi-institutional' balance.[23]

Thus, almost counter-intuitively, granting courts the power to review legislation for its consistency with a broader range of rights might therefore expand and concretise the legislative role in relation to rights, rather that shrinking it.

[21] Tushnet, M (2007) *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* Princeton University Press p228
[22] Boyle, K. & Hughes, E. (2017) 'Identifying routes to remedy for violations of economic, social and cultural rights' *The International Journal of Human Rights* 22:1, p57
[23] Ibid

Bibliography

Books

Allan, T.R.S. (2001) *Constitutional Justice: A Liberal Theory of the Rule of Law* Oxford: Clarendon Press

Bellamy, R. (2007) *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* Cambridge University Press

Black, C (1997) *A New Birth of Freedom: Human Rights, Named and Unnamed* New York: G.P.Putnam

Boyle, K. (2020) *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* New York: Routledge

Bynoe, I. and Spencer, S. (1999) *Mainstreaming Human Rights in Whitehall and Westminster* IPPR. London

Cairney, P. (2011) *The Scottish Political System Since Devolution: From New Politics to the New Scottish Government* Exeter: Imprint Academic,

Crick, B and Miller, D. (1995). *To Make the Parliament of Scotland a Model for Democracy*. John Wheatley Centre: Edinburgh

Dworkin, R (1977) *Taking Rights Seriously* Massachusetts: Harvard University Press

Ely, J.H, (1980) *Democracy and Distrust: A Theory of Judicial Review* Cambridge, MA: Harvard University Press

Gardbaum, S. (2013) *The New Commonwealth Model of Constitutionalism: Theory and Practice* Cambridge University Press

Hiebert, J.L. & Kelly, J.B. (2015) *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* Cambridge: Cambridge University Press

Kavanagh, A., (2009). *Constitutional Review under the UK Human Rights Act* Cambridge: Cambridge University Press

Leigh, I, and Masterman, R. (2008), *Making Rights Real: The Human Rights Act in its First Decade* Oxford: Hart Publishing

Lijphart, A. (2012). *Patterns of Democracy: Government Forms and Performance in Thirty Six Countries* London: Yale University Press, Second Edition.

Page, A. (2015). *Constitutional Law of Scotland.* Edinburgh: W. Green

Roach, K. (2001). *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue,* Toronto: Irwin Law

Tocqueville, A (First published 1835, 1994) *Democracy in America* London: David Campbell

Tomkins, A. (2005) *Our Republican Constitution* Oxford: Hart Publishing

Tushnet, M (2007) *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* Princeton University Press

Waldron, J (1999) *The Dignity of Legislation* Cambridge: Cambridge University Press

Young, A.L. (2008) *Parliamentary Sovereignty and the Human Rights Act* Oxford: Hart Publishing

Young, A.L. (2017) *Democratic Dialogue and the Constitution* Oxford: Oxford University Press

Edited Book Sections

Adamson, B. 'The Protection of Human Rights in the Legislative Process of Scotland' in Hunt, M., Hooper, H.J. and Yowell, P. Eds (2015). *Parliaments and Human Rights: Redressing the Democratic Deficit,* London: Hart Publishing

Allan, T.R.S. 'Common Law Constitutionalism and Freedom of Speech' in Beatson, J & Cripps, Y. (eds) (2000) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* Oxford: Clarendon Press,

Boughey, J. 'The Victorian Charter: A Slow Start or Fundamentally Flawed' in Groves, M., Boughey, J. & Meagher, D. Eds (2019) *The Legal Protection of Rights in Australia* Oxford: Hart Publishing

Campbell, T 'Parliamentary Review with a Democratic Charter of Rights' in Campbell et al Eds (2011) *The Legal Protection of Human Rights: Sceptical Essays* Oxford: Oxford University Press

Hiebert, J.L. ‘Legislative Rights Review: Addressing the Gap between Ideals and Constraints’ in Hunt et al (Eds) (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit* London: Hart Publishing,

Hiebert, J.L. ‘Parliamentary bills of rights: have they altered the norms for legislative decision-making?’ in Jacobsohn, G. & Schor, M. Ed (2018) *Comparative Constitutional Theory: Research Handbooks in Comparative Constitutional Law series* Cheltenham: Edward Elgar Publishing

Hiebert, J.L. ‘The Notwithstanding Clause: Why Non-use Does Necessarily Equate with Abiding by Judicial Norms’ in Oliver, P et al Eds. (2017) *The Oxford Handbook of the Canadian Constitution* New York: Oxford University Press

Himsworth, C. ‘Rights Versus Devolution’. In Campbell, T. et al (2001). *Sceptical essays on human rights.* Oxford: Oxford University Press

Himsworth, C. ‘The Hamebringing: Devolving Rights Seriously.’ in Boyle, A. et al (2002). *Human Rights and Scots Law.* Oxford: Hart Publishing

Himsworth, C. ‘Devoluted human rights’ in Gearty, C & Douzinas, C Eds (2011) *The Cambridge Companion to Human Rights Law* Cambridge: Cambridge University Press

Kavanagh, A. (2015). ‘The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog’. in Ed. Hunt, M., Hooper, H.J., and Yowell, P. (2015) *Parliaments and Human Rights: Redressing the Democratic Deficit.* London: Hart Publishing,

Laws, J. ‘Wednesdbury’ in Forsyth, C. & Hare, I. (eds) (1998) *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* Oxford: Clarendon Press

McCorkindale, C. ‘Statutory interpretation and legislative competence: section 101(2) of the Scotland Act 1998’ in Neudorf, L., Hunt, C., and Rankin, M. (Eds). (2018). *Legislating for Statutory Interpretation: Perspectives from the Common Law World.* Canada: The Carswell Company Ltd

O’Neill, A. ‘Human Rights and People and Society’. In Sutherland, E.E. and Goodall, K.E. (2011). *Law Making and the Scottish Parliament,* Edinburgh: Edinburgh University Press

Page, A. ‘One Legal System, Two Legislatures: Scottish Law-Making After Devolution.’ in McHarg, A. and Mullen, T. Eds, (2006) *Public Law in Scotland.* Avizandum Publishing: Edinburgh,

Reed, R. Q.C., ‘Devolution and the Judiciary’ in Beaston, J. et al eds. (1998). *Constitutional Reform in the United Kingdom: Practice and Principles.* Oxford: Hart Publishing

Rice, S ‘”Culture, What Culture?” Why We Don’t Know if the ACT Human Rights Act is Working.’ In Groves, M., Boughey, J., & Meagher, D. Eds. (2019) *The Legal Protection of Rights in Australia* Oxford: Hart Publishing,

Shephard, M.P. ‘The committee system of the Scottish Parliament’ in Hassan, G. (ed) *The Story of the Scottish Parliament: The First two Decades Explained.* (2019) Edinburgh: Edinburgh University Press, p97-104

Tierney, S. ‘Constitutionalising the Role of the Judge: Scotland and the New World Order.’ in Boyle, A. et al (2002). *Human Rights and Scots Law.* Oxford: Hart Publishing

Articles

Alexander, L & Schauer, F. (1997) ‘On Extrajudicial Constitutional Interpretation’ *Harv.L.Rev Vol 110*

Allo A, MacLellan, C, Nash, S, Pearson, B, Reid, L, Woodford, R, and Young, J (2012) ‘Scottish Parliament Committees’ Perspective on Human Rights’ *Glasgow, Glasgow Human Rights Network*

Amos, M. (2017). ‘The Value of the European Court of Human Rights to the United Kingdom’. *E.J.I.L 28(3)*

Arter, D (2002) ‘On Assessing Strength and Weakness in Parliamentary Committee Systems: Some Preliminary Observations on the New Scottish Parliament’, *Journal of Legislative Studies, 8(2)*

Bateup. C (2006) ‘The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue’ *71 Brook.L.Rev*

Bellamy, R. (2011). ‘Political constitutionalism and the Human Rights Act’. *9 Int’l J. Const. L. 86*

Bird, B. (2019) ‘The Judicial Notwithstanding Clause: Suspended Declarations of Invalidity’ *Manitoba Law Journal* Vol 42:1

Boyle, K. & Hughes, E. (2017) ‘Identifying routes to remedy for violations of economic, social and cultural rights’ *The International Journal of Human Rights* 22:1

Cairney, P. and Johnston, J (2014). ‘What is the Role of the Scottish Parliament’ *Scottish Parliamentary Review, 1:2 Winter,*

Campbell, K. (2017). ‘At the Intersection of Scottish Agricultural History and Constitutional Law: *Salvesen v. Riddell* and the Legislative Competence of the Scottish Parliament’, *Statute Law Review 38*

Carolan, E., (2016). ‘Dialogue isn’t working: the case for collaboration as model of legislative-judicial relations’ *Legal Studies 36(2)*

Carr, D.J. (2013) ‘Not law (but not yet effectively not law)’. *Edin. L.R. 17(3)*

Chen, B. (2021) ‘The Quiet Demise of Declarations of Inconsistency under the Victorian Charter’ *Melbourne Law Review* 44(3) (advance)

Chief Justice Helen Murrell, 1 July 2014 ‘The Judiciary and Human Rights’, speech to the conference *Ten Years of the ACT Human Rights Act: Continuing the Dialogue* 10th Anniversary of the Human Rights Act, Australian National University

Combe, M.M. (2012). ‘Case Comment: Human rights, limited competence and limited partnerships: Salvesen v Riddell’. *S.L.T. 32*

Combe, M. (2016). ‘The Land Reform (Scotland) Act 2016: another answer to the Scottish land question”. *Jur. Rev.*

Draghici, C (2014) ‘The Human Rights Act in the Shadow of the European Convention: are copyist’s errors allowed?’ *E.H.R.L.R. 2*

Elliott, M. (2002) ‘Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention’ *Legal Studies 22*

Evans, S. and Evans, C. (2006). ‘Legislative scrutiny committees and parliamentary conceptions of human rights.’ *P.L. Win*

Ewing, K.D. (2013) ‘The Resilience of the Political Constitution’ *G.L.J, 14(12)*

Fallon, R.H. (2008) ‘The Core of an Uneasy Case *for* Judicial Review’ *Harv.L.Rev Vol 121(7)*

Feldman, D. (2004). ‘The Impact of Human Rights on the UK Legislative Process’ *Statute Law Rev 22(2*

Fredman, S. (2013) ‘From dialogue to deliberation: human rights adjudication and prisoners’ rights to vote’ *P.L. Apr*

Gardbaum, S. (2013), ‘The Case for the New Commonwealth Model of Constitutionalism’. *G.L.J. 14(12)*

Geiringer, C (2017) ‘The Constitutional Role of the Courts under the NZ Bill of Rights: Three Narratives from *Attorney-General v Taylor’ 48 VUWLR*

Geiringer, C. (2019) ‘“Something new under the sun?” A NZ-centric critique of comparative constitutional law scholarship on the Anglo-Commonwealth “model” of human rights protection” *CCS Brownbag*

Griffith, J.A.G. (1979). ‘The Political Constitution’ *MLR Vol 42(1)*

Hale, B. (2012) ‘*Argentoratum Locutum:* Is Strasbourg or the Supreme Court Supreme?’ *H.R.L.R. 12:1*

Harel, A. & Kahana, T. (2010) ‘The easy core case for judicial review’ *J.Legal Analysis 2(1)*

Hickman, T., (2005) ‘Constitutional dialogue, constitutional theories and the Human Rights Act 1998’ *P.L. Sum*

Hickman, T., (2008). ‘The courts and politics after the Human Rights Act: a comment’ *P.L.*

Hiebert, J.L. (2004) ‘New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?’ *82 Tex. L. Rev. 1963*

Hiebert, J.L. (2005) ‘Interpreting a Bill of Rights: The Importance of Legislative Rights Review’ *British Journal of Political Science 35*

Hiebert, J.L. (2006) ‘Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?’ *4 Int’l.J.Cons.L 1*

Hiebert, J.L. (2012) ‘Governing under the Human Rights Act: the limitations of wishful thinking’ *P.L. Jan*

Hogg, P.W., & Bushell, A., (1997) 'The Charter Dialogue Between Courts and Legislatures (or Perhaps The Charter of Rights Isn't Such A Bad Thing After All)' *35 Osgoode Hall L.J. 75*

Joseph, P.A., (2004) 'Parliament, the Courts and the Collaborative Enterprise' *K.C.L.J. 15*

Kelly, J.B. (2011) 'A Difficult Dialogue: Statements of Compatibility and the Victorian *Charter of Human Rights and Responsibilities Act' Australian Journal of Political Science* 46:2

Kelly, J.B. & Hennigar, M.A. (2012) 'The Canadian Charter of Rights and the Minister of Justice: Weak-Form Review within a Constitutional Charter of Rights, *10 Int'l J Const L 35*

Klug, F. (2001). 'The Human Rights Act – a "third way" or "third wave" Bill of Rights', *E.H.R.L.R. 4*

Klug, F., and Wildbore, H. (2007). 'Breaking new ground: the Joint Committee on Human Rights and the Role of Parliament in human rights compliance'. *E.H.R.L.R.*

Maxwell, D.S.K. (2017). 'Case Comment: Article 1 of the First Protocol and a tenants right to compensation: McMaster v Scottish Ministers', *CSOH 46*

Maxwell. D.S.K. (2018). 'Mistaken rights to property, agricultural tenancies, and good governance: McMaster v Scottish Ministers.' *J.P.L 10*

Maxwell, D.S.K. (2019). 'Broadening the human rights discourse, realising socio-economic rights, and balancing rights to property: moving beyond the rhetoric of socio-economic rights and Scottish land reform', *P.L. Jan*

McCorkindale, C. & Hiebert, J.L. (2017) 'Vetting Bills in the Scottish Parliament for Legislative Competence' *Edin.L.R 21.3*

McCorkindale, C., McHarg, A. & Scott, P.F. (2017) 'The Courts, Devolution, and Constitutional Review' *UQLJ 36(2)*

Nicol, D., (2003). 'The Human Rights Act and the politicians' *Legal Studies*

Nicol, D (2006), 'Law and politics after the Human Rights Act', *P.L. Win,*

Norton, P., (2013). 'A Democratic Dialogue? Parliament and Human Rights in The United Kingdom' *21 Asia Pac. L. Rev. 141*

O'Neill, A. (1999). 'The Scotland Act and the government of judges'. *SLT 9*

O'Neill, A. (2009). 'Constitutional Constitutional review in Scotland – Some Recent Developments' *Paper given at Constitutional review Conference*

Poole, T. (2003). 'Back to the Future: Unearthing the Theory of Common Law Constitutionalism' *O.J.L.S. 23(3)*

Rishworth, P (2010) 'The Bill of Rights and "Rights Dialogue" in New Zealand: After 20 Years, What Counts as Success? *Paper Presented at the University of Sydney Workshop on Judicial Supremacy or Inter-Institutional Dialogue: Political Responses to Judicial Review*

Russell, M. and Benton, M. (2009). 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Approaches' *Paper for PSA Legislative Studies Specialist Group Conference, 24th June 2009, UCL,* available at www.ucl.ac.uk/constitution-unit/research/parliament/policy-impact (accessed 16/11/17)

Sales, P (2012) 'Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine' *P.L. Apr*

Shephard, M., McGarvey, N., and Cavanagh, M. (2001).). 'New Scottish Parliament, New Scottish Parliamentarians?' *Journal of Legislative Studies, 7:2*Spano, R. 'The Democratic Virtues of Human Rights Law – A Response to Lord Sumption's Reith Lectures' (20 February 2020) *The Inaugural Bonavero institute Annual Human Rights Lecture,* Available at https://echr.coe.int/Documents/Speech_20200220_Spano_Lecture_London_ENG.pdf, Accessed 27/07/21

The Rt Hon. The Lord Hope Of Craighead. (1999). 'The Human Rights Act 1998: The Task of Judges'. *Statute Law Rev 20(3)*

The Rt Hon. The Lord Hope of Craighead. (2004). 'What a Second Chamber Can Do for Legislative Scrutiny'. *Statute Law Rev 25(1)*

Tomkins, A. (2002) 'In Defense of the Political Constitution' *O.J.L.S. Spring Vol 22(1)*

Tushnet, M. (2003). 'New Forms of Judicial Review and the Persistence of Rights- and Democracy-based Worries' *38 Wake Forest Law Review*

Tushnet, M. (2003), 'Judicial Activism or Restraint in a Section 33 World' *The University of Toronto Law Journal, 53:1*

Waldron, J. (2006) ‘The Core of the Case against Judicial Review’ *The Yale Law Journal 115*

Webber, G. (2017) ‘Loyal Opposition and the Political Constitution’ *O.J.L.S. 37:2*

Williams, A. & Williams, G. (2016) ‘The British Bill of Rights debate: lessons from Australia’ *P.L Jul*

Wolffe, J. QC, (2014). ‘Economic and Social Rights in Scotland: Lessons from the past; options for the future, A Lecture on International Human Rights Day 2014’, *Edinburgh School of Law*

Young, A., (2011). ‘Is dialogue working under the Human Rights Act 1998’ *P.L. Oct*

Legislation

UK

Parliament Act 1911

Parliament Act 1949

Human Rights Act 1998

Northern Ireland Act 1998

Scotland Act 1998

Human Rights Act 2001 (Isle of Man)

Human Rights (Jersey) Law 2000

Human Rights (Bailiwick of Guernsey) Law 2000

Scotland Act 2012

Communications Act 2003

House of Lords Reform Act 2014

Scotland

Mental Health (Public Safety and Appeals) (Scotland) Act 1999

Convention Rights Compliance (Scotland) Act 2001

Protection of Wild Animals (Scotland) Act 2002

Sexual Offenses (Procedure and Evidence) (Scotland) Act 2002

Agricultural Holdings (Scotland) Act 2003

Criminal Justice (Scotland) Act 2003

Antisocial Behaviour etc. (Scotland) Act 2004

Vulnerable Witnesses (Scotland) Act 2004

Adoption and Children (Scotland) Act 2007

Criminal Proceedings etc. (Reform) (Scotland) Act 2007

Damages (Asbestos-related Conditions) (Scotland) Act 2009

Protection of Vulnerable Groups (Scotland) Act 2009

Sexual Offenses (Scotland) Act 2009

Criminal Justice and Licensing (Scotland) Act 2010

Tobacco and Medial Services (Scotland) Act 2010

Children's Hearings (Scotland) Act 2011

Alcohol (Minimum Pricing) (Scotland) Act 2012

Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012

Children and Young People (Scotland) Act 2014

Scottish Independence Referendum (Franchise) Act 2014

Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014

Land Reform (Scotland) Act 2016

Community Empowerment (Scotland) Act 2016

Social Security (Scotland) Act 2018

International Legislation

Canadian Bill of Rights (SC 1960, c.44)

Canadian Charter of Rights and Freedoms, Constitution Act 1982

Department of Justice Act (CA), R.S.C., 1985, c.J-2

New Zealand Bill of Rights Act 1990

The Constitution of the Republic of South Africa 1996

Australian Capital Territory Human Rights Act 2004

Charter of Human Rights and Responsibilities Act 2006 (Victoria)

Human Rights Act 2019 (Act no.5 of 2019) (Queensland)

New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (Bill no 230-1)

International Treaties

European Convention of Human Rights 1951

Declarations recognising the competence of the European Commission of Human Rights to receive individual petitions and recognising the compulsory jurisdiction of the European Court of Human Rights 1966

International Convenant on Economic, Social and Cultural Rights 1966

Bills and Associated Documents

Civil Appeals (Scotland) Bill 2006,

Provision of Rail Passengers (Scotland) Bill 2006

Criminal Sentencing (Equity Fines) (Scotland) Bill 2008,

Footway Parking and Double Parking (Scotland) Bill 2015

UK Withdrawal from the European Union (Continuity) Bill 2016

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill 2021

SP Bill 27 Children and Young People (Scotland) Bill [Policy Memorandum] Session 4 (2013)

SP Bill 27 Children and Young People (Scotland) Bill [Statements on Legislative Competence] Session 4 (2013)

Scottish Government (2013) *The Scottish Government Response to 'A Scotland for Children: A Consultation on a Children and Young People Bill',* The Scottish Government, Edinburgh,

available at https://www.gov.scot/publications/scottish-government-response-scotland-children-consultation-children-young-people-bill/pages/3/, Accessed (07/08/2020)

Sam Webster (12 Feb 2014) 'Children and Young People (Scotland) Bill Referral to the UK Supreme Court: Letter to the Rt Hon Frank Mulholland QC – The Lord Advocate' *Christian Institute:* Available at https://www.christian.org.uk/wp-content/uploads/named-person-frank-mulholland.pdf (Accessed 21/08/20)

Legal Secretariat to the Lord Advocate (20 March 2014) 'Children and Young People (Scotland) Bill: Response to Christian Institute' *Scottish Government:* Available at https://www.christian.org.uk/news/scot-gov-legal-advisor-prevented-lengthy-named-person-battle/ (Accessed 21/08/20)

SP Bill 17 Children and Young People (Information-sharing) (Scotland) Bill [Statements on Legislative Competence] Session 5 (2017)

Official Reports

ACT

ACT Bill of Rights Consultative Committee (2003) *Towards an ACT Human Rights Act*

ACT Human Rights Research Project (2009) *The Human Rights Act 2004 (ACT): The First Five Years of Operation* Report to the ACT Department of Justice and Community Safety

ACT Human Rights and Discrimination Commissioner (2014) *Look who's talking: A snapshot of ten years of dialogue under the Human Rights Act 2004*

Simon Corbell MLA *Declaration by the ACT Supreme Court that section 9C of the Bail Act 1992 is not consistent with section 18(5) of the Human Rights Act 2004: Government Response* Tabled in the ACT Legislative Assembly on 28 June 2011

Simon Corbell MLA *Declaration by the ACT Supreme Court that section 9C of the Bail Act 1992 is not consistent with section 18(5) of the Human Rights Act 2004: Final Government Response* Tabled in the ACT Legislative Assembly in May 2012

Scotland

Scottish Constitutional Convention, (1995). 'Scotland's Parliament, Scotland's Right'

Scottish Executive (2001) *For Scotland's Children,* Scottish Executive, Available at https://www2.gov.scot/Resource/Doc/1141/0105220.pdf (Accessed 21/05/2020), p90

Scottish Executive (2002) "*It's everyone's job to make sure I'm alright": Report of the Child Protection Audit and Review*, Scottish Executive, Available at https://www2.gov.scot/Resource/Doc/47007/0023992.pdf (Accessed 21/05/2020),

Scottish Government (2009) *Changing Professional Practice and Culture to Get it Right for Every Child*, The Scottish Government, Edinburgh, Available at https://www.webarchive.org.uk/wayback/archive/20180530075035/http://www.gov.scot/Publications/2009/11/20094407/12 Accessed (21/05/2020),

The Land of Scotland and the Common Good: Report of the Land Reform Review Group' (2014) *Scottish Government*

Scottish Government, *Ministerial Code* (2016)

Nicola Sturgeon MSP Speech at the University Strathclyde Conference on Human Rights Innovation, 14 November 2018 available at https://www.gov.scot/news/human-rights-sacred/ (accessed 28/09/21)

Shields, K. (2018). 'Human Rights and the Work of the Scottish Land Commission', *Scottish Land Commission*

Welsh, I (2019) 'Getting It Right For Every Child Practice Development Panel: Final Report' *The Scottish Government*

GIRFEC Practice Development Panel Report: Scottish Government Response (September 2019) The Scottish Government,

Miller, A. et al First Minister's Advisory Group on Human Rights Leadership (FMAGHRL), *Recommendations for a new human rights framework to improve people's lives* Report to the First Minister (December 2018) Available at https://humanrightsleadership.scot/ (Accessed 28/09/2021)

Nicola Sturgeon MSP 'Enhancing human rights – Announcement from the First Minister' *Scottish Government* (December 2020) Available at https://humanrightsleadership.scot/ (Accessed 28/09/21)

Scottish Affairs Committee Briefing Paper, (2013), 'Towards a comprehensive land reform agenda for Scotland' (2013), *Edinburgh: The Stationary Office*

Education and Culture Committee, 'Stage 1 Report on the Children and Young People (Scotland) Bill' *11th Report 2013 SP Paper 421*

Delegated Powers and Law Reform Committee, 50th Report 2013, 'Children and Yong People (Scotland) Bill' *50th Report 2013 SP Paper 398*

Rural Affairs, Climate Change and Environment Committee 'Report on the proposed draft Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014' *1st Report 2014 SP Paper 473*

Delegated Powers and Law Reform Committee 'Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014' *9th Report 2014 SPP 462*

Scottish Parliament Equalities and Human Rights Committee 'Getting Rights Right: Human Rights and the Scottish Parliament' *6th Report, 2018 (Session 5), SP Paper 4*

UK

UK Government White Paper, (1996) *Rights Brought Home: The Human Rights Bill*, Cm.3782

Scotland Office. (1997). *Scotland's Parliament,* White Paper Cm 3658

Home Office (2000), *Human Rights Act Guidance for Departments* 2nd Edition

Ministry of Justice (2020) *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2019-2020*

JCHR, First Report, *Session 2000-2001*

JCHR 'The Case for a Human Rights Commission', *Sixth Report of Session 2002-2003*

JCHR *A Bill of Rights for the UK?* Twenty-ninth Report of Session 2007-08

JCHR. 'Human Rights Judgments', *Seventh Report of Session 2014-15,*

JCHR The Government's Independent Review of the Human Rights *Act Third Report of Session 2021-22*

Victoria

Victorian Human Rights Consultation Committee (2005) *Rights, Responsibilities and Respect*

Cases

ACT

In the Matter of an Application for Bail by Isa Islam [2010] ACTSC 147

Australia

Momcilovic v. The Queen (2011) 245 CLR 1

Canada

Reference re Public Service Employee Relations Act (Alta) ("Alberta Reference") [1987] 1 SCR 313,

Re Manitoba Language Rights [1985] 1 SCR 721, 19 DLR (4^{th}) 1

R v Seaboyer [1991] 2 S.C.R. 557;

R v. Pearson [1992] 3 S.C.R. 665;

R v Morales [1992] 3 S.C.R. 771

R v Barlow (1995) 2 HRNZ 635

Vriend v Alberta [1998] 1 SCR 493

R v Mills [1999] 3 S.C.R. 668;

R v. Hall [2002] 3 S.C.R. 309

New Zealand

Hansen [2007] 3 NZLR 1

Hamed v R [2011] NZSC 101

Attorney-General v Taylor [2017] NZCA 215

Taylor v. Attorney-General [2018] NZSC 104

UK

Whaley v. Lord Watson of Invergowrie 2000 S.C. 340

Brown v Stott 2000 SCCR 314

R v. A (No2) [2001] UKHL 25

Anderson v Scottish Ministers, [2001] UKPC D5

Adams v Scottish Ministers, 2004 S.C. 665, para 27

R. (on the application of Ullah) v Special Adjudicator [2004] UKHL; [2004] 2 AC 323

Ghaidan v Godin-Mendoza [2004] 2 AC 557

DS v HM Advocate 2007 SC UKPC 36

Cadder v HMA [2010] UKSC 43

Fraser v HMA [2011] UKSC 24

AMI v Dunn [2012] HCJAC 108

Imperial Tobacco Ltd v Lord Advocate, [2012] CSIH 9

Cameron v Cottam (no 2) 2013 JC 12;

S v L 2013 SC (UKSC) 20

Salvesen v Riddell [2013] UKSC 22;

Sinclair Collis Ltd v Lord Advocate [2013] CSIH 80

Sinclair Collis v. Lord Advocate, 2013 SC 221

Bank Mellat [2013] UKSC 29

R (Nicklinson) v Ministry of Justice [2014] UKSC 38

Recovery of Medical Costs for Asbestos Diseases (Wales) Bill – Reference by the Counsel General for Wales [2015] UKSC 3, [2015] AC 1016

Moohan v Lord Advocate [2014] UKSC 67

R(T) v Chief Constable, Greater Manchester Police [2014] UKSC 35

Christian Institute v Lord Advocate [2015] CSOH 7

Christian Institute v Lord Advocate 2016 S.C. 47,

Christian Institute v Lord Advocate [2016] UKSC 51

R.(Roberts) v. Commissioner of Police of the Metropolis, [2016] *1 W.L.R. 210*

P v Scottish Ministers 2017 SLT 27;

AB v HMA [2017] UKSC 25;

McMaster v Scottish Ministers [2017] CSOH 46

McMaster v Scottish Ministers [2018] CSIH 40

The UK Withdrawal from the European Union (Legal Continuity) Bill – A Reference by the Attorney General and Advocate General for Scotland [2018] UKSC 64;

Burns v Lord Advocate [2019] CSOH 23

XY, Appellant [2019] CSIH 19

Queen v. Lord Advocate [2020] CSIH 15

Reference by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (UNCRC) (Incorporation) (Scotland) Bill Case ID 2021/0079;

Reference by the Attorney General and the Advocate General for Scotland – European Charter for Local Self-Government (Incorporation) (Scotland) Bill Case ID 2021/0080

Victoria

Momcilovic v the Queen [2010] VSCA 50

ECtHR

Hirst v. UK (No. 2) App No. 74025/01, (2005)

Animal Defenders International v UK App no 48876/08, judgment of 22 April 2013

Online Commentary

Adam, E. 'Prisoners' Voting Rights: *Case Closed?*' (30 January 2019) *UK Constitutional Law Blog* Available at https://ukconstitutionallaw.org/2019/01/30/elizabeth-adams-prisoners-voting-rights-case-closed/ (Accessed 21/04/21)

Costello, S. (19 November 2010) 'Is a Presumption Against Bail Consistent with Human Rights? ACT Supreme Court Rules on Human Rights and the Interpretation of Legislation' *Human Rights Law Centre* Available at https://www.hrlc.org.au/human-rights-case-summaries/in-the-matter-of-an-application-for-bail-by-isa-islam-2010-actsc-147-19-november-2010 (Accessed 11/08/21)

Ekins, R. & Gee, G. (18 September2018) *Submission to the Joint Committee on Human Rights: 20 Years of the Human Rights Act* Available at https://policyexchange.org.uk/wp-content/uploads/2018/10/JPP-submission-to-the-JCHR-inquiry-18-September-2018.pdf (Accessed 10/08/21)

Elliot, M. (25 April 2013) 'The Legal Status of Unlawful Legislation: Salvesen v Ridell [2013] UKSC 22' *Public Law for Everyone Blog* Available at https://publiclawforeveryone.com/2013/04/25/the-legal-status-of-unlawful-legislation-salvesen-v-riddell-2013-uksc-22/ (Accessed 03/09/21)

Elliot, M. (5 December 2013). 'The three dimensions of the relationship between UK law and the ECHR' *Public Law for Everyone Blog,* Available at https://publiclawforeveryone.com/2013/12/05/the-three-dimensions-of-the-relationship-between-uk-law-and-the-echr/ (Accessed 29/10/18)

Fox, A (1 May 2003), 'How the Leopard Changed it's Spots', *Journal of the Law Society of Scotland 48(5),* Available at http://www.journalonline.co.uk/Magazine/48-5/1000027.aspx#.XSMugOhKjIU, (Accessed 08/07/19)

Geiringer, C & Geddis, A. (August 2020) *Submission to Privileges Committee on New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill* Available at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_96241/tab/submissionsandadvice (Accessed 09/08/21)

Knight, D (11 August 2020) *Submission to Privileges Committee on the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill* Available at https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_96241/tab/submissionsandadvice (Accessed 09/08/21)

McCorkindale, C. (29 April 2016) 'The New Powers of the Judiciary in Scotland – Part 1' *The Judicial Power Project* Available at http://judicialpowerproject.org.uk/the-new-powers-of-the-judiciary-in-scotland/ (Accessed 20/08/21)

McHarg, A. (26 June 2012). 'The Dog That Finally Barked: Constitutional Review under the Scotland Act' *UKCLA.* Available at https://ukconstitutionallaw.org/2012/06/26/aileen-mcharg-dog-that-finally-barked-constitutional-review-under-the-scotland-act/ (Accessed 06/09/18)

McHarg, A. ‘Salvesen v. Riddell’ (08 Nov 2013), Presentation at The Scottish Feminist Judgments Project: An Insight, hosted by the Scottish Public Law Group, Available at https://splg.co.uk/the-scottish-feminist-judgments-project-an-insight/ (Accessed 09/07/19)

Mead, D., (15 Sept 2012). ‘Talking about dialogue’ *UK Const.L. Blog*, available at https://ukconstitutionallaw.org/2012/09/15/david-mead-talking-about-dialogue/, (Accessed 18/05/18)

Mitchell. J. (07 Jun 2018), ‘How the SNP’s post-referendum membership has changed the party – and what has stayed the same’, *Democratic Audit UK* Available at http://www.democraticaudit.com/2018/06/07/how-the-snps-post-referendum-membership-has-changed-the-party-and-what-has-stayed-the-same/ (Accessed 09/07/19)

Mitchell, J. (27 Feb 2021) ‘Comment: We need institutional reform to live up to the original ideals of the Scottish parliament’ *Holyrood Magazine* Available at https://www.holyrood.com/comment/view,comment-we-need-institutional-reform-to-live-up-to-the-original-ideals-of-the-scottish-parliament (Accessed 19/08/21)

Powell, F. & Needleman, S. (24 Mar 2021) ‘How Radical an instrument is Section 3 of the Human Rights Act 1998?’ *UKCLA Blog* Available at https://ukconstitutionallaw.org/2021/03/24/florence-powell-and-stephanie-needleman-how-radical-an-instrument-is-section-3-of-the-human-rights-act-1998/ (Accessed 10/08/21)

Scottish Tenant Farmers Association (27 November 2013); ‘Salvesen v Riddell Legal Fix Must Not Create More Casualties’ STFA News Release available at http://www.tfascotland.org.uk/author/tfadmin/page/13/ (Accessed 08/07/19)

Scott, D. (20 July 2016) ‘Scottish Government’s Named Persons scheme incompatible with Article 8’ *UK Human Rights Blog*, available at https://ukhumanrightsblog.com/2016/07/29/scottish-governments-named-persons-scheme-incompatible-with-article-8/#:~:text=Scottish%20Government's%20Named%20Persons%20scheme%20incompatible%20with%20Article%208,-29%20July%202016&text=The%20Supreme%20Court%20has%20today,see%20our%20previous%20coverage%20here) (Accessed 20/08/20)

Sigalet, G. & Woodfinden, B. (15 June 2021) ‘Opinion: Doug Ford’s use of notwithstanding clause stands up for democracy’ *National Post* Available at

https://nationalpost.com/opinion/opinion-doug-fords-use-of-the-notwithstanding-clause-stands-up-for-democracy (Accessed 26/07/2021)

Tickell, A. (28 July 2016) 'Named Persons: a Phyrric Victory, a Phyrric defeat', *Lallands Peat Worrier Blog*, Available at http://lallandspeatworrier.blogspot.com/2016/07/named-persons-pyrrhic-victory-pyrrhic.html, (Accessed 10/12/20)

Tickell A. '"Hated Named persons scheme blasted as 'totalitarian''…"' (29 July 2016) *Lallands Peat Worrier Blog* Available at http://lallandspeatworrier.blogspot.com/2016/07/hated-named-persons-scheme-blasted-as.html (Accessed 15/04/2021)

Newspaper Reports

Appleton, J. 'Named persons: spies in the family home' (25 June 2014) *Spiked* Available at https://www.spiked-online.com/2014/06/25/named-persons-spies-in-the-family-home/ (Accessed 13/04/21)

Borland, B. 'SNP bill to spy on parents is criticised by families' (19 May 2013) *The Express* Available at https://www.express.co.uk/news/uk/400779/SNP-bill-to-spy-on-parents-is-criticised-by-families (Accessed 12/04/21)

Borland, B 'State spies already snoop on thousands of families' (16 February 2014) *The Sunday Express* Available at https://www.express.co.uk/news/uk/460054/State-spies-already-snoop-on-thousands-of-families (Accessed 13/04/21)

Brooks, L. 'Campaigners call for land reform as Scottish farmer faces eviction',(10 Nov 2015) *The Guardian*

Brooks, L. 'What next for land reform in Scotland?' (19 Oct 2015) *The Guardian* Available at https://www.theguardian.com/uk-news/scotland-blog/2015/oct/19/what-next-for-land-reform-in-scotland (Accessed 09/07/19)

Carrell, S. 'Alex Salmond provokes fury with attack on UK supreme court', (01 June 2011) *The Guardian* available at https://www.theguardian.com/uk/2011/jun/01/alex-salmond-scotland-supreme-court (Accessed 25/08/21)

Cochrane, A. 'There's more to the Stoddart case than just lairds versus tenants' (22 November 2015) *The Telegraph* available at

https://www.telegraph.co.uk/comment/12010173/Theres-more-to-the-Stoddart-case-than-just-laird-versus-tenant.html (Accessed 13/06/19)

Currie, B 'Record on human rights slammed' (10 May 2012) *Herald Scotland* available at http://www.heraldscotland.com/news/13057395.Record_on_human_rights_slammed/ (Accessed 22/05/18)

Davidson, J. 'Scottish Parliament at 20: the unfinished business of land reform' (28 February 2019) *Holyrood Magazine*,– available at https://www.holyrood.com/articles/inside-politics/scottish-parliament-20-unfinished-business-land-reform (Accessed 20/06/19)

Davidson, R: 'Named person' for every child could lead to another Baby P tragedy' (29 November 2015) *The Herald* Available at https://www.heraldscotland.com/news/14111244.ruth-davidson-named-person-every-child-lead-another-baby-p-tragedy/ (Accessed 16/04/21)

Dinwoodie, R. 'Farm Tragedy: Row over land reform pledge, (10 October 2012); *The Herald*

O'Leary, D. 'Land fight farmer found dead after final harvest', (05 October 2012) *The Scotsman*

Donaldson, D. 'Scotsman Letter: Guard against 'named person' notion' (06 July 2015) *The Scotsman* Available at https://www.scotsman.com/news/opinion/letters/guard-against-named-person-notion-1998225 (Accessed 15/04/21)

Garavelli, D 'Scare tactics put children's lives at risk' (12 March 2016) *The Scotsman* Available at https://www.scotsman.com/news/politics/dani-garavelli-scare-tactics-put-childrens-lives-risk-1480660 (Accessed 15/04/21)

Grant, G. 'Is there anything more chilling than the state laying claim to children before they are born?' (26 February 2015) *The Scottish Daily Mail* Available at *l* https://no2np.org/graham-grant-children-will-subject-orwellian-official-audits-happiness-well/ (Accessed 13/04/2021)

Malcom, E 'Stop meddling with parents' children' (16 February 2014) *The Scotsman* Available at https://www.scotsman.com/news/opinion/columnists/euan-mccolm-stop-meddling-parents-children-1544922 (Accessed 13/04/2021)

Massie, A. ‘Why the Named Person proposal is deplorable’ (2013) *No 2 Named Persons Blog* Available at https://no2np.org/allan-massie-named-person-proposal-deplorable/ (Accessed 12/04/21)

Massie, A. ‘State guardians for an untrustworthy society’ (02 Feb 2016) *The Times* Available at https://no2np.org/named-persons-based-dubious-philosophy-warns-scots-editor/ (Accessed 13/04/21)

McCall, A. ‘STFA calls on Government to properly compensate tenant farmers’, (06 Feb 2014)*The Herald*

McKenna, K. ‘Scottish children don’t need these government spies’ (23rd Feb 2014) *The Guardian* Available at ‘https://www.theguardian.com/commentisfree/2014/feb/23/scottish-children-government-appointed-guardians (Accessed 12/04/21)

Meikle B. ‘Controversial ‘Named Person’ laws ‘to be scrapped by Scottish Government’ as John Swinney set to announce repeal today’ (19 Sept 2019) *The Sun* Available at https://www.thescottishsun.co.uk/news/4737510/named-person-scottish-government-john-swinney/ (Accessed 12/04/21)

Murray, P. ‘Big Brother becomes a surrogate Mum or Dad’ (22 June 2014) *The Sunday Express* Available at https://no2np.org/sunday-express-big-brother-becomes-surrogate-mum-dad/ (Accessed 13/04/21)

Peterkin, T. ‘There’s trouble in the SNP ranks’ (29 January 2015) *The Scotsman* Available at https://www.scotsman.com/news/opinion/columnists/tom-peterkin-theres-trouble-snp-ranks-1999004 (Accessed 13/04/21)

Naysmith, S. ‘Named persons turning into a PR disaster for ministers’ (06 July 2015) *The Herald* Available at https://www.heraldscotland.com/opinion/13415843.named-persons-turning-pr-disaster-ministers/ (Accessed 15/04/21)

Peterkin, T. ‘Supreme Court will rule on SNP plans for named guardians’ (24 October 2015) *The Scotsman* Available at https://no2np.org/supreme-court-hear-legal-challenge-8-march/ (Accessed 13/04/21)

Riddoch, L. ‘Time to tackle ‘Scotland’s Shame’’ (08 Nov 2015) *The Scotsman*

Swerling, G and McIntosh, L. ‘Family face eviction from after ‘mistake’ by the Scottish parliament’. (2 Nov 2015) *The Times*

Swerling, G. 'Farmers in tenancy row unite to sue government' (23 Jan 2016) *The Times*

Tomkins, A '*Big Sister: Inside Nicola Sturgeon's one-party state'* (17 October 2015) *The Spectator*

Waiton, S. 'Sinister law the will chill the blood of every family' (05 March 2016) *The Scottish Daily Mail* Available at https://no2np.org/dr-stuart-waiton-sinister-law-will-chill-blood-every-family/ (Accessed 13/04/21)

'Court of Session backs landlord in quit case' (16 March 2012) *The Herald*

'Court of Session ruling adds to tenant farmers fears' (30 April 2012) *The Herald*

'Farmer Commits Suicide after Losing legal battle over land', (06 October 2012) *Daily Record*

'Bitter Legacy of Salvesen v. Riddell' (29 Nov 2013) *Legal Monitor Worldwide*

'SNP Conference 2015: Delegates vote for more radical land reform plans' (16 Oct 2015) *BBC News* Available at https://www.bbc.co.uk/news/uk-scotland-scotland-politics-34555773 (Accessed 09/07/19)

'Victory! Supreme Court Strikes Down Named Person Scheme' (2016) *No 2 Named Persons Blog,* Available at https://no2np.org/victory-supreme-court-strikes-named-person-scheme/ (Accessed 12/04/21)

'Lawyers slam 'insidious' plans to give every child a named person' (2015) *STV News*

'Named person' (15 February 2015) *Scotland on Sunday* Available at https://www.scotsman.com/news/opinion/columnists/leaders-named-person-murphys-matron-call-1512629 (Accessed 13/04/21)

'Theatre group gets primary kids signing from SHANARRI song sheet' (2016) *No 2 Named Persons Campaign* Available at https://no2np.org/theatre-group-gets-primary-kids-singing-shanarri-song-sheet/ (Accessed 13/04/21)

Guardian bill set to face legal hurdles' (20 February 2014) *The Press and Journal* Available at https://www.pressandjournal.co.uk/fp/news/44671/guardian-bill-set-to-face-legal-hurdles/ (Accessed 13/04/21)

’Named person’ plan faces legal challenge – Tories’ (19 February 2014) *The Scotsman* Available at https://www.scotsman.com/news/politics/named-person-plan-faces-legal-challenge-tories-1544570 (Accessed 15/04/21)

‘Poll: 64% of Scots say named-person policy is an ‘unacceptable intrusion’’ (06 June 2016) *The Herald* Available at https://www.heraldscotland.com/news/14539070.poll-64-scots-say-named-person-policy-unacceptable-intrusion/ (Accessed 15/04/21)

‘Scottish Labour calls for named person ‘pause’’ (31 March 2016) *BBC News* Available at https://www.bbc.co.uk/news/uk-scotland-scotland-politics-35933371 (Accessed 16/04/21)