Common law declarations of unconstitutionality

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This article proposes that British courts have an inherent power to issue nonbinding, common law “declarations of unconstitutionality” when Parliament legislates against constitutional norms. Courts have already recognized higher-order principles as part of an emerging constitutional jurisprudence and will interpret statutes to be compatible with them absent Parliament’s clear, contrary intent. When this interpretive process leads to a constitutional conflict (that is, where higher-order principles and statute are irreconcilable), courts then necessarily decide that Parliament has acted unconstitutionally. The logical next step is for a court simply to make a formal declaration to that effect. Thus, the common law declaration is available not only where Parliament violates common law rights but also the conventions and fundamental statutes that regulate democratic, decision-making processes. The courts’ current interpretive approach inexorably leads to this proposed remedy; this article rests on the premise that further theoretical inquiry into the nature of the British Constitution, parliamentary sovereignty, or the foundations of judicial review is, at this point, not only unnecessary but perhaps even unhelpful, to legal practitioners.

Introduction

It is over eight years since the Human Rights Act 1998 (HRA) came into force in the United Kingdom, and its constitutional impact during that time has been substantial.¹ With this act, Parliament “incorporated” rights enshrined in the European Convention on Human Rights (ECHR), giving them effect in domestic law. Although the U.K. had long been a party to this regional human rights treaty, its provisions had never been directly enforceable in British courts prior to the HRA because of the country’s

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¹ The Human Rights Act came into full force throughout the United Kingdom in October 2000.
dualist approach to international law.\(^2\) With the HRA, however, Parliament gave the courts new powers to interpret British law consistently with the convention, to quash the actions of public authorities that violate its rights guarantees, and even to declare acts of Parliament “incompatible” with convention rights.\(^3\) In light of the fact that the U.K. has no formal written constitution or legally entrenched bill of rights of any kind, and that Parliament remains sovereign and legislatively supreme, the HRA represents a remarkable constitutional development.

Of course, despite its constitutional significance, the HRA remains—strictly qua law—nothing more than an act of Parliament subject to repeal by simple legislative majority. Moreover, the judicial power under section 4 of the HRA to issue a “declaration of incompatibility” against an act of Parliament does not impugn the legal validity of the offending statute. Incompatible legislation remains in force unless and until such a declaration can embarrass Parliament and the government of the day into amending the law, thus bringing it into compliance with the U.K.’s human rights obligations under the convention. Accordingly, the fundamental constitutional rule of parliamentary sovereignty remains unaltered by the act. Nonetheless, according to the interpretive mandate under section 3 of the act, courts can usually construe legislation consistently with the convention and quash incompatible regulations and decisions made by the executive, local government, and administrative tribunals, for instance. In most cases, therefore, the act has enabled British litigants to enforce their convention rights directly before U.K. courts, without long and costly recourse to the European Court of Human Rights (ECtHR) in Strasbourg, as was previously the case. Required by section 2 of the act to have regard for the jurisprudence of the ECtHR, judges have increasingly infused British public law and even, in some cases, the private rules of common law with convention concepts such as proportionality, legitimate expectations, and a right to privacy.\(^4\)

Finally, the HRA is part of a larger program of progressive constitutional reform over the past decade that has seen changes in the hereditary House of Lords, devolution of power to Scotland, Wales, and Northern Ireland, and even plans for a new Supreme Court to replace the House of Lords Appellate Committee (although this latter piece of legislation has not yet come into force).\(^5\) During its short time in operation and within this broader context of

\(^2\) In the U.K., although the Crown has the prerogative power to ratify treaties creating international obligations for the Government, neither those treaties nor customary international law are directly enforceable in British courts as domestic law unless and until Parliament “incorporates” them through statute. See Anthony W. Bradley & Keith D. Ewing, Constitutional and Administrative Law 331 (Pearson Longman, 14th ed. 2007).


change, the act arguably has promoted a new “human rights culture” in British law.

But the honeymoon, as they say, is over. With the ongoing, so-called war against terrorism, the Human Rights Act faces its greatest, long-term test as a serious bulwark of individual rights. In this respect so far, the HRA (and, one might also say, the judiciary) has been resilient vis-à-vis the government’s battery of tough antiterrorism measures, showing real teeth. In the case of *A and Others (No. 1)*, perhaps most notably, the House of Lords Appellate Committee quashed the government’s emergency derogation order under article 15 of the ECHR, intended to exempt the U.K. from its regular obligations under the convention. Consequently, the Law Lords declared that the indefinite detention of suspected alien terrorists under the Anti-terrorism, Crime and Security Act 2001 was incompatible with articles 5 and 14 of the convention, which together guarantee the right to liberty and security of the person without discrimination on grounds such as national origin. The House of Lords has also shown that “control orders” imposed by the executive against suspected terrorists can be incompatible with the convention when they place extreme, arguably punitive restrictions on an individual’s freedom of movement, privacy, and personal associations without adequate due process of law. Decisions such as these have provoked harsh reactions against both the judiciary and the HRA from members of the Labour Government (which, ironically, brought in the act under Prime Minister Tony Blair), as well as the Conservative opposition. Some prominent politicians have gone so far as to suggest that the HRA needs to be revised in the face of the terror threat or scrapped altogether in favor of a wholly British bill of rights. All the while, political rhetoric about public security concerns—whether in regard to terrorism, crime, or antisocial behavior—continues unabated, raising questions about the future role of the Human Rights Act.

What all this means is that one must not take for granted the continuation of the HRA nor naively assume that Parliament will never exercise its powers in a heavy-handed manner at the behest of a security-prioritizing government, even if one with good intentions. While the sky is not falling, it is not inconceivable

6 *See* Terrorism Act, 2000, c. 11; Anti-terrorism, Crime, and Security Act, 2001, c. 24; Prevention of Terrorism Act, 2005, c. 2; Terrorism Act, 2006, c. 11; Counter-terrorism Act, 2008, c. 28.


8 *See* Sec’y of State for the Home Dep’t v. JJ and Others [2007] UKHL 45 and Sec’y of State for the Home Dep’t v. MB [2007] UKHL 46.

that, one day, courts might find themselves adjudicating rights claims after Parliament has effectively “dis-incorporated” the convention in some way. However, exclusive focus on the HRA and particular individual rights overlooks other important, systemic political mechanisms in the United Kingdom for protecting rights more generally. Responsible government, separation of powers, and regional pluralism all ensure that the Crown and Parliament exercise their power as part of a modern, liberal democratic state. Government decision making within this larger constitutional context not only gains strength and legitimacy from individual rights but affords them some protection through Britain’s unique political institutions. With or without the HRA, nevertheless, a government might occasionally seek to bypass the usual decision-making channels for the sake of perceived urgency, national security, or political expediency.

This article proposes a judicial remedy to protect rights in anticipation of any unfortunate though possible rollback of the HRA in the future, a remedy that would operate at the systemic level, where political decision making takes place. It suggests that courts have an inherent, discretionary power to declare when Parliament exercises its sovereign power in an “unconstitutional” way; that is, when Parliament legislates against legal norms or fundamental baselines for political behavior deemed by courts of special significance within Britain’s unwritten constitution. This common law “declaration of unconstitutionality”—though legally unenforceable in light of parliamentary sovereignty—is a natural extension of the judicial process of interpreting, hierarchically ordering, and reconciling various legal sources. As part of this interpretive process, courts recognize that some common law rights, conventions, or fundamental statutes have a higher, constitutional status over other “ordinary” laws. The constitutional principles judicially derived from these privileged legal sources are part of a substantive rule-of-law framework that influences statutory interpretation and resists legislative departures except by Parliament’s clear intent. Thus, the courts have already developed a nascent constitutional jurisprudence, existing independently of the HRA, which protects individual liberty on multiple levels. Parliament could be said, therefore, to act “unconstitutionally” by infringing common law rights directly or by threatening them indirectly through interference with the norms of democratic decision making found in conventions and fundamental statutes. A nonbinding declaration of unconstitutionality would only formally announce that the courts have been unable to reconcile a statute with these judicially recognized, higher-order principles, because Parliament may have clearly legislated incompatibly with them. The declaration would make clear the legal costs of government actions and ensure open political accountability.

It should be made clear that this article focuses on a declaration of unconstitutionality as a new and practical constitutional remedy. The supporting argument is intended to be straightforward and simple, and it builds on much ground already well covered. This work does not explore any old theories or
propound any novel ones about a common law constitution and the nature of parliamentary sovereignty. More able scholars have done that already. Moreover, as a nonbinding remedy, this declaration does not undermine or challenge parliamentary sovereignty. Rather, as put forward in this paper, the declaration openly recognizes Parliament’s exercise of sovereign power within (or, one might say, against) an accepted constitutional context. In light of the established constitutional jurisprudence, sophisticated theoretical justifications for the proposed declaration of unconstitutionality are now unnecessary for the judge or practitioner who has concluded that a supreme Parliament may not have lived up to its constitutional obligations, and that a reviewing court should just get on with it and say so. Sufficient justification for this remedy becomes clear with a basic review of Britain’s new constitutional jurisprudence and the judicial interpretive process that goes with it. Theory has done its job this far: only a bold judge need take the final and logical step to declare when Parliament transgresses accepted constitutional boundaries to the exercise of its power.

1. Common law rights

It is now established by British case law that some common law rights have a special constitutional status vis-à-vis conflicting statutes, with the result that Parliament can limit such rights only by expressly legislating against them. Cases show that, in finding a statute plainly irreconcilable with judicially recognized common law rights, a court necessarily must decide that Parliament


11 See generally SCEPTICAL ESSAYS ON HUMAN RIGHTS, pt. I (Tom Campbell, Keith D. Ewing & Adam Tomkins eds., Oxford Univ. Press 2001) (expressing reservations about the democratic propriety of reliance upon judicial, as opposed to political, protections for human rights or other social values). See also Elliott, supra note 10, at 6–9, 19–21 (suggesting even that judges on the whole have failed in articulating a positive, coherent theoretical basis for the expansion of judicial review generally).
has legislated contrary to its constitutional obligations. In the event of such conflict, of course, the express will of Parliament must prevail. Nevertheless, the doctrine of parliamentary sovereignty simply cannot conceal the court’s underlying conclusion of unconstitutionality. Indeed, judicial application of the doctrine in the face of common law rights forces such a conclusion into the open.\textsuperscript{12} As part of the interpretive process, then, courts must differentiate higher-order principles from “ordinary” law and attempt to reconcile these principles with parliamentary sovereignty; where they cannot a constitutional conflict occurs. There is, therefore, a nascent constitutional jurisprudence already in the United Kingdom, which allows—even demands—that courts give effect to Parliament’s legislative power within the context of a substantive rule of law and to make clear failed attempts to do so.\textsuperscript{13}

\textit{Ex parte Leech}\textsuperscript{14} was one of the first major indicators of this emerging constitutional jurisprudence. In that case, (then) Lord Justice Steyn reaffirmed the long-standing judicial “presumption against statutory interference with vested common law rights.”\textsuperscript{15} Some rights, he then extrapolated, had special constitutional significance. One such right was unimpeded access to the courts, which required a prisoner’s access to legal consultation with a solicitor. Thus, legal access, “[e]ven in our unwritten constitution … must rank as a constitutional right.”\textsuperscript{16} Lord Justice Steyn explained that a court should find statutory interference with such a basic right only where Parliament has used express language, while a necessary implication for interference should be a rarity.\textsuperscript{17}

\textsuperscript{12} The interpretive process supporting a common law declaration of incompatibility is, therefore, essentially the same as that behind a section 4 declaration of incompatibility under the HRA; Mark Elliott is critical of judicially fashioned, common law–based review of statutory powers, on the grounds that it would establish autonomous rules for the judicial review of government actions having the same “analytical implications” [emphasis added] as review under the HRA. In his view, this would make common law review incompatible with parliamentary sovereignty. Elliott’s assessment of the similar interpretive processes under the HRA and common law review is right, although his conclusion that common law review would undermine parliamentary sovereignty is misplaced in light of the facts that (a) courts have long given preference to autonomous common law rules in interpreting and applying statutes, and (b) in any case, express statutory provisions must nevertheless prevail in the event of any conflict. See Elliott, supra note 10, at 235–237. See also Christopher Forsyth & Mark Elliott, The Legitimacy of Judicial Review, 2003 Pub. L. 286, 290–294.

\textsuperscript{13} Lord Lester has, among others, alluded to a new constitutional jurisprudence in clear terms: “It may be subversive in the eyes of government to suggest that British guiding constitutional principles ‘are raised above the reach of statute and State’, but in reality our adherence to European and international human rights law has had that effect; and a new body of jurisprudence is arising to reflect the changing constitution.” Lord Lester, Developing Constitutional Principles of Public Law, 2001 Pub. L. 684, 694 (quoting Oliver Wendell Holmes, Jr.).


\textsuperscript{15} Id. at 209.

\textsuperscript{16} Id. at 210.

\textsuperscript{17} Id. at 210, 212.
Subsequent cases elaborated on *Leech*, both in developing the interpretive approach and cataloguing constitutional rights. In *Ex parte Witham*, for example, (then) Justice Laws addressed this same right of access to the courts. Unequivocally endorsing a special constitutional status for some rights, he explained the implications that such status had for statutory interpretation and for the ways in which Parliament must exercise its legislative power:

In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by a special provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers that power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequences of the democratic political process but would be logically prior to it. 19

According to Justice Laws, certain constitutional rights are intrinsic to the common law, even without reference to the European Convention.20 As such, they define Parliament’s constitutional obligations in legislating, although they do not legally limit its sovereign power. Moreover, Parliament can only infringe such rights by express language. 21

For these reasons, constitutional rights would continue to influence statutory interpretation even if Parliament chose to “dis-incorporate” the convention. In many cases, the common law would afford similar protections.22 The House of Lords has recognized that the common law encompasses, for example, the guarantee against retrospective increase of a criminal sentence (*Ex parte Pierson*)23 and freedom of expression (*Ex parte Simms*).24 This emerging constitutional jurisprudence thus protects individual rights apart from the

20 *Witham*, supra note 18, at 585.
22 *See, e.g.*, A & Others v. Sec’y of State for the Home Dep’t (No. 2), [2006] 1 All E.R. 575 (H.L.) (where the House of Lords unanimously made clear that the common law absolutely prohibits the use of torture evidence in legal proceedings, just as does art. 3 of the convention).
convention. The independent existence of common law constitutional rights might also mean, for present purposes, that they could conceivably offer protection in some circumstances where the incorporated convention does not—where convention rights end, the common law might yet occupy ground.\footnote{See Greene v. Assoc’bd Newspapers Ltd., [2005] Q.B. 972 (C.A.) (where the court found that privacy rights under art. 8 of the convention could not outweigh the freedom of the press in order to support a prepublication injunction against an alleged libel).} Such overlapping fields of protection, as in those convention states with written guarantees of constitutional rights, might then expand rights protections beyond what either the common law or the convention alone offers.

In Ex parte Lightfoot,\footnote{R. v. Lord Chancellor, ex parte Lightfoot, [1998] 4 All E.R. 764 (Q.B.).} Justice Laws elaborated on the close relationship between these constitutional rights and the apparently conflicting doctrine of parliamentary sovereignty. Looking past the precise scope or definition of discrete rights for the moment, he justified the more general notion of higher-order principles by rooting them deeply within the very democratic system that legitimizes legislative power and responsible government:

> Whether express words are necessary or not, the abrogation of constitutional rights must require specific provision by Parliament to that effect, since that is the only means by which the common law can accord such rights a special status; otherwise they are writ in water. The importance of the point for present purposes is that it provides a very powerful reason why the law should be astute to confine the concept of constitutional right to that special class of rights which, in truth, everyone living in a democracy under the rule of law ought to enjoy. Access to justice is one. Freedom of the person, of speech, thought, and religion are others. They are largely articulated in the principal provisions of the European Convention on Human Rights … which is to be enacted into our law… [This interpretive approach] is fully in harmony with the proper powers of the democratic arm of the state where what is at stake is the denial of rights which no democrat could deny save on pain of self-contradiction.\footnote{Id. at 773–774.}

As Justice Laws characterized them, constitutional rights are embedded within a substantive conception of the rule of law that is intimately bound up with democracy and the legitimate exercise of government power.\footnote{For a recent extracurial statement of this view, see Lord Bingham, The Rule of Law, 66 CAMBRIDGE L.J. 67, 75–77, 78–79 (2007). See also ALLAN, CONSTITUTIONAL JUSTICE, supra note 10, at 288, 312–313; Jeffrey Jowell, Beyond the Rule of Law: Towards Constitutional Judicial Review, 2000 PUB. L. 671, 675.} Not only do they overlap with the convention but they represent fundamental values that Parliament cannot legislate against without risking damage to democratic order and so, in turn, undermining the democratic claim to the legitimacy of its own sovereign power.\footnote{See R. v. Sec’y of State for the Home Dep’t, Ex parte Pierson, [1998] A.C. 539 at 587 (per Lord Steyn).}
This view of the connection between common law rights and the rule of law in Britain resembles the doctrine of “implied rights” in Australian constitutional law. In Australia, courts have explored the notion that fundamental rights arise from an autonomous rule of law that underlies, informs, and possibly even supplements the written Constitution, which otherwise lacks a bill of rights. While some have criticized the doctrine of implied rights, and its further development in the courts seems to have stalled, it remains an important development in the constitutional law in that country. As such, it provides British judges an example of how courts can assess the constitutionality of legislation based on unwritten, judicially articulated principles. Three seminal cases illustrate just how such principles can support the constitutional review of statutes.

The first case, Leeth v. Commonwealth, involved Commonwealth legislation that tied criminal sentencing to the laws of several Australian states. The Supreme Court of Australia upheld the legislation, finding that some disparities in sentencing, due to differences in state law, did not violate an implied right of equality before the law. Dissenting from the final judgment, Justices Deane and Toohey plainly put forward a theory of common law rights, existing behind the veneer of the written constitution. To them, the idea of equality was implicit both in the “free agreement” of the people at the time of confederation and in the nature of the judicial process. Furthermore, several provisions of the Constitution also made manifest “fundamental common law principles upon which it is structured…”

In the other two cases, Nationwide News Proprietary Ltd. v. Wills and Australian Capital Television Proprietary Ltd. v. Commonwealth (A.C.T.V.), the

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30 Nevertheless, the Australian Constitution does expressly provide for a few rights, such as the prohibition of religious discrimination (§. 116) and the guarantee of trial by jury in some cases (§. 80).

31 See Brian Galligan & F.L. Morton, Australian Exceptionalism: Rights Protection Without a Bill of Rights, in Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia 17, 23–25 (Tom Campbell, Jeffrey Goldsworthy, & Adrienne Stone eds., Ashgate 2001). See also Peter W. Hogg, Constitutional Law of Canada, Student edition s. 31.4(c) (Thomsen Carswell 2005) (proposing that some Canadian Supreme Court justices also flirted with an implied rights doctrine long before adoption of the Canadian Bill of Rights in 1960 and used it in assessing the federal distribution of legislative powers between the provincial assemblies and the federal Parliament). Although it was never accepted by a majority of the Supreme Court of Canada and has been a neglected constitutional theory since adoption of the Charter of Rights and Freedoms in 1982, the implied rights doctrine has never been definitively laid to rest by the Court. See generally Mark Walters, The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law, 51 U. Toronto L.J. 91 (2001); Jean Leclair, Canada’s Unfathomable Unwritten Constitutional Principles, 27 Queen’s L.J. 389 (2002).


33 Id. ¶¶ 9–10.

34 Id. ¶ 11.


Supreme Court found that the Australian Constitution implied a “freedom of communication,” necessary for the functioning of a parliamentary democracy. 37 In Nationwide, the Court addressed the question whether a Commonwealth law, making it an offense to criticize the Industrial Relations Committee, was reasonably and appropriately adapted to the constitutional power of Parliament to settle and prevent industrial disputes, and, if so, whether the measure taken nevertheless would be disproportionate in the adverse consequences that it caused. In making this assessment, the Court found that “it is material to ascertain whether those adverse consequences result in any infringement of fundamental values protected by the common law, such as freedom of expression.” 38 The Court decided that the law, indeed, was disproportionate in its adverse impact on this implied right. Similarly, in Australian Capital Television, the Court invalidated a law restricting political advertising. The Supreme Court found that freedom of communication was necessary in a democratic, representative government and was, therefore, an implied restriction on Parliament’s legislative powers. The Court later narrowed this doctrine of implied rights in cases such as Lange v. Australian Broadcasting Corporation, 39 tying it more closely to the constitutional text rather than to the open contours of the common law. Nevertheless, the Lange Court reaffirmed that some implied rights do exist in Australia, inherent in the democratic political system and incident to more specific textual provisions in the Australian Constitution.

The Australian implied rights doctrine shows that courts can articulate and use fundamental common law rights to assess the constitutionality of legislation. Of course, one must keep in mind that the British legal system differs from that of Australia in that there exists in the U.K. no written, supreme constitution from which judges might either extract or to which they might attach unwritten rights, as was done in Leeth, Nationwide, and Australian Capital Television. However, as this essay’s introduction suggests, questions about the theoretical source or legitimacy of unwritten rights in the U.K. (such questions still exist in Australia) 40 are now backward-looking, in light of the House of Lords’ clear and repeated endorsement of the constitutional status of some autonomous common law rights. Indeed, the House of Lords has developed its own doctrine of common law rights, existing independently of any legislative or constitutional texts, and that, potentially, goes much further than the

37 But cf. United States v. Carolene Products Corp., 304 U.S. 144, 152 n. 4 (1938) (suggesting that legislative provisions which, for example, interfered with rights related to participation in the democratic political process or targeted vulnerable minorities could demand more exacting judicial scrutiny for constitutionality).

38 Nationwide News Proprietary Ltd. v. Wills, (1992) 177 C.L.R. ¶ 19 (per Mason C.J.) [footnote omitted].


implied rights doctrine in Australia. Still, the existence of a written constitution in Australia should not obscure the antipodean lesson for British judges; namely, that judges can articulate unwritten, common law norms and assess the constitutionality of legislation against them.

Accordingly, this new constitutional jurisprudence in Britain enhances the working relationship between the courts and Parliament, already long established and implicit in the judicial review of administrative action. It is not a new idea that Parliament exercises its legislative power firmly within a rule-of-law context, guarded by the judiciary. The dynamics prevailing between the branches of government (which includes the conflicts, of course) can encourage a more reflective decision-making process on the part of the omnipotent legislature; moreover, the same dynamics may render the Parliament not only more attentive to certain values but may promote greater political accountability on the part of elected officials. Parliamentary sovereignty, nevertheless, ensures that the democratically elected legislature retains the final word over the unelected judiciary. In this light, a declaration of unconstitutionality would make clear to elected officials and the public that courts and Parliament have reached an impasse in their respective views of the legislature’s constitutional obligations. Resolution of the constitutional conflict would then be left to the democratic political process.

A declaration of unconstitutionality thus fits with the uncontroversial notion that the U.K. Parliament ought to exercise its sovereignty within a larger, rule-of-law context. Were Parliament to act in a possibly unconstitutional way, it runs two risks. First, Parliament would be legislating in a manner that threatens to loosen its sovereign power from the normative, democratically rooted moorings of its own legitimacy. Even popular or seemingly trivial


constitutional infractions should raise concerns about Parliament’s willingness to legislate contrary to the usual baselines that moderate the exercise of its legally limitless power. Second, if Parliament has expressly legislated against constitutional principles, this would suggest it has decided that these same baselines have exceptions or, perhaps of greater concern, no longer have the same normative validity.\footnote{See T. R. S. Allan, Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority, 62 Cambridge L.J. 685 (2004) (seeming to foreclose this option by strong, substantive constraints on Parliament’s legal authority, thereby essentially rejecting the orthodox doctrine of parliamentary sovereignty).} Even if these exceptional legislative measures are temporary and arguably justifiable—indeed, even maybe appropriate, as a form of constitutional “amendment”—their long-term implications can be unpredictable. By requiring Parliament to make plain its intentions to interfere with prevailing constitutional principles, courts can temper otherwise unlimited legislative power by avoiding interferences through implication alone. Furthermore, a court, in concluding that Parliament has expressly interfered with these higher-order principles, can make the costs and risks plain to elected officials and the voting public. A declaration of unconstitutionality would no more interfere with parliamentary sovereignty than would the interpretive process that has led to it. Indeed, such a declaration actually would contribute to open political debate and promote the democratic process that legitimizes the sovereignty doctrine in the first place.\footnote{See David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency 67, 212 (Cambridge Univ. Press 2006).}

Therefore, as Lord Steyn put it in Ex parte Pierson, “common law and statute coalesce in one legal system,”\footnote{See Lord Browne-Wilkinson, Ex parte Pierson, [1998] A.C. 539 at 589. See Allan, Constitutional Justice, supra note 10, at 259.} in which higher-order, constitutional rights and other principles independently coexist and interact with “ordinary” law. This means that they, together, create an expanded field of rights protection, even in the event of “dis-incorporation” of the ECHR, by way of the regular process of statutory interpretation. A declaration of unconstitutionality would, for these reasons, only announce the result of a court’s failed attempt to reconcile guiding constitutional principles with parliamentary sovereignty, ultimately leaving the conflict for political resolution.\footnote{See Dyzenhaus, supra note 44, at 189–190.}
2. Constitutional conventions

The power to issue a declaration of unconstitutionality would not be restricted necessarily to use only where Parliament directly infringes common law rights. A declaration could also be issued where Parliament threatens rights indirectly—for example, by violating other constitutional norms that regulate democratic political activity at a systemic level. In this way, a declaration would protect rights even with the HRA still in place; it would do so by promoting the decision-making channels on which all rights depend and, in turn, foster. Parliament possibly could obstruct or disrupt these channels, for example, were it to legislate against conventions or fundamental statutes having normative value. Like common law rights, they, too, contribute to a substantive rule of law that constrains and legitimizes Parliament’s otherwise unlimited legal power.

Unlike common law rights, however, conventions and fundamental statutes have a somewhat different relationship to legislation. While the common law stands apart and separate from legislation—and indeed is autonomously rooted in the judicial process—fundamental statutes are, on the surface, indistinguishable from any other “ordinary” statute passed by Parliament. Nevertheless, they have attained an iconic status, representing deeper constitutional principles, a process discussed in the next section of this paper. Conventions, on the other hand, are not even rules of law, strictly speaking. Still, their constitutional importance in the United Kingdom is immense, as they typically regulate how democratic decision making actually takes place in a political system lacking a formal, written constitution. The normative quality of conventions accordingly enshrouds them, along with fundamental statutes and common law rights, in a constitutional jurisprudence that supports judicial declarations against Parliament’s unconstitutional acts.

Many conventions indirectly protect rights in the U.K. by systemically regulating political and legal processes, ensuring that government power rests on democratic foundations. For example, the Crown will not refuse royal assent to a bill passed by Parliament, and ministers must be accountable to Parliament. Nevertheless, conventions are not legal rules, strictly speaking, and so remain unenforceable in the courts. However, as with common law rights, “unenforceable” does not mean judicially “unrecognizable” or “without legal effect.” Legal rules and conventions together form the whole of the British Constitution; a breach of convention, while not a breach of law, is still a breach of the Constitution—a crucial distinction in British public law that might seem contradictory to foreign observers accustomed to written constitutional rules synonymous with legality. 49

Despite the judicial obligation to acknowledge parliamentary sovereignty, a court’s refusal to take notice of conventions, where they come into play, would overlook much constitutional law and ignore how the Constitution, in practice, erects a democratic, substantive rule-of-law framework, which courts are themselves bound to uphold. The normative value of conventions as higher-order principles is in no way diminished by their status or judicial characterization as something other than strict legal rules. Without conventions, the Constitution loses its modern, democratic mechanisms and becomes no more than the bare frame of an old, still autocratically minded relic of the Glorious Revolution in 1688–89. That is a thin vision that courts, already committed to a new constitutional jurisprudence, cannot take without contradiction or even self-delusion.

Conventions, therefore, create democratically focused expectations for political actors, jurists, as well as all other citizens, while they also factor into the process by which courts interpret primary legislation. This role in statutory construction gives them an indirect legal effect. In perhaps the most notable U.K. case of this kind, Attorney General v. Jonathan Cape Ltd., the English High Court found that the convention of joint cabinet responsibility informed the understanding of the law of confidentiality. The court gave legal effect to the convention and related its politically systemic function back to common law doctrines of private rights and obligations. Accordingly, the court restrained the publication of a minister’s writings that would breach the confidence owed by the minister to the Queen in the conduct of governmental business. As an interpretational aid, apparent in Jonathan Cape, a convention can have legal effect (despite not being a legal rule, strictly speaking) by shaping statutory meaning much as common law rights can have just such effects.


51 Geoffrey Marshall, Constitutional Conventions: The Rule and Forms of Political Accountability 15 (Clarendon Press, reprint with additions 1986) (noting that where courts have noticed conventions, they have clarified existing law in three main ways: “1) By being a part of the material that was enacted into law. 2) By helping to elucidate the background against which legislation took place, thus providing guidance as to the intention of the legislature where the meaning of a statute had come into question. 3) By constituting a practice or set of facts that fell under an existing legal doctrine”); Allan supra note 42, at 246 (suggesting that in this way a court “… affirms the legal status of convention; and Dicey’s distinction between law and convention is thereby broken down”). See also id. at 253, 282–283. See Joseph Jaconelli, Do Constitutional Conventions Bind?, 64 CAMBRIDGE L.J. 149 (2005) (advancing a critical view of the legal importance of conventions, though he is more concerned with actual, legal enforcement than with indirect legal effects). See also Allan supra note 42, at 244 (offering a stronger supporting analysis).


53 See Allan, Constitutional Justice, supra note 10, at 185.
construction of a statute in light of a convention, therefore, involves the same interpretive process that applies to common law rights. Conventions are part and parcel of a constitutional jurisprudence through which courts will hold government to the rule of law, with or without the HRA.

Conventions are also important democratic mechanisms in parliamentary systems throughout the Commonwealth. Two cases, one before the Privy Council and the other before the Supreme Court of Canada, demonstrate how courts can take notice of conventions’ constitutional roles. In *Madzimbamuto v. Lardner-Burke*, the Privy Council considered the lawfulness of an act of the U.K. Parliament meant to have effect in Southern Rhodesia (now Zimbabwe). After the colony’s unilateral declaration of independence in 1965, Parliament passed the Southern Rhodesia Act 1965, reaffirming imperial power over the African colony and authorizing the Crown to make orders in council in any matter necessary or expedient in face of the colony’s attempts at independence. A subsequent order in council, among other points, suspended the country’s 1961 constitution, suspended the authority of the Southern Rhodesian legislature, and granted sweeping rule-making authority to a secretary of state. The Southern Rhodesian government simply ignored Parliament and the Crown; its legislature ratified a new, independence constitution, continued to enforce a state of national emergency arising from racial and civic unrest, and so authorized the government to continue detaining Daniel Madzimbamuto (who, engaged in the struggle for majority rule, had previously been arrested) on security grounds. The detainee’s wife, as applicant, argued that her husband’s detention was unlawful in light of the Southern Rhodesia Act.

One of the respondent’s arguments, on behalf of the Southern Rhodesian government, rested upon a constitutional convention by which Parliament would not legislate for Southern Rhodesia without the consent of the government on matters within the local legislative assembly’s competence. Accordingly, the act of the U.K. Parliament would be invalid. The Privy Council, per Lord Reid, tersely dismissed this submission in a short paragraph; however, he did so in a way that did not foreclose constitutional review in an appropriate case. First, Lord Reid recognized that it would be unconstitutional for Parliament to do certain things, because the “moral, political and other reasons against doing them are so strong…” Interestingly, however, the Privy Council found

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55 The respondent made two other arguments supporting the authority of the Southern Rhodesian government to detain the petitioner, which necessitated a judicial examination of the constitutional situation in the country. One argument was, even assuming that the actions of the Southern Rhodesian government were unlawful, courts must give them effect under a doctrine of necessity for preserving civil order and *de facto* control of national territory. Except for one dissent, the Privy Council rejected this argument. It also rejected an argument that Parliament had previously limited its sovereignty by granting self-government to Southern Rhodesia.

no such constitutional limitations in the case before it. The council recognized the proposed convention but then conditioned its application on Southern Rhodesian adherence to the original constitution of 1961. Southern Rhodesia’s unilateral declaration of independence consequently released the U.K. Parliament from observing the convention. Thus, Madzimbamuto turned on the absence of any higher-order, constitutional principle opposed to the statute in question.

Lord Reid offered dicta to shore up the doctrine of parliamentary sovereignty in a world where Parliament’s imperial power had waned: “Their Lordships in declaring the law are not concerned with these matters [conventions]. They are only concerned with the legal powers of Parliament.”57 Still, the Privy Council had seemed prepared to recognize a conflict between convention and statute, should a convention actually govern a case.58 In such circumstances, judicial reconciliation of the conflict would necessarily lead to the conclusion that Parliament has legislated in an unconstitutional way, the doctrine of parliamentary sovereignty notwithstanding. In Madzimbamuto, the Privy Council avoided a conflict by making the convention in question contingent on Southern Rhodesia’s observance of its original constitution.

Although there is no evidence for it in the case report, one is tempted to believe that the privy councillors might have kept in mind the core of the controversy before it. That is, the case was not just about a power struggle between the imperial Parliament and a wayward colony. The case at bar concerned a man detained by a racist regime, attempting to govern outside a democratically rooted, substantive rule of law. The Privy Council’s decision, consciously or not, seemed to reflect the democratic nature of conventions, specifically, by refusing to apply one in circumstances where it would actually subvert the rule of law. Read the other way around, Madzimbamuto suggests that a court might find a convention to limit Parliament if the convention’s operation, instead, supported the same democratic, substantive rule-of-law framework in which Parliament itself exercises its sovereign power.59

The Canadian Patriation Reference60 made this position clearer. In that case, the Supreme Court of Canada declared that an act of the Canadian Parliament

57 Id.

58 See Marshall, supra note 51, at 16. The author only briefly mentions the Madzimbamuto case but claims that the privy councillors “showed no inclination to recognize established conventional relationships or conventions as capable of creating or modifying law …” suggesting that they took no account of them. However, any dismissal of Madzimbamuto as authority for the constitutional force of conventions would be too hasty. While, of course, not prepared to recognize conventions as legally enforceable against the sovereign Parliament, the Privy Council nevertheless briefly considered the possibility of conflict between convention and statute before finding that the convention at issue no longer applied.

59 See Allan, supra note 42, at 288–289.

60 Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753.
was incompatible with a certain convention.\textsuperscript{61} The Reference concerned the attempt of the Canadian government to “patriate” the Canadian Constitution. The government intended to request the U.K. Parliament to surrender all legislative power to Canada, allow for Canadian amendment of the Constitution, and attach to it a Charter of Rights. Although the Canadian Parliament had authority to request imperial legislation from the U.K. Parliament, a constitutional convention had developed whereby the federal government would first consult with and gain approval from the provincial governments before doing so. Several provinces refused to agree to the federal government’s proposed constitutional amendments, fearing that they would decrease provincial autonomy and powers. The government pushed ahead and insisted that Parliament forward the constitutional proposals to the U.K. Parliament without provincial support. Several provinces brought suit in the courts, seeking declarations that the federal Parliament could not constitutionally request legislation from the U.K. Parliament without their agreement, as convention forbade such unilateral federal initiatives.

Following a lower court reference, the Supreme Court found that, strictly as a matter of law, Parliament could lay the proposals before the U.K. Parliament despite an unenforceable constitutional requirement to observe the convention. The Court approached the issue in two steps. First, a majority of justices\textsuperscript{62} cited Madzimbamuto for the proposition that conventions, by nature, were different from regular legal or other written constitutional rules in that the former depended on political practices, were judicially unenforceable, and might only in exceptional circumstances crystallize into a clear rule of law.\textsuperscript{63} As such, no convention could legally restrict the Canadian Parliament’s authority to forward the proposals without provincial consultation and approval.

The Court, however, went further. Six justices\textsuperscript{64} decided that the convention claimed by Manitoba, Newfoundland, and Québec did indeed exist, while three\textsuperscript{65} found it did not. However, all nine justices unanimously agreed that judges had the power to decide whether the convention existed and whether Parliament had complied with it. Thus, although the dissenters did not wish to term a breach of convention as “unconstitutional in any strict or legal sense,”\textsuperscript{66} even they went on to state that “courts may recognize the existence

\textsuperscript{61} The Canadian Supreme Court made its decision pursuant to its jurisdiction to hear appeals of statutorily authorized advisory opinions by provincial courts. See [1981] 1 S.C.R. 753 at 767–768. See also Peter W. Hogg, Constitutional Law of Canada § 8.6(b) (Thomson Carswell 2005).

\textsuperscript{62} Laskin C.J., Dickson, Beetz, Estey, McIntyre, Chouinard, and Lamer J.J.

\textsuperscript{63} [1981] 1 S.C.R. at 775–84.

\textsuperscript{64} Martland, Ritchie, Dickson, Beetz, Chouinard, and Lamer J.J.

\textsuperscript{65} Laskin C.J., Estey, and McIntyre J.J.

\textsuperscript{66} [1981] 1 S.C.R. at 852.
of conventions in their proper sphere.”67 As for the majority, it characterized conventions as constitutional rules,68 and that “it is perfectly appropriate to say that to violate a convention is to do something which is unconstitutional although it entails no direct legal consequence.”69 In its view, courts were perfectly capable of recognizing and applying conventions “to provide aid for and background to constitutional or statutory construction.”70 Where Parliament or the Crown acted within its legal powers but against a convention, the action would be legally valid but, nonetheless, unconstitutional. The Supreme Court accordingly declared:

We have reached the conclusion that the agreement of the provinces of Canada, no views being expressed as to its quantification, is constitutionally required for the passing of the [Resolution] and that the passing of this Resolution without such agreement would be unconstitutional in the conventional sense.71

The government, in response to the decision, held a conference afterward to renegotiate the patriation terms with the provinces, eventually achieving the consent of all but Quebec.72 The convention at issue in the Patriation Reference, with regard to Canadian federalism as well as to efforts to secure full legal self-determination for Canada, raised many questions about just how conventions might protect abstract rights systemically in sometimes contradictory, competing, or unpredictable ways. Nevertheless, the case showed a connection between conventions and democratic political processes, while the subsequent actions of the federal government suggested the utility and influence that a declaration of unconstitutionality similarly might have on the U.K. Parliament in upholding and promoting those processes.

The Canadian Supreme Court’s decision in the Patriation Reference, built as it was on Madzimbamuto, made clear that courts could identify and recognize, if not enforce, conventions against conflicting statutes. Unenforceability did not make a convention any less of a constitutional rule, however. These two cases distinguished between a strictly legal act, on the one hand, and constitutional acts of government more broadly construed, on the other. Therefore,

67 Id. at 856.
68 Id. at 874.
69 Id. at 883.
70 Id. at 886.
71 Id. at 909.
72 See Re: Objection to Resolution to Amend the Constitution [1982] 2 S.C.R. 793 (where the Supreme Court rejected a claim by Quebec that its consent was required to the patriation resolution as a matter of convention. Not only had passage of the Constitution Act, 1982 arguably made the question moot, but the convention that there be a “substantial degree” of provincial consent did not require unanimity).
judicial recognition of conventions—and a declaration of unconstitutionality when they are broken—flows naturally from the same interpretive process applied to common law rights. Both cases, very much concerned with democratic processes, showed that conventions have an important place in constitutional jurisprudence because they support a rule of law that restrains government power. On this systemic level, conventions indirectly protect rights. The Canadian and Southern Rhodesian cases suggest, accordingly, that judicial determination of whether a convention applies or not in any particular circumstances will likely be substantively based on how it would or would not promote democratic political processes. The result in the Patriation Reference, in particular, showed the role that a declaration could have in helping—not hindering—those processes by making clear the conventional boundaries to Parliament’s exercise of sovereign authority; the effect of the declaration, however, would still leave the ultimate resolution of a constitutional conflict to politicians and the electorate. Furthermore, the systemic protections that conventions afford rights, generally, would justify a declaration with or without the incorporation of the ECHR: these homegrown conventions defend the democratic, substantive rule-of-law framework on which all rights both depend and build.

3. Fundamental statutes

When common law and statute coalesce in one legal system, it is not only because the common law impacts statutory interpretation and guides Parliament in fulfilling its constitutional obligations. Sometimes, statutes can also have such normative significance that they themselves embody or generate higher-order principles that weave into a common law constitutional fabric. These fundamental statutes combine with common law rights and conventions to form a constitutional jurisprudence that is partly unwritten, partly written. While detailed provisions of these statutes might undergo legislative change from time to time, their core principles transcend text, intertwine with basic rights and conventions, and make up the substantive rule of law that constrains Parliament. Like conventions, these statutes protect rights independently of the ECHR, supporting a declaration of unconstitutionality upon their violation. Moreover, the HRA itself has quickly acquired constitutional status, so that significant legislative alteration of it would quite likely be unconstitutional on its own accord.

The constitutional significance of documents like the Magna Carta, the Bill of Rights 1689, the Act of Settlement 1701, the Acts of Union, and the Great

73 See Allan, Constitutional Justice, supra note 10, at 182–183.

74 See Allan, supra note 42, at 253–254.

Reform Bill of 1832 is well established. The Parliament Acts of 1911 and 1949, the House of Lords Act 1999, and the Constitutional Reform Act 2005 (not yet in force) have altered the institutions of government; still other textual additions to the constitutional tapestry include the European Communities Act 1972, the acts of devolution to Scotland and Wales, and, of course, the HRA.\(^\text{76}\) Whether statute, treaty, or in some other form, these documents have all affected the constitution on a normative level, progressively adding to and adjusting its baselines.\(^\text{77}\) Many of these statutes systemically protect rights by buttressing democratic governance through institutional design and regionalism. Despite not having the same status as entrenched written constitutional provisions, fundamental statutes nevertheless have privileged status over ordinary laws in that courts will interpret primary legislation compatibly with them whenever possible.\(^\text{78}\) Fundamental statutes, along with common law rights and conventions, construct the constitutional framework within which both Parliament and the Crown exercise power. The result is a dynamic, if patchwork, constitution, partly written in its sources, that will support a declaration of unconstitutionality were Parliament to legislate contrary to their core tenets.\(^\text{79}\)

_Thoburn v. Sunderland City Council\(^\text{80}\)_ shows how courts can review “ordinary” statutes against the criteria provided by fundamental ones, particularly where individual rights are in issue. In _Thoburn_, the so-called Metric Martyrs case, the appellants were greengrocers convicted of violating executive regulations prohibiting the use of imperial measuring units in trade, except as supplemental to metric units. The regulations in question implemented European Community directives and amended, by order, the Weights and Measures Act 1985 under section 2 of the European Communities Act 1972. The appellants argued that the regulations under which they were convicted were unlawful, as the 1985 statute as originally enacted permitted the use of imperial measures and so by

\(^{76}\)See _Thoburn v. Sunderland City Council_, [2003] QB 151 ¶ 62 (C.A.) (per Laws L.J., recognizing these written elements to the unwritten constitution).

\(^{77}\)Lord Lester, _supra_ note 13, at 688.

\(^{78}\)Alison L. Young, _Hunting Sovereignty: Jackson v. Her Majesty’s Attorney General_, 2006 PUBL. L. 187, 189. For an interesting consideration of how constitutional sources might potentially conflict (such as convention rights with E.U. law), see Aidan O’Neill, _Fundamental Rights and the Constitutional Supremacy of Community Law in the United Kingdom after Devolution and the Human Rights Act_, 2002 PUBL. L. 724.

\(^{79}\)The author has previously offered a lengthy comparative view of how unwritten and written sources combine in different constitutional systems. See, e.g., David Jenkins, _From Unwritten to Written: Transformation in the British Common-Law Constitution_, 36 VAN. J. TRANSNAT’L LAW 863 (2003).

\(^{80}\)_Thoburn v. Sunderland City Council_, [2003] Q.B. 151. For a criticism of_ Thoburn, expressing concern that E.U. law was upheld in a way leading to criminal sanction, see James Young & David Campbell, _The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws_, 2002 PUBL. L. 399.
implication repealed section 2 of the European Communities Act insofar as that act might permit the executive to make regulations inconsistent with the 1985 law. The court rejected the appellants’ argument of implied repeal. Citing his decision in Witham\(^{81}\) as authority, Justice Laws distinguished “ordinary” from “constitutional” laws, where the latter, especially, conditions the legal relationship between citizen and state, enlarging or diminishing fundamental rights. Parliament’s amendment or repeal of a constitutional statute, therefore, could not be implied, he found, but must be express or arise from specific words leading to an irresistible inference.\(^{82}\) Justice Laws found that the European Communities Act was just such a “constitutional statute which by force of the common law cannot be impliedly repealed.”\(^{83}\)

This rule of construction gives the U.K., according to Justice Laws, “most of the benefits of a written constitution,” while “preserv[ing] the sovereignty of the legislature and the flexibility of our uncodified constitution.”\(^{84}\) Where a court concludes that Parliament does expressly legislate against a constitutional statute, it therefore indicates that Parliament has acted in an unconstitutional, if strictly legal, way. This interpretive process reconciles the rule of law with parliamentary sovereignty, while a declaration of unconstitutionality would openly acknowledge that, in the view of a court, a conflict had arisen between them.\(^{85}\)

Under the reasoning of Thoburn, outright amendment or repeal of the Human Rights Act itself, for example, would require that Parliament unambiguously do so in order to restrict or “dis-incorporate” convention rights. Even in that event, the Magna Carta, Bill of Rights 1689, and Great Reform Bill constitutionally establish basic rights principles such as habeas corpus, a right to petition, and a right to vote. Constitutional statutes in this way insinuate themselves into the common law, with both mutually informing and reinforcing each other.\(^{86}\) Through their normative force, the principles enshrined in these special statutes have a value beyond their explicit text, elevating them above ordinary statutes and setting them in a substantive rule-of-law framework that restrains government power independently of the HRA.


\(^{83}\) Id. ¶ 59.

\(^{84}\) Id. ¶¶ 63–64.

\(^{85}\) See Forsyth & Elliott, supra note 12, at 298–299.

\(^{86}\) Thus, as Justice Laws. said, “[t]he special status of constitutional statutes follows the special status of constitutional rights.” Thoburn v. Sunderland City Council, [2003] Q.B. 151 ¶ 62.
Like conventions, some fundamental statutes go beyond particular rights in order to define the government’s institutional structures and regulate democratic decision-making processes. The Parliament Acts, the Act of Settlement, and the Constitutional Reform Act 2005 (not yet in force) do just this, while the Acts of Union and the devolution acts respect the values of regionalism. While not directly affecting individual rights, these structurally significant statutes do so indirectly by establishing the institutional mechanisms or regional levels through which Parliament and the government must act. Institutional mechanisms prevent institutional or personal concentrations of power, which might permit decision makers to interfere arbitrarily, oppressively, or undemocratically with individual rights. Regionalism mitigates the overcentralization of government power for the same ends, by promoting some degree of regional equality, identity, or decision-making autonomy for the U.K.’s constituent national communities.

The decision in *Jackson v. Attorney General* not only illustrated the importance that fundamental statutes have but went so far as to suggest, in dicta, that, conceivably, they could legally limit parliamentary power under some circumstances. In *Jackson*, the appellants argued that the Hunting Act 2004, passed under the procedures of the Parliament Act 1949, was not actually an act of Parliament because the 1949 act itself was not legally valid. The appellants argued that the government of the day had secured passage of the Parliament Act 1949 improperly through the procedures of the Parliament Act 1911, which, correctly construed, did not permit the House of Commons to reduce further the legislative power of the House of Lords without that chamber’s consent. The Lords disagreed with the appellants’ argument and declared both the 1949 Act and the Hunting Act to be valid acts of Parliament, finding that the Parliament Act 1911 changed the definition of primary legislation and so gave power to the House of Commons to pass any statute whatsoever under its procedures without the consent of the Lords.

Section 2(1) of the 1911 Act, however, expressly made one notable exception on the use of its procedures, excluding from these any bill extending the life of Parliament beyond five years. Although unnecessary for deciding the case before them, some Lords of Appeal speculated on the hypothetical issue of whether or not the House of Commons could use the Parliament Act 1949 to amend section 2(1) of the 1911 Act, so as to permit the Commons to extend the life of Parliament beyond five years without the consent of the House of Lords. Lord Bingham expressed an opinion that the House of Commons, in this way, could indirectly achieve what it could not directly legislate under the unamended 1911 Act. Lord Nicholls disagreed, however, arguing that section

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87 These statutes, respectively, define the relationship between the houses of Parliament, guarantee the independence of judges, and, when brought into force, will establish a Supreme Court for the U.K..


89 *Jackson v. Attorney Gen.*, [2005] 4 All E.R. 1253, ¶ 32. See also id. ¶ 164 (per Baroness Hale).
2(1) necessarily implied that the House of Commons could not indirectly extend the life of Parliament by first amending section 2(1), leading to a conclusion that any bill purporting to do so by this two-step procedure could not be an act of Parliament and would, therefore, be legally invalid.

Most interesting, however, was the decision of Lord Steyn. He agreed with Lord Bingham that the House of Commons could use the procedures of the two Parliament acts to amend section 2(1) of the 1911 Act so as to permit the Commons to extend the life of Parliament without consent of the House of Lords. However, he explored the constitutional implications of such unicameral authority in the House of Commons. Under this interpretation of section 2(1), “the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation.” Although the supremacy of Parliament remained the “general principle” [italics original] of the constitution, it was not absolute. Lord Steyn mused: “In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a New Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.” Lord Steyn’s warning raised doubts about the orthodox doctrine of parliamentary sovereignty and the constitutional responsibility of the courts to enforce a statute, should a government introduce legislation manifestly at odds with liberal democracy. While one might not wish to speculate about or doubt the doctrine of parliamentary sovereignty, as did some of the Lords in Jackson, the case, nonetheless, reveals the special status that some statutes have in constructing the rule-of-law framework within which Parliament legitimately exercises its power.

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90 Id. ¶¶ 58–62. See id. ¶ 122 (per Lord Hope), ¶ 175 (per Lord Carswell), concurring with this interpretation of s. 2(1).

91 Id. ¶ 102.

92 Id. Lord Carswell, id. ¶ 176, also suggested “theoretical possibilities: abolition of the House of Lords, radical change in its composition which would effect a fundamental change in its nature, substantial reduction of the powers of the House of Lords or the virtual removal of the braking mechanism contained in section 2(1) by amending the number of times that the House of Lords can reject a bill or reducing the time which must elapse to a minimal period.” Lord Carswell reserved judgment on what the legal position of such radical alterations of the bicameral system would be. Id. ¶ 178.

93 See also id. ¶ 126 (per Lord Hope). Lord Rodger, id. ¶ 139, suggested the close relationship between the violation of unwritten constitutional norms, express provisions of a constitutional statute, and the broader principles of governance that such a statute represents: “Extending the life Parliament is a matter of fundamental constitutional importance. Not only could it undermine the democratic basis of the British system of government, but it would also affect the dynamic which underlies section 2 of the 1911 Act, even as amended by the Parliament Act 1949.” This view would be the same as that for or against judicial recognition of a convention in circumstances where its application might actually undermine the democratic processes it was intended to promote.
Jackson also drew attention to regionalism, alongside bicameralism and the separation of powers, as a constitutional principle enshrined in fundamental statutes. Lord Hope re-affirmed the Acts of Union as constitutionally significant statutes, leading him to opine that “here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality.”\(^\text{94}\) As Lord Hope recognized in his citations, some judges have questioned whether the Acts of Union might not, in some circumstances, even legally limit Parliament’s sovereignty rather than provide only unenforceable but normative baselines.\(^\text{95}\)

In any case, as illustrated by Thoburn, the Acts of Union or any other fundamental statute need not limit Parliament’s sovereign power legally in order to generate higher-order principles that guide a court’s statutory interpretation and support a nonbinding declaration of unconstitutionality. Furthermore, as with any fundamental statute, the higher-order status of the Acts of Union would not necessarily foreclose a judicial distinction between their material and immaterial breach, allowing Parliament to amend them in ways that would not undermine their normative principles.\(^\text{96}\) The justiciability of a claim that Parliament has violated a fundamental statute, and the suitability of a declaration as a remedy in the case, would depend, accordingly, on the nature and seriousness of the alleged breach. With the Acts of Union, for example, some breaches might be minor

\(^{94}\) Id. ¶ 106.

\(^{95}\) Id. See also J. D. B. Mitchell, Constitutional Law 69–75, 86–91 (W. Green & Son, 2d ed. 1968) (discussing the possibility that the Acts of Union are “constituent documents” that might in a future case provide grounds for the judicial review of statute). Lord President Cooper, for example, asserted bluntly that “[t]he principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law.” MacCormick v. Lord Advocate, [1953] S.C. 396 at 411 (Ct. Sess.). As said by Lord Hope, “the argument that the legislative powers of the new Parliament of Great Britain were subject to the restrictions expressed in the Union Agreement by which it was constituted cannot be dismissed as entirely fanciful.” Lord Gray’s Motion [2000] S.C. 46 at 59 (H.L.). This controversial position contradicted Lord Guthrie’s defense of parliamentary sovereignty in the same case on a prior hearing (as well as the later opinion of Lord Slyn in id. at 49), in which Lord Guthrie asserted that “[t]he doctrine of the sovereignty of Parliament is recognised in Scotland as a basic principle of constitutional law” [1953] S.C. at 403.

\(^{96}\) In Jackson, the House of Lords rejected the conclusion of the Court of Appeal that the House of Commons could use the Parliament Acts to effect modest but not fundamental changes in the relationship between the two houses of Parliament. Jackson v. Attorney Gen., [2005] 4 All E.R. 1253. However, that decision turned on the definition of what constitutes an act of Parliament under the Parliament Acts procedures. According to the reasoning of the Law Lords, a bill passed under those procedures could not be a valid act for some purposes but invalid for others. The distinction between fundamental and immaterial breaches of constitutional statutes, however, does not call into question the validity of an act of Parliament but only affects the judicial assessment of the justiciability of the issue and a determination as to whether Parliament’s violation of a constitutional statute warrants declaratory relief.
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or nonjusticiable, while others will be of a constitutional order; for example, if “the United Kingdom Parliament passed an Act purporting to abolish the Court of Session or the Church of Scotland or to substitute English law for the whole body of Scots private law.” This emphasis on principle, rather than strict text, results from the higher-order nature of fundamental statutes, which, like conventions or common law rights, make up a substantive rule of law that, at once, constrains and accommodates parliamentary power.

Other statutes, in addition to the Acts of Union—the Scotland Act, the Northern Ireland Act, and the Government of Wales Act—establish quasi-federal principles promoting regional autonomy and democratic governance. The Scotland Act, however, is perhaps the most interesting of the three statutes, in giving back to Scotland a parliament that can make primary legislation on devolved issues. Scotland’s history as an independent nation with its own Crown and Parliament, and its having voluntarily united with England and Wales, arguably enhances the constitutional status of the Scotland Act by setting it within a unique historical and political context. Although it retains sovereign power to legislate for Scotland, the Westminster Parliament will refrain from

97 See MacCormick, [1953] S.C. 396 (per Lord President Cooper, finding that Queen Elizabeth’s incorporation of the numeral “Second” into Her Royal Title was nonjusticiable); Gibson v. Lord Advocate, [1975] S.C. 136 (Ct. Sess.) (per Lord Keith, finding that the question whether Parliament’s alteration of Scottish private law is “for the evident utility” of Scottish subjects, as required under the Scottish Act of Union 1707, art. XVIII, was nonjusticiable).

98 [1975] S.C. at 144 (per Lord Keith, reserving opinion on the question whether such an act would even be legally valid).

99 One case makes clear that the Acts of Union do establish constitutional limits on the jurisdiction of English courts. See R. v. Commissioner of Police of the Metropolis ex parte Bennett [1995] QB 313 (Q.B.) (finding that Article XIX of the English Union with Scotland Act 1706 prevented an English court from interfering with the execution of a Scottish arrest warrant, even where the House of Lords had previously found that an English warrant executed under the same circumstances constituted an unlawful abuse of judicial process). See also Bennett v. Horseferry Road Magistrate’s Court, [1994] 1 A.C. 42 (H.L.). The implication of Ex parte Bennett is that primary legislation enlarging the jurisdiction of English courts, so as to reverse the holding in the case, would consequently breach not only an express provision of the Acts of Union, but would violate one of the Acts’ underlying principles that the legal systems of Scotland and England remain separate and equal. Another such basic principle, suggested by Mitchell, supra note 95, at 96, is the guarantee of adequate representation for Scotland in the Parliament at Westminster. However, for reservations about the justiciability of such a principle, at least under the facts of the case at hand, see Lord Gray’s Motion, [2000] S.C. at 60–61, per Lord Hope.

doing so without consent of the Holyrood Parliament. This political practice quickly achieved constitutional status as the Sewel Convention, revealing an interesting relationship between conventions and fundamental statutes.\(^{101}\) Along with the Acts of Union, therefore, the Scotland Act, Northern Ireland Act, and Government of Wales Act represent constitutional principles of devolved decision making that Parliament is constitutionally bound to respect.\(^{102}\)

Accordingly, should Parliament expressly amend or repeal a constitutional statute, as it did previously in suspending the Northern Ireland Act 1998 following the impending breakdown of the Good Friday Agreement,\(^{103}\) the courts would then have to determine whether the interference so undermined the statute’s underlying principles that it would justify a declaration. The Northern Irish situation, for instance, suggests the delicate political issues that courts would confront in deciding not just what alterations to constitutional statutes are serious or minor but also whether they are consistent with the statutes’ principles. For example, the U.K. Parliament took the extreme step of authorizing the suspension of devolved government under the Northern Ireland Act 1998, doing so in order to salvage the peace process and ensure stable, peaceful self-government in the region for the long term. From this perspective, the suspension of Northern Irish government arguably would have been constitutional in the sense of being consistent with the principles of devolution, although the Northern Ireland Act itself (for various reasons) might not have “constitutionally embedded” itself as quickly or as firmly as, say, the Scotland Act seems to have done.

The point is, faced with Parliament’s express amendment or repeal of any of the terms of a constitutional statute, a court will be faced with two choices with regard to making a declaration. First, a judge must cautiously distinguish the constitutional from the unconstitutional alteration of a fundamental statute, looking beyond strictly textual alterations to overarching constitutional principles and the legislative purposes motivating the amendments in question. This assessment will require a teleological approach to constitutional adjudication. Taking again the example of the suspension of the Northern Irish government, Parliament’s actions might arguably have been constitutional regarding the devolution project as a whole, especially given that devolution was itself in an early, somewhat experimental stage.\(^{104}\) Furthermore, legislative changes to fundamental statutes might also be consistent with emerging

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\(^{101}\) See Elliott, *supra* note 50, at 360–361.

\(^{102}\) See Bogdanor, *supra* note 100, at 64 (predicting such a development, at least in regard to the Scotland Act, just after its passage). See also Elliott, *supra* note 50, at 353–354, 356, 366.

\(^{103}\) See Northern Ireland Act, 2000, c. 1.

\(^{104}\) Nearly thirty years before, of course, Parliament had suspended self-government in Northern Ireland under the Northern Ireland (Temporary Provisions) Act 1972 and imposed direct rule in response to the escalating Troubles. Whether that action would now be considered “constitutional,” in light of the preceding fifty years of Northern Irish government under the Government of Ireland Act 1920, is highly questionable.
constitutional norms, valuably amending “out-of-date” ones.\textsuperscript{105} Just what standards a judge would apply in distinguishing constitutional from unconstitutional alterations of fundamental statutes—and in deciding whether a declaration would be appropriate in the latter case—will require further elaboration by the courts. For now, however, it may be said that where Parliament has expressly and seriously contravened not only the terms but the spirit of a constitutional statute in an unjustifiable, disproportionate, or wanton way, courts can legitimately consider declaring the interfering law to be unconstitutional, leaving it for Parliament and the public to consider the ramifications of the offending actions.

The second approach toward declaring some infringement of a fundamental statute unconstitutional is strictly and more simply rooted in the text. That is, if Parliament expressly amends or repeals a fundamental text in any way, a court could consider making a declaration of unconstitutionality, highlighting the inconsistency of the resultant law with the special statute and then leaving it for parliamentary reconsideration through the political processes. With this second approach, a declaration of unconstitutionality would flow more directly from an interpretive conflict between contradictory, new legislation and the existing constitutional text, just as it would with the infringement of common law rights or conventions. Unlike with those rights or conventions, however, the hard text of fundamental statutes leaves less room for flexible judicial interpretation of the constitutional norms involved, or for their reconciliation with potentially conflicting, subsequent legislation. This could make a strict approach to judging a conflict between new legislation and a fundamental statute, perhaps, undesirable. The lack of flexibility might also make it more problematic for judges who, on wider principles, might be indisposed to declare the changes in question to be unconstitutional, especially as otherwise there would be no “amending procedure” by which the permanent alteration of a written constitutional norm could be achieved.

The above questions notwithstanding, Britain’s new constitutional jurisprudence has now developed in a way that logically points toward a declaration of unconstitutionality based upon special textual provisions. Discerning the standards to be applied in distinguishing a constitutional from an unconstitutional breach is the next step on the path of legal development already chosen by the courts. While courts have long recognized certain documents to have special constitutional significance for purposes of statutory interpretation, the decision in \textit{Thoburn} settled the fact that courts will now require Parliament to amend or repeal constitutional statutes by express language only.

\textsuperscript{105} See, e.g., Universities (Scotland) Act, 1853, c. 89 (repealing the requirement under the Acts of Union that “in all time coming” professors and other staff at Scottish universities belong to the Church of Scotland).
The interpretive approach toward these statutes is, therefore, the same as that taken toward common law rights and conventions. Whether protecting individual rights directly or indirectly through the establishment of institutional structures and respect for regionalism, constitutional statutes establish the norms by which courts must assume Parliament exercises its supreme legislative power. Thus, “[i]t is possible to achieve the same practical effect as entrenchment whilst preserving continuing parliamentary legislative supremacy.”106 Where a court finds that Parliament does clearly wish to amend or repeal a fundamental statute—at least in a material way that offends that statute’s transcendent principles—the interpretive process points toward a conclusion that Parliament has legislated in an unconstitutional way. This, in turn, leads to and justifies a nonbinding declaration to that effect.

4. Is a Constitutional remedy foreclosed?

Until the Human Rights Act, no court had ever declared formally, as a remedy, that an act of Parliament violated individual rights. Of course, one might say that courts, once, were less protective of fundamental rights, more deferential to the political branches, and made little distinction between constitutional law and statutory law than is now the case.107 Breaking with this more radical formalistic tradition, judicial recognition of substantive, higher-order values has risen in the past decades, along with a more assertive view of the judiciary in guarding the rule of law. It is noteworthy, nevertheless, that no British court has ever explicitly disavowed the power to grant a declaration that Parliament has violated constitutional principles.

That said, some pre-HRA challenges to government action did seek declaratory relief, potentially raising this kind of constitutional conflict. In Malone v. Metropolitan Police Commissioner108 and R. v. Secretary of State for the Home Department, ex parte Brind,109 courts refused to issue declarations that the Crown had violated convention or common law rights unlawfully; this was under circumstances where doubt might have arisen about the compatibility of the statute with fundamental rights. These two cases are often cited as showing the lack of rights protection before the HRA, as well as the unavailability of a judicial remedy for rights infringements.110 These cases, then,

106 Young, supra note 78, at 195.

107 See Gearty, supra note 10, at 121.


110 Elliott takes this line on Brind, Constitutional Foundations, supra note 10, at 204–218. However, he recognizes judicial inconsistencies between the approach in that case and later ones recognizing common law rights, insofar as they seem to envision different roles for the courts and different intensities of review. But see Allan, supra note 42, at 188–189 (suggesting that Brind is not as restrictive of a rights-based view as might first appear).
have the greatest potential for undermining the argument that courts have the authority to make a declaration of unconstitutionality against Parliament. A reexamination of these cases, however, shows that they did not categorically reject a declaratory power in situations where a government infringes basic rights but only denied the higher status of the particular rights at issue. *Malone* and *Brind*, despite refusing to declare that the Crown had infringed any fundamental rights, actually left open the possibility that such declarations might issue against either it or Parliament under appropriate circumstances.

In *Malone*, the claimant sought declarations that, among other things, the police had tapped his telephone in the absence of statutory authorization, in contravention of rights at common law, and against section 8 of the unincorporated ECHR. The Chancery court refused to grant the declarations. Sir Robert Megarry V.C. made clear that declarations were available only as to “rights and liabilities that are enforceable in the courts, and not merely moral, social or political rights or liabilities that are not.” In the case before him, Sir Robert found that rights under the convention were nonjusticiable—and so unenforceable—because they arose under a treaty unincorporated into domestic law. Furthermore, the claimant had no legally recognizable rights of property, privacy, or confidentiality at common law that wiretapping would violate. The claimant simply had no legal rights that would support the desired declaration that the wiretapping warrant was unlawful. Moreover, *Malone* concerned wiretapping ordered by the executive and done without (but not contrary to) either common law or statutory authority; in the absence of any prohibitions against it, the tapping was lawful. *Malone*, therefore, did not even address the issue of whether a declaration would be inappropriate or impossible as a remedy, where an act of Parliament itself violated a fundamental common law right. The closest Sir Robert came to analyzing the idea of a fundamental right was to reiterate that the court’s declaratory power was “confined to..."
making declarations on matters that are justiciable in the courts.”

However, there existed no plausible domestic rights in the case—either under common law or the convention, and thus the situation failed to present a justiciable controversy. Accordingly, Malone left open the possibility that, in other circumstances, a court might indeed consider declaratory relief, where a statute and some constitutional right could not be reconciled.

Brind also concerned a request for a declaration that the Crown had violated an individual’s fundamental rights; the request was made under the unincorporated convention alone, without any appeal to common law. Like Malone, Brind did not reject outright the idea of constitutional rights and did not categorically preclude a court’s making the kind of declaration sought by the claimant. In Brind, the home secretary exercised a statutory power to order that the BBC and Independent Broadcasting Authority refrain from broadcasting any matter spoken by persons representing proscribed terrorist organizations. The applicants claimed that this order was ultra vires by arguing that the home secretary had a legal duty to comply with section 10 of the convention, to be imputed into the primary legislation under which the order was made. The House of Lords rejected that argument. While Lord Donaldson recognized the similarities between many common law and convention rights, he noticed that “in this case we are invited to grapple with the fundamental question of the effect of the Convention as distinct from any common law to the like effect.”

Brind rested upon the status of convention rights only and did not address the apparent conflict between the authorizing statute itself and rights at common law. Like the Chancery court in Malone, the House of Lords found that the convention was a legally unenforceable treaty. The Lords admitted that English courts would consider the convention when construing ambiguous statutory language but dismissed its relevance where the statute’s meaning was clear.

In Brind, however, Parliament’s intent was quite apparent and to find an implied intention that the executive must comply with the convention would be to incorporate the treaty “by the back door.”

Brind, like Malone, therefore rejected the unincorporated convention as a source of domestic legal rights, which might otherwise support the declaration sought. As a result, the convention created no legal rights against which the statute could have been considered “incompatible,” in the later terms of the HRA. Essentially, both cases only reaffirmed the accepted English rule that

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116 Id.


unincorporated treaties and international law are no more than aids to statutory construction. Neither decision resolved a conflict between any act of Parliament and higher-order principles, for the simple reason that the courts found that the claimed rights did not exist in domestic law.

Malone and Brind, as the two most prominent pre-HRA cases where declarations based on fundamental rights were sought and refused, never actually dealt with a conflict between Parliament and a higher-order principle. Instead, both cases left open the possibility of such a conflict, as well as of declaratory relief in that event. If one objects that there is no direct precedent for a declaration against Parliament, neither is there any against it. Therefore, any reading of these cases as foreclosing a declaration of unconstitutionality as a constitutional remedy is too broad. Such a broad reading would, furthermore, be at odds with the new constitutional jurisprudence and the courts’ interpretive process—both of which now clearly point toward a declaration where higher-order principles and a statute are irreconcilable.

5. Conclusion

In the years since the Human Rights Act came into force, courts have for the first time directly and substantively reviewed acts of Parliament against fundamental rights, incorporated in the form of the European Convention on Human Rights. Where Parliament violates those rights, the HRA allows courts to make nonbinding declarations of incompatibility; ideally, this will increase Parliament’s political accountability for respecting human rights. However, the declaration made in cases such as A and Others (No. 1) and other decisions under the HRA have incited criticisms of both judges and of the act itself, prompting not-so-veiled threats that future amendment of the HRA is not a political impossibility. It is perhaps not too outrageous to fear that, one day sooner or later, Parliament might amend or even repeal the Human Rights Act so as to “dis-incorporate” convention rights.

This article has argued, however, that such an unfortunate development would not extinguish the judicial power to declare acts of Parliament incompatible with constitutional norms, such as common law rights. Indeed, this constitutional remedy would be available even with the HRA in place; indeed, common law rights might offer greater protection than the ECHR, even as indigenous legal conventions and fundamental statutes can promote the systemic mechanisms of democratic government. Such a declaratory power resides in the courts by virtue of the interpretive process by which they apply a

120 See also Whaley v. Lord Advocate, [2004] S.C. 78 (Ct. Sess.) (where the Court of Session found that the Scottish Parliament can legislate against unincorporated international law and so refused to make a declaration that it had done so because international law has no domestic legal effect).

constitutional jurisprudence that exists and evolves independently from the HRA. These multiple sources of higher-order law, subject only to express amendment or repeal, establish principles within a substantive rule-of-law framework that both constrains legislative power and gives legitimacy to the doctrine of parliamentary sovereignty. Courts, therefore, will not lightly find statutory conflict with these constitutional principles and will require that Parliament make a contrary intent unmistakably clear. Where a court finds that Parliament has indeed exercised its sovereign power against these principles, it will also, and necessarily, conclude that Parliament has acted unconstitutionally. The logical extension of this interpretive process is that courts can formally issue a declaration of unconstitutionality in the event of a constitutional conflict.

No precedent precludes this constitutional remedy, nor would it undermine the doctrine of parliamentary sovereignty. Such a declaration, like its statutory counterpart under section 4 of the Human Rights Act, would be nonbinding and not affect the legal validity of a statute. A declaration of unconstitutionality would instead complement parliamentary sovereignty, within the liberal democratic context, by enhancing government’s political awareness of its constitutional obligations and its accountability to the electorate. Resolution of the constitutional conflict, then, would be appropriately left to the democratic political process. With its sovereignty intact, the only objection Parliament could have to a declaration would be the desire to exercise its legislative power free from open and full accountability in the courts for violations of its constitutional obligations. And any attempt by Parliament to forbid a declaration—should a judge first be brave enough to take this important next step of constitutional jurisprudence—would be, no doubt, unconstitutional.