

# Taking Sovereignty Seriously

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## Introduction

Concerns about sovereignty have been, and still are, central to the case against the Human Rights Act.<sup>1</sup> However, they have not always been taken seriously by defenders of the Act. Indeed, a constitutional orthodoxy has emerged according to which arguments against the Act which target its impact on sovereignty are not just mistaken, but wholly misconceived. Such arguments should not, or so the dominant position among defenders of the Act tells us, be taken seriously.<sup>2</sup>

In this chapter, I argue that there are genuine sovereignty-based reasons to object to the Human Rights Act and, whilst they do not ultimately amount to reasons to repeal the Act, their proponents deserve to have their arguments taken seriously. An ongoing failure to do this has left important reasons to preserve the Act absent from public debate. And the associated refusal to take critics seriously has contributed to deepening the pathologies of an (already) unhealthy public controversy.

I am conscious that both the ‘case against’ and the ‘defence’ of the HRA are nebulous notions. Neither has an identifiable or organised core, and each consists of a variety of positions, arguments and motivations which are not necessarily internally consistent (and, in a pluralist democracy, rightly so). The current government was, however, elected on a general election manifesto promise to repeal the Act, itself preceded by several years of sustained criticism of the Act and, latterly, by the publication of a fairly detailed policy document outlining *their* case against the Act. I have treated this as the core of the case against.<sup>3</sup> The defence of the Act is harder still to pin down. I

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<sup>1</sup> They featured, for example, in the debate on Act at second reading in the House of Commons (below, fn24 and accompanying text) and they are prominent in the Conservatives’ 2014 policy paper on Human Rights reform (see below, fn3, and the discussion accompanying fn9).

<sup>2</sup> For succinct example of this position, see *Liberty’s* response to some criticism of the Human Rights Act by David Cameron during Prime Minister’s Questions in June 2015, <https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/liberty-responds-david-camerons-pmq-questions-human-rights-act> (discussed below, fn34 and accompanying text).

<sup>3</sup> ‘Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws’ (The Conservative Party October 4, 2014)

focus on academic commentary intended (as I understand it) to respond to the case against the HRA and to the arguments that feature in the case against. In particular, I refer throughout to Conor Gearty's recent book, *On Fantasy Island* (a book which has many virtues which, alas, I do not mention here). I do this not because it is constitutive of the case defending the HRA (although now it is, at least partly) but because the position it defends (with unprecedented care and rigour) is reflective of an attitude towards the constitutional position of the HRA which seems to have become entrenched as a kind of orthodoxy among constitutional scholars, consistently with other positions I discuss here.<sup>4</sup>

The chapter unfolds as follows. First, I distinguish two senses of sovereignty, national sovereignty and parliamentary sovereignty. I show that both of these ground identifiable, publicly articulated objections to the HRA. Next, I tackle each in turn. I argue that each sense of sovereignty grounds cogent concerns about the Act. The Act compromises both national sovereignty and parliamentary sovereignty, and arguments which begin from either foundation deserve to be treated seriously, and engaged with rather than dismissed. I conclude by suggesting that a failure to do so has imperilled the future of the HRA and contributed to a degradation in the quality of constitutional discourse in the UK.

### Two (relevant) senses of sovereignty

Sovereignty is a multifaceted and flexible term.<sup>5</sup> Its essence is the idea of independent authority or supremacy; a sovereign authority is one with the power to make decisions free from outside interference and without the risk that those decisions will be overridden by a different or competing decision maker. But different authorities can be supreme or independent in different ways, and arguments from sovereignty accordingly take different forms and can invoke different kinds of sovereign. Two different aspects of sovereignty must be distinguished in the case against the HRA. First, it features appeals to the idea of *national sovereignty*. This is a moral-political concept which is also prominent in international legal doctrines. Here, I will understand it as the idea that political communities ought to be empowered to make their own decisions without outside interference or override. In particular, it requires that the community of the United Kingdom can use its domestic political institutions to make its own decisions, without fear of interference or

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<sup>4</sup> For the view from outside this orthodoxy, see G. Gee and G. Webber, 'HRA Watch: Reform, Repeal, Replace? Conventional Wisdom and the Human Rights Act' UK Const. L. Blog, 15th Jun 2015.

<sup>5</sup> As Robert Jackson recently observed, it is a "big idea" which "defies academic attempts to pin it down and fit it into tidy analytical categories" Robert Jackson, *Sovereignty: the Evolution of an Idea*. (Wiley 2013) xi. For an important attempt at systematic categorisation see Stephen D. Krasner, *Sovereignty: organized hypocrisy* (Princeton University Press 1999).

override from external institutions. Any arrangement which empowers outside institutions to override domestic decisions is thus a threat to national sovereignty. Note, however, that the principle of national sovereignty makes no particular claims about how our domestic political institutions are organised, so long as they are (collectively) independent from outside interference. Which is where our second sense of sovereignty enters the picture. This is the idea of *parliamentary sovereignty*. This is a domestic legal concept about the allocation of political power between the institutions of the government of the United Kingdom.<sup>6</sup> In Dicey's famous formulation it requires (asserts, even) that:

“Parliament...has, under the English constitution, the right to make or unmake any law whatever; and, further...no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”<sup>7</sup>

Accordingly, Parliament is sovereign to the extent that it can legislate without risk of its decisions being overridden, in particular by the courts, and any judicial power to override legislation is a violation of that sovereignty.

The case against the HRA relies, separately, on each of these senses of sovereignty. It alleges that different features of the scheme put in place by the Act violate both national and parliamentary sovereignty and that these violations count as reasons to contemplate repeal or reform of the Act. My argument in the rest of this chapter is that those arguments have not been taken as seriously as they ought to have been, and that the position of the HRA is weakened as a result of that neglect.

### National Sovereignty in the Case Against the Human Rights Act

A concern with national sovereignty has always been implicit in the (vague but long-standing) proposal that the Human Rights Act be replaced with a *British* or *UK* Bill of Rights.<sup>8</sup> This particular concern is more explicitly articulated in the policy document published by the Conservative Party

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<sup>6</sup> Note that it also channels, albeit imperfectly, yet another (moral-political) sense of sovereignty: *popular sovereignty*, the idea that the People are the masters of their own destiny. This third sense does not feature in my analysis here, but it should be kept in mind that it lurks in the background of many of the arguments that I discuss (and many that I do not!).

<sup>7</sup> A.V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1961) 39–40

<sup>8</sup> David Cameron advocated a *British* Bill of Rights in 2006, The Conservatives promised in 2010 and the Commission on a Bill of Rights assessed in 2012 the possibility of a *UK* Bill of Rights and the Conservatives promised in 2015 a *British* Bill of Rights in 2015 (my emphasis).

in late 2014 in preparation for the 2015 General Election. The first of its four objections to the HRA included the following claim:

“There is mounting concern at Strasbourg’s attempts to overrule decisions of our democratically elected Parliament and overturn the UK courts’ careful applications of Convention rights”<sup>9</sup>

And the second of those four objections opened as follows:

“[The] Human Rights Act undermines the role of UK courts in deciding on human rights issues in this country. Section 2 of the HRA requires UK courts to “take into account” rulings of the Strasbourg Court when they are interpreting Convention rights. This means problematic Strasbourg jurisprudence is often being applied in UK law.”<sup>10</sup>

These themes were echoed in the Conservatives’ 2015 general election manifesto, which included (distinct) promises to “scrap the Human Rights Act and curtail the role of the European Court of Human Rights” and to “[b]reak the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK”.<sup>11</sup>

This particular thread of opposition to the HRA is based on concern that a foreign court (the European Court of Human Rights in Strasbourg) is exercising excessive authority over domestic institutions, both Parliament and the Courts. These arguments are thus grounded in an appeal to the value of national sovereignty.

In legal terms the key provision of the Act here is section 2, which provides (in the relevant part) as follows:

“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account ...any judgment, decision, declaration or advisory opinion of the European Court of Human Rights...so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen”<sup>12</sup>

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<sup>9</sup> *The Conservatives’ Proposals* 3

<sup>10</sup> *The Conservatives’ Proposals* 4

<sup>11</sup> *The Conservative Party Manifesto 2015*, 58.

<sup>12</sup> Human Rights Act 1998, section 2.

The cogency of the argument from national sovereignty will thus depend on the extent to which section 2 compromises or violates national sovereignty. More specifically, it will depend on the intensity with which the courts understand their obligation to “take into account” the jurisprudence of the Strasbourg court. At first sight, then, the argument from national sovereignty is likely to appear weak. There is, after all, no threat to sovereignty in (merely) taking into account what outsiders are doing and, furthermore, that looks like the kind of thing that a responsible sovereign would consider doing anyway. Accordingly, the dominant response to this line of argument has been to deny it has any purchase at all rather than to engage with it. This line of argument is common to the defences of the Human Rights Act or responses to the government’s proposals proposed by Gearty, Elliott and Young and Dimelow.<sup>13</sup> Elliott criticises the Conservatives for “the implication that there is presently a ‘link’ that requires UK Courts to *apply* ECtHR interpretations of the Convention”. This, he argues, is not (or at least is no longer) the case. “Although UK courts did...come close to reading such an obligation into...it is clear that they now conceive of their relationship with Strasbourg in more flexible terms.”<sup>14</sup>

Gearty unpacks this line of thought in greater detail. One of the fantasies around which his book is constructed is that which, or so he argues, has come to surround the operation of section 2, namely the fantasy of the ‘supremacy of Strasbourg’. In summary, Gearty’s argument runs as follows. There was a problem, he concedes, with “how the courts initially approached” their task, as they “allowed the permissive language of section 2 to harden into an unavoidable obligation”.<sup>15</sup> The foundation of this hardening was Lord Bingham’s speech in *Ullah*, where he articulated what is now commonly known as the “mirror principle”:

“...the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law...since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”<sup>16</sup>

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<sup>13</sup> Conor Gearty, *On fantasy island: Britain, Strasbourg, and human rights* (Oxford University Press 2016); Mark Elliott, ‘My analysis of the Conservative Party’s proposals for a British Bill of Rights’, October 3, 2014; Alison Young and Stephen Dimelow, *Common Sense or Confusion: The Human Rights Act and the Conservative Party* (The Constitution Society 2015)

<sup>14</sup> Elliott,

<sup>15</sup> Gearty, *On fantasy island* 104–5

<sup>16</sup> R (*Ullah*) v *Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 [20]

Resistance to the mirror principle, driven (as Gearty notes) by the fact that it “simply did not accord with the intention of section 2” led to a judicial retreat to a new position of “calm co-responsibility” and a “new, more equal partnership” with the Strasbourg court.<sup>17</sup> Accordingly, Gearty rejects the fantasy of the supremacy of Strasbourg.

This narrative is compelling, not least because Gearty’s and Elliott’s accounts of what Lord Wilson once called the “retreat from the *Ullab* Principle” are legally accurate.<sup>18</sup> But, it is important to note that this does not entail that the argument from national sovereignty is misguided. Consider the passage on which Gearty relies to characterise the (“calm”, “more equal”, “flexible”) position to which the courts have now retreated. In *Horncastle*, Lord Phillips characterised the duty of the court under section 2 as follows:

“The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case.”<sup>19</sup>

Even on this approach, the domestic court’s power to resist Strasbourg jurisprudence is limited to cases where the Strasbourg court has not “sufficiently appreciated or accommodated particular aspects of our domestic process”. The same basic position has more recently been outlined, in slightly different language, in *Chester v Secretary of State for Justice*.<sup>20</sup> Lord Mance described the domestic courts’ ability to defy Strasbourg as being limited to situations “involv[ing] some truly fundamental principle of our law or some most egregious oversight” and Lord Sumption restricted

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<sup>17</sup> Gearty, *On fantasy island* 108–9. Gearty traces the story through the following line of cases: *Horncastle*, *Al Khawaja* and *Tabery*, *Hanney*, *Kaiyam*, *Massey*, *Robinson* and *Vinter*.

<sup>18</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [104]

<sup>19</sup> *R v Horncastle and others* [2009] UKSC 14, [2010] 2 AC 373 [11]. Following Gearty, I have reproduced the relevant passage (almost) in full. Gearty, *On fantasy island* 107.

<sup>20</sup> *Chester v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271

the domestic courts' room for manoeuvre to "altogether exceptional cases", specifically where the Strasbourg court "has misunderstood or overlooked some significant feature of English law".<sup>21</sup>

So something more than mere disagreement is needed before the domestic courts can resist Strasbourg jurisprudence. In the absence of special circumstances, of the kind which Lord Phillips, Lord Mance and Lord Sumption each try to capture in the words quoted above, the domestic courts' duty under section 2 – even in its recent, more modest form – requires the court to defer to Strasbourg's authority even if it disagrees with its position. The current position is exemplified by Lord Sumption's speech in *Chester* (which, although he was not writing for the majority in the case, gets the process demanded of him by the law exactly right). He made clear that he was constrained to follow a line of Strasbourg jurisprudence with which he disagreed:

"Without the decisions in *Hirst (No 2)* and *Scoppola*, I would have held that the question how serious an offence has to be to warrant temporary disenfranchisement is a classic matter for political and legislative judgment, and that the United Kingdom rule is well within any reasonable assessment of a Convention state's margin of appreciation. However, the contrary view has now been upheld twice by the Grand Chamber of the European Court of Human Rights, and is firmly established in the court's case law."<sup>22</sup>

So whilst the retreat from *Ullah* does markedly reduce the conflict between the demands of the HRA and the requirements of national sovereignty, it does not eliminate it altogether. After *Horncastle* and *Chester*, there are caveats on the power of the courts to resist Strasbourg, caveats which conflict with the national sovereignty of the United Kingdom. So Alison Young and Stephen Dimelow slightly misconceive the case against the Act when they argue that:

"the portrayal of the current situation in domestic law as being that UK courts will always apply decisions against it...is highly misleading"<sup>23</sup>

Any claim that the court *always* defer to Strasbourg would of course be wrong. But that is not part of the case against the HRA. The fact that courts *sometimes* do so would be enough for the argument from national sovereignty to get off the ground. And they sometimes do, because there are caveats on their authority to depart from Strasbourg jurisprudence. And as those caveats

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<sup>21</sup> *Chester* [27], [121]

<sup>22</sup> *Chester* [137]

<sup>23</sup> Alison Young and Stephen Dimelow, *Common Sense or Confusion: The Human Rights Act and the Conservative Party* 36

originate in section 2 of the Human Rights Act, it is cogent for the Act's opponents to attack it for its impact on national sovereignty and to agitate for reform to reduce, or even to eliminate, that impact. Such criticisms neither misunderstand nor misrepresent the law. As such, the appropriate response is not to deny their cogency, but to engage with their merits.

### Parliamentary Sovereignty in the Case Against the Human Rights Act

Doubts about the HRA have been grounded in concerns about its impact on parliamentary sovereignty since the very beginning. Theresa May opposed the Bill which became the Act during its second reading in the House of Commons in 1998 on the grounds that it would “reduce parliamentary sovereignty” and criticised the government for being “not ... able to understand or accept” those ramifications of the Bill.<sup>24</sup> In an intervention in the House of Commons early in his parliamentary career, David Cameron complained that “the Human Rights Act has resulted in ... Parliament sometimes being unable to do things that all reasonable people accept are the right things to do”<sup>25</sup>. Perhaps most famously, as Prime Minister he reacted angrily to the decision in *R (F) v. Home Secretary*<sup>26</sup>:

“My hon. Friend speaks for many people in saying how completely offensive it is, once again, to have a ruling by a court that flies in the face of common sense...I am appalled by the Supreme Court ruling...I can also tell my hon. Friend that a commission will be established imminently to look at a British Bill of Rights, because it is about time we ensured that decisions are made in this Parliament rather than in the courts”<sup>27</sup>

But these concerns always ran counter to the conventional and academic wisdom about the Human Rights Act.<sup>28</sup> Jack Straw, the then Home Secretary, piloting the Act through the House of Commons, had insisted (at Third Reading) that “[o]ne of the Bill's many strengths is ... maintaining the sovereignty of Parliament”.<sup>29</sup> Lord Steyn, in a celebrated passage in *Kebilene*, said it was “crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of

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<sup>24</sup> HC Hansard, 16 Feb 1998 : Column 848.

<sup>25</sup> HC Hansard, 30 October 2001 : Column 824.

<sup>26</sup> [2011] 1 AC 331. The Supreme Court issued a declaration of incompatibility regarding the absence of any provision in the Sexual Offences Act 2003 for the eventual lifting of duties imposed “indefinitely” on certain categories of sex offender to keep the police notified of where they are living and of plans to travel abroad

<sup>27</sup> HC Hansard, 16 February 2011, Col. 955. Despite the Prime Minister's distaste for the decision, his government prepared remedial secondary legislation, The Sexual Offences Act 2003 (Remedial) Order 2012.

<sup>28</sup> For a rare example of an academic attack on the Act grounded in concerns about parliamentary sovereignty, see David Campbell, “Catgate” and the challenge to parliamentary sovereignty in immigration law’ [2015] Public law 426.

<sup>29</sup> HC Hansard, 21 Oct 1998 : Column 1358.



parliamentary sovereignty”<sup>30</sup>. Tom Hickman captured this orthodoxy precisely, when he described it as a “cardinal, and uncontroversial” feature of the Act that it “ultimately preserved parliamentary sovereignty”.<sup>31</sup>

Nevertheless, the third of the four objections in the Conservatives’ 2014 policy document focussed on the Act’s implications for parliamentary sovereignty:

“Labour’s Human Rights Act undermines the sovereignty of Parliament, and democratic accountability to the public. Although, the HRA affirms the sovereignty of the UK Parliament over human rights matters, Section 3(1) undermines Parliamentary sovereignty in practice. This provision requires UK courts to read and to give effect to legislation in a way which is compatible with Convention rights, “so far as it is possible to do so”. There are cases in which, due to this rule, UK courts have gone to artificial lengths to change the meaning of legislation so that it complies with their interpretation of Convention rights, most often following Strasbourg’s interpretation, even if this is inconsistent with Parliament’s intention when enacting the relevant legislation”.<sup>32</sup>

This passage contains a (reasonably) clearly articulated legal argument about Section 3 of the Act, the relevant part of which reads:

“So far as it is possible to do so, primary legislation...must be read and given effect in a way which is compatible with the Convention rights”<sup>33</sup>

In particular, it alleges that in applying this section, the Courts have understood it to be “possible” to read legislation in ways which violate parliamentary sovereignty. Consistently with the conventional wisdom outlined above, this has not been taken seriously in evaluations of the reform proposals. For example, Shami Chakrabarti (then director of Liberty, now Baroness Chakrabarti) suggested in 2015 that these arguments revealed the Prime Minister to be in need of “an urgent lesson in constitutional and legal literacy” as “[u]nder the Human Rights Act...parliamentary sovereignty is perfectly preserved”.<sup>34</sup>

This is unfortunate, because it is true that section 3 of the HRA has compromised parliamentary sovereignty. Whilst this is not obvious from the text of the provision itself, which uses the

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<sup>30</sup> *R v DPP ex parte Kebilene* [2000] 2 AC 326, 367.

<sup>31</sup> Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing, Oxford 2010) 63, emphasis added.

<sup>32</sup> *The Conservatives’ Proposals* 4

<sup>33</sup> Human Rights Act 1998, section 3.

<sup>34</sup> <https://www.liberty-human-rights.org.uk/news/press-releases-and-statements/liberty-responds-david-camerons-pmq-comments-human-rights-act>

language of the ‘possible’, it is clear from a famous dictum in the leading case on the limits of section 3, *R v A*, where Lord Steyn memorably outlined the judicial power created by that section:

“the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings... it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions.”<sup>35</sup>

On this reading, section 3 equips the courts with two ways to construct (unambiguous) legislation in order to make it comply with Convention rights: reading down and the implication of provisions. These techniques only come into play when the interpretation they make possible is contrary to the intention of parliament in passing the legislation to be interpreted. If the interpretation arrived at was consistent with Parliament’s intention, there would be no need for recourse to section 3 in the first place. In other words, section 3 provides a way for the courts to override primary legislation. It is therefore a violation of parliamentary sovereignty.

Conor Gearty dedicates a chapter of *On Fantasy Island* to defending the conventional wisdom (that the Act respects and preserves parliamentary sovereignty) against this account of section 3.<sup>36</sup> He begins by conceding that section 3 requires the judges to “engage in a fresh way” and characterises Lord Steyn’s dictum in *R v A* (cited above) as “heady stuff indeed”.<sup>37</sup> But, he argues, this approach to the judiciary’s task under section 3 was “manifestly not what the Human Rights Act had intended” and therefore “did not take off”. He claims that Lord Steyn’s “colleagues on the bench were not nearly so robust”, and that following “an almost immediate hostile reaction...the final nail in this activist adventure was nailed in” by Lord Bingham in *Anderson*.<sup>38</sup>

The problem with this riposte to the critics is that Lord Steyn’s approach to section 3 *did* take off. Indeed, it is today still a sound statement of the courts’ duty under the section, and of the way it creates powers to override legislation. In particular, it is still the case that section 3 empowers the courts to contradict parliamentary intention, and that they can do so both by reading down

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<sup>35</sup> *R v A* [2001] UKHL 25, [2002] 1 AC 45, 68.

<sup>36</sup> Gearty, *On fantasy island* chap. 6, The Supremacy of the Judges

<sup>37</sup> Gearty, *On fantasy island* 81,85

<sup>38</sup> *R v Anderson* [2002] UKHL 46, [2003] 1 AC 837

statutory words and by implying extra terms into statutes. As the following cases show, both practices are now well established.

The significance of the judicial power to read down statutes is highlighted by the decision in *Sheldrake v DPP*.<sup>39</sup> Here, the House of Lords read section 11(2) of the Terrorism Act 2000 as imposing an evidential rather than a legal burden.<sup>40</sup> And this was done, explicitly, contrary to Parliament's intention in enacting the provision. Giving judgment for the majority, Lord Bingham confirmed that, in principle, the interpretative obligation in s3 of the HRA "may require the court to depart from the legislative intention of Parliament".<sup>41</sup> And he stressed that in the case at hand, there could be "no doubt that Parliament intended section 11(2) to impose a legal burden on the defendant".<sup>42</sup> The court's task, he said was to assess "whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence."<sup>43</sup> The court found that it did, and the legislation was read down, and the burden on the defendant transformed, accordingly.

The significance of the power to imply extra terms is highlighted by *R v Waya, Secretary of State for the Home Department v MB*, and *Pomiczowski v District Court of Legnica, Poland*.<sup>44</sup>

*Waya* concerned the confiscation regime under the Proceeds of Crime Act 2002.<sup>45</sup> That regime required the court to assess the amount recoverable through confiscation orders using a systematic, three stage test: the identification of the benefit obtained by the defendant, the valuation of that benefit, and the valuation of the defendant's recoverable assets (to set a cap on the recoverable amount).<sup>46</sup> Section 6(5) of the Act obliged the court to make an order requiring the payment of that amount. The court held that the systematic nature of the test combined with the obligation to order payment of the full amount it yielded created a risk (realised, the court found, in this case) that such an order would violate a defendant's right to the peaceful enjoyment of his possessions,

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<sup>39</sup> *Sheldrake v Director of Public Prosecutions* [2004] UKHL 43, [2005] 1 AC 264. See also *DPP v Wright* [2009] EWHC 105 (Admin), [2010] QB 224 (applying *Sheldrake* to an analogous burden of proof in the Hunting Act 2004 and *R v Lambert* [2001] UKHL 37 (which is cited, on this point, in the Conservative's reform proposals, discussed above)

<sup>40</sup> Terrorism Act 2000, section 11(2). Section 11(1) made it an offence to belong or profess to belong to a proscribed organisation; Section 11(2) made it a defence to "prove" that the organisation was proscribed when the member became a member, or began to profess membership or that the member had not participated in the organisation's activities while it was proscribed.

<sup>41</sup> *Sheldrake* [28]

<sup>42</sup> *Sheldrake* [50]

<sup>43</sup> *Sheldrake* [31]

<sup>44</sup> *R v Waya* [2012] UKSC 51, [2013] 1 AC 294; *Pomiczowski v District Court of Legnica, Poland* [2012] UKSC 20, [2012] 1 WLR 1604; *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440

<sup>45</sup> Proceeds of Crime Act 2002.

<sup>46</sup> *Waya* applying *R v May* [2008] UKHL 28, [2008] AC 1028

guaranteed by Protocol 1, Article 1 of the Convention. Accordingly, and in exercise of its powers under section 3 of the HRA, the court inserted a qualification as to proportionality into the Act:

“It is plainly possible to read paragraph (b) as subject to the qualification: “except in so far as such an order would be disproportionate and thus a breach of article 1, Protocol 1.” ... in order to ensure that the statute remains Convention-compliant”<sup>47</sup>

The court took a similar approach in *Secretary of State for the Home Department v MB*.<sup>48</sup> The Prevention of Terrorism Act 2005 included provision for the courts to supervise the imposition of control orders by the Home Secretary.<sup>49</sup> The Act also required that the rules of court in such proceedings obliged the court to refuse permission to disclose information where disclosure would be contrary to the public interest.<sup>50</sup> This requirement to refuse disclosure created a conflict with Article 6 of the Convention in cases involving material whose disclosure was contrary to the public interest but which was also essential to a fair hearing. Accordingly, the court implied a qualification into the relevant sections of the statute:

paragraph 4(3)(d) of the Schedule to the 2005 Act, should be read and given effect “except where to do so would be incompatible with the right of the controlled person to a fair trial”. Paragraph 4(2)(a) ... would have to be read in the same way.<sup>51</sup>

*Pomiczowski* concerned the strict time limits for appeals under the Extradition Act 2003. The court found that the statutory scheme infringed Article 6 of the Convention, and remedied the infringement by implying a qualification into the statute:

“the statutory provisions concerning appeals can and should all be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for both filing and service, where such statutory provisions would otherwise operate to prevent an appeal in a manner conflicting with the right of access to an appeal process ... under article 6... The High Court must have power in any individual case to determine whether the operation of the time limits would have this effect. If and to the extent that it would do so, it must have power to permit and hear an out of time appeal which a litigant personally has done all he can to bring and notify timeously”<sup>52</sup>

In each case, the court altered legislation contrary to parliamentary intention in order to bring it into line with the demands of Convention rights. Any and all of them show the conflict between the interpretive obligation in section 3 of the HRA and the doctrine of parliamentary sovereignty. But these cases (and others like them) and the literature do feature three potential responses to

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<sup>47</sup> *Waya* [16]

<sup>48</sup> *MB*

<sup>49</sup> Prevention of Terrorism Act 2005 section 3.

<sup>50</sup> Prevention of Terrorism Act 2005 paragraph 4 of the Schedule.

<sup>51</sup> *MB* [72]

<sup>52</sup> [39]

this line of argument. Each seeks, in a different way, to reconcile the operation of section 3 with the doctrine of parliamentary sovereignty.

The first is implausible. It suggests that, since the HRA, Parliament is taken to have a standing intention that legislation be compatible with Convention rights. The use of section 3 is sometimes justified in this way. For example, in *Pomiechowski*, Lord Mance suggests that his decision to imply a judicial discretion to extend time limits into the statute was compatible with Parliament's intention in enacting the Extradition Act:

“In the present case, there is no reason to believe that Parliament either foresaw or intended the potential injustice which can result from absolute and inflexible time limits for appeals. It intended short and firm time limits, but can only have done so on the basis that this would in practice suffice to enable anyone wishing to appeal to do so without difficulty in time”<sup>53</sup>

But this line of argument contradicts the pervasive dicta scattered throughout the line of cases discussed above which acknowledge that the use of section 3 violates rather than honours parliament's intention. Indeed, this is often the source of judicial misgivings. For example, Lord Bingham was tempted to dissent in *MB* from a decision which he recognised “would very clearly fly in the face of Parliament's intention”.<sup>54</sup> Similarly, Lord Phillips articulates some misgivings about the conflict between interpretation under section 3 and parliamentary intention in his 2010 Weedon lecture.<sup>55</sup>

A second, more subtle, line of argument gives priority to Parliament's intention in 1998. Gearty, for example, notes of the section 3 duty that the judges “had it thrust upon them by Parliament” and that these cases involve the courts “squaring two statutory purposes”.<sup>56</sup> Richard Bellamy notes the argument, which he attributes to the court itself, that “post-HRA rights-based review of legislation has legitimacy because it accords with the express will of Parliament that [the court] interpret the law with regard to these norms”.<sup>57</sup> And, in Paul Robert's elegant explanation of the decision in *Sheldrake*:

“This approach was calculated to serve parliamentary sovereignty in the deeper, richer sense, previously elaborated by Lord Steyn in *R. v. A (No. 2)* ...by giving effect to Parliament's contextualising second order directive for broad compliance with the HRA

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<sup>53</sup> [39]

<sup>54</sup> *MB* [44]

<sup>55</sup> Lord Phillips, ‘The Art of the Possible: statutory interpretation and human rights’, 2010

<sup>56</sup> Gearty, *On fantasy island* 83, 89

<sup>57</sup> Richard Bellamy, ‘Political constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86, 105

in all aspects of legislation and law enforcement – including judicial interpretation of Parliament’s own first-order legislative intentions.”<sup>58</sup>

A third line of thought denies the contradiction between section 3 and parliamentary sovereignty by pointing to the limits of the powers that it gives the courts. In *R v Anderson*, Lord Bingham emphasised that section 3 does not go so far as to empower the courts to adopt interpretations which are “contrary to express statutory words or ...by implication necessarily contradicted by the statute”.<sup>59</sup> In *Re S*, Lord Nicholls said that courts cannot depart “substantially from a fundamental feature of an Act”.<sup>60</sup> In *Ghaidan v Godin Mendoza*, Lord Nicholls denied that the courts cannot remove “the very core and essence, the ‘pith and substance’” of legislation.<sup>61</sup> The courts’ own articulation of these limits is a little inconsistent, but the underlying idea is clear. This aspect of the section 3 jurisprudence is an important part of Gearty’s dismissal of the argument from parliamentary sovereignty; the courts cannot override, he notes, “what the statute was really about”.<sup>62</sup>

These second and third responses are true. Section 3 does rely on Parliament’s intention in enacting the 1998 Act for its legitimacy and the powers it grants to the court are not plenary or unlimited. But neither of those facts is enough to counter the argument from parliamentary sovereignty. In each of the cases described above, the court deployed the tools described by Lord Steyn in *R v A* to alter legislation contrary to Parliament’s intention. In *Sheldrake*, the court made the defence less onerous than Parliament intended. *Waya* results in confiscation orders which are for lower sums than Parliament intended. The decision in *MB* meant that the Home Secretary was unable to rely on material which Parliament intended her to be able to rely on. And in *Pomiechowski* the court arrogated to itself a discretion to extend time limits which Parliament had intended to be short and inflexible. This is enough to establish a conflict with parliamentary sovereignty. Section 3 is a modest, self-imposed restraint on parliamentary sovereignty. But a modest, self-imposed restraint is still a restraint. And, for that reason, the argument from parliamentary sovereignty is cogent. It should be taken more seriously when it is deployed by critics of the HRA.

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<sup>58</sup> Paul Roberts, ‘Criminal procedure, the presumption of innocence and judicial reasoning under the Human Rights Act’ in Helen Fenwick and others (eds), *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press 2007) 410

<sup>59</sup> *Anderson* [59]

<sup>60</sup> *Re S* [40].

<sup>61</sup> *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [111] (The internal quote, ‘pith and essence’ is to Lord Watson [in a different context] in *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580,587)

<sup>62</sup> Gearty, *On fantasy island* 92

## Conclusion: Sovereignty and the Case Against the HRA

So far, then, I have argued that the arguments from national sovereignty and from parliamentary sovereignty are cogent, in the sense that it is true that the Human Rights Act compromises sovereignty in both senses. And, I have suggested, it follows that those arguments ought to have been (and ought to be) taken more seriously by defenders of the Act. But (perhaps belatedly) I should stress that none of this has been intended to constitute an endorsement of these elements of the case against the Act, at least not *qua* arguments against the Act. It simply does not follow from the facts that the Act compromises national and parliamentary sovereignty that it ought to be repealed. On the contrary, both of these features of the Act strike me as eminently justifiable. In fact, in my view, they are justified. There are good reasons for cooperating in an international, partly judicial, effort to settle the concrete demands of our collective abstract commitment to the rights declared (in fairly abstract fashion) in the European Convention on Human Rights. There are good reasons for that cooperation to involve the acknowledgement of a certain degree of authority (even in domestic law) for the decisions of the European Court of Human Rights. And there are also good reasons for giving the courts a limited (and reversible) but real power to override parliamentary violations of those rights to which we as a community have announced (and continue to profess) our commitment. As it happens, those good reasons are captured reasonably well by the subtle and nuanced scheme put in place by the HRA – even when, as it is fair to argue happened in the lines of cases discussed above, it has been developed in ways which go beyond Parliament’s intention in 1998. These various reasons have been explored, tested and developed in a rich tradition of academic literature, predating, abstracted from, and focussed on the HRA. Furthermore, many of those reasons feature in the judicial decisions discussed above about the appropriate scope of the Act’s provisions. These reasons ought to be at the heart of the controversy about the Act’s future. But they have been effectively obscured from public debate by the emergence of a constitutional orthodoxy, which denies the Act’s impacts on sovereignty, characterises the arguments from sovereignty as misconceived, and treats their advocates as constitutional illiterates. The debate about the Human Rights Act is not an example of healthy constitutional debate. Unfortunately, some of the positions defended by the Act’s critics *are* fundamentally misconceived in ways which do point to constitutionally illiteracy or bad faith.<sup>63</sup> But the arguments from sovereignty are not among them.

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<sup>63</sup> The most famous example is, of course, Catgate, where the current Prime Minister (then Home Secretary) said: “We all know the stories about the Human Rights Act...the illegal immigrant who cannot be deported because – and I am not making this up – because he had a pet cat”. The speech has not, as far as I know, been officially published. It is however, widely available. See <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech->

I want to close by suggesting that the debate is not just substantively impoverished by the absence of arguments which ought to be at its heart. The refusal to take seriously and engage with the arguments from sovereignty has contributed in its own way to the degradation in the quality of our national discourse. Dismissing cogent arguments is frustrating for and disrespectful to those who espouse them. Sovereignty provides rational (albeit, in my view, ultimately mistaken) reasons to oppose the Human Rights Act. But those reasons do not, by themselves, amount to reasons to hate human rights. However, by failing to take that rational opposition seriously, and by rhetorically banishing its proponents from an important arena of constitutional controversy, defenders of the Act risk weakening rather than strengthening the Act's place in the UK constitution. By refusal to engage in honest rational debate, they may even be giving the Act's opponents a reason to hate human rights.

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[in-full](#) for a transcript. For a sympathetic analysis (which nevertheless characterises the speech as “impossible to justify”, see Campbell, above, n28