A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom

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In 2014, the Supreme Court of Canada ruled in Reference re Supreme Court Act, ss 5 and 6 *that its position at the apex of the judicial system was constitutionally entrenched. It did so by interpreting its own history and developing a narrative that emphasized both the critical importance of section 6 in protecting Quebec's distinct interests and legal tradition, and the Court's position as domestic rights protector. The author analyzes this narrative and argues that the Court's entrenchment within the* Constitution Act, 1982 *was not as inevitable as its reasoning suggests. The article then turns its attention to the newly established United Kingdom Supreme Court and its role pre- and post-adoption of the* Human Rights Act 1998. *The author pulls out themes in the Court's recent judgments—which suggest a move away from the European* Convention for the Protection of Human Rights and Fundamental Freedoms *and the Strasbourg Court and a desire to return to British common law traditions—and an emerging narrative that resembles that of its Canadian counterpart. The author then compares the narratives developed by the two courts to predict how the United Kingdom Supreme Court might in the future interpret its own role as the guardian of its legal tradition.*

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Introduction

Why compare the Supreme Court of Canada and the United Kingdom Supreme Court from the perspective of constitutional change? Both are high courts in systems that have a common constitutional tradition: Canada's constitution announces in its preamble that it is to be "a Constitution similar in principle to that of the United Kingdom".[1] Of course, there are large differences between Canada and the UK. One is a federation with a written constitution and constitutionalized bill of rights and the other has neither of these features. Nevertheless, the UK is slowly moving in a Canadian direction: It has undergone important constitutional reforms, it has adopted a formal enforcement mechanism for fundamental rights, and the Westminster Parliament has devolved important powers to Scotland, Wales and Northern Ireland.

Why compare the two now? There is a wealth of recent cases and commentary on the constitutional roles of the two institutions.

1. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

Both have recently expressed distinctive understandings of their positions in their respective constitutional orders, drawing in part on supporting narratives to justify their reasoning. In this article, I suggest that there are similarities in the narratives recently developed by the two courts. My motivation for writing is a "general curiosity"[2] about whether some tentative lessons and predictions can be drawn from the ample available material, allied to a degree of skepticism about the accuracy of the narratives relied upon by the two courts.

My particular focus is on the SCC's 2014 decision in *Reference re Supreme Court Act, ss 5 and 6*,[3] and the role of the UK high court after the adoption of the *Human Rights Act 1998* (*HRA*)[4] made the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (*Convention*)[5] part of domestic law. In Part I, I explore the relationship between the narrative developed by the SCC in *Reference re Supreme Court Act* and the substantive decision in that case. In Part II, I provide an overview of the UK high court's role pre-and post-*HRA*, and its emerging predilection for a return to British common law and domestic rights protection. Finally, in Part III, I compare the narratives developed by both Courts and close by offering some insight into how the UK Supreme Court may solidify its position as guardian of the domestic constitutional order.

What emerges from the comparison is that the Canadian Supreme Court is much clearer about its constitutional role. In *Reference re Supreme Court Act*, the SCC confirmed beyond all doubt its entrenchment in the Canadian Constitution, weaving together a supporting narrative that allowed the Court to describe itself both as a neutral arbiter of disputes relating to federalism and human rights, and as a champion of the distinct values of the province of Quebec. These important developments were made possible by a favourable constitutional climate that the Court itself had a large role in creating.

2. Kazuyuki Takahashi, "Why Do We Study Constitutional Laws of Foreign Countries, and How?" in Vicki C Jackson & Mark Tushnet, eds, *Defining the Field of Comparative Constitutional Law* (Westport, Conn: Praeger, 2002) 35 at 48.

3 2014 SCC 21, [2014] 1 SCR 433 [*Reference re Supreme Court Act*].

4. (UK), c 42 [*HRA*].

5. 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*Convention*].

By contrast, the UK Supreme Court has found it much more difficult to identify its place in the constitutional order, most notably in the area of rights protection. It may have initially embraced the role accorded to it by the *HRA*, but political attacks on the new rights-protecting machinery rendered this embrace perilous. After all, the UK remains a jurisdiction in which fundamental constitutional change can be achieved by a transitory parliamentary majority. Moreover, the Court is not the sole interpreter of the *HRA* and the *Convention* rights it incorporates. In an important respect, it found itself subservient to the European Court of Human Rights (the Strasbourg Court).

Unsurprisingly, the UK Supreme Court has backed away from the *HRA*, preferring instead in recent decisions to emphasize the common law. In doing so, it relies on a narrative that venerates the common law and describes the Court as a protector of home-grown, rather than European, constitutional values. These values—and perhaps the Court itself—may even be entrenched beyond the reach of ordinary legislation. The Court now exercises important functions in respect of the devolution of law-making power to the component parts of the UK, which enhances the plausibility of it adopting a role as guardian of an autochthonous constitutional tradition.

I. Canada: The Constitutional Entrenchment of the Supreme Court

A. The Appointment of Justice Nadon

In late September 2013, Prime Minister Stephen Harper nominated Federal Court of Appeal Justice Nadon to the SCC. The legality of this nomination was challenged; the issue lay in sections 5 and 6 of the *Supreme Court Act*:[6]

5. Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.	5. Les juges sont choisis parmi les juges, actuels ou anciens, d'une cour supérieure provinciale et parmi les avocats inscrits pendant au moins dix ans au barreau d'une province.
...	...
6. At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province.	6. Au moins trois des juges sont choisis parmi les juges de la Cour d'appel ou de la Cour supérieure de la province de Québec ou parmi les avocats de celle-ci.

Given that federal court judges are no longer *advocates* and are not members of Quebec courts, the nomination of a sitting judge of the Federal Court of Appeal was legally doubtful, sufficiently so that the federal government commissioned a (supportive) opinion from retired Supreme Court Justice Ian Binnie.

Subsequently, the federal government took two steps to end the ongoing uncertainty about the validity of the appointment.[7] First, it proposed modifications to the *Supreme Court Act*. These modifications took the form of declaratory legislation clarifying that members of the federal courts can be promoted to the Supreme Court. For example, the proposed section 6.1 read: "For greater certainty, for the purpose of

6. RSC 1985, c S-26, ss 5–6.

7. *House of Commons Debates*, 41st Parl, 2nd Sess, vol 147 No 5 (22 October 2013) at 252 (Hon Peter MacKay).

section 6, a judge is from among the advocates of the Province of Québec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province."[8] Second, the government referred two questions to the Court for decision: whether federal court judges can be appointed to the Court pursuant to sections 5 and 6 of the *Supreme Court Act*; and whether Parliament can enact sections 5.1 and 6.1.[9]

As is well known, the Court concluded that sections 5 and 6, properly interpreted, excluded federal court judges from appointment to its three Quebec seats.[10] The question then arose whether the declaratory legislation was valid. Ordinarily, a statute like the *Supreme Court Act* can be modified by the competent legislature—here, the federal Parliament—at its pleasure. The situation would be different, however, if there were constitutional constraints on changes to the Supreme Court. Invited to analyze the question of its constitutional status, the Supreme Court took up the offer.

B. The Supreme Court Rules on its Constitutional Status

(i) Canada's Constitutional History

The waters of Canadian constitutional amendment are murky.[11] Section 101 of the *Constitution Act, 1867* vests in Parliament the power to provide "for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada".[12] Yet, this power is circumscribed

8. *Reference re Supreme Court Act, supra* note 3.

9. PC 2013-1105, (2013) C Gaz II, 2218.

10. See Ian Peach, "*Reference re Supreme Court Act, ss 5 and 6*: Expanding the Constitution of Canada" (2014) 23:3 Const Forum Const 1.

11. See Benoît Pelletier, *La modification constitutionnelle au Canada* (Scarborough, Ont: Carswell, 1996) at xii. Professor Pelletier has put the point well, in describing Part V of the *Constitution Act, 1982*:

> Malgré tout, les dispositions de cette loi ont souvent été rédigées avec beaucoup de hâte, sans que leur enchevêtrement ait été soigneusement analysé. Aussi chercherait-on en vain à déceler un quelconque fil conducteur dans la procédure de modification constitutionnelle issue du compromis de 1982. De même, les auteurs divergent fréquemment de point de vue quant à la portée exacte de telle ou telle modalité composant cette procédure.

Ibid.

12. *Constitution Act, 1867, supra* note 1, s 101.

by Part V of the *Constitution Act, 1982*,[13] which requires unanimous provincial consent to changes to the "composition of the Supreme Court of Canada"[14] and the agreement of seven provinces representing fifty percent of the population for any other changes—the so-called "7/50" formula.[15] The adoption of Part V was part of the process of "patriating" the Canadian Constitution from the Westminster Parliament.

Prior to the *Reference re Supreme Court Act*, there was some disagreement about the place of the SCC in the constitutional framework. Notably, the *Supreme Court Act* does not appear in the list of statutes annexed to section 52 of the *Constitution Act, 1982* that are said to form part of the "Constitution of Canada".[16] While section 101 vests Parliament with the power to establish a general court of appeal, it does not impose a duty to do so.[17] The Attorney General of Canada argued that Part V would only bite on an effort to entrench the SCC somewhere in the Constitution of Canada. In such a process, unanimity would be required for anything touching the composition of the Court while the 7/50 formula would apply to any other proposed changes.[18] Any other tinkering with the *Supreme Court Act* could be accomplished by means of ordinary legislation pursuant to section 101.[19] There was also some historical support for this argument, as this approach was taken in the Meech Lake Accord.[20]

However, the Court rejected this argument as unsustainable, for it would entrench the Court's *exclusion* from constitutional protection and serve instead to insulate a unilateral federal power of amendment of any

13. Being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Constitution Act, 1982*].

14. *Ibid*, s 41(d).

15. *Ibid*, s 42(1)(d).

16. In the words of section 52(2), the "Constitution of Canada *includes*" the documents listed in the schedule [emphasis added]. The Supreme Court has continually insisted that the list is not exhaustive. See especially *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 118 NSR (2d) 181; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32, 161 DLR (4th) 385. See also *British Columbia (Attorney General) v Canada (Attorney General)*, [1994] 2 SCR 41 at 94, 91 BCLR (2d) 1.

17. *Constitution Act, 1867*, *supra* note 1, s 101.

18. See Pelletier, *supra* note 11 at 53, n 154.

19. See Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2007) (loose-leaf revision 5), ss 1.4, 4.2(c), 4.4.

20. First Minister's Meeting on the Constitution, *1987 Constitutional Accord*, Doc R165-80-7-E (Quebec: 30 April 1987).

aspect of the Supreme Court from the rigours of the Part V procedures.[21] Two practical consequences flowed from the argument, consequences, which, in the Court's view, the provinces could never have intended. First, "Parliament could unilaterally and fundamentally change the Court, including Quebec's historically guaranteed representation, through ordinary legislation"[22] and second, "the Court would have less protection than at any other point in its history since the abolition of appeals to the Privy Council".[23] As a result, the unilateral power exercisable by Parliament under section 101 had been "overtaken by the Court's *evolution* in the structure of the Constitution, as recognized in Part V"[24] and was henceforth restricted to "routine amendments necessary for the continued maintenance of the Supreme Court".[25]

The Court's portrayal of Canadian constitutional history and its own evolution is striking. At the time of Confederation, the Judicial Committee of the Privy Council was the general court of appeal. Several years elapsed before a domestic high court was created.[26] It was not until 1949, when appeals to London were abolished, that the Supreme Court became the authoritative interpreter of Canadian law and "the keystone to Canada's unified court system".[27] Its role would continue to mature as the twentieth century progressed.[28] Significantly, the abolition of civil appeals "as of right"[29] freed its judges up to "focus on questions of public legal importance".[30] Finally, the adoption of section 52 of the *Constitution Act, 1982*, which expressed the Constitution to be the "supreme law of Canada",[31] required "[t]he existence of an impartial and authoritative judicial arbiter".[32] This justified the conclusion that patriation afforded the essential features of the Supreme Court constitutional protection and

21. *Reference re Supreme Court Act*, *supra* note 3 at para 98.
22. *Ibid* at para 99.
23. *Ibid*.
24. *Ibid* at para 101 [emphasis added].
25. *Ibid*.
26. *Supreme and Exchequer Court Act*, SC 1875, c 11.
27. *Reference re Supreme Court Act*, *supra* note 3 at para 84.
28. *Ibid* at para 86.
29. *Ibid*.
30. *Ibid*.
31. *Canada Act, 1982*, *supra* note 13, s 52.
32. *Reference re Supreme Court Act*, *supra* note 3 at para 89.

guaranteed that any changes to those features would be subject to the amending procedures.[33]

(ii) The Court's Narrative

This reading of the historical record is reasonably convincing, but it does seem rather convenient, even Whiggish, in portraying the Court's inevitable trajectory towards the apex of Canada's constitutional structure. For instance, abolition of appeals to the Privy Council can be seen as yet another one of Canada's slow, halting steps along the path towards independence[34]—perhaps a halfway marker between the *Statute of Westminster, 1931*[35] and patriation—rather than a positive affirmation of the role of a cherished national institution. Certainly "the idea that Canadian values should be taken into account by judges"[36] influenced the decision to remove appeals to London. Nonetheless, dissatisfaction with the work of the Privy Council, seen as unduly favourable to provincial interests at the expense of strong central government,[37] was probably

33. See *ibid* at para 90.

34. See Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (New York: Oxford University Press, 2005) [Oliver, *The Constitution of Independence*]. See generally Leslie Zines, *Constitutional Change in the Commonwealth* (New York: Cambridge University Press, 1991).

35. (UK), 22 & 23 Geo V, c4, s 2.

36. Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 275.

37. See e.g. WPM Kennedy, "The British North America Act: Past and Future" (1937) 15:6 Can Bar Rev 393 at 398–99. Kennedy decried the perceived erosion of federal power effected by the Privy Council:

> The federal "general power" is gone with the wind. It can be relied upon at best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used, for these, though in fact national in the totality of their incidents, must not be allowed to leave their watertight provincial compartments; the social lines must not obliterate the legal lines of jurisdiction—at least this is the law, and it killeth.

Ibid. See also FR Scott, "The Privy Council and Minority Rights" (1930) 37 Queen's Quarterly 677; Raphael Tuck, "Canada and the Judicial Committee of the Privy Council" (1941) 4:1 UTLJ 33.

more influential than a sense of national pride in the Court.[38] Canadian independence required the termination of appeals to the Privy Council, but "a realistic appraisal of the quality and stature of the Supreme Court [in the 1920s] demanded a delay".[39] In 1947, when the way had been cleared for abolition, the "government continued to hesitate, a good indication that public opinion was still ambivalent".[40] The Supreme Court's metamorphosis into a "keystone" could be read as emerging due to historical happenstance rather than popular or political acclaim.

There are several interesting omissions from the Court's account of its journey. I discuss these in ascending order of importance. First, the Court gave little weight to the understanding of the actors in post-patriation constitutional reform efforts. For example, the drafters of the Meech Lake Accord proposed to add new sections to the *Constitution Act, 1867* in order to formally entrench the Court. In this process, unanimity was required for anything touching the composition of the Court while the general amending formula applied to all other changes. Though not conclusive,[41] this historical precedent lends itself to the argument that the

38. See John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002) at 228–32.

39. James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press for the Osgoode Society, 1985) at 185.

40. *Ibid* at 189.

41. See Paul Daly, "Submissions to Senate Standing Committee on Legal and Constitutional Affairs re Modifications to the Supreme Court Act", (19 November 2013), online: <http://ssrn.com/abstract=2357273> at 22, n 71 [Daly, "Submissions to Senate Standing Committee"]: "This approach was taken for Meech Lake, though this fact is not conclusive of the question. All would no doubt agree that the provisions of Part V apply to the sort of entrenchment envisaged by Meech Lake. But this does not resolve the question whether Part V applies to some types of amendment to the *Supreme Court Act*." *Ibid*.

Court was not immediately entrenched in 1982.[42] More could have been done to address the argument.

Second, although the abolition of automatic civil appeals has generally been seen as a significant event in the Court's evolution,[43] it remains the case that there are *criminal* appeals as of right.[44] Accordingly, the Court's control over its own docket is not absolute, and its freedom to focus on matters of fundamental legal importance not unfettered. Third, it is notable that the Court does not mention its controversial, patriation-enabling decision in the *Reference Re Resolution to amend the Constitution* (*Patriation Reference*).[45] Formally, amendments to what was then the *British North America Act, 1867* were effected by Westminster on the request of the House of Commons and Senate.[46] Prime Minister Pierre Elliott Trudeau threatened to act without the support of the provinces, provoking constitutional tumult. A UK parliamentary committee was advised by William Wade, the doyen of British constitutional lawyers, that Westminster had a duty to act "as guardian of the rights

42. See Peter Oliver, "Canada, Quebec, and Constitutional Amendment" (1999) 49:4 UTLJ 519 at 576–77, n 188 [Oliver, "Constitutional Amendment"]. However, Oliver concludes that the "apparent purpose" of the drafters was immediate entrenchment. He also states with eerie prescience:

> If . . . the Supreme Court of Canada is presented, for example, with a reference by the province of Quebec via its Court of Appeal questioning unilateral federal alteration of vital aspects of the Supreme Court of Canada, a bold Court might well be willing to give immediate and effective meaning to paragraphs 41(d) and 42(1)(d) in order to protect Quebec's interests.

Ibid at 580.

43. See e.g. Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013) at 42.

44. *Canadian Criminal Code*, RSC 1985, c C-46, ss 691–96.

45. *Reference Re Resolution to amend the Constitution*, [1981] 1 SCR 753, 34 Nfld & PEIR 1 [*Patriation Reference* cited to SCR].

46. An excellent account is given in Oliver, *The Constitution of Independence*, *supra* note 34. See also Geoffrey Marshall, *Constitutional Conventions* (Oxford: Clarendon Press, 1984) at 180–200.

of the Provinces".[47] Litigation understandably ensued in Canada. Three provincial governments referred the legality of the Trudeau plan to their respective provincial courts of appeal. Consolidating the appeals, a majority of the Court recognized that there was a constitutional convention requiring "a substantial measure of provincial assent" to constitutional changes.[48] The Court did not shrink from recognizing—as opposed to enforcing—a convention.[49] Neither of these conclusions was inevitable:[50] The Court could well have concluded that the matter was entirely non-justiciable, but in requiring "substantial" provincial support, the Court ensured that a single province could not veto constitutional change[51] and that country-wide assent would nonetheless be necessary. Its own decision thereby paved the way for the very patriation process that "enhanced the Court's role under the Constitution and confirmed its status as a constitutionally protected institution".[52]

Fourth, there is no discussion of the clauses in the *Canadian Charter of Rights and Freedoms* (*Charter*)[53]—which was entrenched by the adoption of the *Constitution Act, 1982*—that allow for the limitation of some protected rights. Notably, the notwithstanding clause contained in section 33 permits Parliament or a provincial legislature to expressly declare that legislation "shall operate notwithstanding" certain provisions of the

47. UK, HC, "Amendment of the Constitution of Canada: The Role of the United Kingdom Parliament", in *Sessional Papers* vol II (1980–81) 102 at 105, para 20. The committee concluded that Canadians had a "right to expect the UK Parliament to exercise its amending powers in a manner consistent with the federal nature of the Canadian constitutional system", but also acknowledged that the British authorities were "not *bound* to reject" a request made without provincial support [emphasis in original]. UK, HC, "British North America Acts: The Role of Parliament–Part A", in *Sessional Papers* vol I (1980–81) vii at i–ii, para 103. For a first-hand account, see John Finnis, "Patriation and Patrimony: The Path to the Charter" (2015) 28:1 Can JL & Jur 28.

48. *Patriation Reference*, *supra* note 45 at 905.

49. See *ibid* at 885.

50. See e.g. Pierre Elliott Trudeau, "Convocation Speech at the Opening of the Bora Laskin Law Library" (1991) 41:3 UTLJ 295 at 299–303. Although he was a law professor before entering politics, Trudeau was not an impartial observer. However, this speech neatly summarizes the important objections to the decision.

51. Including Quebec, of course. See e.g. François Boulianne, « Le rapatriement constitutionnel de 1982: existait-il une coutume constitutionnelle nécessitant l'accord unanime des provinces pour modifier la Constitution? » (2014) 55:2 C de D 329.

52. *Reference re Supreme Court Act*, *supra* note 3 at para 88.

53. Part I of the *Constitution Act, 1982*, *supra* note 13 [*Charter*].

Charter.[54] The presence of this power has not prevented the emergence of a "highly juridical orientation to constitutionalism":

> A robust rights culture has arisen, but it is one that privileges courts, as interpreters and defenders of rights, and reflects deep scepticism about whether representative institutions have a valid role to contribute to constitutional judgment, other than to anticipate judicial decisions and correct offending legislation within the parameters established by courts.[55]

Such is the dominance of the Court in matters of *Charter* interpretation that the notwithstanding clause has slipped into dormancy and perhaps even desuetude.[56]

There was nothing inevitable about this:[57] "[C]oordinate interpretation", which privileges the input of the executive and legislative branches in matters of constitutional law, is an alternative means "of reconciling Canadian judicial power with the other principles and norms found in the Canadian constitution".[58] The Court's treatment of section 1 of the *Charter* has been influential in this respect. The provision permits the imposition of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[59]

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54. *Ibid*, s 33.

55. Janet L Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 69:1 Mod L Rev 7 at 19.

56. See Stephen Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism" (2010) 8:2 Intl J Constitutional L 167 at 179; Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62:3 Am J Comp L 641 at 669–73.

57. See Grant Huscroft, "Constitutionalism from the Top Down" (2007) 45:1 Osgoode Hall LJ 91 at 94. *Cf* Hiebert, *supra* note 55 ("[s]hort of amending the Constitution, the judiciary is the ultimate authority when determining the constitutional validity of legislation" at 11).

58. Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 2010) at 3. As the author concludes, assuming that the adoption of the *Charter* caused a regime change "is problematic . . . [because] many vestiges of parliamentary supremacy are embedded in the new regime of constitutional supremacy". *Ibid* at 148. See also Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ 221.

59. *Charter*, *supra* note 53, s 1.

Here, the Court's *own* adoption of a proportionality test that gave *it* the authority to determine whether limits on *Charter* rights can be justified,[60] and its *own* retention of the final word as to the compatibility of legislative modifications with judicial decisions,[61] solidified its position at the apex of Canada's constitutional order. My point is not that the Court's ultimate conclusion was wrong,[62] but that it relied on a supporting narrative that was somewhat selective. A fuller, more critical account highlights just how historically contingent the Court's ascent was and how the Court itself paved part of the way.

(iii) The Court's Counter Narrative

Famously, Quebec never signed the *Constitution Act, 1982*, and many in the province continue to refuse to recognize its legitimacy. Yet in the *Reference re Supreme Court Act*, the SCC was able to portray itself as a defender of Quebec interests and read the Constitution as requiring it to protect them. A document and an institution to which many Quebecers deny legitimacy was invoked by the Court to protect Quebec's distinctive legal tradition.

When interpreting section 6 of the *Supreme Court Act*, the Court supported its textual analysis by reference to the parliamentary debates on the creation of the Supreme Court in 1875. The debates supported the conclusion that the purpose of section 6 is "to ensure not only civil law training and experience on the Court, but *also* to ensure that *Quebec's distinct legal traditions and social values are represented on the Court*, thereby *enhancing the confidence of the people of Quebec* in the Supreme Court as the final arbiter of their rights".[63] The drafters of section 6 saw it

60. See *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719. See e.g. Christopher P Manfredi, "Judicial Power and the *Charter*: Reflections on the Activism Debate" (2004) 53 UNBLJ 185 at 188.

61. See e.g. Christopher P Manfredi, "The Day the Dialogue Died: A Comment on *Sauve v. Canada*" (2007) 45:1 Osgoode Hall LJ 105.

62. See Daly, "Submissions to Senate Standing Committee", *supra* note 41.

63. *Reference re Supreme Court Act*, *supra* note 3 at para 49 [emphasis added]. See also *ibid*, ("Its function is to limit the Governor in Council's otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebec's legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court" at para 59).

"as a means of ensuring not only the functioning, but also the legitimacy of the Supreme Court as a federal and bijural institution".[64]

The bijural nature of the institution—a bargain central to the creation of the Supreme Court—was now constitutionally entrenched.[65] The effect of including the composition of the SCC in Part V was to "codify the composition of and eligibility requirements for appointment to the SCC as they existed in 1982".[66] Without "the guarantee that a significant proportion of the judges would be drawn from institutions linked to Quebec civil law and culture",[67] there would have been no Supreme Court at all and the guarantee's objective—to ensure the representation of Quebec's legal tradition—remains even today integral to the "competence, legitimacy, and integrity of the Court".[68] The practical effect was to give Quebec a veto over changes to its mode of representation on the Court: "Requiring unanimity for changes to the composition of the Court gave Quebec constitutional assurance that changes to its representation on the Court would not be effected without its consent."[69] The Court was thus able to develop a counter narrative to that of its opponents.

Historically, some Quebec nationalists have associated the Court with the gradual erosion of provincial autonomy.[70] According to one of them, the Court has been like the Tower of Pisa—always leaning to the side of Ottawa.[71] The Court's pre-eminent status, which it saw as confirmed by the patriation of the Constitution, was achieved without the agreement

64. *Ibid* at para 55.
65. *Ibid* at para 93.
66. *Ibid* at para 91.
67. *Ibid* at para 93.
68. *Ibid*.
69. *Ibid*.
70. See Pierre Patenaude, « L'érosion graduelle de la règle de l'étanchéité : une nouvelle menace à l'autonomie du Québec » (1979) 20 C de D 229. See also Jacques-Yvan Morin, "A Constitutional Court for Canada" (1965) 43:4 Can Bar Rev 545 at 547. Morin went so far as to suggest that the replacement of the Privy Council by the Court "may have been one of the initial factors that launched the profound movement of self-determination which is developing in Quebec". *Ibid*.
71. The remark is attributed to Maurice Duplessis. See e.g. Jean Leclair, "Forging a True Federal Spirit: Refuting the Myth of Quebec's 'Radical Difference'" in André Pratte ed, *Reconquering Canada: Quebec Federalists Stand Up for Change* (Vancouver: Douglas & McIntyre, 2008) 29 at 47.

of Quebec,[72] a "continuing point of irritation in constitutional affairs".[73] However by emphasizing Part V—which requires Quebec's consent to make any changes to its mode of representation on Canada's highest court—the Court told a very different tale, one in which its composition is necessary for the preservation of Quebec's distinct legal tradition and social values.

Notably, the decision in the *Reference re Supreme Court Act* arrived during a period in which the Court preached the virtues of "cooperative federalism".[74] Crudely put, the conventional narrative of Canadian constitutional history is that the Privy Council favoured provincial interests at the expense of Ottawa (this, contrary to the wishes of the framers of the *Constitution Act, 1867*) and that the Court redressed the balance after 1949.[75] However, in recent times, the Court has been more respectful of provincial autonomy, encouraging the existence of overlapping regulatory schemes that allow both the central and provincial governments to exercise authority simultaneously.[76] Its favouritism in the *Reference re Supreme Court Act* for provincial interests is of a piece with this broader re-articulation of its role in the area of federal-provincial relations. Here, the Court's narrative is much more plausible.

72. See *Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 SCR 793, (*sub nom Reference re Quebec (AG) and Canada (AG)*) 140 DLR (3d) 385.

73. Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1992) at 574, n 41.

74. *Reference re Securities Act*, 2011 SCC 66 at para 132, [2011] 3 SCR 837.

75. See Saywell, *supra* note 38.

76. See e.g. *Bank of Montreal v Marcotte*, 2014 SCC 55, [2014] 2 SCR 726. *Cf Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 (no immunity for provincial regulation of assisted suicide from federal competence over criminal law); and *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, 383 DLR (4th) 614 (unilateral destruction of gun registry data claimed by Quebec was within the competence of Parliament).

II. The United Kingdom: The Evolution and Role of the High Court

A. The Establishment of the UK Supreme Court

Section 23(1) of the *Constitutional Reform Act, 2005*, provides laconically: "There is to be a Supreme Court of the United Kingdom."[77] By virtue of this provision, the UK Supreme Court sits now in the place previously occupied by the Appellate Committee of the House of Lords. The creation of the Court came during a period of intense constitutional change,[78] in which the reforms were adopted by ordinary legislation.[79] Chief among those was the adoption of the *HRA*. Although the UK had long been a signatory to the *Convention*—which establishes a system presided over by the Strasbourg Court—it never provided these rights a domestic law basis.[80] Individuals could take the long road to Strasbourg were they sufficiently well-funded and bloody-minded, but they could not assert their *Convention* rights directly in the UK courts. A government white paper explaining the Act described its aim as straightforward: "It is to make more directly accessible the rights which the British people already enjoy under the *Convention*. In other words, to bring those rights home."[81]

Devolution of law-making power to the component parts of the UK was also a theme of the constitutional reforms of the 1990s and 2000s. Scotland, Wales and Northern Ireland were granted significant autonomy

77. (UK), c 4, s 23(1).

78. See Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: Oxford University Press, 2013) (describes the reforms under the New Labour government in the late 1990s and early 2000s as "a more radical set of constitutional reforms" than those enacted by any government since the First World War at 3).

79. Although it must be noted that referendums were held in the affected regions before the adoption of the devolution statutes discussed below. See the text accompanying note 209, *below*.

80. A situation deplored by many. See e.g. Leslie Scarman, *English Law: The New Dimension* (London, UK: Stevens & Sons, 1974); Tom Bingham, "The European Convention on Human Rights: Time to Incorporate" (1993) 109:3 Law Q Rev 390.

81. UK, HC, "Rights Brought Home: The Human Rights Bill", Cm 3782 in *Sessional Papers* (1997) at para 1.19.

by the Westminster Parliament;[82] sitting in ultimate judgment on the scope of these devolved law-making powers is the Court.[83] The Court has both the power to hear appeals in cases involving claims that one of the regional legislatures has overstepped the legal mark,[84] and the power of abstract review of legislation referred for its assessment.

One might have thought that the establishment of a "Supreme Court", with these new functions, would make the UK's high court more assertive. As one member of the Court has recently remarked: "In a sense undreamt of in Victorian times, the Supreme Court has become a real constitutional court."[85] Coming so soon after the adoption in domestic law of *Convention* rights, one might have further thought that the new Court would assert itself above all as a rights-protecting institution. It could plausibly echo its Canadian counterpart and claim to be an "impartial and authoritative judicial arbiter" of human rights and devolution questions.[86]

To date, the UK Supreme Court has struggled to find a comfortable place as a rights-protecting institution. However, there are signs that it has learned important lessons from recent history. Now, the Court seems ready to claim the mantle of guardian of the domestic constitutional order, one in which an indigenous tradition of rights protection is venerated above one bearing a European hue.[87] Moreover, the Court has made some bold statements about its place in the constitutional order, raising the prospect that it may be entrenched—de facto if not de jure—where it is safe from the whims of transitory parliamentary majorities.

82. *Scotland Act 1998* (UK), c 46; *Government of Wales Act 1998* (UK), c 38, as amended by (UK), c 32; *Northern Ireland Act 1998* (UK), c 47.

83. For an early, perceptive treatment of this new role, see Paul Craig & Mark Walters, "The Courts, Devolution and Judicial Review" [1999] Pub L 274.

84. See e.g. *Scotland Act 1998*, *supra* note 82, s 33 (as amended by *Constitutional Reform Act 2005*, c 4, ss 40(4), 148(1), Schedule 9 para 96(1)); *Robinson v Secretary of State for Northern Ireland*, [2002] UKHL 32.

85. Lady Hale, "The Supreme Court in the United Kingdom Constitution" (Bryce Lecture delivered at the Somerville College, Oxford, 5 February 2015) at 2, online: UK Supreme Court <www.supremecourt.uk/docs/speech-150205.pdf>.

86. *Reference re Supreme Court Act*, *supra* note 3 at para 89.

87. I do not discuss in detail the relationship between the Court and the European Court of Justice, the ultimate arbiter in matters of European Union law. Although the relationship between the UK and Europe is extremely fraught politically, the legal landscape has remained stable in recent years, though see the text accompanying notes 176–83, *below*, for a discussion of an important decision that represents a potentially important shift.

Underpinning these recent shifts is a narrative that extols the virtues of the common law and the place of the judiciary in the new constitutional framework.

B. The Human Rights Act 1998*: Granting the Court New Powers*

(i) The Role of the Court Prior to the *Human Rights Act 1998*

The Court's purview prior to the *HRA* was one of purely administrative review. The UK courts assessed administrative action for legality, rationality and procedural fairness.[88] They had no power to review legislation for compatibility with constitutional or other norms.[89] The UK was a signatory to the *Convention*, but decisions issued by the Strasbourg Court were binding on the UK as a matter of international law only.

R v Secretary of State for the Home Department, ex parte Brind[90] is demonstrative of the *Convention*'s limited applicability prior to the *HRA*. Concerned that terrorists in the Northern Ireland conflict were using the public airwaves to further their cause, the Home Secretary issued a directive to broadcasters to refrain from airing direct statements by members of specified organizations. A group of journalists challenged the legality of the directive. Amongst other things, they argued that the Home Secretary had failed to have proper regard to Article 10 of the *Convention*, which protects freedom of expression. This argument was roundly rejected on the basis that, while ambiguous legislation should, where possible, be interpreted in accordance with international obligations, no such general principle existed in respect of administrative discretion.[91] Indeed, Lord Bridge perceived an approach that would privilege *Convention* rights as "a judicial usurpation of the legislative function".[92] There was, then, no requirement that the Home Secretary exercise his discretion in accordance with the strictures of *Convention*

88. See *Council of Civil Service Unions v Minister for the Civil Service*, [1983] UKHL 6.

89. But see TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (New York: Oxford University Press, 2001) (suggesting that judges must exercise their authority to interpret legislation to ensure it is applied in a manner consistent with fundamental constitutional norms).

90. [1991] 1 AC 696 (HL (UK)) [*Brind*].

91. See *ibid* at 762.

92. *Ibid* at 748.

rights. Still less could the legislation permitting the Home Secretary to issue directives be scrutinized for compatibility with the *Convention*. Thus, even where legislation clearly interfered with common law rights, the judges were bound to apply it.[93]

The mechanics of the *HRA* are as follows: Section 3(1) imposes an obligation on courts to interpret legislation to render it compliant with the *Convention* "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the *Convention* rights".[94] Where this proves impossible, a court is empowered by section 4(2) to issue a declaration that a "provision is incompatible with a *Convention* right",[95] "a new mechanism through which the courts can signal to government that a provision of legislation is, in their view, incompatible. It is then for government and Parliament to consider what action should be taken."[96]

Declarations of incompatibility are something of a "booby prize":[97] Section 4(6)(a) specifies that a declaration would "not affect the validity, continuing operation or enforcement of the provision in respect of which it is given".[98] Whether to revise or repeal an incompatible law or statutory provision is a matter entirely for Parliament. Accordingly, the interpretive power under section 3 is a much more potent tool to achieve *Convention* compliance. As Lord Steyn put it in *Ghaidan v Godin-Mendoza*: "Rights could only be effectively brought home if section 3(1) was the prime remedial measure, and section 4 a measure of last resort."[99] Lord Nicholls rejected the suggestion that section 3 could only be applied in cases of ambiguity.[100] Instead, "to an extent

93. It is worth noting, however, that "[f]undamental rights cannot be overridden by general or ambiguous words", thereby providing some check on the scope of legislative infringements on individual rights. *Secretary of State for the Home Department, ex parte Simms*, [1999] 3 All ER 400 at 412, (HL (UK)) Hoffman L. See also *R v Lord Chancellor, ex parte Witham*, [1997] EWHC Admin 237.

94. *HRA*, *supra* note 4, s 3(1).

95. *Ibid*, s 4(2). See also Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Oxford: Oxford University Press, 2009) [Kavanagh, *Constitutional Review*].

96. UK, HL, *Hansard*, vol 584, col 1294 (19 January, 1998) (Irvine L).

97. Geoffrey Marshall, "Two Kinds of Incompatibility: More about Section 3 of the Human Rights Act 1998", [1999] Pub L 377.

98. *HRA*, *supra* note 4, s 4(6)(a).

99. [2004] UKHL 30 at para 46 [*Godin-Mendoza*].

100. *Ibid* at paras 29–30.

bounded only by what is 'possible', a court can *modify* the meaning, and hence the effect, of primary and secondary legislation".[101] This was subject to two limitations. First, "[w]ords implied must . . . 'go with the grain of the legislation.'"[102] Second, courts are not required "to make decisions for which they are not equipped", such that some questions may call for "legislative deliberation" rather than immediate judicial resolution.[103] With some justification, Lord Millet described this as "a quasi-legislative power, not a purely interpretative one".[104]

(ii) The Court's Reliance on the *Convention*

R v British Broadcasting Corporation, ex parte Prolife Alliance,[105] decided after the introduction of the *HRA*,[106] is a revealing contrast with *Brind* because the subject matter was also broadcasting. At issue was section 6(1)(a) of the *Broadcasting Act 1990*,[107] which imposed a general duty on the television regulator to ensure that licensees did not screen material that "offends against good taste or decency".[108] The Alliance wished to broadcast an anti-abortion advertisement but was refused permission. Even though the Alliance purported not to launch a frontal attack on the compatibility of section 6(1)(a) with the *Convention's* protection of freedom of expression—a concession accepted by the majority of the House of Lords—Lord Hoffman dismissed this as "lip-service, because the thrust of its submissions, which found favour in the Court of Appeal, [was] that the statute should be disregarded or not taken seriously".[109] In his view, "[t]he real issue . . . [was] whether the requirements of taste and decency [were] a discriminatory, arbitrary or unreasonable condition for allowing a political party free access at election time to a particular public medium,

101. *Ibid* at para 32 [emphasis added].
102. *Ibid* at para 33.
103. *Ibid*.
104. *Ibid* at para 64.
105. [2003] UKHL 23 [*R v BBC*].
106. See Jeffrey Jowell, "Beyond The Rule of Law: Towards Constitutional Judicial Review" [2000] Pub L 671 ("[j]udicial reasoning in public law litigation will become of a kind that is familiar to democracies with written constitutions which protect democratic rights from governmental interference" at 671).
107. (UK), c 42.
108. *Ibid*, s 6(1)(a).
109. *R v BBC*, *supra* note 105 at para 52.

namely television."[110] He ultimately concluded that the imposition of the restriction was "an entirely proper decision for Parliament as representative of the people to make".[111] Prior to the incorporation of the *Convention* in domestic law, however, Lord Hoffman would never have been in a position to raise the issue.

Possessed with powerful new tools,[112] which naturally needed testing,[113] the judges could safely let some rust gather on old ones. The common law began to lose its lustre. Not long before *Godin-Mendoza*, for example, the House of Lords refused to recognize a new privacy tort. This was partly because "the coming into force of the Human Rights Act 1998 weaken[ed] the argument for saying that a general tort of invasion of privacy [was] needed to fill gaps in the existing remedies".[114] Further, the House of Lords stated that it would be unwise to "pre-empt the controversial question of the extent, if any, to which the *Convention* require[ed] the state to provide remedies for invasions of privacy by persons who are not public authorities".[115]

As to the interpretation of the *Convention* rights themselves, section 2(1) provided that British courts "must take into account"[116] decisions of the *Convention* institutions, most prominently, any "judgment, decision, declaration or advisory opinion of the European Court of Human Rights".[117] Fatefully, in *R v Special Adjudicator, ex parte Ullah*,[118] Lord Bingham tied the destiny of the domestic courts to that of Strasbourg.

110. *Ibid* at para 62.

111. *Ibid* at para 77.

112. See e.g. Jeffrey Jowell, "Judicial Deference: Servility, Civility or Institutional Capacity?" [2003] Pub L 592 ("[i]t is important to note that the conception of democracy which the [*Convention*] advances fundamentally differs from that which has hitherto prevailed in the United Kingdom" at 597).

113. For an early salvo in a long debate on the principles of "deference" and the limitations of the new tools, see generally Lord Hoffman, "The COMBAR Lectures 2001: Separation of Powers" (2002) 7:3 Judicial Rev 137. For excellent statements of the opposing viewpoints and reference to the voluminous literature, see generally TRS Allan, "Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory" (2011) 127:1 Law Q Rev 96; Aileen Kavangh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126:2 Law Q Rev 222.

114. *Wainwright v Home Office*, [2003] UKHL 53 at para 34, Hoffman L.

115. *Ibid*. See also *Watkins v Home Office*, [2006] UKHL 17.

116. *HRA*, *supra* note 4, s 2(1).

117. *Ibid*, s 2(1)(a).

118. [2004] UKHL 26.

Mindful of the desirability of uniform interpretation of *Convention* rights across jurisdictions, he christened what became known as the "mirror principle". This principle holds that "[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."[119] The mirror principle has subsequently been qualified[120] and there has occasionally been constructive inter-institutional dialogue,[121] but it remains the case that Strasbourg ultimately has the last word on the scope of *Convention* rights and, in many cases, their meaning.[122]

As the domestic courts' reliance on *Convention* rights grew, so too did many "myths" about the *HRA*. Some of these had little to do with the interface between domestic courts and Strasbourg and more to do with the very idea of judges applying human rights to challenge parliamentary sovereignty or to aid disfavoured groups such as criminals, prisoners and ethnic minorities.[123] But the perception that the rights set out in the *HRA* were *European* undoubtedly played a role in developing these myths. A government commission concluded that there was no sense of "ownership" of the *HRA*:[124] "[A] perception has emerged that particular rights—or particular interpretations of rights—are *imposed* upon the UK from the outside, and that there has been a commensurate loss of

119. *Ibid* at para 20. See also *R v Secretary of State for the Environment, Transport and the Regions*, [2001] UKHL 23 at para 26; *Manchester City Council v Pinnock*, [2010] UKSC 45 at para 48 [*Pinnock*].

120. See *In re P and others*, [2008] UKHL 38 at para 36, Hoffman L, para 120, Hale B, para 129, Mance L. See also *R v Secretary of State for Justice*, [2013] EWCA Civ 34.

121. See *Pinnock*, *supra* note 119 at para 48. See e.g. the volte-face of the Strasbourg Court in the area of political financing: *VgT Verein gegen Tierfabriken v Switzerland*, No 24699/94, [2001] VI ECHR 243; *R v Secretary of State for Culture, Media and Sport*, [2008] UKHL 15; *Animal Defenders International v United Kingdom*, [2013] ECHR 362. See also Philip Sales, "Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine", [2012] Pub L 253.

122. *Cf* Lord Irvine of Lairg, "A British Interpretation of Convention Rights" [2012] Pub L 237; Roger Masterman, "Taking the Strasbourg Jurisprudence into Account: Developing a 'Municipal Law of Human Rights' under the Human Rights Act" (2005) 54:4 ICLQ 907.

123. UK, Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (London: 2006) at 29–34.

124. UK, Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, vol 1 (London: December 2012) at 28, 176 [*A UK Bill of Rights?*].

sovereignty".[125] Not surprisingly, the government responded to public criticism of the *HRA* by emphasizing the desirability of a *British* bill of rights to replace those set out in the *Convention*:[126] "[A] strong argument in favour of a UK Bill of Rights would be to gain greater public ownership of the rights it contained".[127]

These criticisms were not the regressive rantings of cranks on the margins of polite society and political life; they were adopted by the Conservative party, which became the dominant force in a coalition government after the 2011 election. In their election manifesto, the Conservatives undertook to "replace the Human Rights Act with a UK Bill of Rights".[128] Change to the UK's place in the *Convention* system and to the Court's own role was no longer a speculative possibility; it was squarely on the political agenda.

C. Developing a Narrative to Empower the Common Law

(i) Moving Away from the *Convention*

An appreciation of the sea change in the Court's attitude to the *HRA* can be glimpsed by reference to *R (Nicklinson) v Ministry of Justice*.[129] Although the case was procedurally complex, the central issue was whether the universal prohibition on assisted suicide was compatible with the guarantee of respect for private and family life contained in Article 8 of the *Convention* and, in particular, whether it was a proportionate restriction.[130] Four judges concluded that it was, five that it was not. Though a division between judges is, of itself, nothing remarkable, Lord Sumption's suggestion that *Convention* rights could be justifiably

125. Mark Elliott, "Law, Rights and Constitutional Politics" in Guy Lodge & Glenn Gottfried, eds, *Democracy in Britain: Essays in Honour of James Cornford* (London, UK: Institute for Public Policy Research, 2014) 107 at 111 [emphasis in original] [Elliot, "Law, Rights and Constitutional Politics"].

126. See e.g. UK, Ministry of Justice, "The Governance of Britain" Cm 7170 at 60–63.

127. *A UK Bill of Rights?*, *supra* note 124 at 147.

128. Conservative Party, *Invitation to Join the Government of Britain* (Manifesto) (London: April 2010) at 79.

129. [2014] UKSC 38 [*Nicklinson*].

130. *Suicide Act, 1961* (UK), 9 & 10 Eliz II, c 60, s 2, as amended by the *Coroners and Justice Act 2009* (UK), c 25, s 59(2).

breached where Parliament had made a *choice* based on *moral values*,[131] is noteworthy for its highly deferential approach.[132]

Of greater interest for present purposes is the division within the majority. Three of the judges who viewed the prohibition as incompatible with the *Convention* nonetheless refused to issue a declaration of incompatibility. Lord Neuberger insisted that before making a judgment, the Court ought to afford Parliament the opportunity to consider amending the law.[133] He encouraged Parliament to act within a reasonable time but refrained from stipulating in advance "what would constitute satisfactory addressing of the issue".[134] Lord Wilson agreed, but also noted the possibility of a fresh claim "[w]ere Parliament for whatever reason, to fail satisfactorily to address the issue".[135] Lord Mance was more circumspect—seeing no reason to depart from recent precedent[136]—but nonetheless affiliated himself with Lord Neuberger's comments, adding: "Parliament is certainly the preferable forum in which any decision should be made, after full investigation and consideration, in a manner which will command popular acceptance."[137]

Nicklinson is perhaps an unusual case. In particular, the factual record was underdeveloped, leading Lord Mance to suggest that the case was "an invitation to short-cut potentially sensitive and difficult issues of fact and expertise, by relying on secondary material".[138] Lady Hale retorted, however, that the question of incompatibility was one of principle,[139] with Parliament free after a declaration of incompatibility to act, or not to act, "either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative".[140] As Lord Kerr

131. *Nicklinson*, *supra* note 129 at para 230. Lord Sumption placed much weight on the fact that Parliament had recently amended the statutory provision at issue without altering its principle. See especially *ibid* at para 231.

132. See especially *ibid* at para 234.

133. *Ibid* at para 113.

134. *Ibid* at para 118.

135. *Ibid* at para 202.

136. See *R (Pretty) v Director of Public Prosecutions*, [2001] UKHL 61.

137. *Nicklinson*, *supra* note 129 at para 190.

138. *Ibid* at para 177. See also Lady Hale's acknowledgement of the underdeveloped record, *ibid* at para 318.

139. *Ibid*.

140. *Ibid* at para 300.

explained, a declaration of incompatibility is "merely an expression of the court's conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a *Convention* right", to which Parliament may either decide to react or "decide to do nothing".[141] Lord Kerr's analysis is a clear-eyed, and clearly accurate, description of the *HRA*'s structure. It is settled law that, after a declaration of incompatibility, Parliament may "decide whether to change the law and if so from what date and whether retrospectively or not".[142] That there would be any judicial hand-wringing about the propriety of issuing a non-binding declaration of incompatibility is remarkable.

Prior to *Nicklinson*, the Court had begun to move away from the *Convention*. The decision in *R (Osborn) v The Parole Board*,[143] came as a surprise to informed observers of the UK's high court.[144] A group of prisoners unhappy with parole decisions argued that they had a right to an oral hearing in advance before the parole board. Their submissions to the Court "paid comparatively little attention to domestic administrative law",[145] focusing instead on the *Convention* protections for liberty interests (Article 5) and fair adjudicative procedures (Article 6). For this they were admonished by Lord Reed, who found their arguments did "not properly reflect the relationship between domestic law (considered apart from the *Human Rights Act 1998*) and *Convention* rights".[146] According to Lord Reed, a more nuanced view of the mirror principle was required.

The *Convention* did not supplant the protection afforded human rights under the common law or statute and "[p]roperly understood, . . . [did] not form a discrete body of domestic law derived from the judgments of

141. *Ibid* at para 343.

142. *Godin-Mendoza*, *supra* note 99 at para 64.

143. [2013] UKSC 61 [*Osborn*].

144. See e.g. Richard Clayton, "The Empire Strikes Back: Common Law Rights and the Human Rights Act" [2015] Pub L 3. See also Sangeeta Shah and Thomas Poole, "The Impact of the Human Rights Act on the House of Lords", [2009] Pub L 347 (arguing based on an empirical analysis for "the co-existence of both types of argument", common law and *Convention*). However, not until the *HRA* and the *Convention* came under sustained political attack did the Court begin to speak again in eulogistic terms of the remedial possibilities of the common law. For further discussion, see the text accompanying note 109, *above*.

145. *Osborn*, *supra* note 143 at para 54.

146. *Ibid*.

the European court."[147] Lord Reed recalled an observation of Lord Cooke: "The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by *recognising rather than creating* them."[148] Adoption and incorporation of the *Convention* was merely a marker along a road already mapped out by the common law: "Human rights *continue* to be protected by our domestic law, interpreted and developed in accordance with the Act when appropriate."[149]

Similarly, in *Kennedy v The Charity Commission*,[150] the Court preferred to analyze an interpretive problem presented by an access to information statute through the lens of the common law rather than that of the *Convention*. For instance, Lord Toulson insisted that the Court did not need to address Article 10 as it contributed nothing to the common law:

> What we now term human rights law and public law has *developed* through our common law over a long period of time. The process has *quickened* since the end of World War II in response to the growth of bureaucratic powers on the part of the state and the creation of multitudinous administrative agencies affecting many aspects of the citizen's daily life. The growth of the state has presented the courts with new challenges to which they have *responded by a process of gradual adaption and development of the common law* to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.[151]

For his part, Lord Mance regretted the "*Convention*-ization" of discourse before the UK courts. For him, this caused "the law in areas touched on by the *Convention* [to be viewed] solely in terms of the *Convention* rights", even though these rights "represent a threshold protection" only, and "may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law".[152]

147. *Ibid* at para 63.

148. *R (Daly) v Home Secretary*, [2001] UKHL 26 at para 30 [emphasis added]. See also *R (Anufrijeva) v Home Secretary*, [2003] UKHL 36 (Lord Steyn stating "the *Convention* is not an exhaustive statement of fundamental rights under our system of law" at para 27).

149. *Osborn*, *supra* note 143 at para 57 [emphasis added].

150. [2014] UKSC 20 [*Kennedy*].

151. *Ibid* at para 133 [emphasis added].

152. *Ibid* at para 46.

Some rewriting of history was also evident in *Kennedy*.[153] On the relationship between Strasbourg and the UK, Lord Mance commented that "[t]he development of common law discretions, to meet *Convention* requirements and subject to control by judicial review, has become a fruitful feature of United Kingdom jurisprudence."[154] Specifically, he used a series of housing law cases—in particular *Doherty v Birmingham City Council* and *Kay v United Kingdom*[155]—to demonstrate that "the House of Lords and Supreme Court modelled a common law discretion to meet the needs of article 8".[156] An alternative, and more plausible, telling of this particular tale would be that the UK courts were brow-beaten into accepting the Strasbourg Court's view of the world. For example, there is no mention of the House of Lords' decisions in *London Borough of Harrow v Qazi*,[157] or *Kay v London Borough of Lambeth*,[158] which evinced a singular reluctance to accede to the demands of the Strasbourg case law. It is true that the concessions in *Doherty* were eventually welcomed, but only after the UK position had been roundly rejected in *McCann v United Kingdom*.[159] It would be more accurate to say that the UK Supreme Court yielded in *Manchester City Council v Pinnock*,[160] though plainly this would not have supported the Court's preferred narrative.

In any event, there has plainly been an important shift in the Court's understanding of its own role. Where once it felt comfortable asserting itself as an enforcer of *Convention* rights—ready to reinterpret domestic legislation into *Convention* compliance[161]—it has now begun to assert itself as an expositor of the ageless wisdom of the common law. In recent decisions, the Court has minimized the importance of the *Convention*, re-envisaging it as a mere application of the timeless precepts of the common law. Underlying the narrative in which the Court presents itself as

153. *Ibid*.

154. *Ibid* at para 38.

155. *Doherty v Birmingham City Council*, [2008] UKHL 57 at paras 55, 70, 84, 133–35; *Kay v United Kingdom* (2010), [2011] HLR 13 at para 73.

156. *Kennedy*, *supra* note 150 at para 38.

157. [2003] UKHL 43.

158. [2006] UKHL 10.

159. [2008] ECHR 385.

160. *Pinnock*, *supra* note 119.

161. See also Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge, UK: Cambridge University Press, 2013) ("[i]t is widely considered that the courts have scaled back from the strongest reading of section 3" at 227).

guardian of the rights-protecting tradition of the common law is a desire to ensure robust rights-protection in the event that the Act is repealed and replaced by a sheared-down version of the *Convention*:

> The common law constitution was no stranger to human rights before the *HRA*, and it would be no stranger to them if the *HRA* were repealed . . . It may be possible for the UK to rid itself of its obligations under the *Convention*, but the parameters set by the common law may prove harder to circumnavigate.[162]

In this scenario, protection of rights would, of course, fall principally within the judicial domain.

Not only is the Court's narrative a selective interpretation of recent history, it is also designed in part to support the legitimacy of imposing judicial limits on parliamentary action—a controversial initiative that needs to be defended on its own terms.[163] Moreover, it rests on an overly rosy view of the past. Not so long ago, learned authors decried the ineffectiveness of the common law tradition in imposing limits on Parliaments hostile to rights.[164] Finally, the narrative attributes a central place to the common law, which is more English (and Welsh) than British whereas Scotland has a distinct civil law tradition. But as we will see below, the Court has begun to ascribe itself a central place in the *British* constitutional order. It remains to be seen how the Court will reconcile its desire to protect the (British) constitutional order with its wish to venerate the (English) common law.

(ii) Invoking the Common Law

The traditional view is that the UK courts "have no power to declare enacted law to be invalid".[165] The Crown-in-Parliament is sovereign—

162. Mark Elliott, "A Damp Squib in the Long Grass: The Report of the Commission on a Bill of Rights" [2013] Eur HRL Rev 137 at 150. See also Kavanagh, *Constitutional Review*, *supra* note 95 at 303–07.

163. See e.g. Thomas Poole, "Legitimacy, Rights and Judicial Review" (2005) 25:4 Oxford J Leg Stud 697.

164. See e.g. Conor Gearty & Keith Ewing, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford: Oxford University Press, 1990).

165. *British Railways Board v Pickin*, [1974] 1 All ER 609 at 627 (HL), Simon L of Glaisdale. See also *British Coal Corporation v R*, [1935] UKPC 33 at para 146, Sankey L.

all are bound by a law duly adopted by the Commons and the Lords and assented to by the monarch. Parliament could, if it wished, abolish judicial review, do away with the courts and order blue-eyed babies be put to the sword,[166] and a challenge on common law grounds would be impossible.[167]

Nevertheless, the idea that some legislative changes would be beyond the pale has gathered momentum in recent decades, provoking suggestions that the UK courts may refuse to give effect to draconian legislation.[168] Some assertions along these lines were made, in *obiter*, in *Jackson v Her Majesty's Attorney General*.[169] The technical question before the Court was the legality of the *Parliament Act, 1949*, which modified the *Parliament Act, 1911*—an act that permitted legislation to take effect without the approval of the House of Lords.[170] Some of the speeches ranged much wider. Lord Steyn accepted that "the supremacy of Parliament is still the *general* principle of our constitution" but noted that "[i]t is a construct of the common law."[171] For Lord Hope, "[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based."[172] The logical—or, at least, "not unthinkable"—conclusion was, in Lord Steyn's terms, that "[i]n exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts [the judiciary] 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."[173]

166. See generally Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999).

167. See *Axa General Insurance Ltd v Lord Advocate*, [2011] UKSC 46 at para 48 [*Axa Insurance*].

168. See e.g. Sir John Laws, "Law and Democracy", [1995] Pub L 72.

169. [2005] UKHL 56 [*Jackson*].

170. *Ibid* at para 1. A ban on fox hunting had been adopted pursuant to this procedure and provided the background to the challenge. As Lord Bingham of Cornhill explained: "[A]lthough the Hunting Act gives rise to the present issue between the appellants and the Attorney General, the real question turns on the validity of the 1949 Act and that in turn depends on the true effect of the 1911 Act." *Ibid.*

171. *Ibid* at para 102 [emphasis in original]. *Cf* Tom Bingham, *The Rule of Law* (Toronto: Penguin, 2011) at 167.

172. *Ibid* at para 107.

173. *Ibid* at para 102.

Baroness Hale (as she then was) was more circumspect: "The courts will treat with particular suspicion (and *might* even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny."[174] Nonetheless, the idea that some features of the constitutional order are entrenched beyond the reach of the Crown-in-Parliament was clearly one that members of the Court were willing to countenance.

Some similar views were expressed in *Axa General Insurance v Lord Advocate*.[175] *Axa Insurance* concerned legislation adopted by the devolved Scottish Parliament that was designed to compensate victims of asbestos-related pleural plaques who had not been able to pursue their claims in the courts.[176]At issue was the scope of judicial review applicable to the legislation. Although this was not a challenge to primary legislation, several members of the Court took the opportunity to discuss the role of the courts in somewhat expansive terms. In the leading speech, Lord Hope invoked the spectre of a government using a dominant parliamentary majority "to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual".[177] He concluded that in such circumstances, the "rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise".[178] Lord Reed saw the Scottish Parliament as having "plenary powers",[179] but noted that these were granted "for a liberal democracy founded on particular constitutional principles and tradition".[180] Accordingly, it was not "free to abrogate fundamental rights or to violate the rule of law".[181]

This account of recent developments in the UK—in which the common law has come to be venerated and the role of the courts is now seen as

174. *Ibid* at para 159 [emphasis added].
175. *Axa Insurance*, *supra* note 167.
176. See *Rothwell v Chemical & Insulating Co Ltd*, [2007] UKHL 39.
177. *Axa Insurance*, *supra* note 167 at para 51.
178. *Ibid*. See also *ibid* (Lord Mance suggesting that devolved legislatures could not adopt legislation offensive to "fundamental rights or the rule of law" at para 97).
179. *Ibid* at para 147.
180. *Ibid* at para 153.
181. *Ibid*.

fundamental to the constitutional order—is neatly concluded by *R* (*HS2 Action Alliance Ltd*) *v Secretary of State for Transport* (*HS2 Alliance*).[182] Here, the issue was the relationship between UK constitutional law and principles of European Union law. It had been suggested in argument that European Union law required the UK courts to scrutinize proceedings in Parliament; these, however, were subject to parliamentary privilege that UK courts are loath to disturb.[183] What if European Union law required them to upset centuries of tradition? It had previously seemed that a conflict between domestic law and European Union law would be resolved in favour of the latter.[184] In *R v Secretary of State for Transport, ex parte Factortame Ltd* (*No 2*) for example, the UK courts followed an edict from the European Court of Justice[185] preventing them from applying otherwise valid legislation that was in conflict with European Union law. However, in *obiter*—because a conflict was held not to arise in this context—the Court signalled a different approach: "If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom."[186] On behalf of their colleagues, Lord Neuberger and Lord Mance took the opportunity to state, more expansively:

> The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights

182. [2014] UKSC 3 [*HS2 Alliance*].

183. See e.g. *Dalkeith Railway Co v Wauchope* (1842), 8 Cl & F 710 (HL Eng), Campbell L:

> All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages.

Ibid at 725.

184. See generally Paul P Craig, "Sovereignty of the United Kingdom Parliament after *Factortame*" (1991) 11 YB Eur L 221. On the constitutional impact of the litigation, compare William Wade, "Sovereignty: Revolution or Evolution?" (1996) 112 Law Q Rev 568 with TRS Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 Law Q Rev 443.

185. [1991] AC 603. This report contains the decisions of both the European Court of Justice and the House of Lords.

186. *HS2 Alliance*, *supra* note 182 at para 79.

and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.[187]

Taken together with the Court's renewed emphasis on the common law, the decision in *HS2 Alliance* represents a clear statement about the Court's role as guardian of an autochthonous constitutional tradition. Moreover, mention of the *Constitutional Reform Act 2005* raises the tantalizing possibility that the Court has become constitutionally entrenched. There is now an argument that, at the very least, only clear statements by the Crown-in-Parliament will suffice to repeal the statutes listed, and they may perhaps be beyond its grasp altogether. In sum, the narrative the Court has been developing in recent years underpins a role as a rights-protecting institution at the apex—or close to it—of the constitutional order.

III. Canada and the United Kingdom: A Comparison

A. The Supreme Court of Canada's Constitutional Role

The SCC operates in a constitutional climate that is very favourable to the Court. Reversing the *Reference re Supreme Court Act* is virtually impossible because of the difficulty of constitutional change in Canada. Part V's "unusually complicated"[188] escalating procedures—going from unilateral federal or provincial modifications on matters not of general concern, to the 7/50 formula, onwards to unanimity—place significant formal barriers in front of constitutional amendment.

187. *Ibid* at para 207 (although the devolution statutes are not mentioned in this passage, they could conceivably be given a similar status).

188. Walter Dellinger, "The Amending Process in Canada and the United States: A Comparative Perspective" (1982) 45:4 Law & Contemp Probs 283 at 297.

It is true that these barriers could be overcome by actors with sufficient political will,[189] but the barriers are imposing as "[t]he Canadian formula is probably the most complex in the world."[190]

In the *Reference re Senate Reform*,[191] a decision handed down just weeks after the *Reference re Supreme Court Act*,[192] the Court identified the 7/50 formula as the general rule for amendments to the Constitution of Canada, underpinned by the "principle that substantial provincial consent must be obtained for constitutional change that engages provincial interests".[193] In addition, modification to the text of the Constitution is not the only type of amendment that requires recourse to the procedures set out in Part V. The Court noted that "the Constitution should not be viewed as a mere collection of discrete textual provisions. It has an architecture, a basic structure. By extension, amendments to the Constitution are not confined to textual changes. They include changes to the Constitution's architecture."[194] These changes must also be "informed by the foundational principles of the Constitution, which include principles such as federalism, democracy, the protection of minorities, as well as constitutionalism and the rule of law".[195] Hence, proposals for non-binding consultative elections, held under the auspices of legislation passed unilaterally by the federal Parliament, with the goal of guiding the appointment by the federal executive of new members of the Senate, had to be submitted to the 7/50 formula in part because

189. It is worth noting that major constitutional change has never been especially easy in Canada. See Mary Dawson, CM, QC, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution—Patriation, Meech Lake, and Charlottetown" (2012) 57:4 McGill LJ 955 at 959. Dawson, CM QC, one of those involved in the patriation of the Constitution, observed that there were "several lengthy periods of intense federal-provincial constitutional negotiation, involving a range of proposals, between 1967 and 1980, but all ultimately ended in failure". *Ibid*.

190. Oliver, "Constitutional Amendment", *supra* note 42 at 520.

191. 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reference*].

192. *Reference re Supreme Court Act*, *supra* note 3.

193. *Senate Reference*, *supra* note 191 at para 34.

194. *Ibid* at para 27. See also *ibid*: "[T]he Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text." *Ibid* at para 26.

195. *Ibid* at para 25.

"the Senate's fundamental nature and role as a complementary legislative body of sober second thought would be significantly altered".[196] A novel plan was thus rejected as an alteration to the Constitution's text and architecture.

By privileging substance, in the form of the Constitution's unwritten structure and principles, over text, the Court ruled out the possibility of a "constitutional workaround" that would allow meaningful reform to take place without the need to strike a national constitutional bargain.[197] Rather, an approach that privileged the amending procedures, designed to "foster dialogue", was preferred.[198] Resort to the Part V procedure is, however, unlikely to occur in the near future: "Successfully adopting a multilateral formal amendment within the exacting constraints of this escalating structure of formal amendment requires constitutional politics to perform heroics."[199] At present, there is "no appetite anywhere to try again for broad constitutional reform".[200]

Indeed, by virtue of its own decision in the *Reference re Supreme Court Act*, the Court now has an effective veto over future reforms affecting it. It acknowledged that Parliament may adopt "routine amendments" as to the Court's functioning, but "only if those amendments do not change the constitutionally protected features of the Court".[201] On any question, the Court will have the last word on whether a reform represents a fundamental alteration to its functioning or a permissible administrative alteration. Indeed, the Court will be able to judge proposed reforms with

196. *Ibid* at para 52. Part V was also engaged because its text applies the 7/50 formula to changes to the "method of selecting Senators . . . [language that] extended the constitutional protection provided by the general amending procedure to the entire process by which Senators are 'selected'". *Ibid* at para 65.

197. Robert E Hawkins, "Constitutional Workarounds: Senate Reform and Other Examples" (2011) 89:3 Can Bar Rev 513 at 516. I mean only to highlight the consequences of the Court's decision in the instant case, not to discount the possibility of other innovative reform initiatives that do not trigger the amending procedures. On the possibility of informal constitutional change, see generally Carlo Fusaro & Dawn Oliver, "Towards a Theory of Constitutional Change" in Carlo Fusaro & Dawn Oliver, eds, *How Constitutions Change: A Comparative Study* (Oxford: Hart Publishing, 2011) 405.

198. *Senate Reference*, *supra* note 191 at para 31.

199. See Richard Albert, "Constitutional Amendment by Stealth" 60:4 McGill LJ 673.

200. Dawson, *supra* note 189 at 998. Compare the slightly more optimistic view in Katherine Swinton, "Amending the Canadian Constitution: Lessons from Meech Lake" (1992) 42:2 UTLJ 139 (recommending that politicians do away with the "linkage or packaging" of amendments at 147).

201. *Reference re Supreme Court Act*, *supra* note 3 at para 101.

one eye on its own legitimacy. For instance, it will decide if bilingualism or gender equity requirements can validly be imposed, if a transparent appointments process is a constitutional requirement, and if criminal appeals as of right form part of its core jurisdiction.[202] On any such question it may choose to give an answer shaped by its concern for its own legitimacy. Absent a constitutional amendment with broad national support, the Court's future destiny is largely in its own hands[203] and it is free to write the story it wishes to write.

B. Future UK Narratives

Might this portend future developments in the UK? Defining, let alone assessing, the UK's unwritten Constitution is a notoriously difficult task. It has been said that the UK Constitution "is no more and no less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also."[204] This point should not be exaggerated,[205] but it helps to underline the fluidity of the UK's constitutional arrangements. Fundamental reforms can be accomplished by way of ordinary legislation. For example, the UK owes its membership in the European Union, its Supreme Court and its domestic guarantee of *Convention* rights to ordinary statutes that could be repealed by a transitory parliamentary majority.

Nevertheless, the idea that sweeping reforms can be accomplished by simple legislation should not be exaggerated. At the very least, the sovereignty of Parliament has internal limits. Parliament may order that blue-eyed babies be put to the sword, but no parliamentarian in her

202. See generally Nadia Verrelli, ed, *The Democratic Dilemma: Reforming Canada's Supreme Court* (Montreal & Kingston: McGill-Queen's University Press, 2013).

203. Of course, the Court does not have a roving commission to reform the law as it sees fit and so would have to wait for an appropriate case to come before it before pronouncing on any of these issues. The point is that the Court—not the political branches—will have the definitive last word—a point worthy of note regardless of one's view of the merits of the underlying issues.

204. JAG Griffith, "The Political Constitution" (1979) 42:1 Mod L Rev 1 at 19.

205. See Graham Gee & Grégoire CN Webber, "What is a Political Constitution?" (2010) 30:2 Oxford J Leg Studies 273 ("[i]t may be, then, that Griffith's quip that Britain's constitution is no more and no less than what happens was merely a reminder, in aphoristic form, that a constitution should always be subject to political debate in, and the possibility of change through, the ordinary political process" at 280–81).

right mind would vote for such a law, and the citizenry would be up in arms: "The electors can in the long run always enforce their will."[206] Lord Carswell emphasized in *Jackson* the political nature of the limitations on Parliament: "If a fundamental disturbance of the building blocks of the constitution is contemplated at some time, it may well be that no government in the real political world would attempt to use those powers for the purpose."[207] As Baroness Hale (as she then was) put it: "[T]he constraints upon what Parliament can do are political and diplomatic rather than constitutional".[208]

Moreover, political realities—and the growing popularity of the referendum as a condition precedent to major constitutional change[209]—might impose practical hurdles to the exercise of this power. Mark Elliott, discussing fundamental changes such as membership in the European Union and devolution of powers to Scotland, Wales and Northern Ireland, comments:

> The fact that those reforms were implemented merely via acts of Parliament mean that they lack the legal security which inclusion in a hard-to-amend written constitution would provide. Yet, in real-world terms, backtracking on devolution or dismantling the Supreme Court would be unthinkable; those reforms will resonate for generations, irrespective of whether they come to be institutionalized in a written constitution.[210]

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206. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed by ECS Wade (London, UK: Macmillan & Co, 1959) at 73.

207. *Jackson*, *supra* note 169 at para 178.

208. *Ibid* at para 159.

209. Brigid Hadfield, "Devolution: A National Conversation" in Jeffrey Jowell & Dawn Oliver, eds, *The Changing Constitution*, 7th ed (Oxford: Oxford University Press, 2011) 213 at 233 suggests that devolution has radically altered the constitutional order:

> [D]evolution marks a clear movement from the formal doctrine of parliamentary sovereignty standing alone . . . to its combination with a process, already a constitutional convention, whereby the holding of a referendum on any fundamental change to devolution . . . is not a matter of a concession or a (central government) convenience (for resolving internal disputes) but a nascent right. Devolution is not simply a gift from the Westminster Parliament but a reflection of an autochthonous movement which continues to develop.

Ibid.

210. Elliott, "Law, Rights and Constitutional Politics", *supra* note 125 at 107.

In such an environment, statements by the Court, even in *obiter*, and speeches by senior members of the judiciary, have a "generative" quality.[211] They inform political understandings of the practical limits of parliamentary sovereignty. Threats that the judiciary would not countenance the enforcement of radical laws could help to ensure that such statutory provisions stay off the legislative agenda. The force of the narratives the Court has been developing can again be appreciated.

There is, in addition, the prospect that the Court may take steps to entrench its newly acquired functions and role. As Bradley observes, the response of the courts to constitutional reform "needs to be known before we can be certain of the extent of the constitutional changes that Parliament has initiated".[212] The Canadian experience provides a very modest indicator of the direction that the Court, mindful of its own institutional position, may take. Further *obiter* and judicial speeches about constitutional fundamentals and the central role of the Court in the constitutional order are to be expected. Should the Crown-in-Parliament ever attempt to fundamentally disrupt this constitutional order, it would be foolhardy to expect the Court to stand idly by. If confronted with this situation it may refuse to enforce the legislation, or, more moderately, require that pre-conditions (such as, conceivably, a referendum) be respected to effect dramatic constitutional reforms.

It bears emphasizing that in the area of fundamental rights, the SCC had no institutional rival in matters of legal interpretation. It won the final word in respect of compliance of government action with the *Charter*, and was able to watch from the sidelines as political conditions tipped the notwithstanding clause towards obsolescence. Meanwhile, the UK Supreme Court has had to share space with a foreign body—the Strasbourg Court—which has become increasingly unpopular in the UK. Rather than remain at the mercy of shifting political perceptions of this independent actor, the UK Supreme Court has understandably resorted to the common law, which it can justifiably claim as its own. An appreciation of the Canadian position helps us to understand why

211. Roger Masterman & Se-shauna Wheatle, "A Common Law Resurgence in Rights Protection?" [2015] Eur HRL Rev 57 at 62.

212. Anthony Bradley, "The Sovereignty of Parliament: Form or Substance?" in Jowell & Oliver, *supra* note 209, 35 at 66. See also Diana Woodhouse, "The Constitutional and Political Implications of a United Kingdom Supreme Court" (2004) 24:1-2 LS 134; Kate Malleson, "The Evolving Role of the UK Supreme Court" [2011] Pub L 754.

the UK Supreme Court has begun to both sideline the *Convention* in favour of its domestic tradition of rights protection, and develop a slightly dubious narrative in which the common law was not dormant in the years after the adoption of the *HRA*. Recent Canadian history indicates that the UK Supreme Court's claims to the guardianship of the domestic constitutional tradition are likely to increase in both number and force. Expect it to speak loudly of its mantle of rights protector under the common law, to tout its role as arbiter of devolution disputes and to proclaim the principles of the UK's constitutional tradition.

Conclusion

The emergence of distinctive narratives to support the legal positions taken by the two courts is interesting. While grand conclusions should not be too readily drawn from a two-country comparison, three observations can be made. First, the framework for constitutional change in Canada was much more favourable to the SCC, in part because of its own decisions. By contrast, its UK counterpart has never really been in a position from which it could obviously complicate the process of constitutional reform; though, as we have seen, some well placed *obiter* comments might well have altered political expectations in such a way as to solidify its new-found place in the UK constitutional order.

Second, the SCC's institutional position as arbiter of fundamental constitutional disagreements has long been undisputed. Its UK counterpart's position was, however, undermined by the overbearing presence of the Strasbourg Court—though it bears emphasis that this presence was in part facilitated by the UK Court itself. The Canadian experience provides a modest indication of future paths the UK Supreme Court may take, asserting itself both as the ultimate, neutral arbiter of home-grown rights and constitutional values, and entrenching this new role. It is thus unsurprising that the UK Supreme Court has recently begun to decouple itself from the Strasbourg Court and assert itself as defender of the domestic constitutional order.

Third, although this account of recent developments is not perfectly symmetrical—the two Supreme Courts have travelled down different tracks in response to different circumstances and towards different destinations—it highlights the influence that narratives developed by the

judiciary might have on substantive law. In both Canada and the UK, understandings of the past have been invoked to justify distinctive judicial roles in the present and into the future: The SCC laid out its version of its own history in the *Reference re Supreme Court Act*, whereas the rough UK equivalent has to be woven together from strands found in several decisions covering a shorter period of time.

These narratives are powerful because constitutional identity and interpretation are inextricably linked:[213] "Viewed systematically and dialectically, constitutional interpretation produces constitutional identity and is at the same time shaped, filled, and molded by the latter."[214] Legal traditions are "part and parcel of a complex normative world. [These] tradition[s] include—not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it."[215] The recent constitutional developments in Canada and the UK were not quite as inevitable as the supporting narratives developed by their Supreme Courts would have the reader believe. For this very reason they ought to be developed cautiously and subjected to critical analysis by the legal community.

213. See e.g. JWF Allison, "History to Understand, and History to Reform, English Public Law" (2013) 72:3 Cambridge LJ 526 at 527 (commenting critically on selective "invocations of history" by legal academics).

214. Michel Rosenfeld, "Constitutional Identity" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 756 at 771. See also Hugo Cyr, "Conceptual Metaphors for an Unfinished Constitution" (2014) 19:1 Rev Const Stud 1.

215. Robert M Cover, "Foreword: *Nomos* and Narrative" (1983) 97:1 Harv L Rev 4 at 9. See also Kim Lane Scheppele, "Foreword: Telling Stories" (1989) 87:8 Mich L Rev 2073.