

**Courts and the Making of Public Policy**

# The Conflict between Government and the Judges

**Vernon Bogdanor**

The Foundation for Law, Justice and Society

in collaboration with

The Centre for Socio-Legal Studies,  
University of Oxford

[www.fljs.org](http://www.fljs.org)

The Foundation for Law, Justice and Society



## Executive Summary

- The United Kingdom has been engaged over the centuries in the process, unique in the democratic world, of gradually giving itself a constitution. This is being achieved in an ad hoc fashion with no stated consensus as to what the end result should be. The cornerstone of this new constitution will be the Human Rights Act of 1998. It is the closest the United Kingdom can get, under its current system, to a bill of rights. The Act is transforming our understanding of rights and of the relationship between government and the judiciary.
- Traditional understanding of these matters owes much to the constitutional theorist of the nineteenth century, A. V. Dicey. He would have been horrified by the Human Rights Act, due to his pride in the fact that the United Kingdom had no bill of rights. There is a fundamental difference between countries such as Belgium, where individual rights are deductions drawn from the principles of the constitution, and England, where the principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals.
- Following the Human Rights Act, however, our rights are no longer based on inductions or generalisations, but are coming to be derived from certain 'principles of the constitution'; that is, the European Convention on Human Rights. In spite of this, the sovereignty of Parliament is formally preserved. Judges have not been empowered to use the Human Rights Act to strike down Acts of Parliament. All that judges can do if they believe that legislation contravenes the European Convention on Human Rights, is to issue a declaration of incompatibility. It is then up to Parliament to amend or repeal the offending statute or part of a statute by means of a special fast-track procedure if it wishes to do so.
- The Human Rights Act seeks to secure a democratic engagement with rights on the part of the representatives of the people in Parliament. However, the main burden of protecting human rights has been transferred to the judges, whose role is bound to become more influential as a result.
- The compromise upon which the Human Rights Act is based is a tenuous one, dependent as it is upon self-restraint by judges, ministers and MPs. Already, only six years after the Act, there are calls for it to be amended from both parties.
- The lack of a codified constitution in the United Kingdom means that constitutional change goes largely unnoticed, and allows for the amendment of constitution arrangements easily and without fuss or difficulty. Clearly, then, the integration of the European Convention on Human Rights has been a significant step and now forms a fundamental part of the law of the land.
- Conflict between the judges and government is built into the very concept of the judicial protection of human rights. The Act does presuppose a basic consensus on human rights between the judges, on the one hand, and the government, people and Parliament on the other. However, there is clearly no consensus when it comes to the rights of unpopular minorities, such as asylum seekers and suspected terrorists. The government argues the need for new measures to tackle these problems, whilst the judges argue against compromising our traditional principles of habeas corpus and the presumption of innocence.
- It is clear that there is a conflict between two constitutional principles; the sovereignty of Parliament and the rule of law. This conflict, if unresolved, could result in constitutional crisis.

## The Conflict between Government and the Judges

We have been engaged in a process unique in the democratic world of gradually giving ourselves a constitution. We have been transforming a hitherto uncodified constitution into a codified one, but in a piecemeal and ad hoc way, there being neither the political will to do more nor any degree of consensus as to what the final resting place should be.

The cornerstone of our new constitution will be the Human Rights Act 1998. It is as near as we can get, under our system, to a bill of rights. The Act is transforming our understanding of rights and of the relationship between government and the judiciary.

Our traditional understanding of these matters owes much, of course, to a great constitutional theorist of the nineteenth century, A.V. Dicey, who lived from 1835 to 1922. He would surely have been horrified by the Human Rights Act. He was proud of the fact that we had no bill of rights. 'There is', Dicey wrote in his classic work, *Introduction to the Study of the Law of the Constitution*, first published in 1885, 'in the English constitution (*sic*) an absence of those declarations or definitions of rights so dear to foreign constitutionalists'. Instead, the principles defining our civil liberties are 'like all maxims established by judicial legislation, mere generalizations drawn either from the decisions or dicta of judges, or from statutes'. 'With us', he says, 'the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code are not the source but the consequence of the rights of individuals, as defined and enforced by the courts'. By contrast, he says, 'most foreign constitution-makers have begun with declarations of rights'. 'For this', Dicey adds, 'they have often been in no wise to blame'.

The consequence, however, was that 'the relation of the rights of individuals to the principles of the constitution is not quite the same in countries, like Belgium, where the constitution is the result of a legislative act, as in England, where the constitution itself is based on legal decisions – the difference in this matter between the constitutions of Belgium and the English constitution may be described by the statement that in Belgium individual rights are deductions drawn from the principles of the constitution, whilst in England the so-called principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals'.

Following the Human Rights Act, however, our rights are no longer based on inductions or generalizations. They are coming, instead, to be derived from certain 'principles of the constitution', that is the European Convention on Human Rights. For judges are now charged with interpreting legislation in the light of a higher law, the European Convention. Dicey, however, famously declared that there can be no such higher law in the British Constitution. 'There is no law which Parliament cannot change. There is no fundamental or so-called "constitutional law", and there is no person or body which can pronounce void any enactment passed by the British Parliament on the ground of such enactment being opposed to the constitution.'<sup>1</sup>

Formally, the Human Rights Act does not alter this situation. Formally, the sovereignty of Parliament is preserved. Judges have not been empowered to strike down Acts of Parliament. All that judges can do, if they believe that legislation contravenes the European Convention of Human Rights is to issue a declaration of incompatibility. It is then up to

---

1. Dicey, A.V. (1885) *Introduction to the Study of the Law of the Constitution*. London: Macmillan, pp. 88, 91.

Parliament to amend or repeal the offending statute or part of a statute by means of a special fast-track procedure if it wishes to do so.

The Human Rights Act provides for a compromise between the two doctrines of the sovereignty of Parliament and the rule of law. This compromise depends upon a sense of restraint on the part of both the judges and Parliament. Were the judges to seek to invade the political sphere and to make the judiciary supreme over Parliament, something which critics allege is already happening, there would be considerable resentment on the part of ministers and MPs. Conversely, were Parliament ever to ignore a declaration of incompatibility on the part of a judge, and refuse to repeal or amend the offending statute or part of a statute, or were the government to deny access to the courts to a litigant, by depriving her of the right of appeal, the Human Rights Act would have proved of little value.

The Human Rights Act seeks to secure a democratic engagement with rights on the part of the representatives of the people in Parliament. But, of course, the main burden of protecting human rights has been transferred to the judges, whose role is bound to become more influential. Many human rights cases concern the rights of very small and unpopular minorities – suspected terrorists, prisoners, asylum seekers, even perhaps suspected paedophiles. Life would be much simpler if the victims of injustice were always attractive characters or nice people like ourselves.

The compromise on which the Human Rights Act is based is, therefore, a tenuous one, dependent as it is upon self-restraint by judges, ministers and MPs. Already, only six years after the Human Rights Act came into effect, there are calls for it to be amended. The prime minister has suggested that there should be new legislation limiting the role of the courts in human rights cases. This would presumably mean amending the Act. The leader of the opposition has renewed the pledge in the Conservative Party's 2005 election manifesto to 'reform, or failing that, scrap' the Human Rights Act. He has since elaborated

proposals for a British Bill of Rights to replace the Human Rights Act. Thus the prime minister and the leader of the opposition both agree that the Human Rights Act needs amendment.

It is remarkable how rapidly the Human Rights Act has led to a conflict between government and the judges. In the United States, it took 16 years from the drawing up of the constitution in 1787 to the first striking down of an Act of Congress by the Supreme Court – the landmark case of *Marbury v. Madison*, 1803. After that, no further Act of Congress was struck down until the famous *Dred Scott* case in 1857, a case which unleashed the Civil War. Not until after the Civil War of 1861–5 did the Supreme Court really come into its own as a court which would review federal legislation.

In France, the Fifth Republic established a new body, the *Conseil Constitutionnel*, in 1958, empowered to delimit the respective roles of Parliament and government. Yet the *Conseil* did not really assume an active role until the 1970s. The impact of the Human Rights Act has been much more rapid. We underestimated its likely impact in large part because we do not have a codified constitution. In a country with a codified constitution, such as, for example, France or Canada, the Act might have required a constitutional amendment or some special process of legislation to enact it, and would almost certainly have given rise to a great deal of public debate and discussion; for a country with a codified constitution would have become accustomed to the idea that legal modalities were of importance in the public affairs of the state.

In Britain, by contrast, with our uncodified constitution, constitutional change tends to go unnoticed. As Walter Bagehot commented in his book, *The English Constitution*, first published in 1867, 'An ancient and ever-altering constitution [such as the British] is like an old man who still wears with attached fondness clothes in the fashion of his youth; what you see of him is the same; what you do not see is wholly altered'. Under this system, the government of the day can alter the constitution

as it wishes, with the same ease as it can alter laws on any other matter. This has the advantage that constitutional arrangements can be altered easily, without fuss or difficulty. But, precisely because it is so easy, we perhaps do not always reflect sufficiently on what it is that we are doing. We have therefore not noticed that we have made the European Convention on Human Rights, in practice, if not in form, part of the fundamental law of the land.

Although the Human Rights Act has aroused conflict between the government and the judges more rapidly than many would have suspected, conflict is, in a sense, built into the whole idea of the judicial protection of human rights. There are bound to be tensions between the principle of the rule of law, as interpreted by the judges, and the principle of the sovereignty of Parliament. The Human Rights Act seeks to resolve these tensions by means of a dialogue between the judiciary, Parliament and government. The Act sought to avoid the question: what happens if there is a clash between the two principles, the sovereignty of Parliament and the rule of law? Indeed, when I asked a very senior judge what happens if there is a clash, he replied: 'That is a question that ought not to be asked'.

The Act presupposes a basic consensus on human rights between judges on the one hand, and the government, Parliament and people on the other. It assumes that breaches of human rights will be inadvertent and unintended and that there will therefore be little disagreement between the government and the judges.

But there is clearly no such consensus when it comes to the rights of unpopular minorities. Two matters in particular – issues concerning asylum-seekers and issues concerning suspected terrorists – have come to the fore since the Human Rights Act came into force. To deal with these problems, so the government argues, new methods are needed, and these new methods may well infringe human rights. The judges, however, retort that we should not compromise our traditional principles – habeas corpus and the presumption of innocence – principles which have been tried and tested over many centuries and have served us well.

Some senior judges, however, have gone further. They have suggested that a natural consequence of the Human Rights Act should be an erosion of the principle of the sovereignty of Parliament. They argue that the sovereignty of Parliament is but a judicial construct, a creature of the common law. If the judges could create it, they can now, equally justifiably, supercede it. In *Jackson v. Attorney-General*, 2005, the case that dealt with the validity of the Hunting Act, judges for the first time declared, obiter, that Parliament's ability to pass primary legislation is limited in substance. Lord Steyn declared, obiter, that the principle of the sovereignty of Parliament, while still being the '*general* principle of our constitution' was:

a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.

He then went on to say in words which have already been much quoted:

In exceptional circumstances involving an attempt to abolish judicial review of the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

In another obiter dictum from *Jackson*, Lady Hale of Richmond said, '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 powers'. In another obiter dictum in the same case, a third law lord, Lord Hope of Craighead, declared:

Parliamentary sovereignty is no longer, if it ever was, absolute.

It is not uncontrolled – It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament is being qualified.

He then said:

The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based.

It may be significant that Lord Hope is a Scottish law lord, for the Scots have always shown more skepticism than the English towards the absolute sovereignty of Parliament, which they find difficult to reconcile with the Acts of Union uniting England and Scotland in 1707, but preserving certain features of the Scottish legal system and the Scottish church ‘for ever’.

The implication of the obiter dicta by the three law lords is that the sovereignty of Parliament is a doctrine created by the judges which can also be superceded by them. The law lords would, it seems, like to see the sovereignty of Parliament supplanted by an alternative rule of recognition, the rule of law.

One may ask, however, does the question of the ultimate norm of the legal system, the rule of recognition, rest with the judges alone, or does not the doctrine of the sovereignty of Parliament derive from our whole constitutional history, and, in particular, from the outcome of political struggles in the seventeenth century between Parliament and the king? If this latter view is correct, then the judges alone cannot supercede the principle of parliamentary sovereignty. They would require the consent both of Parliament and perhaps also the people, through referendum. It is, at present, highly unlikely that this consent would be granted.

It is clear, then, that there is a conflict between two constitutional principles, the sovereignty of Parliament and the rule of law. This conflict, if not resolved, could generate a constitutional crisis.

What I mean by a constitutional crisis is not simply that there are differences of view on constitutional matters. That is to be expected in any healthy democracy. What I mean by a constitutional crisis is that there is a profound difference of view as to the method by which such differences should be settled.

In any society, a balance has to be drawn between the rights of the individual and the needs of society for protection against terrorism, crime and so on. But who should draw the balance, the judges or the government.

Senior judges would no doubt claim that they have a special role in protecting the rights of unpopular minorities. They would say that in doing so they are doing no more than applying the Human Rights Act as Parliament has asked them to do.

The government and, one suspects, most MPs and much of the press, would disagree. The government and MPs would say that it is for them, as elected representatives, to weigh the precise balance between the rights of the individual and the needs of society. For they are elected and accountable to the people, but the judges are not. They will say that the Human Rights Act provides for the judges to review legislation. But this should not be made an excuse for the judges to seek judicial supremacy. The judiciary should not seek to expand its role by stealth, although, of course, both the American Supreme Court and the French *Conseil Constitutionnel* both acquired their powers by stealth, since in neither case are their powers explicitly laid down in the constitution. Neither the American constitution of 1787 nor the Fifth Republic constitution of 1958 has anything to say about the judicial review of legislation.

There is, then, a profound difference of view as to how issues involving human rights should be resolved. The government believes that they should be resolved by Parliament. The judges believe that they should be settled by the courts. Because they are coming to disagree about the rule of recognition, both government and the judges are coming to believe that the other has broken the constitution.

Government and Parliament say that judges are usurping power and seeking to thwart the will of Parliament. Judges say that the government is infringing human rights, and then attacking the judiciary for doing its job in reviewing legislation for its compatibility with the Human Rights Act. The British Constitution is coming to mean different things to different people. It is coming to mean something different to the judges from what it means to government, parliament and people. The argument from parliamentary sovereignty points in one direction, the argument from the rule of law in another. There will inevitably be a conflict and a struggle. The question is: how will it be resolved?

There are, clearly, two possible outcomes. The first is that Parliament succeeds in defeating the challenge of the judges, and parliamentary sovereignty is preserved. But the logical corollary of such an outcome would be that Parliament might well, on some future occasion, refuse to take notice of a declaration of incompatibility. The second possible outcome is that the Human Rights Act comes to trump Parliament, and that, in practice, a declaration of incompatibility by a judge comes to be the equivalent of striking down legislation. It is too

early to tell which outcome is more likely to prevail. What seems to me unlikely is that the compromise embodied in the Human Rights Act can survive over the long term.

It is, of course, possible that, like almost every other democracy, we come to develop a codified constitution. After all, so much of the constitution has been codified in recent years that it may not now seem such a great step as once it did to codify the remainder. With a codified constitution, it would seem natural for judges to be given the power to strike down laws which contravene the constitution, and that would include laws offending against human rights.

We are, at present, I believe, in a transitional period. Eventually, no doubt, a new constitutional settlement will be achieved. But that could prove a painful process. The path towards a new constitutional settlement could prove a difficult one, and there may be many squalls, and indeed storms on the way.

Those who seek a quiet life should steer clear of the constitution.







### **The Foundation**

The mission of the Foundation is to study, reflect on and promote the understanding of the role that law plays in society. We do this through the identification and analysis of issues of contemporary interest and importance. The Foundation provides this insight to practitioners by making the work of researchers and scholars more accessible and useful to them.

### **Courts and the Making of Public Policy**

In the last fifty years, courts have emerged as key participants in the public policymaking process, exercising discretion to make decisions which have far reaching consequences in terms of the distribution of benefits and burdens within society. The 'Courts and the Making of Public Policy' programme seeks to provide a critical assessment of the role of courts in policymaking from both empirical and theoretical perspectives, assessing their level of influence and scrutinising the efficacy and the legitimacy of their involvement. The programme considers a range of issues within this context: including the relationship between courts, legislatures and executives; how judicial policymaking fits within a democratic society; what training and qualifications judges have for policy decisions; and how suitable the judicial forum is for handling the information that is needed for informed policy choices.

**Vernon Bogdanor** is Professor of Government at Oxford University, Gresham Professor of Law, Fellow of the British Academy and Honorary Fellow of the Institute for Advanced Legal Studies. He has been an adviser to a number of governments, including the Czech Republic, Hungary, Israel and Slovakia. His books include, *The People and the Party System: The Referendum and Electoral Reform in British Politics, Multi-Party Politics and the Constitution*, and *Power and the People: A Guide to Constitutional Reform and Devolution in the United Kingdom*. He is editor of, amongst other books, *The British Constitution in the 20th Century* and *Joined-Up Government*. He is at present completing an interpretation of British government. He is a frequent contributor to TV, radio and the press.

For further information please visit  
our website at [www.fljs.org](http://www.fljs.org)  
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College  
Linton Road  
Oxford OX2 6UD  
T · +44 (0)1865 284433  
F · +44 (0)1865 284434  
E · [info@fljs.org](mailto:info@fljs.org)  
W · [www.fljs.org](http://www.fljs.org)