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Parliamentary Supremacy and the Re-Invigoration of Institutional Dialogue in the UK

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2011 was bookended by two significant speeches on the relationship between Parliament and the judiciary. The first was delivered by Lord Neuberger, the Master of the Rolls; the second by Jonathan Sumption QC—in a final speech before being sworn in as a Justice of the UK Supreme Court. Both speeches were steeped in the traditions of the nineteenth century constitutional theorist, Albert Venn Dicey. Parliament was said to be supreme, although the possibility for dialogue between the courts and the legislature was acknowledged. Internationally such forms of 'dialogic review' have frequently been criticised for morphing into a kind of judicial monologue. However, this article will argue that the recent prisoner disenfranchisement debates demonstrate a renewed willingness on the part of the Parliament at Westminster to withstand judicial pressure.

While James Madison foresaw competition between the courts, the legislature and the executive—arguing that 'ambition must be made to counteract ambition' (Madison, 1788)—senior members of the UK judiciary are retreating from the fray. In April 2011, Lord Neuberger, the Master of the Rolls, delivered the second Lord Alexander of Weedon Lecture and in November, Jonathan Sumption QC gave the F.A. Mann Lecture. The latter event took on even greater significance when Lord Sumption was sworn in as a Justice of the UK Supreme Court on 11 January 2012. Both lectures revisited the tension that exists between the 'notion of supremacy of the democratically elected legislature and the rule of law' (Lord Neuberger, 2011, para 10). Lords Neuberger and Sumption both adopted the position of the nineteenth century English constitutional theorist Albert Venn Dicey (Davies, 2011; Sumption, 2011, p. 16)—Parliament remains

supreme despite the European Court of Human Rights at Strasbourg and the Human Rights Act 1998 (HRA).

The soon to be Lord Sumption concluded that 'parliamentary scrutiny is generally perfectly adequate for the purpose of protecting the public interest in the area of policy-making. It is also the only way of doing so that carries any democratic legitimacy' (Sumption, 2011, p. 18). Similarly, Lord Neuberger overtly rejected any notion of judicial supremacy. He was clear that any form of institutional dialogue—between the judiciary and the legislature—must be firmly constrained by the supremacy of Parliament. In effect this means that the courts can express an opinion on the human rights implications of denying the franchise to prisoners, for example, but it is ultimately for Parliament to decide. This gives rise to two questions: is it possible to generate a dialogue between the courts and the legislature; and if so, is Parliament capable of fulfilling its function or will it simply back down in the face of judicial criticism?

This article will begin by outlining the nature of the problem as it is understood by Lords Neuberger and Sumption. It will then examine the concept of institutional dialogue as a means of resolving the apparent tension between the courts and the legislature. It will pay particular attention to the historical basis for dialogue within the Constitution of the UK as well as the dialogic role of s. 4 of the HRA. Dialogic or 'new commonwealth' models of review are frequently criticised for giving way to the kind of judicial monologue which Lords Neuberger and Sumption wish to avoid. However, this article will contend that the parliamentary reaction to the European Court of Human Rights judgments on prisoner voting provide evidence of a re-invigoration of institutional dialogue in the UK.

1. Who are the masters now?

Lord Neuberger is unequivocally opposed to judicial supremacy. In his lecture he engaged in a 550-year review concluding with an approving citation of Lord Millett: 'the doctrine of parliamentary supremacy is [not] sacrosanct, but . . . any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism'.[1] To avoid doubt Lord Neuberger clarifies that the supremacy of Parliament is not sacrosanct only because 'Parliament or the people could decide to alter it' (Lord Neuberger, 2011, para 30). He is forcefully dismissive of Lord Steyn's suggestion in *R (Jackson) v Her Majesty's Attorney General* that parliamentary supremacy is 'a construct of the common law'.[2] Such a position is described as 'intellectual

[1] *Ghaidon v. Godin Mendoza* [2004] 2 AC 557 at [57].

[2] *R (Jackson) v Her Majesty's Attorney General* [2006] 1 AC 262, [101].

sleight of hand'. Lord Sumption is equally uncomfortable with what he sees as the counter-democratic tendencies of Lord Steyn, arguing that it is not 'the function of the judiciary to correct the outcome of general elections' (Sumption, 2011, p. 17). Furthermore, 'parliamentary sovereignty was acknowledged rather than bestowed by the courts' and is more likely to be derived from the people than it is from the common law (Lord Neuberger, 2011, para 43).

Having set out their belief in the centrality of Parliament to the UK Constitution, both men proceed to make the case against judicial activism. Lord Sumption refers to *R v Foreign Secretary, ex parte World Development Movement*.[3] The World Development Movement (WDM) sought a judicial review of the decision of the Secretary of State for Foreign Affairs to fund the building of the Pergau Dam in Malaysia from the overseas aid budget. The claim by the WDM, that the use of these funds in this way would constitute an improper purpose, was accepted by the Court.[4] That decision was undeniably controversial—embroiling the High Court in a review of the policy decisions of the Secretary of State. However, the WDM case is a surprising case study of judicial activism. In spite of the High Courts' ruling on the merits of funding the building of the Pergau Dam, Parliament voted to reallocate the funds allowing the Foreign Secretary to make the payments. In short the Court's decision was ultimately overturned by Parliament (Sumption, 2011, p. 9). Taken as a whole, the case and the subsequent parliamentary response is more demonstrative of the ultimate supremacy of Parliament and might even be seen as an early example of institutional dialogue.

Lord Neuberger, on the other hand, seeks to bolster his defence of parliamentary supremacy through an analysis of *Jackson*,[5] a case which saw the validity of (not one but) two Acts of Parliament contested in court. The Hunting Act 2004 made it a criminal offence to hunt wild mammals with dogs.[6] It was passed without the approval of the House of Lords under the procedures set out in the Parliament Act 1949. The Parliament Act 1949 is a very short Act which amends s. 2 of the Parliament Act 1911 reducing the length of time by which the House of Lords can delay legislation. In a manner which is logically contentious, the Act of 1949 was itself passed without the consent of the House of Lords using the powers granted to the Crown and the House of Commons under the Parliament Act 1911.

[3] [1994] EWHC 1.

[4] [1994] EWHC 1.

[5] *R (Jackson) v Her Majesty's Attorney General* [2006] 1 AC 262.

[6] Hunting Act 2004, s. 1.

In *Jackson* it was argued that using the 1911 Act in this manner was an error and that the consent of the House of Lords should have been sought in order to limit the power of that House still further.[7] If such an argument were accepted, the Parliament Act 1949 would be invalid. Since the Hunting Act 2004 was passed using the provisions of the Parliament Act 1949 this would mean that the Hunting Act 2004 would also be invalid. Such an outcome would run counter to the principles of parliamentary supremacy since that theory holds that no body, other than Parliament, may question the validity of an Act of Parliament (Dicey, 1915). To reconcile *Jackson* with Dicey Lord Neuberger argues that if the court had set aside the Parliament Act 1949 (and by extension the Hunting Act 2004) it would not have been setting aside primary legislation; rather it 'would have been clarifying the effect of the 1911 Act', and deeming that the 1949 Act and the Hunting Act to have been mere secondary legislation (Lord Neuberger, 2011, para 38). It is open to the courts to review the validity of secondary legislation and as such, according to the Master of the Rolls, *Jackson* and parliamentary supremacy can be reconciled.

Jackson is not the only, nor even the most significant, challenge to parliamentary sovereignty. The premise that no body, other than Parliament, can challenge the validity of an Act of Parliament is put under strain by the European Convention of Human Rights (ECHR). More particularly, the judgments emanating from the European Court of Human Rights present a difficulty for traditional Diceyean scholars. The European Court of Human Rights can impugn the validity of an Act of Parliament based on its non-compliance with the human rights norms established within the Convention. But Lord Neuberger adopts a formalist analysis: Strasbourg may impose obligations but these are international, not domestic. Parliament could choose not to implement a Strasbourg judgment—this would place the UK in breach of a treaty obligation but that would be acceptable in a domestic law. 'This would be a political decision, with which the courts could not interfere' (Lord Neuberger, 2011, para 56). Lord Neuberger argues that 'there is something in the view that Strasbourg is getting rather too interventionist . . . that it has strayed too far from the alarm bell intention behind the Convention' (Lord Neuberger, 2011, para 65). In the end he advocates the need for a dialogue between domestic courts and the court at Strasbourg (Lord Neuberger, 2011, para 66). As with his analysis of *Jackson*, the dialogue Lord Neuberger envisages is firmly rooted in parliamentary sovereignty: 'when Strasbourg speaks, it is ultimately for Parliament to consider what action needs to be taken' (Lord Neuberger, 2011, para 67).

[7]Lord Bingham, *R (Jackson) v Her Majesty's Attorney General* [2006] 1 AC 262 at [1].

As has been demonstrated, the judicial branch of government—as embodied by Lords Neuberger and Sumption at least—is placing considerable store in the ability of Parliament to uphold citizens' rights. However, there are a number of obstacles to effective legislative protection of rights. Indeed Lord Neuberger M.R. advocates parliamentary supremacy while simultaneously acknowledging the weaknesses inherent in the parliamentary system: he argues that 'Parliament no doubt appreciates that the unelected judges sometimes are more easily able to do what is right, but temporarily unpopular, than politicians who need to submit themselves at least every five years to the electorate' (Lord Neuberger, 2011, para 71). As a result, he encourages dialogue between international and domestic courts, and Parliament, but this is merely an aspiration—no mechanism is proposed to facilitate that conversation and the precise nature of the envisaged constitutional settlement is left unexplored. A further problem arises if legislatures 'mistakenly believe that the courts will bail the people out of whatever trouble the political branches make' (Tushnet, 2005, p. 2680). Parliamentarians will be less inclined to act in the defence of civil liberties if they believe that the courts will do it for them (Davis, 2010). Moreover, it is not immediately apparent that faith in the political branch is justified: de Londras, for example, has argued that the UK and US legislatures' design and implementation of laws for the detention of individuals in the 'war on terror' has been greatly influenced by popular and manufactured 'moral panics' (de Londras, 2011). If the dialogic model imagined by Lords Neuberger and Sumption is to be relied upon we must have reason to believe that the legislative branch of government will in fact fulfil its role. Alternatively, we are faced with the prospect of the judiciary stepping away from rights protection, in anticipation of greater parliamentary scrutiny, while the legislature fails to address the issue based on the incorrect assumption that this is a judicial function—all of which results in unrestrained executive power (Davis, 2010). In that context, Part 2 of this article will set out a more concrete basis of dialogue within the Constitution of the UK.

2. Institutional dialogue

In the latter part of the twentieth century, new forms of institutional dialogue between courts, Parliament and the executive emerged (Hogg and Bushell, 1997; Hickman, 2005; Dixon, 2007; Tushnet, 2008; Gardbaum, 2010). Dialogue encourages a conversation between institutions 'about which of the competing reasonable interpretations of constitutional provisions is correct' while ensuring that, in the end, the legislature's interpretation can be made legally effective (Tushnet, 2008, p. 209). An early attempt at dialogue formally encapsulated in a constitutional framework is the 'notwithstanding clause' contained in s. 33 of

the Canadian Charter of Rights 1982.[8] The UK declaration of incompatibility in s. 4 of the HRA, while operationally different from the 'notwithstanding clause', also restricts the courts to 'courteous requests for conversation, not pronouncements of truth from on high' (Gearty, 2006, p. 96). If properly functioning, the attractiveness of a dialogic model is that it plays to the comparative advantage of each institution:

> most people think that legislatures are less likely than courts to be attentive to the limits constitutionalism places on democratic self-governance. Dialogic review capitalises on the institutional advantage courts have in constitutional attentiveness by allowing courts to bring constitutional values, in connection with specific problems, into focus in the legislative forum. This advances the constitutionalist value of limitations on democratic self-governance. With the issue brought to the legislature's attention, we can then advance the value of democratic self-governance by leaving the final decision to the legislature (Tushnet, 2008, p. 212).

This is precisely the balance sought by Lord Neuberger: he argued against judicial supremacy but at the same time disavowed judicial passivism, calling on Parliament to acknowledge its own weaknesses (Lord Neuberger, 2011, para 71). Theoretically, this dialogic approach permits courts to robustly defend rights while deferring to 'legislative sequels that evidence clear and considered disagreement with their rulings' (Dixon, 2007, p. 393). This approach is encapsulated in the HRA s. 4 declaration of incompatibility—the Act deliberately undermines 'its own authority inviting the political back in to control the legal at just the moment when the supremacy of the legal discourse seems assured' (Gearty, 2006, p. 95).

3. Traditional forms of institutional dialogue in the UK

Robert Dahl noted that the US Supreme Court is not just a court of law but 'also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy' (Dahl, 1957, p. 279). That politically contentious function of courts risks tension between the judiciary and the other

[8]Section 33 for the Canadian Charter permits the federal parliament and provincial legislatures of Canada to pass legislation 'notwithstanding the possibility (or certainty) that the legislation might be understood by some, including the courts, as inconsistent with one of a significant number of rights contained in the charter'. Thus, the legislatures can anticipate a judicial objection to the legislation and determine that the legislation should remain valid notwithstanding that judicial objection (Tushnet, 2008, pp. 205–206); http://www.efc.ca/pages/law/charter/charter.text.html (last accessed 25 July 2011).

branches of government. 'Traditionally, the tension has been constrained by both judges and government adopting positions which avoid confrontation' (Woodhouse, 1996, p. 423). Such a position was exhorted by Lord Irvine prior to—though perhaps in anticipation of—his appointment as Lord Chancellor: he advocated 'judicial self-restraint in deference to the sovereignty of Parliament' (Lord Irvine, 1996, p. 60). Deference is insufficient because, as Lord Irvine himself acknowledged, the judiciary have an important function: 'the consequences of the "democratic deficit", the want of parliamentary control over the executive in recent years, have been, to an important degree mitigated by the rigours of judicial review' (Lord Irvine, 1996, p. 59). Restraining the judiciary can result in an unfettered executive.

Parliament, of course, is not always weakened by the so-called 'democratic deficit': Prime Minister David Cameron's coalition government has been held to account through ongoing parliamentary revolts.[9] However, even in the circumstances of a hung parliament, there are institutional limitations which hamper the legislature from effectively securing citizens' rights. While 'only democratic politics can be sufficiently sensitive to the results of change and only democratic politics can respond adequately to the different interests and perspectives of subcultures', the courts are required to 'tame the democratic legislature in the light of existing legal doctrine' (Raz, 1990, pp. 335–36). This taming process brings with it the danger of politicisation. To avoid these problems the institutions must be designed to withstand controversy; there needs to be a mechanism for dealing with tension.

Prior to 2005 the UK Constitution's mechanism for relieving such tension was the Office of the Lord Chancellor: the office spanned all three branches of government. The Constitutional Reform Act, 2005 altered the role to remove this flagrant breach of the separation of powers—but the reforms had unintended consequences. As Lord Woolf noted:

> What had been seriously underestimated was the significance of the removal of the Lord Chancellor. It had not been appreciated sufficiently that the Lord Chancellor played a pivotal role in coordinating the three arms of Government. Nor had sufficient attention been paid to the fact that, because of his membership of the Cabinet, the Lord Chancellor was able to act as a lightning conductor at times of high tension between the executive and the judiciary (Lord Woolf, 2004, p. 320).

The pre-2005 Office of the Lord Chancellor might reasonably be construed as an ancient (or perhaps pre-modern) attempt at incorporating dialogue into constitutional design. Of course the role of 'lightning rod' was at times an

[9] www.revolts.co.uk (last accessed 22 February 2012).

uncomfortable one and sparks were bound to fly: Woodhouse detailed the potential for controversy resulting from the former office of Lord Chancellor's confusing role—describing, for example, political interference with the Guildhall speech of Lord Mackay in 1995 (Woodhouse, 1996, p. 432). The position of the Lord Chancellor became untenable as it became obvious 'that the emphasis of the office had shifted—away from the judicial, toward the political . . . which raised questions about the legality, under article 6(1) [of the ECHR], of the role of lords chancellors as judges and, hence, about the constitutionality and efficacy of their being responsible for the' office (Woodhouse, 2007, p. 155). The Constitutional Reform Act, 2005 remedied this apparent breach of the separation of powers but in doing so it also removed a useful conduit between Parliament, executive and judiciary.

4. The atrophy of institutional dialogue

Despite its apparent usefulness and historic antecedents in the Constitution of the UK, internationally institutional dialogue has been somewhat unsuccessful. For example, the Canadian notwithstanding clause has been described as 'relatively unimportant because of the development of a political climate of resistance to its use' (Hogg and Bushell, 1997, p. 83). Belief that there would be public outrage in the face of a federal parliament use of the notwithstanding clause has resulted in that power never being used at the federal level, 'leading some to assert the existence of an "embryonic" constitutional convention barring it' (Vermeule, 2012, p. 6). As a result, often 'Parliament adjusts its legislation not because it agrees with the Court's constitutional interpretations, but because it understands that it will be unable to make its own interpretation stick' (Tushnet, 2008, pp. 213–24). That is not a dialogue. We ought to see 'a presumption that legislatures will abide by court decisions and not routinely ignore them; but on matters of principle, where there is reasonable disagreement after serious debate, it should be considered legitimate for legislatures to exercise their independent legal powers of the final word' (Gardbaum, 2010, p. 193). This is the model of dialogue advocated for the UK.

Internationally, the strongest example of dialogue working is, ironically, the result of judicial activism: the New Zealand precedent of *Simson v Attorney General (Baigent's case)*.[10] Here the police conducted an illegal search and the victim sought damages. New Zealand's highest court adopted 'an aggressive approach' to its Bill of Rights enforcement. The New Zealand Bill of Rights conferred an extremely weak judicial review power on the court. However, the court exercised its common law powers to create a remedy for violations of the

[10] [1994] 3 New Zealand Law Review 667.

bill of rights (Tushnet, 2008, p. 215). In response to this innovation the government of New Zealand asked the Law Reform Commission to advise on whether Parliament ought to adopt new legislation to reverse judgment of the court. The Commission considered the issue, concluded that the courts had got the matter right and advised against. As Tushnet notes:

> simply looking at the result . . . might lead one to think that the New Zealand court had converted its extremely weak form of judicial review into the more traditional form of judicial supremacy . . . But *Baigent's Case* and its sequel show dialogic review in action: The court's decision stuck because parliament eventually agreed with the court (Tushnet, 2008, p. 215).

This example still lacks the overt rejection of the court's interpretation which might firmly cement the right of the legislature to set aside the judicial opinion (Vermeule, 2012, p. 19), but it does at least demonstrate a willingness to consider rejection of the court's position and the ultimate acceptance was not the result of legislative capitulation.

5. Prisoner disenfranchisement

Baigent's case aside international experience might lead to the conclusion that the dialogue envisaged by Lords Neuberger and Sumption often gives way to judicial monologue. After all, Parliament has complied with almost every declaration of incompatibility, under s. 4 of the HRA, issued by the UK courts (Ministry of Justice, 2010). 'There has not been a single case in which Parliament has openly and notoriously rejected the declaration, or even signalled rejection by inaction' (Vermeule, 2012, p. 18). Just as it was argued that the notwithstanding clause was 'relatively unimportant' (Hogg and Bushell, 1997, p. 83) it has been argued that 'Parliament's ability to derogate from the ECHR, although formally undisturbed by the HRA, begins to look increasingly notional' (Elliott, 2004, p. 553) and that the intention of the HRA was 'surely . . . that government and Parliament will faithfully implement any declaratory judgment'.[11] To avoid the emergence of a constitutional convention against the use of s. 4, some have gone so far as to suggest that 'Parliament should override, or at least conspicuously ignore, some declaration of incompatibility or other' solely to keep their power alive (Vermeule, 2012, p. 19). While in extremis that might be necessary, the prisoner disenfranchisement debates perhaps demonstrate that Parliament is willing to take a principled stand against the judgment of a court and in doing so assert its own supremacy.

[11]HL Deb. vol. 582 col. 1276 (3 November 1997).

Following *Pearson and Martinez*,[12] the European Court of Human Rights considered the UK's blanket ban on prisoner voting in *Hirst v. the United Kingdom*[13] and again in *Greens and MT v the United Kingdom*.[14] Firstly, the government indicated a willingness to comply with the judgments but engaged in a protracted review—issuing consultation documents in 2006 and 2009 (Murray, 2011, p. 62). By the 2010 UK general election there was still no reform. This was more indicative of political foot dragging than an attempt at detailed and deliberative dialogue. More recently Parliament has debated the issue in terms which demonstrate a willingness to assert their authority in the face of judicial disapproval. On a rhetorical level Prime Minister David Cameron stated that he feels 'physically ill' at the thought of giving the vote to convicted prisoners[15]—although Francesca Klug has noted that he did not mention this sense of nausea during his speech to the Council of Europe (Klug, 2012). More significantly David Davis MP moved a motion which specifically acknowledged the European Court of Human Rights judgments and the UK treaty obligations arising from the ECHR but asserted that 'legislative decisions of this nature should be a matter for democratically elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand'.[16] Davis abruptly declared that 'the historical task of this Parliament is to correct bad law, no matter where it comes from'[17] and his motion in defiance of the European Court of Human Rights was passed by a margin of 234 votes to 22.[18]

Davis' statements in relation to correcting 'bad law' might be taken together with Judge Tulkens' concession that the European Court of Human Rights 'does not have a monopoly on understanding the Convention' (Judge Tulkens, 2010, p. 9). This acceptance of the Court's fallibility suggests an openness to some form of exchange on the substance of the rights contained within the ECHR. Similarly, Lady Justice Arden has recognised that 'in the case of the Strasbourg Court, dialogue with the national courts is an important means of providing . . . checks and balances' (Lady Justice Arden, 2010, p. 24). However, Lady Justice Arden admits that the current operation of s. 2 of the HRA undermines

[12] [2001] EWHC Admin 239.

[13] (2006) 42 EHRR 41.

[14] [2010] ECHR 1826. For a more detail on the prisoner disenfranchisement cases see Briant (2011); Murray (2011) and Slapper (2011).

[15] HC Deb. vol. 517, col. 921 (3 November 2010).

[16] HC Deb. vol. 523, col. 493 (10 February 2011).

[17] HC Deb. vol. 523, col. 496 (10 February 2011).

[18] HC Deb. vol. 523, col. 584, Div. 199 (10 February 2011).

the ability of the UK courts to effectively restrain the Strasbourg Court. This is because s. 2 has been interpreted as 'requiring our domestic courts to follow Strasbourg jurisprudence "as it evolves over time: no more but certainly no less"' (Lady Justice Arden, 2010, p. 25). That interpretation means that the UK courts docilely follow Strasbourg rather than engaging in a judicial conversation or disagreement.

In *R v Horncastle*, Lord Philips, on behalf of the UK Supreme Court appeared to acknowledge the need for the kind of conversation advocated by Lady Justice Arden. While s. 2 of the HRA would ordinarily require the domestic courts to follow the European Court of Human Rights, there would be rare occasions where that was not appropriate. This would be particularly true where the Strasbourg Court does not sufficiently appreciate or accommodate 'particular aspects of our domestic process'. In such circumstances Lord Phillips envisaged a dialogue between the UK courts and Strasbourg with the UK courts giving reasons for their rejection of the Strasbourg jurisprudence and the 'Strasbourg Court [taking] the opportunity to reconsider the particular aspect of the decision that is in issue'.[19] However, the Court's willingness to withstand Strasbourg's precedent is insufficient. The form of institutional dialogue envisaged in this article goes beyond intra-judicial dialogue; it requires Parliament to retain the final say (Gardbaum, 2010, p. 193).

More recently, the UK government has intervened in the European Court of Human Rights case of *Scoppola v Italy (No. 3)*.[20] This is a yet another case on prisoner disenfranchisement and the UK government has argued that 'it is likely that the judgment of the Grand Chamber in *Scoppola* will have a direct impact on the question of which legislative proposals should be brought forward in order to comply with the judgment in *Greens and MT*' (Wagner, 2011). Previously the UK government had until 11 October 2011 to comply with the judgment in *Hirst (No. 2)*. By intervening in *Scoppola* that date is deferred until 6 months after a judgment in that case. As a result, this intervention can be seen as either a cynical attempt to further delay legislative remedy or as an attempt to gain valuable guidance prior to decisively legislating on the issue. Either way the events can be characterised as dialogue. In passing a motion in defiance of the European Court of Human Rights, Parliament has demonstrated a willingness to consider the judgment of the court coupled with a determination to defy that judgment. Parliament has asserted its right to retain the final say. Furthermore, in response to Parliament's actions the UK government has asked the European Court for further clarification. Having received such clarification the government will presumably draft legislation compliant with the future *Scoppola* judgment

[19] [2009] UKSC 14 at [11].

[20] Application No. 126/05.

and present that to Parliament for consideration. This is nothing if not a conversation. In terms of the strength of institutional dialogue in the UK, it is worth noting that it is one thing to withstand pressure from a court in Strasbourg, but it is quite another to stand in opposition to the UK Supreme Court. To secure the future of dialogic review in the UK, Parliament will need to exercise its powers under the HRA and deliberately choose to ignore a s. 4 declaration of incompatibility. Until recently, that possibility seemed remote, but the prisoner disenfranchisement debates may reawaken Parliament's sense of its own supremacy.

6. Conclusion

This article has been largely supportive of Lords Neuberger and Sumption's joint efforts to resist the siren call of judicial supremacy. However, the traditional theory of parliamentary supremacy alone is inadequate for the twenty-first century: it left Lord Neuberger in the position of advocating dialogue without providing any mechanism for such interactions. He respected the role of Parliament and hoped that parliamentarians would behave in an equally respectful manner in acknowledging the expertise of the judiciary. Dialogue is too fragile a concept to rest on such a gentleman's agreement. This article has demonstrated that there is historic precedent for institutional dialogue in the UK Constitution—as such it does not pose a threat to traditional UK constitutional values. Furthermore, Parliament explicitly provided for just such an exchange through s. 4 of the HRA. Dialogue is not dismissive of the role of courts: it acknowledges and facilitates judicial expertise while retaining the right of the legislature to reject the courts view after careful consideration. In Canada constitutional attempts at dialogue have withered on the vine—that should not be allowed to happen in the UK and the parliamentary response to the prisoner disenfranchisement cases demonstrates how the UK legislature might reassert its right to stand in opposition to a court judgment. This provides moment for the potential re-invigoration of the dialogic model in the UK. Institutional dialogue can energise all branches of government; we must not hide it under a Diceyean bushel.

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