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LEGISLATIVE SCRUTINY ON CONSTITUTIONAL GROUNDS IN THE UNITED KINGDOM PARLIAMENT

THE CONTRIBUTION OF CONSTITUTIONAL COMMITTEES TO (POLITICAL?) RESPONSIBILITY FOR THE CONSTITUTION

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ABSTRACT / LAY SUMMARY

This thesis focuses on institutional arrangements designed to strengthen the ability of political institutions to assess the constitutional implications of legislation in the law-making process. It sheds light in the under-developed field of parliamentary constitutional assessments by bringing together disparate constitutional theory literature that discusses or touches upon the distinctiveness of this activity with a view to conceptualise "legislative scrutiny on constitutional grounds" ("LSGC"). The thesis distinguishes three alternative conceptions of LSCG: a legalistic conception, a conception of constitutional deliberation, and a conception of constitutional construction and development. This work characterises these conceptions and employ them as a framework to interpret the working practices of the United Kingdom ("UK") Parliament.

The thesis shows that the UK has a set of institutional arrangements, consolidated through time, which are designed to foster legislative scrutiny of the constitutional implications of legislation. It argues that the Joint Committee on Human Rights, the Delegated Powers and Regulatory Reform Committee and the Select Committee on the Constitution are the main parliamentary drivers of constitutional thinking in the UK law-making process. The thesis suggests that these constitutional committees face significant challenges in pursuing their legislative scrutiny work. From a substantive point of view, the very nature of the UK constitution shapes the work of these committees. Constitutional committees struggle working out the contents of its constitutional principles, values, conventions, practices, doctrines and other standards. The UK constitutional framework is one of multiple layers, and no clear constitutional philosophy. It remains essentially contested, and therefore cannot provide clear normative guidance about which LSCG conception should be preferred. Each committee has responded differently to this challenge, having its own approach to the constitution, underpinned by a different conception of LSCG.

From a procedural point of view, constitutional committees have encountered significant difficulties to mainstream constitutional considerations among elected politicians, either in government or in Parliament. Constitutional committee reports provide a highly valuable resource, that might bridge the gap between the highly

technical and complex nature of constitutional matters, and the lack of time, energy and information among elected politicians to engage in constitutional assessments. However, as far as the UK is concerned, these institutional arrangements have not met their normative expectation to mainstream constitutional considerations among elected politicians.

Yet, these committees have become necessary points of reference for bill teams, legislative drafters, and the Law Officers. In Parliament, the House of Lords engages with their reports, which both inform their debates and some of peers' amendments to government legislation. Hence, whilst constitutional committees may not have a substantial impact among elected politicians, they form part of a wider network of political and legal accountability checks. These checks operate on the basis of interactions and collaboration between government officials, the Lords, parliamentary lawyers and legal advisers, and the other relevant civil society actors. It is mainly through these interactions that constitutional committees have managed to operate as conduits through which constitutional considerations are channelled into political decision-making.

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DECLARATION

I declare that this thesis has been composed solely by myself, that it is my own work, that this work has not been submitted for any other degree or professional qualification, and that, exception where stated otherwise by reference of acknowledgment, the work presented is entirely my own.

PABLO SALVADOR GREZ HIDALGO

Edinburgh, 23th December 2019

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INTRODUCTION

I. Problem and research questions

Constitutional lawyers commonly think of the practice of assessing the constitutional implications of legislation as the natural competence of courts. On reflection, this thinking is rather surprising. As a matter of fact, only a fraction of enacted legislation is ever challenged before a court. More significantly, political branches of government conduct their own assessments about the constitutional implications of legislation in the law-making process. Governments have their own legal service, which advises ministers on the constitutional dimension of government's intended legislation, from the earliest stages of the policy-making and legislative drafting. Ministers may either have a commitment to finding constitutionally consistent legislative means to achieve their policies; or they may be concerned with the prospects of successful judicial challenges, and therefore have a risk-assessment approach. Similarly, legislative assemblies may either gather legal advice from their own parliamentary lawyers or seek views from legal academics or the wider public on the constitutional implications of government legislation. Furthermore, there may be "constitutionally-aware" MPs, which due to their legal background and/or interests, take issue with the constitutional implications of legislation. In addition, constitutional issues may dominate parliamentary debates when they gain political salience. It may also be that Parliament has a pragmatic approach and seeks to approve "constitution-proof" legislation. In sum, there are multiple instances in which political institutions engage in constitutional assessments of legislation. Courts have no monopoly in the modern constitutional state on assessing the constitutional implications of legislation.

However, the role that political institutions perform in developing, interpreting, changing and deliberating about the Constitution, as well as keeping legislation within its confines, remains generally neglected.[1] There are only a few contributions on this topic. On the one hand, there is seldom constitutional scholarship on bureaucratic controls of legality and constitutionality of primary legislation.[2] On the other hand,

[1] Richard W. Bauman and Tsvi Kahana, 'New Ways of Looking at Old Institutions' in Richard W. Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006).

[2] Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press 1999), Ch7.

there is some constitutional scholarship that discusses the role of Parliament on constitutional assessments. However, an overwhelming majority of this body of work limits their analysis to parliamentary contributions on human rights matters,[3] neglecting its engagement with other constitutional standards.[4] The academic literature

[3] The UK literature parliamentary constitutional assessments is largely human rights-centred. See David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323; David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 Statute Law Review 91; Danny Nicol, 'The Human Rights Act and the Politicians' (2004) 24 Legal Studies 451; Janet Hiebert, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4 International Journal of Constitutional Law 1; Francesca Klug and Helen Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance' [2007] European Human Rights Law Review 231; Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2009); Tom Campbell, 'Parliamentary Review with a Democratic Charter of Rights' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights - Sceptical Essays* (Oxford University Press 2011); Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012); Murray Hunt, 'The Joint Committee on Human Rights' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013); Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliament and Human Rights* (Hart Publishing 2015); Elin Weston, 'The Human Rights Act 1998 and the Effectiveness of Parliamentary Scrutiny' (2015) 26 King's Law Journal 266; Janet Hiebert and James Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press 2015) ; Adam Tomkins, 'Parliament, Human Rights and Counter-Terrorism' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights - Sceptical Essays* (Oxford University Press 2011); Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 Australian Journal of Political Science 41; Alice Donald and Phillip Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press 2016) Kirsten Roberts Lyer and Philippa Webb, 'Effective Parliamentary Oversight of Human Rights' in Matthew Saul, Andreas Follesdal and Geir Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (Cambridge University Press 2017); Grégoire Webber and others, *Legislated Rights* (Cambridge University Press 2018); Alexander Horne and Megan Conway, 'Parliament and Human Rights' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018).

For a comparative perspective, see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013); Hiebert and Kelly; Thomas Bull and Iain Cameron, 'Legislative Review for Human Rights Compatibility: A View from Sweden' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015); Donald and Leach; Matthew Saul, Andreas Føllesdal and Geir Ulfstein, *The International Human Rights Judiciary and National Parliaments* (Cambridge University Press 2017); Janet Hiebert, 'The Charter's Influence on Legislation: Political Strategizing about Risk' (2018) 51 Canadian Journal of Political Science 727.

[4] For UK literature looking at constitutional standards other than rights, see Robert Hazell, 'Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?' [2004] Public Law 495; Dawn Oliver, 'Constitutional Scrutiny of Executive Bills' (2004) 4 Macquarie Law Journal 33; Dawn Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] Public Law 219; Peter Davis, 'The Significance of Parliamentary Procedures in Control of the Executive: A Case Study: The Passage of part 1 of the Legislative and Regulatory Reform Act 2006' [2007] Public law 677; Jack Simson Caird, 'Parliamentary Constitutional Review: Ten Years of the House of Lords Select Committee on the Constitution' [2012] Public Law 4; Andrew Le Sueur and Jack Simson Caird, 'The House of Lords Select Committee on the Constitution' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013); Jack Simson Caird, 'Identifying the Value of Parliamentary Constitutional Interpretation' (DPhil thesis, Queen Mary University 2014); Dawn Oliver, 'Constitutional Guardians: The House of Lords' The Constitution

has not provided a systematic analysis of the different ways in which Parliament and the Constitution relate in the law-making process.

Most constitutional theorists place little faith in the possibility of politicians taking the Constitution seriously. Their intuition is that MPs may not promote and protect constitutional principles, values and other standards. The relationship between the Constitution and the exercise of political powers through elected representatives tends to be depicted as one of potential conflict.[5] While there exists a variety of views about the degree in which the Law disciplines the exercise of political powers, most constitutional scholars think that the Constitution imposes substantive limits on the exercise of political powers, and that courts should act as arbiters in this conflict between Law and politics. Although it may seem an overstatement, Jeremy Waldron has a point when he argues that "(…) constitutionalism takes democracy and the power assigned to ordinary people through elective and representative procedures as its natural enemy."[6] This set of beliefs has had an agenda-setting impact on constitutional scholarship. Constitutional scholars spend significant time and resources addressing questions such as whether judges should have powers to strike down legislation in breach of constitutional rights, and under what conditions such an exercise of constitutional review powers would be legitimate in the democratic constitutional state. This has resulted in a detriment of the analysis of alternative forms of constitutional assessments that take place in the political branches of government.

It could be argued that constitutional scholars have neglected Parliament's role of assessing the constitutional implications of government legislation for good reasons. Thus, empirical evidence suggests that politicians usually fail to fully engage with constitutional matters.[7] Instead, they prioritize political and policy considerations.

Society <https://consoc.org.uk/publications/constitutional-guardians-the-house-of-lords/> accessed 8 January 2018; Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016); Mark Elliott and Stephen Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' [2019] Public Law 37. For a comparative perspective, see Gabrielle Appleby and Anna Olijnyk, 'Constitutional Deliberation in the Legislative Process' in Ron Levy and others (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press 2018).

[5] AW Bradley, Katja S Ziegler and Denis Baranger, 'Constitutionalism and the Role of Parliaments' in AW Bradley, Katja S Ziegler and Denis Baranger (eds), *Constitutionalism and the Role of Parliaments* (Hart Publishing 2007), 2.

[6] Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016), 38.

[7] Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists', 226.

Nevertheless, this argument has a noticeable drawback. It is possible to design institutional arrangements to promote political engagement with the Constitution. Take for instance the experience of some countries that belong to the Commonwealth tradition. Canada, New Zealand, the United Kingdom ("UK") and Australia have imposed statutory duties on government to report to Parliament about the compatibility of its legislative proposals with human rights.[8] In addition, the UK and Australia have created specialised and permanent joint committees of both Houses of Parliament which scrutinise government bills for their human rights implications. Moreover, the Australian Senate has a Legal and Constitutional Affairs Committee, which scrutinises bills referred by the Senate. This committee engages with a wide range of subjects, including legislative scrutiny of bills on constitutional grounds. The UK House of Lords has a strong machinery of two specialised committees dealing with constitutional matters. The remit of the Delegated Powers and Regulatory Reform Committee (herein, "DPRRC") is to scrutinise every provision delegating powers and defining degrees of parliamentary oversight. Secondly, the Select Committee on the Constitution (herein, "SCC") scrutinises the constitutional implications of legislation. These examples show that constitutional democracies can design institutional arrangements with a view to foster political engagement with the constitutional implications of legislation in the law-making process.

This is a thesis about institutional arrangements designed to strengthen the ability of political institutions to assess the constitutional implications of legislation in the law-making process. It mainly focuses on Parliament's role in this activity, which I conceptualise as "legislative scrutiny on constitutional grounds" ("LSCG"). My research questions are as follow: How to conceptualise LSCG? What are its theoretical

[8] In Canada, section 4.1 of the Department of Justice Act, RSC 1985 imposes a duty on the Minister of Justice to examine every bill introduced by the government to the House of Commons and to report whether any of its provisions is inconsistent with the purposes and provisions of the Canadian Charter of Rights and Freedoms. In New Zealand, section 7 of the Bill of Rights Act 1990 provides that the Attorney-General shall bring to the attention of the House of Representatives any provision of a government bill that may be inconsistent with the rights and freedoms contained in the Bill of Rights. In the UK, section 19(1) of the Human Rights Act 1998 (hereafter, "HRA") requires that the minister responsible for a government bill to make a statement of compatibility with Convention rights. In Australia, clause 8 of the Human Rights (Parliamentary Scrutiny) Act 2011 provides that an MP who introduces a bill through Parliament must present to the respective House of Parliament a statement of compatibility or incompatibility with human rights. Similar provision exists in clause 28 of the State of Victoria's Charter of Human Rights and Responsibilities Act 2006, and in clause 37 of the Australian Capital Territory's Human Rights Act 2004 (although, in this case, the statement must be prepared by the Attorney-General).

foundations? How does a concrete set of constitutional arrangements shape LSCG? How does LSCG work in practice? Can institutional arrangements such as those abovementioned ones foster LSCG? Who are their main actors? Do these institutional arrangements deliver their promises to mainstream the constitution among politicians? Do they foster political accountability of the government for the constitutional implications of its bills?

II. Methodology and case study

I will address these questions by employing a methodology that is attentive to the theoretical concerns of constitutionalism, as shaped and constrained by empirical realities. I look at the two main political institutions, namely, Parliament and the executive. This thesis discusses how legislative powers ought to be exercised in the context of the modern constitutional state, while discussing its application in a real-world legislature operating in a country that embraces the key tenets of constitutionalism.

The first step in this argument is to provide a theoretical conceptualisation of LSCG. I identify three different conceptions of LSCG, and discuss which conception of the Constitution underpins each of them. The second step is to employ these theoretical insights to interpret and assess the LSCG practice of a real-world legislature, operating under a concrete set of constitutional arrangements. To pursue the second step, this thesis employs the UK Parliament as a case study.[9] There are good reasons to focus on this jurisdiction. Firstly, because the UK has a long-standing tradition of parliamentary democracy. Secondly, because the UK government justifies the constitutional implications of its legislative proposals in compliance with statutory duties and/or long-standing practices of publishing explanatory notes attached to bills and/or dedicated memorandums. Thirdly, and critically, because the UK Parliament

[9] There is a nation-wide UK Parliament, namely, the UK Parliament at Westminster, and regional legislative assemblies for Scotland, Wales and Northern Ireland. This thesis is only concerned with the former. The three devolved legislative assemblies partially respond to a different model of constitutionalism. They are legislatures of limited competence. In contrast, the UK Parliament has theoretically supreme legislative powers. This means that there are no legal limits on its legislative power. For an analysis of political institutions conducting pre-legislative and legislative scrutiny on constitutional grounds in the context of a devolved legislature, see Christopher McCorkindale and Janet L. Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21 Edinburgh Law Review 319.

has a strong system of permanent and specialised constitutional committees assisting parliamentary deliberations about the constitutional implications of legislation.

This two-step methodology means that this thesis combines literature review and critical analysis of constitutional theory scholarship with insights provided by political science and other empirically informed materials, as well as analysis of primary sources such as parliamentary debates, committee reports and committee meetings, and other rules of soft law. This thesis not only theorises a concrete set of institutional arrangements designed to secure political engagement with the constitutional implications of legislation. It also interprets and assesses the UK law-making practice as a concrete manifestation of these arrangements. Hence, normative and empirical considerations perform an essential role in the development of theoretical insights, but may also enter into a relationship of tension, thus leading to an immanent critique or reformulation of theoretical models.

III. Contribution

This thesis makes the following contributions.

Firstly, it brings together disparate constitutional theory literature that discusses or touches upon the distinctiveness of parliamentary assessments on the constitutional implications of legislation. The aim is to conceptualise LSCG. This thesis distinguishes and presents three discrete conceptions of LSCG. This theoretical insight may operate both as a model to understand and interpret, as well as to assess, the activity performed by real-world legislatures assessing the constitutional implications of legislation.

Secondly, this thesis presents the three constitutional committees as a part of a set of institutional arrangements designed to foster constitutional assessments in the law-making process by the political branches of government. There is constitutional scholarship discussing discrete components of this system. By an overwhelming margin, the Joint Committee on Human Rights ("JCHR") has attracted most of the attention.[10] In contrast, section 19 of the Human Rights Act 1998, which imposes a statutory duty on ministers to issue a statement of compatibility on every government

[10] See references in footnote 3.

Bill, has captured little attention.[11] There has been some interest on the SCC.[12] Finally, there has been little interest in the DPRRC.[13] Although a few contributions have suggested that these three constitutional committees form part of a system,[14] there are no studies theorising, discussing and presenting them as a system. In my view, doing so presents both substantive and procedural challenges. From the first point of view, it requires understanding what it means to assess the constitutional implications of legislation in the UK context. Secondly, it requires interpreting and describing each constitutional committee's approach to the UK constitution, and the conception of LSCG that underpins their work. From a procedural point of view, it is essential to understand the ways in which constitutional committees interact with each House of Parliament and other select committees. However, constitutional committees also interact with ministers and civil servants, through formal and informal channels. Finally, these committees interact with the wider civil society. Without accounting those interactions, it is not possible to have a grasp of the place that constitutional committees have in the law-making process.

Finally, this thesis also provides clear grounds to compare the work of the three constitutional committees.

I shall make a note of caution. This is not a thesis that seeks to demonstrate the superiority of legislative reasoning over judicial reasoning when it comes to assessing the constitutional implications of legislation. This thesis keeps peace with the fact that most modern constitutional states provide some form of constitutional review of legislation. LSCG is compatible with a range of alternative institutional arrangements. Nevertheless, those institutional arrangements will shape the practice of LSCG in each state.

IV. Outline of the thesis

The main argument of this thesis is that there is an overlooked practice of LSCG in the UK law-making process which is mainly driven by key constitutional thinkers

[11] Elin Weston, 'Section 19 of the Human Rights Act 1998: Importance, Impact and Reform' (DPhill, King's College London 2013).

[12] See references in footnote 4.

[13] Philippa Tudor, 'Secondary Legislation: Second Class or Crucial?' (2000) 21 Statute Law Review 149; Chris Himsworth, 'The Delegated Powers Scrutiny Committee' [1995] Public Law 34.

[14] Hazell, 'Who is the Guardian' (n 4); Oliver, 'Constitutional Guardians: The House of Lords', 'Constitutional Guardians' (n 4).

at Parliament, namely, the JCHR, the DPRRC and the SCC. This thesis claims that each constitutional committee has its own distinctive approach to the constitution, underpinned by a different conception of LSCG. At the two ends of a spectrum, while the JCHR has a legalistic, liberal and normative approach, the DPRRC has adopted a quite flexible case by case analysis with no clear constitutional underpinnings. In contrast, the SCC is a more complex committee which at times employs a nuanced legalistic approach, and at others a more prudential-based assessment of the constitutional implications of legislation. Whilst, as noted above, constitutional committees are institutional devices designed to promote political ownership of the constitution and to improve parliamentary deliberation on matters of constitutional significance, a practice-based account of their operation and impact in the legislative process tells a different history. Thus, this thesis argues that constitutional committees have not been able to mainstream constitutional considerations among elected politicians, either at government or Parliament. Nevertheless, constitutional committees are effectively operating as conduits through which constitutional considerations are channelled into political decision-making. This takes place through a series of interactions between constitutional committees and non-elected actors in the law-making process, such as members of the House of Lords, and civil servants in government. Consequently, the UK experience tells a history of relative success of a system of constitutional committees. Yet, one in which these institutional devices have a modest impact on political deliberation, while promoting in significant ways technocratic deliberation among bureaucrats and non-elected actors at Parliament.

To make this argument, this thesis proceeds as follows: Chapter One provides a theoretical framework to conceptualize LSCG. This chapter starts by defining LSCG and then explores the potential distinctiveness of parliamentary assessments about the constitutional implications of legislation, by comparison to judicial review. It develops three alternative theoretical conceptions of LSCG, and identifies their conception of the constitution. Chapter Two discusses the possibility of LSCG in the UK Parliament. The main objective is to find the locus of constitutional thinking in this legislature. I discuss the challenges that LSCG faces at the House of Commons, and the advantages that the Lords offer as a forum for LSCG. I introduce the three constitutional committees, namely, the JCHR, the DPRRC and the SCC, and justify the thesis' focus

on their contribution to LSCG. Chapter Three discusses the LSCG conceptions in the context of the UK unwritten constitution. This chapter sets out the challenges that arise for those assessing the constitutional implications of legislation in this jurisdiction. For this purpose, Chapter Three discusses some features of the UK constitution that have a significant impact on parliamentary assessments. In addition, it disentangles how the peculiar nature of UK constitutional arrangements shapes LSCG conceptions. Chapters Four and Five discuss constitutional committees' substantive assessments. While Chapter Four examines the DPRRC and the SCC, Chapter Five discusses the JCHR. These two chapters analyse how each committee approaches the UK constitution when they scrutinise legislation, and interpret their substantive assessments in light of the three LSCG conceptions presented in Chapter One. Chapter Six re-examines questions about legislative practice and process. It provides a dynamic account of the operation of constitutional committees. The chapter discusses evidence about their impact in the formal stages of the legislative process, as well as evidence about their preventive influence at the early stages of policy-making and legislative drafting. In light of these findings, this chapter reconsiders the place of politics in LSCG. Finally, Chapter Seven illustrates many of the claims made in previous chapters by providing a detailed account of two case studies. The first discusses the passage of the European Union (Withdrawal) Act 2018, and the contribution of the SCC and the DPRRC to legislative scrutiny of delegated powers. The second discusses the political response of the UK to the adverse ECtHR judgment in the case of *Hirst No. 2*, and the contribution of the JCHR.[15]

[15] *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41.

CHAPTER 1 PARLIAMENT AND THE CONSTITUTION: A THEORETICAL FRAMEWORK TO UNDERSTAND LEGISLATIVE SCRUTINY ON CONSTITUTIONAL GROUNDS

I. Introduction

This thesis explores and assesses the role that the UK Parliament performs scrutinising the constitutional implications of legislation. It is therefore a thesis concerned with legislative scrutiny, but only to the extent that this activity assesses government's legislative proposals based on a variety of constitutional standards. Most of the literature claims that Parliament should perform a role protecting the constitution in the legislative process. However, there is little elaboration about how such protective role takes place. This chapter provides a theoretical and conceptual framework to assess Parliament's role scrutinising the constitutional implications of legislation. It is a first step towards moving on from the significant degree of generality present in the literature.

The chapter starts by introducing the concept of "legislative scrutiny on constitutional grounds" (hereafter, "LSGC"). Section II, therefore, has two key components. Firstly, it defines "legislative scrutiny" by briefly introducing the role that Parliament performs in law-making in contemporary legislative practice. Secondly, it explains what comprises "constitutional grounds". Although the content of the Constitution will vary across different jurisdictions, I will argue that normally, Constitutions have, among other standards, constitutional principles of institutional design, human rights, conventions and doctrines, and I will briefly introduce them.

After introducing this concept, section III draws on the literature that compares the institutional differences between Parliament and courts as protectors of human rights values. Most of this literature discusses these differences with a normative project in mind. Literature relies on these differences to argue in favour or against an expansive programme of judicial activism in constitutional review. However, the point of section III is not to take sides on that debate. Instead, it intends to identify the specific institutional features of Parliament as a constitutional scrutiniser. In other words, the objective of this section is to advance Parliament's distinctive approach to different constitutional standards.

Section IV continues the effort of grasping the concept of LSCG by identifying three different theoretical conceptions. Although section III provides an insight into Parliament's distinctive approach to constitutional standards, how Parliament should perform LSCG also depends on normative theories about the constitution. In other words, there are different ways in which the relationship between Parliament and the Constitution can be conceived. Firstly, some stress the role that abstract, universal and timeless constitutional principles and values perform as substantive and legally enforceable constraints on political powers. This view emphasises the role of legal reasoning techniques in identifying and articulating these principles and values. Hence, this conception will focus on substantive standards and legislative outputs. Nevertheless, I will show that there are two strands of thinking within this conception, namely, hard and soft legalism. Secondly, an alternative conception emphasises the legitimating capacity of deliberation in representative democracy. This conception approaches different constitutional standards as relevant rational considerations that should be prioritized by politicians, and should frame deliberation both at government and Parliament. This view focuses on the quality of the procedure through which constitutional standards are considered by political branches of government in law-making. This conception also welcomes improved deliberation at government among policy-makers, legal advisers and legislative drafters. Finally, others have a sceptical view about the role of abstract, universal and timeless rationalism in public law, and emphasise the function that concrete traditions of behaviour and thought have in shaping political and constitutional practices within the state. Some authors taking this view have recently argued that constitutional principles and values are broad and underdetermined. These standards are in need of legislative action plans that develop their consequences. Otherwise, these principles and values cannot have real existence and cannot impact in real life. These authors claim that political branches of government enjoy significant discretion to develop these constitutional principles and values in different ways.

Before moving on, two words of caution are called for. Firstly, it is most likely that a majority of constitutional scholars will endorse nuanced versions of my three conceptions, or some sort of combination of these conceptions. The point of presenting three discrete conceptions is to provide a grasp of their underlying values, and how

they envisage the relationship between Parliament and the Constitution. Secondly, this is mainly a theoretical chapter, and therefore will inevitably provide an idealized version of legislatures. Its main objective is to clarify basic concepts and to provide a framework to assess a real-world legislature scrutinising government legislation against a concrete set of constitutional arrangements. Although the endeavour is mainly theoretical, since this thesis employs the UK Parliament and its constitutional committees as a case study, I will provide a empirically-informed few insights as the discussion takes place. Yet, it will be mainly for subsequent chapters of this thesis to tailor these theoretical insights into the specificities of the UK Parliament and constitution.

II. What is Legislative Scrutiny on Constitutional Grounds?

A conceptualization of LSCG must start by answering the most basic questions. These represent what I mean by legislative scrutiny, on the one hand; and by constitutional grounds, on the other. The idea of legislative scrutiny, whatever the grounds upon which it is performed, has a broader background. This is the role of Parliament in the law-making process. The classic tripartite separation of functions between the creation of law, the execution of laws and the adjudication of disputes suggests that Parliament is a law-maker. However, in contemporary legislative practice, the executive branch is in control of the law-making process, by means of developing policy and drafting legislation.[1] For instance, in the UK, broad policy decisions are taken at party meetings, when political parties discuss and draft manifestos, and at ministerial and cabinet level. Then, broadly speaking, policy is developed by civil servants and legislation is drafted by lawyers at the Office of the Parliamentary Counsel.[2] For these reasons, the role of Parliament in the legislative process is to react to government's legislative proposals by subjecting them to

[1] Here I am thinking about the control exerted at the pre-legislative stages. Whether the government controls the formal stages of the legislative process may depend on other factors. For instance, in Westminster systems, the executive normally controls Parliament by asserting its parliamentary majority.

[2] Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press 1999), 253; Michael Zander, *The Law-Making Process* (7th edn, Hart Publishing 2015), 9, 17; Phillip Norton, *Parliament in British Politics* (2nd edn, Palgrave Macmillan 2013), 75.

scrutiny.[3] Theoretical accounts highlight Parliament's character as a representative assembly as its main asset.[4] MPs bring different perspectives and views to parliamentary debates about policy matters. In this way, Parliament deliberates on the merits and demerits of government's legislative proposals. "Legislative scrutiny" refers to Parliament's role in law-making, namely, the activity through which MPs analyse, discuss, amend and approve government's legislative proposals. In British parliamentary democracy, where the business of Parliament is organised in terms of the logic of confrontation between government and the main opposition party, this role is mainly performed by the "loyal opposition".[5] MPs supporting the government provide the basis for effective government. Opposition MPs, by contrast, hold government's bills to account. The leader of the main opposition party performs a fundamental role in confronting governmental policies and providing an alternative view about how to conduct the government's business. In sum, legislative scrutiny refers to the modern role performed by Parliament in the legislative process. This role is about checks on the government's business by scrutinising and holding its bills to account.

This takes us to the second concept, namely, constitutional grounds. Parliament can scrutinise legislation against a wide range of considerations. For instance, it can assess the economic impact of policies, their effectiveness, consider alternatives courses of action, etc. *Prima facie*, parliamentary debates are open to all relevant considerations; all sort of reasons for actions can be discussed. Among them, MPs can certainly look at the constitutional implications of the government's proposed

[3] However, Parliament also exerts a more subtle and preventive influence before legislation is formally introduced to the legislative process. See Daniel Gover and Meg Russell, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British law* (Oxford University Press 2017).

[4] John Stuart Mill, *Considerations on Representative Government* (Cambridge University Press 2010), Ch5, especially 100-1 and 104; Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009), 149; Mark Elliott and Robert Thomas, *Public Law* (2nd edn, Oxford University Press 2014), 127; Alexander Horne and Andrew Le Sueur, 'Introduction' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016), 2; Stephen Laws, 'What is the Parliamentary Scrutiny of Legislation for?' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016), 20-21.

[5] Grégoire Webber, 'Loyal Opposition and the Political Constitution' (2016) 37 Oxford Journal of Legal Studies 357. Note, however, that other opposition parties do contribute to holding the government to account. On the other hand, government backbenchers may occasionally rebel against its government, and make their own contribution to legislative scrutiny.

legislation. For instance, Parliament can assess the impact of legislation on principles such as democracy, political representation, the Rule of Law, human rights, the separation of powers, among others. The content of the Constitution is something that varies across different jurisdictions. However, in modern western constitutional states, it is possible to distinguish between two main constitutional grounds.[6] On the one hand, there are human rights. This includes what we commonly call social and individual rights. Rights raise questions of political morality about the just distribution of scarce resources, the common good, dignity, equal respect, toleration, liberty, among others. These are questions about the ideals and ends that our political communities should promote. On the other hand, there are constitutional principles of institutional design. These are principles about how to constitute and organize the exercise of political power in our societies. Any state must have institutions with powers to pursue policies that should achieve aims of public good. These principles of institutional design establish relationships between the different institutions of the state, provide mechanisms to arbitrate disagreement about ends and means, and impose limits on the exercise of political powers, including systems of checks and balances and accountability mechanisms.

Yet, Constitutions are not only abstract rationalisations of principle and value. There are modes in which Constitutions are lived, as reflected in long standing, more flexible and less articulated conventions, practices and understandings.[7] These are developed organically in the traditions of a given political community, rather than being the product of deliberation and will. The UK constitutional framework, lacking a written constitution, in important respects, remains a traditional constitution.[8] Key institutions of the state, such as the office of government and the practices of parliamentary democracy have been developed through a series of constitutional conventions, practices and understandings, and these standards continue to perform a critical role, even on those modernised layers of the constitution, such as devolution. Assessing the constitutional implications of legislation in this jurisdiction, therefore,

[6] Here I follow the distinction between questions of justice and questions of political institutions as developed by Jeremy Waldron in Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016) and Nick Barber in N.W. Barber, *The Principles of Constitutionalism* (Oxford University Press 2018).

[7] Martin Loughlin, *The British Constitution* (Oxford University Press 2013), Ch1.

[8] For discussion, see Chapter Three below.

demands also paying due regard to these ever evolving and less articulated constitutional standards.[9] Finally, landmark case law and highly regarded constitutional scholarship may also provide constitutional standards against which to assess the constitutionality of legislation. In the UK, these two sources are relevant components of the unwritten constitution. Yet, their significance and weight will vary from jurisdiction to jurisdiction.

To sum up, in this thesis, legislative scrutiny on constitutional grounds includes both human rights and constitutional principles of institutional design. These two standards are abstract, universal and timeless rational formulations, developed by constitutional theory as benchmarks to assess the legitimacy of a given state. Human rights, in addition, are grounded on moral theory and political philosophy. Constitutional principles of institutional design have normative implications, and may pursue overarching moral values as well. These standards should be contrasted with the more immanent, practice oriented, flexible and less articulated nature of constitutional conventions, political practices and understandings. Finally, the category also includes case law adjudicating on matters of constitutional significance, and highly regarded constitutional scholarship. While the basic concepts of legislative scrutiny on constitutional grounds have been laid down here, little has been said so far about what it means to perform this sort of scrutiny. The next sections continue to grapple with this concept.

III. Theoretical expectations about Parliament's performance conducting Legislative Scrutiny on Constitutional Grounds

Courts and Parliament have different institutional features. These differences shape their distinctive approaches to constitutional standards. This section looks at the literature on normative debates about the role of courts in protecting human rights values, with a view to identify some distinctive features in Parliament's approach to the Constitution. As explained above, this thesis does not take sides on this normative debate. I keep peace with the institutional fact that most jurisdictions incorporate legal and political constraints on the exercise of political powers. I do not attempt to

[9] Yet, as Martin Loughlin notes, political conventions, practices and understandings remain significant even in jurisdictions that have adopted a written and entrenched constitution. See Loughlin, *The British* (n 7), 11-13.

demonstrate the superiority of legislative reasoning on constitutional matters. Instead, the point of this section is to gain insights to continue my work of characterising legislative scrutiny on constitutional grounds.

Before starting, it is worth noting that this literature raises two problems. On the one hand, it relies on highly idealized accounts of these branches of government. Moralised accounts of constitutional theory which favour judicial review provide an idealized account of courts. Ronald Dworkin's "herculean" judge is a case in point.[10] Conversely, they tend to depict Parliament in a critical way. By the same token, those who prefer legislatures, provide dignified accounts of legislatures, and highlight pathological cases of judicial decisions.[11] For this reason, the insights gained here will necessarily be theoretical and idealised, and will need to be confronted with the problems and pathologies suffered by real-world legislatures.[12] In Chapter Two, I will discuss the possibility of LSCG in the UK Parliament. As far as this chapter is concerned, the point is to canvas what the ideal legislature may achieve performing LSCG. The second problem of this body of literature is that it tends to neglect the analysis of constitutional standards other than human rights values. Its focus is on how courts perform constitutional review on human rights grounds, and whether Parliament could perform better than courts. For this reason, most of the examples I will draw on are related to human rights values. Bearing these two caveats in mind, I will compare constitutional assessments by courts and Parliament.

The key difference between Parliament and courts is that while the former is a law-making body, the latter is a law-applying body. Understanding how both institutions approach constitutional standards, therefore, requires conceptualizing what it means to adjudicate in law and how it differentiates from legislative reasoning. I will therefore start by characterising courts. Firstly, I will focus on legal reasoning on human rights grounds. For these purposes, I understand human rights as moral and political values that express those individual and collective goods required in a political community for its members to flourish. As such, human rights belong to the

[10] Ronald Dworkin, *Law's Empire* (Hart Publishing 1986), 239-40.

[11] See for instance, Grégoire Webber and others, *Legislated Rights* (Cambridge University Press 2018).

[12] Consider for instance Rosalind Dixon's observation about the Canadian Parliament suffering from "blind-spots" and "burdens of inertia". See Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue, and Deference' (2009) 47 Osgoode Hall Law Journal 235, 257ff.

domain of political morality. However, courts are law-applying institutions. Their reasoning must be grounded on institutional reasons. Constitutional adjudication cannot merely be reasoning about free standing moral values. How those moral values should feature in judicial reasoning is a matter of debate. However, a key feature of human rights adjudication is that it is mediated by the law. Take for instance Ronald Dworkin's account of constitutional review on human rights grounds.[13] Dworkin argues that judges are constrained by the value of "integrity". Courts must interpret clauses concerning rights in accordance with past constitutional traditions and practices, including constitutional texts, dominant lines of precedents and the structural design of the Constitution. Understood in this way, constitutional interpretation is about the best conception of the constitutional text and practice as a whole. Human rights adjudication is moral reasoning, yet subject to institutional constraints.[14]

Constitutional review under the Human Rights Act 1998 (herein, "HRA"), for instance, provides a good example of how institutional constraints shape legal reasoning. Firstly, adjudication must start from a text, namely, Convention rights domesticated by means of section 1(1) HRA and set out in its schedule 1. Rights in the European Convention of Human Rights (herein, "ECHR") have a certain formulation and are subject to certain limitation clauses. The text must be the object of constitutional interpretation, and therefore when judges construct its meaning must follow certain cannons and accepted practices. Those cannons and practices are developed by common law, doctrinal analysis and jurisprudential analysis. Secondly, section 2(1) HRA imposes a requirement on domestic courts to take into account any relevant European Convention jurisprudence on the issues that may be relevant to the proceedings in which the question has arisen. Common law has struggled to interpret the scope of this duty, moving from feeling bound to follow any European Court of Human Rights' (herein, "ECtHR") relevant interpretation, to a more qualified and

[13] Dworkin, *Laws' Empire* (n 10), especially 363ff; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996), 10.

[14] Cf Jeff King, 'Rights and the Rule of Law in Third Way Constitutionalism' (2015) 30 Constitutional Commentary 101, 117-18, who is sceptical about the capacity of the text to effectively impose meaningful constraints on courts.

reflexive approach to its case law.[15] Again, section 2(1) HRA highlights the significance of past precedents as the basis to construct the meaning of Convention rights clauses. Section 2(1) has not only prompted cross-fertilization between the ECtHR's case law and domestic approaches to Convention rights interpretation. Domestic courts have also followed the international trend towards employing proportionality analysis when assessing the human rights implications of legislation.[16]

Thirdly, the HRA has incorporated human rights considerations into statutory interpretation. Its section 3 requires courts to interpret legislation, so far as it is possible to do so, in a way that is compatible with Convention rights. This means that judges must construct the meaning of statutes in a human rights-friendly fashion. Hence, human rights also operate as cannons of interpretation.

Fourthly, for institutional reasons, courts may exercise self-restraint and refrain from declaring primary legislation in breach of the human rights. This is a recognition that courts are ill-suited to make certain decisions, and therefore it is better for political branches of government to take them.[17] Judicial deference can be on different grounds, such as democratic legitimacy, epistemic or institutional grounds, among others. For instance, certain decisions require consulting interest groups and/or experts, gathering and processing a wide range of information, assessing policy considerations, and so on. Neither courts; nor the judicial process are designed to undertake those tasks. In recognition of their institutional limitations, in these cases courts may defer to political branches of government. Judicial deference is a contested issue which gives rise to different theories.[18] Yet, it is beyond doubt that courts do recognise the significance of judicial self-restraint, and usually defer decisions to political branches of government. Finally, there are limitations that flow from the rules that govern constitutional review

[15] Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press 2009), Ch6.

[16] Grant Huscroft, Bradley W. Miller and Gregoire Webber, 'Introduction' in Grant Huscroft, Bradley W. Miller and Gregoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014). Furthermore, there have been instances where proportionality analysis or some variation of it has been transplanted into the common law. See Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell 2012), at para 21-012.

[17] Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 International Journal of Constitutional Law 2, 13-4; Adam Tomkins, 'Parliament, Human Rights and Counter-Terrorism' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights - Sceptical Essays* (Oxford University Press 2011), 26.

[18] Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 Oxford Journal of Legal Studies 409.

in a given jurisdiction. Take for instance the UK. The HRA provides for a system of concrete ex post review on human rights grounds. In this jurisdiction, courts' institutional competence and reasoning is limited by the scope of a claim brought by a specific victim, directed against a specific provision of an Act, and grounded on a specific human right violation.[19] The alleged human rights violation frames the case. Courts cannot broaden the scope of review, nor develop the constitution in ways that go beyond this setting.

These are not exclusive features of rights-adjudication. Any judicial interpretation of constitutional principles of institutional design such as separation of powers, questions of access to public information, federalism or devolution, are subject to similar legal constraints. An inherent characteristic of constitutional adjudication is that it is subject to institutional constraints. Legal reasoning must be mediated by the law. Courts must engage with the relevant law, restrict their analysis to the issues raised by the parties, and respect the institutional competences of other branches of government. Their reasoning is essentially limited by institutional considerations.

In contrast to courts, Parliament is a law-making body. I will identify four consequences for its handling of the Constitution that arise from this fact. Firstly, Parliament has the capacity to assess the implications of legislation before it comes into force.[20] This means that parliamentary assessments may have a preventive effect. MPs conducting legislative scrutiny may identify certain provisions as having a negative impact on constitutional standards. Parliament could strike a compromise with government and amend the original text of a bill in a way that is more respectful of the Constitution. On the other hand, this preventive effect can operate in subtler ways. If the government is aware that Parliament will conduct anxious scrutiny of the constitutional implications of legislation, ministers may exercise self-restraint.[21] As Kelly and Hiebert claim, legislative scrutiny on constitutional grounds can have an impact on the way legislative decision-making is done, and shape legislative outcomes

[19] *R (Chester) v Secretary of State for Justice and Another* [2013] UKSC 63, [99]-[102] (per Lady Hale).

[20] Note that in certain jurisdictions, constitutional courts have preventive powers to review legislation before it comes into force.

[21] Gover and Russell, *'Legislation at Westminster'* (n 3), Ch8. For an account of constitutional committees' preventive effect in the UK legislative process, see Chapter Six below.

along the lines of the Constitution.[22] This preventive effect takes place at the early stages of the policy-making and drafting of legislation. In the UK, there is evidence of this preventive effect in the role that civil servants, legal advisors and lawyers at the Office of the Parliamentary Counsel are asked to perform in terms of assessing the constitutional implications of legislation. As shall be explained in Chapter Six below, these advisors are warned that constitutional select committees may look carefully at the constitutional implications of legislation.[23] This fosters deliberation about constitutional matters among civil servants, and further consolidates internal legality checks within government.

Secondly, Parliament can engage in free-standing assessments of political morality without any need for institutional support on legal materials. Parliament is not subject to statutes, legal doctrines, precedents or any other institutional constraints in the way courts are.[24] Legislative scrutiny can address all the issues directly on their merits. In addition, Parliament can consult experts and interest groups, and gather a wide range of information on the issues.[25] Questions about constitutional standards are complex. Legal and moral considerations are relevant. However, there are other relevant dimensions that Parliament can consider. For instance, it should take into account how a given legislative proposal fits into the broader constitutional framework and traditions, political practices and understandings. There may also be relevant budget considerations and other aspects to bear in mind. Furthermore, decisions are not taken in a vacuum, they have polycentric effects, including knock-on effects on other constitutional standards. Parliament's institutional position as a law-making body allows MPs to assess a wide range of considerations.

A good illustration of the different considerations that should feature in LSCG is provided by the Northern Ireland (Executive Formation and Exercise of Functions) Bill 2018. This bill was introduced to address the lack of a power-sharing executive in Northern Ireland. The bill, among other things, provides general discretionary powers to civil servants to administer in Northern Ireland while efforts to restore the executive

[22] Janet Hiebert and James Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press 2015), 4.

[23] In Chapter Six, I will argue that this specially applies to Convention rights matters and delegated powers.

[24] Waldron, 'Judges as Moral Reasoners' (n 17), especially 20.

[25] Barber, *The Principles* (n 6), 230, 233.

continue take place. Effectively, civil servants may make decisions on matters of policy –which should be limited to government ministers– if they think there is public interest in taking a decision rather than deferring it. The UK Select Committee on the Constitution (herein, "SCC") published a report addressing the constitutional issues raised by this piece of legislation.[26] The report argues that the legislative proposal may conflict with constitutional principles, because it raises questions about political and legal accountability of these unelected officials. However, the SCC adopts a prudential approach in its assessment. The committee is keenly aware of the complex political context in Northern Ireland. In its view, the current situation puts the stability of institutions at stake. Legislation, therefore, should address the emergency and avoid creating a vacuum in the provision of services that may arise if no government continued in Northern Ireland. Otherwise, other relevant principles of the Belfast agreement may be at risk. Although civil servants should not exercise political power, there are prudential reasons to maintain the devolved institutions working. This example shows that legislative constitutional reasoning can balance different relevant considerations with a degree of freedom that would not be appropriate for courts.

Thirdly, legislatures can consider all the opinions and perspectives that might be relevant to a decision. Hopefully,[27] these views and opinions will be aired in a pluralistic and deliberative environment, reasons will be given for each side of the argument, and legislative scrutiny on constitutional grounds will operate as an input to improve the quality of debate and a more informed decision-making procedure. On the one hand, MPs are representatives of the people; they must make the voices of their constituents heard. On the other hand, public bill and select committee meetings provide an opportunity for experts and other stakeholders to make written representations and/or provide oral evidence. Other previous instances may be offered if there is consultation prior to the passage of a bill. Parliamentary debate may feed from this wealth of perspectives on the position in question. Where possible, this may lead to consensus motivated by the coercion of the best argument, and therefore, to a stable decision. In other cases, where disagreement persists, the legislative process will

[26] Select Committee on the Constitution, *Northern Ireland (Executive Formation and Exercise of Functions) Bill* (HL 2017-19, 211).

[27] I include this caveat because usually constitutional considerations are overshadowed by policy and political considerations.

provide a fair system of decision-making in which all the relevant perspectives will be considered.

Fourthly, LSCG has a broader scope. On the one hand, both the executive and Parliament can assess the complete legislative agenda, and not only the small proportion of legislation that is challenged before courts.[28] Furthermore, Parliament can scrutinise the whole scheme of any bill, including every single provision of any government proposal. Contrast this, for instance, with a judicial review challenge based on human rights. Legislative scrutiny is not limited to an analysis of a victim's claim based on a specific right. Nor is it limited to the techniques and constraints of constitutional interpretation, or to due deference to other branches of government.[29] Therefore, the UK Parliament, for instance, can cover the rights scheduled to the HRA, and even rights embodied in other Conventions signed and ratified by the UK. A move away from the text expands consideration not only to an individualistic perspective, but rather to "the more equal or fuller enjoyment of the full range of rights by other groups".[30] This is significant, since courts usually remain attached to issues of liberty and property,[31] and tend not to be assertive when it comes to issues of social rights.[32]

Finally, as Adam Tomkins has argued, "Parliament has the in-built ability repeatedly to return to the same subject",[33] being able to reassess legislation, even after enactment. In other words, Parliament not only looks to the future, it can also look to the past. Parliament can revisit its decisions, and assess policies against empirical data. Post-legislative review offers an opportunity to examine whether the operation of legislation complies with constitutional standards. On the other hand, there are many instances in which MPs do not push for constitutionally inspired amendments and rely on ministerial assurances, evidence and justification. If Parliament conducts post-legislative scrutiny, it could assess the merits of government's justification against

[28] Hiebert and Kelly, *Parliamentary Bills of Rights* (n 22), 7; Tomkins, 'Parliament, Human Rights' (n 17), 27-9 (referring to the haphazardness of litigation).

[29] Tom Campbell, 'Parliamentary Review with a Democratic Charter of Rights' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights - Sceptical Essays* (Oxford University Press 2011), 468-9.

[30] Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 International Journal of Constitutional Law 86, 255.

[31] Campbell, 'Parliamentary Review' (n 29), 468.

[32] Cf Ioanna Tourkochoriti, 'What Is the Best Way to Realise Rights?' [2019] Oxford Journal of Legal Studies.

[33] Tomkins, 'Parliament, Human Rights' (n 17), 27.

empirical evidence about the operation of the Act. In the UK, the practice of post-legislative scrutiny by parliamentary select committees is still a work in progress.[34] In 2012, the Liaison Committee included post-legislative scrutiny of Acts of Parliament as one of the core tasks select committees should perform.[35] Currently, the government publishes a memorandum on post-legislative assessment, which may or may not be the subject of an inquiry by a select committee. Despite this, there have been instances where constitutional select committees have been proactive. For instance, in the field of counterterrorism, the JCHR has subjected to post-legislative scrutiny the extension of the period of detention of suspected terrorists without charges introduced in 2007.[36] There is certainly room for improvement, but the potential for post-legislative scrutiny is there.

In sum, there are sharp differences between Parliament and courts' considerations of constitutional standards. These differences derive from the different institutional roles that each branch performs, one as a law-maker and the other as a law-applier. By assessing and promoting Parliament's role as a law-maker, this section sought to identify the distinctiveness of LSCG. Although this is a good starting point to conceptualize LSCG, there are different ways to conceive LSCG. These different conceptions are expressions of deeper views about the relationship between Parliament and the Constitution. The next section will explore three alternative conceptions that emerge from different accounts of constitutional theory.

IV. Conceptions of Legislative Scrutiny on Constitutional Grounds

There are different ways in which legislative scrutiny on constitutional grounds can be conceived. In what follows, I explore different conceptions of how Parliament should assess the constitutional implications of legislation. Although they are

[34] Richard Kelly, 'Select Committees: Powers and Functions' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013), 172-4; Christopher Johnson, 'Select Committees: Powers and Functions' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018), 111.

[35] Liaison Committee, *Select Committee Effectiveness, Resources and Powers* (HC 2012-13, 697), at para 2.

[36] The JCHR incorporated post-legislative scrutiny as part of its working practices in Joint Committee on Human Rights, *The Committee's Future Working Practices* (2005-06, HL 239, HC 1575). See also Francesca Klug and Helen Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance' [2007] European Human Rights Law Review 231, 237.

grounded on different ways of thinking about the relationship between Parliament and the Constitution, there is room for nuanced and mixed approaches to LSCG. The point about providing a self-contained account of each conception is to identify the underlying values and constitutional philosophy of the respective conceptions. This approach also seeks to provide some analytical clarity on a generally neglected field from the point of view of constitutional theory.

1. The legalistic conception

The first conception of LSCG claims that abstract, timeless and universal constitutional principles and values should be employed as benchmarks to assess the constitutional implications of legislative proposals. This conception is akin to jurisdictions that have written Constitutions. In these jurisdictions, the predominant thinking is that Constitutions are a deliberate and deliberative attempt, informed by a set of universalistic moral and political beliefs, to frame and limit the exercise of political powers in a political community.[37] This is a modern idea, which draws from the political theory of the Enlightenment. Modern liberal constitutionalism advocates a set of principles, values and doctrines as the cornerstones to legitimate the coercive powers of the state. Among these are central tenets such as popular sovereignty, democracy and political representation, the separation of powers, human rights and the independence of the judiciary, among others. In most Constitutions of Western modern states, the rules, principles and values that constitute and regulate the institutions of the state are underpinned by these tenets. The legalistic conception draws from this thinking about the Constitution. It takes the Constitution as the key legitimating source for the exercise of political powers. The legalistic conception therefore claims that Parliament's legislative powers must be subject to its rules, principles and values. While closely connected with constitutional practices of jurisdictions that have written constitutions, this legalistic conception of LSCG is also possible in jurisdictions that lack a written constitution, such as the UK. In these cases, the contributions of constitutional theory to develop the central tenets of constitutionalism, moralised

[37] I point out that this is the predominant thinking, because the better view is one that understands that modern constitutions are both a set of arrangements framed by a text, as well as modes in which political power is exercised. By the latter, I mean also a set of conventions and traditions that inform political practices. See Martin Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 183; Loughlin, *The British Constitution* (n 7), 9-13.

accounts of the unwritten constitution, highly regarded legal doctrines and constitutional practices and conventions may provide benchmarks to assess the constitutional implications of government legislation.

The legalistic conception is generally sympathetic to the 20th century trend towards understanding the Constitution as a form of "higher law" to be policed by courts through judicial review, including constitutional review of legislation.[38] These developments have contributed to thinking that regards the relationship between Parliament and the Constitution as one of either stark or potential tension, as enacted legislation may represent a threat to the rules, principles and values of the Constitution. Against this background, a legalistic conception claims that Parliament should prevent the enactment of unconstitutional legislation. Parliamentarians, specialised constitutional committees and legal advisers should identify red lines or no-go areas for legislation. They should employ the Constitution to constrain policy objectives and legislative means. In sum, a legalistic conception focuses on identifying substantive standards, assessing legislation against those standards, and on securing constitutionally appropriate legislative outcomes.

A legalistic conception of LSCG, consequently, expects both government and Parliament to develop "legal expertise". Political branches of government should master legal reasoning techniques such as constitutional interpretation and proportionality analysis, among others. Whilst the government can rely on bureaucracies, developing legal expertise presents a challenge to legislatures. Parliament will have to develop its own in-build legal advice service. For instance, to assists MPs in their understanding of complex constitutional matters, legislatures will have to rely on parliamentary lawyers, based at the House's library services or directly advising specialised select committees. Specialised committees may also gather specialist knowledge from academics and legal experts.

A key question that political branches of government performing legalistic LSCG must address is their relationship with the judiciary. Consider the case of jurisdictions where courts perform constitutional review, either strong or weak, ex ante or ex post. Consider also the case of jurisdictions that are members of a regional system

[38] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000), 31.

of international human rights protection. In these jurisdictions, there will be legal and political reasons for LSCG to generally conform to courts' case law and settled interpretations. How far or close should Parliament remain from courts' reasoning, case law and doctrines will be a matter of legal, political and scholarly controversy. Depending on the response to this question, it is possible to distinguish two branches of legalism, namely, hard and soft legalism.

Hard legalistic conceptions claim that political branches should mirror courts when assessing the constitutional implications of legislation.[39] Where there are clear precedents or settled constitutional interpretations, government and Parliament should conform to them. In matters where courts have not issued a judgment, political branches should try to second-guess the likely outcome of such judgment. Overall, government and Parliament shall perform an assessment that resembles the one performed by constitutional courts in jurisdictions that have a system of ex ante and abstract review of legislation. In practice, it will involve a "risk-assessment" analysis of the likelihood of a piece of legislation being found incompatible with the constitution or with human rights standards. Examples of this approach are provided by pre-legislative assessments on the human rights consequences of legislation performed by governments.[40]

This strand should be confronted with a more nuanced approach to legalism.[41] "Soft legalism" is sympathetic to the significance of legal arguments and case law in LSCG, because of its adherence to a normative conception of liberal constitutionalism

[39] See for instance David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323, 328ff; David Feldman, 'Democracy, Law, and Human Rights: Politics as Challenge and Opportunity' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 104ff, 111-2.

[40] On the UK government's approach to Convention rights compatibility assessments under section 19 Human Rights Act 1998, see Hiebert and Kelly, *Parliamentary Bills of Rights* (n 22), Ch7. On the Canadian Ministry of Justice's assessments on the compatibility of legislation with the Charter of Fundamental Rights and Freedoms, see Janet Hiebert, 'The Charter's Influence on Legislation: Political Strategizing about Risk' (2018) 51 Canadian Journal of Political Science 727, 734ff. For a similar account of the practices of governments in France, Germany, Italy and Spain, see Stone Sweet, *Governing with Judges* (n 39).

[41] Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015); David Kinley, 'Finding and Filling the Democratic Deficit in Human Rights' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 36; Dawn Oliver, 'Constitutional Guardians: The House of Lords' The Constitution Society <https://consoc.org.uk/publications/constitutional-guardians-the-house-of-lords/> accessed 8 January 2018, 36.

that stresses the need to constraint the exercise of political powers. However, this strand is also attentive to the institutional advantages of legislatures as law-making bodies (see section III above), and pays tribute to the democratic legitimacy of the representative assembly. Consequently, this strand will stress the value of comity and demand expressions of mutual self-respect between branches of government. Whilst this strand of legalism will generally demand political branches of government to conform with courts' judgments, this normative expectation will be dependent on the assumption that courts exercise judicial self-restraint when assessing legislation. On the other hand, soft legalism will welcome from political branches a more independent legal assessments rather than mere second-guessing. It will also emphasise the need for evidence-based assessments to challenge government's claims and will promote the incorporation of legal safeguards in the face of bills to address constitutional concerns raised by government legislative proposals.

One field which the legalistic conception is prone to emphasise is that of human rights. Scholars and courts have developed sophisticated argumentative devices, such as constitutional interpretation, legal reasoning and proportionality analysis to assess the human rights implications of legislation. A legalistic conception will see merit on political branches relying on these contributions, as well as on domestic and international case law.

Understood in this way, LSCG is likely to be informed by a moralised account of constitutional theory.[42] Whilst a hard legalistic conception will focus on the idea of the right answer to legal issues that ultimately raise moral questions, and may therefore promote a sort of subjection of Parliament to courts;[43] a soft legalistic approach will insists on the idea of comity. The later will stress that the intimate connection between legislative reasoning and legal contributions by scholars and courts should be underpinned by a theory of inter-institutional collaboration between Parliament and courts.[44] There will be an spectrum of views, yet most soft legalistic scholars may

[42] Although there are a few exceptions, these theories tend to be grounded on liberalism, and therefore, emphasise the protection of individual liberties.

[43] Jonathan Morgan, 'Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011).

[44] Although these interactions tend to normatively be defended in terms of theories of constitutional dialogue, this debate has become difficult to map out, due to different concepts of dialogue. See Alison Young, *Democratic Dialogue and the Constitution* (Oxford University Press

argue that Parliament should not normally challenge adverse human rights judgments,[45] and should closely follow settled interpretations of rights by courts. Without endorsing a theory of judicial activism, soft legalism will stress that there are instances in which courts may address issues that Parliament is not well equipped to identify, such as legislative blind spots, burdens of inertia and the interests of under-represented minorities and disadvantaged groups.[46] The idea of comity is one in which both Parliament and the courts shall bring their own institutional advantages and work together as equal partners in the collaborative enterprise of upholding the Constitution.[47]

While legalistic conceptions may provide a workable framework to assess the human rights implications of legislation,[48] its application to other constitutional standards such as constitutional principles of institutional design raise some questions. A legalistic conception of human rights assessments, although controversial,[49] is conceivable. In contrast, LSCG of constitutional principles of institutional design requires a multi-layered and complex assessment.[50] Firstly, these principles must pay due regard to the political culture and institutional history of a country. Theoretical ideals will have to be balanced against the constitutional traditions of the country.[51]

2017), 11. I agree with Aileen Kavanagh that this has reached a point in which the concept has become unhelpful. See Aileen Kavanagh, 'The Lure and the Limits of Dialogue' (2016) 66 University of Toronto Law Journal 83.

[45] For such an account, see King, 'Rights and the Rule of Law in Third Way Constitutionalism' (n 14), 123ff. Note that this account is premised on the need for courts to adopt a deferential approach to judicial review. See also Kavanagh, 'The Lure and the Limits of Dialogue' (n 41), 119.

[46] Dixon, *'The Supreme Court'* (n 12) 257ff. Legislative blind spots refer to the incapacity of legislatures to anticipate all the instances of application of their laws to particular cases in a way that limits rights; to consider the perspectives of those who are no directly represented at Parliament; and to identify rights friendly alternative courses of action or additional safeguards on rights. On the other hand, there are three types of burdens of inertia, namely, those coming from competing legislative priorities; competing factions within political parties in the legislature; and bureaucratic executive delay and poor legislative scrutiny. See also Jeff King, 'Dialogue, Finality and Legality' in Rosalind Dixon, Geoffrey Signalet and Gregoire Webber (eds), *Constitutional Dialogue* (Cambridge University Press 2019), 196-99.

[47] Kavanagh, 'The Lure and the Limits of Dialogue' (n 41), 119-20.

[48] However, see remarks in section IV.3 below.

[49] For a critique, see section VI.3 below.

[50] In what follows, see Barber, *The Principles* (n 6), Ch1 and Ch8; Waldron, *Political Political Theory* (n 6), Ch1.

[51] The degree of authority of a written constitution is dependent on the acceptability of its principles and values by the people. As Martin Loughlin notes, the political culture of a country must embrace the constitution. If the constitution does not fit the customs of the people, its political authority may erode. Loughlin, *The British Constitution* (n 7), 11-13.

Secondly, when discussing the application of abstract principles of institutional design, the state may face budget restrictions. When faced with these restrictions, political branches may need to fall short of the theoretical ideal, and try for a second best option. Thirdly, there is a value dimension that may be subject to disagreement. People have different views about the reasons why we establish a democracy; the separation of powers; federalism, devolution or centralization of powers; a unicameral or bicameral Parliament, etc. In these debates, there will be multiple values at stake, such as the prevention of arbitrary power, the protection of dignity, truth and loyalty, justice, equal respect, stability, etc. These value choices have an impact on our understanding of these principles, and, therefore, on our assessments about whether they have been respected or not. Finally, constitutional principles of institutional design are under-determined, and admit different ways to realise them. In choosing one alternative there will be complex assessments that balance value choices, indigenous constitutional traditions, political culture and budget considerations. I sum, constitutional principles of institutional design require multi-layered assessments that bring together a variety of perspectives and contributions not only from legal and political theory, but also from social choice theory, history, economics, and so on. There will also be a need to balance different principles and values, and to consider possible knock-on effects on other principles. A wide-ranging analysis will be necessary to "produce a coherent, prospective, set of rules to structure the relationship between institutions".[52]

While a hard legalistic conception may insist on the need for conformity with abstract ideals, a soft legalistic conception will be attentive to these other dimensions, and therefore provide a more adequate framework to conduct assessments based on constitutional principles of institutional design. Similar reasons suggests that hard legalism neither provides an appropriate framework to assess the impact of legislation on constitutional conventions, political practices and understandings. These more flexible constitutional standards are expressions of traditions and modes of political conduct that are intrinsically contextual and contingent. By contrast, the hard legalistic conception is intrinsically linked to abstract, universal and timeless thinking. This does

For discussion about the significance of a conservative disposition in the context of constitutional change, see Graham Gee and Grégoire Webber, 'A Conservative Disposition and Constitutional Change' (2019) 39 Oxford Journal of Legal Studies 526.

[52] Barber, *The Principles* (n 6), 230.

raise a question about the suitability of hard legalistic conceptions in a jurisdiction such as the UK, where the constitution remains in significant aspects a traditional constitution. I will discuss this matter in more depth in Chapter Three below. As far as this chapter is concerned, suffice to say that generally hard legalistic conceptions operate better when there is a written entrenched Constitution, and/or clear constitutional principles and values with undisputed pedigree and core normative content.

Nevertheless, the application of hard legalistic assessments in the field of human rights is not without controversy. The discussion is intimately connected with broader debates about the nature of rights-claims and their counter-majoritarian effect. If rights are political claims, and, therefore, matters about which people disagree within a political community, it seems at odds with the representative nature of Parliament to foreclose ample debate about them. Parliament is a pluralistic and deliberative assembly where all relevant matters and views about rights are discussed. Furthermore, the legislative process is designed to take disagreement seriously,[53] because it provides enough room to consider different reasons for legislative action, empirical evidence, expert advice, consultation, demands for justification, etc. Hard legalistic conceptions pay less tribute to the institutional differences of courts and Parliament as law-applying and law-making institutions, respectively (see section III above). There is a risk that a strongly legalistic conception of LSCG, which advocates for a priority of the legal over the political, will neglect these differences. Furthermore, while rights assessments may consider case law developments, courts' settled interpretations, proportionality analysis and other legal advice, rights raise other issues as well. Legislative scrutiny must consider not only political and moral disagreement about rights, but also the legitimate democratic scope for developing broad statements of rights in different ways,[54] budget restrictions, polycentric effects, among many other issues. A legalistic conception may provide a relevant perspective to assess the human rights implications of legislation. However, it should neither foreclose debate, nor demand legal reasons to take priority over any other relevant consideration, because in a deliberative

[53] Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999); Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2009), 19ff and 150ff.

[54] On this matter, see section VI.3 below.

assembly all relevant reasons should be considered when assessing the human rights implications of legislation.

Despite these considerations, a hard legalistic perspective remains an attractive approach for elected politicians from a pragmatic point of view. Consider for instance those jurisdictions where courts have strong constitutional review powers. Politicians have incentives to avoid successful legal challenges to their policies.[55] They will prefer to deploy preventive checks to avoid the frustration of the bill's policy objectives. As Alec Stone Sweet noted in his comparative study of constitutional review in continental European countries, the interaction between courts and Parliament has led to a process of "judicialization of law-making".[56] This process takes place in two steps. On the one hand, courts work out the limits on the exercise of legislative powers; and on the other, political branches of government take account of these limits. Notably, in the UK, where courts do not enjoy strong judicial review powers, and cannot invalidate legislation, declarations of incompatibility by domestic courts carry significant political weight.[57] The figures suggest that these declarations have become de facto binding, because political branches of government regularly comply with these judgments.[58] On the other hand, pragmatic reasons are also relevant when the country is subject to the jurisdiction of an international system of human rights protection. In these cases, there may also be an interest to protect the country's reputation on compliance with its international obligations.[59] This may have an impact in the country's stance in the wider context of international relationships. In sum, this analysis suggests that while a hard legalistic conception may be defended on normative and pragmatic grounds, there are legitimate concerns about its suitability as a framework for a law-making institution such as Parliament.

[55] Stone Sweet, *Governing with Judges* (n 39), 197. In the UK, see the approach taken by the government during the pre-legislative assessment of the compatibility of Bills with Convention rights in Hiebert and Kelly, *Parliamentary Bills of Rights* (n 22), Ch7.

[56] Stone Sweet, *Governing with Judges* (n 39), 194ff. These processes are complex and vary across jurisdictions, and within jurisdictions, across different policy areas.

[57] For discussion, see Chapter Five below.

[58] See figures in Ministry of Justice, *Responding to Human Rights Judgements* (CP 182, 2019).

[59] See ibid, where the UK Ministry of Justice is at pains to show figures that illustrate the excellent UK's record on Convention rights compliance, when compared to other European countries.

2. Constitutional deliberation

There is an alternative understanding of LSCG that shares the legalistic conception's concern for delivering protection of constitutional fundamentals. However, by contrast to the legalistic conception, deliberative constitutionalism is not intimately connected with a moralised account of the Constitution. In addition, by contrast to hard legalistic conceptions, deliberative constitutionalism seems to retain faith in the democratic process and in political accountability mechanisms as effective tools to deliver constitutional protection. These ideas find inspiration from the so-called deliberative turn in democratic theory.[60] Deliberative theories claim that democracy is not merely a decision-making procedure to settle disputes between confronting views about policy by means of preference aggregation.[61] If the democratic process aspires to be legitimate, it must go beyond the operations of majoritarian rule. Instead, democratic decisions must be the product of informed debate in which different reasons for action are interchanged and citizens are persuaded by the coercion of the best argument. Employing this very framework, some scholars have argued that the Constitution should frame political debates because its principles, values and other standards may foster rationality and deliberation in political decision-making. [62] Accordingly, constitutional standards should be prioritised in decision-making procedures, and be submitted to a serious public process of rational consideration and assessment. This process should involve different actors, the public, politicians and civil servants. It should extend from the initial stages of the policymaking process, including the drafting of legislation, and then continue throughout the legislative process.

Although "constitutional deliberation" is a wide-ranging process, this thesis is concerned with such deliberation insofar as it takes place among political branches of government, in the institutional setting of the legislative process, including its pre-

[60] John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press 2002), 1.

[61] Ron Levy and Hoi Kong, 'Introduction: Fusion and Creation' in Ron Levy and others (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press 2018).

[62] Making the case for high quality deliberation on constitutional matters, see Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' (n 37), 116; Oliver, 'Constitutional Guardians: The House of Lords' (n 37) 29, 31, 39; Feldman, 'Democracy, Law, and Human Rights: Politics as Challenge and Opportunity' (n 37), 99-102, 108, 110-1; Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016).

legislative stages. Within this institutional framing, constitutional deliberation aims at developing a "culture of political justification" in regards to decisions affecting constitutional fundamentals.[63] By contrast to the legalistic conception, deliberative constitutionalism does not necessarily embrace a given constitutional philosophy of the Constitution. This conception can remain open to all sort of relevant considerations and perspectives when assessing the constitutional implications of legislation. Deliberative constitutionalism can provide room for different constitutional standards to be employed as the basis of the assessment. Deliberative constitutionalism will welcome reasoning on the basis of abract constitutional principles and values, as well as a wider set of constitutional standards, such as constitutional conventions, traditions, prudential reasons, political understandings and practices. In contrast to the legalistic conception, which focuses on legislative outcomes, deliberative constitutionalism puts a premium on the quality and legitimacy of the decision-making processes. Hence, this conception tolerates a wider range of outcomes –even if at pains with constitutional standards–, provided that legislation is the product of good quality deliberation.

Constitutional deliberation, therefore, is different from the legalistic conception, but not necessarily opposed to it. Constitutional deliberation should be sympathetic to legal analysis, insofar as it improves the quality of parliamentary deliberations about the constitutional implications of legislation. This raises two separate points. The first concerns the relationship between courts and Parliament under the conception of constitutional deliberation. One view considers the sophistication of legal reasoning deployed in constitutional review as an example of public reason.[64] As noted above, constitutional courts may also identify legislative blind spots and burdens of inertia. This suggests that parliamentary deliberations may benefit from courts' judgments. These matters will be discusses in more depth in Chapter Five. As far as this chapter is concerned, it is important to note that there are different ways in which legislative reasoning may relate to case law, but will not always result in a positive impact on deliberation. Secondly, constitutional deliberation allows for a wider concept of the

[63] David Dyzenhaus, 'What is a Democratic Culture of Justification?' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015); Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012), 66.

[64] John Rawls, *Political Liberalism* (Columbia University Press 2005).

Constitution that incorporates –but is not reduced– to abstract reasoning based on principles and values. There is room to consider case law, constitutional interpretation and proportionality analysis. However, deliberative constitutionalism remains open to other views about constitutionalism. This conception can be receptive to arguments grounded on political practices, constitutional conventions and traditions. It may consider political, moral, historical, economic and philosophical perspectives about the Constitution, including any empirical evidence, polycentric effects and budget restrictions that may be relevant. Furthermore, deliberative constitutionalism can be orientated towards a theory of constitutionalism that rejects abstract rationalisations and instead embraces constitutional practices, contestation and tradition. This is quite significant in this jurisdiction, as the UK lacks a written constitution, and although it has undergone a process of constitutional modernisation, this process remains incomplete.[65]

As noted above, constitutional deliberation relies on the quality of parliamentary debate. Parliament must demand full justification for the impact of government's policy objectives and legislative means on constitutional standards. Parliamentarians must subject such justification to strong and all-encompassing legislative scrutiny. The very idea of a "culture of democratic justification" concerns demanding that elected politicians, both at government and Parliament, confront their responsibility for legislation that has negative impact on constitutional standards. These standards, therefore, are seen as tools that furnish better and stronger scrutiny of government legislation. They identify focal points to demand proper justification from the government. However, a key challenge for this conception of LSCG is how to secure proper deliberation about constitutional matters in real-world legislatures. Take for instance the UK, a jurisdiction where parliamentary debates at the Commons are based on a two-sided confrontation between the two main political parties, one in control of the government, while the other is the leading opposition party. Party loyalties and political considerations tend to overshadow constitutional considerations. On the other hand, even if constitutional considerations make their way into parliamentary debates, the electoral system has historically secured strong majority government which control

[65] For discussion, see Chapter Three.

the legislative process.[66] For these reasons, long-standing anxieties exists about the prospects of politicians engaging in high quality deliberation on constitutional fundamentals.[67]

Deliberative constitutionalism, therefore, should propose institutional arrangements that secure proper considerations of constitutional standards in the legislative process. Some take the view that matters involving constitutional standards cannot merely depend on a strong and enlightened political culture.[68] The degree of engagement with constitutional matters, on the other hand, will depend on the salience of the issues. In the UK, concerns about government's control of the legislative process and party loyalty are amplified by the lack of a written and entrenched constitution, and a bespoke procedure for constitutional change. The fact that the UK constitution can be changed by statute throws into sharp relief the need for institutional arrangements to secure proper deliberation of legislation that has constitutional implications.

Some think that proper legislative scrutiny grounded on constitutional standards could mitigate the challenges raised by this institutional setting.[69] A constitutional consideration focus might conceivably cut across party loyalties. The creation of permanent and specialised constitutional committees at the UK Parliament has been seen as a means to strengthen and focus parliamentary assessments about the constitutional implications of government legislation.[70] The point, as far as this chapter is concerned, is that deliberative constitutionalism is quite demanding. It not only requires the incorporation of constitutional standards into political decision-making. Deliberation also requires both government and Parliament to be open to reconsider their views, in good faith, in light of the interchange of reasons at parliamentary debates. Rational arguments grounded on constitutional standards, should therefore prompt governmental self-restraint during the preparatory stages of legislation, and

[66] However, this trend in the UK is changing. For discussion, see Chapter Two below.

[67] See for instance, Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, January 2000), Ch5.

[68] See for instance, Campbell, 'Parliamentary Review' (n 29), 464.

[69] Dawn Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] Public Law 219; Oliver, 'Constitutional Guardians: The House of Lords' (n 37); Simson Caird and Oliver, 'Parliament's Constitutional Standards' (n 57).

[70] For discussion about their impact on parliamentary deliberations, see Chapter Six below.

constitutionally inspired amendments during the formal stages of the legislative process.

In sum, LSCG is depicted by constitutional deliberation mainly as an exercise in rational assessment of the constitutional implications of legislation. This is achieved through different means: raising consciousness about constitutional standards among political branches of government, demanding justification, promoting critical assessments, and the willingness of the relevant actors to change views in light of debate. The focus will be on the quality of the procedure, rather than on substantive considerations and the outcome of the legislative procedure. A key advantage of constitutional deliberation is its openness to different conceptions of constitutionalism, and different constitutional standards.

3. Constitutional construction and development

Finally, there is a third conception of LSCG that I will refer to as "constitutional construction and development". I draw this conception from contributions to human rights scholarship by Grégoire Webber,[71] which have been refined in a recent co-authored book by Webber himself, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley Miller and Francisco Urbina (herein, "Webber et al").[72] A similar view has been developed by Jeremy Waldron and Nick Barber's account of constitutional principles of institutional design.[73] As such, this conception focuses on two types of constitutional standards, namely, constitutional principles and human rights values. Its proponents have not worked out how this conception would apply, if at all, to other standards such as constitutional conventions and practices.

Webber et al have articulated this conception as a framework for discussion of human rights values. Webber argues that countries with written constitutions[74] tend to think of human rights as "end-states", as finished products that impose legal limits on political powers. However, he submits that human rights clauses should be taken just as a starting point. Webber notes that rights clauses are formulated "at the highest level of abstraction". Furthermore, these clauses are subject to equally broad and abstract

[71] Webber, *The Negotiable Constitution: On the Limitation of Rights* (n 54).
[72] Webber and others, *Legislated Rights* (n 11).
[73] Barber, *The Principles* (n 6); Waldron, *Political Political Theory* (n 6).
[74] While the UK does not have a written constitution, the domestication of Convention rights by the HRA makes Webber's analysis relevant in this jurisdiction, because this Act operates as the UK's statutory bill of rights.

limitation clauses. On the basis of this observation, Webber argues that rights clauses do not resolve "the great moral-political debates alive in the community".[75] He claims that the "constitutional edifice" is only completed when Parliament enacts legislation that specifies and develops human rights clauses. Through legislation, rights are given a "three-term jural structure, which defines a class of right holder, an act or act-description, a set of circumstances and a corresponding class of duty holders."[76] Without this further specification, rights cannot have real existence and impact in our lives.

Webber's observation, according to which rights clauses are underdetermined and need legislative action is, arguably, one that many people would endorse.[77] However, Webber et al take their argument from the empirical to the normative domain. According to Webber, in the democratic constitutional state, questions of political legitimacy about how to accommodate the principles of democracy and human rights ought to remain open, on an ongoing basis, to contestation and re-negotiation. This account, therefore, is a normative defence of Parliament's democratic legitimacy to make decisions about rights. These authors are sceptical about the role and contribution of judges in reviewing legislation on human rights grounds. Relying on Waldron's circumstances of politics,[78] they claim that rights do not settle debates on political morality because people fundamentally disagree about these questions. Hence, the Constitution ought to remain open for re-negotiation through democratic channels.[79] It is through a process of construction and development of rights that political communities settle and re-negotiate the Constitution, distribution and constrains over government power. In their view, Parliament is a representative assembly with democratic credentials that has been institutionally designed to take those disagreements seriously. It provides the forum for different understandings of

[75] Webber, *The Negotiable Constitution: On the Limitation of Rights* (n 54), 53.

[76] Grégoire Webber, 'Rights and Persons' in Grégoire Webber and others (eds), *Legislated Rights* (Cambridge University Press 2018).

[77] Note the following examples of scholars who, while having different views about the relationship between Parliament and human rights, come to recognise the role of Parliament in developing these moral values: Kavanagh, *Constitutional Review Under the UK Human Rights Act* (n 15), 279; Jeff King, *Judging Social Rights* (Cambridge University Press 2012), 41ff; Campbell, 'Parliamentary Review' (n 29), 459-64.

[78] Waldron, *Law and Disagreement* (n 54), 101-2.

[79] Webber, *The Negotiable Constitution: On the Limitation of Rights* (n 54), 9.

rights to be discussed and assessed. Parliament is also able to modify rights, as views and understandings about these moral values evolve.

The conception of constitutional construction, therefore, conceives the relationship between Parliament and the Constitution in stark contrast to the legalistic conception. While this conception mainly understands rights as imposing substantive constraints, the conception of constitutional construction regards them in more "positive" or empowering terms. Constitutional construction assumes that rights clauses can be developed in different ways, and it is for the democratic legislature to decide from a broad range of reasonable alternatives. The relationship between Parliament and the Constitution works both ways. The Constitution operates both as a frame, and as something to be framed by the legislator. Notably, this conception moves away from the idea of rights as a priori, abstract, universal and timeless values with clear normative content. Instead, there is an emphasis on change, disagreement and the democratic legitimacy of legislatures.[80]

There are two additional aspects of this conception that are worth bearing in mind. The first point is that the legalistic conception depicts the relationship between common good and human rights as one of tension and in need of balancing (proportionality analysis). By contrast, Webber et al combine the concepts of the common good and of human rights. In their conception, good reasons to change the law are reasons that promote the common good. And human rights are fundamental components of the common good. These two concepts are not in tension because a decision that promotes the common good is one that takes into consideration human rights.

The second point is that these authors are aware that legislative decisions can have serious effects on the enjoyment of individual and social rights. In response to those that raise legitimate concerns about the protection of human rights, these authors provide a highly dignified and idealised account of legislatures. Constitutional construction has a strong commitment to the workings of parliamentary democracy and political accountability mechanisms. This conception depicts Parliament as a

[80] A conception of constitutional construction can be read in different ways. It can be the expression of conservative scepticism over abstract and universal rationalisations. It can also be an expression of left wing scepticism about the inherent bias of the judiciary towards the protection of individual rights. Finally, it can also be read as a programme of radical democracy.

rational agent that conducts high quality deliberation, and acts on the basis of good reasons to change the law.[81] Underpinning this conception is an account of Parliament as a strongly deliberative forum, which exercises "moral reasoning informed and framed by empirical and technical reasoning".[82] However, as discussed above, on many occasions real world legislatures fall short off the ideal of a well-functioning, fully representative and deliberative legislature. Consequently, this view is subject to criticism from this perspective.

Although Webber argues that his conception of constitutional construction and development applies to the whole constitutional framework, and not exclusively to human rights clauses,[83] neither he nor the co-authored book develops how this conception applies to other constitutional standards. Webber's contention seems correct, as far as constitutional principles of institutional design are concerned. As Waldron notes, many provisions related to political institutions contained in modern constitutions are deliberately drafted in vague or abstract language. This results in "major features of the country's political arrangements, the limits on government, or the restraints imposed on governmental power"[84] being undefined. Along similar lines, Barber's account of constitutional principles of institutional design is also at pains to stress that these principles are inherently under-determined; and that therefore, there are many ways in which states can pursue them.[85]

Take for instance the principle of democracy. Legislative action is necessary to realize democracy. This requires addressing issues such as what the boundaries of constituencies should be, whether there should be a unicameral or bicameral Parliament, its powers and limitations, whether it is legitimate to have an appointed second chamber, what the qualifying voting age should be, which voting disqualifications we ought to implement, etc. Furthermore, a legislative assembly will

[81] Richard Ekins, 'Legislation as Reasoned Action' in Grégoire Webber and others (eds), *Legislated Rights* (Cambridge University Press 2018).

[82] Grégoire Webber and Paul Yowell, 'Introduction: Securing Human Rights Through Legislation' in Gregoire Webber and others (eds), *Legislated Rights* (Cambridge University Press 2018), 11.

[83] Webber, *The Negotiable Constitution: On the Limitation of Rights* (n 54), 9, 13 ("The constitution of a democratic constitutional state, and especially constitutional rights, ought to remain open, on an ongoing basis, for democratic re-negotiating.").

[84] Waldron, *Political Political Theory* (n 6), 42.

[85] Barber, *The Principles* (n 6), 14. Note, however, that on Barber's account, the principles of constitutionalism are thought as abstract, universal and timeless principles. This is not quite the way how Webber et al think of human rights values.

also require regulation on political parties, public financing, caps on campaign spending, among many other matters. In this process of legislative specification and development, Parliament will have to address the different layers of these constitutional principles of institutional design. Developing these principles will require a wide-ranging analysis that takes into account the constitutional framework and traditions, policy considerations, budget restrictions, history, and so on. In sum, as in the case of human rights, the relationship between Parliament and constitutional principles of institutional design can also be seen in more positive and empowering terms.

Although this conception seems to be premised upon the existence of a written and entrenched Constitution, some of its key insights seem fully applicable to the UK. From the point of view of human rights, this conception adds to the literature that mistrusts the role that domestic courts perform under the UK statutory bill, namely, the HRA. The observation that rights clauses are drafted in broad terms, and subject to equally broad restrictions, is fully applicable to Convention rights. From the point of view of constitutional principles of institutional design, questions arise because there is inherent dispute about their pedigree and normative content in the UK. Despite this, as will be discussed in length in Chapter Three, there is a trend in British constitutional scholarship to think about the constitution as embracing principles developed by modern constitutionalism. Along these lines, a conception of constitutional construction and development should be welcomed, because it highlights the flexibility of these abstract principles, and the legitimate scope for choice that the democratic legislature has between different instantiations of such principles.[86]

To sum up, the conception of constitutional construction and development advances a rich understanding of LSCG. This conception is fundamentally opposed to legalistic conceptions, both in terms of its depiction of the relationship between Parliament and the Constitution, and in terms of its constitutional philosophy. Since broad constitutional principles and values are open for democratic negotiation, Parliament's role is to assess the merits and drawbacks of government legislation

[86] For discussion about how should constitutional principles be constructed under the UK constitution, see Chapter Three below.

developing and specifying the Constitution. In other words, this conception requires Parliament to deliberate on matters of constitutional policy, principle and practice. The Constitution as an activity puts at the heart of legislative scrutiny on constitutional grounds normative questions such as what Constitution we ought to have, what sort of rights citizens ought to enjoy, what distribution of law-making powers between government and Parliament ought to be in place, which mechanisms promote transparency and open government, how to hold the government into account, to prevent corruption, and so on. The idea of the Constitution as activity, therefore, is closely associated with ideas of constitutional deliberation.

V. Conclusion

LSCG is a manifestation of Parliament's role holding the government's bills to account. However, as there are conflicting views about the relationship between Parliament and the Constitution, there are different views about how to conceptualize this exercise of legislative scrutiny. I have confronted two different strands of a legalistic conception, namely, hard and soft legalism. Whilst the former remains highly attach to abstract reasoning based on first principles, the latter has a more nuance approach that pays due regard to Parliament's institutional position as a law-making body and, therefore, takes advantage of the distinctive features of the legislative process, as compared to an adjudicative process. Secondly, I have identified a conception that stresses the deliberative potential of constitutional considerations. This conception of deliberative constitutionalism, rather than adhering to a certain moral conception of the Constitution, it focuses on the procedural aspects of political decision-making. Finally, I identified a different conception, closely connected with the ideal of constitutional deliberation, but based on a different theoretical understanding of the relationship between Parliament and the Constitution. This view moves away from an idea of delivering constitutional protection and imposing substantive limits on outcomes, to the recognition that constitutional principles and values require legislative action for their realisation. LSCG, under this view, is an assessment on constitutional policy. I have called this conception "constitutional construction and development".

These three conceptions can be seen in terms of the traffic light metaphor. The legalistic conception's starting point is a set of abstract, universal and timeless constitutional principles and values, which are seen mainly as substantive criteria to limit the exercise of political powers. This conception tends to depict the relationship between Parliament and the Constitution as one of conflict. LSCG operates as a red traffic light. Deliberative constitutionalism can be seen in terms of an amber traffic light. It demands from political branches careful consideration, awareness and engagement with the constitutional implications of legislation. There is an emphasis on justification and assessment. This conception differs from the former in that constitutional standards receive indirect protection, delivered by means of procedural rationality. Finally, the conception of constitutional construction and development emphasises political branches' discretion to flesh out the principles and values of a Constitution, within a wide range of possible alternatives. This view can be seen in terms of a green traffic light, because it puts a premium on the under-determined character of the Constitution. This view thinks of constitutionalism in more positive and empowering terms.

I will conclude with a couple of notes of caution. Firstly, most authors may prefer a nuanced version of these conceptions, or some mixed conception. The effort developed here does not foreclose this possibility. Instead, it seeks to advance a more systematic theoretical analysis of matters that have not been at the centre of debates in constitutional and legal theory.[87] Secondly, there is no need for a given legislature to adopt only one of these conceptions. Furthermore, in Chapter Three I will make the case for a pluralistic model of LSCG in the UK constitution. In addition, I will show in Chapters Four and Five that UK constitutional committees employ a plurality of conceptions of LSCG. Normative debates will arise about which conception ought to be preferred. Yet, these debates will be underpinned by broader debates about the role and meaning of the constitution in the modern state and its local constitutional traditions.

[87] Waldron, *Law and Disagreement* (n 54), 2; Richard W. Bauman and Tsvi Kahana, 'New Ways of Looking at Old Institutions' in Richard W. Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press 2006), 1; Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013), 2.

CHAPTER 2 THE POSSIBILITY OF LEGISLATIVE SCRUTINY ON CONSTITUTIONAL GROUNDS IN THE UK PARLIAMENT

I. Introduction

Chapter One provided a theoretical account of legislative scrutiny on constitutional grounds ("LSCG"). I argued that legislative assemblies have a distinctive approach when they engage in the protection of constitutional fundamentals. I also identified three alternative conceptions of LSCG and explored its theoretical underpinnings. However, it is not possible to gain a proper understanding of LSCG without engaging with the peculiarities of a real-world legislature, operating against a concrete constitutional framework. In other words, a theory of LSCG should identify the institutional, political and cultural factors that condition the ability of a concrete legislature to be an effective constitutional scrutiniser. Secondly, a theory of LSCG should explore how the concrete constitutional provisions, principles, practices and other standards of a given country shape constitutional assessments of legislation. This chapter and Chapter Five will address the first conditioning factor. Chapters Three and Four will focus on the second conditioning factor.

The aim of this chapter is to find the place of LSCG in the United Kingdom ("UK") Parliament. This requires looking at both Houses of Parliament and their respective select committees with a view to identify where there is a possibility for LSCG to flourish, and why. In the UK, this exploration should start by recognising the difficulties that Parliament faces to perform its general legislative scrutiny function. It is common to address those difficulties by considering the significant control that the executive exerts over the democratic House of Commons. For instance, mainstream political science literature has argued that the capacity of legislatures to influence policy-making is a product of the relative autonomy that they enjoy from the executive.[1] Following this contention, this literature tends to depict the United States ("US") Congress and the UK Parliament as paradigms of a strong Congress and a weak Parliament, respectively. There are sharp differences between these two legislatures.[2]

[1] Meg Russell and Philip Cowley, 'The Policy Power of the Westminster Parliament: The "Parliamentary State" and the Empirical Evidence' (2016) 29 Governance 121.

[2] For the contrast between the UK and the US legislatures, I follow Peter Cane, 'Reconceptualising Separation of Powers' (2015) 101 Amicus Curiae 2.

In the US presidential system, the President, the House of Representatives and the Senate operate according to a logic of "power-sharing" which effectively imposes mutual checks and balances. These three political institutions interact in the context of a horizontal and multi-polar relationship, whereby each institution enjoys a discrete source of authority, and none of them have authority over the other. Cooperation and coordination between these institutions is key to prevent deadlocks. By contrast, the UK operates with a logic of concentration of powers in a single sovereign authority, Parliament. Rather than being autonomous, the power of the executive derives from the confidence provided by the Commons. Theoretically, a vertical relationship exists between the two political branches of government, expressed in the idea of accountability. Ministers are responsive to Parliament; there is authority and subordination. However, in practical terms, the power that is theoretically fragmented between a government that develops policy and drafts legislation, and Parliament which deliberates on government's proposals and discusses whether to approve them, ends up being concentrated in the former. This is made possible by the operation of the party system and the electoral system. As a result, the government effectively controls the law-making process, and Westminster Parliament is considered an epitome of a weak "policy-influencing legislature".

These close links between the executive and Westminster Parliament undermine the prospects of LSCG. Observers of UK politics may be sceptical about the possibility of Members of Parliament ("MPs") engaging with matters of constitutional significance. They will question why government backbenchers would make the passage of bills more difficult by raising constitutional objections if their primary function is to provide the basis for political support to government at Parliament. On the other hand, the opposition, by definition, would not be able to defeat the government on constitutional grounds or otherwise. In addition, the system requires that the opposition focus on policy debate, as this shows its readiness to assume office and allows it to perform informative and educative functions that are essential for the functioning of parliamentary democracy. If the prospects of legislative scrutiny in general are not good at the most powerful chamber in Parliament, then questions arise about the possibility of LSCG in the UK. Thus, the dynamic of political confrontation

where policy debates take precedence is likely to overshadow constitutional considerations.

Bearing these considerations in mind, this chapter accounts for the possibility of LSCG in the UK Parliament. The objective is to find the locus of constitutional thinking in this legislature, and to assess the prospects of each House engaging in questions of constitutional significance raised by legislation. This chapter's central claim is that three constitutional select committees provide the main forum for constitutional thinking in the UK Parliament. These are the Select Committee on the Constitution ("SCC"), the Delegated Powers and Regulatory Reform Committee ("DPRRC"), and the Joint Committee on Human Rights ("JCHR"). I also claim that the upper chamber is more likely to engage in deliberation about the constitutional significance of legislation than the Commons.

The structure of this chapter is as follows: first, I will focus on the Commons. I will argue that MPs face significant difficulties to grasp the complex and technical nature of constitutional arguments. This is because MPs are mostly generalists, rather than experts, and face significant pressures on their parliamentary time. The second reason has already been mentioned, but requires unpacking. Westminster style politics focuses parliamentary energies in a two-sided confrontation between competing policy proposals, that of the government and that of the opposition. This provides little room for constitutional arguments. Finally, I will address two normative questions. Firstly, the question about the relative importance of legislative scrutiny as a constitutional function of the Commons. Secondly, how different conceptions of parliamentary democracy impact the prospects of LSCG.

Then, the chapter will discuss the role of the Lords. I will argue that, in contrast to the Commons, the Lords do exercise LSCG of government's bills as part of its regular legislative scrutiny functions. I claim that the Lords provide an ideal environment for principled and deliberative debate about the constitutional implications of legislation. This is because of the Lords' relative isolation from partisan politics, relative independence from the executive, the expertise of some of its members, and because they are assisted in this task by specialised constitutional committees. However, this constitutional protection function cannot be taken too far. The Lords lack political legitimacy to challenge the Commons' will in the context of

modern British democracy. The Lords have rightly interpreted its role as being a revising chamber that prompts second thoughts from the lower chamber. Even when confronted with a matter of constitutional significance, if the Commons are not willing to compromise, the Lords will defer to the political judgment of the lower chamber.

Finally, the last section claims that the main drivers of constitutional thinking at Parliament are the three constitutional committees mentioned above. To make this claim, I will briefly introduce these committees. I recognise that they are not the only forums for constitutional thinking at the UK Parliament. However, I will identify five features that make them the "main" forum for conscious and systematic thinking in the UK Parliament, and the main drivers of LSCG.

II. The House of Commons as a general policy forum for political confrontation

The possibility of LSCG in the Commons has been approached with scepticism. Take for instance Dawn Oliver and Jack Simson Caird, who argued that the Commons is dominated by a culture of resistance and an adversarial approach to legislative scrutiny which "does not leave much room for a consensual, principled and detailed approach to scrutiny of legislation to develop."[3] The government has a culture of resistance that irradiates among its backbenchers. Ministers are not willing to compromise and aim at keeping amendments and concessions to a minimum. They can also control the flow of information and may not always be willing to explain their justification for their legislative proposals. The adversarial logic of confrontation between government and the opposition also creates challenges for LSCG. Government may not make concessions, as these could be interpreted as short-term gains for the opposition. Although there may be instances of high quality legislative scrutiny, particularly in public bill committees, the adversarial logic diverts most efforts to issues of policy. In their view, this is regrettable, since engagement by MPs on more detailed scrutiny about the constitutional implications of legislation would provide a strong democratic legitimacy imprint to LSCG.[4]

[3] Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016), 69.

[4] Ibid, 70.

There are two main reasons why MPs struggle to engage with constitutional matters. The first one concerns the highly technical and complex nature of constitutional arguments. The second one is structural, and concerns the logic of operation of Westminster systems. I will explain them in the same order. The final section addresses two normative questions. The first one concerns the relative importance of legislative scrutiny as a discrete – but not the only – constitutional task of the Commons. Secondly, the relationship between LSCG and competing conceptions of British parliamentary democracy.

1. The technical and complex nature of constitutional arguments

Constitutional theory and law is a discrete area of specialised knowledge. Understanding its key tenets, doctrines, rules and principles, requires lengthy and laborious study, even for someone trained in the legal profession. Furthermore, LSCG is dependent on the constitutional arrangements of a given country. Each jurisdiction has its own structures, rules and principles of government. The UK constitutional framework, for instance, is unique in that it lacks a written constitution and a bespoke procedure for constitutional change. This raises all sort of challenges for constitutional lawyers, and makes the subject a highly contested one. Chapter Three will provide an account of some of the difficulties that arise from the UK constitution, with special reference to LSCG. As far as this chapter is concerned, the point is to highlight the technical and complex nature of constitutional law, and to question the ability of MPs to grasp its content. The chapter considers three interrelated problems that damage the prospects of LSCG. These are knowledge, time and the nature of modern legislation. I will briefly refer to them.

Firstly, MPs are not experts. They have a general knowledge that may cover some policy matters, for instance, if they have a specific background. Yet, this usually is not enough to address complex policy issues.[5] Parliamentary reform has brought about specialised select committees which mirror government departments, thus

[5] John Stuart Mill, *Considerations on Representative Government* (Cambridge University Press 2010); Ch5; Ivor Jennings, *Parliament Must be Reformed: A Programme for Democratic Government* (Kegan Paul, Trench and Trubner 1941), 40-43; J. A. G. Griffith, 'The Place of Parliament in the Legislative Process Part I' (1951) 14 Modern Law Review 279; Phillip Norton, 'Parliament and Legislative Scrutiny: An Overview of Issues in the Legislative Process' in Alex Brazier (ed), *Parliament, Politics and Lawmaking* (Hansard Society 2004); Mark Elliott and Robert Thomas, *Public Law* (2nd edn, Oxford University Press 2014), 388.

improving its institutional capabilities to hold the government to account.[6] This has provided an opportunity for MPs to focus their scrutiny work on specific subject matters, not least through evidence gathering. The Commons currently has a number of select committees that may address matters of constitutional significance. There is a European committee, a Brexit committee, a Justice committee, a Public Administration and Constitutional Affairs committees, a Women and Equality committee, committees dealing with internal matters of procedure (Procedure, Privileges, Standards, Standing Orders committees), and committees dealing with matters related to social rights (Housing, Health and Social Care, Work and Pensions, Education committees), and matters related to the constituent parts of the Union (Northern Ireland Affairs, Scottish Affairs and Welsh Affairs committees). On the other hand, half of the JCHR membership comes from the Commons. These instances have provided an opportunity for MPs to build up some knowledge on constitutional matters. However, we should note the limitations of these forums. Only a few MPs sit on these select committees. On the other hand, even in those jurisdictions with strong legislatures, empirical evidence suggests that committee members tend to miss the broader picture and may only be able to identify specific issues raised by bills.[7] The Commons has an epistemic disadvantage when it comes to addressing complex and technical issues, such as the constitutional implications of legislation.

The aforementioned limitations are closely connected with a second inherent problem of the parliamentary function. MPs usually do not have enough time to form a view of their own on complex matters. Instead, they have to trust others' views contained in short briefing materials written by advisors, the Commons' library, select committees or other sources. Furthermore, there are additional demands on parliamentary time. MPs also must tend to the needs of their constituencies, attend and prepare debates at Westminster Hall, PM Questions, Ministerial Questions, and select committee sessions, among others. On the other hand, a permanent concern about elections and re-elections will require MPs to engage with "concerns of the day", gain

[6] Alexandra Kelso, 'Parliament' in Matthew V. Flinders and others (eds), *The Oxford Handbook of British Politics* (Oxford University Press 2009), 228ff.

[7] Cass Sunstein, 'The Most Knowledgeable Branch' (2016) 164 University of Pennsylvania Law Review 1607, 1616-17.

headlines and "talk points".[8] This further undermines the prospects of MPs for gaining constitutional knowledge and employing it to scrutinise legislation.

Finally, the sheer volume of highly complex and technical legislation that is passed every year puts additional pressure upon limited parliamentary resources, time and capacity to gather and process relevant information. Government's legislative proposals raise relevant policy issues, and it is likely that MPs will focus on these matters. Otherwise, MPs will not be able to conduct proper legislative scrutiny. This additional factor leaves little room for MPs to address the issues of constitutional significance raised by bills.

In sum, the highly technical and complex nature of constitutional considerations undermines the prospects of MPs addressing these matters. They do not have specialised knowledge, and lack time, energy and resources to equip themselves with the expertise necessary to scrutinise properly the constitutional implications of legislation. Ultimately, MPs have to rely on experts' opinions to address these matters.

2. Westminster-style politics

A second challenge for the possibility of LSCG at the Commons comes from structural factors related to the operation of Westminster systems. The key point to note here is Parliament does not have a single identity and voice.[9] This is not merely in the obvious sense that Westminster is a bicameral legislature. Mass democracy and the electoral system have favoured the representation of two main political parties at the Commons. This has had profound consequences for the operation of Parliament. Here, I am interested in the dynamics of parliamentary debates. They are dominated by a two-sided political confrontation about policy proposals between the government and the main opposition party. This focus on policy confrontation is a second factor that significantly pressures the possibility of LSCG at the Commons. In what follows, I will try to unpack how these structural factors operate.

The logic of the Westminster-system provides for a theoretically strong Parliament with supreme and unlimited powers to legislate at will. Currently, in a modern attempt to justify the legitimacy of these theoretically unlimited powers, the so-called "doctrine of parliamentary sovereignty" is grounded on ideas of popular

[8] Ibid, 1609-10.

[9] Kelso, 'Parliament' (n 6), 225; Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press 2003), 172-73.

sovereignty that permeated the Commons as the franchise was enlarged and mass democracy emerged. The Commons is the politically representative popular assembly. Representation at the Commons is a factor of the first past the post electoral system. This system is designed to ensure that one party gains a single parliamentary majority, regardless of its overall performance in the elections. The second runner, on the other hand, is recognised as the main opposition party and designated as "her majesty's loyal opposition". This puts party politics at the centre of parliamentary working practices.[10] Parliamentary debates focus on a two-sided confrontation between competing policy alternatives.[11] On the one hand, there is the party that commanded a majority and controls the government. From the point of view of law-making, the government's focus will be on pursuing a legislative agenda that implements its manifesto commitments, responds to matters of public interest, advances ministers' agendas, among other things. On the other hand, the focus of the opposition will be on highlighting policy alternatives, because these proposals will be tested in the future general elections. The key challenge for the opposition in Westminster systems is to present itself as a credible alternative for government. Once again this provides little room for constitutional arguments. The government's main concern will be to advance its policy agenda, rather than study the constitutional issues raised by legislation. The opposition, on the other hand, even if it is willing to pursue a constitutional agenda, by definition, will not be able to defeat the government. Yet more fundamentally, rather than focusing on legislative scrutiny, the opposition may devote most of its energies on discussing the government's policy agenda and on presenting an alternative of its own. In this bi-polar logic, there is also a risk that constitutional considerations may be weaponised by the opposition against government legislative proposals.

This logic of confrontation is further strengthened by political techniques and institutions designed to secure strong party allegiance and cohesion. Firstly, the government has a significant presence at the Commons.[12] A convention of ministerial

[10] Adam Tomkins, ''Talking in Fictions': Jennings on Parliament' (2004) 67 Modern Law Review 772, 759; Kelso, 'Parliament' (n 6).

[11] Ivor Jennings, *Parliament* (2nd edn, Cambridge University Press 1957); J. A. G. Griffith, 'The Place of Parliament in the Legislative Process Part II' (1951) 14 Modern Law Review 425, 290.

[12] Section 2(1) of the House of Commons Disqualification Act 1975 sets a cap of 95 MPs holding ministerial office. See also Elliott and Thomas, *Public Law* (n 5), 116, 194; Phillip Norton, *Parliament in British Politics* (2nd edn, Palgrave Macmillan 2013), 54-55.

collective responsibility means that ministers should vote in favour of the government legislative proposals. Secondly, the whip. Backbenchers are key parliamentary actors for the government, as they provide the executive's base of political support. Ultimately, the success of the government's legislative programme depends on its capacity to exert its parliamentary majority. There may be an expectation that backbenchers will have a natural adherence to party policies. However, the critical significance of party loyalty has required to organise backbenchers' contribution to the legislative process. Whips secure support for governmental bills. On the other hand, backbenchers have additional incentives to support the government, as this may foster their prospects for progressing in their political careers.[13] Hence, they may be rewarded with ministerial offices. Such mechanisms are critical to prevent backbench rebellions. In single majority governments, without rebellions, the government will not be defeated. Party allegiance undermines the prospects of LSCG, as backbenchers do not have incentives to voice constitutional concerns and make the passage of government's bills more difficult.

These considerations are premised on the assumption that Westminster systems will secure strong single majority governments. However, recent developments raise questions about the continuing validity of this premise. Consider first the assumption about backbenchers' loyalty. Westminster Parliament has traditionally been depicted as a weak policy-influencing legislature.[14] However, in recent years, there has been a decline in party voting cohesion.[15] Yet, more fundamentally, the evidence suggests that governments exercise political self-restraint at the policymaking and drafting stage if there are prospects of backbench rebellions.[16] This suggests that government backbenchers exert influence in policymaking, but in more subtle and informal ways. The inherent obscurity of behind the scenes action prevents exact quantifications of the policy impact of Parliament. However, this raises doubts about traditional

[13] Elliott and Thomas, *Public Law* (n 5), 107; Russell and Cowley, 'The Policy Power' (n 1), 125; Norton, *Parliament in British Politics* (n 12), 3.

[14] Daniel Gover and Meg Russell, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British law* (Oxford University Press 2017), 3ff; Matthew V. Flinders, *Democratic Drift Majoritarian Modification and Democratic Anomie in the United Kingdom* (Oxford University Press 2010), 126; Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription* (Collins 1978), Ch20.

[15] Gover and Russell, *Legislation at Westminster* (n 14), 120-22.

[16] Ibid, 134ff.

assumptions of parliamentary influence. It may well be that MPs can voice concerns about the constitutional implications of legislation, and the government may be willing to address those concerns, especially if they are likely to obstruct the passage of a bill. The second assumption may also no longer apply. Since the post second World War period, single majority governments have been the rule, rather than the exception. MPs coming from third political parties were marginal. However, since 2010, the significance of third political parties has increased, changing the dynamics of the modes of relationship between the executive and Parliament.[17] In the 2010 elections no party gained an overall majority, leading to a coalition between Conservatives and Liberal Democrats. A coalition government has a more complex relationship with Parliament, as it must secure support from backbenchers coming from two parties, in addition to frontbenchers from the junior coalition party. In coalition governments, there is a possibility that unhappy MPs dealing with an unwanted coalition may weaken the government's control of its parliamentary majority. In these cases, the government may not be as strong as observers of Westminster systems may expect.

Minority governments face even more pressure. This is clearly exemplified in the experience of Theresa May and Boris Johnson's Conservative minority governments.[18] Between 2017 and 2019, the Conservative party was in government, but dependent upon a confidence and supply agreement with the Democratic Unionist Party. The divisive issue of exiting the European Union ("EU") put under significant stress the capacity of government to control Parliament.[19] Policy differences within the Conservative party significantly eroded the government's political power. During the 2017-19 parliamentary session, there were significant backbench rebellions on the more fundamental policy issue facing the UK, namely, the exit from the EU. MPs managed to introduce significant changes to the government's flagship Brexit piece of

[17] Meg Russell and Philip Cowley, 'Modes of UK Executive-Legislative Relations Revisited' (2018) 89 The Political Quarterly 18.

[18] By the end of 2019, Boris Johnson won a landslide majority in general elections and the UK is governed at the time of writing by a single strong majority government.

[19] Stephen Laws and Richard Ekins, 'Endangering Constitutional Government' (*Policy Exchange*, 2019) <https://policyexchange.org.uk/wp-content/uploads/2019/03/Endangering-Constitutional-Government.pdf> accessed 5 April 2019; David Howarth, 'Westminster versus Whitehall: Two Incompatible Views of the Constitution' (*U.K. Const. L. Blog*, 10 April 2019) <http://ukconstitutionallaw.org/> accessed 29 July 2019.

legislation, namely, the European Union (Withdrawal) Act 2018.[20] Furthermore they have even been able to gain control of the legislative agenda through changes on Standing Order 14(1) at fundamental times. The European Union (Withdrawal) Act 2019 (the so-called Cooper-Letwin Act) and the European Union (Withdrawal) (No. 2) Act 2019 (the so-called Benn Act) represent an example of Parliament going further than a merely policy-influencing legislature, to effectively a policy-making one. Although it represents the exception rather than the rule, it further reinforces other trends mentioned above. Weak minority governments may well become the rule, rather than the exception, because of the unsavoury experience of the Liberal Democrats as junior partners in the 2010-15 coalition, and the context of divided politics at the plurinational level.[21] In addition, the operation of the Fixed-term Parliaments Act 2011 may result in minority government keeping office despite lacking a working parliamentary majority.[22]

These factors may change mainstream accounts about the relationship between government and Parliament. The UK Parliament may no longer be the epitome of a weak legislature. In the context of non-stable coalitions or weak minority governments, the prospects of a few backbench rebellions may be enough to put the government's legislative agenda at stake. This rebalances the distribution of political power between ministers and Parliament, and may provide new avenues for LSCG. Empowered MPs may potentially raise constitutional concerns, either informally or during the formal stages of the legislative process. Yet, this possibility does not change the fact that MPs will struggle to grasp issues of constitutional significance, and may lack time and energy to engage with them. Epistemic challenges will remain in place.

Although an emerging reconfiguration of the relationship between government and Parliament may offer new avenues for LSCG, it is worth noting that government has other means to control the legislative process and undermine parliamentary scrutiny of legislation. Firstly, the executive has significant epistemic advantages,

[20] Mark Elliott and Stephen Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' [2019] Public Law 37.

[21] Howarth, 'Westminster versus Whitehall' (n 18).

[22] This may be due, on the one hand, to the failure to pass a motion of no confidence. On the other, it is also attributable to unwillingness by the government and/or its backbenchers to pass a motion for an early general election; or alternatively, since minority government by definition cannot meet the supermajority threshold, if opposition parties reject a motion to have an early general election.

when compared with Parliament.[23] It can rely on a professional civil service to develop policy and draft legislation, which provides capacity to gather expert knowledge and information, assess policy impact and prospects, set priorities within a budget, etc.[24] As noted in section II.1 above, MPs face significant asymmetries of information and struggle to understand the scheme of a complex bill, let alone its constitutional implications. These features put the executive in control of law-making. In the exceptional cases where Parliament manages to take control, these epistemic disadvantages affect the quality of legislation, as the recent passage of the European Union (Withdrawal) Act 2019 exemplified.[25] Secondly, the government has a legislative agenda setting power, because it controls what, how and when matters are debated at Parliament. This includes the ability to set the time that Parliament will spend on one or more stages of a bill's passage. By rushing bills through Parliament, the government prevents detailed scrutiny of the constitutional implications of legislation. Thirdly, there is a long-standing trend towards delegating broad law-making powers to government ministers and other agencies. These are to a significant extent natural and inevitable consequences of changes in government scope in the last 150 years.[26] However, as will be argued in Chapter Three, since the 1980s the government has employed broad and wide-ranging delegated powers, including Henry VIII powers, to circumnavigate parliamentary scrutiny and take decisions on issues of policy and even matters of principle.[27] The so-called Brexit bills, including the European Union (Withdrawal) Act 2018,[28] provide a good example of government capacity to obtain from Parliament significant delegated powers on key matters of principle and policy. The limited effectiveness of parliamentary mechanisms to

[23] Sunstein, 'The Most Knowledgeable' (n 7).

[24] According to Martin Loughlin, the civil service has been the "efficient secret" of the 20th century British constitution. See Martin Loughlin, *The British Constitution* (Oxford University Press 2013), 61.

[25] Alison Young, 'Taking (Back) Control?' (*U.K. Const. L. Blog*, 23 April 2019) <https://ukconstitutionallaw.org/> accessed 29 July 2019. See also Select Committee on the Constitution, *European Union (Withdrawal) (No.5) Bill* (HL 2017-19, 339).

[26] Griffith, 'The Place of Parliament in the Legislative Process Part II' (n 11).

[27] Stephen Tierney, 'The Legislative Supremacy of Government' (*U.K. Const. L. Blog*, 3 July 2018) <https://ukconstitutionallaw.org/> accessed 29 July 2019.

[28] For an analysis, see Elliott and Tierney, 'Political Pragmatism' (n 19), 47-51.

scrutinise statutory instruments raises additional concerns about the ability of Parliament to assess the constitutional implications of executive law-making.[29]

In sum, Westminster-style politics structures parliamentary debates on a two-sided policy confrontation between government and the opposition. MPs have traditionally aligned according to party loyalties. Backbenchers have little incentive to rebel against their own government, let alone to obstruct the passage of bills grounded on constitutional concerns. Currently, there has been a change in traditional understandings. As rebellions have become more frequent, research has demonstrated MPs' ability to influence behind the scenes, and strong single majority government may be in retreat. However, it remains the case that MPs may focus on policy matters, leaving little room for LSCG. Furthermore, Parliament faces significant epistemic difficulties to understand matters of constitutional significance. It lacks time, energy and resources to address them properly. Although the new trends suggest stronger assertiveness in Parliament, the executive can still employ other techniques to pre-empt the prospects of LSCG at the Commons, such as programming and delegated powers.

3. The constitutional role of the Commons and conceptions of British parliamentary democracy

If the Commons face epistemic challenges, and their limited energies are mainly focused on policy confrontation, it is worth asking what is the place for legislative scrutiny in general, and LSCG more specifically. Thinking about this role in the wider context of Parliament's other constitutional roles provides a clearer picture about the place of LSCG at the Commons. This first question explores the significance of legislative scrutiny in the broader context of other constitutional functions performed by the Commons. Then, I will address a second question concerning the role that the Commons should perform in legislative scrutiny. The answer to this question depends on broader conceptions about British parliamentary democracy. I will address these two questions in the same order.

Although traditionally people think of Parliament as a law-making institution, constitutional scholars do not necessarily consider legislative scrutiny as the main

[29] Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014).

constitutional function of the Commons. About 150 years ago, Walter Bagehot identified four tasks that pertain to the Commons.[30] These were, by order of priority, to elect the government; to perform an informing function about the state of affairs of the nation;[31] to express the minds of the people on all the different matters that come before the House; to teach the people; and finally, to legislate. Bagehot thought that the significance of legislation varied among parliamentary seasons. Yet, overall, Bagehot considered that other tasks outweighed in significance the legislative function.[32]

Following Bagehot's contention that the Commons' key function is to elect the government, the idea of partisanship becomes highly relevant. The Commons must provide the basis for political support to sustain the government's ability to fulfil its manifesto commitments. Party discipline allows the government to act as the "efficient" secret of the British constitution. On the other hand, agonistic politics at the Commons is also essential for the fulfilment of its constitutional tasks. As Grégoire Webber notes, it is through debate between the two main political forces at the Commons that this chamber fulfils its "expressive, teaching and informing functions".[33] Political parties provide a coherent set of ideas, policies and beliefs about the political community and the state of affairs of a country. Agonistic debates highlight differences between alternative political proposals. Citizens must choose between these proposals contained in political parties' manifestos at the general elections. By focusing on policy debates, opposition parties communicate their alternative proposals, thus enabling them to present themselves before citizens as a credible alternative for government. Political confrontation between two alternative policy proposals performs a constitutional function essential for British parliamentary democracy. It shapes debate and reflection.

[30] Walter Bagehot, *The English Constitution* (Cornell University Press 1963), 150ff.

[31] Although listed fourthly, Bagehot recognizes this to be the second in importance. See ibid, 153.

[32] Ibid, 153. Cf Tomkins, 'Talking in Fictions: Jennings on Parliament' (n 10), 754. According to Adam Tomkins, the point of Bagehot was not to dismiss the significance of the lawmaking function. Rather, it was to recognize that legislation was not made by Parliament, but "through" Parliament. An author that clearly downplayed Parliament's role as legislator was Ivor Jennings. See ibid, 775.

[33] Grégoire Webber, 'Loyal Opposition and the Political Constitution' (2016) 37 Oxford Journal of Legal Studies 357, 15.

This view has further implications for the Commons' working practices. The role of the opposition is not to defeat the government. Nor is the main role of government backbenchers to make the passage of government's bills more difficult. Partisanship is not seen as an obstacle for the Commons to perform its constitutional functions, insofar as there is a democratic system with two factions trying to achieve and maintain power by persuasion.[34] The point about agonistic politics is to engage in a democratic exercise of defending and criticising the government. In this scheme, the opposition must present itself as a credible alternative for government. This requires choosing a leader and shadow ministers who mirror government departments, channelling criticism through persuasion,[35] and putting forward alternative policy proposals.

Others take a slightly different view. Adam Tomkins, for instance, argued that the key constitutional role of the Commons is to hold the government to account.[36] In this view, partisanship is troubling. According to Tomkins, the key idea of responsive government means that the executive only remains in office for as long as it retains Parliament's confidence. Parliament must hold the government to account for the general state of the nation, and to maintain or withhold confidence, accordingly. This view portrays the relationship between government and Parliament in monolithic terms. Parliament must act in unity and independent from government, inspired by the promotion of the public good.[37] Not surprisingly, Tomkins identifies an inherent tension between the Commons' role providing political support for the government, and its role as a democratic accountability mechanism.[38] Note that on Tomkins' view, there is a general accountability role that may include legislative scrutiny, but covers a wider range of matters, such as the role of Prime Ministers Questions, accountability

[34] Tomkins, 'Talking in Fictions: Jennings on Parliament' (n 10), 777-78.

[35] Webber, 'Loyal Opposition; (n 31), 19.

[36] Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005). See also Tomkins, ''Talking in Fictions': Jennings on Parliament' (n 10), 781-83.

[37] Hence, institutions such as whips becoming deeply problematic. See Tomkins, *Our Republican Constitution* (n 34), 137-8.

[38] Webber has rightly argued that Tomkins is wrong. The Commons is a complex institution that does not speak with one voice. Primary responsibility to sustain the government is held by government backbenchers. By contrast, primary responsibility to hold the government into account bears on the main opposition party. Other components of the Commons may contribute in the latter task, such as other third opposition parties, select committees, and in some instances, government backbenchers. See Webber, 'Loyal Opposition; (n 31), 13ff. See also Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016), Ch5, especially 101ff.

for policy implementation, control of spending, etc. Furthermore, according to Tomkins, the general accountability task of Parliament takes precedence over its legislative function.[39]

Whether we follow Bagehot's account or that of Tomkins, a common feature that emerges is the complexity of the constitutional roles performed by the Commons. The lower chamber appears overburdened by other significant functions, such as general accountability, educative, expressive and informing functions. In performing these functions, another feature that emerges is the role of agonistic politics. These functions, on the other hand, pressures the legislative scrutiny function, which although important, appears slightly downplayed in the broader context of other constitutional functions. Against this background, LSCG appears marginalized. From a more observational perspective, I noted in sections 1 and 2 above that LSCG faces epistemic difficulties, time pressures and tends to be overshadowed by policy debates and confrontation. Now from a more normative perspective, the possibility of LSCG appears again diminished by other slightly more relevant constitutional functions performed by the Commons. There is an inherent difficulty in finding space for LSCG in the Commons.

The second question in this section is more specific. I will put aside the question about the significance of legislative scrutiny in the wider context of the constitutional role of the Commons. In what follows, I will briefly discuss what role we should expect from the Commons in the context of law-making, and the implications for LSCG. Recently, the changes that MPs managed to implement in the operation of Standing Order 14(1), which secures precedence for government business in Parliament, the passage of the European Union (Withdrawal) Act 2019 and the European Union (Withdrawal) (No. 2) Act 2019, which directed the government to seek a delay of exit day, and the question about whether the government could advise the Queen to withhold royal assent, put the spotlight on different conceptions about British parliamentary democracy.[40] There is no room here for in depth study of this debate, or to form a view about which conception should prevail. Yet, it is important to briefly

[39] Adam Tomkins, 'What is Parliament For?' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003).

[40] Howarth, 'Westminster versus Whitehall' (n 18); Young, 'Taking (Back) Control' (n 23); Robert Craig, 'Executive Versus Legislature in the UK - A Response to Mark Elliott and Tom Poole' (*U.K. Const. L. Blog*, 5 April 2019) <https://ukconstitutionallaw.org/> accessed 2 August 2019.

characterise these two conceptions, and to note that the possibility of LSCG may require taking sides between these competing views.

The first conception interprets parliamentary elections as a competition between political leaders that presented the people with a manifesto containing policy proposals. Hence, elections are about choosing a government. The workings of the Commons must be strictly organised through party loyalties, thus enabling the governing party to implement its manifesto commitments through legislation. According to this view, "any interference in the implementation of the winning party's manifesto is an affront to democracy, because it constitutes defiance of the electorate's choice."[41] The recent defence of the government's privileged position as a lawmaker by Richard Ekins and Stephen Laws fits this view.[42] These authors put a premium on the convention of responsible government. They think it is right for the government to retain control of policy-making and the legislative agenda. Parliament is ill-equipped to take control of the legislative process. If it does, the UK parliamentary system will risk incoherent and unaccountable policy-making. Governments can rely on the legitimacy of their party manifesto to pursue their policies through Parliament. This does not mean that Parliament should be prevented from holding the government to account. Yet, if Parliament is no longer willing to support key government policy proposals, the solution is not a "subversion" of the constitutional roles of Parliament and government. Instead, it is a vote of no confidence and change in government.

There is a second view, which puts the emphasis on the position of the Commons as the key component of a sovereign Parliament. According to this view, British parliamentary democracy is grounded on ideas of representative democracy and political accountability of government. Rather than mere members of a party, MPs are representatives of the people, and must take decisions inspired by the common good. The government is dependent on Parliament, and can only govern through Parliament. In holding the government to account, this conception expects the Commons to behave as a deliberative body, which discusses relevant matters of public life, including government's legislative proposals, with a critical and fair-minded spirit. The

[41] David Howarth, 'The House of Commons Backbench Business Committee' [2011] Public Law 490, 494. See also Craig, 'Executive Versus Legislature in the UK" (n 38).

[42] Stephen Laws, *The Risks of the "Grieve Amendment" to Remove Precedence for Government Business* (Policy Exchange Research Note, 2019).

emphasis is placed on reason-demanding and reason-giving, as well as willingness to change views based on good reasons. Hence, it is legitimate for the Commons to challenge the government, insofar as dissent is based on good reasons. Faced with rebellions and opposition to its policies, the government should either justify its proposals, or seek changes that address parliamentary concerns.

There is a wide range of possibilities in between these two extremes. Assessing the debate about Parliament's attempt to gain control of the legislative agenda, Alison Young pointed out that these competing views of democracy have been in constant tension, alternating dominance at times.[43] The case of Parliament gaining control of policy-making seems to be an exception, rather than the rule. In times of crisis, the tensions become apparent. Yet, it should be noted that, as Martin Loughlin has argued, the British constitution works by "holding governmental institutions and practices in a relationship of mutual tension."[44] Tension is not alien to the British constitution. As far as LSCG is concerned, it seems apparent that there needs to be a strong deliberative component in Parliament. Otherwise, LSCG may not be able to flourish. I began my discussion about the possibility of LSCG by recalling Oliver and Simson Caird's contention about the need for a "consensual, principled and detailed approach to scrutiny of legislation". These ideas are better served by the second conception of British parliamentary democracy. LSCG needs a strong and deliberative Parliament where constitutional arguments gain prestige and exert influence among MPs. If the Commons continue to behave most of the time along party lines, the place of LSCG will have to be found elsewhere.

III. The House of Lords as a constitutional protector

By contrast to the Commons, the upper chamber has inherent characteristics that make it a more effective forum for the sort of reasoned and principled debate that LSCG requires. Hence, the LSCG finds a natural place at the Lords in British parliamentary democracy. I will start by identifying the key characteristics that make the case for LSCG at the Lords. However, in subsection 2 I note the difficult position of the Lords as the appointed chamber in the context of British parliamentary

[43] Young, 'Taking (Back) Control' (n 23).
[44] Loughlin, *The British Constitution* (n 22), 109.

democracy. This imposes inherent limits on the legitimacy and capacity of the Lords to perform LSCG.

1. The Lords as a forum for principled and reasoned debate

The role of the Lords in the legislative process is generally described as that of a revising chamber. Hence, the Lords scrutinises legislation, proposes amendments and prompts second thoughts on the Commons.[45] In this capacity, the Lords complement the work of the Commons, addressing those areas where the lower chamber fails to find time to conduct proper work.[46] One of those areas, as argued above, is scrutiny of the constitutional implications of government's bills. This idea is grounded on the attractive view that the Commons and the Lords should collaborate in the joint enterprise of protecting the constitution. Since the Commons do not have time, energy or expertise to address issues of constitutional significance, the Lords, exercising its revising role, should flag these issues. Lords' amendments addressing constitutional concerns should prompt second thoughts in the Commons. These amendments may command the support of the opposition and some backbenchers. If the government envisages possible backbench rebellions, or for any other reason is forced to compromise, it may either accept the Lords' amendments or may propose its own amendments. The passage of the European Union (Withdrawal) Act 2018, for instance, provides significant examples of this collaborative operation between chambers.[47]

The idea that the Lords should assess bills affecting constitutional fundamentals has been proposed for at least a century.[48] A LSCG role has also been present in more recent debates about the reform of the Lords,[49] and vehemently defended by some constitutional scholars.[50] Moreover, this LSCG role is not only present in reform and

[45] Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, January 2000), Ch4.

[46] Kelso, 'Parliament' (n 6), 232.

[47] Elliott and Tierney, 'Political Pragmatism' (n 19).

[48] Viscount Bryce, *Conference on the Reform of the Second Chamber. Letter from Viscount Bryce to the Prime Minister* (Cd 9038, 1918), at para 6(3).

[49] Royal Commission on the Reform of the House of Lords, *A House for the* Future (n 43), Ch5; Meg Russell, 'Responsibilities of Second Chambers: Constitutional and Human Rights Safeguards' (2001) 7 Journal of Legislative Studies 61; Gavin Phillipson, ''The Greatest Quango of Them All', 'a Rival Chamber' or 'Hybrid Nonsense'? Solving the Second Chamber Paradox' [2004] Public law 352.

[50] Dawn Oliver, 'Constitutional Guardians: The House of Lords' The Constitution Society <https://consoc.org.uk/publications/constitutional-guardians-the-house-of-lords/> accessed 8 January 2018. See also Oliver, *Constitutional Reform in the UK* (n 9), 198-99 and 384.

academic debates. There is evidence that the Lords has engaged in constitutional arguments in the legislative process,[51] and the recent passage of the Brexit bills provides further evidence that it continues to do so, as mentioned above.

By contrast to the Commons, the Lords provide a natural forum for principled and reasoned debate about the constitution. There are a few reasons for this. Firstly, the Lords face fewer pressures upon parliamentary time. Peers are not elected. This means that they do not have constituency work to attend. On the other hand, they do not have to take care of daily political business and seek headlines and talking points, as peers do not face pressures to be re-elected. Not surprisingly, the Lords spend an average of half of its sitting time scrutinising public bills.[52] Secondly, since 1999, an overwhelming majority of peers is appointed. Appointments are considered an "honour", and should be based on the candidate's merits. This is not always the case, as frequent controversies about party patronage in appointments suggest.[53] Despite this, it remains true that the Lords can draw from the legal and constitutional expertise and knowledge of many of its members, among which are civil servants, lawyers, former senior judges and academics, including legal academics and political scientists. Thirdly, the Lords is relatively isolated from partisan politics and more independent from the executive.[54] Even in the case of peers who are politicians, they are appointed late in their political careers, and therefore, face less pressure to progress. On the other hand, although there is a strong party presence at the Lords,[55] since the removal of all but 92 hereditary peers, there is no overall party majority. Furthermore, crossbenchers account for more than twenty per cent of membership, and the government has less presence than in the Commons. For these reasons, the government is not in control of the upper chamber. Finally, the Lords' role in scrutinising the constitutional

[51] Meg Russell, *The Contemporary House of Lords Westminster - Bicameralism Revived* (Oxford University Press 2013), 142-44 and 154-57.

[52] House of Lords, *Statistics on Business and Membership, 2016-17* (UK Parliament Official Website, 2017).

[53] Sonali Campion and Sean Kippin, 'How Undemocratic is the House of Lords?' in Patrick Dunleavy, Alice Park and Ross Taylor (eds), *The UK's Changing Democracy* (LSE Press 2018). On Loughlin's view, the appointment system has "rejuvenate[d] the trade in political honours" and "strengthen the power of party leaders" (Loughlin, *The British Constitution* (n 22), 111).

[54] Phillip Norton, 'Parliament: A New Assertiveness?' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015), 187ff; Oliver, 'Constitutional Guardians: The House of Lords' (n 48), 30ff; Elliott and Thomas, *Public Law* (n 5), 176; Russell, *The Contemporary House of Lords Westminster - Bicameralism Revived* (n 49), Ch4.

[55] It accounts for about seventy percent of total membership. See House of Lords, *Statistics* (n 50); Campion and Kippin, 'How Undemocratic' (n 51).

implications of legislation is assisted by select committees. In contrast to the Commons' select committees, Lords' committees do not mirror government departments but operate on cross-cutting areas, and perform legislative scrutiny functions. The SCC and the DPRRC are remarkable examples of Lords' committees engaging with issues of constitutional significance raised by legislation. The Lords also draws from contributions by the JCHR. This committee also performs legislative scrutiny. Given their key importance for the purposes of this thesis, I will address them in depth in the next section and subsequent chapters of this thesis. As far as this section is concerned, suffice to say that these reports enlighten debate on matters of constitutional significance, and that the Lords do engage with them when performing legislative scrutiny functions. These four factors, among others, have favoured an ethos of rational debate and emphasis on justification that characterises the Lords' approach to legislative scrutiny.[56] This less partisan and politically driven debate provides an ideal environment for LSCG.

2. The political limitations in the role of the Lords as a revising chamber

It is already clear that the Lords do provide an environment for principled and consensual debate about matters of constitutional significance, and that they engage in LSCG. However, a different question is how far can the Lords take these constitutional arguments forward. This question is relevant because the Lords have a difficult position in contemporary British parliamentary democracy. Numerous attempts to introduce a democratic component at the Lords have failed. The vast majority of its members are appointed, 92 are hereditary peers,[57] and 26 are Archbishops or Bishops of the Church of England. The lack of a representative[58] and democratic basis of the Lords remains an unsolved constitutional problem, and there are no prospects of

[56] Royal Commission on the Reform of the House of Lords, *A House for the* Future (n 43), at paras 4.39-41; Oliver, 'Constitutional Guardians: The House of Lords' (n 48), 31.

[57] Ironically, this remains the only elected component of the Lords.

[58] According to Russell, the composition of the Lords in terms of party representation is "more proportional to the way that people vote in elections than … in the elected House of Commons" (Russell, *The Contemporary House of Lords Westminster - Bicameralism Revived* (n 48), 71). Russell is right to question the representative character of the Commons, which is a factor of the electoral system. However, the agreement between incumbents about the need to maintain some party proportionality in the Lords is ultimately dependent on the Prime Minister. On the other hand, under Jeremy Corbyn's leadership, the Labour Party has slowed down its appointments, and the SNP has remained fiercely opposed to sit at the Lords (Campion and Kippin, 'How Undemocratic' (n 51)). Furthermore, women, ethnic minorities and the North are significantly underrepresented. Finally, there are no democratic accountability chains.

reform.[59] For these reasons, the relationship between the two chambers requires securing the primacy of the Commons. I will briefly explain how this is secured, the limitations of this scheme, and the impact that this has on LSCG. Finally, I will discuss whether it is legitimate for the Lords to exercise LSCG.

The primacy of the Commons is secured through a set of institutional arrangements. It comprises long standing constitutional conventions and practices, as well as statutory requirements. Yet, the idea that the Lords should defer to a majority government supported by the Commons is a long standing one. It had started to manifest itself by the mid 1800s.[60] Although the Lords had the power to reject legislation, it was thought that they could not carry this right to its extremes. By 1867, Walter Bagehot argued that the Lords was "a chamber with (in most cases) a veto of delay with (in most cases) a power of revision, but with no other rights or powers."[61] During the 20th century, these political practices were secured by means of the Parliament Acts 1911 and 1949. By the same token, other conventions and practices continued to develop.[62] The point of these institutional arrangements is to prevent the Lords from blocking legislation or passing amendments that wreck the Commons' will, whatever the reasons.[63] Therefore, the lack of democratic credentials means that the Lords will be able to perform LSCG, to criticise legislation that conflicts with the constitution, and/or propose constitutionally-informed amendments. However, if confronted with opposition at the Commons, it may have to step back from its constitutional concerns.

[59] Dissatisfaction with the lack of democratic credentials is long-standing. It is expressed in the preamble of the Parliament Act 1911. Membership reform has been approached in a quite British piecemeal and pragmatic fashion. The Life Peerages Act 1958 incorporated appointed life peers to the hereditary and aristocratic chamber. The House of Lords Act 1999 removed all but 92 hereditary peers. Since then, disagreements about the future composition of the Lords have prevented further reform. There have been white papers, pre-legislative scrutiny efforts and even a failed bill (The House of Lords Bill 2012).

[60] Jennings, *Parliament* (n 11), 402.

[61] Bagehot, *The English Constitution* (n 28), *128*-31.

[62] An example of a convention is the Salisbury Convention, according to which the Lords will not vote down at second or third reading a government bill that implements a manifesto commitment. An example of a political practice is that the Lords usually approve bills at second reading, regardless of whether the bill implements a manifesto commitment or not. The Lords may propose amendments, but they will not vote down the whole bill. For an account of these practices and conventions, see Joint Committee on Conventions, *Conventions of the UK Parliament* (2005-06, HL 265-I, HC 1212-I). See also Russell, *The Contemporary House of Lords Westminster - Bicameralism Revived* (n 48), 133.

[63] Oliver, 'Constitutional Guardians: The House of Lords' (n 48); Phillipson, 'The Greatest Quango' (n 47), 377-79.

Nevertheless, the limitations referred to above are not as straightforward as they appear. Consider a few examples. Firstly, the Parliament Acts 1911 and 1949 only apply when the Commons is the chamber of introduction. If disagreement between the two chambers arises, and the bill was introduced at the Lords, the ping pong stage can potentially be endless. Although the government should avoid introducing controversial bills in the Lords, this may not always be possible. For reasons related to an appropriate distribution of work between the chambers during a legislative session, cases arise in which the government is forced to introduce controversial bills at the Lords. In these cases, the Act will not apply. On the other hand, even when bills are introduced at the Commons, the Parliament Acts 1911 and 1949 is rarely employed.[64] Instead, most government defeats at the Lords end up in some sort of compromise, rather than in a protracted ping pong that may require the application of the Parliament Acts 1911 and 1949.[65] There are different explanations for this, but the point is that the power of delay can have damaging effects on governmental policy objectives, and may force the government to compromise. Finally, the Salisbury convention is premised on the assumption that the people have elected a single majority government. The idea is that by doing this, the people have democratically endorsed the policies contained in the manifesto. However, as noted above, recent governments have not been able to command a majority in Parliament. The very prospect of coalition and minority governments becoming the rule rather than the exception puts the operation of the Salisbury convention under increasing pressure.[66]

Consequently, the institutional arrangements that secure the primacy of the Commons are not perfect. Ultimately, the relationship between both Houses is largely dependent on political practices such as that of not blocking bills in second reading, and of having the government's business dealt with in reasonable time.[67] These practices are an expression of consensus among peers and MPs about the need to preserve the pre-eminence of the Commons.[68] Despite this, it should be noted that

[64] Richard Kelly and Lucinda Maer, *The Parliament Acts* (House of Commons Library Briefing Paper No 675, 2016).
[65] Oliver, 'Constitutional Guardians: The House of Lords', 31-32.
[66] Ibid, 48ff.
[67] Joint Committee on Conventions, *Conventions of the UK Parliament* (n 60).
[68] Ibid.

since the removal of almost all hereditary peers in 1999,[69] the Lords have felt more confident to perform their functions. The redistribution of political forces at the Lords has prompted a new assertiveness, to the point that political scientists have argued that the UK is experiencing a revival of bicameralism.[70] However, even this confident upper chamber must employ political judgement when confronted with opposition from government and the Commons. There is room for the Lords to exercise LSCG, and invite the Commons to "think twice" about the constitutional implications of legislation. However, the lack of democratic credentials will require the Lords, in certain circumstances, to stand back and defer to the Commons' will. As Oliver frankly puts it, for reasons of practical politics and survival, the Lords must exercise restraint when they oppose the government and the Commons.[71]

3. Concluding remarks: the worst of both worlds?

In conclusion, the Lords are subjecting government's bills to LSCG. Their relative isolation from partisan politics, independence from the executive, expertise of some of its members, and inputs from specialised constitutional committees, has provided an ideal environment for principled and deliberative debate about the constitutional implications of legislation. However, when performing this function, as with any exercise of legislative scrutiny, the Lords must exercise political self-restraint and avoid challenging the primacy of the Commons. The Lords will have to balance two constitutional considerations when exercising LSCG. On the one hand, their contribution to the protection of constitutional principles and values. On the other hand, the need to maintain the primacy of the democratically elected Commons. There will be tensions between these two considerations. Ultimately, how far the Lords can pursue LSCG will depend on a political judgement.

A final remark worth making is that Jeremy Waldron has questioned the legitimacy of the appointed House of Lords to perform a constitutional protection function.[72] Waldron has argued that this would require the Lords to become an elected

[69] According to section 2(2) of the House of Lords Act 1999, up to 92 hereditary peers may sit at the upper chamber.

[70] Russell, *The Contemporary House of Lords Westminster - Bicameralism Revived* (n 48); Gover and Russell, *Legislation at Westminster* (n 14).

[71] Oliver, 'Constitutional Guardians: The House of Lords' (n 48). See also, Phillipson, 'The Greatest Quango' (n 47), 377-79.

[72] Waldron, *Political Political* Theory (n 36), 87. See also Vernon Bogdanor, *Politics and the Constitution: Essays on British Government* (Dartmouth 1996), 246-47.

body. Discussing bicameralism, he argued that "constitutional review by an appointed chamber would be the worst of both worlds."[73] However, Waldron is not clear enough in regards to the nature of the function he is thinking about. I take his remarks to be referring to a comprehensive replacement of a system of strong judicial review by a sort of abstract, ex ante, "legislative" review by the upper chamber. His scheme seems to envisage veto powers, as Waldron's main concern is with non-democratic institutions with powers to block the decision of a democratic and representative legislative assembly. Since the Lords lack legal and political standing to challenge the Commons' will, LSCG performed by peers should not be considered "the worst of both worlds".

Yet, it is also worth mentioning that Waldron's depiction of a constitutional protection function by legislatures is a different kettle of fish from the idea of LSCG, as understood in this thesis. This thesis does not discuss LSCG as an alternative remedy to constitutional review. Furthermore, I have argued that LSCG could operate in a constitutional system with strong, weak or no judicial review powers. Nor is my view that LSCG requires that a chamber or parliamentary body (for instance, a select committee) performing legislative scrutiny to have veto powers. Moreover, as stated at the beginning, this thesis is agnostic to the question about the legitimacy of judicial review. I do recognise that the constitutional architecture of a given country has an impact on LSCG. For that very reason, after providing a theoretical framework, I have moved from the polarised debate about the legitimacy of constitutional review, to an attempt to understand the operation of LSCG in the context of a real-world legislature.

IV. Constitutional committees and Legislative Scrutiny on Constitutional Grounds

Discussing the possibility of LSCG at the Lords, I identified constitutional committees as one reason that explains peers' engagement with matters of constitutional significance. This section focuses on the DPRRC, the SCC and the JCHR. I will argue that these three committees provide the main forum for systematic and conscious thinking about the constitution in the UK Parliament. Their task is to perform LSCG of government bills, and to publish reports to enlighten debate about

[73] Waldron, *Political Political* Theory (n 36), 87.

issues of constitutional significance raised by government bills on the floor of both Houses. In this section, I will briefly introduce these three committees. Then, I argue that these constitutional committees are essential components of any assessment of LSCG in the UK Parliament. For this very reason, this thesis focuses on the work of the DPRCC, the SCC and the JCHR. This section, therefore, performs a key role in the context of this thesis. It justifies why subsequent chapters of this thesis, without neglecting the consideration of both Houses of Parliament, will focus mainly on the contribution of these three constitutional committees to LSCG.

1. Constitutional thinking at the UK Parliament and the place of constitutional committees

The creation of the three committees mentioned above does not respond to a masterplan, but took place individually and with little thought to their constitutional relationship. In 1992, the House of Lords created a select committee on delegated powers, currently known as the Delegated Powers and Regulatory Reform Committee. It is a permanent select committee exclusively based at the Lords, whose remit is to scrutinise clauses delegating powers and providing degrees of parliamentary oversight on the exercise of those powers.[74] It emerged out of concerns about the expansion of the scope of delegated powers during the 1980s.[75] In 2001, the Lords created the Select Committee on the Constitution. This is also a Lords' based permanent committee. Its remit is to scrutinise the impact of government bills on the constitution, and to keep the constitution under review. It was created following a proposal by the Royal Commission on the Reform of the House of Lords, whose members were concerned about the quality of constitutional reform in the UK.[76] Finally, the Joint Committee on Human Rights is the first permanent joint select committee. It entered into operation in 2001, on a proposal by the New Labour government, as part of its effort to mainstream human rights within Parliament.[77] The JCHR performs human rights protection functions, including the scrutiny of legislation on human rights grounds. Quickly, these three constitutional committees grew in reputation on the basis of their

[74] The DPRRC also scrutinises Legislative Reform Orders created under the Legislative and Regulatory Reform Act 2006.

[75] Select Committee in the Committee Work of the House, (HL 1991-92, 35-I), at para 133.

[76] Royal Commission on the Reform of the House of Lords, *A House for the* Future (n 43), at para 5.21.

[77] Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (Cm 3782, October 1997), at para 3.6.

significant contribution to LSCG. Hence, writing in 2006, a leading constitutional scholar considered them the "three new pillars of the constitution".[78]

Constitutional committees do not exhaust the avenues for constitutional debate in Parliament. Matters of constitutional significance are debated at Prime Minister Questions, Ministerial questions, at various select committees,[79] at the floor of both Houses, Westminster Hall debates, etc. In these debates, individual MPs and peers sometimes take issue with matters of constitutional significance.[80] There are other more focused forums for constitutional debate. For instance, Commons' select committees sometimes have held inquiries on constitutional matters,[81] and both Houses of Parliament have created ad hoc commissions to address issues of constitutional significance.[82] Moving on from general discussions about matters of constitutional significance to LSCG more specifically, individual MPs and peers may contribute to the scrutiny of the constitutional implications of legislation at public bill committees, at the committee stage at the Lords, or in debates at the floor of both Houses. There have also been instances of ad hoc select committees or joint select committees performing either scrutiny[83] or pre-legislative scrutiny[84] of bills and draft bills raising issues of constitutional significance.

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[78] Robert Hazell, 'Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?' [2004] Public Law 495.

[79] Robert Hazell, 'Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997-2005' [2006] Public Law 247, 277-78.

[80] For various ways in which individual peers contribute to constitutional protection, see Lucy Aitkinson, ''Talking to the Guardians'' The Constitution Unit Research Paper <https://consoc.org.uk/publications/constitutional-role-house-lords/> accessed 10 November 2017, 12ff.

[81] For instance, the Commons' Procedure Committee has led inquiries into parliamentary scrutiny of statutory instruments. See Select Committee on Procedure, *Delegated Legislation* (HC 1995-96, 152); Select Committee on Procedure, *Delegated Legislation* (HC 1999-00, 48); Select Committee on Procedure, *Delegated Legislation: Proposals for a Sifting Committee* (HC 2002-03, 501). Furthermore, as noted above, the Commons has a significant number of select committees dealing with matters of constitutional significance. See also Political and Constitutional Reform Committee, *Voting by Convicted Prisoners: Summary of Evidence* (HC 2010-11, 776); Public Administration and Constitutional Affairs Committee, *The Future of the Union, Part One: English Votes for English Laws* (HC 2015-16, 523).

[82] Consider for instance the Brooke Committee on delegated legislation. See Joint Committee on Delegated Legislation, *Report* (1971-72, HC 475, HL 184); Joint Committee on Delegated Legislation, *First Report* (1972-73, HL 188, HC 407); Joint Committee on Delegated Legislation, *Second Report* (1972-73, HL 204, HC 468).

[83] Constitutional Reform Bill Committee, *Constitutional Reform Bill Report* (HL 2003-04, 125-I).

[84] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill Report* (2013-14, HL 103, HC 924); Joint Committee on the Draft Modern Slavery Bill,

A number of instances provide an opportunity for MPs and peers to engage with LSCG. However, constitutional committees provide the "main" forum for LSCG at the UK Parliament. The next section will justify why this is the case.

2. The distinctiveness of constitutional committees' contribution to Legislative Scrutiny on Constitutional Grounds

There are five features of constitutional committees that show why these parliamentary bodies are the main drivers of LSCG in the UK Parliament. This section provides an account of these five features. I will make comparisons with other parliamentary bodies, as appropriate. These features are their direct involvement in legislative scrutiny, their permanent character, their expertise, their consensual and non-partisan operation, and finally, their ability to engage in dialogue with government both at political and civil service level.

Firstly, the three constitutional committees are directly involved in legislative scrutiny of government bills. Contrast this with the role of the Commons' select committees. These committees were created to enhance the ability of Parliament to hold the government to account for the general state of the country.[85] For this reason, Commons' select committees mirror government departments.[86] There are three core tasks of these committees, namely, looking at policy, expenditure and administration.[87] The point of these committees is to provide a public forum for debate about the government's performance. For these reasons, legislative scrutiny has not been included by the Commons' Liaison Committee among select committees' core tasks.[88] Hence, most of the Commons' select committees' time is spent conducting inquiries

Draft Modern Slavery Bill Report (2013-14, HL 166, HC 1019); Joint Committee on the Draft House of Lords Reform Bill, *Draft House of Lords Reform Bill Report* (2010-12, HL 284-I, HC 1313-I).

[85] Christopher Johnson, 'Select Committees: Powers and Functions' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018), 106ff and 112; Stephen Bates, Mark Goodwin and Stephen McKay, 'Do UK MPs engage more with Select Committees since the Wright Reforms? An Interrupted Time Series Analysis, 1979–2016' (2017) 70 Parliamentary Affairs 780, 782; Gover and Russell, *Legislation at Westminster* (n 14), 205.

[86] There are a few exceptions, namely, the Public Accounts Committee, the Liaison Committee and the Environmental Audit Committee. On the other hand, there are committees that deal with matters related to the House's business, such as the Backbench Business Committee and the Administration Committee.

[87] Standing Order 152 (1).

[88] Liaison Committee, *Annual Report for 2002* (HC 2002-03, 558), at para 13. According to the Liaison Committee, assessment of policy may include exercises of pre-legislative scrutiny (Green Papers, White Papers, draft Guidance and Draft Bills). However, no mention whatsoever is made to legislative scrutiny.

on relevant policy areas.[89] At the Commons, public bill committees perform detailed legislative scrutiny of bills.[90] By contrast, legislative scrutiny is an integral part of the three constitutional committees' core tasks. The SCC and DPRRC's terms of reference incorporate a legislative scrutiny task explicitly. Although such reference is missing in the JCHR's terms of reference, this committee has considered them to be broad enough to include legislative scrutiny among its core tasks.[91] There is also evidence that legislative scrutiny accounts for a significant part of constitutional committees' work. Figures of the 2011-12 Parliament show that legislative scrutiny accounted for more than half of SCC and JCHR's published reports, and the vast majority of DPRRC's reports.[92] This focus on LSCG puts these three constitutional committees in a privileged position as forums for constitutional thinking in the UK Parliament.

Secondly, the permanent character of these committees is highly relevant. Constitutional committees are able to work out their own understanding of the British constitution, as their scrutiny work develops. Committee members are able to develop knowledge and expertise through numerous exercises of legislative scrutiny, pre-legislative scrutiny and special inquiries. On the other hand, permanence allows constitutional committees to develop and maintain an institutional memory about the constitution.[93] Over the course of time, legislative scrutiny builds a body of reasoning and recommendations. For this reason, some authors think that it is possible to extract constitutional standards and benchmarks from constitutional committees' reports.[94] This shows that constitutional committees can rely on their previous work and learn

[89] Johnson, 'Select Committees' (n 83), 113.

[90] There have been exceptional instances in which Commons' select committees have reported about bills or specific aspects of bills. However, the Liaison Committee has argued against select committees taking responsibility for bills' committee stage. See Liaison Committee, *Annual Report* (n 86), at para 40.

[91] Joint Committee on Human Rights, *First Report Criminal Justice and Police Bill* (2000-01, HL 69, HC 437), at para 1.

[92] Gover and Russell, *Legislation at Westminster* (n 14), 211.

[93] As a former legal advisor to the JCHR notes, before the creation of the JCHR, there was "no systematic arrangement capable of ensuring that even the most obvious and important human rights issues relating to Bills are regularly and reliably raised by members, whether in debate, through parliamentary questions, or in private correspondence with the ministers responsible." See David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323, 340.

[94] Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 3rd Edition* (November 2017); Simson Caird and Oliver, 'Parliament's Constitutional Standards' (n 3).

from the past when addressing new issues of constitutional significance.[95] Another relevant point is that permanence allows constitutional committees to build up a reputation and gain recognition.[96] Their prestige is the natural consequence of hard work and high quality insights contained in clear and accessible reports. These reports make highly complex constitutional matters accessible to a wider audience of generalist MPs and peers. A final relevant aspect of permanence is the possibility to consolidate relationships and networks, not only with ministers, peers and MPs, but also with civil servants.

Thirdly, constitutional committees are resourced to address the complex and technical nature of constitutional arguments. In terms of membership, these committees usually incorporate well respected people, sometimes with expertise on specific issues. For instance, in the 2017-19 parliamentary session, among their members there were barristers (Lord Pannick, Lord Faulks, Harriet Harman, Joanna Cherry, Lord Trimble, Baroness Ludford), a former solicitor (Fiona Bruce), a former advocate general for Scotland (Lord Wallace), academics with backgrounds in politics (Lord Beith) and the history of government (Lord Hennessy). Leading former members of the SCC, for instance, have included Lord Norton, professor of British Politics, and Lord Judge, former Lord Chief Justice of England and Wales, Lords Woolf and Jauncey, retired senior judges, Lord Goldsmith, former Attorney-General, Lords Morris and Lyell, former Law Officers, Lord Irvine, former Lord Chancellor, among others.[97] On the other hand, these committees benefit from the assistance of learned academic legal advisors and in House clerks. They provide the necessary technical support to assists members' consideration of bills. The SCC, for instance, currently has as legal advisors two leading professors of constitutional theory, namely

[95] For instance, as Aileen Kavanagh shows, the JCHR has drawn on its previous work when scrutinises anti-terrorism legislation. See Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 122-3. See also Adam Tomkins, 'Parliament, Human Rights and Counter-Terrorism' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights - Sceptical Essays* (Oxford University Press 2011), 44-65. Adam Tomkins argues that the JCHR has been able to follow up previous reports. This maintains the issues in the political agenda and updates new developments.

[96] Noting the excellent reputation of the JCHR, see Kavanagh, 'The Joint Committee on Human Rights' (n 93), 117.

[97] Andrew Le Sueur and Jack Simson Caird, 'The House of Lords Select Committee on the Constitution' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013), 284ff.

Jeff King and Stephen Tierney. In the past, professors Mark Elliott, Richard Rawlings and Adam Tomkins, Andrew Le Sueur and Maurice Sunskin have served as legal advisors to the SCC.[98] The JCHR has had as legal advisors professor David Feldman and Murray Hunt. By contrast, the DPRRC has relied on parliamentary clerks and lawyers to assist their scrutiny work. In addition, constitutional committees usually call for evidence from the wider public. Hence, constitutional experts and other stakeholders can provide additional insights to enlighten constitutional committees' assessment. For these reasons, constitutional committees are well equipped to understand and address the constitutional issues raised by government's legislation.

Fourthly, constitutional committees operate in a relatively non-partisan fashion. I have already referred to a special ethos at the Lords. Members from the SCC and the DPRRC are exclusively drawn from the Lords. This means that they are relatively isolated from partisan politics and more independent from government.[99] The JCHR is equally benefited by the fact that half of its membership comes from the Lords. The result is that no party has overall control of the JCHR. In addition, its chair is not drawn from the governing party.[100] Consequently, as in the case of the DPRRC and the SCC, no party has overall control of the JCHR. This feature fosters cross-party consensus building. Constitutional committees avoid divisions in their reports. This consensual and non-partisan approach allows constitutional committees' reports to appeal to a wider audience.

Finally, constitutional committees engage in dialogue with ministers and civil servants. They send letters to ministers, require information and question both ministers and civil servants on matters of constitutional significance. On the other hand, it is government's practice to respond to constitutional committee's reports.[101] Another relevant point is that constitutional committees have been able to open up informal channels of communication with legal advisors and civil servants at government departments. This dialogue, which draws on networks mentioned above,

[98] Ibid, 288.

[99] According to Dawn Oliver, the unelected nature of constitutional committees' members is an essential component of their success. See Dawn Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defense of the Sovereignty of Parliament' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013), 239 and 334.

[100] Kavanagh, 'The Joint Committee on Human Rights' (n 93), 117.

[101] Cabinet Office, *Guide to Making Legislation* (July 2017), at paras 12.35 (JCHR) and 16.14-18 (DPRRC).

operates behind the scenes. As will be argued in Chapter Six, these networks are essential to the operation of constitutional committees.

In sum, these five features show that LSCG finds its natural place in constitutional committees. These committees perform a fundamental role in securing the consideration of the constitutional implications of government bills at Parliament. It is not possible to understand LSCG in the UK without addressing the role that these committees perform.

V. Conclusion

This chapter explored the possibility of LSCG in the UK Parliament. It looked at both Houses of Parliament to assess the challenges that LSCG faces. I have argued that LSCG has found little room at the Commons. The reasons are twofold. On the one hand, MPs struggle to address the technical and complex nature of constitutional arguments, and lack the time, energy and resources to address this gap in knowledge. On the other hand, the adversarial logic of confrontation between the two main political forces at the Commons has a pervasive effect on parliamentary debates. The government has been traditionally in control of the lower chamber by exerting its parliamentary majority. The opposition, on the other hand, has focused on making policy proposals, as they will be tested in next general elections. This has left little room for constitutional arguments at the Commons.

However, I have noted some signs of change at the Commons. Firstly, there is pressure on the traditional configuration of political forces at the Commons, as single majority governments are in slow retreat. This makes for a more complex relationship between government and the Commons, than the mere unilateral control of government through its parliamentary majority. It also suggests that Parliament may become more assertive and may be willing to defy an unhappy coalition or weak minority government. Secondly, a decline in party voting cohesion opens new avenues for LSCG, also in the form of government self-restraint when there are prospects of backbench rebellions.

Nevertheless, the government has been able to develop other means to control the legislative process and undermine legislative scrutiny, including LSCG. These include asymmetries of information, the ability to keep control of the legislative

agenda and to set the amount of time that Parliament will spend on one or more stages of a bill's passage, and the employment of skeleton bills and broad clauses delegating powers on matters of principle and issues of policy. All of these factors undermine the ability of MPs to conduct proper LSCG.

These remarks drew attention to broader normative questions about the relative constitutional weight of the Commons' legislative scrutiny function. I argued that constitutional scholars have traditionally favoured the Commons elective function, as well as its informing, educational and expressive functions over its role in the legislative process. I also pointed out that although partisanship obstructs the ability of the Commons to perform LSCG, party politics is essential for the lower chamber to perform its elective, informative and educational functions. Hence, the possibility of LSCG at the Commons is undermined by other relevant constitutional functions that outweigh the legislative scrutiny function in significance. A second normative question is that LSCG is compatible with one account of British parliamentary democracy which puts emphasis on the position of the Commons as a sovereign, representative and democratic institution. This view argues that government is subordinated to Parliament, and that MPs should act as representatives of the people and pursue the common good rather than political interests as members of a party. It emphasises the deliberative nature of the Commons. This view sits comfortably against the idea of LSCG. However, there is an alternative account of British parliamentary democracy, which understands parliamentary elections as a competition between political parties for government. The winning party should be allowed to get its business done through the Commons, because government's policies were part of a manifesto that was endorsed by the electorate. This view emphasises party loyalty and the need to protect the principle of efficient government. Under this alternative view, LSCG finds little room. LSCG needs a deliberative conception of democracy.

This analysis of the possibility of LSCG at the Commons raised more questions than answers offered. By contrast, at the Lords LSCG finds its natural place. The Lords operate as a forum for principled and reasoned debate, because of its relative isolation from partisan politics, and independence from the executive. In addition, there is less pressure over their parliamentary time, which means that the Lords spend about half of their time in legislative scrutiny. Another point is that the Lords can draw from the

expertise of some of its members, and is assisted by three constitutional committees which scrutinise the constitutional implications of legislation. These considerations provide the ideal environment for LSCG to flourish. On the other hand, the Lords understand their role as that of being a revising chamber that complements the work of the Commons in those areas where time is wanting. The Lords can assess the constitutional implications of legislation and propose amendments to address constitutional concerns. This seeks to prompt second thoughts at the Commons. The system expects these two chambers to work together in the collaborative enterprise of protecting constitutional fundamentals. The Lords can flag the issues, and the Commons take their suggestions forward. There may be cases where the government proposes amendments of its own, especially if it fears backbench rebellions.

However, there may be cases where neither the Commons, nor government are willing to address these constitutional concerns. The Lords cannot take its LSCG's function too far. It must exercise political judgement and respect the principles of the primacy of the Commons and of efficient government. This is an inevitable consequence of the difficult position of the Lords as an appointed chamber in the context of contemporary British democracy. Although there are cracks on the institutional arrangements that secure the primacy of the Commons, the Lords must exercise self-restraint, even if significant constitutional concerns are at stake.

Finally, this chapter argued that three constitutional committees, namely the DPRRC, the SCC and the JCHR, are the main forums for constitutional thinking in the UK Parliament. They perform an essential role in LSCG, to the point that it is inescapable to discuss this sort of legislative scrutiny without referring to the contribution of constitutional committees. I introduced these three committees and I argue that they feed constitutional deliberation at both Houses of Parliament by providing clear and accessible analysis of the constitutional implications of government's bills. To justify that these committees represent the main forums of constitutional thinking at the UK Parliament, I identified the following five distinctive features: their direct involvement in legislative scrutiny, their permanent character, their expertise, their consensual and non-partisan operation, and finally, their ability to engage in dialogue with government both at political and civil service level. The role of constitutional committees is to process the complex and technical nature of

constitutional arguments, and provide a high quality, but digestible analysis of the constitutional implications of legislation.

This chapter has shown that there is potential for LSCG to take place in various forums. However, the possibility of LSCG at the UK Parliament is dependent, to a significant extent, on the contribution of constitutional committees, and the chances of the Lords taking their reasoning and recommendations forward. The Commons, unfortunately, has a great deal of other matters to attend.

CHAPTER 3 CONCEPTIONS OF LEGISLATIVE SCRUTINY ON CONSTITUTIONAL GROUNDS UNDER THE UK CONSTITUTION

I. Introduction

LSCG is shaped by the constitutional arrangements in which it is set to operate. This chapter discusses what it means to perform an assessment of the constitutional implications of legislation in the UK context, which lacks an entrenched and written constitution, and does not provide courts with strong constitutional review powers. For these purposes, I discuss in depth certain features of the British constitution and how they shape LSCG in this jurisdiction. I also look at different theoretical accounts of the British constitution, including theories about the nature of Parliament's theoretically supreme legislative powers. The main objective of this chapter, therefore, is to provide an account of how Parliament –and constitutional committees– may scrutinise the constitutional implications of legislation in the context of the UK constitution, and to come back to the theoretical conceptions of LSCG developed in Chapter One and explore its appropriateness in this jurisdiction. Since this is a chapter about how the substance of the constitution has an impact on LSCG conception, I will mainly discuss the suitability of the legalistic conception in this jurisdiction. The conception of constitutional deliberation has no clear normative theory about the Constitution, and therefore its merits will be mainly tested on the ground, considering empirical evidence in Chapter Six.

The claims of this chapter are as follows: Firstly, the unsettled and contested nature of the UK's unwritten constitutional arrangements means that there is no clear answer to the normative question concerning which conception of LSCG should be preferred. I argue that the answer to this question depends on broader questions about the place of theories of parliamentary democracy and the separation of powers in the UK constitution, among others. Answering these questions goes beyond the scope of this work, and beyond the scope of a theory of LSCG. As far as this thesis is concerned, the point is that those exercising LSCG may face challenging questions when performing constitutional assessments. I argue that constitutional committees are likely to struggle when dealing with confronting theoretical views about the constitution, constitutional principles of dubious pedigree and unclear normative content.

Secondly, I claim that the legalistic conception of LSCG introduced in Chapter One above may apply smoothly to those modernized dimensions of the constitution. For instance, it can be employed as a framework to assess the human rights implications of legislation. By contrast, in those more political and ever evolving aspects which remain attached to the traditional constitution, there are questions about the legalistic conception's fit to UK constitutional arrangements. I note that hard legalism does not provide a satisfactory framework. In contrast, I claim that in those flexible and ever changing areas of the constitution, there is room for more nuanced soft legalistic conceptions of LSCG. I exemplify the challenges that the traditional constitution raises for LSCG in this jurisdiction by discussing the issue of delegated powers. I show that UK constitutional scholars have advocated for this approach to legalism. They have argued that constitutional committees have developed broad and flexible constitutional standards with core normative principle, but sensible to the circumstances of the case, an regularly employ them as benchmarks to assess legislation.

Finally, I discuss the relationship between LSCG and UK style constitutionalism. I claim that LSCG in the UK Parliament requires seriously considering the existence of "non-legal" limits on Parliament's theoretically supreme legislative powers.[1] The chapter discusses two alternative accounts about the nature of these "non-legal" limits. Ultimately, these different accounts are an expression of different views about the theoretical underpinnings of the constitution. Even though a theory of LSCG in the UK cannot, on its own, arbitrate between these confronting views, there are implications for the legislative scrutiny work conducted by constitutional committees. I therefore propose two principles of good practice for constitutional committees, which seek to address the inherent controversies that constitutional assessments raise in the UK.

[1] In this chapter, when I refer to the doctrine of "parliamentary sovereignty", in most instances, I will refer to it as "Parliament's legislative supreme powers".

II. The unsettled constitution and the impossibility to adopt a unitary conception of Legislative Scrutiny on Constitutional Grounds

1. The basic problem

The first challenge for LSCG is that the UK lacks a written constitution. Consequently, questions that in other countries may be resolved by interpreting clauses contained in an entrenched constitutional document, in the UK remain deeply contested. The lack of a canonical and codified constitutional text, and of a bespoke procedure for constitutional change, means that there is no authoritative statement that identifies the principles, values, conventions, political understandings, doctrines and other standards that belong to the constitution, and that articulates their content. Efforts have been made to address this challenge. One device is the House of Commons' long-standing convention to subject bills of "first class constitutional significance" to a committee of the whole House. However, the operation of this convention is flawed because it is difficult to identify what counts as constitutional in the first place.[2] A second device is the concept of "constitutional statutes," created by the common law as an interpretative tool to solve clashes between an older and a newer Act of Parliament in cases where the former is of constitutional significance, and the later just an ordinary statute.[3] Although this concept –which not only includes statutes, but also other "instruments"–, may be helpful, there is still dispute about what this concept includes. Constitutional statutes are still a work in progress.[4]

This throws into sharp relief the most obvious challenge raised by the unwritten constitution, namely, whether a given standard has sufficient constitutional pedigree. A second challenge flows from this. Even if it is possible to identify a set of principles, values, conventions, political practices, doctrines and other standards with constitutional pedigree, their lack of entrenchment means that these standards can be changed by statute. Hence, its content remains in constant flux. It could even be argued

[2] Robert Hazell, 'Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997-2005' [2006] Public Law 247, 248; Matthew V. Flinders, *Democratic Drift Majoritarian Modification and Democratic Anomie in the United Kingdom* (Oxford University Press 2010), 218ff; Tarunabh Khaitan, ''Constitution' as a Statutory Term' (2013) 129 Law Quarterly Review 589, 608.

[3] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) [per Laws LJ]; *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another* [2014] UKSC 3 [per Lord Reed]. For discussion, see David Feldman, 'The Nature and Significance of "Constitutional" Legislation' [2013] Law Quarterly Review 343; Paul Craig, 'Constitutionalising Constitutional Law: HS2' [2014] Public Law 373.

[4] Khaitan, 'Constitution' (n 2), 604ff.

that when Parliament legislates in a way that seems incompatible with these standards, rather than legislating in breach of them, it is legislating in a way that changes their meaning. This introduces significant uncertainty about their content. Another factor that raises challenges is that the content of some of these standards remains unarticulated. In sum, operating under the UK constitution raises difficult questions of pedigree. In addition, inherent disputes arise about the meaning, and normative consequences –if any– of its constitutional standards.

This first challenge throws into sharp relief the difficulties of making sense of LSCG in the UK context. Yet, it only represents the starting point. In what follows, I will expand on two key features that raise additional difficulties for working out the meaning of the constitution.

2. Two challenging features of the UK constitution

There are two features of the British constitution that I think are worth discussing, for their implications for LSCG. The first is that the constitution is in transition.[5] Although it remains in fundamental aspects a traditional constitution, since the 1970s it has been the object of significant changes inspired by modernising principles and values. The result is a mixed constitution whose true nature is increasingly difficult to identify. Traditional and modern components have an uneasy coexistence, and there are significant differences between them in terms of methodology and sources. The second feature is that the UK constitution is not settled in terms of its constitutional philosophy. Different, and even rival, theoretical accounts of the constitution have been able to coexist. These theoretical debates have been fostered by current developments in terms of constitutional reform. These two features introduce an additional layer of complexity for anyone trying to work out the contents of the constitution, and assess the constitutional implications of legislation. In what follows, I will provide a brief account of these two components of the constitution, with a view to underscore the challenges that working out the meaning of the constitution raises for its operators.

I will start with the first feature. The traditional constitution does not recognise a single constitutive moment in which a foundational text is adopted. Instead, it is

[5] Here, I follow Martin Loughlin, *The British Constitution* (Oxford University Press 2013) and Neil Walker, 'Our Constitutional Unsettlement' [2014] Public Law 529, who distinguish between the "settled constitution" (the old) and the "unsettled constitution" (the new).

based on political practices, understandings and conventions. This results in a flexible and ever changing constitutional framework. Change takes place incrementally, at a slow pace, as political understandings, circumstances and practices evolve.[6] These key features were given juristic foundation in the late 19th century by Albert Venn Dicey.[7] He identified two main tenets of the constitution, namely the doctrine of parliamentary sovereignty and the Rule of Law. These tenets served a key role. They provided unity and an essential character to the constitution,[8] despite being an unwritten and ever evolving settlement. Change occurs because Parliament is free to enact any law whatsoever, without recognising any "legal" limits on its law-making authority. Furthermore, there is change because political understandings and conventions mutate, and because the Rule of Law is developed through the common law method. Nevertheless, Dicey's two tenets ensured continuity, despite this dynamic of change.

Constitutional moments and abrupt transformative change are at odds with the traditional constitution. As Neil Walker notes, "reform in the evolutionary constitution is never holistic, but gradual, piecemeal and typically unsystematic".[9] Reform neither seeks to challenge the very foundations of the constitutional order,[10] nor is it inspired by first abstract rationalistic principles.[11] Instead, the traditional constitution is pragmatic in its approach, and evolves on a case by case basis, adopting a problem-solving methodology. In this sense, the traditional constitution draws from experience and empiricism.

Although historically praised for its flexibility, the UK's traditional constitutional arrangements came under increasing pressure, as a sense of economic decay and decline of political virtues became apparent in the 1970s.[12] Since then, a process of constitutional modernisation has taken place, driven both by membership

[6] Note that the principles, values, conventions and other standards of the constitution also evolve when they are developed by legislation and the courts.

[7] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, LibertyClassics 1915).

[8] Martin Loughlin, 'The British Constitution: Thoughts on the Cause of Present Discontents' (2018) 16 New Zealand Journal of Public and International Law 1, 2-3.

[9] Walker, 'Our Constitutional Unsettlement' (n 5), 534.

[10] Ibid.

[11] Loughlin, *The British Constitution* (n 5), 18ff.

[12] Ibid, 39ff. Along similar lines, see Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press 2003), 14 ff.

of the European Union ("EU"),[13] a programme of constitutional reform, the codification of political understandings and practices in soft law documents, and the practice of constitutional referendums.[14] Membership of the EU came with acceptance of the principle of primacy of EU law,[15] which required the judiciary to develop interpretative tools to qualify certain doctrines derived from "parliamentary sovereignty".[16] Membership of the EU, at least while it continues, effectively created a different source of power and law-making, beyond the control of Parliament, and hierarchically superior to Acts of Parliament (principle of primacy of EU law).

Even though this modernising reform constitutes a significant change of traditional understandings of the constitution, it still retains certain features of UK-style constitutional reform. These modernising attempts lack an overarching principle which gives coherence to the constitutional reform programme.[17] Instead, they have been piecemeal and pursued with a great deal of pragmatism.[18] Although inspired by modernising principles, such as human rights, global constitutionalism, weak forms of constitutional review, decentralisation, and so on, these modernising reforms have been ambiguous. They have also sought to retain the central tenets of the traditional constitution. Take for instance some of the most significant reforms introduced by the first wave of the New Labour government's programme. The Human Rights Act 1998 is inspired by the idea of universal moral values; the creation of the UK Supreme Court on the principle of separation of powers; Devolution sought to recognise the principle

[13] Loughlin, 'The British Constitution: Thoughts on the Cause of Present Discontents' (n 8). Cf Oliver, *Constitutional Reform in the UK* (n 12), 7ff, who argues that the modernisation process started on the mid-1980s.

[14] Loughlin, *The British Constitution* (n 5).

[15] Debate over the enactment of the European Communities Act 1972 suggests that MPs were aware of the constitutional implications of membership to the then European Economic Community (Danny Nicol, *EC Membership and the Judicialization of British Politics* (Oxford University Press 2001), Ch5, especially 92ff).

[16] See cases and discussion referred above in footnote 2.

[17] Walker, 'Our Constitutional Unsettlement' (n 5), 536. For a critique of New Labour's constitutional reform programme in this respect, see Oliver, *Constitutional Reform in the UK* (n 12), 3; Flinders, *Democratic Drift* (n 2), *234*. For a more recent critique of constitutional reform developments post New Labour's governments, see Select Committee on the Constitution, *English Votes for English Laws* (HL 2016-17, 61), at para 70.

[18] Consider for instance the Human Rights Act 1998. Rather than triggering debate about the sort of rights British people should enjoy, New Labour avoided potentially endless disputes and political controversy about the catalogue of rights by domesticating Convention rights.

Likewise, by removing most of the hereditary peers from the House of Lords, New Labour achieved an upper chamber no longer dominated by a Conservative majority. And Devolution, as Dawn Oliver notes, is partly a "response to loss of electoral support for Labour in Scotland to the Scottish National Party" (Oliver, *Constitutional Reform in the UK* (n 12), 4).

of plurinationalism by distributing power to the constituent nations of the Union; and the Freedom of Information Act 2000 was inspired by the principles of transparency and accountability. Yet, none of these measures sought to challenge the legislative supremacy of the UK Parliament.

Interestingly, in the context of these reforms, Parliament has issued declarations that seem to undermine orthodox understandings of the UK Parliament's legislative supremacy. Section 1 of the Constitutional Reform Act 2005 provides that the Act "does not adversely affect the existing constitutional principle of the rule of law". Section 1 of the Scotland Act 2016 declares the Scottish Parliament and the Scottish Government as a permanent part of the UK's constitutional arrangements, expresses a commitment by the UK's government and Parliament to the permanence of these institutions, and provides that they can only be abolished by an Act of Parliament following a referendum held in Scotland. Section 1 of the Wales Act 2017 makes similar provision for the Welsh government and national assembly. In addition, section 2 to the Scotland Act 2016 put the Sewel convention on a statutory footing, by 'recognising' it. The legal status of these declarations remains a matter of controversy.[19]

Another relevant feature of modernising constitutional reform, is that the pace of change has increased dramatically. As the editors of "The Changing Constitution" noted in the book's 8th edition, "key elements of the British constitution have undergone radical transformation", and "the pace of change seems to be ever-quickening".[20] In the most recent 9th edition of that book, although the editors focus their analysis on the destabilizing effect of the Brexit process,[21] they point out that the UK constitution "is arguably changing at a faster rate than ever."[22] Although Tony Blair's first New Labour government introduced constitutional reform on a range of

[19] Defending the orthodoxy, see Richard Ekins, 'Legislative Freedom in the United Kingdom' (2017) 133 Law Quarterly Review 582. Cf Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (2019) 81 Modern Law Review 989. On the legal enforceability of codified constitutional conventions, see *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at paras [136]-[151].

[20] Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide, 'Editors' Introduction' in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide (eds), *The Changing Constitution* (8th edn, Oxford University Press 2015), 2-3.

[21] Which, in itself, is a source of major change.

[22] Jeffrey Jowell and Colm O'Cinneide, 'Preface to the Ninth Edition' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019), viii.

subject matters, this was just a first wave. Then, Gordon Brown's government,[23] the Coalition government[24] and two successive Conservative governments,[25] all incorporated modernising constitutional reform as part of their manifesto commitments and enacted some of their promises. For instance, there has been further devolution of powers to Scotland and Wales, reforms on local government, on terms for the election of a new Parliament, on political parties, and on procedures for the approval of international treaties, among others.

Constitutional change not only takes place through legislation. There has been a trend towards the codification of political practices and understandings in administrative guidelines and manuals.[26] This juridification of political practices has been a response to a series of scandals that reflected a decay in standards of conduct in public life.[27] There was a sense that politicians could no longer be trusted as guardians of constitutional conventions, and codification was a means to reassert their existence. A final trend worth mentioning for the purposes of this chapter are constitutional referendums. They have been employed in matters as disparate as devolution, electoral system reform, independence of Scotland, transfer of new powers to EU institutions, and membership of the EU. This trend represents a shift from a paradigm of representative democracy to one of popular sovereignty, because it transfers political powers from the representative assembly to citizens. It is notable that Parliament enacted the European Union (Notification of Withdrawal) Act 2016, despite the referendum being merely advisory and a significant majority of MPs supported remaining in the EU. This suggests that by referring fundamental political decisions to the people, Parliament is recognising the need to resort to alternative sources of legitimacy in the case of constitutional decisions of major relevance.[28] Once

[23] For an account of Gordon Brown's constitutional agenda, see Stephen Tierney, 'A New Wave of Constitutional Reform for the UK?' (2009) 15 European Public Law 289.

[24] Consider for instance the failed reform of membership to the House of Lords, the Fixed-Term Parliaments Act 2011, the referendum on Scotland's Independence, and the enactment of the Scotland Act 2016.

[25] Consider for instance David Cameron's referendum on UK's membership to the European Union, and its manifesto commitment to scrap the Human Rights Act.

[26] Take for instance the Cabinet Manual, the Ministerial Code, the Guide for Making Legislation and the Civil Service Code.

[27] Oliver, *Constitutional Reform in the UK* (n 12), 15-8.

[28] A relevant development that is not addressed here is a more assertive judiciary, with a relevant role by the European Court of Justice –Brexit putting a question mark over its jurisdiction–, the European Court of Human Rights, and domestic courts developing the doctrine of common law

the people's will is known, Parliament ends up effectively constrained by the result of the referendum.

These developments sit uncomfortably against the unitary principles of the UK constitution, namely the orthodox doctrine of "parliamentary sovereignty" and the rule of law. It remains true that, from a legal point of view, Parliament continues to be able to centralise powers, legislate contrary to human rights and to the popular will as expressed in a referendum, etc.[29] It is also true that Parliament has recently decided to repeal the European Communities Act 1972 by means of section 1 of the European Union (Withdrawal) Act 2018. However, the constitutional developments of the last fifty years suggest a more complex and multi-layered constitution than that depicted by Dicey. Since the 1970s, the constitution has moved towards recognising different sources of authority such as the EU, devolved governments, the popular will and the judiciary. These developments are difficult to reconcile with the centralisation of unlimited political power at Westminster that is promoted by the principle of parliamentary sovereignty. Recently, Martin Loughlin and Stephen Tierney have argued that parliamentary sovereignty is a shibboleth. In their view, the political conditions within the British state are such that Westminster Parliament is no longer able to express the "voice of the political nation assembled".[30] The point here is that the orthodox understanding of parliamentary sovereignty is under increasing pressure. Whether the constitution has definitively moved away from the traditional to now embrace modernity will remain a matter of controversy.[31] As far as this chapter is concerned, the key issue is that there are two driving forces in the British constitution: tradition and modernisation. They overlap and have an uneasy coexistence, because they operate with different logics. This raises a major challenge for anyone trying to navigate the constitutional framework.

The second feature that raises significant difficulties to perform LSCG in this jurisdiction is that UK's constitutional arrangements have "worked against a settled

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constitutionalism. These developments raise additional doubts about the omnipotence of the legal doctrine of parliamentary sovereignty.

[29] Ekins, 'Legislative Freedom' (n 19).

[30] Loughlin and Tierney, 'The Shibboleth' (n 19).

[31] Vernon Bogdanor, *The New British Constitution* (Hart Publishing 2009). Cf Loughlin, *The British Constitution* (n 5); Walker, 'Our Constitutional Unsettlement' (n 5).

constitution in terms of substantive philosophy and principles of government."[32] This feature has provided enough room for the rise of different –even rival– theoretical accounts of the British constitution.[33] A theoretical turn in public law scholarship has taken place since the 1980s. These different schools of thought have embraced different theoretical underpinnings and methodologies. The consequence has been contested views about the political philosophy of the UK constitution, thereby introducing an additional layer. Providing an account of these views goes beyond the limits of this work. A couple of examples may illustrate the point. Take for instance those who think that abstract notions of justice and liberty give coherence and unity to the British constitution. This view challenges orthodox understandings about parliamentary sovereignty upon which the traditional constitution is based.[34] Slowly, since the 1990s, ideas of "common law constitutionalism" and a thick rights-based conception of the Rule of Law suggest that these theoretical developments have resonated among the judiciary.[35] Confront this with a second example. As a reaction to developments in terms of the "legal" constitution, some scholars reacted reinstating the orthodox view of "parliamentary sovereignty". However, they took their defence a step further. Rather than a plain defence of the traditional constitution, they grounded their arguments on modern normative constitutional ideas.[36] The doctrine of "parliamentary sovereignty", which emerged as a consequence of historical struggles that positioned Parliament as the hegemonic political power in Britain, was on this account reinterpreted on civic republican grounds.

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[32] Walker, 'Our Constitutional Unsettlement' (n 5), 533.

[33] Distinctions between schools of thought in UK public law are quite common. Consider for instance polarities such as normativism and functionalism (Martin Loughlin, *Public Law and Political Theory* (Clarendon Press 1992)); and political and legal constitutionalism (Tom Hickman, 'In Defense of the Legal Constitution' (2005) 55 University of Toronto Law Journal 981; Adam Tomkins, 'What's Left of the Political Constitution?' (2013) 14 German Law Journal 2275; Martin Loughlin, 'The Political Constitution Revisited' (2019) 30 King's Law Journal 5). For an assessment, see Samuel Tschorne, 'The Theoretical Turn in British Public Law Scholarship' (DPhil thesis, London School of Economics 2016); Robert Brett Taylor, 'The Contested Constitution: An Analysis of the Competing Models of British Constitutionalism' [2018] Public Law 500.

[34] T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013), 5 and 9. Cf J. A. G. Griffith, 'The Political Constitution' (1979) 42 Modern Law Review 1, who argued that thinking about the constitution requires a description of the political conditions that prevailed at a given time, with a clear focus on the realities of public institutions, rather than on an exercise of theorising from highly abstract first principles.

[35] Martin Loughlin, 'The Apotheosis of the Rule of Law' (2018) 89 The Political Quarterly 659.

[36] Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

These different views have been able to coexist, among other reasons, because their theoretical consequences have not been tested.[37] Whatever its merits are,[38] the point, as far as this chapter is concerned, is that they introduce an additional layer of complexity for those operating within the British constitutional framework. It is not possible to draw sharp distinctions between descriptive and normative views about the British constitution, simply because those distinctions are dependent on broader theoretical views about it.

3. Concluding remarks

In conclusion, this account of two significant features of the British constitution throws into sharp relief the magnitude of the challenge of assessing the constitutional implications of legislation. It is not merely due to the lack of a written constitution, raising difficult questions about pedigree and content. It is also on account of two additional features. Firstly, there are two overlapping layers of the constitution, each operating with different logics. On the one hand, we have the traditional constitution based on two tenets, namely parliamentary sovereignty and the Rule of Law. Always adapting to changing political circumstances, its standards evolve at a slow and incremental pace, driven by experience and pragmatism. On the other hand, it is a modern and multi-layered constitution, which decentralises political powers from the UK Parliament to other sources of authority, and introduces constitutional reform partly inspired in the recognition of first abstract principles and values. Secondly, additional complexity flows from different and even competing theoretical accounts of the British constitution. The constitutional framework provides enough room for these different accounts to coexist. The consequence is a complex constitutional landscape that Parliament, and certainly constitutional committees, will struggle to navigate. However, more fundamentally, it shows that any normative argument about which conception should be preferred depends upon broader questions related to the nature of the British constitution. LSCG cannot provide a definitive answer to those

[37] Consider for instance dictum in *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, at paras [104]-[107] (per Lord Hope).

[38] Against this understanding of British constitutionalism in terms of polarities, see Aileen Kavanagh, 'British Constitutionalism Beyond Polarities' <https://www.dropbox.com/s/4nq0yb4ya3fhp3o/AK%20British%20Constitutionalism%20Beyond%20Polarities%20FINAL%20DRAFT%20Oct%202016.pdf?dl=0> accessed 27 June 2018; Taylor, 'The Contested Constitution' (n 33), 517ff.

questions. They remain contested and are beyond the extent of this work. As far as a theory of LSCG in the UK constitution is concerned, the point is to recognise these problems, and to note that exercises of LSCG may need to address some of these questions. In sum, a theory of LSCG must incorporate these problems into the analysis, and provide the theoretical tools to accommodate different accounts of the British constitution.

III. Is the legalistic conception a partial fit?

The unique characteristics of the British constitution discussed in section II above suggest that legalistic conceptions of LSCG may not fit, or may fit only partially in this jurisdiction. I will claim that it is possible to make a case for the application of the hard legalistic conception to assess the human rights implications of bills. By contrast, in other discrete areas where there is deep contestation, lack of constitutional standards with sufficient pedigree and/or unarticulated normative content, this conception may only fit imperfectly. I will also show that in those areas it is possible to employ a soft legalistic conception, and will briefly show how it shall operate by relying on the idea of "constitutional standards", as developed by Dawn Oliver, Robert Hazell and Jack Simson Caird. Before developing the argument, it is important to clarify that the point of this section is not to make a normative argument about which conception should be preferred in the UK. Instead, this section aims at further advancing how LSCG may look like under the UK constitution, and what are the challenges that different conceptions face in this jurisdiction.

I will illustrate the point that a legalistic conception of LSCG fits the activity of assessing the human rights implications of legislation by discussing David Feldman's conception of legislative scrutiny.[39] Feldman has advocated a model of scrutiny that closely resembles the legalistic conception developed in Chapter One. Feldman claims that legislative scrutiny should be a "principled exercise" based on four standards. These standards are meant to be "independent", thus allowing scrutiny to be isolated –at least in part– from short-term political calculations. This is a rather unorthodox view about legislative scrutiny that moves away from a focus on political

[39] David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323, 328-30, 332.

considerations or policy objectives.[40] Instead, the point of legislative scrutiny is to ensure that bills meet a series of four standards. Three of Feldman's standards are legal standards, namely, standards arising from constitutional law; deriving from a formal conception of the rule of law; and from human rights and fundamental freedoms.[41] Not surprisingly, Feldman puts special emphasis on the role of Convention rights as "a crude litmus test for the appropriateness of legislation". In his view, the will of Parliament, as expressed in sections 19 and 4 HRA, is that Convention rights are employed as standards to assess the moral and legal appropriateness of legislation.

Feldman is right to think that Convention rights provide a fertile terrain for a legalistic conception of LSCG. Convention rights provide a set of abstract moral values against which to scrutinise legislation. The HRA domesticated these rights, thus conferring legal authority and solving questions about the constitutional pedigree of these moral values. When addressing difficult questions about the normative content of these values, Parliament can rely on settled interpretations and case law both by the ECtHR and domestic courts. In addition, there are sophisticated legal techniques that may assist Parliament, such as proportionality analysis and constitutional interpretation, and numerous contributions by the academic literature. Parliament can rely on these materials and legal reasoning techniques to conduct its own assessments. If Parliament follows this route, legislative scrutiny on human rights grounds would mirror the doctrines and reasoning techniques employed by courts performing human rights adjudication. As noted in Chapter One, these assessments may correspond to a hard or a soft strand of legalism, depending on how close the analysis follows courts' judgments and on whether political branches try to second-guess the likely outcome of these judgments where there is no case law. I am not making a normative argument that Parliament and constitutional committees should adopt either of the two strands of this conception or some variation of it.[42] The point is that these considerations

[40] On Feldman's view, the scrutiny of policy objectives is not an exercise in legislative scrutiny. Instead, it is essentially a political matter. See ibid, 337.

[41] Feldman's fourth standard "is concerned with the fitness of the legislation for its declared purpose." See ibid, 329.

[42] Note for instance that Feldman incorporates a few elements of constitutional deliberation in his model (ibid, 333). Furthermore, in Chapter Five, I will argue that the JCHR faces contradictory pressures to secure Parliament's compliance with Convention rights, and to develop Parliament's own voice on human rights matters. Responding to these contradictory pressures requires adopting different conceptions of LSCG.

illustrate that legislative scrutiny on human rights grounds may easily accommodate a legalistic conception.

By contrast, there are other dimensions of the constitution that may not easily accommodate to a legalistic conception. Consider, for instance, the case of delegated powers. This is a matter that has been in constant evolution for more than a hundred years.[43] Since the 1850s, the scope of delegated powers has grown dramatically. The increasing complexity of society and the emergence of the Welfare state underscored Parliament's inability to undertake many of the challenges posed by modernist social reform. Later, since the 1980s, the continued use of delegated powers as a privatization and de-regulation tool, demonstrated its plasticity as a law-making technique. Delegated powers continued to feature prominently, this time as a tool to roll back the state. The history of delegated powers has been one of constant evolution. However, if one thing has been constant, it is the quantitative and qualitative growth of delegated powers. This has fundamentally changed the balance of law-making powers between Parliament and the government in favour of the latter. This evolution is highlighted by contrasting the views about delegated powers held at the beginning and the end of the 20th century. In 1932, the Committee on Ministers' Powers argued that delegation was mainly confined to matters of detail and technicalities.[44] By contrast, since the 1980s, public lawyers have argued that it has become a matter of routine for legislation to delegate powers on matters of principle and issues of policy,[45] including wide-ranging powers to change primary legislation (Henry VIII clauses).[46] As Adam Tucker notes, the UK has reached a point in which "delegated legislation is the dominant rule-making technique in the contemporary constitution across most areas of national life and we

[43] Michael Taggart, 'From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 University of Toronto Law Journal 575.

[44] Committee on Ministers' Powers, *Report* (Cmd 4060, 1932), 31ff, argued that cases currently raising significant constitutional concerns, such as overly broad and not clearly defined powers, delegation on matters of principle and taxation, Henry VIII powers and ouster clauses, were by the 1930s rather exceptional. Some 30 years later, on evidence to the Commons' Select Committee on Delegated Legislation, Cecil Carr pointed out that statutory instruments were mainly about "routine or administrative character involving no great issues of liberty or public rights" (Select Committee on Delegated Legislation, *Report* (HC 1952-53, 310), at para 51).

[45] Peter Wallington and J.D. Hayhurst, 'The Parliamentary Scrutiny of Delegated Legislation' [1988] Public Law 547, 573-4; Select Committee in the Committee Work of the House, (HL 1991-92, 35-I), at para 133.

[46] Chris Himsworth, 'The Delegated Powers Scrutiny Committee' [1995] Public Law 34; N. W. Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] Public Law 112.

are thus substantially governed by the exercise of discretionary executive powers to legislate."[47] These developments, which have redistributed law-making powers between Parliament and the government, can only be understood as a product of the flexible nature of the traditional constitution.

Thinking of delegated powers through the lenses of a legalistic conception is challenging. The most obvious difficulty is the lack of clear principles enjoying sufficient constitutional pedigree to address the issues raised by delegated legislation.[48] As noted in Chapter One, when this is the case, legalistic conceptions can identify benchmarks against which to assess the issues raised by legislation by looking at contributions by constitutional theory. This is precisely what some scholars have done. They have suggested that the abstract legal principles of separation of powers and parliamentary supremacy be employed to assess the constitutional legitimacy of current practices in delegated legislation.[49] However, these proposals have their own particular problems. Consider first the principle of separation of powers. Its constitutional pedigree in the UK is dubious. As Loughlin notes, Britain has never had proper separation of powers. Significant links between the two political branches of government derive from the fact that the government sits in Parliament.[50] This raises questions about the suitability of assessing delegated powers by employing the separation of powers as a constitutional benchmark. Yet, even if we put issues of pedigree aside, difficult normative questions arise. The doctrine of separation of powers does not provide a clear answer about how law-making powers should be distributed between Parliament and the executive.[51] The modern state is a much more complex machinery today compared with when the idea of a tripartite separation of

[47] Adam Tucker, 'Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018), 357.

[48] Concerns about the normative reach of delegated powers are long standing. They receive their first articulation in 1929. See Gordon Hewart, *The New Despotism* (Ernst Benn 1929).

[49] Aileen McHarg, 'What is Delegated Legislation?' [2006] Public law 539, 556ff; Tucker, Parliamentary Scrutiny of Delegated Legislation (n 47).

[50] Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2003), 24-5. Cf Alison Young, 'The Relationship Between Parliament, The Executive and The Judiciary' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019), who challenges the traditional assumption that this doctrine is of little interest in the UK because of the close links between Parliament and the government.

[51] Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013), 45 ("a clear concept of division [of powers] applies only to courts").

state functions was proposed.[52] On the other hand, society is much more complex than it was in the 18th century. Regulation must adequately respond to highly complex, technical and fast-changing issues. Legislation may not be suitable for addressing those challenges. There is an inherent pragmatic dimension in any decision to delegate law-making powers.

The second proposal is to employ the doctrine of "parliamentary sovereignty". The argument would be that in a representative democracy, key questions of principle and policy should be discussed and decided at Parliament. This principle enjoys indisputable constitutional pedigree in the UK. However, it faces significant normative problems because delegation of powers is in itself the product of Parliament's will. On the other hand, if "parliamentary sovereignty" means that Parliament has unconstrained legal authority to legislate at will, this power certainly includes the ability to delegate significant policy decisions to ministers. I noted above that modernisation has meant that since 1972, the centralisation of powers at the UK Parliament has been under increasing pressure from the EU. Furthermore, since the end of the 1990s, new pressures have emerged from the devolution settlements, common law constitutionalism, the HRA and the practice of constitutional referendums. Delegated powers are another example of this broader trend, stripping law-making powers away from Parliament to cede them to the executive. As in the other examples, this has been possible because of Parliament's acquiescence.

Hence, delegated powers is an area in which there are constitutional principles of dubious pedigree and disputed normative content, and a long-standing tradition of pragmatic accommodation to changing political and social circumstances. Consider also the unsettled constitutional philosophy of the UK constitution as a relevant factor here. It is likely that different theoretical views about the British constitution will approach delegated powers in quite different ways. Normative theories will be suspicious of delegated powers, but may differ in their strategies. Liberals may take a normative approach to parliamentary democracy, and employ the principles of parliamentary supremacy and separation of powers to argue that key questions of policy and principle ought to be taken by Parliament. Traditionalists may prefer to

[52] Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press 2007).

maintain the flexibility of the constitution, supplemented by a strong development of the common law as a means to constrain ministerial discretion and protect the indigenous liberties of the British people. Finally, functional theories of public law have argued that it is not possible to think constructively about delegated powers through the lens of abstract principles, and will advocate for a permanent accommodation to changing political and social circumstances.[53]

I am not arguing against identifying workable constitutional benchmarks against which to assess clauses delegating powers. Nor is it my intention to defend the functionalist view about the distribution of law-making powers between government and Parliament. In Chapter Four, I will argue that the DPRRC has fallen short of identifying clear standards against which to assess delegated powers. I will claim that the DPRRC should send a clearer message about the constitutional principles that underpin their assessment. I am sympathetic to the development of clear constitutional standards to assess clauses delegating powers in the UK. Nevertheless, , as far as this section is concerned, this discussion illustrates a key point about LSCG in the UK context. While the legalistic conception can operate with no difficulty in regard to certain aspects of the British constitution, such as human rights, it is more difficult to implement in more contested and evolving areas, such as delegated powers. This is simply because abstract reasoning based on first principles operates smoothly in more modernised aspects of the constitution, but less in regard to traditional aspects of the constitution. In less modernised aspects of the constitution, hard legalism provides an unsatisfactory framework. Abstract analysis needs to be qualified by pragmatic needs, accommodation of constitutional traditions and other relevant considerations. This suggests that it may still be possible to adhere to a soft strand of legalism, provided that this approach is grounded on flexible and broad statements of principle and value that are sensitive to the circumstances of the case.

Such conception of soft legalism has been developed by Robert Hazell, Dawn Oliver and Jack Simson Caird's (herein, "Hazell et al"). These authors advocate for the adoption of a "code of constitutional standards". Their proposal addresses the

[53] Consider J.A.G. Griffith's account of Ivor Jennings' thinking in J. A. G. Griffith, 'A Pilgrim's Progress (Book Review)' 22 Journal of Law and Society 410. See also Ivor Jennings, 'The Report on Ministers' Powers' (1932) 10 Public Administration 333; J. A. G. Griffith, 'The Place of Parliament in the Legislative Process Part II' (1951) 14 Modern Law Review 425, 291ff; William Robson, 'The Report of the Committee on Ministers' Powers' (1932) 3 The Political Quarterly 346.

problem of identifying workable constitutional standards to assess government legislation in the context of the UK unwritten constitution.[54] Looking at Hazell et al's proposal is a fruitful way of thinking how a soft legalistic LSCG conception may operate in this jurisdiction.

These authors developed the idea of a code of constitutional standards with a view to strengthen the SCC's position as a legislative scrutiniser, and to foster its influence at governmental level. Hazell et al argue that constitutional committees, most notably the SCC, have developed a set of standards over the course of years of operation assessing the constitutional implications of legislation.[55] These standards have been developed incrementally, in a similar fashion to the development of the common law. They can be distilled from the reasoning and recommendations contained in constitutional committees' numerous reports. Hazell et al argue that these standards could be codified into a document containing a set of broad and coherent substantive and procedural principles. Then, this document could guide future exercises of LSCG both in government and in Parliament, at the floor of both Houses, at public bill committees, and at constitutional committees. Finally, Hazell et al also argue that such a code would be a significant contribution to LSCG in the UK, since it could provide some clarity about the contents of the constitution, filling in –to a limited extent– the vacuum created by the unwritten constitution.

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[54] Robert Hazell and Dawn Oliver, 'The Constitutional Standards of the Constitution Committee: How a Code of Constitutional Standards Can Help Strengthen Parliamentary Scrutiny' (*The Constitution Unit*, 22 November 2017) <https://constitution-unit.com/2017/11/22/the-constitutional-standards-of-the-constitution-committee-how-a-code-of-constitutional-standards-can-help-strengthen-parliamentary-scrutiny/> accessed 30 November 2017.

The concept was first articulated in Dawn Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] Public Law 219. See also Dawn Oliver, 'Constitutional Guardians: The House of Lords' The Constitution Society <https://consoc.org.uk/publications/constitutional-guardians-the-house-of-lords/> accessed 8 January 2018; Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016).

So far, Dawn Oliver, Robert Hazell and Jack Simson Caird have published three editions of this code. See Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 1st Edition* (The Constitution Unit, January 2014); Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 2nd Edition* (The Constitution Unit, August 2015); Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 3rd Edition* (The Constitution Unit, November 2017).

[55] Oliver coined the term "legisprudence" to refer to a body of reasoning that "reflect[s] the experience and culture that have built up among politicians in both Houses in response to lessons learned and expressions of public opinion over many years." See Oliver, 'Constitutional Guardians: The House of Lords' (n 54), 35.

As section II above has shown, Hazell et al are right to be concerned about the challenge that the unwritten constitution raises to identify workable constitutional standards with undisputed pedigree and clear normative content. Hence, they identify a fertile terrain for constitutional committees in enhancing the constitutional pedigree of certain principles, values and other standards, and in developing their content. A second point worth noting is that because of their specialised remit and permanent character, constitutional committees are in a good position to undertake this task. As argued in Chapter Two above, constitutional committees have the capacity to build up institutional memory. They are in an advantaged position to develop systematic and conscious thinking about the constitution.

Yet, more significantly for the purposes of this discussion, Hazell et al are also right to be cautious about the process of developing constitutional standards. They claim that the standards ought to be broad and flexible.[56] These characteristics perform a relevant function. Section II above has shown that the UK constitution is deeply contested, has no settled constitutional philosophy, and is in transition from a traditional to a modern constitution. Hence, it is preferable to avoid introducing excessive rigidity to the UK constitution, unless there are good reasons.[57] Constitutional standards, therefore, should recognise that an inherent characteristic of the British constitution is its ever-evolving nature. While Hazell et al adhere to a liberal normative conception of the constitution,[58] their conception of LSCG is an example of nuanced soft legalism. They advocate for the development of broad and flexible constitutional standards with a core normative content. This recognises ample discretion for political branches of government to realise these standards in different ways. Nevertheless, the core normative content guides assessments, while also being sensitive to the circumstances of the case. Legislation may be a response to concrete political and social circumstances, broad and flexible constitutional standards provide room for accommodation. This is the sort of approach that may prove more fruitful when it comes to contested and ever evolving areas of the British constitution, such as that of delegated powers.

[56] Simson Caird and Oliver, 'Parliament's Constitutional Standards' (n 54), 64.
[57] See for instance my analysis of the DPRRC in Chapter Four below.
[58] See Oliver, 'Constitutional Guardians: The House of Lords' (n 54), 59, where she argues that Parliament's constitution role is part of a broader normative project that seeks the flourishing of "liberal democracy".

IV. Legislative Scrutiny on Constitutional Grounds and UK-style constitutionalism

This chapter has already discussed some key characteristics of the British constitution in section II above. The purpose there was to illustrate the difficulties of adopting a single conception of LSCG for the UK. Here, I re-examine this discussion, but for a slightly different purpose. The point here is to understand how LSCG fits within UK style constitutionalism. For this purpose, I will provide a brief account of UK constitutionalism (section 1), and then situate LSCG within this tradition of constitutionalism (section 2).

1. Parliament's theoretically supreme legislative powers

The UK is usually seen as an outlier from a comparative perspective because it lacks a written constitution. In contrast to modern written constitutions, the UK constitution is not the product of a single constitutive moment in constitutional engineering. Instead, it is a set of evolving arrangements – some of which even date back to pre-modern times – that have been adapted to ever-changing political circumstances. As argued in section II above, the contemporary UK constitution is complex and multi-layered, mixing traditional and modern components. It comprises statutes, principles and values, constitutional conventions, judicial decisions and soft law documents, among others. These different components remain in a state of constitutional unsettlement.

Despite this complex constitutional landscape, as far as the law-making function is concerned, constitutional scholars would undoubtedly argue that the fundamental principle of the unwritten constitution is the supremacy of the Crown-in-Parliament. According to orthodox understanding,[59] the Acts of Parliament constitute the higher form of law in the UK. This means, on the one hand, that there are no legal limits on Parliament's will. The law of the constitution can be changed by statute, as there is no difference between constitutional law and ordinary law. It also means, on the other hand, that the UK lacks any special procedural requirement to pass constitutional legislation. Nevertheless, the problem with orthodox accounts of "parliamentary

[59] Ekins, 'Legislative Freedom' (n 19).

sovereignty" is that they offer an incomplete and misguided picture of the constitutional context upon which the UK Parliament is set to operate.[60]

The fact that in contrast to most written constitutions, the UK Parliament recognises no legal limits on its legislative authority, is not inconsistent with the possibility of limitations of a different nature. Although most authors may differ in their interpretation of the nature of these limitations, they tend to agree on the examples provided. The first example is the territorial constitution. Consider for instance Martin Loughlin and Stephen Tierney's contention that evolving political relationships between the constituent parts of the Union have eroded the political authority of the UK Parliament to the point that it is no longer able to express the voice of the nation assembled.[61] The devolution settlements are an institutional accommodation of claims for political and cultural recognition of the distinctiveness of Scotland, Northern Ireland and Wales. The recognition of autonomy of the constituent parts of the Union has become so integrated into the UK's constitutional landscape that the UK Parliament's legislative supremacy has been conditioned by political factors. The very fact that the Scotland Act 2016 and the Wales Act 2017 provide for the permanence of devolved governments and legislatures unless there is a referendum in Scotland or Wales, respectively, constitute an explicit recognition by the UK Parliament that it is unconceivable –although theoretically possible– for an Act of Parliament to abolish the devolution settlements. In addition, a set of conventions and practices govern the relationship between devolved governments and legislatures, and the central government at Whitehall and Westminster. The Sewel convention, which expresses the shared understanding that the UK Parliament should not normally legislate on matters within the competence of devolved legislatures without asking their previous consent, is –on Loughlin and Tierney's reading– an institutional recognition of the evolving power relations between the centre and the regions. The more politically entrenched the devolution settlements become, the less room for manoeuvre the UK Parliament has to exercise its "theoretically" supreme legislative powers. This does

[60] Loughlin and Tierney, 'The Shibboleth' (n 19); Mark Elliott, 'Parliamentary Sovereingty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019); Mark Elliott, 'Legislative Supremacy in a Multidimensional Constitution' in David Feldman and Mark Elliott (eds), *Cambridge Companion to Public Law* (Cambridge University Press 2016).

[61] Loughlin and Tierney, 'The Shibboleth' (n 19), especially 1005ff.

not go so far as to undermine the legal position, as the recent approval of the European Union (Withdrawal) Act 2018 without a Legislative Consent Motion by the Scottish Parliament shows.[62] However, it does point to the political need to reach agreements between the centre and the regions, as a necessary condition to maintain the unity of the nation. In this sense, the very fact that the passage of the Withdrawal Act, with all its shortcomings,[63] demanded a more consensual approach by the government on devolution matters, including significant concessions that effectively rewrote the original provisions of the bill, exemplifies how these "non-legal" limits condition the exercise of Parliament's law-making powers.[64]

Secondly, the UK Parliament has refrained from taking certain decisions of the highest constitutional significance without previously putting the matter to the people through a referendum.[65] The practice of constitutional referendums has become a feature of the contemporary constitution. Loughlin and Tierney note that, as in the case of the devolution settlements, this practice seems to come from the recognition by British political elites that their political authority to take certain fundamental decisions has been eroded.[66] As in the former case, Parliament remains legally free to legislate on any constitutional matter. However, political elites have acknowledged that the people are the ultimate sovereign, and that some significant decisions cannot be legitimately taken without consulting them. The referendum on EU membership is quite relevant in this respect because it illustrates how politicians consider themselves bound by the expressions of will from the people. Consider in the first place that it is hard to imagine this decision without the matter being put before the people in a referendum. Furthermore, it is not a surprise that Parliament, despite arguably having

[62] The European Union (Withdrawal Agreement) Act 2020 was approved by the UK Parliament despite the three devolved governments refusing to grant a Legislative Consent Motion.

[63] Amendments to clauses on devolution found no time to be properly discussed at the ping pong stage once the European Union (Withdrawal) Bill 2017 came back from the Lords to the Commons. Discussion was focused on the "meaningful vote" issue. This caused the SNP to walk out from the benches in protest. See Pippa Crerar, Peter Walker and Libby Brooks, 'SNP MPs Walk Out of Commons in Protest Over Brexit debate' *The Guardian* (14 June 2018) <https://www.theguardian.com/politics/2018/jun/13/snp-mps-walk-out-of-commons-in-protest-over-brexit-debate> accessed 9 October 2019.

[64] Mark Elliott and Stephen Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' [2019] Public Law 37, 53ff.

[65] See the wide range of matters put into a referendum in Stephen Tierney, 'Direct Democracy in the United Kingdom: Reflections from the Scottish Independence Referendum' [2015] Public Law 633, 637.

[66] Loughlin and Tierney, 'The Shibboleth' (n 19), 1005-6.

a majority for it, has never attempted to simply cancel referendum results. This was clearly exemplified by the quick passage of the European Union (Notification of Withdrawal) Act 2017, which was introduced immediately after the Miller No. 1 case,[67] and received Royal Assent less than two months from its passage by Parliament with no amendments.[68] Even a critic of the Brexit process, such as Paul Craig, recognises that "the result of the referendum should be treated with constitutional respect" and "should not be revisited without good cause."[69] Whether or not the conditions for a second referendum have been met is beyond the scope of this work. As far as this chapter is concerned, the key point is to note the existence of "non-legal" limits to Parliament's supreme legislative powers. MPs felt politically bound by the people's decision to withdraw from the EU.

A third factor setting the context for understanding the exercise of the UK Parliament's legislative supremacy.[70] This is the interpretative power of the Courts. Through common law artefacts such as the principle of legality, courts have managed to integrate and construct the content of Acts of Parliament in light of a wider set of moral values (common law rights). This interpretative function has been fostered by the interpretative powers provided by section 3 HRA, which requires courts to read and give effect to an Act of Parliament "in a way which is compatible with the Convention rights". Through these interpretative powers, common law moral values and European moral values were incorporated into the UK constitutional landscape, effectively conditioning the way courts construct and enforce Acts of Parliament.[71] By the same token, other doctrines that flow from the orthodox understanding of parliamentary supremacy, such as the doctrine of "implied repeal", have been qualified

[67] *Miller* (n 19)

[68] As Elliott and Tierney argue, this was the key moment in which Parliament could have put itself in the driving seat of Brexit. However, it refrained from doing so. See Elliott and Tierney, 'Political Pragmatism' (n 64), 59.

[69] Paul Craig, 'Brexit and the UK Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019), 119.

[70] Elliott, 'Parliamentary Sovereingty in a Changing Constitutional Landscape' (n 61), 44ff and Elliott, 'Legislative Supremacy in a Multidimensional Constitution' (n 61), 90ff.

[71] Note also the inevitable cross-fertilization taking place between Convention rights and the traditional methods and grounds of review in the common law, including common law rights. See Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009), 113ff; Mark Elliott, 'Interpretative Bills of Rights and the Mystery of the Unwritten Constitution' [2011] New Zealand Law Review 591, 608-09.

by common law through the concept of constitutional statutes.[72] Additionally, there are a few cases in which Supreme Court justices have made explicit calls for political self-restraint in the exercise of Parliament's supreme legislative powers, either in dictum or in extra-judicial lectures.[73] They have warned that if Parliament does "the unthinkable", courts might move away from their default deferent position into a more activist one.[74] As in the cases of devolution and popular sovereignty, the common law courts also provide a context upon which Parliament's supreme legislative powers are exercised. Thus, through the interpretative powers of the common law, courts have managed to integrate – if not also substantially shape –[75] the content of Acts of Parliament into a wider constitutional landscape.

So far, I have mentioned domestic limitations on parliamentary supremacy. However, there are also limitations imposed by international law. The HRA incorporated Convention rights into the domestic constitutional landscape. Although this Act is said to have preserved parliamentary supremacy, the political reality is much more complex. Chapter Five will argue that although declarations of incompatibility do not affect the validity, continuing operation or enforcement of the provisions in regards to which they are given (section 4(6) HRA), these declarations carry such political weight, that they have become de facto binding.[76] The same is true for adverse ECtHR's judgments. Political branches of government have felt compelled to respond to adverse human rights judgements by changing the law. On the other hand, and for the time being, membership of the EU continues to shape domestic understandings of parliamentary supremacy by imposing the principle of supremacy of EU law over domestic primary legislation. This has meant that Acts of Parliament, even those approved after the passage of the European Communities Act 1972, have been disapplied by domestic courts when found incompatible with EU law.[77] In this

[72] *Thoburn v Sunderland City Council*; *R (on the application of HS2 Action Alliance Limited) v The Secretary of State for Transport and another*.

[73] Young, 'The Relationship Between' (n 50), 332ff.

[74] The common law cannot condition the exercise of Parliament's supreme powers. The point here is to illustrate how the interpretative powers of courts can condition Parliament's intention. If courts were to disapply an Act of Parliament on constitutional grounds, this would amount to a constitutional revolution.

[75] Consider for instance *R (Evans) v Attorney-General* [2015] UKSC 21.

[76] See Ministry of Justice, *Responding to Human Rights Judgements* (CP 182, 2019). For discussion, see Chapter Five below.

[77] *Factortame (No 2) v Secretary of State for Transport* [1991] 1 AC 603.

way, the role of UK domestic courts in the context of EU law is quite similar to that of constitutional courts with strong review powers. EU law, therefore, has curtailed the ability of Parliament to exercise its legislative supremacy. It continues to do so at the time of writing, and may continue to operate in this fashion after withdrawal during the transition period as far as pre-exit primary legislation is concerned, by means of section 5 of the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020.

2. Contested views about the nature of non-legal limits

Although most constitutional scholars recognise the existence of these "non-legal" limits on Parliament's supreme law-making powers, there is disagreement about the nature of these limits. These discrepancies are a consequence of contested views about UK constitutionalism examined in section II above. I will exemplify such differences by discussing two views on the nature of these limits. Firstly, a view that rationalises these limitations in light of modern constitutionalism. Secondly, a view that interprets these limitations as expressions of changing power relationships.

I will start discussing the first view above by looking at Mark Elliott's account of the nature of non-legal limits.[78] Elliott's starting point is to distinguish between the constitutional legitimacy, as opposed to the "legality", of primary legislation. To assess the constitutional legitimacy of legislation, he identifies a set of constitutional principles and employs them as benchmarks. Legislation in breach of these constitutional principles remains valid, yet, in Elliott's view, unconstitutional legislation may be politically problematic. This author identifies a few constitutional principles that serve as benchmarks for LSCG. In his view, the devolution settlements give rise to a constitutional principle demanding respect for the autonomy of the devolved institutions. Similarly, Elliott notes that UK's international obligations deriving from membership to the EU and the ECHR have given rise to the constitutional principle according to which it would be improper for Parliament to legislate contrary to EU law, and to Convention rights. In Elliott's view, this principle is grounded on the very decision by the UK to agree to be bound by international treaties, and by the domestic Rule of Law. Finally, from the operation of the common

[78] Elliott, 'Parliamentary Sovereingty in a Changing Constitutional Landscape' (n 61), 53-7; Elliott, 'Legislative Supremacy in a Multidimensional Constitution' (n 61), 80-2.

law, the very uncertain nature of the British constitution and the institutional tensions to which these factors give rise to, Elliott draws a general constitutional principle which recommends Parliament's legislative supreme powers be exercised with political self-restraint.[79] This means, for instance, that Parliament should not affect common law rights,[80] or impede the common law courts' reviewing powers. The key point to note is that Elliott's methodology consists of identifying a set of constitutional developments and rationalising them in abstract formulations of principle. Then, these principles are employed as benchmarks to assess the "constitutional legitimacy" of government legislation. Elliott's conception is an example of nuanced soft legalism.

Other UK constitutional scholars take a similar view.[81] This approach conceives LSCG as a principled exercise based on constitutional standards drawn from a variety of sources. One should note though that most of these authors are careful to tailor these constitutional benchmarks to the specificities of UK constitutional arrangements. The very idea of constitutional standards developed by Hazell et al –discussed above– is a good example of this approach. On the one hand, there is an intellectual exercise of rationalization that draws from constitutional theory. Yet, on the other, there is an attempt to tailor them to the British constitution. This requires flexibility to account for the UK's ever evolving constitutional arrangements, as well as recognition of significant political discretion due to Parliament's supreme legislative powers. Yet, these principles do have a core normative content. While they do not impinge upon the legality of legislation, these constitutional standards are not a mere description of UK

[79] Elliott, 'Parliamentary Sovereingty in a Changing Constitutional Landscape' (n 61), 57 ("… the constitutional system demands and expects that Parliament will desist from exercising the full width of the extravagant powers which it would possess if it were sovereign.").

[80] The doctrine of "parliamentary sovereignty" assumes that Parliament can undermine common law rights. Hence, Elliott's abstract formulation can only have, as a matter of constitutional law, an interpretative rule (the principle of legality) as an output.

[81] For instance, consider Thomas Poole's analysis of the legitimacy of executive's actions and law-making powers in Thomas Poole, 'The Executive in Public Law' in *The Changing Constitution* (9th edn, Oxford University Press 2019), 197; Aileen McHarg and Adam Tucker analysis of delegated powers in McHarg, 'What is Delegated Legislation' (n 49); Tucker, Parliamentary Scrutiny of Delegated Legislation (n 47); Alison Young's analysis of the principle of separation of powers in Young, 'The Relationship Between' (n 50); David Feldman's account of LSCG (discussed above) in Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' (n 39); Dawn Oliver's analysis of LSCG in Dawn Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defense of the Sovereignty of Parliament' in Gavin Drewry and Alexander Horne (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018); Dawn Oliver, 'Constitutional Scrutiny of Executive Bills' (2004) 4 Macquarie Law Journal 33; Hazell et al proposals to create a code of constitutional standards Hazell and Oliver, *The Constitutional Standards* (n 54); Simson Caird, Hazell and Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 3rd Edition* (n 54).

constitutional practices. They provide the basis to assess those practices against an idealized account of constitutional legitimacy. For this reason, the very idea of LSCG grounded on abstract formulations of principle sits comfortably against the broader trend of UK constitutional modernization.

Contrast this account about the nature of non-legal limits with Loughlin and Tierney's account.[82] Their account focuses on identifying and describing evolving political circumstances; and interpreting them as constitutional facts. Hence, "non-legal" limits are seen as manifestations of a redistribution of political powers between the centre and the regions (devolution); the UK and the international legal order (EU law and the ECHR); between political branches and the judiciary (common law constitutionalism); and between citizens and elected representatives (constitutional referendums). Loughlin and Tierney claim that these instances are an expression of the erosion of the legislative authority of the UK Parliament. This approach does not translate these constitutional facts into abstract formulations of rational normative principles. Instead, these authors interpret them as changing "power relationships".

In Loughlin and Tierney's view, the legislative supremacy of Parliament is a legal doctrine about the distribution of power within a set of institutional arrangements in the UK. Yet, this set of arrangements is ultimately dependent on a wider set of relationships that form the constitutive dimension of power in a nation. Historical and political developments have changed power relationships in the UK, to the point of making incoherent the orthodox understanding of "parliamentary sovereignty". The very fact that Parliament acceded to the EU, introduced the HRA, created the devolution settlements, deferred key constitutional changes to the will of the people as expressed in constitutional referendums, among others developments, are explicit legislative recognition of the changing political relationships between the central power at Westminster and other sources of political authority. These instances show that in the contemporary constitution multiple sources of political authority condition the exercise of the UK Parliament's supreme legislative powers.

Loughlin and Tierney's account does not deny that there may be a role for juristic constitutional principles. However, in line with Loughlin's previous contributions to public law theory, they argue that exercising political powers in a way

[82] Loughlin and Tierney, 'The Shibboleth' (n 19).

that respects the constitution strengthens the political authority of the legislature.[83] The law-maker must bear in mind constitutional standards as a matter of "political judgement".[84] These authors do not think that the constitutional legitimacy of legislation should be assessed by reference to an abstract and idealized world. Instead, the constitutional domain is composed of contested principles, values, conventions and political practices that are concrete, contingent and indigenous products of ever-changing political circumstances. The challenge for those exercising political powers, including law-makers, is to engage in an exercise in prudential reasoning, with a view to prevent political conflict, and maintain the unity of the state. In the UK context, this requires from them recognition of the need to defer to the alternative sources of political authority referred above.

In sum, here I have introduced two alternative views regarding the nature of non-legal limits on Parliament's legislative supreme powers. One view extracts from a series of developments and changes in the UK constitution a set of abstract rationalizations articulated in the form of constitutional principles, values and other standards. These principles, values and standards depict an idealized normative world against which the legitimacy of government legislative proposals is assessed. By contrast, the second view interprets ever-changing power relationships underpinning the British constitution as conditioning the "political authority" of the UK Parliament. This view, therefore, interprets these non-legal limits on political powers as prudential reasons to secure the "survival and well-being of the state".[85]

3. Concluding remarks

A theory of LSCG in the UK cannot, on its own, arbitrate between these confronting views about the nature of non-legal limits on the exercise of Parliament's theoretically supreme legislative powers. This is a broader debate that has numerous implications and broader consequences, one of which is to shape our understanding of LSCG in this jurisdiction. Nevertheless, the discussion in this chapter has relevant implications for the legislative scrutiny work conducted by constitutional committees. I will present in what follows two principles of good practice for constitutional committees when performing LSCG. Since they are intended to operate as

[83] Loughlin, *The Idea of Public Law* (n 50), 150-51.
[84] Martin Loughlin, *Political Jurisprudence* (Oxford University Press 2017), Ch1.
[85] Loughlin, *The Idea of Public Law* (n 50), 148ff.

"principles", not as "rules", they admit a spectrum of possibilities, are context sensitive and must be balanced against other relevant considerations.

Firstly, constitutional committees should not generally endorse a hard legalistic, highly morally committed account of the British constitution. The constitution is fraught with controversy between modernisers and traditionalists, which is expression of a deeper disagreement about the nature of UK constitutional arrangements. LSCG in the UK takes place in a context where there are lively debates about the constitutional pedigree and normative content of different constitutional standards, about the theoretical underpinnings of the constitution, and a complex interplay between its modern and traditional components. Constitutional committees are not in a good position to arbitrate these debates because they do not enjoy any special authority to state the contents of the constitution.[86] This is especially critical in the case of the DPRRC and the SCC, which are exclusively Lords based committees. Hence, their membership lacks any democratic representative basis. In the case of the JCHR, the issues are more pressing because of competing conceptions of rights, and the controversial status of Convention rights. Nevertheless, as I shall show in Chapter Five, there are good reasons for the JCHR to pursue a soft legalistic LSCG conception, due to legal and political reasons. The very fact that constitutional committees' recommendations are not binding is an institutional manifestation of their purely "advisory" role. The coercive nature of constitutional committee recommendations will ultimately depend on the quality of the reasons in support, the salience of the constitutional issues, the capacity of those driving constitutional considerations to influence debate and political decision-making, and the receptiveness of elected politicians to arguments of this nature, among other factors. While many of these factors are not entirely in control of constitutional committees, it will remain true that the more controversial the constitutional reasons in support of their recommendations, the less persuasive these committees will be.

A second guiding principle is that where there is contestation or controversial constitutional matters, either because there are confronted views, principles of dubious constitutional pedigree or uncertain normative content, among others, there will be good reasons for constitutional committees to have a less normative take, and instead,

[86] Walker, 'Our Constitutional Unsettlement' (n 5), 544.

a more informative and descriptive one. Constitutional committees will make a significant contribution in this area by taking a more informative and less prescriptive approach which prompts debate by accounting for confronted views about the relevant issues. This does not mean that constitutional committees should not express a view of their own on a controversial matter, should they have a clear stance on the matter. Instead, this guiding principle recommends that it is good practice to provide additional information documenting any alternative views and the reasons in support of them, so that MPs and peers can make a judgment of their own. Neither it means that constitutional committees cannot push for a more assertive take, even in cases where there are no clear principles with core normative principle, when there is a trend or pressing issues. One example of this is delegated powers, as I shall argue in Chapter Four below.

This second principle of good practice is also inspired by the same reason announced in support of the first principle. Yet, in addition to that, it is also prompted by the nature of Parliament as a pluralistic and representative assembly where different views about the most important aspects of society are discussed. It is the place where debate and confrontation must take place, and all views about the most relevant public matters, including constitutional matters, should find a space to be deliberated. Parliamentary debates must provide room for different views about British constitutional arrangements, in a context of deep contestation about those very arrangements. A theory of LSCG in the UK should pay tribute to the very representative nature of Parliament. It should not foreclose debate. This view also is more consistent with the "advisory" role that LSCG performs in the UK legislative practice, where constitutional committees lack vetting powers on constitutional grounds, and therefore shall focus on enriching debate and raise consciousness about the constitutional implications of government legislation.

Ultimately, constitutional committees will benefit from a looser or more flexible take of controversial constitutional matters, not only to secure unanimous support from members for its reports, but also to appeal to a wider audience. From the point of view of members, having controversial views will stress constitutional committees' operation, as different members may have different views about the issues. From the point of view of the audience, constitutional committees may prefer to be seen as "non-

partisan", to appeal to a wide range of MPs. Securing unanimous reports and avoiding dissenting opinions is key to achieve this. In general, as noted above, this may be achieved by constructing broad and flexible standards which can circumvent difficult and highly technical debates about the nature of the constitution and its underlying constitutional philosophy.

V. Conclusion

This chapter is premised upon one claim, namely, that the constitutional arrangements of a given country shape the theoretical conceptions of LSCG. The UK constitutional arrangements are unique in that this jurisdiction lacks a written constitution and a bespoke procedure for constitutional change, thereby generating uncertainty concerning the pedigree and normative content of constitutional standards. The picture becomes more complicated due to the mixed nature of the British constitution, which remains in relevant aspects a flexible and ever changing traditional constitution, but which has been subject to significant modernising reforms inspired by first abstract principles. This has put the constitution in a state of transition and unsettlement and has provided enough room for different, even rival accounts of its constitutional philosophy.

The very fact that UK constitutional law is an essentially contested matter has significant implications for the theoretical conceptions of LSCG discussed in Chapter One. It suggests that the normative question about which conception of LSCG should be preferred in this jurisdiction will be dependent on broader debates about the nature of the UK constitution and the place of fundamental constitutional principles such as parliamentary democracy and the separation of powers, among others. Nevertheless, a theory of LSCG in the UK can draw some lessons from the unique nature of British constitutional arrangements. This chapter has discussed some of those lessons.

Firstly, I have discussed the appropriateness of the legalistic conception to UK constitutional arrangements. The legalistic conception advocacy for abstract reasoning based on first principles applies smoothly to those more modernised layers of the constitution, notably, to human rights assessments. Yet, it is put under pressure as a framework to conduct constitutional assessments of those more flexible and evolving dimensions of the constitution. By discussing the issue of delegated powers, I argued

that a more nuanced and soft legalistic approach fits better the characteristics of these traditional areas of the constitution. Following Hazell et al, I have also pointed out the need for constitutional committees to develop "broad and flexible" standards if they were to follow a soft legalistic conception.

The second lesson is that LSCG must take seriously the existence of "non-legal" limits on Parliament's theoretically supreme legislative powers. It cannot simply dismiss these limits because they are extra-legal, as some orthodox understandings seem to suggest. However, contestation about the nature of the British constitution is also reflected on the question about the nature of these non-legal limits. I discussed two alternative accounts about non-legal limits on parliamentary supremacy. Many constitutional scholars interpret these limitations through the lenses of modern constitutionalism. They rationalise certain constitutional developments in terms of abstract formulations of principle. Their views are consistent with a soft approach to legalistic LSCG conceptions. By contrast, others maintain a more traditionalist account of these limitations. They interpret constitutional facts as expressions of changing power relationships that have an impact on the power distributive dimension of the constitution. These changing power relationships erode Parliament's political authority, and demand that law-makers defer to alternative sources of authority. Constitutional standards are not seen, then, as abstract constitutional benchmarks as in the first view, rather as prudential reasons advising those exercising political powers to prevent political conflict and maintain the unity and integrity of the state. As far as LSCG is concerned, both views are workable frameworks to develop the activity of assessing the constitutional implications of legislation.

Given these controversies, I claim that constitutional committees should follow two broad principles of good practice when conducting LSCG. Firstly, they should not generally endorse a hard legalistic, highly morally committed account of the British constitution. Secondly, where there is contestation or controversial constitutional matters, either because there are confronted views, principles of dubious constitutional pedigree or uncertain normative content, among others, there will be good reasons for constitutional committees to have a less normative take, and instead, a more informative and descriptive one. Both principles are context dependent, and must be balanced against other relevant considerations.

CHAPTER 4 CONSTITUTIONAL COMMITTEES AND THE CONSTITUTION: THE SELECT COMMITTEE ON THE CONSTITUTION AND THE DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

I. Introduction

This work has shown that constitutional committees are the main drivers of constitutional thinking in the United Kingdom ("UK") legislative process (Chapter Two). It has also identified alternative conceptions of LSCG (Chapter One), and discussed how those conceptions may apply to the peculiarities of the British constitution (Chapter Three). This chapter and the next one will discuss in greater depth the working practices of each constitutional committee. The aim is to identify how each committee approaches the constitution and which conception(s) of legislative scrutiny on constitutional grounds ("LSCG") underpins their work. This chapter will address both the Delegated Powers and Regulatory Reform Committee ("DPRRC") and the Select Committee on the Constitution ("SCC"). Chapter Five will be entirely dedicated to the Joint Committee on Human Rights ("JCHR").

This chapter claims that the DPRRC has promoted constitutional deliberation by operating as a reason-demanding body, imposing burdens of justification on the government, and prompted political self-restraint. However, I submit that the DPRRC's ability to foster deliberation has been curtailed by its reluctance to clarify the criteria against which it assesses government legislation and the constitutional principles that underpin its work. This has arguably undermined the DPRRC's capacity to send a clear message, both to government and Parliament, about what the boundaries of delegated powers should be. I suggest that a more assertive approach that resembles a soft legalistic LSCG conception could enhance the DPRRC's deliberative impact, and be a more appropriate response to the exponential growth in clauses delegating powers.

By contrast, the SCC has engaged in constitutional considerations with more depth. It has set out key tenets of the constitution, with a focus on the institutional and power-distributive aspects of the constitution. From the point of view of LSCG conceptions, there are two main ways to conceive the SCC's work. Firstly, as an agent for constitutional deliberation in the process of constitutional change, which advocates for a careful and coherent development of the constitution. In performing this work,

the SCC sometimes discusses the content of reforms. In these cases, the SCC works under a conception of constitutional construction by providing reasons to revise or improve government proposals. In other cases, the SCC seeks to improve the quality of reform by making procedural recommendations. Secondly, the SCC also acts as a "constitutional scrutiniser". In this second strand, the SCC reminds politicians about the existence of "non-legal" limits on Parliament's supreme legislative powers. This role can be seen in different ways, depending on whether the SCC's work comes closer to the conception Mark Elliott and others have developed regarding the nature of these "non-legal" limits, or to those of Martin Loughlin and Stephen Tierney (see Chapter Three above). For instance, in some cases the SCC develops abstract and rational principles, values and other standards, and employs them as benchmarks to assess the constitutional legitimacy of government legislation. In these cases, there are elements of different conceptions underpinning the SCC work. Their contribution seeks to improve constitutional deliberation. But in certain instances, legal reasoning and rationalizations are part of their scrutiny work, taking the SCC closer to soft legalism. By contrast, in other cases the SCC reasons on the basis of prudential considerations oriented towards the maintenance of an appropriate distribution of powers between different sources of political authority. In such cases, the emphasis is on promoting deliberation both at Parliament and government, and prompting political self-restraint.

This chapter is divided into two parts. I will start by discussing the DPRRC, and then I will discuss the SCC.

II. The Delegated Powers and Regulatory Reform Committee

In this section, I argue that the DPRRC has remained attached to the methods of the traditional constitution. Pragmatism has taken priority over principled considerations and a deeper understanding of the British constitution. Clauses delegating powers and providing for degrees of parliamentary scrutiny have been assessed on a case by case basis, according to the particular circumstances. From the point of view of the DPRRC's working practices, the committee has introduced a valuable dynamic of constitutional deliberation that has had a significant impact on government's policy-making and legislative drafting. The government routinely justify provisions seeking delegated powers and providing degrees of parliamentary

scrutiny. Furthermore, there is evidence that the government is willing to change its mind and introduce amendments at the formal stages of the legislative process to address DPRRC's concerns, suggesting political self-restraint. The DPRRC has enhanced Parliament's ability to scrutinise closely these clauses. Nevertheless, I claim that the DPRRC's capacity to enhance constitutional deliberation is undermined by its thin take on questions of constitutional principle. A more assertive soft legalistic approach to LSCG that puts forward clear and broad statements of principle would provide clear guidance to government departments and improve the deliberative impact of the DPRRC.

1. Methodological considerations: flexibility and deliberation

The DPRRC's approach to legislative scrutiny of clauses that delegate powers is flexible and sensitive to the circumstances of each case. The committee does not involve itself in abstract reasoning based on first identifying principles and then developing its normative consequences.[1] Nor has it adopted any fixed criteria or red lines by which to judge delegated powers. Instead, the DPRRC has preferred a more cautious and pragmatic approach.[2] The committee is right to recognise that delegated powers are an inevitable need in the context of the modern state.[3] The decision to avoid abstractions and instead adopt a flexible approach suggests that the DPRRC remains attached to the methods of the traditional constitution. This means that for the DPRRC, the so-called doctrine of "parliamentary sovereignty" will continue to operate as the medium for an ever-evolving distribution of law-making powers between government and Parliament. Although implicitly the DPRRC may try to uphold the UK

[1] The core of the DPRRC's approach is to conduct "line by line" scrutiny of any provision of a bill delegating powers and providing for degrees of parliamentary scrutiny. DPRRC's recommendations, therefore, are context specific. The DPRRC, on the other hand, has an overwhelming focus on legislative scrutiny, rather than on inquiries into more general themes (Daniel Gover and Meg Russell, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British law* (Oxford University Press 2017), 211). Inquiries do offer an opportunity for the DPRRC to look at wider developments and review its substantive criteria. In fact, in those rare instances in which it has conducted inquiries, criteria have been updated. See for instance, Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (HL 2014-15, 39); Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (HL 2015-16, 119).

[2] Select Committee on the Scrutiny of Delegated Powers, *First Report* (HL 1992-93, 57), at paras 23, 25 and 30; Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (n 1), at paras 20-22.

[3] Select Committee on the Scrutiny of Delegated Powers, *First Report* (n 2) at para 1. More recently, making the same point, see Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (n 1), at para 19.

Parliament's position as the main law-maker, this committee thinks that it is ultimately for Parliament to decide about the appropriate boundaries between primary and secondary legislation.

This methodological decision raises questions. The very creation of the DPRRC was motivated by "considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion".[4] There was a concern about the need to secure consistency on parliamentary assessments both on scope of powers and degrees of parliamentary scrutiny.[5] There were different paths to follow. The Hansard Society Commission on the Legislative Process ("Rippon Committee") suggested an outline for a set of constitutionally suspicious cases.[6] The DPRRC followed this suggestion.

The point of these cases is to send a warning, as that of an amber traffic light. Government departments will know in advance about Parliament's disquiet over certain developments in terms of both scope of delegated powers and degrees of parliamentary scrutiny. The message has two targets. On the one hand, at ministerial level, the government will be aware that clauses delegating powers may hinder the passage of the bill –most likely at the upper chamber. On the other hand, departmental lawyers and legislative drafters must seriously consider delegation in these cases, and produce appropriate justification.[7] These civil servants will have to make a convincing case for delegation and for the chosen degrees of parliamentary scrutiny in a delegated powers memorandum attached to each bill incorporating clauses that delegate powers.[8] Otherwise they may risk a negative DPRRC's report. The memorandum performs an essential role because is the starting point for the DPRRC's assessment.[9] The

[4] Select Committee in the Committee Work of the House, (HL 1991-92, 35-I), at para 133.

[5] Select Committee on the Scrutiny of Delegated Powers, *12th Report: Review of the Committee's Work* (HL 1993-94, 90), at para 7.

[6] Hansard Society Commission on The Legislative Process, *Making the Law* (Hansard Society 1992), at paras 266-67. The Commission was chaired by Lord Rippon, who later became the chair of the DPRRC's predecessor (then known as the Select Committee on the Scrutiny of Delegated Powers).

Note the report of the Select Committee in the Committee Work of the House (n 4), at para 133, which seems to suggest that the government was open to reach consensus on what should be the exclusive domain of primary legislation.

[7] For evidence that government departments are thinking carefully about delegated powers at the policy-making and legislative drafting stages, see Chapter Six.

[8] This commitment was undertaken by the government upon creation of the DPRRC. See Select Committee on the Scrutiny of Delegated Powers, *First Report* (n 2), at para 20.

[9] The DPRRC has been concerned about the quality of the memoranda, and exerted pressure on government to improve this document. The committee has published clear guidelines about good

DPRRC's analysis will be contained in a report assessing the issues raised by each clause delegating powers and defining degrees of parliamentary scrutiny. These reports are an input to improve the quality of debate and awareness between peers and MPs about the issues raised by these clauses. They also may prompt responses from the government, either in the form of additional justification, or may even trigger an amendment to address the DPRRC's concerns. This operation as a reason-demanding body, as well as its ability to enlighten debate and prompt government's responses shows that the DPRRC has a positive impact on constitutional deliberation, specially among civil servants.

The DPRRC's list of constitutionally suspicious cases is broad and flexible. There are no red lines. The committee took the decision to avoid abstractions and fixed criteria in its very first report.[10] Different stakeholders were sceptical about adopting such criteria.[11] As noted earlier in Chapter Three, there is a case for flexibility and pragmatism when assessing clauses delegating powers. This, among other reasons, because there are no clear and undisputed constitutional benchmarks against which to assess the constitutional implications of delegated powers, and because constitutional committees lack authority to state the normative contents of the British constitution. Among the reasons for this highly cautious approach, are that the DPRRC does not consider itself as the ultimate arbiter of the appropriateness of delegated legislation. The DPRRC thinks of its role as providing food for thought to the Lords.[12] It leaves to the upper chamber to decide how far to press the government for constitutional

practices on the memoranda. See Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (n 1), Appendix 4. For an earlier version of these guidelines, see Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the Role and Requirements of the Committee* (May 2010).

[10] Select Committee on the Scrutiny of Delegated Powers, *First Report* (n 2), at paras 23 and 25.

[11] The House of Lords Select Committee in the Committee Work of the House ("Jellicoe Committee"), which proposed the creation of the DPRRC, had anticipated that members to the DPRRC were unlikely to adopt rigid criteria (Select Committee in the Committee Work of the House (n 4), at para 133).

In evidence to the DPRRC, the government argued against the idea of having rigid criteria. See Select Committee on the Scrutiny of Delegated Powers, *First Report* (n 2), at para 8. Along the same lines, see Hansard Society Commission on The Legislative Process (n 6), at paras 266-67.

[12] Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (n 1), at para 4.

As the predecessor of the DPRRC's put it, "our primary aim is to inform debate". See Select Committee on the Scrutiny of Delegated Powers, *First Report* (n 2), at para 32. See also Select Committee on the Scrutiny of Delegated Powers, *12th Report: Review of the Committee's Work* (n 5), at para 2.

concerns to be addressed. Another relevant point is that the Jellicoe Committee warned that fixed criteria and a strong vigilant role could be confused with opposition to government policies, and therefore used for partisan purposes.[13] This is a complex point for the upper chamber. The Lords must exercise self-restraint to secure its political survival.[14] Peers, given their unelected nature and lack of democratic legitimacy, try to keep their role confined to operate as a revising chamber that rather than making a political point, addresses more technical or constitutionally inspired concerns raised by government legislation.

In sum, the DPRRC has opted to promote political self-restraint and engagement in a process of reasoning, justification and assessment. Whether this approach can have a relevant impact on constitutional deliberation also depends on the substantive reasons that underpin the DPRRC's assessments. I turn to this issue in the next subsections.

2. The committee's substantive criteria

As explained above, the DPRRC has laid down a set of constitutionally suspicious cases. These cases demand from the government special justification, both in terms of the scope of delegated powers and of degrees of parliamentary scrutiny. This section accounts for and discusses the DPRRC's criteria.

Starting with the question about the scope of delegated powers, it is possible to classify the DPRRC's set of cases into three main categories. Firstly, two cases attract the DPRRC's main concerns, namely, skeleton bills and Henry VIII powers. Here, the DPRRC has not provided any substantive guidelines about their appropriateness. Instead, it has focused on demanding justification. Regarding skeleton bills, the DPRRC requires a "full explanation" and warns that they will "attract careful consideration". Likewise, in the case of Henry VIII powers, the DPRRC demands them to be "clearly identified" and "fully justified". A second category comprises content-dependent cases. Here again the DPRRC refrains from providing any substantive guidelines. Instead, it expresses that it will be "particularly vigilant" over them. The DPRRC includes among these cases bills granting ministerial powers to decide on

[13] Select Committee in the Committee Work of the House (n 4), at para 133.

[14] Dawn Oliver, 'Constitutional Guardians: The House of Lords' The Constitution Society <https://consoc.org.uk/publications/constitutional-guardians-the-house-of-lords/> accessed 8 January 2018.

matters of policy and issues of principle; taxation; powers to create criminal offences and define penalties; and to interfere with vested rights or legal relations. Finally, there is a third group of more tailored cases that may capture the DPRRC's attention. Among these are powers to define or amend key expressions of a bill; delegated powers concerning Scotland and Wales; powers to make provisions by directions, or in codes or guidance; delegation to a person or body other than ministers; and, in general, any unusual or novel delegation.[15] As in the former cases, there are no substantive guidelines as to when and how these cases may be justified.

The DPRRC has also defined cases of parliamentary oversight that may raise constitutional concerns. Initially, the DPRRC borrowed its criteria from the Brooke Committee's report.[16] By contrast to the DPRRC's approach to the legitimate scope of delegated powers, here there are clear guidelines about when the affirmative procedure should apply. According to the Brooke Committee, the affirmative procedure should apply to cases where delegated powers substantially affect provisions of Acts of Parliament; impose or increase taxation or other financial burdens on the subject; or raise statutory limits on the amounts which may be borrowed or lent or granted to public bodies. Finally, it should apply to powers involving considerations of special importance, such as the creation of new varieties of criminal offences of a serious nature. Later, the DPRRC developed its own take on Henry VIII powers. It went on to say that a presumption in favour of the affirmative procedure would apply to such powers.[17] This continues to be its position,[18] although the DPRRC recognises that the

[15] There have been instances in which the DPRRC, rather than identifying constitutionally suspicious cases, has provided examples in which delegation is acceptable. Take for instance the case of Henry VIII powers to make incidental, consequential and similar provision in Delegated Powers and Regulatory Reform Committee, *Henry VIII Powers to Make Incidental, Consequential and Similar Provision* (HL 2002-03, 21).

[16] Select Committee on the Scrutiny of Delegated Powers, *First Report* (n 2), Appendix III.

The Joint Committee on Delegated Powers ("Brooke Committee") was created in 1972 by the House of Commons Procedure Committee. Between 1971 and 1973, it published three reports on parliamentary scrutiny of delegated powers.

[17] Ibid, at para 31.

[18] The presumption also applies to Henry VIII powers to make incidental, consequential and similar provision (Delegated Powers and Regulatory Reform Committee, *Henry VIII Powers to Make Incidental, Consequential and Similar Provision*) (n 15). For more contemporary statements, see Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the Role and Requirements of the Committee* (n 9), at paras 16-7; Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (n 1), Appendix 4, at paras 35 and 37.

negative procedure may be appropriate in certain instances.[19] On the other hand, the DPRRC has also made a significant contribution by criticising the variety of strengthened scrutiny procedures to which exceptionally wide Henry VIII powers are subject to. Noting that there are asymmetries between the additional safeguards in different procedures,[20] the DPRRC has recommended consistency for the future.[21]

The cases outlined above, both in terms of scope of delegated powers and degrees of parliamentary scrutiny, flow from four different reports. The first articulation was contained in the very first DPRRC report, dating back to 1992.[22] It then took 18 long years for the DPRRC to revisit its criteria, and provide a new list of cases.[23] Four years later, in the context of a special inquiry into the quality of delegated powers memoranda, the DPRRC revisited again and updated its previous criteria.[24] Finally, there is a fourth instance in which the DPRRC, without being all-inclusive, discussed some problematic cases of delegation.[25] By looking at these four instances, it is possible to identify an evolution in the DPRRC's thinking. While at the very beginning, the DPRRC opted for setting out quite general cases, as its scrutiny work developed, it set out more tailored cases. For instance, while the first report included cases of delegation on matters of principle and issues of policy, such cases are absent in subsequent formulations of cases. By contrast, a list of more tailored cases was developed in those later reports. Another trend is that the DPRRC has refined its views on delegated powers and criminal law. Finally, the DPRRC has developed its own criteria on parliamentary scrutiny of Henry VIII powers.

3. Assessment

The main question in terms of my assessment is whether the DPRRC has built a body of cases that relies on precedent and principle. This, with a view to send a clear

[19] Select Committee on the Scrutiny of Delegated Powers, *12th Report: Review of the Committee's Work* (n 5), at paras 22-4.

[20] For instance, consultation, laying of supporting documents, and powers of veto by select committees.

[21] Delegated Powers and Regulatory Reform Committee, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* (HL 2012-13, 19).

[22] Select Committee on the Scrutiny of Delegated Powers, *First Report* (n 2).

[23] Delegated Powers and Regulatory Reform Committee, *Guidance for Departments on the Role and Requirements of the Committee* (n 9).

[24] Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (n 1), Appendix 4.

[25] Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (n 1).

message to ministers, civil servants, legislative drafters, Law Officers, MPs and peers about the appropriate scope of delegated powers, and about appropriate degrees of parliamentary scrutiny. I employ this benchmark because if there are no clear common grounds upon which the DPRRC can launch a constitutional conversation among bureaucratic actors, peers and elected politicians about the issues raised by delegated legislation, the DPRRC's capacity to improve deliberation is undermined.

The first point to make is that the DPRRC has not engaged in a constitutional exploration of the issues raised by delegated legislation. As Meg Russell has argued, the DPRRC has pushed on the small questions, rather than on the big ones.[26] The DPRRC has refrained from identifying the underlying constitutional principles that inspire its criteria. As the DPRRC's list of cases has evolved from general to more tailored cases, the DPRRC's deeper constitutional views have become even harder to identify. Furthermore, a line by line scrutiny technique focused on the special circumstances of the case has also undermined the DPRRC's ability to engage with general principles and broader guidelines. The lack of an external, academic, legal advisor may also be a relevant factor preventing the DPRRC from engaging in broader constitutional debates about the issues raised by delegated legislation.[27] Instead, it has favoured a more black letter approach and a line-by-line scrutiny technique.

The second point is a more normative one. There are good reasons to be cautious when approaching an ever-evolving area of the British constitution, such as the distribution of law-making powers between Parliament and the government. Nevertheless, as argued in Chapter Three above, this is not an obstacle to the development of clearer constitutional standards to assess delegated powers. Without being overly prescriptive, the DPRRC could adopt a soft and nuanced legalistic LSCG conception and set out broad statements of principles with core normative content, but sensible to the circumstances of each case. The DPRRC has avoided that path, despite the fact that, as part of its scrutiny work, this committee is required to have a concept

[26] Evidence by Professor Megan Russel given to the Lords' Secondary Legislation Committee inquiry on the Strathclyde Review. See Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review: Effective Parliamentary Scrutiny of Secondary Legislation* (HL 2015-16, 128). See full reply to Q37, Oral and Written evidence, 23, 24-5.

[27] The DPRRC employs parliamentary lawyers working at the Counsel to the Chairman of Committees. See Andrew Kennon, 'Legal Advice to Parliament' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013).

of the constitution.[28] Hence, the DPRRC scrutinises regulatory reform orders created by means of the Legislative and Regulatory Reform Act 2006 (herein, "LRRA"). Among the safeguards imposed by this act, section 3 provides that the DPRRC must assess whether or not a regulatory reform order makes changes of constitutional significance. This shows that constitutional arguments are not alien to the DPRRC's working practices. Section 3 LRRA requires the DPRRC to have a concept of the British constitution, and an idea of its different principles, values, rules and practices, both political and legal.[29] In other words, it is part of the DPRRC's work to engage with constitutional arguments. There is no reason in the context of regulatory reform orders for the DPRRC to engage in questions of constitutional principle, while in the context of clauses delegating powers it refrains from doing so.

Arguably, the DPRRC has had an ambiguous position on these matters. Recently, on account of developments in terms of the scope of delegated powers, the DPRRC argued that the UK needed to "re-set the boundary between primary and delegated legislation".[30] On its view, "successive governments have attempted to relegate too many important policies to delegated legislation, leaving too little on the face of the bill".[31] However, it has argued that it will not adopt stricter criteria.[32] In its view, the criteria and advice is available, but it has not been followed by ministers and officials. The challenge, according to the DPRRC, is how to secure government compliance with the available criteria. These two views are somewhat contradictory, because the first one assumes the need to start from scratch, and to set up new tougher criteria; while the latter retains the status quo in terms of substantive criteria and focuses on its dissemination and on other procedural arrangements.

Following this route, the DPRRC has made some procedural proposals, most of them targeting the government's internal procedures. Hence, in its response to the Strathclyde Review, the DPRRC suggested procedural changes to improve not only the quality of the memoranda, but more fundamentally, the way in which delegated

[28] I am grateful to Professor Adam Tucker for suggesting me this point.

[29] Tarunabh Khaitan, ''Constitution' as a Statutory Term' (2013) 129 Law Quarterly Review 589, 598-601.

[30] Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (n 1), at para 2.

[31] Ibid, at para 22.

[32] Ibid, at paras 40 and 56.

powers thinking takes place during earlier stages of the policy making and drafting of legislation.[33] In addition, the DPRRC sent a strong message to government, insisting on the need for proper justification when its criteria is engaged. It went on to say that if not satisfied with the memoranda, the DPRRC may require the minister to provide justifications in person. In addition, the DPRRC went on to say that it would consider asking the House for a "scrutiny reserve". This means that the committee stage at the Lords should be parked to give enough time for the committee to take oral evidence and to report to the House.[34]

The DPRRC has certainly made a significant point. To deal with delegated powers in a more constitutionally respectful way, the government should improve its internal procedures and practices. However, its contention that criteria and advice are available, and therefore this is just a matter of government willingness to comply, is not fully convincing. There is some evidence pointing in the opposite direction. In 2014, providing evidence to the DPRRC, the then First Parliamentary Counsel expressed that there were no clear principles agreed by all relevant actors on the question about degrees of parliamentary scrutiny.[35] These remarks by the head of the office in charge of drafting legislation may well have been influential in the DPRRC's decision to revisit its criteria in 2014.[36] However, later in 2016, on evidence to the Secondary Legislation Scrutiny Committee, Ruth Fox argued that there was no consensus among bill teams in different government departments on the boundaries between primary and secondary legislation. The obstacle to consensus was the lack of sufficient dissemination of parliamentary committees' thinking on the matter. In her view, tackling this problem required establishing clear boundaries.[37] It seems to me that Fox has identified a key problem. The DPRRC has not recognised that dissemination of the criteria among government departments will do little if the criteria

[33] Ibid, at paras 51-4, 56, 60 and 65. The report reminded that many of these improvements had already been discussed and agreed with the government two years before. See Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (n 1), at para 24. See also paras 29-32 and Appendix 4, Part II.

[34] Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (n 1), at para 48.

[35] See reference in Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (n 1), at para 33. The full intervention is available in Richard Heaton's reply to Q15, Oral and Written Evidence, 26.

[36] Ibid, Appendix 4.

[37] Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review* (n 26), see remarks by Dr. Ruth Fox in her reply to Q15, Oral and Written evidence.

are not clearly defined in the first place. As noted above, the DPRRC's criteria are so flexible that even if there is better dissemination among government departments of this criteria, this will not result in civil servants having a clear idea about what the committee expects from them. Clearer guidelines, grounded on principle and precedent, will send a strong message to government. The DPRRC has recognised the need to start a constitutional conversation about the appropriate boundaries of delegated legislation. However, it is making only a limited contribution to that conversation.

4. Concluding remarks

The DPRRC's stance suggests that it will remain attached to its working practices, in line with the flexibility of the traditional constitution. No changes are expected in terms of a more assertive criteria, or a deeper engagement with the more theoretical questions raised by delegated powers. Despite this, it is fair to say that the DPRRC has improved internal governmental checks on delegated powers, and enhanced Parliament's capacity to hold ministers to account for their legislative proposals.

The question that arises is whether the DPRRC could do more to reverse the qualitative and quantitative trends on delegated powers. These have remained unaltered, if not exacerbated, despite twenty years of DPRRC's contribution. Legislation continues to delegate significant powers on matters of principle and policy, including Henry VIII powers. On the other hand, deep dissatisfaction over the effectiveness of parliamentary scrutiny mechanisms persists. Certainly, the DPRRC should not be blamed for this. However, delegated powers continue to be at the forefront of constitutional concerns,[38] and there is agreement that something needs to be done about it. It is then worth asking whether the DPRRC should do more, for instance, by way of adopting more assertive substantive criteria, and therefore

[38] Adam Tucker, 'Parliamentary Scrutiny of Delegated Legislation' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018); James Chalmers and Fiona Leverick, 'Criminal Law in the Shadows: Creating Offences in Delegated Legislation' (2018) 38 Legal Studies 221; Lord Judge, 'A Judge's View on the Rule of Law' (*Bingham Centre for the Rule of Law*, 2017) <https://www.biicl.org/documents/1637_2017_05_11transcript_of_lord_judges_speech_3.pdf?showdocument=1> accessed 15 September 2017; Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014); N. W. Barber and Alison Young, 'The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty' [2003] Public Law 112.

pursuing a soft legalistic LSCG conception.[39] I have suggested that the answer to this question is affirmative. The DPRRC should be a relevant voice in the constitutional debate about resetting the boundaries between primary and secondary legislation.

As things stand, the DPRRC will not be a relevant voice in this debate. The answer to questions about the fundamental principles governing the distribution of law-making powers between Parliament and government will have to be found elsewhere. The SCC has recently made a significant contribution to this matter in its inquiry into the legislative process.[40] Perhaps other arrangements may be preferred. Consider for instance Russell's proposal to create a Joint Committee of both Houses that puts down some statements of principle to establish the appropriate boundaries of delegated legislation.[41] Russell's proposal raises a final point. The challenges that delegated powers raise for contemporary constitutional practice are mainly due to the nature of the British constitution. If the UK had a written Constitution setting clear boundaries between primary and secondary legislation, the work of the DPRRC would look quite different. Since this is not the case, the committee works on "thin air". In that context, perhaps the key point regarding Russell's proposal is that any workable solution to the problem of delegated powers requires involving the Commons in reaching some sort of consensus. In the meantime, despite the DPRRC's contributions, delegated powers will remain a fundamental feature of the British legal system, and will continue to be at the forefront of constitutional concerns.

III. The Select Committee on the Constitution

This section discusses how the SCC approaches the UK constitution, and what sort of LSCG conception it prefers. I will argue that the SCC's remit covers a wide range of constitutional matters. However, it is fair to say that the focus is primarily on

[39] Note that by looking at the evolution of the DPRRC, it is possible to identify sometimes a more assertive language. Originally the DPRRC thought it should only "call the House's attention". However, slowly, it felt more confident to employ more assertive language. In certain cases, it bluntly qualifies delegation as "inappropriate", or it expresses the urgency of the matter by employing similar language (for instance, the DPRRC is "strongly of the view…"). See Select Committee on the Scrutiny of Delegated Powers, *First Report* (n 2), at paras 13-5. Cf Delegated Powers and Regulatory Reform Committee, *Special Report: Response to the Strathclyde Review* (n 1), at paras 22 and 31-9.

[40] Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (HL 2017-19, 225).

[41] Secondary Legislation Scrutiny Committee, *Response to the Strathclyde Review* (n 26). See Professor Megan Russel reply to Q37, Oral and Written evidence, 23, 24-5 and reply to Q38, Oral and Written evidence, 26.

the institutional and power generational dimensions of the constitution, rather than on more substantive limits on the exercise of law-making powers. From the point of view of LSCG conceptions, there are two ways to think about the SCC's work. Firstly, as a mechanism to foster constitutional deliberation in the process of constitutional change. In this first view, the SCC employs a conception of constitutional deliberation. However, when it engages with the content of these reforms, it may contribute to constitutional construction and development. Secondly, the SCC also operates as a "constitutional scrutiniser". Here, the SCC's work is more complex. Its remarks are directed towards improving constitutional deliberation, but in certain cases the SCC incorporates legal reasoning and rationalizations, moving closer to a legalistic conception.

Despite this, it should be noted that the SCC is cautious to frame its recommendations as the result of an analysis of government legislation based on either "constitutional benchmarks" (or standards), or as prudential "constitutional" reasons.

1. The committee's approach to the constitution

The SCC's remit is wide-ranging, as it covers all matters of constitutional significance. Within this domain, it is fair to say that this committee has focused on the institutional and power-distributive aspects of the constitution, rather than on the substantive – and hence, morally controversial– limitations over Parliament's legislative powers. Consider firstly the very definition of the constitution that the SCC adopted in its first report. In the committee's view, the constitution creates institutions, defines its competences and regulates inter-relations between them, and their relationships with the individual.[42] Note secondly that the SCC identified five central tenets of the constitution. Only one of them may place substantive limits on law-making powers, namely, the rule of law and the rights of the individual.[43] Yet, two further qualifications are needed. On the one hand, SCC's legislative scrutiny on constitutional grounds has focused on issues raised by retrospective legislation, the protection of legal certainty,[44] and the control of government's discretionary powers.

[42] Select Committee on the Constitution, *First Report: Reviewing the Constitution: Terms of Reference and Method of Working* (HL 2001-02, 11), at para 20.

[43] Ibid, at para 21.

[44] Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 3rd Edition* (The Constitution Unit, November 2017), 6 and 7.

The SCC does not commit to a thick and substantive conception of the Rule of Law. On the other hand, while the SCC argues that the rights of the individual are a central tenet of the constitution, it usually defers any human rights assessment to the JCHR. For this reason, the SCC usually makes brief remarks on human rights matters, with a focus on civil liberties and criminal law, legal safeguards, access to justice, due process and procedural fairness.[45] This position should be contrasted with the fact that the SCC usually engages with delegated powers, despite the fact that there is a dedicated constitutional committee scrutinising each clause delegating powers at the Lords, namely, the DPRRC.

The SCC's methodological approach to LSCG differs from that of the DPRRC discussed above. The SCC does not conduct LSCG of every single constitutional issue raised by legislation.[46] Nor is its work structured on the basis of a "line by line" scrutiny of the bill. To select which issues are worth scrutinising, the SCC applies a "significance" test. This means that the SCC subjects to LSCG only those bills which raise issues that are a principal part of the constitution and important questions of principle. Bills that are subject to scrutiny are not discussed in detail. Instead, the SCC may examine the broader "constitutional principles underlying legislation". There have been some quite detailed instances of scrutiny, when the significance of the issues demands it. A final point worth making is that the SCC avoids making political remarks about the merits of government policies, except in the most exceptional circumstances. This also serves the purpose of preventing internal divisions and minority opinions in its reports.

These broad conceptual and methodological definitions serve a variety of purposes. Two are worth mentioning. Firstly, a focus on institutions protects the SCC's position as a legislative scrutiniser, because by not focusing on those more contentious aspects of the constitution, it does not need to commit to any of its competing theoretical accounts examined in Chapter Three above. Debates about rights or substantive conceptions of the Rule of Law are more akin to misinterpretation on political grounds. The same is true for the overarching assessment of the architecture of the bill, rather than on the more detailed assessment of each of the bills' provisions.

[45] Ibid, 13-5.

[46] Select Committee on the Constitution, *First Report: Reviewing the Constitution: Terms of Reference and Method of Working* (n 42), at paras 22, 27, 35, 36 and 54.

Since this detailed scrutiny may have an impact on the government's ability to pursue its policies, it risks being confused with policy scrutiny or providing ammunition that may be instrumentalized by the opposition or backbenchers. These definitions have contributed to building the SCC's reputation as a technical and independent scrutiniser of broader constitutional developments that seeks to "enlighten" peers and MPs debates.[47]

However, it is difficult to appreciate the impact of these fundamental decisions without looking at the SCC's work in discrete areas of constitutional significance. Looking at these areas also throws into relief the different ways in which the SCC develops its work. For the SCC, in comparative terms, is the most versatile and complex UK constitutional committee.

2. The committee as a deliberative agent to foster rationality in constitutional reform

There is a first strand of SCC work. It is in line with the idea of those who proposed the creation of the SCC. They thought that a Lords' constitution committee should act as an agent to promote the rationality of constitutional change in the UK. The idea was to address some of the issues raised by the UK style of constitutional reform. For this reason, to fully understand the contribution of the SCC to constitutional deliberation, it is valuable to begin by looking closely at the peculiarities of constitutional change in the UK.

The starting point is the obvious contention that the UK lacks entrenched constitutional rules, and a special constitutional reform procedure. On the other hand, the British mentality has historically been attached to empiricism, avoiding deeper debates about underlying principles. This has resulted in the UK developing a distinctive style of constitutional change. Reforms tend to be piecemeal and pragmatic in approach. Issues are addressed as problems arise.[48] This style of constitutional reform raises a number of problems, which shall be discussed below.

Firstly, it creates a vacuum in the process of constitutional reform. Sometimes significant constitutional reform demands additional measures to secure political

[47] See SCC's own description of its legislative scrutiny function at Select Committee on the Constitution, *Sessional Report 2009-10* (HL 2010-11, 26), appendix 1.

[48] Robert Blackburn, 'Constitutional Amendment in the United Kingdom' in Xenophon Contiades (ed), *Engineering Constitutional Change* (Routledge 2013), 362.

legitimacy for the changes. The British are aware of this problem, and at different times, have filled this vacuum by different means.[49] Secondly, this style of constitutional reform may work insofar as the pace of constitutional change remains slow. However, as explained in Chapter Three above, since 1997, there have been numerous and significant constitutional reforms. That year, New Labour was elected with a manifesto that included an energetic programme of constitutional reform.[50] As the pace of change increased, the issues of UK style constitutional reform were thrown into sharp relief. New Labour reforms altered various strands of the constitution without an overarching principle or master plan inspiring them. Instead, that government undertook each reform as "pragmatic responses to political pressures and perceived problems".[51] This agenda of constitutional modernisation has continued under the Coalition and then two subsequent Conservative governments. Claims about the lack of a masterplan remain valid.[52] However, constitutional modernization remains unfinished business. As argued in Chapter Three above, relevant aspects of the constitution continue attached to the traditional evolution of political conventions, practices and understandings. The complex interplay between traditional and modern components has led to what has been called "a state of constitutional unsettlement".[53] It may well be that the flexible constitution risks becoming dysfunctional once the pace of change increases and the cumulative effect of constitutional reforms call into question its internal coherence.

Thirdly, this background –namely, the lack of a special procedure for constitutional change and the increasing speed at which reform has taken place– raises

[49] Neil Walker, 'Our Constitutional Unsettlement' [2014] Public Law 529, 543-4.

Among these mechanisms are consultation (publication of green and white papers, and draft bills), commissions of different sort, such as Royal Commissions, the Speaker's Conferences on Electoral Law and Joint Parliamentary Committees, and more recently, constitutional referendums.

[50] New Labour's first wave of constitutional reform introduced changes in areas as different as human rights (Human Rights Act 1998), devolution (Scotland Act 1998, Good Friday Agreement-Northern Ireland Act 1998, Government of Wales Act 1998), local government (Local Government Acts 1999 and 2000, and The Greater London Authority Act 1999), access to public information (Freedom of Information Act 2000), membership to the House of Lords (House of Lords Act 1999) and political system (Political Parties, Elections and Referendums Act 2000).

[51] Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press 2003), 3; Matthew V. Flinders, *Democratic Drift Majoritarian Modification and Democratic Anomie in the United Kingdom* (Oxford University Press 2010).

[52] See for instance Public Administration and Constitutional Affairs Committee, *The Future of the Union, Part One: English Votes for English Laws* (HC 2015-16, 523), at para 69.

[53] Walker, 'Our Constitutional Unsettlement' (n 49).

concerns about the quality of parliamentary scrutiny. An energetic programme of constitutional reform puts significant pressure over parliamentary resources and time. In Chapter Two, I already noted the difficulties that parliamentarians face in grasping difficult issues of constitutional significance because they only have general knowledge, face time constraints, and limitations to gather information and to access experts' advice. On the other hand, historically, the combined effect of the Westminster parliamentary system and the "first past the post" electoral system has been a majority government that controls both the legislative agenda and the Commons through different techniques such as programming, a strong presence of cabinet at the lower chamber, and the whip system. Although the recent experiences of a coalition and a minority government suggest that this trend may be changing,[54] many of the most significant reforms since 1997 were introduced by strong governments and approached by Parliament along party lines. These factors are likely to have a negative impact on the quality of legislative scrutiny and do raise significant questions about the capacity of Parliament to approach constitutional change. The challenge, then, is to look for meaningful measures to secure that MPs and peers think through the underlying principles of the proposed changes, and their impact on the broader constitutional framework.

The genesis of the SCC was driven by these concerns. New Labour was elected in 1997 with a significant majority. This secured the success of its constitutional reform programme. A Royal Commission was appointed to discuss the Reform of the House of Lords ("Wakeham commission"). Its report, published in January 2000, expressed anxiety over the enormous power the government had in the legislative process. Members advocated for the Lords to play a special role preventing the government to bring about "controversial and ill-considered changes to the constitution without the need to secure consensus support for them."[55] In their view, the Lords should act as a counterbalance to government's powers, ensuring "that changes are not made to the constitution without full and open debate and an awareness of the consequences".[56] The Wakeham commission recommended the creation of the

[54] For discussion, see Chapter Two above.

[55] Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, January 2000), at para 3.10. See also para 3.6.

[56] Ibid, at para 5.5.

SCC to assist the Lords in this function.[57] The concern of the Wakeham commission, therefore, was to promote the procedural value of deliberation in the process of constitutional change. This commission did not have in mind a substantive agenda. The SCC mission was not to secure specific legislative outcomes or to promote certain substantive principles or values. Instead, it was about improving the quality of debate in the context of constitutional reform. The idea was to enhance constitutional deliberation at Parliament.

Consequently, the SCC was conceived as a measure to address the issues raised by UK style constitutional reform, namely incremental, piecemeal and pragmatic reform, undertaken at a rapid pace, pushed through by a strong government that controls the Commons. I emphasise this because cases of revolutionary and wide-ranging constitutional reform require additional measures to provide political legitimacy.[58] Wide consultation, including green and white papers, draft bills, constitutional conventions, citizens' assemblies, joint parliamentary committees, royal commissions and constitutional referendums may provide political legitimacy to significant constitutional changes. The point is not to deny the potential contribution that the SCC could make to this sort of constitutional reform. Instead, the aim is to understand the constitutional context in which the SCC is set to operate. A Lords-based committee will not be able to provide political legitimacy to wide ranging and revolutionary constitutional reform. Other measures may be needed to convey the voice of the nation assembled.

There are cases in which the SCC has promoted the quality of constitutional reform. In these cases, the SCC's efforts focus both on the content of the bill and on procedural measures to secure the quality of constitutional reform. The first strand is performed by asking the government whether it has thought through the issues raised by bills, and whether the constitutional policy inspiring change is sound. When the SCC performs this sort of scrutiny, it is not only contributing to constitutional deliberation, but also to the process of constitutional construction and development.

[57] Ibid, at para 5.21: The committee should "take full account of all the constitutional implications when considering proposed legislation and scrutinising the actions of the executive." See also recommendation 21.

[58] For discussion about procedural requirements for the adoption of a written constitution in the UK context, see Jeff King, 'The Democratic Case for a Written Constitution' (2019) 7 Current Legal Problems 1, 25-30.

Consider for instance the SCC's assessment of the provisions of the Wales Bill 2017,[59] which changed the scope of powers of the Welsh Assembly from a conferred to a reserved powers model. Within a reserved model, there were different possible instantiations. The SCC argued that the particular configuration of limits on the Assembly's legislative competence was complex and considerable.[60] This, in circumstances that by comparison, a reserved powers model should be far simpler than a conferred powers model.[61] The SCC claimed that there was no clear rationale inspiring the Bill's scope of devolved powers.[62] It also noted that there is a significant number of reserved matters and other matters subject to complex legal tests that are far from straightforward. The SCC argued for a clearer scheme which prevents judicial litigation over the extent of the Welsh Assembly's powers.[63] In this way, the SCC contributed by signalling alternative paths and technical reasons to change the way the government proposed to implement the reserved powers model in Wales.

The second strand is fulfilled, for instance, by making the case for proper consultation. Consider the case of the Fixed-terms Parliaments Bill.[64] The Bill was subject to a lengthy and highly critical report. The SCC concluded "that the origins and content of this Bill owe more to short-term considerations than to a mature assessment of enduring constitutional principles or sustained public demand."[65] For the SCC, a bill of this constitutional significance should have been subject to consultation, including green and white papers, and to a proper assessment of the pros and cons. A second example is provided by the SCC's inquiry into the process of constitutional change, which sets out some key features that pre-legislative stages of constitutional bills should undertake, the need to avoid rushing these bills through parliament, and the desirability of subjecting this legislation to post-legislative scrutiny.[66] In this line of thinking, the SCC has recommended that significant

[59] Wales HC Bill (2016-17) [5].
[60] Select Committee on the Constitution, *Wales Bill* (HL 2016-17, 59), at para 24.
[61] Ibid, at para 34.
[62] Ibid, at para 33.
[63] Ibid, at paras 40, 50.
[64] Fixed-term Parliaments HC Bill (2010-11) [64].
[65] Select Committee on the Constitution, *Fixed-term Parliaments Bill* (HL 2010-11, 69), at para 20.
[66] Select Committee on the Constitution, *The Process of Constitutional Change* (HL 2010-11, 177).

constitutional legislation should not be fast-tracked.[67] This recommendation is based on the contention that there should be enough time for proper debate about the wider constitutional implications of legislation. However, as noted in Chapter Three above, the SCC develops broad and flexible constitutional standards, thereby recognising that certain circumstances political considerations may demand rushing legislation through. For instance, the SCC accepted the government's contention that such conditions were met in the case of the European Union (Notification of Withdrawal) Bill 2017.[68] Despite this exception, it is fair to argue that when the SCC focuses the process of constitutional change, it seeks to ensure the quality of constitutional deliberation, both at government and Parliament. A final example is the SCC's proposal to create a Joint Committee to assess the impact of English Votes for English Laws ("EVEL") both in England and in the devolved regions.[69] Here, the SCC proposed a concrete procedure to review the operation of EVEL, it suggested criteria against which to assess the trial operation of EVEL, and a longer period before the review takes place to get a better sense about the operation of the system.

To sum up, a first approach to the SCC is to think of its contribution as an agent to promote rational debate in the context of constitutional reform. In this view, the SCC will be expected to enhance the quality of debate through its reports, as well as to insist on the need for a coherent development of the constitutional framework, and for appropriate procedural measures to secure the quality of the reform.

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[67] Select Committee on the Constitution, *The Process of Constitutional Change* (n 66), at para 99.

[68] European Union (Withdrawal) HC Bill (2017-19) [5]. See Select Committee on the Constitution, *European Union (Notification of Withdrawal) Bill* (HL 2016-17, 119). Note that in the case of the European Union (Withdrawal) Bill 2017, questions about timing were a major concern for the SCC, especially regarding the domestication of EU law. The SCC argued that a constraint timetable would mean that significant transfers of powers would be needed from Parliament to the Executive. On the SCC's view, this should not affect Parliament's ability to subject statutory instruments to proper scrutiny, despite the special circumstances. This was anticipated in Select Committee on the Constitution, *The 'Great Repeal Bill' and Delegated Powers* (HL 2016-17, 123). Once the bill was introduced, concerns about fast tracking this domestication process would be focused on the proposed made affirmative procedure. See Select Committee on the Constitution, *European Union (Withdrawal) Bill: Interim Report* (HL 2017-19, 19); Select Committee on the Constitution, *European Union (Withdrawal) Bill* (HL 2017-19, 69).

[69] Select Committee on the Constitution, *English Votes for English Laws* (HL 2016-17, 61), at paras 35-47.

3. The committee as a constitutional "scrutiniser"

There is an alternative way of thinking about the SCC's contribution to legislative scrutiny. This alternative mode of operation is not incompatible with the first one. Most government legislation is not approached as a reform to the constitution, but as legislation that has an impact on the constitution, or that raises issues of constitutional significance, or alternatively, that is of constitutional significance. In these cases, the SCC examines government legislation from a constitutional point of view. To understand the nature of this scrutiny, I will refer back to the discussion held in Chapter Three above about the nature of the non-legal limits on Parliament's supreme legislative powers. I will show that in certain instances the SCC adopts constitutional standards as abstract and rational statements of principle, in line with soft legalistic conceptions. In contrast, in other cases, most notably when it comes to the territorial constitution, it adopts a prudential approach closer to Martin Loughlin and Stephen Tierney's conception of non-legal limits on Parliament's supreme powers.

Firstly, in a significant number of cases, the SCC identifies abstract normative constitutional principles, values and other standards, and employs them to assess the constitutional "legitimacy" of government proposals. This strand of work is an example of soft, liberally informed, legalism, inspired in the conception of non-legal limits on Parliament's supreme powers articulated by Mark Elliott[70] and others. It is also reflected in the idea of constitutional standards, as developed by Robert Hazell, Dawn Oliver and Jack Simson Caird.[71] From the SCC's point of view, the idea of

[70] Mark Elliott, 'Parliamentary Sovereingty in a Changing Constitutional Landscape' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019); Mark Elliott, 'Legislative Supremacy in a Multidimensional Constitution' in David Feldman and Mark Elliott (eds), *Cambridge Companion to Public Law* (Cambridge University Press 2016).

[71] Hazell, Oliver and Simson Caird have compiled a set of constitutional principles distilled from SCC's reports. There have been three editions of this code. See Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 1st Edition* (The Constitution Unit, January 2014); Jack Simson Caird, Robert Hazell and Dawn Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 2nd Edition* (The Constitution Unit, August 2015); Simson Caird, Hazell and Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 3rd Edition* (n 44).

These authors also make the case for the official adoption of this code by the SCC. See Robert Hazell and Dawn Oliver, 'The Constitutional Standards of the Constitution Committee: How a Code of Constitutional Standards Can Help Strengthen Parliamentary Scrutiny' (*The Constitution Unit*, 22 November 2017) <https://constitution-unit.com/2017/11/22/the-constitutional-standards-of-the-constitution-committee-how-a-code-of-constitutional-standards-can-help-strengthen-parliamentary-scrutiny/> accessed 30 November 2017.

constitutional standards requires a two-step contribution. Firstly, to identify and flesh out general constitutional principles, values and other standards; and secondly, to apply those standards as benchmarks to assess government legislative proposals. However, these two steps are mutually adjusted, as these standards are drawn from particular instances of legislative scrutiny. Constitutional standards, to be effective, need to rely on precedent and must be grounded on clear statements of principle, and be applied more or less uniformly. Although the SCC has not codified a set of constitutional standards, its LSCG work does rely on precedent. The SCC has a coherent view of certain aspects of the constitution. This is most likely facilitated by the profile of its members, and by its highly learned academic advisors (see Chapter Two above). The very fact that the Constitution Unit at UCL has been able to publish an unofficial code of constitutional standards based on the SCC's recommendations and reasoning illustrates that precedent and consistency are features of the committee's work.

Nevertheless, the SCC faces a challenge to disseminate its constitutional thinking. As I will explain in more detail in Chapter Six below, by contrast to the JCHR and the DPRRC, the Guide for Making Legislation contains no mention whatsoever of the SCC's constitutional standards.[72] This chapter has already discussed the importance of disseminating properly articulated criteria. I noted that this enables constitutional committees to send a clear message to those in charge of government's internal checks on the constitutionality and legality of proposed legislation. These clearly articulated standards or criteria reinvigorate internal deliberation at governmental level, and may also promote political self-restraint. For these reasons, it should be noted that the capacity of the SCC to operate as a deterrent tool at the early stages of policy development and legislative drafting is undermined by the lack of a code of constitutional standards. It is also undermined by the lack of a dedicated "constitutional" memorandum. Despite this, one relevant advantage, when compared to the DPRRC for instance, is that the SCC regularly conducts inquiries on significant constitutional matters. In those instances, the SCC draws on its past experience, and sometimes sets out constitutional standards. Reports on inquiries are a good source of

[72] There is only a reference to the SCC's report on Fast-track Legislation in Cabinet Office, *Guide to Making Legislation* (July 2017), appendix C.

information on the SCC's thinking,[73] and may provide an alternative –if imperfect– path to disseminate its constitutional standards.

It is worth illustrating the SCC work assessing government legislation against constitutional standards by providing a few examples. Take firstly the introduction of a permanence clause for the devolved government and Parliament in Scotland and Wales. The SCC criticised this inclusion. It went on to say that the "sovereignty of Parliament" was the "fundamental principle of the UK constitution".[74] The SCC argued that the provisions incorporating sections 63A and 1A in the Scotland Act 1998 and the Government of Wales Act 2006, respectively, introduced external procedural requirements to limit the UK Parliament's own competence. The SCC warned that this may give rise to confusion as to the role of the courts in enforcing this provision, and as to the nature of the UK Parliament's legislative supremacy. In the SCC view, this fundamental principle should not be called into question.[75]

A second example of an area where the SCC has developed standards is that of delegated legislation.[76] Take for instance the case of Henry VIII clauses.[77] The SCC thinks that these clauses should be limited to the "minimum necessary", grounded on a "pressing need", and have a specific purpose clearly stated on the face of the Bill. In the case of widely drafted Henry VIII powers to "make consequential amendments", the SCC's recommendation was to identify the provisions that require amendment in a schedule, instead of leaving this matter to ministerial discretion.[78] On the other hand, SCC's overarching concern has been to protect Parliament's ability to fulfil its scrutiny role in the legislative process. Delegated powers dealing with matters of constitutional significance is a case in point. In the Civil Contingencies Bill,[79] the SCC expressed

[73] See for instance, Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (n 40).

[74] Select Committee on the Constitution, *Scotland Bill* (HL 2015-16, 59); Select Committee on the Constitution, *Wales Bill* (60).

[75] Select Committee on the Constitution, *Scotland Bill* (n 74), at para 36; Select Committee on the Constitution, *Wales Bill* (n 60), at paras 11-14.

[76] In its most recent inquiry into delegated powers, the SCC employed the concept of "constitutional standards" to identify the principles that are developed in the scrutiny of clauses delegating powers. See Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (n 40).

[77] Simson Caird, Hazell and Oliver, *The Constitutional Standards of the House of Lords Select Committee on the Constitution, 3rd Edition* (n 44).

[78] Select Committee on the Constitution, *Co-operative and Community Benefit Societies and Credit Union Bills* (HL 2008-09, 158), at paras 20-1.

[79] Civil Contingencies HC Bill (2003-04) [14].

concerns over the possibility of emergency powers being interpreted as to disapply or modify the Human Rights Act 1998, and argued there should be an express provision to prevent this.[80] Likewise, in the Identity Cards Bill,[81] the SCC was anxious about the bill's skeleton structure. There was ministerial discretion to decide different stages of the scheme, including a shift from a voluntary to a compulsory phase. The SCC argued this should be a matter for primary legislation, because it involved a fundamental change, of a constitutional nature, in the relationship between the individual and the state.[82] The last example is the passage of the controversial Legislative and Regulatory Reform Bill.[83] The SCC took a strong stance, arguing that Henry VIII powers, either deliberately or inadvertently, should not bring about constitutional change.[84] The SCC recommended the imposition of a substantive limit on these powers, namely, that legislative reform orders could not change "constitutional fundamentals". In addition, it recommended procedural assurances to prevent delegated powers from making constitutional changes. The text of the Act did include such a provision (see clause 3(2)(f) Legislative and Regulatory Reform Act 2006).

However, there are instances where rather than abstract constitutional principles, the SCC seems to be thinking more in terms of prudential reasons to maintain the unity of the nation, and prevent conflict. This alternative view, as argued in Chapter Three above, focuses on understanding the constitution as a set of evolving arrangements that distribute and re-distribute powers according to changing political circumstances. These prudential reasons are not intended to be normative in the sense that constitutional standards as abstract principles are. Instead, they are approached as principles of good governance that seek to enhance the authority of political power. When the SCC employs prudential reasons, is not adopting a liberal normative approach. Instead, it is promoting constitutional deliberation based on a more holistic understanding of the constitution. I shall provide three examples of this approach to LSCG. Consider first the debate about the notification of withdrawal from the

[80] Select Committee on the Constitution, *Civil Contingencies Bill* (HL 2003-04, 114), at paras 13-6.

[81] Identity Cards HC Bill (2004-05) [30].

[82] Select Committee on the Constitution, *Identity Cards Bill* (HL 2004-05, 82), at para 12.

[83] Legislative and Regulatory Reform HL (2005-06) 109.

[84] Select Committee on the Constitution, *Legislative and Regulatory Reform Bill* (HL 2005-06, 194), at paras 21 and 52ff.

European Union, which took place after the Brexit referendum. The SCC's report advocated for Parliament to have a role in triggering article 50 of the Treaty on the European Union.[85] Furthermore, the SCC called Parliament's attention to the need to find ways to be involved in the negotiations with the EU and the approval of the final deal. These initial concerns have since shaped the SCC's work scrutinising the Brexit process. There has been an insistence on the need to secure a relevant role for Parliament to provide political legitimacy to the Brexit process. In this sense, the three reports that the SCC published on the European Union (Withdrawal) Bill, followed this prudential consideration by insisting on the need to curtail both the scope of delegated powers, and to improve the mechanisms for parliamentary oversight. I will provide a more detailed account of this in Chapter Seven. As far as this chapter is concerned, the point is that these interventions have been inspired by the need to maintain a fundamental feature of the British constitution, namely, government's accountability to Parliament.

A second example of these prudential considerations directed to the maintenance of the unity of the state are the SCC's views on the development of the territorial constitution. The SCC has issued several reports both on inquiries and on legislative scrutiny. In these reports, the SCC has insisted on the significance of the devolved settlements for "the constitutional stability of the Union".[86] The lack of formality in the structures and practices of inter-governmental relationships and the asymmetries between different devolved settlements,[87] among other issues, have featured prominently within the SCC's concerns. The committee has also insisted on the knock-on effects that a piecemeal and ad hoc approach to the reform of the territorial constitution has had on the different constituent nations. The overall message is one about the need for the central government at Whitehall and Westminster to treat the territorial constitution with respect, and not to take the Union for granted. Hence, to

[85] Select Committee on the Constitution, *The Invoking of Article 50* (HL 2016-17, 44).

[86] Consider for instance: Select Committee on the Constitution, *The Union and Devolution* (HL 2015-16, 149); Select Committee on the Constitution, *Scotland Bill* (n 75); Select Committee on the Constitution, *Wales Bill* (n 60); Select Committee on the Constitution, *English Votes for English Laws* (n 67); Select Committee on the Constitution, *Northern Ireland (Executive Formation and Exercise of Functions) Bill* (HL 2017-19, 211).

[87] See for instance Select Committee on the Constitution, *Wales Bill* (n 60), at paras 25-33.

understand the significance that consensus-building with devolved nations has for the maintenance of a healthy Union.

Finally, I shall recall an example previously mentioned in Chapter One, namely, the case of the Northern Ireland (Executive Formation and Exercise of Functions) Bill.[88] The problem raised by the lack of an Executive in Northern Ireland is that it generated a vacuum of power in the devolved institutions. The government decided to empower civil servants in Northern Ireland to take certain policy-decisions and to keep the devolution institutions running. This raised a significant accountability problem, as civil servants are not elected and their chains of accountability depend on Northern Ireland Ministers, who are absent. On the other hand, a retrospective clause validated the exercise of powers by civil servants during this period where Northern Ireland has lacked an executive. Moreover, the bill was fast-tracked, despite its constitutional significance. Although the SCC considered these decisions to be problematic from a constitutional point of view, it went on to recognise the serious "political circumstances in Northern Ireland", in particular, the significant impact that the suspension of devolved institutions has had for the territorial constitution. The SCC's recommendation to accept government proposals is therefore grounded on prudential reasons to maintain the integrity of the devolution settlement, rather than on more abstract constitutional principles of legal and political accountability.[89]

4. Concluding remarks

The SCC is concerned with the constitutional implications of legislation. Its scrutiny work has focused on the institutional and power generating aspects of the constitution, rather than on identifying substantive limits on the exercise of law-making powers. Its approach generally is to consider only highly significant constitutional matters, focusing on the broader architecture of the bill, rather than matters of detail.

The SCC has made relevant contributions on a wide range of issues, such as devolution, delegated powers, Brexit and the legislative process. In certain cases, the SCC operates as an agent for rational debate in the process of constitutional change. In these cases, the SCC has discussed the content of the reform, with a view to improve

[88] Northern Ireland (Executive Formation and Exercise of Functions) HC Bill (2017-19) [425].
[89] As the SCC explicitly recognises in Select Committee on the Constitution, *Northern Ireland (Executive Formation and Exercise of Functions) Bill* (n 86), at para 24.

the quality of these proposals. It also has proposed procedural measures to prevent ill-conceived constitutional reform, such as consultation, and argued against fast-tracking constitutional change. This strand of work is not inspired by a given substantive conception of the constitution. Instead, it seeks to promote constitutional deliberation in the legislative process. Yet, there are instances in which the SCC makes substantive recommendations, which suggest that in certain cases this committees collaborates with constitutional construction and development.

Secondly, there are other instances in which the SCC assesses the impact that legislation has on the constitutional framework. In some of these instances, LSCG involves identifying and applying abstracts formulations of principle, values and other standards as benchmarks to assess the constitutional legitimacy of government legislation. This is an example of the SCC performing soft legalistic LSCG. This scrutiny work is inspired by the protection of core normative constitutional principles and ultimately aims at political self-restraint, both at governmental level and at Parliament. Finally, there are instances where rather than abstract and idealized constitutional thinking, the SCC employs constitutional considerations as prudential reasons to protect the authority of political branches of government. Concerns about the political legitimacy of certain processes, balancing abstract principles against political circumstances and pressing social needs, maintaining the integrity of the state, and preventing further political conflict. In these cases, the SCC maintains its focus on improving deliberation, but moves away from a more juristic analysis grounded on abstract principles.

IV. Conclusion

This chapter has shown that the DPRRC and the SCC have approached the challenges that LSCG raises in this jurisdiction in distinctive ways. On the one hand, the DPRRC has refrained from engaging in deeper constitutional questions about the theoretical underpinnings of its work. It has not developed broad constitutional standards with core normative content, nor has explored the constitutional issues that the distribution of law-making powers between Parliament and the executive raises. The DPRRC's methodology corresponds to a highly flexible case by case detailed analysis of each clause delegating powers. By contrast, the SCC looks at the broader

architecture of the bill and explores its consequences for the constitutional framework. With less emphasis on moral substantive limits on the exercise of political powers, this committee focuses on the institutional and power-distributive aspects of the constitution. The SCC covers a wide range of subject matters, such as devolution, delegated powers and the legislative process, among others.

From the point of view of LSCG, the DPRRC operates as a reason demanding body with places a burden of justification on the government. It has also contributed to a more informed debate in Parliament, and prompted political self-restraint on the part of the government. Nevertheless, its thin take on questions of constitutional principle has undermined the contribution of the DPRRC to constitutional deliberation. The evidence suggests that the DPRRC has not sent a clear message to officials at government departments and at the Office of the Parliamentary Counsel about the principles that should govern delegated legislation.

In contrast, the SCC is a complex and dynamic constitutional committee, from the point of view of LSCG. In certain instances, it acts as an agent of constitutional deliberation and rational action in the process of constitutional change. At times, the SCC discusses and makes concrete proposals in the context of constitutional change, thereby contributing to the process of constitutional construction and development. In other cases, the SCC operates as a constitutional scrutiniser. Most of this scrutiny work is an example of a soft and nuanced legalistic conception of LSCG. Broad statements of principle with core normative content are employed to assess the legitimacy of legislation. Nevertheless, in other cases, most notably in the context of devolution, the SCC employs constitutional standards not as normative considerations, but as "prudential" reasons directed at enhancing the political authority of legislation, protecting the integrity of the State and preventing political conflict. This shows that in contrast to the DPRRC, the SCC is a complex and multifaceted constitutional committee.

CHAPTER 5 THE JOINT COMMITTEE ON HUMAN RIGHTS: RESISTING THE PRESSURES CREATED BY THE DECISION TO DOMESTICATE CONVENTION RIGHTS?

I. Introduction

This chapter continues the effort initiated in Chapter Four to articulate how the United Kingdom ("UK") constitutional committees assess the constitutional implications of legislation in the context of the UK constitution. As in the case of Chapter Four, this chapter draws on the three theoretical conceptions of legislative scrutiny on constitutional grounds ("LSCG") developed in Chapter One. The chapter also resumes the general discussion started in Chapter Three on how these models operate in the context of the British constitution.

The main claim of this chapter is that the Joint Committee on Human Rights ("JCHR") is in an uncomfortable position as a legislative scrutiniser. This is due to contradictory pressures arising from the decision to domesticate Convention rights by means of the Human Rights Act 1998 ("HRA"). On the one hand, the JCHR is expected to prevent legislation found in breach of Convention rights. Yet, on the other, there is an expectation that Parliament will develop its own approach to human rights protection, and that the JCHR will assist the legislature in this task. This inherent ambiguity in the HRA sends contradictory messages about which conception of LSCG the JCHR should prefer. While the first expectation requires the JCHR to employ a legalistic conception; the second is akin to a conception of constitutional deliberation and of constitutional construction and specification. The constitutional framework, therefore, does not provide a clear guidance to the JCHR. I will argue that the choice of conception will ultimately depend on broader normative debates about the constitutional philosophy of the British constitution, the nature of human rights standards (moral or political), and the question about who should be the guardian of human rights. I will address these issues as the chapter approaches each alternative conception available for the JCHR. The chapter will also discuss whether these conceptions are reflected in the JCHR's working practices. I will show that the JCHR approaches human rights assessments from a legalistic conception of LSCG, although it has evolved from a hard to a soft approach to legalism. Nevertheless, I will also claim that by engaging in a dynamic of justification and assessment with the

government, and providing a forum for experts and stakeholders, its working practices also foster constitutional deliberation.

The last section of the chapter briefly discusses the issue of inter-institutional relationships between Parliament and courts when it comes to political responses to an adverse human rights judgment. Here, I make two points. Firstly, I argue that political branches of government are subject to significant political and legal pressures to implement adverse human rights judgments. The political and constitutional circumstances are such that adverse human rights judgments have become "de facto" binding. There is little room for disagreement. However, the second point is that compliance with an adverse human rights judgment is a matter of degree. There are no clear legal benchmarks to assess political responses to implementation of adverse judgements. This is reflected in the fact that the implementation process is subject mainly to political, rather than legal controls. I conclude this last section by assessing the JCHR's contribution to this field.

The chapter proceeds as follows. Sections II, III and IV address the issue of LSCG. Sections II and III address each contradictory pressure. Section IV explores the deliberative credentials of a legalistic approach to legislative scrutiny on human rights grounds. Finally, section V addresses the issue of legislative responses to adverse human rights judgments.

II. Convention rights and the expectation for compliance

Since its creation, the JCHR has considered itself the appointed parliamentary guardian of Convention rights.[1] There are historical and institutional reasons for this. The New Labour government's proposal to create a human rights committee at Parliament came about during the pre-legislative stage of the HRA.[2] In their consultation paper, Jack Straw and Paul Boateng argued that Parliament and government departments should ensure that legislation complied with Convention rights and other international human rights obligations of the UK.[3] This was partly a

[1] Joint Committee on Human Rights, *Second Report Antiterrorism, Crime and Security Bill* (2001-02, HL 37, HC 405), at para 5.

[2] Paul Boateng and Jack Straw, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law' [1997] European Human Rights Law Review 71, 79 and Secretary of State for the Home Department, *Rights Brought Home: The Human Rights Bill* (Cm 3782, October 1997), at para 3.6.

[3] Boateng and Straw, 'Bringing Rights Home' (n 2), 78.

reaction to concerns over UK's international reputation on human rights matters.[4] The objective of the HRA's drafters, therefore, was to introduce a culture of political compliance with Convention rights, both at government and Parliament.

The HRA's scheme incorporated structural conditions to develop this culture of political compliance. Firstly, instead of adopting an indigenous bill of rights, it opted for domesticating Convention rights, thereby granting constitutional pedigree to European human rights values. Secondly, by providing a role for courts in finding legislation in breach of Convention rights (section 4 HRA), it introduced incentives for government to prepare "Convention rights-proof" legislation to minimise the risk of legal challenges to their policies. Thirdly, the HRA sought to secure "closer scrutiny of the human rights implications of new legislation and new policies"[5] at the political level. It did so by imposing on the relevant minister the duty to issue a declaration of compatibility with Convention rights prior to passage of any bill (section 19 HRA). In this way, the HRA framed internal government assessments on Convention grounds. Finally, the HRA created a fast-track remedy that granted prospective Henry VIII powers to ministers to change primary legislation if found in breach of Convention rights. As Janet Hiebert has convincingly demonstrated, the point of these institutional arrangements was "to alter the very norms of legislative decision-making"[6] by permeating Convention rights throughout the political decision-making process, both at government and Parliament.

In line with these considerations, the JCHR interpreted its role as that of protecting Convention rights.[7] This meant securing a culture of political compliance

[4] Dawn Oliver, *Constitutional Reform in the UK* (Oxford University Press 2003), 124.

[5] Secretary of State for the Home Department, *Rights Brought* Home (n 2), at para 1.18. See also para 3.1.

[6] Janet Hiebert and James Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press 2015), 236.

[7] The JCHR does not limit its analysis to Convention rights. It has also considered other legal standards. It has assessed legislation against common law rights (David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323, 344; Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill* (2012-13, HL 59, HC 370)). It has also considered international human rights law instruments other than Convention rights (Joint Committee on Human Rights, *First Report Criminal Justice and Police Bill* (2000-01, HL 69, HC 437); Joint Committee on Human Rights, *The Work of the Committee in the 2001-2005 Parliament* (2004-05, HL 112, HC 552), at para 43; Secretary of State for the Home Department, *Rights Brought* Home (n 2), at para 3.7; Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 119).

with Convention rights. In other words, in this view, the objective of the JCHR's legislative scrutiny work is to prevent Parliament from enacting legislation in conflict with Convention rights, and therefore to secure that the UK keeps peace with its international obligations under the European Convention on Human Rights ("ECHR").[8] This conception puts the JCHR's role closely connected with domestic courts and the European Court of Human Rights ("ECtHR"). Its reports and recommendations should diminish the likelihood of domestic courts issuing declarations of incompatibility, and the ECtHR finding primary legislation in breach of Convention rights. To achieve this, the JCHR must develop legal expertise, follow up case law developments, keep pace with settled interpretations and precedents, and master legal reasoning techniques such as proportionality analysis, deference and margin of appreciation. In addition, the JCHR must monitor the implementation of adverse human rights judgments both at international and domestic level. In sum, a mix of political expectations and institutional considerations led the JCHR to adopt a legalistic conception of LSCG.

As discussed in Chapter One, there are two variants of the legalistic conception, namely, one that is uncompromised and court-centred (hard) and another that is more independent, nuanced and evidence-based (soft). The JCHR adopted a hard legalistic conception during the first five years of its legislative scrutiny work.[9] It followed case law, and where there was no clear precedent, the JCHR tried to second-guess how courts would assess legislation, mimicking their reasoning techniques. JCHR's reports contained a "risk-assessment" about the possibility that legislation could be found in breach of Convention rights.[10] The assessment was based on a spectrum, which ranged

[8] Article 46 ECHR.

[9] Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' (n 7); 127; Tom Campbell, 'Parliamentary Review with a Democratic Charter of Rights' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights - Sceptical Essays* (Oxford University Press 2011), 468-69; Michael Tolley, 'Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights' (2009) 44 Australian Journal of Political Science 41, 46; Francesca Klug and Helen Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance' [2007] European Human Rights Law Review 231, 243ff; Danny Nicol, 'The Human Rights Act and the Politicians' (2004) 24 Legal Studies 451.

[10] The JCHR went on to say:

"(…) we see our role as to alert both Houses of Parliament on occasions when we consider that they might be at risk of proceeding in a manner which will later be held by a court to be incompatible with the ECHR" (Joint Committee on Human Rights, *The Work of the Committee in the 2001-2005 Parliament* (n 7), at para 44).

from "significant risk" to "no appreciable risk" of incompatibility with Convention rights. The JCHR thought this was the right approach, as "ultimately it is for the courts to decide whether legislation is compatible with Convention rights".[11] In other words, so pervasive was the court-centred assessment, that the JCHR did not feel confident enough to reach its own conclusion over legislative compatibility with Convention rights.

Different reasons explain this approach. Firstly, the political decision to avoid a debate about the sort of rights the British people should have, and instead to domesticate Convention rights came at a price. As noted above, the HRA imposed "structural conditions to ensure that domestic legislation complies with European convention principles".[12] In these circumstances, the JCHR thought it had little choice but to recognise the ECtHR as the authoritative interpreter of these rights, and assumed its role as protector of the UK's good record of compliance with its international human rights law obligations. Its core task in legislative scrutiny, consequently, would be to prevent Parliament from enacting legislation that breaches Convention rights. Other reasons are more pragmatic.[13] As mentioned above, the government had incentives to secure Convention-proof legislation to avoid legal challenges to their policies. By signalling possible challenges, the JCHR's voice could become more influential at government. A court-centred approach could also prevent divisions among committee members and promote an independent and non-partisan profile of the JCHR. Hence, the JCHR could gain a reputation before both Houses of Parliament as a technical and highly learned advisory committee.

The government adopted the same approach. Bills teams were encouraged to perform proportionality assessments, and take into account case law on Convention rights and other international human rights law instruments when developing policy and drafting the human rights memorandum for the Parliamentary Business and Legislation Committee (Cabinet Office, *Guide to Making Legislation* (July 2017), at paras 12.6, 12.11 and 12.33). Hiebert's research demonstrated that government assessments are framed in terms of the likelihood of policies being successfully challenged before courts. Civil servants conduct a risk assessment, which in most cases employs a 50% chance threshold (See Hiebert and Kelly, *Parliamentary Bills of* Rights (n 6), 280-81 and 286-87).

[11] Joint Committee on Human Rights, *The Work of the Committee in the 2001-2005 Parliament* (n 7), at para 45. Notably, the JCHR then added, in brackets: "(although, of course, under the scheme of the HRA, it is **theoretically possible** for Parliament to disagree with the assessment of compatibility by the domestic courts)" (the emphasis is mine).

[12] Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (2019) 81 Modern Law Review 989, 1009.

[13] Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012), 157-58.

However, this legalistic and court-centred approach was not without criticism. Some legal scholars thought the JCHR went too far. In their view, the JCHR was neglecting the differences between the functions and responsibilities of courts and Parliament.[14] The latter was a forum for deliberation and contestation, and it was not clear whether a court-centred approach would have a positive impact on the quality of parliamentary debates. A risk-based assessment of the human rights implications of legislation, for instance, does not leave enough room for an evidence-based assessment of government's justification. On the other hand, the risk-based assessment pays little attention to Parliament's ability to bring different voices to the debate, engage in a merits-based debate, draw from different sources of information, and address polycentric issues.

In addition, other scholars committed to liberal moral values have argued that judicial protection of human rights is limited. This is reflected in certain techniques that domestic courts employ to defer to political branches of government on institutional, epistemic or democratic grounds. Likewise, at international level, the ECtHR recognises a wide margin of appreciation to member states. A court's protection is inherently subsidiary and minimalistic. A robust human rights protection –this view argues– would require Parliament to go beyond case law. Hence a court-centred approach could reduce rights to their minimum content. Finally, their criticism contended that a court-centred approach was likely to privilege Convention rights over non-enumerated rights, and individual rights over social and economic rights.[15] Overall, critics thought the JCHR's insistence to mimic courts would diminish Parliament's ability to contribute to human rights protection.

On account of this criticism, the JCHR moved away from "attempting to second-guess the view which courts might take".[16] Frome herein, the JCHR has come closer to a soft legalistic conception of LSCG. This change was the result of a process of

[14] Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' (n 7), 127; Sathanapally, *Beyond Disagreement* (n 13), 70ff.

[15] Sathanapally, *Beyond Disagreement* (n 13), 71.

Keith Ewing and John Hendy have recently criticised the JCHR approach to legislative scrutiny of the Trade Union Bill 2016 (Keith Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 Industrial Law Journal 391, 398-403). They note that a light touch protection of social rights in this case comes from JCHR's insistence to stick to human rights case law.

[16] Joint Committee on Human Rights, *The Work of the Committee in 2007 and the State of Human Rights in the UK* (2007-08, HL 38, HC 270), at para 20.

critical reflection on its own working practices, with a view to the forthcoming 2005-10 parliamentary session.[17] The JCHR commissioned a report to Professor Francesca Klug,[18] who herself was critical of the court-centred approach. On account of this review, the JCHR committed itself to write shorter and more focused reports that would address the most significant issues in an accessible way for non-lawyers, avoiding lengthy reports of the relevant law.[19] Since then, scholars recognise that progress has been made, with the JCHR developing a more independent voice,[20] which is evident from reading its more recent reports.[21]

Although this is a significant development, it does not amount to a fundamental change of the JCHR's working practices. The JCHR continues to frame its analysis on legal considerations. The key components of the JCHR's assessment are Convention rights, securing legal certainty, and assessing the necessity and proportionality of the measures.[22] There are multiple reasons for this emphasis on legal analysis. Firstly, the JCHR continues to consider itself as a guardian of Convention rights, as explained above. Secondly, the JCHR relies heavily on its legal advisers and clerks. The legal advisers exert significant influence over the JCHR's scrutiny agenda through a sifting procedure, which is conducted on Convention rights grounds.[23] In addition, they

[17] Joint Committee on Human Rights, *The Committee's Future Working Practices* (2005-06, HL 239, HC 1575).

[18] Her findings were published in Klug and Wildbore, 'Breaking New Ground' (n 9).

[19] Consider also that Murray Hunt, legal adviser of the JCHR between 2004 and 2017, was himself a critic of the original JCHR's approach. See Jonathan Morgan, 'Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press 2011), 440.

[20] Campbell, 'Parliamentary Review' (n 9), 469; Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' (n 7), 127; Alexander Horne and Megan Conway, 'Parliament and Human Rights' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018), 238.

[21] Take for instance Joint Committee on Human Rights, *Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill* (2017-19, HL 87, HC 568), where although the analysis is mainly framed in terms of legal safeguards, necessity and proportionality assessment, the JCHR based its conclusions mainly on its own analysis and remarks made by expert witnesses.

A remarkable example of a more independent voice is found in the JCHR's disagreement with the House of Lords' judgments on control orders in the cases of JJ and MB. For an account, see Adam Tomkins, 'Parliament, Human Rights and Counter-Terrorism' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights - Sceptical Essays* (Oxford University Press 2011), 35; Hiebert and Kelly, *Parliamentary Bills of* Rights (n 6), 326-27.

[22] Joint Committee on Human Rights, *The Committee's Future Working Practices* (n 17), at paras 4, 29 and 47.

[23] Ibid, at paras 22-23, and 27-42. To decide which bills are subject to full scrutiny by membership to the JCHR, legal advisers employ a "significance" threshold and identify "patterns of incompatibility". See also Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of

provide advice to the committee members on legislative scrutiny on each individual bill,[24] and draft reports. Thirdly, as noted above, human rights are contentious issues of political morality on which MPs and peers disagree. Given that JCHR's members come from different backgrounds and political loyalties, there will be contested views about the role of the state, social rights and individual liberties. This inherent political dimension of rights is problematic, since parliamentary select committees try to maintain a less partisan and more independent approach to the issues.[25] Arguably, a legal perspective focused on expert advice, proportionality analysis and case law fosters unity among members who disagree about fundamental issues of policy that necessarily underpin any debate about human rights. By avoiding divisions, the JCHR's reports may appeal to a wider audience at Parliament. The JCHR's current legal advisers are aware of this issue.[26] They have argued that committee members are unlikely to go further than courts on matters where there is policy disagreement.[27] In sum, for several reasons legal considerations frame current JCHR's legislative scrutiny work, and are likely to do so for the time being.

To sum up, the JCHR has adopted a legalistic model of LSCG. This decision has not been haphazard. It is the consequence of political expectations for a compliance-oriented culture among political branches of government at the time of the JCHR's appointment, as well as other pragmatic considerations. The HRA's architecture is

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Constitutional Watchdog' (n 7), 118-9; Horne and Conway, 'Parliament and Human Rights' (n 20), 239.

[24] See the JCHR's own account of how it performs legislative scrutiny in Joint Committee on Human Rights, *The Work of the Committee in the 2001-2005 Parliament* (n 7), at paras 47-8 and 52 (the legal adviser prepares a "note" which operates as the basis for legislative scrutiny). See also Joint Committee on Human Rights, *The Committee's Future Working Practices* (n 17), at para 44 ("(…) we would aim to give detailed consideration, on the basis of advice from our Legal Adviser, to those bills raising significant human rights issues").

[25] Daniel Gover and Meg Russell, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British law* (Oxford University Press 2017), 206 and 211.

[26] Horne and Conway, 'Parliament and Human Rights' (n 20), 242, 258, 263. Note that Alexander Horne and Megan Conway reply to Ewing and Hendy (see footnote 15 above) precisely concedes the point. They go on to argue that the right to association raises significant political issues that cause division among their members. On their view, "It is perhaps naïve to imagine that a parliamentary committee would go further that the Strasbourg court in relation to such a potentially politically contentious issue." (ibid, 258).

[27] Cf Campbell, 'Parliamentary Review' (n 9), 471. Campbell is against the JCHR focusing its assessment on legal considerations. He recognises that "Whatever their content, parliamentary human rights committees dealing with a democratic charter of rights would have difficult practical choices to make, which would generate lively disagreement, increased demand for evidence-based justifications for controversial legislation, and wide-ranging enquiries into the human rights issues that are pressed upon them."

consistent with this culture. For instance, it domesticated Convention rights; it provided a role for courts in finding legislation in breach of them; and it introduced political mechanisms during pre-legislative and legislative stages to ensure that legislation complies with Convention rights. The JCHR understood its role as being the parliamentary guardian of Convention rights. For this purpose, it adopted a legalistic conception of LSCG. During its first parliamentary session, the JCHR followed a hard legalistic conception, taking the ECtHR as the authoritative interpreter of Convention rights, mimicking its techniques and trying to predict its likely outcomes. Later, the JCHR's working practices evolved. The JCHR developed a more independent voice in line with a soft legalistic conception. It performed its own proportionality assessments and had a more evidence-based analysis.

Nevertheless, it would be a mistake to think that the JCHR only faces pressure to secure a culture of political compliance. The HRA was drafted to retain parliamentary sovereignty. This introduced, as I will explain below, a different and contradictory pressure for Parliament to develop its own voice on human rights matters. An emphasis on this alternative pressure provides room for alternative conceptions of LSCG.

III. The expectation for Parliament to develop its own voice

1. The retention of "parliamentary sovereignty" as a conditioning factor

The HRA is said to have preserved the doctrine of parliamentary sovereignty. In this sense, New Labour did not attempt to create a constitutional revolution by incorporating US-style constitutional review. Domestic courts do not have the power to strike down legislation. Under the HRA, primary legislation remains valid, despite being declared in breach of Convention rights. Declarations of incompatibility by courts have a "purely exhortatory" power.[28] Rather than a duty to remedy incompatibility, political branches have a discretionary power to respond. Parliament retains the final word. Seeking to preserve the central role of parliamentary sovereignty doctrine in British constitutionalism and political culture, and to avoid democratic

[28] Sathanapally, *Beyond Disagreement* (n 13), 4 and 23.

Furthermore, section 6 HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. However, the definition of public authority does not include Parliament.

concerns over the role of the judiciary in the political domain, the HRA opted for a middle way model between parliamentary supremacy period, and judicial supremacy. For these reasons, the HRA has been described as a "weak-review" model,[29] as part of a new model of commonwealth constitutionalism,[30] and as an "open remedies" model.[31]

The formal preservation of parliamentary sovereignty is not the only reason to emphasise Parliament's freedom to move away from a legalistic and court-centred conception of LSCG. Consider the following additional points. Firstly, the HRA is not an entrenched piece of legislation. In principle, it is like any ordinary piece of primary legislation, and therefore can be repealed by Act of Parliament. On the other hand, Parliament can legislate contrary to Convention rights, insofar as it makes its will explicit in the bill. Secondly, even though the HRA domesticated Convention rights, the UK continues to be a dualist system. If a claimant is successful before the ECtHR, this does not confer her a right under domestic law to enforce the judgment.[32] Thirdly, the HRA's white paper stressed that it was for Parliament to decide how it would contribute to the task of protecting rights.[33] These considerations suggest that both Parliament and the JCHR could adopt an alternative conception of LSGC.[34]

These considerations take us back to the difficult question about the nature of the British constitution. The preservation of parliamentary sovereignty could be interpreted as a restatement of the orthodoxy. This view would stress that the HRA did not change the central tenets of the UK constitution. The UK constitution retained its flexibility and has not embraced abstract reasoning from first principles, as required by the legalistic conception. The British empiricist and pragmatic mentality, its strong belief in the workings of representative democracy and political accountability

[29] Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights - And Democracy - Based Worries' (2003) 38 Wake Forest Law Review 813.

[30] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013).

[31] Sathanapally, *Beyond Disagreement* (n 13).

[32] See *R (Chester) v Secretary of State for Justice and Another* [2013] UKSC 63, at para [42] (per Lord Mance).

[33] Secretary of State for the Home Department, *Rights Brought* Home (n 2), at para 3.6.

[34] Campbell, 'Parliamentary Review' (n 9), 467. For Campbell, the decision to retain parliamentary sovereignty even if primary legislation is declared in breach of Convention rights provides conclusive evidence that the HRA did not expected the JCHR to second-guess courts.

mechanisms have been preserved. Hence, Parliament retains legislative freedom to change settled understandings of rights, and even to act contrary to them.

The theoretical underpinnings of this view are well known. Legal reasoning will not dissolve deep disagreements within our political communities over fundamental questions of political morality, such as rights, social justice and public policy.[35] Parliament is a representative assembly with democratic credentials. It is designed to take disagreements seriously. It is the place where different views present in society deliberate about these matters, by discussing everyone's perspectives on the issues. On the other hand, legislative reasoning ought to remain open to all sort of relevant considerations when assessing the human rights implications of legislation. A legalistic conception, by contrast, focuses on legal reasoning, which is constrained by institutional considerations. Judges must employ the techniques of legal interpretation, proportionality and precedent. Ultimately, their arguments will depend on the legal validity of the reasons provided in support.[36] While this view may accept the relevance of the legal dimension of human rights, it will stress that the JCHR should also consider other relevant dimensions. These include, for instance, moral, political and policy considerations, budget restrictions, possible polycentric effects, and whether the scheme of the bill fits within the broader constitutional framework and traditions, among others. This requires a more "political" approach to Convention rights. As Jonathan Morgan bluntly put it, "the JCHR should be a locus of parliamentary resistance to the legal-monopoly-of-wisdom view of human rights".[37] This would require the JCHR to consider alternative models of LSCG. The following sections explore two alternatives.

2. A deliberative model for the Joint Committee

Some supporters of political approaches to human rights have regarded the JCHR's contribution in terms of a model of constitutional deliberation. Tom Campbell, for instance, argued that human rights considerations demand going beyond the

[35] Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999), specially 154ff; Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2009), specially 19ff and 150 ff.

[36] For a conception of legal reasoning as a special case of moral practical reasoning, see Robert Alexy, *A Theory of Legal Argumentation* (Ruth M. Adler and Neil MacCormick trs, Oxford University Press 1989). See also Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 International Journal of Constitutional Law 2.

[37] Morgan, 'Amateur Operatics' (n 19), 441.

"normality of ordinary democratic activities".[38] As explained in Chapter Two, mainstreaming human rights among politicians raises significant challenges. It is highly likely that human rights considerations will end up overshadowed by political and policy considerations. If this is the case, the expectations for a full and unconstrained assessment of the human rights implications of legislation advocated by the authors referred above will be merely theoretical. Following Campbell's contention, the point of institutional arrangements such as section 19 HRA and the appointment of the JCHR is to prioritize human rights considerations among political branches of government. Rather than focusing on legislative outputs and substantive standards, this view looks at the quality of the legislative procedure. The expectation is that human rights should frame parliamentary debates, and by doing so, they may improve the quality of "constitutional deliberation".

A conception of constitutional deliberation fits the HRA because its scheme introduces a dynamic of reason giving and assessment. This flows, on the one hand, from section 19 HRA. This section imposes a burden of justification on the government, which is fulfilled by means of a statement of compatibility with Convention rights, supported by justification contained in a bill's explanatory notes, and in some cases, a human rights memorandum.[39] The government must make the case for the compatibility of its bills. On the other hand, the JCHR provides a special forum for politicians and other stakeholders to engage with human rights considerations and critically assess government's justifications for its legislative proposals. The output of the JCHR should be clear and accessible reports containing insights about the human rights issues raised by government bills. These reports provide parliamentarians substantiation, and may promote a more informed debate[40] and result in stronger scrutiny of the human rights implications of bills. The point is to

[38] Campbell, 'Parliamentary Review' (n 9), 464ff. Pointing out that the JCHR ensures that human rights considerations are taken seriously in the legislative process, rather than being ignored altogether, see Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the Hirst Case' in Andreas Follesdal, Johan Karlsson and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal Political and Philosophical Perspectives* (Cambridge University Press 2015), 252. Making proposals to enhance the JCHR's role in the legislative procedure, see Morgan, 'Amateur Operatics' (n 19), 444.

[39] As the New Labour government put it, section 19 should render the human rights implications of a bill more transparent. See Secretary of State for the Home Department, at para 3.2.

[40] Tolley, 'Parliamentary Scrutiny' (n 9), 47; Tomkins, 'Parliament, Human Rights' (n 21), 24; Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' (n 7), 129.

build up a "culture of democratic justification"[41] that promotes awareness about these issues and political responsibility for decisions contrary to human rights.[42] Overall, these institutional arrangements could potentially improve the quality of deliberation at the legislative process and the quality and legitimacy of legislation.

Although the JCHR's approach to LSCG is rather legalistic, a closer look at its working practices suggests that some components of constitutional deliberation have been incorporated. Firstly, the JCHR critically assesses government bills and demands appropriate justification for their impact on human rights values. Since the JCHR reviewed its working practices and committed itself to develop a more independent voice, it has undertaken a more evidence-based assessment, testing the government's justification.[43] Another example of this has been the significant pressure that the JCHR has exerted on the government to improve the quality of its justification.[44] As a result, the government moved away from its initial practice limited to providing bold statements of compatibility, and committed itself to publish an assessment of a bill's most significant human rights issues.[45] As mentioned above, in most cases, this assessment is included in the explanatory notes. Yet, if significant Convention rights issues arise, the government will deal with them in a separate memorandum.[46] In either of these cases, if the JCHR is not satisfied with the government's justification, it will

[41] In a similar fashion to the principle of legality, as formulated by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, Parliament is sovereign, and can choose to "legislate contrary to fundamental principles of human rights". Yet, if it chooses so, "(…) Parliament must squarely confront what it is doing and accept the political cost."

[42] Murray Hunt, 'Introduction' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015); David Dyzenhaus, 'What is a Democratic Culture of Justification?' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015).

[43] Consider for instance the field of counter-terrorism. In the case of Gordon Brown's Counter-Terrorism Bill 2008, the JCHR was extremely critical of the lack of evidence to support his policy to increase the period of detention without charge from 28 to 42 days (Hiebert and Kelly, *Parliamentary Bills of* Rights (n 6), 323). In the debate about Terrorist Prevention and Investigation Measures, the JCHR questioned the claim that the UK faced a serious threat from terrorism, a "public emergency threatening the life of the nation" (ibid, 333). When scrutinising the Justice and Security Bill 2012, the JCHR questioned the government for not providing evidence about the need to use closed material in civil proceedings (ibid, 338). This evidence based approach is also reflected in its more recent legislative scrutiny work. See for instance Joint Committee on Human Rights, *Legislative Scrutiny: The Sanctions and Anti-Money Laundering Bill* (n 21).

[44] See for instance Joint Committee on Human Rights, *The Work of the Committee in 2007 and the State of Human Rights in the UK* (n 16), at paras 24-30; Joint Committee on Human Rights, *The Work of the Committee in 2007-08* (2008-09, HL 10, HC 92), at paras 43-6; Joint Committee on Human Rights, *Work of the Committee in 2008-09* (2009-10, HL 20, HC 185), at paras 38-41.

[45] Cabinet Office, *Guide to Making Legislation* (n 10), at para 11.120.

[46] For instance, in the case of the Immigration HC Bill (2013-14) [110].

demand additional explanations.[47] Here, a more fluid communication between civil servants and JCHR staff members is a relevant development. These actors hold meetings in which the committees' legal advisers identify matters of concern and make further requests for information. In other cases, these requests are submitted in writing by the JCHR's chair to the minister responsible for the bill. Alternatively, the minister may be invited to a committee session and questioned.

Secondly, the JCHR provides a forum for engagement with the broader political community. It is common for the JCHR to gather information from experts[48] and pressure groups, both in writing and/or in oral hearings. These insights enrich JCHR's assessments, and provide an opportunity for the general public to make their voices heard. However, an assessment of the JCHR's contribution to constitutional deliberation requires considering other empirical dimensions. Once these dimensions are taken into account, a mixed picture emerges. I will discuss this matter in length in Chapter Six. As far as this chapter is concerned, suffice to say that a relevant component of deliberation is willingness of political actors to change their mind in light of the debate and reasons given.[49] This means that the corresponding minister should consider amending bills in response to JCHR's remarks and recommendations. As will be argued in next chapter, although there are some instances in which government's amendments can be traced back to JCHR's recommendations, in most cases the government insists on its proposals, unless there are prospects of backbench rebellions. On the other hand, it is far from clear whether JCHR's reports and recommendations have an impact on parliamentary debates. Some have claimed that "references to JCHR reports helped to provoke robust, evidence-based deliberation and debate over human rights concerns."[50] However, these authors have also found that JCHR's reports are "discussed more frequently and in greater depth in the House

[47] Horne and Conway, 'Parliament and Human Rights' (n 20), 239ff.

[48] For instance, when it scrutinised control orders, the JCHR gathered information from special advocates and made a proposal to introduce additional procedural safeguards for an all-encompassing reform of the control orders system (Tomkins, 'Parliament, Human Rights' (n 21), 35; Hiebert and Kelly, *Parliamentary Bills of* Rights (n 6), 326-7).

[49] Ron Levy and Hoi Kong, 'Introduction: Fusion and Creation' in Ron Levy and others (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press 2018).

[50] Paul Yowell, 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 142.

of Lords than in the House of Commons."[51] This provides a more mixed picture about the JCHR's deliberative impact on parliamentary workings. Political and policy considerations continue to dominate parliamentary debates at the lower chamber.

3. Constitutional construction and development

Political conceptions of human rights, which emphasise reasonable disagreement and the legitimacy of Parliament to take decisions about them are also compatible with a conception of "constitutional construction and development". Its starting point is that legislatures make a significant contribution to the concrete realization of human rights values. This section discusses a recent theoretical articulation of how Parliament develops rights, contained in a collective book by Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley Miller and Francisco Urbina (hereafter, "Webber et al").[52] I previously introduced some of its key aspects in Chapter One. Here I discuss how they envisage Parliament's role in constitutional construction and explore what the JCHR's contribution may be under this conception.

A conception of constitutional construction and development advocates for a different understanding of the relationship between Parliament and human rights. As explained above, the legalistic model puts Parliament and human rights values in potential conflict. The relationship between the two is negative. Convention rights operate as substantive and legally enforceable constraints on legislation. By contrast, the constitutional construction conception claims that legislation is essential for human rights to have real existence and impact in our lives.[53] To advance this view, Webber et al point out that human rights clauses –including Convention rights– are under-determined, and subject to broad limitation clauses. The mistake of the traditional view has been to consider those clauses as "end-states", when in reality they are merely the starting point for an ongoing contestation and democratic negotiation.[54] Employing a

[51] Ibid, 142.

[52] Grégoire Webber and others, *Legislated Rights* (Cambridge University Press 2018).

[53] Recognising the fundamental role of the legislature in specifying rights, see Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press 2009), 279 ("(…) the detailed regulation of any right in legislative form is always a task for Parliament (…)"); Jeff King, *Judging Social Rights* (Cambridge University Press 2012), 41ff ("The main engine for protecting social rights is and always will be primary legislation adopted by a representative legislature (…)"); Campbell, 'Parliamentary Review' (n 9), 459-64.

[54] Webber, *The Negotiable Constitution: On the Limitation of Rights* (n 36), Ch1.

Hohfeldian analysis, Webber explains that rights embodied in bills of rights are incomplete because they only contain a "two-term" relationship, which specifies a right holder and an object of the right.[55] For a right to have a proper "jural structure", there is a need for legislative action that specifies a three-term relationship which includes a class of right holders, an act or act-description, a set of circumstances and a corresponding class of duty holders. Köpcke explains that legal systems deploy sophisticated chains of specification in which many decisions are taken by different kinds of agents "to transform certain generic claims of justice (two-term rights) into genuine (three-term) rights and duties."[56] She illustrates this point by noting that it takes the complex structure of the NHS to realise the right to health; it takes criminal law, traffic rules and regulations, a police force, prisons, criminal tribunals and procedures, building code standards, food standards, public health policies, among many other measures, to realise the right to life; and so on.

Webber et al are not merely making an empirical claim about how rights acquire real existence in modern constitutional states. They make the normative claim that rights should be matters for the legislature, and not for courts. In their view, in the democratic constitutional state, questions of political legitimacy about how to accommodate the principles of democracy and human rights ought to remain open, on an ongoing basis, to contestation and re-negotiation.[57] It is for the political branches of government to complete the "constitutional edifice", by addressing the major debates about political morality left open by overly broad rights clauses. For these reasons, by contrast to the traditional view, these authors depict the relationship between rights and Parliament as a positive and empowering one. Political branches of government are free to choose how to realise rights within a range of reasonable alternatives.

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[55] Ibid, 159; Grégoire Webber, 'Rights and Persons' in Grégoire Webber and others (eds), *Legislated Rights* (Cambridge University Press 2018).

There are few exceptions, such as absolute rights. For instance, the right not to be tortured, which is not subject to limitation, and whose corresponding duty is imposed to all.

[56] Maris Köpcke, 'Why it Takes Law to Realise Rights' in Grégoire Webber and others (eds), *Legislated Rights* (Cambridge University Press 2018), 75. The theoretical account about how this process of constitutional construction operates is developed throughout the book. See Webber and others, *Legislated* Rights (n 53), especially chapters 1 to 5. See also Webber, *The Negotiable Constitution: On the Limitation of Rights* (n 36).

[57] Webber, *The Negotiable Constitution: On the Limitation of Rights* (n 36). This normative argument is developed further in Richard Ekins, 'Legislation as Reasoned Action' in Grégoire Webber and others (eds), *Legislated Rights* (Cambridge University Press 2018), 107ff.

To address political legitimacy concerns, Webber et al rely on a normative and idealistic account of legislative assemblies and the legislative process. Legalistic conceptions usually depict legislatures in an undignified way. They understand the legislative process mainly as a policy forum designed to aggregate preferences through majoritarian rule. Against this view, Webber et al offer instead a "dignified" account that makes the case for a reflexive legislature acting as a rational agent that changes the law deliberately grounded on reasons directed to promote the common good.[58] Ekins constructs this model by arguing that despite MPs' disparate views and perspectives, Parliament can act as an agent. He claims that bills represent plans of action that provide a coherent purpose for joint action. He also notes that legislatures are institutionally designed to reflect on legislative proposals in a more coherent and orderly way. Ekins offers as examples certain offices designed to assist deliberation, such as the role of ministers moving the bill, party leaders and specialist select committees. Furthermore, he explains that the legislative process comprises a series of readings (parliamentary stages), held in two different chambers, in which a reasonable number of MPs meet to assess and exchange reasons to change the Law. According to Ekins, these institutional features stimulate MPs to act on the basis of good reasons. Although parliamentary decisions are ultimately taken by majority voting, these decisions can be the product of reasoned action. Hence, this dignified account of the legislative branch focuses on key institutional features and characteristics of the legislative process. However, it should be noted that Webber et al rely on the methodology of the "central case".[59] For this reason, they do not address the pathologies that affect real world legislatures. The House of Commons, for instance, faces significant challenges to perform proper scrutiny of legislation on human rights grounds. Some of those challenges have already been outlined in Chapter Two. Chapter Six will provide data confirming the modest impact that the JCHR has had in influencing debates at the Commons. Although Webber et al aim at providing a

[58] Ekins, 'Legislation as Reasoned Action' (n 58), 90, 96ff. See also Grégoire Webber and Paul Yowell, 'Introduction: Securing Human Rights Through Legislation' in Gregoire Webber and others (eds), *Legislated Rights* (Cambridge University Press 2018), 6. Note that legalistic conceptions usually rely on dignified accounts of the judiciary. Ronald Dworkin's "herculean" judge is a case in point.

[59] Webber and Yowell, 'Introduction' (n 59).

normative account, there is a sense that something relevant is missing when significant gaps between ideals and political practices are not addressed.[60]

To understand what the contribution of the JCHR may be under this conception, it is important to note how Webber et al envisage the role of human rights values in legislative reasoning. Ekins advances this role by providing an account of what counts as a good reason to change the law. According to him, a good reason is a morally sound reason that takes account of relevant facts and is framed by technical reasoning about what the existing law dictates, and the likely effects of legislative proposals. This requires reflection on the ends, an analysis of the current state of affairs, legislative means and their prospects to achieve policy objectives, including an analysis of alternative courses of action and possible unintended consequences. For Webber et al, the overall objective of legislation is to achieve the common good. The common good requires securing those conditions that allow each person to flourish.[61] Human rights, therefore, are essential components of the common good. Hence, the common good and human rights are not in tension. There is no need to employ proportionality analysis to balance the relative weight of policy aims and human rights. Since human rights are fundamental components of the common good, the tension is dissolved. The point of human rights, according to Ekins, is to draw Parliament's attention to an aspect of human wellbeing that ought to be considered in legislative reasoning.[62] A second function of rights clauses is to suggest modes of action that are either consistent or likely to support that aspect of the wellbeing. It will be for Parliament to decide between different courses of action about how best to specify these values. In sum, rather than being constraints on political powers, human rights will perform a guiding function, featuring in political decision-making in different ways, namely, as ends, means or side-constraints on means.

A conception of constitutional construction and development offers a rich theoretical framework to reconceptualise the relationship between human rights and Parliament. However, it offers no recipe to address the pathologies of real world legislatures. The JCHR could contribute to addressing the gap between ideals and political practices by operating as a vehicle for constitutional deliberation, along the

[60] For discussion, see Chapter Six.
[61] Webber, 'Rights and Persons' (n 56).
[62] Ekins, 'Legislation as Reasoned Action' (n 58), 102ff.

lines outlined above (see section III.2). It could prevent legislatures from unprincipled action that diverts MPs' attention from the common good. There are different ways in which a model of constitutional construction could benefit from the JCHR. Here are some possibilities. Firstly, the JCHR has the capacity to identify relevant human rights issues arising from government bills. Since human rights clauses are broad and open-ended, it would be valuable for the JCHR to point out different forms of specification that may enhance its enjoyment. Take for instance the JCHR's practice of recommending human rights-inspired amendments to government legislative proposals as an example of how this committee identifies alternative courses of action.[63] Secondly, the JCHR may foster deliberation by providing a forum for public engagement. This contributes to ensure that different perspectives and voices enrich the debate about issues of moral significance. On the other hand, calls for evidence may gather expert information necessary to take informed decisions, for instance, on the possible effects of proposed legislation once enacted. By incorporating these moral, empirical and technical insights in its reports and recommendations, the JCHR could contribute to a more informed parliamentary deliberation. Thirdly, by publishing brief and accessible reports, the JCHR will help MPs to reflect on the issues in a more coherent and orderly way. Last but not least, the process of reason giving and assessment largely explained in section III.2 above, may have a positive overall effect on the quality of deliberation. In sum, the JCHR may contribute to the process of construction and development of human rights values because it is an institutional arrangement that seeks to address the pathologies of real world legislatures conspiring against reasoned action and principled parliamentary debates.[64]

4. Concluding remarks

To sum up, the HRA also created an expectation for Parliament to develop its own voice on human rights protection. This expectation is consistent with the HRA's retention of parliamentary sovereignty. This section explored two alternative conceptions of LSCG which move away from a legalistic and court-centred model. In

[63] Yowell, 'The Impact of the Joint Committee' (n 51), 144, noting that one of the reasons why JCHR's reports have featured more prominently in parliamentary debates since 2006, is because of the introduction of the practice of recommending amendments that later are moved by prominent members.

[64] Whether it really succeeds in fostering this reasoned action in the UK Parliament will be discussed in Chapter Five below.

both of these alternative conceptions, the role of the JCHR is to act as an agent for deliberation and rational action.

IV. The deliberative credentials of legalistic conceptions of legislative scrutiny on human rights

Sections II and III have identified two pressures that flow from the ambiguity of the HRA regarding parliamentary sovereignty, namely, a pressure to comply with Convention rights, and a pressure to develop Parliament's own understanding of rights. These sections have discussed alternative conceptions of LSCG that may address the expectations flowing from these pressures, their theoretical underpinnings and whether they have been incorporated into the JCHR's working practices. In this section, I discuss the deliberative credentials of the legalistic LSCG conception. I explore whether legalistic legislative scrutiny on human rights grounds can have a positive impact on constitutional deliberation. This discussion will benefit from Aileen Kavanagh's claim that the JCHR is a "hybrid breed of constitutional watchdog".[65]

Kavanagh argues in favour of a predominantly legalistic conception of LSCG for the JCHR. However, this legalistic approach is ultimately directed at having a positive impact on Parliament's ability to deliberate. She goes on to say that the JCHR should develop legal expertise to improve "human rights literacy" among parliamentarians.[66] By making legal language more accessible, the JCHR should strengthen parliamentarians' ability to deliberate on human rights issues and to scrutinise government legislation. Furthermore, Kavanagh is not only thinking about the impact of JCHR's legal expertise on Parliament. She is also thinking about the JCHR's ability to target a different audience, namely, legal advisers at government departments, bill teams and Law Officers. According to Kavanagh, legal expertise can also be a tool of political influence on those developing policies and drafting legislation.[67] By channelling legal considerations into the legislative process, a traditional forum for political accountability, and exerting influence on governmental legal advisers, Kavanagh depicts the JCHR as "mediating" between legal and political

[65] Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' (n 7).

[66] Ibid, 128-30.

[67] These remarks raise an important question about who is the target of constitutional committees. I shall come back to this in Chapter Five.

models of accountability.[68] What underpins Kavanagh's argument is a deeper theoretical attempt to think constructively about the constitution beyond the traditional polarities of legal and political constitutionalism. Instead, she argues that the protection of human rights values is a collaborative enterprise in which different branches of government have a role to play.[69]

While this may be an attractive way of looking at things, it is not clear whether there are necessary connections between legal considerations and an improvement in parliamentary deliberation on human rights matters. It seems to me that Kavanagh should start by distinguishing between two strands of the legalistic model, namely, the hard and soft ones (see Chapter One and section II above). The former emphasises a strong culture of compliance with Convention rights. This may well impoverish rather than enhance deliberation. A court-centred approach takes the possibility of an adverse human rights judgment at face value. Parliament will have to take case law and judicial interpretations as an authoritative statement of the Law. In this view, there is little room for political disagreement grounded on enlightened deliberation, for instance, about the consequences of undermining Convention rights for the sake of achieving other public values. In other words, too much emphasis is put on the possibility of a legal challenge, diverting parliamentary deliberation away from the quality of the reasons for a given course of action, including the advantages and disadvantages of alternative courses of action.[70] A more positive impact on parliamentary deliberations will demand a critical assessment of legal materials, including settled interpretations and case law. Ministers, MPs and peers should be prepared to disagree with domestic courts and ECtHR's judgments and interpretations, insofar as they ground their disagreement on debate and good reasons.

Another issue that arises is a paradoxical relationship between a court-centred conception of LSCG, and constitutional deliberation. As Aruna Sathanapally notes,

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[68] Aileen Kavanagh, 'British Constitutionalism Beyond Polarities' <https://www.dropbox.com/s/4nq0yb4ya3fhp3o/AK%20British%20Constitutionalism%20Beyond%20Polarities%20FINAL%20DRAFT%20Oct%202016.pdf?dl=0> accessed 27 June 2018, 26.

[69] See also Dawn Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defense of the Sovereignty of Parliament' in Gavin Drewry and Alexander Horne (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018), 294 ("(…) the functioning of the British system imposes responsibility for the constitution and the rule of law on every organ of the state rather than placing that responsibility solely or primarily in the hands of a Supreme or Constitutional Court."); Adam Tomkins, 'What's Left of the Political Constitution?' (2013) 14 German Law Journal 2275.

[70] Sathanapally, *Beyond Disagreement* (n 13), 70.

the contribution of human rights judgments to deliberation will ultimately depend on the quality of their reasoning.[71] If sentences are merely black letter exercises, they will provide less relevant material for deliberation. By contrast, if sentences engage in deeper moral reasoning, they will provide relevant material for parliamentary deliberations. However, one should note that the flip side of the coin is that if courts engage too deeply on questions of political morality, they will trespass the domain of politics. The paradox, consequently, is that for legal human rights to provide a meaningful input into the quality of deliberation, judicial reasoning will need to be more political, and less legalistic.

In sum, we should be cautious about the relationship between legal reasoning in human rights matters, and constitutional deliberation. As shown above, this connection can develop in multiple ways, and may raise some additional problems. Legal considerations may enrich parliamentary deliberations, but they should be part of a wider pool of reasons and considerations. A more nuanced and soft approach to legalism may contribute better to constitutional deliberation than a hard approach to legalism.

V. Inter-institutional relationships between courts and Parliament

So far, this chapter has discussed conceptions of LSCG in the context of legislative scrutiny of government bills. I have focused my attention on these preventative instances because they are the most neglected in the literature. By contrast, the question about how Parliament should react to an adverse human rights judgment has attracted a significant body of scholarship.[72] Interest on this question has gone in tandem with the growing body of literature on constitutional dialogue. Most of the issues have been addressed by numerous contributions that focus on the normative question about who should have the final word.

These contributions recognise that the UK is under an international obligation to comply with adverse human rights judgments by the ECtHR. They also recognise that if domestic courts find legislation in breach of Convention rights, it is highly likely

[71] Ibid, 72.

[72] In my view, this is regrettable. Only a small portion of legislation subject to scrutiny is litigated, which means that the literature has mainly focus in the margins of Parliament and JCHR's work on human rights matters.

that the ECtHR may come to a similar judgment. On the other hand, since Parliament has retained its sovereignty as a matter of domestic law, these contributions focus on the normative question about if –and when– it would be legitimate for politicians to override a decision of the courts. Although this is a key question, its practical relevance is undermined by the fact that the UK is quite responsive to adverse human rights judgments. For that reason, in what follows I will not address this normative question. Instead, I will make two points. First, I will argue that under the HRA's scheme, political branches of government have little room for disagreement with courts. My second point will stress the difficulties that assessing legislative responses to adverse human rights judgments raises. Compliance with adverse human rights judgments is a matter of degree. People may disagree about whether a legislative response complies –or fully complies– with a given judgment. However, there are no clear benchmarks to assess its implementation. An institutional manifestation of this is that political branches of government enjoy wide discretion in implementing an adverse judgement. I will conclude this section discussing the JCHR's work monitoring compliance with adverse human rights judgments.

1. Political responses to adverse human rights judgments

In the UK political branches of government have little room to disagree with adverse human rights judgments. To illustrate why this is the case, it is useful to compare these with ordinary cases of legislative scrutiny on human rights grounds. There is a qualitative difference between these two cases. In ordinary cases, the question about a possible breach of Convention rights is merely hypothetical. Efforts to consider case law will be at best preventative. Parliament will not be able to foresee all the different instances in which applying the provisions of a bill may be held incompatible with Convention rights. There will be cognitive limitations and reasonable interpretative disagreement about the normative consequences of Convention rights. On the other hand, it may well be that case law is inconsistent, underdeveloped, or leaves the door open to different interpretations. For these reasons, it is likely that different people may have different opinions about the question of compatibility. By contrast, when Parliament is confronted with a judgment declaring legislation in breach of Convention rights, either by domestic courts or by the ECtHR, there is an authoritative declaration stating that the law should be changed to comply

with human rights. Although Parliament is not bound, as a matter of domestic law, to respond, there are significant political and constitutional reasons to address the incompatibility with Convention rights, as I shall explain below.

The legal position is quite straightforward. Section 4 HRA provides that courts lack power to strike down legislation. On the other hand, the power of remedial order under section 10 HRA is discretionary. The default position therefore is that politicians can simply dissent by maintaining the *status quo*.[73] By contrast, in the case of ECtHR, the UK is bound under international law to abide by an adverse judgement (article 46(1) ECHR). This means that if the ECtHR finds legislation in breach of Convention rights, the UK has an international obligation to remedy the incompatibility. However, at the domestic level, implementation of adverse ECtHR judgments is a matter of political will, as the UK's dualistic system means that the claimant has no legal remedies to enforce such judgments.

Despite this, there are political and constitutional reasons why political branches of government in the UK feel bound to abide by adverse human rights judgments. Firstly, the decision to domesticate Convention rights blurred the lines between the domestic and the international spheres. The dualistic system would carry less weight if legislation in breach of Convention rights, although legally enforceable, were problematic as a matter of domestic constitutional law. This decision was, among other reasons, inspired by the pragmatic aspiration to protect the UK's international reputation and standing. Secondly, the imposition of the duty to make a statement of compatibility for every bill passed before Parliament (section 19 HRA), and the very creation of the JCHR, introduced structural factors to secure a culture of political compliance with Convention rights. This was driven by the explicit political expectation that these rights would permeate across different branches of government.[74] Finally, it is worth paying attention to section 10 HRA. This provision creates a prospective Henry VIII power to implement an adverse human rights judgment. The thinking here is that ministers should be empowered to implement such

[73] Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 56-57.

[74] Hiebert and Kelly, *Parliamentary Bills of* Rights (n 6), 258. Hiebert provides evidence that the drafters of the bill expected political branches of government to tackle any incompatibility with Convention rights, but in exceptional circumstances.

judgements[75] because compliance will carry enough political consensus. The expectation is that mainstream political parties will not risk UK's international reputation by preventing the implementation of a human rights judgment. Therefore, ministers should have a quick remedy to address the incompatibility. This shows that the complex interplay between political expectations, demands flowing from international law, and from domestic constitutional law that underpins the architecture of the HRA has reduced the room for political branches of government to override adverse human rights judgments. Adverse human rights judgments, either by the ECtHR or by domestic courts, carry significant constitutional and political weight.

Scholars do recognise these constitutional and political limitations on Parliament's supreme legislative powers. Discussing declarations of incompatibility, Kavanagh argues that ignoring or contesting these judgments result in significant political costs. She also points out that if the government and Parliament fail to remedy the incompatibility, the claimant could petition before Strasbourg. In the face of a domestic declaration of incompatibility, it is highly likely that the ECtHR would come to the same conclusion. Kavanagh notes that although remedies in the HRA are discretionary, the link between Convention rights and the HRA means that declarations of incompatibility may give rise to UK's responsibility as a matter of international law. She concludes that unless there is a "very strong justification", political branches of government will have little alternative but to remedy the incompatibility. A second example –from someone who is sceptical about legal human rights– is Jonathan Morgan.[76] In his view, declarations of incompatibility under section 4 HRA are de facto binding. If the ECtHR finds legislation in breach of Convention rights, the UK government will face a stark choice: it either complies or denounces the ECHR and repeals the HRA. Perhaps Morgan's contention goes too far. Significant litigation costs and time delays are involved in the decision to issue a petition before the ECtHR. A declaration of incompatibility will not necessarily trigger the international dimension. Despite this, both Kavanagh and Morgan identify a key point, namely, that the architecture of the HRA brings together the international law dimension, the domestic constitutional dimension, and the political expectations to

[75] Boateng and Straw, 'Bringing Rights Home' (n 2), 74 and 77; Secretary of State for the Home Department, *Rights Brought* Home (n 2), at paras 1.10, 1.16 and 2.17-19.

[76] Morgan, 'Amateur Operatics' (n 19), 435-38.

consolidate a culture of compliance. The combination of these factors means that political branches of government face significant political and constitutional pressures to comply, to the point that adverse human rights judgments are de facto binding.[77] The figures on the implementation of adverse human rights judgments provide the most compelling evidence of its constitutional and political weight. The UK is quite responsive, and has a good record implementing adverse human rights judgment, either by the ECtHR or by domestic courts.[78]

While the above considerations explain why adverse human rights judgments carry significant weight, Aruna Sathanapally's detailed analysis of declarations of incompatibility shows that pragmatic considerations have also performed a significant role in the government's decision to respond.[79] She argues that when the HRA came into force, the government was interested in demonstrating before the ECtHR that declarations of incompatibility were an effective remedy. This would have an effect at the admissibility stage, because procedures before the ECtHR require the applicant to exhaust domestic effective remedies. The aim was to prevent individuals from going before the ECtHR without prior legal challenge at domestic level. A second reason is that many declarations of incompatibility have been uncontroversial. The government has not considered them to challenge its policies, and therefore it has made the changes in legislation required. However, even in cases where the government considers that its policies have been challenged, it has not directly confronted the judgment. Instead, it employed more subtle strategies.[80] Most notably, in these cases the government

[77] Sathanapally, *Beyond Disagreement* (n 13), Ch6.

[78] For both domestic courts and ECtHR's adverse human rights judgments figures and responses, see Ministry of Justice, *Responding to Human Rights Judgments* (Cm 9728, November 2018). For figures related to domestic courts, see analysis by Jeff King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015); Sathanapally, *Beyond Disagreement* (n 13), 132ff.

[79] Sathanapally, *Beyond Disagreement* (n 13), 141-56. For an account focusing on the ECtHR, see Alice Donald and Phillip Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press 2016), 69-72, 99-105.

[80] Carol Harlow and Richard Rawlings, ''Striking Back' and 'Clamping Down': An Alternative Perspective on Judicial Review' in John Bell and others (eds), *Public Law Adjudication in Common Law Systems - Process and Substance* (Hart Publishing 2015).

delayed its responses.[81] A second strategy is to comply in a minimalistic fashion.[82] Finally, in some cases the government has found a different means to achieve the same policy aim challenged before courts.[83]

Once these considerations are taken into account, it appears that the debate about who should have the final word on human rights matters is of marginal practical importance. The critical question raised by legislative scrutiny of government's proposals to implement adverse human rights judgments concerns identifying workable standards to assess the degree of compliance with the substance of the judgement. This takes me to my second point. There are no clear legal benchmarks to assess political responses to adverse human rights judgments. The very fact that both at the domestic and international levels, courts have little or no role whatsoever in monitoring compliance is a case in point. Instead, assessing the implementation of an adverse human rights judgment is mainly a political and administrative process. Take first the case of domestic declarations of incompatibility. Once domestic courts issue a declaration, there is no further role for them. The declaration does not affect the validity, enforcement and continuing application of primary legislation (section 4(6) HRA). The HRA contains no provision forcing the executive to remedy the incompatibility, nor to be proactive in considering a response.[84] Furthermore, section 10 provides for a "discretional" power of remedial action by ministers. The consequence is that the implementation process is mainly political, and dependent upon the pressure exerted by Parliament. As I will argue below, the JCHR performs a relevant role demanding government responses to declarations of incompatibility.

In the case of the ECHR, article 46(2) provides that it is for the Committee of Ministers of the Council of Europe to supervise the execution of ECtHR's judgments. This Committee is a political entity, composed by the Foreign Affairs Ministers (or their permanent representatives) of the 47 member states of the Council of Europe. It

[81] Consider also that, according to Jeff King, legislative responses to adverse human rights judgments in the UK tend to be more delayed, when compared with the situations of Canada, Germany and France. See King, 'Parliament's Role Following Declarations of Incompatibility under the Human Rights Act' (n 79). See also Harlow and Rawlings, 'Striking back' (n 81).

[82] According to scholars and the JCHR, many UK government responses to adverse human rights judgments have been "minimalistic". See Gardbaum, *The New Commonwealth Model* (n 31), 175-6; Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (2009-10, HL 85, HC 455), at paras 168-70.

[83] Sathanapally, *Beyond Disagreement* (n 13), 149-52.

[84] Ibid, 139 and 163.

is supported by civil servants and legal advisors that form part of member states' permanent missions.[85] Involvement by the ECtHR in the implementation phase only takes place exceptionally. For instance, pilot judgment procedures offer a response to large-scale systematic or structural breaches of Convention rights by a given state.[86] Such judgments are relevant in the case of legislation being found in breach of Convention rights. They may exert additional pressure against states who have failed to comply with a previous judgment, as happened in the case of *Greens*.[87] Another example are the interpretation and the infringement procedures introduced by Protocol 14. The former provides an opportunity for the Council of Ministers to refer to the ECtHR for a clarificatory interpretation of a judgment (article 46(3) ECHR). The latter provides for the Council of Ministers to refer the question about compliance to the ECtHR (article 46(4) ECHR). This procedure effectively provides for the ECtHR to declare that its judgment has not been complied with. However, the procedure has been subject to strong criticism.[88] The 2/3 majority of Member states on the Council of Ministers requirement to trigger the infringement procedure suggests that the ECtHR will only be exceptionally involved in assessing compliance. Not surprisingly, since 2014, the infringement procedure has been followed only against Azerbaijan. On the other hand, resistance against an adverse judgment may be grounded on principled reasons. National governments and/or Parliament's refusal to introduce changes in legislation can arise from substantive disagreement with the judgment, or because of democratic concerns. In these cases, employing the infringement procedure may only aggravate existing wounds, and may be counterproductive for the European system of human rights protection as a whole. It may well be that difficult questions about implementation are better served by a political solution achieved at the Council of Ministers, rather than by providing a legal remedy such as the infringement procedure.

Assessing compliance with adverse human rights judgments is a difficult matter, open to disagreement depending on our wider views on political morality, questions of national sovereignty, and questions about democratic legitimacy and the separation

[85] Donald and Leach, *Parliaments and the European Court of Human Rights* (n 80), 37.
[86] Ibid, 32ff.
[87] *Greens and MT v United Kingdom* 53 EHRR 21.
[88] Kanstantsin Dzehtsiarou and Fiona de Londras, 'Mission Impossible? Addressing Non-execution Through Infringement Proceedings in the European Court of Human Rights' (2017) 66 International & Comparative Law Quartely 467.

of powers. The implementation of an adverse human rights judgment is a matter of degree, rather than a "black or white" assessment.[89] As Alice Donald and Phillip Leach note, the ECtHR recognises a wide margin of appreciation to member states in deciding how to respond to an adverse judgment.[90] Consequently, the ECtHR is cautious when it comes to demanding general measures to redress a breach of Convention rights, including changes to primary legislation. As Donald and Leach argue, the wide margin of appreciation recognised introduces additional ambiguity that makes assessments of compliance quite difficult. This has had knock-on effects on the role of the Council of Europe in monitoring compliance, making it an "unavoidably political" process.[91] Consider for instance the situation created by long-standing British threats to denounce the ECHR,[92] and the political controversy generated by the prisoners' right to vote case.[93] These issues have resulted in the ECtHR recognising significant margins of appreciation to the UK.[94] The wide margin of discretion conferred to the UK in *Scoppola* is a case in point.[95] This suggests that compliance with general measures is difficult to assess, because there are no clear legal benchmarks to assess government responses during the monitoring phase.

2. The role of the Joint Committee monitoring the implementation of adverse human rights judgments

Considering that the implementation of an adverse human rights judgment is to a significant extent a political process, the existence of parliamentary bodies in charge of monitoring compliance provides Parliament with a significant source of information and insights to address this process.

The JCHR began monitoring responses to adverse human rights judgments a few years after its creation.[96] Its work was reduced mainly to correspondence with the

[89] Kirsten Roberts Lyer and Philippa Webb, 'Effective Parliamentary Oversight of Human Rights' in Matthew Saul, Andreas Follesdal and Geir Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (Cambridge University Press 2017), 42.

[90] Donald and Leach, *Parliaments and the European Court of Human Rights* (n 80), 69-70.

[91] Ibid, 99.

[92] The Conservative Party, *The Conservative and Unionist Party Manifesto 2017* (2017).

[93] *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41.

[94] Ewing and Hendy, 'The Trade Union Act' (n 15), 414ff.

[95] *Scoppola v Italy (No. 3)* 56 EHRR 19, at paras [99] and [102].

[96] Alice Donald and Phillip Leach, 'The Role of Parliaments Following Judgments of the European Court of Human Rights' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 67.

relevant minister about how the government would implement an ECtHR judgment.[97] This practice evolved to a regular progress report on these judgments in 2006. By 2007, the JCHR extended this progress report to domestic declarations of incompatibility. The current position, which dates to 2011, is that the Ministry of Justice prepares and submits an annual report on the implementation of adverse human rights judgments to the JCHR.[98] This annual report is one of the most –if not the most– valuable sources of information on this matter in the UK. It has also provided an opportunity for the government to improve its internal following up procedures. The Ministry of Justice performs a role coordinating responses by each relevant government department concerned with a particular case. The evolution of these working practices shows that both the JCHR and the government have approached questions about implementation along the lines outlined above. Adverse human rights judgments are considered as de facto binding, and political branches have felt compelled to respond. The improvement of its internal procedures also shows that the government is responsive to pressure exerted by the JCHR.

The JCHR's work monitoring adverse human rights judgments has focused on three main areas. Firstly, government's internal procedures. I have already mentioned the practice of publishing an annual report, which provides a reliable source of information on this matter. In addition, the JCHR has proposed changes in governmental working practices to improve the UK capacity to respond to an adverse human rights judgment,[99] fostering transparency. Secondly, the JCHR exerts pressure upon the government not to delay its response.[100] Among other measures, it requires the government to notify Parliament when there is an adverse human rights judgment,

[97] Joint Committee on Human Rights, *Implementation of Strasbourg Judgments: First Progress Report* (2005-06, HL 133, HC 954), at para 4.

[98] Donald and Leach, 'The Role of Parliaments' (n 97), 68.

[99] Ibid, 67-70. Most of JCHR's recommendations were condensed in Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 83), at paras 166-7. These recommendations were reviewed in Joint Committee on Human Rights, *Human Rights Judgments* (2014-15, HL 130, HC 1088), at para 6.1.

For former examples of this practice, see Joint Committee on Human Rights, *Making of Remedial Orders* (2001-02, HL 58, HC 473); Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (2006-07, HL 128, HC 728), at paras 140-63; and Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008* (2007-08, HL 173, HC 1078), at paras 6-9.

[100] Hiebert, 'Legislative Rights Review' (n 74), 50; Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' (n 7), 120.

either by the ECtHR or the domestic courts.[101] The JCHR also submits correspondence and may question the relevant minister in oral hearings, and requires the government to disclose its plan, including the measures that it may take in response. As noted above, the government has adopted delaying as a strategy when it strongly disagrees with an adverse judgment. We may think of this role as strengthening Parliament's ability to hold the government to account. However, difficult issues arise when Parliament is also strongly opposed to the judgment. Take for instance the prisoners' right to vote litigation saga.[102] Different governments employed a range of delaying strategies, such as lengthy consultation processes[103] and the publication of a Draft Bill.[104] On the other hand, Parliament expressed its fundamental disagreement with the judgment through a motion submitted by backbenchers from the two main parties.[105] This case put the JCHR in an uncomfortable position, because it kept insisting on the need to comply even though Parliament had made its position clear.[106] Eventually, after Scoppola was delivered,[107] and recognising parliamentary resistance, the JCHR argued in favour of a minimalistic implementation of the *Hirst No. 2* judgment.[108] This suggests that the JCHR can be put in an uncomfortable position when Parliament is not willing to comply.

Finally, the JCHR scrutinises draft remedial orders and remedial orders, as well as bills implementing judgments. In these cases, the committee calls for evidence to gather the views of stakeholders and experts.[109] It therefore provides a forum for experts and interest groups to make their voice heard. In addition, the JCHR operates as a reason demanding body. The government must justify its proposals implementing

[101] Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 83), at paras 172 and 174.

[102] *Hirst (No. 2)*; *Greens and MT v United Kingdom*; *Firth and Others v The United Kingdom* [2014] ECHR 874. For discussion, see Chapter Seven.

[103] Department for Constitutional Affairs, *Voting Rights of Convicted Prisoners Detained within the United Kingdom - The UK Government's Response to the Grand Chamber of the European Court of Human Rights Judgment in the Case of Hirst v the United Kingdom* (CP 29, 2006) and Ministry of Justice, *Voting Rights of Convicted Prisoners Detained within the United Kingdom - Second Stage Consultation* (CP 6, 2006).

[104] Ministry of Justice, *Voting Eligibility (Prisoners) Draft Bill* (Cm 8499, 2012).

[105] HC Deb 10 February 2011, vol 523, cols 493-586.

[106] The JCHR reported 8 times denouncing the lack of process in the implementation period. For a detailed account, see Chapter Seven.

[107] *Scoppola v Italy (No. 3)*.

[108] Joint Committee on Human Rights, *Human Rights Judgments* (n 100), at paras 3.20-3.26.

[109] Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 83), at para 1.2.

adverse human rights judgments. JCHR's reports assess the government's response, and may propose alternative courses of action. For these reasons, the JCHR contributes to the improvement of deliberation within Parliament in regards to adverse human rights judgments.[110] In this sense, the JCHR has advocated for the need to reinforce parliamentary involvement on legislative responses. From a substantive point of view, the JCHR has been critical of the government's minimalistic approach to implementation. Although the JCHR has recognised that adverse human rights judgments leave room for political discretion,[111] it has also advocated for a "full implementation" of these judgments. Arguably, the JCHR has had an activist approach. Hence, it has not questioned the reasoning and outcomes of human rights judgments. Instead, it has interpreted its function mainly as securing compliance with these judgments. This suggests a legalistic and court-centred approach on matters of implementation.

VI. Conclusion

The JCHR faces different and contradictory pressures, namely, pressure to comply with Convention rights as well as pressure to develop Parliament's own voice on human rights matters. Responding to each of these two pressures requires different conceptions of LSCG. The legalistic conception corresponds to pressure for compliance. In contrast, the conception of constitutional deliberation and the conception of constitutional construction correspond to pressure for Parliament to develop a more independent voice. In this respect, the JCHR is an outlier. The Select Committee on the Constitution ("SCC") and the Delegated Powers and Regulatory Reform Committee ("DPRRC") do not face institutional and political pressures to employ a legalistic conception of LSCG. Neither is confronted with anything like the difficult questions raised by the architecture of the HRA. This chapter explored to what extent alternative LSCG conceptions are reflected in the JCHR's working practices. The chapter argued that the JCHR mainly performs a legally framed legislative scrutiny assessment, although one that has evolved from a hard to a soft approach to

[110] Furthermore, according to Sathanapally, *Beyond Disagreement* (n 13), 156, the JCHR has been the main forum for parliamentary engagement with declarations of incompatibility.

[111] Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 83), at para 15.

legalism. Currently, the JCHR focuses on proportionality assessments, legal interpretation, and follows-up case law developments, yet it is also open to empirically-based analysis. In addition, the JCHR also contributes to constitutional deliberation by engaging in a dynamic of justification and assessment with the government, providing a forum to hear the voices of experts and other stakeholders, and seeking to improve MPs knowledge about human rights law issues.

For these reasons, when compared with the SCC and the DPRRC, the JCHR is an outlier. A second feature of the JCHR is that the very fact that human rights law seeks to impose substantive limits on the exercise of political powers, means that this committee may clash with the views of a majority of MPs less sympathetic to these arguments in controversial cases. While the DPRRC and the SCC may enter at times in confrontation with majoritarian views held at the Commons, a feature of their work is that, to a significant extent, it is ultimately directed towards protecting Parliament's role as the senior partner in the relationship between both political branches of government. This feature is obvious from the DPRRC work, but is also reflected in the SCC work. The SCC seeks to protect the position of Parliament in delegated powers and in international negotiations, for instance. The very fact that the SCC has opted to focus on the institutional rather than on the substantive dimensions of the constitution, have prevented this committee from entering into conflict with Parliament. Perhaps one area in which the SCC's work resembles that of the JCHR is on the territorial constitution. However, as argued in Chapter Four, the SCC has employed a "prudential" rather than a legalistic approach to the territorial constitution.

Finally, I discussed the role of the JCHR in the case of legislative responses to adverse human rights judgments. I noted the limited room for manoeuvre when political branches of government disagree. Political and constitutional pressures demand a response from government and Parliament. I argued that the implementation process has mainly a political nature. Courts do recognise wide margins of appreciation of political branches when it comes to remedies, and there are no clear legal benchmarks against which to assess political responses to adverse human rights judgments. I concluded by noting the relevant role that the JCHR performs in improving government's internal procedures, preventing delayed responses, and

assessing government's implementation responses from wider and evidence-based perspectives.

CHAPTER 6 CONSTITUTIONAL COMMITTEES AND DELIBERATION IN THE UK LEGISLATIVE PRACTICE

I. Introduction

Throughout this thesis, I have argued that gaining a proper understanding of legislative scrutiny on constitutional grounds ("LSCG") requires moving forward from purely theoretical considerations to an analysis grounded on the peculiarities of a real-world legislature operating against a given constitutional framework. I have argued that to advance this understanding there are two strands of inquiry. Firstly, since Parliaments are complex institutions, LSCG must be situated within the different constituent bodies of a given legislature. Therefore, the possibility of LSCG must be assessed by looking at the ethos of parliamentary members (at both chambers, if applicable), its relative independence from the executive, the nature of its select committees, among other factors. Secondly, LSCG is necessarily shaped by the peculiarities of the constitutional framework against which Parliament operates. Whether there is a written or unwritten constitution, its principles and values, whether or not there is constitutional review of legislation, are among many other factors that have an impact on theoretical conceptions of LSCG. Chapters Three, Four and Five have focused on this second strand of inquiry. Chapter Two, by contrast, advanced some relevant issues regarding the first strand of inquiry.

In this chapter, I return to the first strand of inquiry by resuming the discussion started in Chapter Two. Here, I focus on the operation of LSCG in the United Kingdom ("UK") Parliament, with emphasis on the role of the three constitutional committees. I will rely on the key findings of Chapter Two. These are that peers are more likely to engage with and debate the issues of constitutional significance raised by government bills than MPs; and that constitutional committees are the main forums for constitutional thinking and drivers of LSCG at the UK Parliament.

However, Chapter Two provided a "static" analysis, because it did not explore the interactions that constitutional committees have with both political branches of government. This chapter undertakes this task by, firstly, providing a practice-oriented account of the operation of constitutional committees (section II). This account is based on primary and secondary sources, such as parliamentary debates, reports, soft law documents, empirically grounded analysis by political scientists and lawyers,

among others. The main finding is that the impact of constitutional committees at the formal stages of the legislative process, among elected politicians within government and at the Commons, is rather modest. Instead, I claim that at the heart of constitutional committees' operation are bureaucratic experts working at the government, as well as committee members and their legal advisors, and peers. Furthermore, I claim that constitutional committees have a preventive effect which has reinvigorated internal checks of constitutionality and legality at government in the early stages of policy-making and legislative drafting. Finally, I note that the influence of constitutional committees on the legislative process is dependent upon the possibility that the Lords engage in constitutional considerations, advancing constitutionally-inspired amendments, and managing to defeat the government.

Based on these findings, section III discusses and reconsiders the place of politics in LSCG in the UK Parliament. Here, I discuss the theoretical implications of the fact that politicians do not necessarily engage in principled or value-based assessment of the constitutional implications of government legislation. In section III, I make three points. Firstly, I discuss whether there should be more constitutional deliberation among elected politicians. I note that my practice-based account suggests that constitutional committees have not had a transformative effect on parliamentary debates. Nevertheless, I argue that the problems created by their modest effect on political constitutional deliberation is not that acute in the UK, due to the significant effect that these committees have had among civil servants and peers. Secondly, I argue that constitutional committees conform to the UK-style of constitutionalism. Constitutional committees, through their influence on bureaucratic experts in government and peers in Parliament warn elected politicians about the need to avoid certain courses of action, or to prevent certain effects. I claim that constitutional committees operate as a conduit for constitutional considerations in two respects. Firstly, as reason-demanding bodies which have an impact on, and reinvigorate, internal governmental constitutionality checks. Secondly, as reason-giving bodies, which provide peers and MPs constitutionally grounded reasons for legislative action. I conclude this theoretical discussion by arguing that the legitimacy of constitutional committees as an accountability mechanism does not necessarily flow from a

democratically elected basis, but that their authority can be grounded on a variety of reasons.

II. Understanding the operation of constitutional committees

This section makes a series of points to advance a practice-oriented account of constitutional committees' contribution to LSCG. I note that theoretical accounts about constitutional committees tend to focus on their contribution to political engagement with the constitution. However, relying on empirical evidence, I will show that constitutional committees have a somewhat modest impact at the formal stages of the legislative process. Conversely, political scientists claim that constitutional committees exert a subtle and informal – but hard to measure – influence during the early policy-making and legislative drafting stages of a bill. Against this background, I will argue that constitutional scholars should be careful not to place too much faith on constitutional committees' ability to mainstream constitutional considerations among politicians, both at government and Parliament. Instead, the evidence shows that the main actors involved in the operation of constitutional committees – apart from committee members and its legal advisers – are peers and bureaucrats and other non-elected experts working at the government and Parliament. It is not possible to grasp the operation of constitutional committees, and their contribution to LSCG, without recognising the reduced place that politics has for LSCG.

1. Managing normative expectations: constitutional committees and their impact in the legislative process

a. Normative expectations

A few authors have provided theoretical accounts of constitutional committees. These accounts revolve around concepts such as democratic legitimacy, constitutional deliberation, culture of democratic justification, and the protection of constitutional fundamentals. By embracing these concepts, theoretical accounts hold normative expectations about the impact of constitutional committees at the formal stages of the legislative process. I will illustrate these points by providing one example. There is a body of literature whose aim is to redress a perceived democratic deficit of human rights values by exploring ways of reforming the legislative procedure to facilitate political engagement with them, and to mainstream human rights thinking in political

decision-making.[1] This literature emphasises the role of the Joint Committee on Human Rights ("JCHR") in securing two aims. Firstly, that every piece of primary legislation is scrutinised at Parliament on Convention rights grounds; and secondly, that Parliament is involved in monitoring compliance with adverse international and domestic human rights judgements.

These theoretical insights shed light on the sort of aims that the JCHR should advance. Firstly, the JCHR is expected to improve political engagement with human rights values by fostering political and moral deliberation about these issues within government and among parliamentarians.[2] As Lord Hoffman put it, politicians cannot simply ignore human rights considerations; they must face up to their actions, and accept the political cost of acting in breach of Convention rights.[3] Secondly, these authors expect the JCHR to promote a culture of democratic justification. This means that politicians both at government and Parliament should provide public reasons for legislative proposals having a negative impact on human rights values.[4] Thirdly, there is a substantive normative expectation placed in the JCHR. The overall effect of this committee should be to enhance political accountability mechanisms, and deliver stronger protection of human rights values.[5] Two normative expectations arise from these remarks. Firstly, an expectation that politicians will engage in human rights reasoning and justify any legislative measure with negative implications for Convention Rights. Secondly, an expectation that raising consciousness and imposing burdens of justification will improve human rights protection. Although these theoretical insights are mainly discussed in regards to the JCHR, Dawn Oliver and

[1] Murray Hunt, 'Introduction' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015).

[2] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013), 81-82.

[3] *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33, per Lord Hoffmann at para [131]. See also Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the Hirst Case' in Andreas Follesdal, Johan Karlsson and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal Political and Philosophical Perspectives* (Cambridge University Press 2015), 252.

[4] David Dyzenhaus, 'What is a Democratic Culture of Justification?' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015); Aileen Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 124ff.

[5] See for instance Alice Donald and Phillip Leach, *Parliaments and the European Court of Human Rights* (Oxford University Press 2016), 110.

Jack Simson Caird have employed a similar framework to discuss the Delegated Powers and Regulatory Reform Committee ("DPRRC") and the Select Committee on the Constitution's ("SCC") contribution to the legislative process.[6]

In sum, the theoretical accounts outlined here emphasise the impact that constitutional committees should have among politicians, at the formal stages of the legislative process. There are normative expectations that constitutional committees should have a relevant impact on two goals. These are, first, to improve parliamentary deliberations on constitutional matters, and, second, to secure a compliance-oriented legislative outcome. I do not argue that these are the only goals of constitutional committees.[7] The point here is that these two goals are implied by theoretical accounts of UK constitutional committees. For these reasons, it is worth looking at the evidence provided by political scientists and other secondary sources to assess these normative expectations against the practice.

b. The impact of constitutional committees in the legislative process

In this section, I will briefly outline the main findings of a few empirical studies that have explored the impact of constitutional committees in the legislative process. I will measure impact by looking at traces of committees' influence both in parliamentary deliberations, and in shaping legislative outcomes. The literature suggests that constitutional committees have not had a significant impact on both goals. The lesson is that the theoretical insights referred to above have placed too much faith in the ability of constitutional committees to prompt constitutional deliberation and to reinvigorate political mechanisms of constitutional protection at the formal stages of the legislative process.

I will start by assessing the first normative expectation, namely, whether constitutional committees' reports have had an impact in parliamentary deliberations. Relying on the evidence provided by these empirical studies, it is possible to make the

[6] Jack Simson Caird and Dawn Oliver, 'Parliament's Constitutional Standards' in Alexander Horne and Andrew Le Sueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing 2016); Dawn Oliver, 'Constitutional Guardians: The House of Lords' The Constitution Society <https://consoc.org.uk/publications/constitutional-guardians-the-house-of-lords/> accessed 8 January 2018, 39, 42; Dawn Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] Public Law 219, 239.

[7] See for instance a complex model to assess effectiveness in Kirsten Roberts Lyer and Philippa Webb, 'Effective Parliamentary Oversight of Human Rights' in Matthew Saul, Andreas Follesdal and Geir Ulfstein (eds), *The International Human Rights Judiciary and National Parliaments* (Cambridge University Press 2017). See also discussion in Kavanagh, 'The Joint Committee' (n 4), 131ff.

following claims about the degree of engagement of MPs and peers with committee reports. Firstly, the degree of engagement is significantly higher in the Lords. Data collected by Daniel Gover and Meg Russell about the influence of select committees in parliamentary debates concluded that about 96% of Lords committees' references are made in the upper chamber.[8] Hence, the SCC and the DPRRC have a marginal impact on parliamentary debates at the Commons, both at the floor and on public bill committees. By contrast, according to Gover and Russell, references to Joint Committees tend to be split in equal numbers between both chambers. However, a study by Murray Hunt, Paul Yowell and Haley Hooper (herein, "Hunt et al") found that engagement with JCHR's reports is qualitatively and quantitatively superior at the Lords.[9] Thus, the Commons accounted for only 34% of references made to JCHR's reports at parliamentary debates. Hence, this data shows that while almost all of SCC and DPRRC's references take place at the Lords, references to JCHR's reports at the Lords almost double the number of references at the Commons.[10]

Secondly, the number of references to constitutional committees in parliamentary debates has increased significantly along the years.[11] This may be the product of constitutional committees effectively consolidating their reputation as non-partisan, technical and learned instances which have gained cross-party recognition. In addition, constitutional committees have refined their techniques for capturing the attention of MPs and peers. A significant development is that committee members have sometimes tabled constitutionally-inspired amendments. This more proactive approach to LSCG has fostered the profile of constitutional committees.[12]

Thirdly, engagement with the constitutional issues raised by government legislation tends to be a niche interest. Discussing the impact of the SCC, Andrew Le

[8] Daniel Gover and Meg Russell, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British law* (Oxford University Press 2017), 218.

[9] Paul Yowell, 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 152-53.

[10] According Janet Hiebert, the instances in which JCHR's reports are referenced at the Commons are "rare", and mainly prompted by committee members themselves. See Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 51.

[11] Andrew Le Sueur and Jack Simson Caird, 'The House of Lords Select Committee on the Constitution' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013), 292; Yowell, 'The Impact of the Joint Committee' (n 9).

[12] Yowell, 'The Impact of the Joint Committee' (n 9), 144.

Sueur and Jack Simson Caird note that at the Lords there is a group of peers who have a special interest in constitutional issues.[13] The profile of these peers is telling. They tend to have a legal background, or have held high offices at government or at the judiciary, or are former SCC members. JCHR's reports have also been able to capture the attention of no more than a minority of MPs and peers. Hunt et al found that at the Commons, 51% of references to JCHR's reports had been made by 10 MPs. However, within this universe, 38% of those references had been made only by two MPs who happened to be JCHR members. This is quite a narrow number of MPs engaging with JCHR's reports. At the Lords, the study identified five high frequent users of JCHR's reports, four of which were committee members. However, by contrast to the Commons, there were other 28 "medium" users. Both high and medium frequent users accounted for 76% of total references to JCHR's reports at the Lords. This represents a significantly higher number of users than at the Commons. However, considering that the upper chamber is composed of about 800 peers, the number of peers engaging with JCHR's reports is quite small.

A fourth and final point emerging from the literature is that the impact of constitutional committees' reports is dependent upon the salience of constitutional issues during the passage of government bills. Gover and Russell, for instance, found that constitutional committees' influence was higher in debates about controversial bills which raised issues of constitutional significance, such as the Identity Cards Bill[14] and the Public Bodies Bill.[15] Other political considerations, such as the position of the main parties on the issues, the degree of government commitment to its policies, among other issues, may also be relevant.[16]

Before moving on to discuss constitutional committees' influence on legislative outcomes, I would like to briefly identify some reasons why their impact on parliamentary deliberations is rather modest. The legislative process, especially at the Commons, is mainly a forum for policy debates and political contestation. This leaves

[13] Le Sueur and Simson Caird, 'The House of Lords' (n 11), 292.
[14] Identity Cards HC Bill (2005-06) [9].
[15] Public Bodies HL Bill (2010-11) [25]. See Gover and Russell, *Legislation at* Westminster (n 8), 218.
[16] See for instance Janet Hiebert's analysis of the impact of LSCG in the Canadian context in Janet Hiebert, 'The Charter's Influence on Legislation: Political Strategizing about Risk' (2018) 51 Canadian Journal of Political Science 727.

little room for principled debate about issues of constitutional significance. As argued in Chapter Two, parliamentary debates in the lower chamber are dominated by partisan politics, meaning, a two-sided confrontation between different policy alternatives. Furthermore, the executive exerts significant control of the legislative process. On the other hand, MPs struggle to grasp constitutional issues, due to the technical nature of these considerations. These are general reasons why the Commons does not fully engage with constitutional considerations. Yet, there are additional reasons that undermine the ability of constitutional committees' reports to exert influence at parliamentary debates in the lower chamber.

Firstly, according to the Guide to Making Legislation, bills that have major constitutional implications should begin their passage through Parliament at the Commons.[17] This means that in most cases, although not all, the Commons will not benefit from having access to constitutional committees in advance of a bill's committee stage. The SCC normally reports before the bill reaches its second reading at the Lords.[18] Likewise, the DPRRC usually reports before the committee stage at the Lords.[19] Timing is essential for LSCG to flourish. If a bill starts its passage at the Commons, MPs will not benefit from SCC and DPRRC's reports in advance of the committee stage. Hence, the chances of MPs engaging in informed debate about the constitutional implications of bills will be lower, as they will lack the time and resources to address them. The SCC and the DPRRC are aware of this problem. Due to the significance of the constitutional issues involved in the Brexit process, as an exceptional measure, they have published some reports in advance of the Commons' committee stage. [20]

[17] Cabinet Office, *Guide to Making Legislation* (July 2017), at para 21.20. Consider also that flagship bills and those having major spending implications are also introduced at the Commons (ibid, at para 27.1). There are pragmatic reasons for this, as the Parliament Acts 1911 and 1949 only applies to bills introduced at the Commons.

[18] Select Committee on the Constitution, *Sessional Report 2009-10* (HL 2010-11, 26), Appendix 1.

[19] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (HL 2017-19, 22), at para 6.

[20] The SCC and the DPRRC reported on the European Union (Withdrawal) Bill before committee stage at the Commons. See ibid; Select Committee on the Constitution, *European Union (Withdrawal) Bill: Interim Report* (HL 2017-19, 19). The DPRRC took this measure in the case of the Fisheries Bill and the Agriculture Bill. See Delegated Powers and Regulatory Reform Committee, *39th Report: Fisheries Bill; Healthcare (International Arrangements) Bill; Divorce (Financial Provision) Bill [HL]; Prisons (Interference with Wireless Telegraphy) Bill* (HL 2017-19, 226); Delegated Powers and Regulatory Reform Committee, *Agriculture Bill* (HL 2017-19, 194). Note also that both the DPRRC

A second procedural reason is related to one of the findings mentioned above. The committee stage of a bill at the Commons takes place in public bill committees. These committees normally consist of between 18 to 30 MPs.[21] This small number of MPs diminishes the impact of constitutional committees at the Commons. I have already noted that constitutional considerations are a niche interest. Hence, the lower the number of MPs conducting detailed scrutiny of bills, the lower the chances that the Commons will engage with constitutional considerations during the detailed consideration of a bill. The data suggest that there is little engagement by MPs with SCC and DPRRC reports. Yet, even in the case of the JCHR, the chances of a frequent user and/or a JCHR committee member being appointed as a member of a public bill committee will be low. This also decreases the chances of public bill committees engaging with matters of constitutional significance. Although by convention bills of "first class constitutional importance" should have their committee stage at the Commons in a committee of the whole house, the application of this convention has been patchy at best.[22] By contrast, at the Lords, the committee stage takes place in a committee of the whole house. Hence, more chances for the Lords to be confronted with a committee report during the detailed consideration of a bill, as constitutional committee members and "constitutionally-aware" peers will attend the debate.

Now it is time to move on and explore whether constitutional committees are shaping legislative outcomes. Firstly, this analysis must go beyond a purely formalistic assessment. The formal stages of the legislative process are largely controlled by the government. This includes the legislative agenda, the timing of bills, successful amendments and which bills make their way into the statute book. Judged from this point of view, not only constitutional committees but also Parliament as a whole would be considered as largely ineffective. However, that analysis is inadequate. Political scientists argue that a qualitative analysis suggests that Parliament does shape legislative outcomes. Research conducted by Gover and Russell claims that most

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and the SCC reported on the Taxation (Cross-border Trade) Bill, even though the Lords do not have powers to amend supply bills. See Delegated Powers and Regulatory Reform Committee, *11th Report Taxation (Cross-border Trade) Bill and others* (HL 2017-19, 65); Select Committee on the Constitution, *Taxation (Cross-border Trade) Bill* (HL 2017-19, 80).

[21] Simon Patrick and Mark Sandford, *House of Commons Background Paper: Public Bills in Parliament* (House of Commons Library SN/PC/06507, 17 December 2012), 9.

[22] Robert Hazell, 'Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997-2005' [2006] Public Law 247, 248ff. See also Chapter Three above.

government amendments are reactions that address concerns voiced by MPs and peers. This includes concessions and responses to non-government amendments, which in turn may be inspired by constitutional committees' recommendations.[23] For these reasons, assessing the capacity of constitutional committees to shape legislative outcomes involves conducting a qualitative analysis of the impact of their recommendations on government amendments. These amendments may be either a direct response to constitutional committees' recommendations, or a response to MPs' concerns or non-government amendments, which in turn may be inspired or overlap with constitutional committees' remarks.

This qualitative analysis is highly complex, as the attribution of causation is a matter of lively debate among political scientists.[24] Endeavouring to overcome these difficulties, Gover and Russell claim to have found evidence of select committees' influence on legislative outcomes. Their research is based in a case study of twelve bills. They found a total of 300 successful changes to these bills during the legislative process, and argued that one-sixth of them "involved some kind of committee influence".[25] Gover and Russell argued that among all select committees, constitutional committees are the most influential.[26] However, there are noticeable differences between these committees in terms of their capacity to shape legislative outcomes. By a significant margin, the DPRRC is the most successful constitutional committee.[27] This finding confirms previous figures referenced by Russell back in 2013. She noted that according to the DPRRC's own data, between 80 to 85% of its recommendations had been adopted through government amendments.[28] Further

[23] Meg Russell and others, 'Actors, Motivations and Outcomes in the Legislative Process: Policy Influence at Westminster' (2017) 52 Government and Opposition 1; Meg Russell, Daniel Gover and Kristina Wollter, 'Does the Executive Dominate the Westminster Legislative Process?: Six Reasons for Doubt' (2016) 69 Parliamentary Affairs 286; Gover and Russell, *Legislation at Westminster* (n 8).

[24] Gover and Russell, *Legislation at Westminster* (n 8), 209ff; Donald and Leach, *Parliaments and the European Court of Human Rights* (n 5), 109-10.

[25] Gover and Russell, *Legislation at Westminster* (n 8), 219.

[26] This finding is not surprising. As noted in chapter two, by contrast to the Commons' departmental select committees, constitutional committees are directly involved in legislative scrutiny of government bills.

[27] However, Gover and Russell warn that some concessions to the DPRRC might be prefabricated, and part of the government's parliamentary handling strategy. By doing this, the government shows a sense of goodwill and allows backbenchers or opposition members to appear as wining a point. See Gover and Russell, *Legislation at Westminster* (n 8), 222-23.

[28] Meg Russell, *The Contemporary House of Lords Westminster - Bicameralism Revived* (Oxford University Press 2013), 219-20. See also Philippa Tudor, 'Secondary Legislation: Second Class or Crucial?' (2000) 21 Statute Law Review 149.

evidence of DPRRC's influence is provided by the Guide to Making Legislation. The Guide demands that bill teams "seriously consider" whether the government should accept the DPRRC's recommendations.[29] No equivalent statement is made in regards to the SCC and the JCHR.

Neither the JCHR, nor the SCC can claim this degree of influence. Janet Hiebert found that once the government makes up its mind about the policy and the bill's compatibility with Convention rights, it is highly unlikely that ministers will introduce substantive changes in response to a critical JCHR report.[30] No studies have been conducted to assess the impact of the SCC in legislative outcomes, apart from that of Gover and Russell. These authors found evidence of SCC's influence during the passage of the Identity Cards Bill,[31] the Welfare Reform Bill[32] and the Public Bodies Bill.[33] More detailed case studies by Le Sueur and Simson Caird found evidence of SCC's influence in legislative outcomes of the Legislative and Regulatory Reform Bill[34] and the Health and Social Care Bill.[35] However, these instances, although prominent, are not necessarily representative. Further research on the impact of SCC's reports in legislative outcomes remains pending.

To sum up, the evidence points to a rather modest capacity of constitutional committees to shape legislative outcomes. Among the three constitutional committees,

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[29] Cabinet Office, *Guide to Making Legislation* (n 17), at paras 16.14-8. However, cf with the much more assertive language of the 2015 Guide. See Cabinet Office, *Guide to Making Legislation* (July 2015), at para 16.17: "It is usual for the Government to accept most, if not all, of the DPRRC's recommendations but any changes to the bill as a result must nonetheless be cleared through the PBL Committee in the normal way, and may also require clearance through the relevant policy committee at Cabinet."

[30] Janet Hiebert and James Kelly, *Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom* (Cambridge University Press 2015), 299-300; Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' (n 10), 50-2. See also Francesca Klug and Helen Wildbore, 'Breaking New Ground: The Joint Committee on Human Rights and the Role of Parliament in Human Rights Compliance' [2007] European Human Rights Law Review 231. Francesca Klug, on account of the JCHR's low capacity to shape legislative outcomes, recommended that the committee expand its work to pre-legislative scrutiny of draft bills, in the hope that at earlier stages of policy-making the JCHR may exert more influence. See also Joint Committee on Human Rights, *The Committee's Future Working Practices* (2005-06, HL 239, HC 1575).

[31] See footnote 14.

[32] Welfare Reform HC Bill (2005-06) [208].

[33] See footnote 15. Gover and Russell, *Legislation at Westminster* (n 8), 222-3. For a more detailed case study of the influence of the SCC in the Public Bodies Bill, see Jack Simson Caird, 'Parliamentary Constitutional Review: Ten Years of the House of Lords Select Committee on the Constitution' [2012] Public Law 4, 7-8.

[34] Legislative and Regulatory Reform HC Bill (2005-06) [111].

[35] Health and Social Care HC Bill (2010-11) [132]. Le Sueur and Simson Caird, 'The House of Lords' (n 11), 295-6 and 297-99.

the DPRRC is the most influential one. The JCHR and the SCC have not been as successful as the DPRRC in securing constitutionally inspired amendments. Their success will ultimately depend on the salience of constitutional issues before MPs, peers and the public. This throws into relief a key factor that helps understand the dynamics between political branches in the formal stages of the legislative process. The government's approach is largely pragmatic. If ministers are deeply committed to a policy, the government may not introduce substantive changes to a bill –for instance, to address constitutional concerns–, unless risking defeat at the Commons. Constitutional committees, therefore, will have a long route to follow. Firstly, they will need constitutionally aware peers or MPs willing to advance constitutional committee recommendations through non-government amendments. Alternatively, the committee chair and/or some prominent committee members may promote a non-governmental amendment. It is more likely that such amendments will resonate stronger at the Lords than at the Commons. If the Lords manage to defeat the government, then the ability of constitutional committee recommendations to shape legislative outcomes will depend on the response of the government or the Commons at the ping pong stage. This illustrates the difficulties constitutional committees encounter in shaping legislative outcomes.

The conclusion is that constitutional committees have not been able to exert significant influence at the formal stages of the legislative process, both in terms of influencing parliamentary debates and shaping legislative outcomes.

2. Preventive influence and political self-restraint: constitutional committees' capacity to exert subtle and informal influence

I have noted that most theoretical expectations placed on constitutional committees focus on their capacity to exert influence at the formal stages of the legislative process. Nevertheless, political scientists have shown that select committees, including constitutional committees, have a preventive influence.[36] Their very existence can motivate political self-restraint at the early stages of policy-making and legislative drafting. Although this influence is subtle and difficult to measure,

[36] Gover and Russell, *Legislation at Westminster* (n 8), 227-8; Meghan Benton and Meg Russell, 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons' (2013) 66 Parliamentary Affairs 772; Russell, *The Contemporary House of Lords* (n 28), 224ff. See also Hiebert's findings about the JCHR's preventive influence in Hiebert and Kelly, *Parliamentary Bills of Rights* (n 30), 296ff.

empirical studies based on interviews with ministers and civil servants suggest that select committees' influence is significant. Political scientists note that at earlier stages of the policy development, governments are more willing to change their minds. Before the introduction of a bill, the government may adjust policy aspects without assuming major political costs.[37] For instance, David Feldman, former legal advisor to the JCHR, pointed out that

> "Fewer initiatives seemed to me to give rise to serious human rights concerns in bills introduced in the 2002-03 session of Parliament than was the case in the 2000-01 or 2001-02. Fewer provisions are now drafted in ways that leave rights subject, in my view, to inadequate safeguards."[38]

It is beyond the scope of this work to explore the degree of preventive influence that constitutional committees effectively exert. For the purposes of this thesis, I will accept at face value claims made by political scientists, as well as Feldman's position. My interest here is to advance an understanding of the operation of constitutional committees by exploring the reasons why they exert preventive influence. In my view, the reasons are threefold. Firstly, ministers have pragmatic reasons to prevent adverse constitutional committees' reactions. Secondly, civil servants have institutional reasons to anticipate constitutional committees' negative reactions. And thirdly, constitutional committees promote open government and transparency. The very fact that the government is required to think through the constitutional implications of its legislative proposals and to provide justifications for its decisions promotes political self-restraint. I will briefly describe these reasons in the same order.

The first reason is pragmatism. From a strategic point of view, ministers will have incentives to avoid a negative report from a constitutional committee report that may hinder the passage of their bills. The government knows that committees' reports will be in the public domain, accessible for consultation by parliamentarians and the

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[37] Hiebert and Kelly, *Parliamentary Bills of Rights* (n 30), 297. Note that the emphasis on pre-legislative scrutiny and consultation are premised on the assumption that Parliament and other stakeholders may be able to influence more substantially when governments are not fully committed to a policy or a given legislative scheme. For this very reason, the JCHR changed its working practices in the 2005-10 Parliament, in order to incorporate pre-legislative scrutiny of draft bills. See Joint Committee on Human Rights, The Committee's Future Working Practices (n 30). See also Klug and Wildbore, 'Breaking New Ground' (n 30), 240-41 and 248.

[38] David Feldman, 'The Impact of Human Rights on the UK Legislative Process' (2004) 25 Statute Law Review 91, 93. However, cf Hiebert and Kelly, *Parliamentary Bills of Rights* (n 30), 300. According to Hiebert's research, "Anticipation of a negative JCHR report does not appear to regularly divert government from pursuing a bill for which it is deeply committed, or influence its judgment about compatibility."

public. Since their reports represent the unanimous view of committee members from different political loyalties, constitutional committees may be able to appeal and mobilise a wider audience. Potentially, their recommendations may gain cross-party support among peers and MPs, including government backbenchers. This may put pressure on the government. Consider for instance the case of unhappy Coalitions or Minority governments, where a few backbench rebels may be enough to inflict a defeat at the Commons. To avoid political defeat or the appearance of making concessions that may be capitalised on by the opposition, the government will have incentives to anticipate constitutional committees' reactions. This may enable ministers to avoid criticism contained in negative committee reports that may spark further criticism at the floor of both Houses and possible backbench rebellions. In short, it is in the interest of the government to make the passage of bills smoother by preventing criticism from constitutional committees.

A second factor is institutional. The Guide to Making Legislation explicitly requires bill teams in charge of developing policy to anticipate constitutional committees' reactions. According to the Guide, bill teams must incorporate constitutional considerations as an integral part of the policy-making process, rather than as "a last minute compliance exercise".[39] The Guide contains chapters on compatibility with Convention rights[40] and on delegated powers,[41] which provide bill teams with essential information to address these matters. In both chapters, the work of the JCHR and the DPRRC features prominently.[42] Although there is no equivalent chapter on the constitution, the Guide does include a few paragraphs warning about the work of the SCC.[43] The Guide briefly instructs bill teams on the issues that may capture each committee's attention. Hence, government departments are subject to soft law requirements to consider carefully the prospects of constitutional committees closely scrutinising government's bills.

[39] Cabinet Office, *Guide to Making Legislation* (n 17), 113.
[40] Ibid, Ch12.
[41] Ibid, Ch16.
[42] See ibid, at paras 12.30-35 and 16.7-24. Note the Guide's explicit recommendation to anticipate the DPRRC's views at para 16.17.
[43] Ibid, at paras 35.12-15. The focus on these sections is on warning bill teams when bills are likely to attract the attention of the SCC.

A third factor is that constitutional committees effectively impose a requirement of transparency and a burden of justification on the government. Open government requirements have traditionally been essential for the effectiveness of political accountability mechanisms.[44] They act as a deterrent for the government to disregard constitutional considerations. The operation of constitutional committees has forced the government to move away from the inherent opacity of its internal procedures for making legislation.[45] By convention, the internal legal advice given by the Law Officers on the legality of government's measures cannot be disclosed.[46] Against that background, requirements such as issuing statements on compatibility with Convention rights, drafting explanatory notes and dedicated delegated powers and human rights memoranda, have partially disclosed information about the government's constitutional thinking.

Take for instance the case of Convention rights. Section 19 HRA imposes a requirement on ministers to express their view about the compatibility with Convention rights of every government bill. However, the HRA fell short of imposing a duty to disclose the reasons that supported the government's case for compatibility. The JCHR was aware that government departments were producing an internal human rights memorandum for the consideration of the Cabinet Office's Parliamentary Business and Legislation Committee ("PBL Committee").[47] These memorandums, which contain a "frank assessment" of each bill's vulnerability to legal challenges, have never been disclosed to the JCHR. As noted in Chapter Five, the quest for the government's justification of its compatibility assessments has been a constant concern of the JCHR.[48] Eventually the government agreed to supplement bald section 19 HRA statements of compatibility with reasoning supporting its conclusion. This reasoning is incorporated in the explanatory notes. However, when the issues are "too substantial", government departments prepare a detailed human rights memorandum.[49]

[44] As J.A.G. Griffith famously put it, "It is not by attempting to restrict the legal powers of government that we shall defeat authoritarianism. It is by insisting on open government." See J. A. G. Griffith, 'The Political Constitution' (1979) 42 Modern Law Review 1, 16.

[45] Jack Simson Caird, 'Public Legal Information and Law-making in Parliament' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018), 174; Hiebert and Kelly, *Parliamentary Bills of Rights* (n 30), 291.

[46] Cabinet Office, *Ministerial Code* (August 2019), at para 2.13.

[47] Cabinet Office, *Guide to Making Legislation* (n 17), at paras 12.8-13.

[48] Hiebert and Kelly, *Parliamentary Bills of Rights* (n 30), 293-95.

[49] Cabinet Office, *Guide to Making Legislation* (n 17), at paras 12.32.

The DPRRC also benefited from a dedicated memorandum. In this case, it was the government who committed itself in 1992 to supply the newly created Delegated Powers committee with a dedicated delegated powers memorandum justifying the scope of powers sought and the degrees of parliamentary scrutiny proposed.[50] However, the quality of those memorandums has been inconsistent, prompting the DPRRC's criticism. In 2014, the DPRRC undertook an inquiry into the quality of delegated powers memorandums, which resulted in further commitments by the government to improve its working practices, and in guidance issued by the committee to government departments.[51]

Both the JCHR and the DPRRC have benefited greatly from these dedicated memorandums. By contrast, the SCC cannot rely on a dedicated constitutional memorandum as the starting point of its scrutiny function. It can only rely on the information contained in the explanatory notes. A major difficulty for the SCC is that its remit is wider than in the case of other constitutional committees, as it covers all sort of matters of constitutional significance. The combination of the lack of a dedicated constitutional memorandum and its wide remit, prompts the Guide to Making Legislation to be less assertive on the work of the SCC.

Constitutional committees can pursue other instruments to press for open government and transparency. The government knows in advance that constitutional committees may demand additional information to conduct their scrutiny work. This can take the form of letters directed to ministers, or calling ministers and other officials to give evidence at committee meetings.[52] On the other hand, constitutional committees will rely on information provided by expert witness and other stakeholders to perform evidence-based assessments of the government's justification.[53] The government knows in advance that if it does not anticipate possible objections, it may face embarrassment at committee meetings and will be required to provide additional reasons. This shows that constitutional committees can enhance transparency and act as reason-demanding bodies, thus effectively requiring the government to think

[50] Select Committee on the Scrutiny of Delegated Powers, *First Report* (HL 1992-93, 57).
[51] Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (HL 2014-15, 39).
[52] See for instance Cabinet Office, *Guide to Making Legislation* (n 17), at para 12.31.
[53] Hiebert and Kelly, *Parliamentary Bills of Rights* (n 30), 299.

carefully about issues of constitutional significance and to justify its decisions. This constitutes, on its own, a motivation for political self-restraint.

In sum, there is evidence that constitutional committees exert preventive influence at the early stages of policy-making and legislative drafting. Political self-restraint is motivated by pragmatism, since ministers have incentives to avoid any constitutional debates that may obstruct the passage of their bills. It is also motivated by institutional requirements demanding civil servants to anticipate possible adverse reactions from constitutional committees. And finally, it is motivated by demands for transparency and justification imposed on the government. This shows that the influence of constitutional committees is not limited to the formal stages of the legislative process. These committees are also relevant at the pre-legislative stage.

3. The role of non-elected experts in the operation of constitutional committees

Politicians are not experts on constitutional matters. A major challenge for LSCG, which was anticipated in Chapter Two above, and was confirmed by the modest impact of constitutional committees at the formal stages of the legislative process, is the technical nature of constitutional arguments. Although some of the most prominent members of constitutional committees have legal expertise (see Chapter Two above), this is likely to be the exception rather than the rule. Constitutional committees are formed by members that come from different backgrounds. Hence, they are likely to have, at best, a general understanding of constitutional matters. For these reasons, the operation of constitutional committees is supported by parliamentary clerks and lawyers. Likewise, at government, Ministers will have –at best– a broad understanding of basic constitutional matters. They will need to rely on a wealth of policy and legal expertise drawn from policy officials and departmental lawyers working in bill teams, as well as lawyers working at the Office of the Parliamentary Council (herein, "OPC"). In performing their roles, these bureaucratic actors may act in consultation with the Law Officers. This section accounts for the role that non-elected experts at government and Parliament perform in the operation of constitutional committees. I will start by describing for the contribution of bureaucratic actors at government. Secondly, I will continue with that of clerks and legal advisors to constitutional committees. Finally, I will argue a significant part of the inter-institutional relationships between political branches of government that are at the

heart of constitutional committees' operation, are conducted between non-elected experts assisting both branches.

a. Intragovernmental constitutionality checks

Government departments delegate the development of policy on "bill teams", composed of policy officials, experts on the subject matter, and departmental lawyers. These civil servants provide the knowledge and legal techniques needed for politicians to achieve their policy objectives.[54] As a former Attorney General put it, departmental lawyers are the "day-to-day" guardians of legality.[55] They are in charge of making the case for the constitutionality of government bills.[56] Departmental lawyers will draft legal documents such as the Human Rights memorandum, the delegated powers memorandum, the memorandum on constitutional and legal issues, and the explanatory notes of every bill.[57] The Attorney General or the Solicitor General will look at these documents to assess whether the department has made a convincing case.[58] These materials will frame debates at the PBL Committee. Here, the Attorney General will advise the PBL Committee about the "readiness" of government bills and authorise its introduction.[59]

On the other hand, bill teams will develop a "Parliamentary Handling Strategy",[60] which shall cover the content of the bill and any other issues that parliamentarians may raise. Bill teams must anticipate any possible negative reaction to the bill during the formal stages of the legislative process. This includes possible negative constitutional committees' reports. Bill teams and civil servants are also in charge of advising on how to react to non-government amendments, and when to make concessions. If a constitutional committee demands additional information or justification, or if it questions ministers or civil servants in committee sessions, bill

[54] Mark Elliott and Robert Thomas, *Public Law* (2nd edn, Oxford University Press 2014), 192; Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009), 141.

[55] Dominic Grieve, 'The Role of Human Rights in a Law Officer's Work: Challenges Facing the HRA and the ECHR' (2012) 17 Judicial Review 101, 101.

[56] If they face difficult or politically sensitive issues, they may consult the Law Officers. See ibid, 101.

[57] Cabinet Office, *Guide to Making Legislation* (n 17), at para 3.23. It is worth noting that there is a "Government Legal Department" that assists government departments by providing legal advice on the development, design, and implementation of government policies, and work with the Parliamentary Counsel on primary legislation.

[58] Grieve, 'The Role of Human Rights' (n 55), 102.

[59] Ibid, 102.

[60] Cabinet Office, *Guide to Making Legislation* (n 17), at para 3.22, 6.22 and Ch20.

teams and departmental lawyers must support the government's case. These considerations show that departmental lawyers working hand in hand with policy officials at bill teams are key bureaucratic actors that engage with the work of constitutional committees. At early stages of the law-making process, they anticipate possible reactions, conduct internal constitutionality checks, and make the case for the constitutionality of bills in explanatory notes and memorandums. These materials are the starting point for constitutional committees' legislative scrutiny work.

There is a second group of non-elected bureaucratic experts that perform constitutionality checks on policy proposals. These are the OPC lawyers, who have a monopoly in legislative drafting in the government.[61] Departmental lawyers prepare policy instructions, and OPC lawyers translate them into legal language. This is a complex process which involves thinking carefully about the internal coherence of the bill, and its external coherence with the statute book.[62] In explaining the nature of this drafting process and its significance for upholding core Rule of Law values, Lord Sales claims that OPC lawyers discipline and refine "political will through the application of constitutional reason".[63] In his view, these lawyers protect values such as legal certainty, predictability, formal justice and equality, non-retrospectivity and basic standards of fairness. Similarly, Terence Daintith and Alan Page argue that OPC lawyers protect the integrity of the statute book, by upholding values such as non-retrospection, proper use of delegation and civil liberties.[64] OPC lawyers are key actors during the preliminary stages of a bill. The head of this service, the first parliamentary counsel, attends meetings at the PBL Committee, and therefore also advises on the legal and constitutional aspects of legislation, if needed. A key point of the OPC's work is to "give effect to the government's intention in a form capable of withstanding Parliamentary and later judicial scrutiny".[65] For these reasons, in performing their tasks, OPC lawyers will take into account constitutional committees'

[61] Writing 20 years ago, Terence Daintith and Alan Page argued that the OPC "is as close as our system has traditionally come to a check on the 'constitutionality' of legislation." See Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press 1999), 254.

[62] Phillip Sales, 'The Contribution of Legislative Drafting to the Rule of Law' (2018) 77 Cambridge Law Journal 630, 632-33.

[63] Ibid, 630.

[64] Daintith and Page, *The Executive in the Constitution* (n 61), 250, 254-56.

[65] Ibid, 250.

recommendations.[66] They may address committees' concerns and raise possible issues to government departments. In this sense, Dawn Oliver notes that OPC lawyers warn ministers when "aspects of a proposed bill (…) are not consistent with normal legal or constitutional values".[67] If disagreements arise, OPC lawyers may refer the issues to the law officers. This shows that, as departmental lawyers, OPC lawyers are also involved in the operation of constitutional committees.

Bill teams, departmental lawyers and lawyers at the OPC form part of a "bureaucratic system of internal legal accountability checks". As noted above, the hard work of assessing the constitutional implications of government legislation before its introduction to Parliament, is performed by these actors. There is a division of labour because Ministers are not equipped to perform these assessments. Instead, they are concerned with the political implications of bills, and with securing enough support at Parliament for their policies. On complex constitutional and legal matters, they defer to the advice given by government lawyers and OPC lawyers.[68] By contrast to Ministers, civil servants are legally bound to act with independence and objectivity.[69] They are subject to a series of institutional duties set out in statutory and soft law documents. In addition, as lawyers, they are also bound by their professional ethics to exercise an independent professional judgement.[70] The combination of these factors means that government lawyers and OPC lawyers will provide frank assessment about the legal and constitutional implications of proposed legislation. If they do not provide legal advice to the best of their knowledge, with professionalism, objectivity and independence, governmental lawyers and OPC lawyers will not retain respect from their political masters, Parliament and the public. The effectiveness of their advice will be called into question.[71]

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[66] See for instance Delegated Powers and Regulatory Reform Committee, *Special Report: Quality of Delegated Powers Memoranda* (n 51), at para 37.

[67] Dawn Oliver, 'Constitutional Scrutiny of Executive Bills' (2004) 4 Macquarie Law Journal 33, 45.

[68] Elin Weston, 'The Human Rights Act 1998 and the Effectiveness of Parliamentary Scrutiny' (2015) 26 King's Law Journal 266, 277.

[69] Section 7(4) Constitutional Reform and Governance Act 2000.

[70] Dawn Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defense of the Sovereignty of Parliament' in Gavin Drewry and Alexander Horne (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018), 311-2; Oliver, 'Constitutional Scrutiny of Executive Bills' (n 67), 42.

[71] Daintith and Page, *The Executive in the Constitution* (n 61), 256.

However, none of these bureaucratic actors enjoys veto power. Civil servants are ultimately accountable to ministers. They owe professional duties to their client, the government.[72] If Ministers are willing to include provisions against the legal or constitutional advice of government lawyers or OPC lawyers, these matters can be escalated and ultimately referred to the Law Officers. They have the final word on constitutional and legal matters at government. Consequently, bill teams and departmental lawyers have to consult them if doubts arise about "the legality or constitutional propriety of proposed primary (…) legislation" and about "the powers necessary to make proposed subordinated legislation".[73] By contrast to civil servants, Law Officers are politicians, but their role is to ensure that the government and ministers act lawfully and in accordance with the rule of law.[74] Because of their special position, they will mediate between lawyers and politicians,[75] resolving disputes and showing political sensitivity, while at the same owing respect to the rule of law.

In sum, there are bureaucratic non-elected government experts who advise ministers about the constitutionality and legality of government legislative proposals. Their role in assessing the constitutionality of government legislation is invigorated by the operation of constitutional committees, as these actors must anticipate possible negative reports. They are only advisors, and decisions about the content of legislation are ultimately political. However, if issues of political sensitivity and constitutionality arise, it will be for the Law Officers to decide. This shows that there is an internal system within government that performs constitutionality checks. It is based on the interaction between experts and politicians. The system protects ministers from possible criticism and adverse parliamentary reactions, as well as possible legal challenges that may frustrate their policy objectives. In doing so, it contributes to an appropriate assessment of the constitutional implications of bill proposals at government.

[72] Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defense of the Sovereignty of Parliament' (n 70), 312.

[73] Cabinet Office, *The Cabinet Manual* (October 2011), at para 6.6. See also David Howarth and Shona Wilson Stark, 'H.L.A. Hart's Secondary Rules: What Do 'Officials' Really Think?' (2018) 14 International Journal of Law in Context 61, 18.

[74] Cabinet Office, *The Cabinet Manual* (n 73), at para 6.4.

[75] Howarth and Stark, *'H.L.A. Hart'* (n 73), 17-8.

b. Parliamentary legal advisers

The operation of constitutional committees not only involves non-elected experts working in government. There are also non-elected experts who support the work of parliamentary constitutional committees. I already introduced them in Chapter Two above. It is now time to briefly expand on their role in the operation of constitutional committees. There are two main advisors. Firstly, parliamentary clerks. They perform a variety of tasks, such as managing and advising committees on matters of parliamentary procedure, briefing members on different subject matters, assisting members in dealing with witnesses and evidence, and advising committees to maximize their influence.[76] Secondly, parliamentary lawyers.[77] Here, there are differences between constitutional committees. The DPRRC is supported by parliamentary lawyers who work at the Counsel to the Chairman of Committees.[78] The JCHR employs two full time legal advisers, but draws one of them from the legal profession.[79] Finally, by contrast, the SCC employs two part-time learned legal academics.

Some of the most prominent members of constitutional committees have a legal background (see Chapter Two above). However, most members have only a general understanding or no knowledge about complex and technical constitutional matters. For this reason, legal advisors perform an essential role for the operation of constitutional committees, and exert significant influence among committee members.[80] This is accentuated by the nature of the tasks that the JCHR and the SCC entrust to their legal advisers.[81] Firstly, legal advisers have a direct influence in the

[76] Ben Yong, Greg Davies and Cristina Leston-Bandeira, 'Tacticians, Stewards, and Professionals: The Politics of Publishing Select Committee Legal Advice' (2019) 46 Journal of Law and Society 367, 11.

[77] Most in-House parliamentary lawyers were formerly employed by the government legal service. See Andrew Kennon, 'Brexit and the House of Commons' The Constitution Society <https://consoc.org.uk/wp-content/uploads/2017/05/Andrew-Kennon-Brexit-conference-notes.pdf> accessed 10 March 2018, 124.

[78] Andrew Kennon, 'Legal Advice to Parliament' in Alexander Horne, Gavin Drewry and Dawn Oliver (eds), *Parliament and the Law* (Hart Publishing 2013), 123.

[79] Usually, an experienced barrister or solicitor. See ibid, 124.

[80] Yong, Davies and Leston-Bandeira, 'Tacticians, Stewards' (n 76), 27.

[81] Note that these two constitutional committees have similar working methods: Joint Committee on Human Rights, *Future Working Practices* (n 30), at paras 22-3, and 27-42; Select Committee on the Constitution, *Sessional Report* (n 18), at Appendix 1. See also Le Sueur and Simson Caird, 'The House of Lords' (n 11), 290-2; Alexander Horne and Megan Conway, 'Parliament and Human Rights' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Hart Publishing 2018), 238-39.

committees' legislative scrutiny agenda, because they must conduct a sifting procedure to identify bills that have "significant" impact on Convention rights or on the constitution, respectively.[82] Secondly, as I will explain below, legal advisers may directly engage with departmental lawyers, and attend private meetings. In these meetings, they may anticipate objections that might arise during the passage of the bill, and/or point out some additional information that the committee may need to conduct LSCG. Thirdly, legal advisors may draft preliminary notes or briefings directed to committee members. These notes will enlighten their assessment. Finally, legal advisors draft reports that present the results of the committee's legal and constitutional analysis. These draft reports will then be circulated to committee members for approval. These numerous and critical tasks show that legal advisors have significant responsibility in the operation of constitutional committees.[83]

Considering the significance of legal advisers' role, it is important to question what sort of relationship they have with committee members. These lawyers are not subject to accountability from their political masters in the way that civil servants are. This raises questions about the position of legal advisors. Consider the following three points. Firstly, given that constitutional committees deal with highly technical constitutional matters, it is possible that committee members will have to defer to the advice provided by their legal advisers. Secondly, as argued in Chapter Three above, constitutional matters in the UK are essentially contested. There are different views about key constitutional questions. Sometimes it is challenging to distinguish technical advice from merits-based assessments. Thirdly, constitutional committees work on a consensual basis and do not record any dissenting views. By reading their reports, one may presume, at face value, that such reports represent the views of all committee members, and not merely those of its legal advisors. Yet, this same work method impedes identification of the degree of control that legal advisers exert over the workings of constitutional committees. Such issues raise concerns about the role of constitutional committees' legal advisors.

[82] Yet, their proposals are ultimately dependent on a decision of the committee chairman, in the SCC's case, or of the committee members, in the JCHR's case.

[83] Le Sueur and Simson Caird, 'The House of Lords' (n 11), 291; Kavanagh, 'The Joint Committee' (n 4), 118-19.

A recent study by Ben Yong, Greg Davies and Cristina Leston-Bandeira (herein, "Yong et al") sheds light on the relationship between committee members and their legal advisers. It provides a useful background for discussing the role of legal advisers. These authors argue that clerks and parliamentary lawyers are subordinated to select committees.[84] Yong et al claim that MPs and peers are the key actors within select committees because only they are capable of exerting influence, not their legal advisers. On the other hand, a key finding is that legal advisers interpret their relationship with committee members as a lawyer-client professional relationship.[85] This means that legal advisers provide advice to the best of their knowledge, subject to professional and ethical norms. This has two relevant implications. First, the legal adviser recognises the client's autonomy. Hence, it is ultimately incumbent upon committee members to decide what to do with the advice given. Even if legal advisers draft committee reports, committee members must appropriate this document.[86] By approving the draft, they make the legal advisers' provisional remarks their own remarks. This means that committee members take political responsibility for what the report states. Secondly, legal advisers will have an interest to protect their own independence.[87] This requires them to appeal to MPs and peers from the whole political spectrum. Otherwise, their reputation may be damaged, and they may be exposed to political criticism. It should be noted that among committee members, some may have legal expertise, and therefore those members may be able to flag issues regarding the advice provided. A similar role may be performed by parliamentary clerks. In addition, if legal advisers fail to account for the whole range of views on a given matter, they may be open to criticism from the legal community. Hence, the need to draw a line between technical constitutional considerations, on the one hand, and a more merits-based assessment, on the other. There are no sharp lines between these two arenas. However, by protecting the independence of their advice, and promoting the ability of committee members to form a view of their own, legal advisers will avoid being held responsible for their client's decision, and therefore, seeing their function politicised.

[84] Yong, Davies and Leston-Bandeira, 'Tacticians, Stewards' (n 76).
[85] Ibid, 13-14.
[86] Ibid, 17.
[87] Ibid, 17ff, especially 25.

In sum, legal advisers perform a critical function in the workings of constitutional committees. The highly technical nature of constitutional arguments demands a significant contribution in essential tasks, such as defining the committees' agenda and drafting reports. However, as in the case of the relationship between the government and bureaucratic non-elected experts, decisions will be taken by committee members, who are ultimately politically responsible for constitutional committees' remarks and recommendations.

c. Interactions between non-elected experts at government and Parliament

A final point is that the work of non-elected experts in government and in constitutional committees is largely collaborative. They interact informally and behind the scenes when assessing the constitutionality of bills through phone calls, emails and meetings. This shows that constitutional committees promote different layers of inter-institutional relationships between political branches of government. At political level, there are interactions when ministers are questioned by a committee in writing or at a committee session. There are also interactions when committees publish a report and the government formally responds, either in parliamentary debate or in writing. However, these are not the only avenues for interaction and dialogue. Bureaucratic experts and legal advisers to constitutional committees engage in dialogue. The Guide to Making Legislation encourages these interactions, because it suggests that civil servants make informal contact with their counterparts at constitutional committees.[88] Furthermore, the evidence suggests that informal discussions between civil servants and legal advisers are "clearly relatively commonplace".[89] This includes meetings between constitutional committees' legal advisers and bill teams. Considering the essential role that bureaucrats and legal advisers to constitutional committees perform, these interactions are a fundamental component of the successful operation of constitutional committees.

[88] For instance, see Cabinet Office, *Guide to Making Legislation* (n 17), at paras 12.34-5. Note that the Guide in its Appendix B contains the contact details of the three constitutional committees' clerks.

[89] Gover and Russell, *Legislation at Westminster* (n 8), 227-28; Le Sueur and Simson Caird, 'The House of Lords' (n 11), 290; Oliver, 'Constitutional Scrutiny of Executive Bills' (n 67), 43; Kavanagh, 'The Joint Committee' (n 4), 123; Horne and Conway, 'Parliament and Human Rights' (n 81), 239-40.

4. Revising normative expectations

This section opened by identifying the normative expectations for theoretical accounts of constitutional committees. These theories expect that by improving political engagement with constitutional arguments, constitutional committees will contribute to redress a perceived lack of democratic legitimacy of constitutional arguments, and will enhance political accountability mechanisms. To tests these ideas, I reviewed the relevant literature about the impact of constitutional committees on parliamentary deliberations, and on shaping legislative outcomes. Literature suggests that constitutional committees have a modest impact on parliamentary deliberations, especially at the Commons. Similarly, constitutional committees, except for the DPRRC, have a rather modest influence in shaping legislative outcomes.

These findings suggest that when assessing the contribution of constitutional committees, attention should be paid not only to the formal stages of the legislative process, but also to the pre-legislative stages of policy-making and legislative drafting. Thus, evidence indicates that constitutional committees have had a preventive influence on the government. Their very existence has motivated political self-restraint on the part of ministers, and obligated government departments to incorporate constitutional considerations as an integral part of the policy-making and legislative drafting process.

When thinking about this preventive influence, the role of non-elected experts who assist both the government and constitutional committees was thrown into relief. The last part of this section provided an account of their contribution. I argued that bill teams and government departments undertake the hard work of making the government's case for the constitutionality of its bills. This includes anticipating possible negative reactions from constitutional committees. In performing this role, they are assisted by OPC lawyers, who also take into account constitutional committees' recommendations when drafting legislation. When difficult and/or politically sensitive issues arise, the Law Officers also get involved. I argued that these actors are part of a system of internal legal accountability checks on government's legislative proposals. This system is reinvigorated by constitutional committees. Non-elected experts also assist constitutional committees. Parliamentary clerks and lawyers perform many tasks. Yet, the significant responsibilities that shouldered by

constitutional committees legal advisers comprised the main focus. According to the JCHR and the SCC's own accounts of their working practices, legal advisers perform an essential role. They define the committee's legislative scrutiny agenda, interact informally with government civil servants, brief committee members, and draft reports. Finally, I argued that constitutional committees facilitate a series of interactions and dialogue between the government and Parliament. Although some are conducted by politicians, a significant part of such inter-institutional interactions take place informally and behind the scenes, between non-elected experts.

These findings suggest that theoretical accounts of constitutional committees should take care not to overstate the role of politicians, and not to understate the role of non-elected experts advising both government and Parliament. A practice-based account of constitutional committees must look at their operation from different angles. The most accurate rendering, then, must consider constitutional committees' contribution to LSCG as part of a broader system of inter-institutional relationships between government and Parliament to assess the constitutional implications of legislation. This system operates from the earlier stages of policy-making, and throughout the formal stages of the legislative process. At different stages, different actors get involved. These include not only politicians at government and Parliament, but notably, non-elected experts advising the government and constitutional committees. The evidence reviewed in this section suggests that theoretical accounts would do well to avoid placing too much faith in the capacity of constitutional committees to foster political engagement. That evidence also suggests that without accounting for the role of non-elected experts, and the interactions and collaborative work that takes place between them, it is not possible to have a proper grasp of the operation of constitutional committees.

III. Reconsidering the place of politics in Legislative Scrutiny on Constitutional Grounds

My practice-based account of constitutional committees has highlighted key aspects of its operation. Notably, it has become apparent that the place for politics in LSCG is limited. In this section, I discuss the theoretical implications of these findings by looking at three issues. Firstly, whether constitutional committees should transform parliamentary deliberations at Parliament. Secondly, how constitutional committees

fit within UK-style constitutionalism. Finally, what is the source of legitimacy of constitutional committees' remarks and recommendations.

1. **Do we need more constitutional deliberation among politicians?**

Constitutional committees are expected to improve deliberation among politicians on matters of constitutional significance during the passage of bills. However, empirical evidence reviewed here portrays quite a different picture of constitutional committees' outcomes. Although these committees do improve constitutional deliberation, it is not necessarily deliberation among elected politicians. Undoubtedly, that constitutional committees do engage in a deliberative process. There are discussions between committee members, assisted by their legal advisors. Constitutional committees gather and assess evidence from a variety of constitutional experts, political scientists, pressure groups and stakeholders, among others. Committee members question ministers and civil servants, and pressure the government to provide justification for its decisions. Secondly, as discussed above, constitutional committees have had an impact on parliamentary deliberations at the Lords. The SCC and the DPRRC, as Lords based committees, mainly influence debates at the upper chamber. While the JCHR is a Joint Committee, engagement with its reports is qualitatively and quantitatively superior at the Lords than at the Commons. This shows that the deliberative impact of constitutional committees not only takes place within the confines of committee sessions. Their remarks and recommendations also inform parliamentary debates at the Lords.

Thirdly, constitutional committees have also prompted constitutional deliberation among bureaucratic actors. The mere prospect of adverse reaction from a constitutional committee has reinvigorated internal governmental constitutionality and legality checks. Bill teams, government lawyers and OPC lawyers, assisted by the Law Officers, are alert to the constitutional implications of government legislation. There is a wealth of constitutional deliberation among bureaucratic experts. There is also constitutional dialogue and deliberation between these bureaucratic non-elected experts and constitutional committee legal advisers, which takes place informally and behind the scenes. In addition, there is further constitutional deliberation and dialogue when ministers and civil servants are questioned. Dialogue also occurs when the government responds to a constitutional committee's report, engaging with its

reasoning and recommendations; and in certain cases, addressing in full or in part, constitutional concerns raised by its bills.[90]

However, in section II above, I concluded that constitutional committees have been unable to mainstream constitutional considerations among elected politicians at government and at the Commons. The data suggests that ministers tend to defer matters of constitutional significance to departmental and OPC lawyers. Their focus is on the political dimension of bills. At the Commons, constitutional committees' reports have had a rather modest impact on debates, as MPs are mainly concerned with policy and political confrontation.[91] This leaves little room for debate about the constitutional issues raised by government legislation. There may be instances in which MPs truly engage with constitutional arguments. However, these are the exception rather than the rule. Constitutional committees have been unable to position constitutional considerations at the heart of parliamentary debates at the Commons. They have not had a "transformative" effect on parliamentary debates at the Commons. Scholars recognise these limitations.[92] As things stand, the impact of constitutional committees is mainly dependent on the Lords taking interest in these matters, advancing constitutionally-inspired amendments, and reaching a compromise with the government or defeating it.

These remarks raise a normative question, namely, whether constitutional committees should transform politics at ministerial level and at the Commons into a more principled and value-based exercise dominated by constitutional considerations. In answering this question, the first point to note is that my practice-based account has shown that in the UK experience, a system of constitutional committees has not been able to deliver the promise of routine engagement by politicians with the constitutional implications of legislation. These institutional devices have not overcome the

[90] These two instances of dialogue are essential for constitutional deliberation, as one of the key tenets of deliberative constitutionalism is the disposition of the participants to change their minds (see Chapter One above).

[91] This point had already been anticipated as highly likely in Chapter Two.

[92] See Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' (n 10), who argues that the JCHR has not changed the processes of political decision-making. See also Simson Caird and Oliver, 'Parliament's Constitutional Standards' (n 6), 69, who argue that the government and the Commons are dominated by a culture of resistance and partisanship which "does not leave much room for a consensual, principled and detailed approach to the scrutiny of legislation to develop."

For more optimistic views about the prospects of the JCHR, see Kavanagh, 'The Joint Committee' (n 4), 134ff; Hunt, 'Introduction' (n 1).

challenges discussed in Chapter Two. That chapter noted that House of Commons is an overburdened chamber that must discharge a variety of constitutional functions, other than legislative scrutiny, let alone on constitutional grounds. Furthermore, it argued that among the chief constitutional functions of the Commons, the very idea of political confrontation between the two main political forces is fundamental for the House to perform its functions of electing the government, expressing the opinion of the people on matters of public significance, informing public debate and educating citizens. There is an inherent tension between constitutional considerations and partisan interests that is at the heart of the failure of constitutional committees to exert significant influence at parliamentary debates.

Nevertheless, my practice-based account has shown that this problem, namely, the modest engagement by elected politicians with matters of constitutional significance, is not as acute in this jurisdiction as it may be in other countries. This, because the evidence shows that constitutional arguments are nevertheless being channelled to the law-making process, thanks to the influence that constitutional committees exert on the Lords and on civil servants. In countries that lack constitutional committees, and/or a less partisan upper chamber, these issues may prove more pressing.

Finally, it should be noted that, although a system of constitutional committees in the UK is far from achieving its theoretical objectives, over constitutionalising political debates might have negative effects. If the normative ideal of a legislature is to act as deliberative and pluralistic presentative assembly, then a hard legalistic LSCG conception can prove problematic as a way of constitutionalising political debates. As noted in Chapter Four, hard legalistic LSCG conceptions can have a negative impact on political deliberation. On the other hand, since it requires a highly specialised knowledge of the intricacies of legal doctrines developed in case law, it is unlikely to operate as a model that fosters political ownership of the constitution. Rather, politicians may not feel confident to challenge these doctrines, as this could be interpreted as an act contrary to the Rule of Law, the independence of courts, and as outside their areas of expertise. A hard legalistic conception further reinforces the inherent “elite” and “expert” nature of constitutional considerations. By contrast, a more nuanced approach to LSCG may present constitutional standards as highly

relevant, but defeasible, considerations that shall be weight against other relevant considerations. While it remains true that politicians will lack expertise and time to understand constitutional considerations, the mediating role of constitutional committees publishing simple and clear reports could prove helpful. Such approach may foster confidence among elected politicians about the significance of their views when assessing the merits of government legislation.

2. How do constitutional committees fit within UK-style constitutionalism?

It has been argued that constitutional committees fit within the UK constitutionalism "political style" because they encourage elected politicians to scrutinise legislation in the framework of the very constitutional principles and procedures underpinning the UK political process.[93] However, as this chapter has shown, this claim is problematic because elected politicians are not significantly engaged in LSCG in the UK. Therefore, it is appropriate to discuss how constitutional committees fit within UK-style constitutionalism. In this section, I provide an alternative explanation for this.

I have argued that LSCG can be understood in different ways. In most cases, it is about assessing the constitutional implications of government legislation. This requires taking seriously the existence of "non-legal" limits on Parliament's theoretically supreme legislative powers. Parliament can assess legislation against a wide range of constitutional considerations, such as principles, values, case law, conventions and political practices and even highly regarded scholarly contributions. In the UK, this body of considerations can be interpreted either as benchmarks or standards to assess "constitutional legitimacy", as opposed to the legality of legislation; or alternatively, as prudential reasons to defer to alternative sources of political authority in order to prevent political conflict and maintain the unity of the state. In either of these accounts about the nature of these "non-legal" limits, the role of constitutional committees is to employ these constitutional materials to constantly remind politicians about the need for self-restraint in the exercise of their law-making powers.

Seen in this light, constitutional committees are one conduit through which these constitutional benchmarks or prudential reasons are channelled to political actors.

[93] Simson Caird and Oliver, 'Parliament's Constitutional Standards' (n 6), 70.

Constitutional committees contribute in different ways, by recommending procedural measures to enhance the legitimacy of legislation, or by engaging with the content of bills. In the latter sense, committees may recommend amendments that seek to achieve the same policy objectives, but in a more "constitutionally legitimate" way. Constitutional committees may recommend that politicians avoid certain courses of action, or to prevent undesirable effects. They provide reasons for legislative action. Hence, the main way in which constitutional committees channel constitutional considerations is by operating as "reason-giving" bodies which provide good constitutionally grounded reasons to legislate in certain ways, and/or to avoid legislating in other ways. However, constitutional committees also operate as conduit for constitutional considerations because they are "reason-demanding" bodies. They impose a burden of justification on the government. In doing so, constitutional committees reinvigorate internal governmental constitutionality checks on legislative proposals. Here, these are indirect conduits, because civil servants directly operate as a check on the exercise of political power by ministers.[94] In these two ways, constitutional committees seek to prevent the political system from exerting too much strain on the constitution.

This role conforms to the UK-style constitutionalism. As some constitutional scholars have argued, a critical feature for the healthy operation of the British constitution is that all branches of government exercise self-restraint, comity, and show mutual exhibitions of respect.[95] Constitutional committees are one of many mechanisms through which the UK constitution demands self-restraint from political branches of government.

3. The legitimacy of constitutional committees as an accountability mechanism

My practice-based account suggests that constitutional committees' legitimacy claims cannot rest on the fact that they promote political ownership of the constitution. Although constitutional committees possess many positive features, it is important to

[94] Martin Loughlin, *The British Constitution* (Oxford University Press 2013), 60-61.

[95] Mark Elliott, 'Interpretative Bills of Rights and the Mystery of the Unwritten Constitution' [2011] New Zealand Law Review 591; Mark Elliott, 'Legislative Supremacy in a Multidimensional Constitution' in David Feldman and Mark Elliott (eds), *Cambridge Companion to Public Law* (Cambridge University Press 2016), 90ff; Oliver, 'Parliament and the Courts: A Pragmatic (or Principled) Defense of the Sovereignty of Parliament' (n 70).

examine their legitimacy. This is especially so in the current context of mass democracy, with continued claims against the political legitimacy of the appointed House of Lords, and contested views regarding the British constitution. Here, I argue that constitutional committees' claims to authority can be justified in a variety of reasons.

Firstly, it should be noted at the outset that democratic legitimacy concerns about the technocratic character of constitutional committees' operation in this jurisdiction must be put in perspective. Constitutional committees lack vetting powers, their recommendations are merely advisory. In those cases where constitutional committees manage to inspire peers' amendments, and then the government suffers a defeat at the Lords, there is always an opportunity at ping pong stage to water down or revert the amendment, provided that the government manages to assert its parliamentary majority at the Commons. Although there is no rule limiting the number of exchanges in case of disagreement between both chambers, the constitution recognises final legislative authority to the Commons.

While this is true in theory, an argument could be made that if the government does not routinely revert constitutionally-inspired amendments, this suggests that constitutional committees' recommendations have become the facto binding, thereby raising concerns about a technocratic imposition over the political branches of government. Thinking in terms of the evidence available, this argument would only carry weight in the case of the DPRRC, which is the most successful constitutional committee in terms of shaping legislative outcomes. Yet, the evidence suggests a more complex picture. Daniel Gover and Meg Russell have suggested that many of the DPRRC's recommendations adopted by the government do not involve a real concession, and may well be part of its parliamentary-handling strategy.[96] For instance, if the government accepts a DPRRC's recommendation to upgrade from the negative to the affirmative procedure, this does not involve any significant risk to its policy objectives. The DPRRC's degree of success, therefore, is not signalling that the power of reversal is largely ineffective, and therefore, that this committee is imposing its will over the democratically legitimate government.

[96] Gover and Russell, Legislation at Westminster (n 8), 222-23.

It seems to me that as important as the question of constitutional committees' effectiveness in shaping legislative scrutiny is the issue of whether the government engages in good faith with their recommendations. In this regard, a healthy constitutional democracy should hold a normative expectation that the government would not merely address constitutional committee recommendations in a pragmatic fashion. The government should not limit is analysis to a question about whether it would manage to revert at the Commons a Lords' constitutionally inspired amendment. This expectation should be stressed in circumstances where, as it is usually the case, constitutional committee recommendations do not endanger the achievement of policy objectives, and instead only seek the introduction of additional safeguards or alternative means to achieve them.

Secondly, constitutional committees can claim authority because they are reason-giving and expert bodies. Their recommendations are supported by reasons provided in clear and accessible reports. The political authority of constitutional committees' recommendations depends on the wisdom of the reasons provided. Hence, constitutional committees may struggle to exert influence and gain prestige if they adopt controversial views about the principles, values, conventions and practices of the constitution. If constitutional committees' recommendations are not supported by good reasons, they will be subject to criticism by politicians and the wider community of legal and political scholars, and this will inevitably damage their prestige and stance at government and Parliament. This also shows that constitutional committees' legitimacy draws from their expertise and specialist knowledge.

Thirdly, closely connected with their claims to expertise and specialist knowledge is their non-partisan and independent approach. The fact that its reports have cross-party support shows independence of judgment both from government and from partisan interests. This fosters the legitimacy of their recommendations, as reports may potentially appeal to a broad range of MPs and peers because they are presentative of an unanimity of views among their members.

Fourthly, constitutional committees may have a representative reinforcing effect when they call for evidence and interest groups promoting the views of under-represented groups manage to make their voices heard. This broadens the range of views that are taken into consideration in the decision-making process. This is

certainly the case of the JCHR and the SCC, which through regular calls for evidence are keen to listen the views of a wide spectrum of civil society.

Fifthly, the transparency of constitutional committees' procedures is another legitimating factor. As any other parliamentary select committee, constitutional committee sessions are broadcast online in the UK Parliament website. Furthermore, constitutional committee procedures are highly transparent. They make open calls for evidence to the public, experts and other stakeholders. If there are written submissions, constitutional committees make them available in their websites. They also make available transcripts of oral evidence sessions. In addition, constitutional committee reports reference their witnesses, thereby acknowledging those who influence their thinking. Finally, constitutional committee reports are published online and printed. For these reasons, constitutional committee procedures are subject to public scrutiny, thus operating openly and transparently.

Finally, my practice-based account has shown that constitutional committees' impact must be understood in close connection with the role of the Lords in the legislative process. The upper chamber's role is to act as a revising chamber that complements the Commons, specially by addressing those matters that are not considered properly by MPs. Among these matters, assessing the constitutional implications of legislation features prominently. If constitutional committees are assisting the Lords to discharge their role in law-making, then the legitimacy of these committees should also be seen in close connection with the legitimacy of the Lords as a revising chamber.

To sum up, constitutional committees do not necessarily rely on significant political involvement by elected MPs to provide legitimacy to their recommendations. However, as expert bodies that advice rather than vet Parliament, they can rely on the quality of the reasons given in support, their representation-reinforcing effect, the transparency of their procedures, and their close links with the role of the Lords in the UK law-making process.

IV. Conclusion

In conclusion, it is fair to say that LSCG is driven by a minority of non-elected experts and peers. Constitutional committees have not been able to exert significant

influence among elected politicians, both at government and at the Commons. However, it is through a series of interactions between Ministers and bureaucratic experts such as departmental lawyers and OPC lawyers; between these bureaucratic experts and constitutional committees' legal advisors; between constitutional committees and peers; and finally, between constitutionally-aware peers and ministers and MPs, that constitutional committees manage to channel constitutional considerations into political decision-making.

Some theoretical accounts expected constitutional committees to mainstream the constitution among politicians. Despite the introduction of a system of constitutional committees, these institutional devices have not managed to promote regular engagement among elected politicians with the constitutional implications of legislation. Nevertheless, this failure is not as acute in the UK as it may be in other countries lacking a system of constitutional committees. The UK constitution is providing alternative institutional arrangements that seek to promote political responsibility for decisions that have significant constitutional implications. Constitutional committees have managed to make a relevant contribution in this respect, although in subtle ways. They demand open government and impose burdens of justification on the exercise of law-making powers. This reinvigorates internal constitutional checks at government, whereby civil servants operate as a check upon the exercise of ministerial powers. On the other hand, constitutional committees operate as reason-giving bodies, which provide reasons for legislative action that seriously regard the existence of non-legal limits on the exercise of Parliament's theoretically supreme legislative powers. Although in this respect constitutional committees have not managed to feature prominently among elected politicians, the Lords may engage with their remarks and recommendations and press the government, either through compromise or defeat, and, in this way, cause the Commons to think twice. Constitutional committees, therefore, promote relationships of mutual institutional tension between elected politicians and non-elected experts on constitutional matters. Since they lack veto powers, and since they conform to UK-style constitutionalism, they may be an attractive institutional arrangement for channelling constitutional considerations into political decision-making. The fact that elected politicians do not fully engage their reports is not necessarily a sign of defective

operation, if we recall that constitutional committees have managed to enter into dialogue with bill teams, departmental lawyers, OPC lawyers, Law Officers and the Lords.

CHAPTER 7 CASE STUDIES

I. Introduction

This chapter contains two detailed case studies. The first discusses the contributions of the Select Committee on the Constitution ("SCC") and the Delegated Powers and Regulatory Reform Committee ("DPRRC") to legislative scrutiny of clauses delegating law-making powers to the executive during the passage of the European Union (Withdrawal) Act 2018. The second assesses the Joint Committee Human Rights' ("JCHR") contribution to the UK's political response to the adverse European Court of Human Rights ("ECtHR") judgment in the case of Hirst v UK (No. 2).[1] The purpose of these cases studies is to illustrate many of the claims made in previous chapters. I will divide my assessments on each case study into two parts. Firstly, a substantive assessment will look at the approach to the constitution and the conception of legislative scrutiny on constitutional grounds ("LSCG") underpinning the work of each committee. Secondly, a procedural assessment will look at the contribution of constitutional committees to deliberation, and to dialogue and collaboration between different parliamentary bodies, as well as with the executive. Each case study will have its own conclusion.

II. Delegated Powers in the European Union (Withdrawal) Act 2018

My first case concerns the issue of delegated powers in the European Union (Withdrawal) Act 2018. This Act repeals the European Communities Act 1972, putting an end to EU law as a source of domestic UK law. However, as 50 years of European Union ("EU") membership has left a profound mark on the statute book, to protect "certainty and stability", the Act retains the body of EU law and converts it into domestic law. As far as this analysis is concerned, a key point of this Act is to provide ministers with corrective powers to make changes to domesticated EU law to prevent deficiencies and failures in its operation on a post-Brexit context.

[1] *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41.

The Withdrawal Act was subject to unprecedented levels of legislative scrutiny,[2] scholarly debate[3] and public discussion. The Act raises a number of legal issues, including the status of retained EU law in domestic law, the status of the European Court of Justice's case law, and the implications of Brexit for the devolved governments, among others.[4] However, in this case study I will only focus on the issue of delegated powers, and will limit my analysis to legislative scrutiny contributions by the SCC and the DPRRC. Both committees were involved in legislative scrutiny of delegated powers since the early stages of the policy development and legislative drafting. I will compare their analysis and recommendations on two substantive dimensions. These are, on the one hand, their substantive analysis of the scope of delegated powers sought by the government; and, on the other, the degrees of parliamentary scrutiny proposed. Secondly, I will compare the procedures that each committee undertook as part of their legislative scrutiny work on the Withdrawal Bill.

1. Substantive assessment

My comparative assessment about the substantive dimension of the DPRRC and the SCC's legislative scrutiny work is twofold. I will identify their methodological approach to LSCG, and discuss what role constitutional standards perform in their analysis. To identify the differences between these two committees, I will provide insights about each committee's views at the different stages of the European Union (Withdrawal) Bill ("Withdrawal Bill"),[5] when appropriate.

[2] Whilst this chapter focuses on the SCC and the DPRRC, it is worth noting that many select committees performed legislative scrutiny of the Bill. See for instance, Exiting the European Union Select Committee, *European Union (Withdrawal) Bill* (HC 2017-19, 373); Select Committee on Procedure, *Scrutiny of Delegated Legislation Under the European Union (Withdrawal) Bill: Interim Report* (HC 2017-19, 386); Select Committee on Procedure, *Scrutiny of Delegated Legislation Under the European Union (Withdrawal) Act 2018* (HC 2017-19, 1395); Joint Committee on Human Rights, *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis* (2017-19, HL 70, HC 774). See also at the pre-legislative scrutiny stage: European Union Committee, *Brexit: Parliamentary Scrutiny* (HL 2016-17, 50), ch7; European Union Committee, *Brexit: Acquired Rights* (HL 2016-17, 82); Joint Committee on Human Rights, *The Human Rights Implications of Brexit* (2016-17, HL 88, HC 695); Secondary Legislation Scrutiny Committee, *Special Report: Submissions to the House of Commons Procedure Committee* (HL 2016-17, 165).

[3] Only in the UK Constitutional Law Association's blog there are more than 25 blog posts discussing the Withdrawal Act at various points in time.

[4] For a survey of these constitutional issues, see Paul Craig, 'Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82 Modern Law Review 319; Paul Craig, 'Brexit and the UK Constitution' in Jeffrey Jowell and Colm O'Cinneide (eds), *The Changing Constitution* (9th edn, Oxford University Press 2019).

[5] European Union (Withdrawal) HC Bill (2017-19) [5].

I will begin with the SCC. This committee did not undertake a detailed "line-by-line" analysis of every single clause of the Withdrawal Bill.[6] Instead, it looked at broader constitutional issues and trends arising from the Bill. Take three examples, all of them contained in the SCC's third and final report on the Withdrawal Bill. Firstly, this committee discussed the impact that ambiguities about the concept of retained EU law and uncertainties about its status as domestic law may have for delegated powers in legislation other than the Withdrawal Bill.[7] Secondly, the SCC expressed concerns about the effects that vaguely drafted provisions delegating powers may have in judicial review. The SCC pointed out that this might either render judicial review ineffective, or introduce uncertainty and promote costly litigation.[8] Finally, the SCC claimed that the upper chamber should prepare itself to cope with the significant increase in the volume of statutory instruments that will have to be scrutinised within a constrained timetable.[9]

A second manifestation of this methodological approach is reflected in the drafting of the reports themselves. The SCC's three reports are striking for their clarity and accessibility, while employing academic language. This is most likely due to the influence of its part-time academic legal advisors. SCC's reports read like an essay on the constitutional implications of the Withdrawal Bill. Consider for instance the structure of these reports, whose headings are organised around issues, principles or problems. Secondly, note that the SCC's analysis is enriched by discussion of hypothetical problems and issues that may arise in the application of the Withdrawal

[6] However, note that in its final report (Select Committee on the Constitution, *European Union (Withdrawal) Bill* (HL 2017-19, 69)), it came close to a "clause-by-clause" assessment. Note for instance, its analysis of the concept of deficiencies in clause 7 (ibid, at paras 168-76). This is probably due to the fact that most provisions of the Withdrawal Bill raised matters of constitutional significance.

[7] Ibid, at paras 21-22, 58-66, 168-76. The SCC noted that the concept of retained EU law was over inclusive, as it incorporated EU-derived domestic legislation, which would end up subject to ministerial corrective powers. As far as the status of retained EU law as domestic law, the SCC recommended to give to all retained direct EU law the status of primary legislation enacted on exit day. This would protect this body of law from clauses delegating powers in other legislation.

Another example of the degree of sophistication of the SCC's analysis is provided by their understanding of the nature and nuances of EU law. This underpins its pre-legislative scrutiny report recommendation to take the body of EU law as a whole, and divide its domestication process into two phases. See Select Committee on the Constitution, *The 'Great Repeal Bill' and Delegated Powers* (HL 2016-17, 123), at paras 38-42.

[8] Select Committee on the Constitution, *European Union (Withdrawal Agreement) Bill: Interim Report* (HL 2019, 21), at para 38; Select Committee on the Constitution, *European Union (Withdrawal) Bill* (n 6), at paras 172-76.

[9] Select Committee on the Constitution, *European Union (Withdrawal) Bill* (n 6), at paras 229-233.

Bill. Thirdly, consider that there are pressing concerns in these reports that run throughout the passage of the Bill. For this reason, the SCC constantly references its previous reports. Finally, the SCC supports its analysis on a wealth of evidence provided by constitutional experts and other stakeholders. This rich body of insights and views about the constitutional significance of the bill -including discussion on the relevant constitutional issues and the application and interpretative problems to which its provisions may give rise- enables the SCC to conduct a highly learned and wide-ranging constitutional assessment of the Withdrawal Bill.

At this point, I will proceed to study the role that constitutional standards perform in the SCC's assessment. In the committee's view, the Withdrawal Bill raises constitutional concerns about the appropriate distribution of law-making powers between Parliament and the executive.[10] The SCC has two broad principles in mind, namely, the separation of powers and the legislative supremacy of Parliament. The SCC developed the content of these principles by proposing a constitutional standard according to which matters of policy and issues of principle should be subject to full parliamentary scrutiny.

A good illustration of how the SCC develops this constitutional standard is provided by its pre-legislative scrutiny report. Here, the SCC proposed a scheme to allow ministers to make the necessary corrections to the body of EU laws to fit the UK's domestic legal framework, and to implement the result of the negotiations with the EU.[11] The point was to prevent ministers from implementing new policies desired by the government in areas that are within the competence of EU law without full parliamentary scrutiny. In the SCC's view, these changes should be brought forward by means of primary legislation.[12] The SCC recommended to take the body of EU laws as a whole and divide its domestication process into two phases. The first phase should be limited to perform the technical adaptation of domesticated EU law to fit into UK law on exit day.[13] A substantive constraint would apply, namely, that ministers will not make policy changes on the preserved EU acquis. Parliament should also provide ministerial powers to account for the outcome of the Article 50 of the Treaty of the

[10] Select Committee on the Constitution, *The 'Great Repeal Bill'* (n 7) at paras 45-49.
[11] Ibid, at paras 14-16, 28-51.
[12] Ibid, at para 49.
[13] Ibid, at paras 69-72.

European Union negotiations. Then, there will be a second phase, in which after serious thinking in government about the domesticated EU law, substantive changes may be brought forward on this body of laws, including the implementation of new policies in areas previously under the competence of EU law. The SCC argued that these changes should be brought forward by means of primary legislation, thus allowing for full parliamentary scrutiny.[14] The SCC argued that if the government did not follow these recommendations, then any statutory instrument that "amends EU law in a manner that determines matters of significant policy interest or principle" should be subject to a "strengthened scrutiny procedure".[15] This procedure should secure opportunities to revise the content of regulations to respond to parliamentary concerns. The SCC also went on to recommend the creation of a sifting procedure that gives Parliament the power to decide about the appropriate degree of parliamentary scrutiny,[16] and required that each statutory instrument be accompanied by an explanatory memorandum.[17] This second-best proposal, which focuses on parliamentary scrutiny, is also inspired by the same overarching standard. If ministers have powers to make policy changes, then a strengthened scrutiny procedure should secure proper parliamentary scrutiny, and the possibility that the content of regulations may change in light of parliamentary debates.[18]

In contrast, the DPRRC's approach to legislative scrutiny consists of a meticulous, line-by-line, black letter analysis of each clause in the Withdrawal Bill that delegates powers. Its analysis is more detailed and precise, when compared to the SCC. The structure of the DPRRC's reports is based on individual clauses (clause 7,

[14] In this phase, the government should also draw an appropriate division between primary and secondary legislation, depending on the nature of the subject matter. See ibid, at paras 67-68.

[15] Ibid, at paras 100-102.

[16] Ibid, at para 102.

[17] This memorandum should indicate whether the regulation of a mechanical nature or simply implements the Brexit deal, it should provide additional details about its object, and recommend a degree of parliamentary scrutiny. This should direct MPs and peers' limited time and resources only to those statutory instruments that merit careful consideration.

[18] Note that once the Withdrawal Bill was passed, the SCC continued making the case for a strengthened scrutiny procedure in its interim report. See Select Committee on the Constitution, *European Union (Withdrawal) Bill: Interim Report* (HL 2017-19, 19), at paras 53-55. However, note that in its final report, the SCC lowered its expectations, and argued in favour of the affirmative procedure in case of regulations making policy proposals. See Select Committee on the Constitution, *European Union (Withdrawal) Bill* (n 6), at para 219.

clause 8, clause 9, etc.), rather than issues.[19] It is worth noting that the DPRRC's reports contain examples and illustrations of possible abuses of powers[20] and a few references to precedent.[21] There are a few cases when the committee employs assertive normative language. For instance, in their analysis of ministerial powers to tax or to impose tax-like fees.[22] Another distinctive feature of the DPRRC's analysis is that it followed-up the progress of the Withdrawal Bill through the different stages of its passage, from its beginning to its end. Like the SCC, it published an interim report for the Commons and a longer report for the Lords.[23] Yet, it went on to publish two additional reports assessing government amendments at the Lords report stage of the Bill.[24] In these reports, the DPRRC discussed the government's amendments and responses to its recommendations.

From the point of view of constitutional standards, the DPRRC is less engaging than the SCC. Constitutional standards are implicit and remain at the background level. However, it is worth noting that the DPRRC explicitly frames the constitutional issues arising from the Withdrawal Bill in terms of striking an appropriate balance between the law-making powers of the executive and of Parliament.[25] The DPRRC's main

[19] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (HL 2017-19, 22); Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (HL 2017-19, 73).

[20] For instance, see Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (n 19), at para 8, 14, 17, 21, 22, etc. See also Delegated Powers and Regulatory Reform Committee, *Special Report: Second Submission to the House of Commons Procedure Committee on the Delegated Powers in the "Great Repeal Bill"* (HL 2016-17, 164), at para 9; Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (n 19), at paras 22, 23, 28.

[21] For instance, the following recommendations: loosely-drawn powers based powers should not be subject to ministerial discretion. Instead, they should be subject to a necessity test (Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (n 19), at para 24). Henry VIII powers should be subject to the affirmative procedure (Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (n 19), at para 53). The recommendation of the sifting procedure should be determinative (ibid, at para 58). Powers to "make consequential and transitional provisions" should be subject to the affirmative procedure (ibid, at para 38; Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (n 19), at para 73).

[22] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (n 19), at paras 42-46.

[23] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (n 19); Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (n 19).

[24] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill: Government Amendments* (HL 2017-19, 124); Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill: Further Government Amendments* (HL 2017-19, 128).

[25] Delegated Powers and Regulatory Reform Committee, *Special Report: Submission to the House of Commons Procedure Committee Inquiry on the Delegated Powers in the "Great Repeal Bill"*

concern is similar to that of the SCC, namely, the risk of ministerial powers encroaching into the domain of policy.[26] It is possible to track this concern in various DPRRC's remarks and recommendations. At the early stages of the Withdrawal Bill's policy-making, the DPRRC argued that the Bill should not "make major changes to policy or establish new legal frameworks in the UK beyond those which are necessary to ensure that the law will continue to function properly from day one."[27] The DPRRC criticised the government's White Paper on the Repeal Bill and the Withdrawal Bill itself, because its proposals could lead to the implementation of "significant and controversial policy matters" by means of secondary legislation.[28] The DPRRC employed the criterion outlined above as its overarching constitutional standard throughout the passage of the Withdrawal Bill.[29] On the one hand, this criterion informed the DPRRC's criticism of clause 7, Henry VIII powers, ministerial powers to define "exit day" and the limited scope of application for the affirmative procedure.[30] On the other hand, consider the following amendments proposed by the DPRRC, informed by this criterion:[31] the introduction of a "necessity test";[32] the removal of Henry VIII powers contained in clause 9 to amend or even repeal any Act of Parliament whenever passed, including the Withdrawal Bill itself;[33] the recommendation to tighten-up powers to "make consequential provision" in clause 17(1);[34] and the recommendation to deny ministerial powers to impose "tax-like" charges or to confer powers on public authorities to tax.

(HL 2016-17, 143), at paras 6, 13; Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (n 19), at paras 3, 4.

[26] Delegated Powers and Regulatory Reform Committee, *Special Report: Second Submission to the House of Commons Procedure Committee on the Delegated Powers in the "Great Repeal Bill"* (n 20), at paras 6-12.

[27] Ibid, at para 12. The DPRRC adopted the very own government's criterion. See Secretary of State for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9446, March 2017), at para 1.21.

[28] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (n 19), at paras 1, 2, 6, 9.

[29] Ibid, at paras 8, 9, 31.

[30] Ibid, at paras 9, 16, 18, 21, 24, 31, 33, 45, 47-49, 63, 65, 73, 102-103, 99-106.

[31] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (n 19), Annex 1.

[32] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (n 19), at paras 20-26; Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (n 19), at paras 6-12, 20, 37.

[33] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (n 19), at paras 44, 45, 48, 49.

[34] Ibid, at paras 71, 72.

2. Procedural assessment

In this section, I discuss the SCC and DPRRC's contributions to legislative scrutiny of the Withdrawal Bill from a procedural point of view. My assessment is twofold. Firstly, I assess their practices through the register of deliberative theories; and secondly, through the lenses of dialogic theories. Although both committees made a contribution in these respects, I will show that quality of the SCC's procedures is superior to that of the DPRRC.

The SCC's legislative scrutiny work on the Withdrawal Bill is a remarkable example of high quality deliberation. From the very early stages of the policy-making, the SCC launched a "call for evidence". The committee gathered a wide-range of written submissions.[35] Academics from the fields of Public Law, EU Law and Human Rights Law, among others, sent contributions. There were also written submissions by members of the legal profession, including former senior judges, the Bar Council, the Faculty of Advocates and the Law Society of Scotland. Parliamentarians also sent contributions to this inquiry. Among them, individual MPs and peers, the Leader of the Commons and the Leader of the Lords, the Leader of the Opposition in the Lords, other representatives of opposition parties and even the Lords' Secondary Legislation committee. The government Department for Exiting the European Union also sent written evidence. Finally, it is worth mentioning that a variety of stakeholders such as the Hansard Society, the Association for British Insurers and various non-governmental organizations such as the Public Law Project, submitted written evidence as well. These submissions had a significant impact on the SCC's assessments. The SCC works out and discusses this body of evidence throughout its reports. It is clear from reading its reports that the SCC's legislative scrutiny work benefited greatly from the views of experts, parliamentarians, the government and other stakeholders. There are traces of this body of contributions in the SCC's analysis of the provisions of the Withdrawal Bill, as well as in their discussion of the government justification for its proposals.

It is also worth mentioning the SCC's proactive stance since the very early stages of the policy-making. Hence, the SCC published a report even in advance of any Green

[35] See Select Committee on the Constitution, *European Union (Withdrawal) Bill* (n 6), Appendix 2: List of Witnesses.

or White Paper on the Withdrawal Bill,[36] with a view to influence the government's thinking and to call Parliament's attention to issues that were likely to be contested during the passage of the Bill. During the passage of the Withdrawal Bill, the SCC published two reports to improve the quality of deliberation, both at the Commons and at the Lords. Note also that these reports contained concrete recommendations to address the challenges raised by the Bill in more constitutionally-friendly ways.

This stands in sharp contrast with the DPRRC's analysis. This committee did not call for evidence. There is no reference or records in their reports of any evidence session, either to question ministers, civil servants, or to hear the views of experts, MPs, peers, select committees and other stakeholders. The DPRRC's analysis seems to be restricted to two main sources. These are, on the one hand, the delegated powers memorandum, including its four supplementary memorandums; and on the other, the very Withdrawal Bill provisions which delegate powers. It is fair to say, therefore, that the SCC's procedures are more deliberative than those of the DPRRC.

In terms of its attitude at the early stages of policy-making, the DPRRC adopted a reactive approach. At this stage, its interventions were two submissions to an inquiry launched by the Commons' Procedure Committee on the "Delegated Powers in the 'Great Repeal Bill'".[37] The DPRRC published four reports during the passage of the Withdrawal Bill; one for the Commons, and three for the Lords. The main DPRRC report contains an Annex with a set of draft amendments, ready to be taken forward by peers.[38] Subsequently, the DPRRC published two additional reports, assessing government amendments.[39] This provided the Lords food for thought in the later stages of their scrutiny work.

Now I turn to the issue of dialogue. Here, the SCC continues to perform better than the DPRRC. However, it is fair to say that both committees have fostered different

[36] Select Committee on the Constitution, *The 'Great' Repeal Bill* (n 7). This report was published on 7 March 2017. The government published its White Paper on 30 March 2017.

[37] Delegated Powers and Regulatory Reform Committee, *Special Report: Submission to the House of Commons Procedure Committee Inquiry on the Delegated Powers in the "Great Repeal Bill"* (n 25); Delegated Powers and Regulatory Reform Committee, *Special Report: Second Submission to the House of Commons Procedure Committee on the Delegated Powers in the "Great Repeal Bill"* (n 20).

[38] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 2* (n 19), Annex 1.

[39] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill: Government Amendments* (n 24); Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill: Further Government Amendments* (n 24).

layers of interactions and collaboration with government, and between both Houses of Parliament and other parliamentary bodies. In what follows, for the sake of clarity, I will distinguish these different layers, and point out the contributions that each committee has made in each case.

A first set of interactions and collaboration takes place between these committees and the lower chamber. First, both committees collaborated with the Commons by publishing interim reports in advance of second reading and committee stage of the Withdrawal Bill in the lower chamber.[40] It is common practice for the SCC and the DPRRC to report before committee stage in the Lords. However, motivated by the exceptional circumstances of Brexit, and the constitutional significance of the Withdrawal Bill, interim reports were published before second reading in the Commons. These reports had an impact on parliamentary debates at the Commons. At second reading, there were no references to the DPRRC's report. By contrast, ten MPs referenced and/or quoted passages of the SCC's interim report that discussed delegated powers in the Withdrawal Bill.[41] At committee stage, by contrast, both committees were referenced by MPs. Whilst four MPs referenced the DPRRC's report;[42] the SCC got nine mentions, most of them on delegated powers.[43] Some of these interventions

[40] Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill No. 1* (n 19); Select Committee on the Constitution, *European Union (Withdrawal) Bill: Interim Report* (n 18). Note also that the DPRRC followed this practice with other Brexit Bills. See Delegated Powers and Regulatory Reform Committee, *Agriculture Bill* (HL 2017-19, 194); Delegated Powers and Regulatory Reform Committee, *39th Report: Fisheries Bill; Healthcare (International Arrangements) Bill; Divorce (Financial Provision) Bill [HL]; Prisons (Interference with Wireless Telegraphy) Bill* (HL 2017-19, 226). Similarly, the SCC's report on the European Union (Withdrawal Agreement) Bill, which was published even in the knowledge that the parliamentary season will come to a close, and with no clarity about whether the Bill would be introduced in the same form. See Select Committee on the Constitution, *European Union (Withdrawal Agreement) Bill: Interim Report* (n 8).

Another significant example of this trend is that both the SCC and the DPRRC reported on the Taxation (Cross-border Trade) Bill, despite being a supply bill, and therefore the Lords lacked any power to amendment. See Delegated Powers and Regulatory Reform Committee, *11th Report Taxation (Cross-border Trade) Bill and others* (HL 2017-19, 65); Select Committee on the Constitution, *Taxation (Cross-border Trade) Bill* (HL 2017-19, 80).

[41] MPs making references to the SCC's reports at second reading at the Commons were: Keir Starmer (Lab), Ian Duncan Smith (Con), David Jones (Con), Pat McFadden (Lab), Richard Burden (Lab), Richard Graham (Con), Daniel Zeichner (Lab), Vernon Coaker (Lab), Antoinette Sandback (Con) and Chris Philp (Con). See HC Deb 7 September 2017, vol 628, cols 358, 361, 377, 379, 410; HC Deb 11 September 2017, vol 628, cols 474, 497, 512-14, 517-18, 564.

[42] MPs making references to the DPRRC's interim report at committee stage at the Commons were: Ian Blackford (SNP), Steve Baker (Department for Exiting the European Union Under-Secretary), George Freeman (Con), Matthew Pennycook (Lab). See HC Deb 4 December 2017, vol 632, col 726; HC Deb 12 December 2017, vol 633, col 280; HC Deb 13 December 2017, vol 633, col 511, 554.

[43] MPs making references to the SCC's reports at committee stage at the Commons were: Steve Baker (Department for Exiting the European Union Under-Secretary), Joanna Cherry (SNP), Kerry

make explicit recognition of constitutional committees' influence in the drafting of amendments. Stephen Gethins MP argued that an SNP amendment to incorporate a "necessity" test had been inspired by the SCC.[44] Chris Leslie MP also argued that a similar amendment to introduce a necessity test had been inspired by SCC's recommendations.[45] Yvette Cooper MP claimed to have introduced amendments to tighten-up clause 7 powers, including a necessity test, inspired by DPRRC and SCC's remarks.[46] Jenny Chapman MP, on the other hand, recognised to have taken forward as an amendment a DPRRC recommendation to prevent taxes or fee-raising powers via tertiary legislation.[47] Finally, Steve Baker, the Under-Secretary of State at the Department for Exiting the European Union, pointed out that the DPRRC had been influential in the Commons' Procedure Committee proposal for a sifting committee.[48] This shows that the SCC and the DPRRC managed to influence parliamentary debates and inspired amendments.

The practice of publishing an interim report to enlighten Commons debates proved quite beneficial in terms of strengthening the capacity of MPs to scrutinise the constitutional implications of government legislation. As Mark Elliott and Stephen Tierney note, this represents a significant example of collaboration between the two houses when constitutional issues are at stake.[49] It is also significant because there are limits to the capacity of the Lords to defeat the government. As argued in Chapter Two, the Lords must exercise political self-restraint, and defer to the views of the democratically elected lower chamber. For this reason, collaboration between constitutional committees and individual MPs is significant, as they enjoy democratic legitimacy to pressure the government to amend legislation in ways that would not be appropriate for the Lords.[50]

McCarthy (Lab), Pete Wishart (SNP), Chris Leslie (Lab), Tom Brake (LibDem), Angela Smith (Lab), Stella Creasy (Lab), Alex Sobel (Lab). See HC Deb 14 November 2017, vol 631, cols 204 and 295; HC Deb 15 November 2017, vol 631, col 431; HC Deb 4 December 2017, vol 632, col 751; HC Deb 12 December 2017, vol 633, cols 215, 218-19; HC Deb 12 December 2017, vol 633, col 269, 316, 330-31, 336.

[44] HC Deb 6 December 2017, vol 632, cols 1077-78.

[45] HC Deb 12 December 2017, vol 633, col 219.

[46] HC Deb 12 December 2017, vol 633, col 253.

[47] HC Deb 6 December 2017, vol 632, vol 1135.

[48] HC Deb 12 December 2017, vol 633, col 280.

[49] Mark Elliott and Stephen Tierney, 'Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018' [2019] Public Law 37, 39.

[50] Constitutional committee reports featured much more prominently at the Lords. This is consistent with the points made in this work in chapters two and six. For this reason, I will not make an

A second layer of interactions and collaboration took place between these committees and other select committees. There is significant evidence of these interactions as early as the pre-legislative scrutiny stage. In its report on the so-called "Repeal Bill", the SCC recorded meetings with DPRRC and Secondary Legislation Scrutiny Committee ("SLSC") members.[51] In addition, the SCC engaged in further collaboration with the SLSC, which also sent written evidence to the SCC's inquiry into delegated powers in the "Repeal Bill".[52] The SCC also employed as secondary sources previous reports published by other select committees. Among these, the DPRRC's report on strengthened scrutiny procedures, as well as responses by the DPRRC, the SLSC and the Public Administration and Constitutional Affairs Committee to the Strathclyde review.[53] By looking at the contribution of other committees, this significant degree of engagement by the SCC shows that select committees can operate as a system by interacting and complementing each other's work. The DPRRC did not engage with other select committees' reports as the SCC did. Yet, the DPRRD did engage in collaboration at the pre-legislative stage by making two submissions to the inquiry launched by the Commons' Procedure Committee.[54]

During the formal stages of the legislative process, these interactions continued, mainly driven by the SCC. The SCC employed as sources other Brexit reports published by the Lords' European Union Committee, the DPRRC,[55] and the Commons' Public Administration and Constitutional Affairs Committee.[56] It is also

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analysis of references and quotations of passages of these reports during the Lords stages of the Withdrawal Bill. Nor will I identify amendments by peers inspired in recommendations by these constitutional committees. It is worth noting that an amendment to introduce a necessity test was put forward at the Lords and eventually approved. However, the government managed to turn this amendment down at ping pong stage. This example serves to illustrate Mark Elliott and Stephen Tierney's contention that "the most turbulent period" for the government took place at the Lords. See ibid, 38-39.

[51] Select Committee on the Constitution, *The 'Great Repeal Bill'* (n 7) at para 2.

[52] Ibid, at para 85.

[53] Ibid, Ch3.

[54] Delegated Powers and Regulatory Reform Committee, *Special Report: Submission to the House of Commons Procedure Committee Inquiry on the Delegated Powers in the "Great Repeal Bill"* (n 25); Delegated Powers and Regulatory Reform Committee, *Special Report: Second Submission to the House of Commons Procedure Committee on the Delegated Powers in the "Great Repeal Bill"* (n 20).

[55] Select Committee on the Constitution, *European Union (Withdrawal) Bill* (n 6), at para 157. At paras 105 and 120, the SCC defers to the JCHR's analysis on questions about the Charter of Fundamental Rights.

[56] Select Committee on the Constitution, *European Union (Withdrawal) Bill: Interim Report* (n 18), at para 71.

remarkable that the SCC decided to collaborate with devolved legislatures. This committee held informal meetings with select committee representatives in the Scottish Parliament and the Welsh National Assembly.[57] Its final report gives an account of some of their views on devolution.[58]

A final point worth mentioning are interactions between the SCC and the DPRRC. There is an overlap between the tasks that both committees undertake. This raises a question about the rational use of scarce parliamentary resources. It could also give raise to contradictory views. Nevertheless, the passage of the Withdrawal Bill shows that the work of these two committees is complementary. One reason for this had already been anticipated in Chapter Four, and was confirmed in my substantive assessment. Both committees approach the analysis of clauses delegating powers from different points of view and methodologies. Yet, the Withdrawal Bill also shows that these two committees complement each other due to a cautious approach by the SCC. This committee prevented conflict by recognising that the DPRRC had a prevalent opinion on matters of delegated powers.[59] At times, the reader gets the sense that the SCC feels compelled to justify its engagement with questions about delegated powers. The SCC's reports show deference and engage with the DPRRC's views. In contrast, the DPRRC's analysis tends to be self-contained, and does not fully engage with the SCC's views. For instance, the DPRRC only makes brief comments about the SCC's proposals at the pre-legislative scrutiny stage.[60]

Finally, and perhaps most importantly, both the SCC and the DPRRC engaged in dialogue with the government. This took place in different ways. Firstly, in the Withdrawal Bill's documents. Both the explanatory notes[61] and the delegated powers memorandum[62] reference passages of the SCC's pre-legislative scrutiny report. The government takes a strategic approach when it quotes those passages of the SCC's report that recognise the magnitude of the task ahead in domesticating EU law, and

[57] Select Committee on the Constitution, *European Union (Withdrawal) Bill* (n 6), at para 4.
[58] Ibid, at paras 247, 258, 266.
[59] Select Committee on the Constitution, *The 'Great Repeal Bill'* (n 7) at para 50.
[60] Delegated Powers and Regulatory Reform Committee, *Special Report: Second Submission to the House of Commons Procedure Committee on the Delegated Powers in the "Great Repeal Bill"* (n 20), at paras 16, 17, 21.
[61] Explanatory Notes to the European Union (Withdrawal) Act 2018, at para 13.
[62] Secretary of State for Exiting the European Union, *European Union (Withdrawal) Bill Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee* (13 July 2017), at paras 13, 35, 37, 43, 44, 48, 49, 60.

therefore, the need for some flexibility in the Bill.[63] The government seeks recognition and legitimacy when it claims to have implemented some SCC's recommendation. The delegated powers memorandum makes explicit recognition of this when it explains the incorporation of a sunset clause, and the requirement of an explanatory memorandum accompanying statutory instruments made in exercise of corrective powers.[64] In contrast, the memorandum only contains a few references to the DPRRC.[65] This is mainly due to the lack of substantive proposals coming from this committee at the pre-legislative stage, as explained above.

Secondly, the government engaged in further dialogue with constitutional committees by publishing four supplementary memorandums to assists the DPRRC's legislative scrutiny work. These memorandums accounted for the changes introduced to the Bill at the Commons, and later at committee and report stage at the Lords. In addition, the government sent a written response to the DPRRC's third report on the Withdrawal Bill.[66] Furthermore, previously, the Department for Exiting the European Union submitted written evidence to the SCC. Thirdly, the government engaged in dialogue with the SCC through oral evidence sessions in which ministers and the Solicitor General were questioned about the constitutional propriety of the government's legislative proposals.

Fourthly, the government also entered in collaboration with the SCC and the DPRRC by introducing amendments that partly responded to their concerns. For instance, the government removed the powers to comply with international obligations, the powers in clause 9 to amend the Withdrawal Bill itself, and incorporated additional sunset clauses. There was a modest improvement in the set of substantive limits on ministerial corrective powers.[67] The government also modestly improved the scope of the affirmative procedure. At the Commons stage, the government accepted an amendment to introduce a sifting procedure, although it rejected the SCC and the DPRRC's recommendation to make the sifting committee's

[63] Ibid, at paras 13, 37, 48, 60.
[64] Ibid, at paras 43, 44, 49.
[65] Ibid, at paras 12, 46.
[66] See Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill: Government Response* (HL 2017-19, 119), Appendix 1.
[67] No powers to create new public authorities or to amend the devolution statutes of Scotland and Wales.

recommendations binding upon the government. Finally, in response to an SCC recommendation, the government expanded the scope of the explanatory statements attached to regulations by including a "good reasons" statement.[68]

3. Conclusion

This substantive analysis of the legislative scrutiny work of the SCC and the DPRRC on the Withdrawal Bill illustrates evident differences between these committees in terms of their methodology and approach to the constitution. The SCC focused on the broader constitutional issues and trends arising from the Withdrawal Bill. Each report read like an essay on the constitutional implications of this Bill, grounded on a wealth of evidence provided by constitutional experts and other stakeholders. On the other hand, the SCC's analysis was underpinned by two main principles, namely, the separation of powers and the legislative supremacy of Parliament. The SCC developed the content of these principles in its recommendations. It went on to construct a constitutional standard according to which the executive should not take policy decisions without full parliamentary scrutiny. Two of its main recommendations, namely, to constrain delegated powers only to technical matters, and to subject statutory instruments that make policy choices to a strengthened procedure, are concretizations of this overarching constitutional standard. This shows that the SCC acted as a "constitutional scrutiniser" that identified constitutional principles, developed its content, and finally employed them as benchmarks to assess government legislation and make recommendations. In contrast, the DPRRC's methodology is best described as a meticulous, line by line, black letter analysis of each provision of the Withdrawal Bill that delegates powers. The DPRRC conducts a detailed analysis that follows up the passage of the Bill from beginning to end. There is no explicit constitutional language in the DPRRC's analysis, apart from a very general appeal to the separation of powers. However, it is possible to argue that this principle operates at the background. Ultimately, the DPRRC is concerned with protecting Parliament's role as the senior partner in its relationship with government, as well as with preventing the exercise of arbitrary executive powers.

[68] At ping pong stage at the Commons, David Davis MP, Secretary of State for the Department for Exiting the European Union, made an explicit recognition that the government's amendment to incorporate a "good reasons" statement in the explanatory notes was in response to a recommendation by the SCC. See HC Deb 12 June 2018, vol 642, col 735.

From a procedural point of view, although the government managed to retain effectively broad corrective powers,[69] the European Union (Withdrawal) Act 2018 stands as a notable example of constitutional deliberation. The SCC provided a forum to discuss the views and arguments of a variety of relevant actors. Both committees engaged critically with the government justification. The government was forced to justify its proposals, and to partially change its mind in light of the debate. Therefore, from a dialogic point of view, the passage of the Withdrawal Act also shows that constitutional committees do make a difference. The SCC and the DPRRC managed to interact and collaborate with different actors, such as other select committees, peers, and – most notably – with individual MPs. On the other hand, the government also engaged in good faith dialogue with these committees. Furthermore, it was forced to tighten-up the scope of delegated powers, and to introduce measures to improve parliamentary oversight of statutory instruments, as a consequence of criticism by these two constitutional committees.

Both, in terms of deliberation and in terms of dialogue and collaboration, the SCC's contribution was more significant than that of the DPRRC. Some drawbacks on the DPRRC's legislative scrutiny work are its lack of engagement with the wider public, the lack of evidence gathered from other sources, and less engagement with the work of other select committees. Despite these differences, it is fair to say that both constitutional committees acted as conduits through which constitutional considerations were channelled to elected politicians. Furthermore, they were an active and key part of parliamentary efforts to hold the government to account during the passage of the Withdrawal Act, because they subjected the Bill to a degree of detailed scrutiny that would have not been possible on the floor of either House.[70]

III. Prisoners' right to vote

My second case study concerns the UK political response to the litigation-saga over section 3 of the Representation of the People Act 1983. This provision deprives prisoners serving custodial sentences of their right to vote on parliamentary and local elections during their imprisonment. The litigation-saga originated more than 18 years

[69] Elliott and Tierney, 'Political Pragmatism' (n 49), 57.
[70] Ibid, 58.

ago, when Mr John Hirst, a post-tariff prisoner serving a discretionary life sentence, challenged this provision.[71] He argued that the ban breached his right to vote protected by Article 3 of Protocol 1 ("A3P1") of the European Convention on Human Rights ("ECHR"). His claim was rejected by the High Court, which also denied his application for permission to appeal. Mr Hirst filed an application before the ECtHR. In the judgment of *Hirst*, a majority of the Grand Chamber held that the UK imposed a "general, automatic and indiscriminate" restriction on a vitally important right that fell outside its margin of appreciation,[72] and found the provision in breach of A3P1.

This judgment was fraught with political controversy. Both New Labour and Coalition governments held strong views against *Hirst*, but felt bound by the judgment.[73] However, neither of them introduced a Bill nor took remedial action in response. Instead, they deployed a number of delaying techniques to refrain from responding. The New Labour government conducted a two-staged consultation process, and then took no further action.[74] The Coalition government asked permission to intervene as a third party in the case of *Scoppola* to argue for a review of *Hirst*.[75] This attempt failed, and the ECtHR imposed a new six-month deadline to introduce "legislative proposals" to implement *Hirst*. A day before this deadline, rather than a Bill, the government introduced a Draft Bill for pre-legislative scrutiny.[76] It is worth noting that these two governments put forward proposals that, if implemented, would

[71] *R (Pearson & Martinez) v Secretary of State for the Home Department* (2001) EWHC Admin 239.

[72] *Hirst (No. 2)*, at para [82].

[73] The New Labour government declared its firm belief that prisoners should lose their right to vote. See Department for Constitutional Affairs, *Voting Rights of Convicted Prisoners Detained within the United Kingdom - The UK Government's Response to the Grand Chamber of the European Court of Human Rights Judgment in the Case of Hirst v the United Kingdom* (CP 29, 2006) at para 3, Ministry of Justice, *Voting Rights of Convicted Prisoners Detained within the United Kingdom - Second Stage Consultation* (CP 6, 2006) at para 23. While head of the Coalition government, Prime Minister David Cameron bluntly stated that complying with *Hirst* made him "physically ill". See HC Deb 3 November 2010, vol 517, col 921.

Lord Falconer's forewords to New Labour's first consultation paper pointed out that "we must take steps to respond to the Grand Chamber's judgment". Likewise, David Cameron in the debate referred above went on to say "we are in a situation that I am afraid we have to deal with. This is potentially costing us £160 million, so we have to come forward with proposals (…)".

[74] Department for Constitutional Affairs, *Voting Rights of Convicted Prisoners* (n 73); Ministry of Justice, *Voting Rights of Convicted Prisoners Second Stage* (n 73).

[75] *Scoppola v Italy (No. 3)* 56 EHRR 19. The ECtHR granted the UK leave to intervene and extended a previous six-month deadline to implement *Hirst* imposed in the case of *Greens and MT v United Kingdom* 53 EHRR 21.

[76] Ministry of Justice, *Voting Eligibility (Prisoners) Draft Bill* (Cm 8499, 2012).

have reflected a "minimal-compliance" approach.[77] After the Joint Parliamentary Committee published its report on the Draft Bill, the ECtHR denied compensation and legal costs to ten prisoners in the case of *Firth*,[78] confirming the criteria previously held in *Greens*. This took place in the context of more than 2,000 applications against the UK pending at the ECtHR. A few months later, the Coalition government decided to postpone discussions on *Hirst* until September 2015.[79] In contrast, David Cameron's Conservative government decided against implementation. It argued that "the UK's policy on prisoner voting is well-established and remains a matter for the UK Parliament to determine."[80]

Eventually, in November 2017, eleven years after Hirst was delivered, Theresa May's Conservative government announced a proposal for implementation that would not require a change in primary legislation, but the adoption of administrative measures.[81] The government amended the Prison Service guidance to confer the right to offenders serving short sentences that are released on temporary license to vote while released.[82] In addition, the government also conferred this right to prisoners released on Home Detention Curfew.[83] These administrative measures raise serious questions about the degree of compliance, if any, with ECtHR's judgment on this subject-matter.[84] According to the government's data, these measures would benefit

[77] Labour proposals at the second consultation stage were to enfranchise prisoners serving sentences of (1) less than a year; (2) less than two years; (3) less than four years; or (4) less than two years, but those sentenced to less than four years could apply before a judge to be granted the vote. The Coalition government's Draft Bill put forward three alternative proposals: (1) enfranchisement of prisoners sentenced to terms of less than four years imprisonment; (2) less than six months imprisonment; or (3) a restatement of the existing ban.

[78] *Firth and Others v The United Kingdom* [2014] ECHR 874.

[79] Ministry of Justice, *Responding to Human Rights Judgments - Report to the Joint Committee on Human Rights on the Government response to Human Rights Judgments 2013-14* (Cm 8962, December 2014), 29.

[80] Ministry of Justice, *Responding to Human Rights Judgements* (Cm 9360, November 2016), 38.

The Conservative party's unwillingness to implement *Hirst* should be understood in the wider context of their proposals substantially change UK human rights law by scrapping the HRA and replace it with a British Bill of Rights. See The Conservative Party, *The Conservative Party Manifesto 2015* (2015), 60; The Conservative Party, *Protecting Human Rights in the UK - The Conservatives' Proposals for Changing Britain's Human Rights Laws* (2014).

[81] HC Deb 2 November 2017, vol 630, cols 1007-1008.

[82] Secretariat General of the Committee of Ministers, *Execution of Judgments of the European Court of Human Rights - Action Plan Hirst No. 2 and others* (DH-DD(2017)1229, 2017), at para 13.

[83] Ibid, at para 14-15.

[84] Elizabeth Adams, ''Prisoners' Voting Rights: Case Closed?' (*UK Constitutional Law Association Blog*, 30 January 2019) <https://ukconstitutionallaw.org/2019/01/30/elizabeth-adams-prisoners-voting-rights-case-closed/> accessed 18 April 2019.

about one hundred offenders.[85] The flexibility of the implementation process discussed in Chapter Five is thrown into sharp relief by the Committee of Ministers' decision to accept this plan of action, and to close the monitoring procedure for the implementation of the *Hirst* litigation-saga.[86]

At Parliament, debates about the implementation of *Hirst* had some unique features. Firstly, MPs debated this matter with relative independence from government, free from partisan loyalties. Secondly, MPs enjoyed opportunities to influence the government response at the early stages of policy-making. As mentioned above, there were two consultation processes, and a draft bill. These two features are quite relevant. As argued in Chapters Two and Six, both executive control of the Commons and partisan politics undermine the ability of MPs to scrutinise legislation on human rights grounds. On the other hand, the evidence suggests that government is more willing to change its mind on human rights matters when policy is being developed.[87] Another point worth noting is that *Hirst* led to lengthy and intense parliamentary debates. There were four parliamentary debates on this matter. Firstly, a Westminster Hall debate on a motion put forward by Phillip Hollobone MP (Con).[88] Secondly, a backbenchers debate on a motion put forward by Jack Straw MP (Lab), Dominic Raab MP (Con), Stephen Phillips MP (Con), Phillip Hollobone MP (Con), John Baron MP (Con) and David Davis MP (Con).[89] Thirdly, a debate upon the Lord Chancellor's announcement of the passage of the Draft Bill referred above for pre-legislative scrutiny.[90] Finally, a debate upon the Lord Chancellor's announcement of the adoption of administrative measures to comply with *Hirst*.[91]

In what follows, I will discuss the contribution of the JCHR to monitoring government response to the *Hirst* litigation-saga. The committee discussed this matter

[85] HC Deb 2 November 2017, vol 630, col 1008.

[86] Secretariat General of the Committee of Ministers, *Execution of Judgments of the European Court of Human Rights - Action Report Hirst No. 2 and others* (DH-DD(2018)843, 2018).

[87] Joint Committee on Human Rights, *The Committee's Future Working Practices* (2005-06, HL 239, HC 1575), at paras 6-7; Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliaments and Human Rights* (Hart Publishing 2015), 52.

[88] HC Deb 11 January 2011, vol 521, cols 1WH-24WH.

[89] HC Deb 10 February 2011, vol 523, cols 493-586.

[90] HC Deb 22 November 2012, vol 553, cols 745-762.

[91] HC Deb 2 November 2017, vol 639, cols 1007-1015.

in eight reports.[92] I will assess these contributions from a substantive and procedural point of view.

1. Substantive assessment

The JCHR adopted a legalistic and court-centred approach to monitoring government responses to *Hirst*. The JCHR was generally reactive, and did not fully engage with the democratic concerns of MPs strongly opposed to the judgment. I will provide two illustrations of this approach. Firstly, the JCHR criticised the New Labour's second stage consultation process.[93] The committee considered the government's proposals "to take a very limited approach to the judgment" that "can lead to further unnecessary litigation".[94] The JCHR, following the ECtHR's line of reasoning, and employing proportionality analysis, argued that setting a threshold based on a "set period of custodial sentence" may not create a clear link between the offence and the necessity of the removal of the right to vote.[95] However, years later, the JCHR would revisit this assessment,[96] when this committee endorsed the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill ("JCDB") recommendation.[97] The JCDB recommended enfranchisement of prisoners serving

[92] Joint Committee on Human Rights, *Legislative Scrutiny: Fifth Progress Report* (2005-06, HL 115, HC 889), at paras 1.40-1.42, Joint Committee on Human Rights, *Implementation of Strasbourg Judgments: First Progress Report* (2005-06, HL 133, HC 954), at paras 51-53; Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (2006-07, HL 128, HC 728), at paras 67-79; Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008* (2007-08, HL 173, HC 1078), at paras 47-63; Joint Committee on Human Rights, *Legislative Scrutiny: Political Parties and Elections Bill* (2008-09, HL 23, HC 204), at paras 1.10-1.19; Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (2009-10, HL 85, HC 455), at paras 99-119; Joint Committee on Human Rights, *Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill* (2010-11, HL 64, HC 640), at paras 2.7-2.15; Joint Committee on Human Rights, *Human Rights Judgments* (2014-15, HL 130, HC 1088), at paras 3.15-3.26.

[93] Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 92), at paras 99-119. Note that previously, the JCHR had criticized the New Labour government's first consultation paper for asking views about maintaining the current blanket ban, as this was held incompatible with the UK's obligations under the ECHR. See Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (n 92), at paras 77-78. Criticizing the New Labour's hesitant views on the need for legislative reform and insisting that *Hirst* imposed such a need, see Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008* (n 92), at para 51.

[94] Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 92), at para 107.

[95] See also lengthy quotation of the ECtHR's judgment on how to struck a balance when removing the franchise from individual prisoners in Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008* (n 92), at paras 57 and 58.

[96] Joint Committee on Human Rights, *Human Rights Judgments* (n 92), at paras 3.15-3.26.

[97] Ibid, at para 3.26.

custodial sentences of less than one year. Note that before the JCHR had argued against a "set period of custodial sentence", and criticised a four-year period as "minimal compliance". This time the JCHR came to accept a one-year threshold. Notably, its justification for accepting this proposal is "court-centred". It is worth quoting the relevant passage in full:

> "(…) if Parliament were to legislate to give effect to the recommendation of the Joint Committee on the Draft Prisoner Voting Bill, the Committee of Ministers would accept that the UK had done enough to implement the outstanding judgments against the UK, and the Court in any future challenge would also uphold the new law as being a proportionate interference with prisoners' right to vote."[98]

The JCHR provided two sets of reasons. Firstly, it argued that the ECtHR recognised a wide margin of appreciation to national parliaments on the regulation of prisoners voting. Secondly, it went on to say that recent ECtHR case law granted a wider margin of appreciation in cases where national parliaments had deliberated properly about the issues at stake. The JCHR envisaged that the passage of a Bill implementing the JCDB recommendation, debated in light of the insights contained in its report, "would weigh heavily with the Court".[99] The JCHR insisted on the need to take action, and went on to draft a "one-clause" Bill to amend s. 3 of the Representation of the People Act 1983 to implement the JCDB's recommendation.[100] This shows that although the JCHR had previously argued for a strong response, it later changed its views. However, this change was not the product of a new analysis of the substantive issues raised by prisoners' disenfranchisement. Instead, it was motivated by an evolution in the ECtHR's views about the margin of appreciation that national parliaments enjoy. This shows how strong the JCHR's court-centred approach was.

While the JCHR interpreted its role as that of securing UK compliance with its international obligations, arguably, a more critical approach to the judgment would have been welcomed. The JCHR did not provide alternative reasons in support of lifting the ban, other than compliance with the ECtHR judgment. In the context of strong parliamentary opposition against a change in the law,[101] there was a need for

[98] Ibid, at para 3.20.
[99] Ibid.
[100] Ibid, at para 3.24.
[101] On 10 February 2011, the Commons debated a backbench motion stating that the Commons supported the current ban on prisoners vote and considered that a decision of this nature should be a

more nuanced approaches to call the Commons' attention. This put the JCHR in an uncomfortable position before Parliament, because it kept insisting on compliance in circumstances that the Commons had made its views clear. The JCHR did not find an alternative way to communicate with Parliament, and instead opted for focusing on exerting pressure over the government. Contrast this with the JCDB's pre-legislative scrutiny work on the Coalition government Draft Bill.[102] Its report addressed the principled question about the disenfranchisement's rationale.[103] It also subjected to criticism the two arguments provided by the government in support of the ban. The report also contained relevant background information, such as an account of the history of prisoners' disenfranchisement, of parliamentary debates held on *Hirst*, and of relevant case law developments on the issue, both at ECtHR and domestic level. The JCDB addressed the controversy about the ECtHR legitimacy in the context of the UK doctrine of "parliamentary sovereignty". It also discussed the political consequences of non-compliance and withdrawal from the Convention. Finally, the report scrutinised the government's three alternative proposals employing a proportionality analysis framework, and made a recommendation of its own, namely, to enfranchise those prisoners sentenced to less than one year imprisonment.[104] The contrast between the JCHR and the JCDB is stark. The latter engaged with a variety of relevant constitutional issues raised by *Hirst*, whereas the JCHR had a narrow approach limited to compliance.[105]

2. Procedural assessment

As indicated above, this section assesses the JCHR's contribution to monitoring responses for adverse human rights judgments through the register of dialogue and collaboration between institutions, as well as that of deliberation. I will start by assessing the JCHR's contribution to dialogue and interactions between institutions. On this matter, the JCHR's main contribution was its engagement with the

matter to democratically-elected lawmakers. After more than five-hours debate, an overwhelming majority of 234 votes against 22 approved the motion. See HC Deb 10 February 2011, vol 523, col 584.

[102] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill Report* (2013-14, HL 103, HC 924).

[103] Ibid, Ch5.

[104] Ibid, Ch7.

[105] Note that the House of Commons Political and Constitutional Reform Committee's report on this matter took a similar approach to that of the JCDB. See Political and Constitutional Reform Committee, *Voting by Convicted Prisoners: Summary of Evidence* (HC 2010-11, 776).

government. There is evidence of letter exchanges between the committee and the Lord Chancellor, the Human Rights Minister, the Ministry of Justice and the Ministry for Europe on the *Hirst* case throughout its reports.[106] Ministers were also questioned in oral evidence. JCHR reports account for discussions with the Secretary of State for Justice and the Human Rights Minister,[107] as well as a long oral evidence session with the Lord Chancellor.[108]

The JCHR's key concern was the lack of progress on the implementation process. Consider for instance the JCHR's views on New Labour's consultation process. The committee demanded justification for the delay in launching the consultation, as well as for having a two-stage process in circumstances that this was a fairly straightforward legal issue.[109] In the JCHR's view, this issue should be the object of a quick solution in the form of a Remedial Order. Upon New Labour's launch of the second consultation stage, the committee criticised the scant progress made, which it attributed to a lack of commitment with the implementation of *Hirst*.[110] Furthermore, it went on to qualify the delay as "unacceptable", and argued that it damaged the international reputation of the UK, placing the nation at risk for continuing litigation and compensation payments. The JCHR demanded from the government clear plans of action.[111]

In contrast, JCHR reports had little impact, if any, at the Commons. As mentioned above, MPs debated *Hirst* four times. In these debates, only one MP made an explicit reference to JCHR reports. In the debate on the backbenchers' motion, Tony

[106] Joint Committee on Human Rights, *Legislative Scrutiny: Fifth Progress Report* (n 92), at para 1.41; Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (n 92), at paras 71, 72, 74 (see also appendix No. 5, 12, 13); Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008* (n 92), at paras 47-49, 52-52 (see also WE 1, 12-16); Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 92), at paras 105-06, 11, 118 (see also Ev 21-29); Joint Committee on Human Rights, *Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill* (n 92), at paras 2.11-2.12 (see also Ev pp 51-52).

[107] Joint Committee on Human Rights, *Legislative Scrutiny: Political Parties and Elections Bill* (n 92), at para 1.15-1.16.

[108] Joint Committee on Human Rights, *The Government's Human Rights Policy and Human Rights Judgments Oral Evidence* (HC 1726-i, 20 December 2011, Q 1-36).

[109] Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (n 92), at paras 71, 78, 79.

[110] Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 92), at paras 108, 117-18.

[111] Joint Committee on Human Rights, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008* (n 92), at para 52.

Baldry MP (Con) quoted the committee's criticism of the New Labour government's decision to include consultation about views on retaining the current blanket ban, thus creating the expectation that this was a workable plan of action.[112] This finding confirms the remarks made in Chapters Two, Five and Six. Constitutional committees have little impact at the Commons. Despite this, two points are worth mentioning. Firstly, none of the JCHR's reports had been published with a view to enlighten the four debates that took place at the Commons. Secondly, even if that had been the case, this is not a guarantee that MPs would engage with JCHR's reports. Consider that the House of Commons Political and Constitutional Reform Committee ("PCRC") prepared a special report to inform the very debate on the backbenchers' motion.[113] Only four MPs referenced this report; one of them was the committee chair.[114] This suggests that MPs are generally not keen on relying on select committees' contributions to parliamentary debates.

A final remark about interactions and collaboration concerns relationships with other select committees. On this matter, the JCHR entered into collaboration with the JCDB when it argued in favour of implementing their recommendation in response to *Hirst*, as mentioned above.

Moving on to deliberation, the most significant feature of the JCHR's work was its engagement with the wider public and experts on the field. Over the years, the JCHR gathered written and oral evidence on the broader question about the implementation of human rights judgments.[115] Some of this evidence concerns *Hirst*. For instance, as part of its 2010 review of "Government's response to judgments identifying breaches of human rights", the JCHR made a successful call for evidence.[116] It received written evidence from a variety of stakeholders, such as the Prison Reform Trust, the Equality and Human Rights Commission and Liberty. Also from members of the legal profession, such as the Immigration Law Practitioners' Association, the Law Society and the Law Society of Scotland, among others. Significantly, between 2011-12, JCHR members discussed the *Hirst* case with senior

[112] HC Deb 10 February 2011, vol 523, col 551.
[113] Political and Constitutional Reform Committee, *Voting by Convicted Prisoners* (n 105).
[114] HC Deb 10 February 2011, vol 523, cols 522, 528-29, 554, 566-67 (Eleanor Laing MP Con).
[115] Some JCHR reports contain a full transcript of this evidence as an Annex.
[116] See evidence available at <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/human-rights-judgments/> accessed 15 December 2019.

judges, namely, Lord Phillips, at the time President of the Supreme Court; Lord Judge, at the time Lord Chief Justice of England and Wales; and Nicholas Bratza, at the time President of the ECtHR. It also examined high profile witnesses such as Dr Michael Pinto-Duschinsky, an influential policy exchange advisor; Phillip Leach, professor of human rights at London Metropolitan University; and Jeremy Waldron, Chichele professor of political theory at Oxford University.[117] Despite this wealth of evidence, on the specific matter of prisoners' disenfranchisement, JCHR reports reflect only a few explicit traces of this evidence.[118] Despite this, the JCHR procedures offered a forum for views from experts and other stakeholders. In addition, as noted above, the JCHR questioned the government, not only for the continuous delays on implementation, but also for its minimal compliance approach, thus prompting the government to provide justification for its proposals.

3. Conclusions

From a substantive point of view, the *Hirst* case illustrates nicely the claims made in Chapter Five. The JCHR has interpreted its role as being the parliamentary guardian of Convention rights. Hence, their insistence on implementing a quick response to *Hirst*, in order to secure compliance with UK's international obligations under the ECHR. From a methodological point of view, the JCHR framed its assessments on legal considerations. Their argument against a "sentence-length" criterion was grounded on proportionality analysis. The JCHR suggested that in that case there is "no rational connection" between the offence and disenfranchisement.

[117] Joint Committee on Human Rights, *Human Rights Judgments Oral Evidence* (HC 873-i, Oral Evidence, 15 March 2011 Q 1-61); Joint Committee on Human Rights, *Human Rights Judgments Oral Evidence* (HC 873-ii, Oral Evidence, 15 November 2011, Q 62-135); Joint Committee on Human Rights, *Human Rights Judgments Oral Evidence* (HC 873-iii, 13 March 2012, Q 136-165).

The evidence by professor Waldron is interesting, because despite his widely known views against the legitimacy of strong judicial review, he went on to argue in favour of prisoners' enfranchisement. Professor Waldron also discussed the significance of the backbenchers' motion debate, among other issues.

[118] See for instance Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments* (n 92), at para 104; Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights* (n 92), at paras 68, 76.

Note that the JCDB conducted a formidable deliberative process during a period of eight months. It is evidenced in its report, but also in 682 pages recording both oral and written evidence. It received 43 submissions from a wide range of individuals and institutions. Along 11 evidence sessions, 39 witnesses were examined, including academics, politicians, pressure groups and individuals associated with prison management. The JCDB questioned both the Attorney General and the Lord Chancellor. JCDB members visited two prisons and met with a group of prisoners. This historically marginalized group had a unique opportunity to be heard. This is a remarkable example of parliamentary deliberation at its best.

One of its reports had a lengthy quotation of key passages of the relevant judgment. Later, when the JCHR watered down its views, and accepted the JCDB's recommendation, the very reason for accepting a proposal that was in contradiction with its previous views was a change in the ECtHR's case law on prisoners' enfranchisement.

From a procedural point of view, the JCHR's work monitoring the implementation of *Hirst* confirms that this committee does contribute to enhance constitutional deliberation. On the one hand, it engages in a dynamic of justification an assessment with the government. Numerous letters show that the JCHR exerted pressure over the government. The JCHR also held oral evidence sessions in which their members questioned ministers. The JCHR demanded from the government justification for the delays on the implementation, and for a minimal compliance approach contained in the proposals put forward for discussion. On the other hand, the JCHR contributed to deliberation by providing a forum to discuss the views of senior members of the judiciary, stakeholders and experts. However, in their specific analysis of *Hirst*, the JCHR could have taken more advantage of this valuable material. These remarks also show that the JCHR engages in dialogue with the government and the wider civil society. However, as suggested in Chapter Six, the JCHR struggles to contribute to parliamentary debates at the Commons. None of the eight JCHR's reports had an impact on parliamentary debates at the Commons. I have suggested some reasons that may explain this. However, I have also noted that the PCRC had prepared a special report for one of the parliamentary debates, that was seldom referenced by MPs. This evidence confirms the claims made in Chapter Six. The Commons tends to focus on more political questions, such as the supremacy of Parliament vis-à-vis the "foreign" judges, rather than on the question of political morality about prisoners' disenfranchisement.

CONCLUSION

This thesis employed the methodology of an in-depth case study to explore, both from a theoretical and a practical point of view, institutional arrangements designed to strengthen the ability of political institutions to assess the constitutional implications of legislation in the law-making process. I employed the United Kingdom ("UK") law-making practice, with an emphasis on the contribution of constitutional committees to legislative scrutiny on constitutional grounds as my case study. This thesis has shown that the UK has a set of institutional arrangements, consolidated through time, which are designed to foster legislative scrutiny of the constitutional implications of legislation. Constitutional committees have been presented as part of a wider network of political and legal accountability checks that operate on the basis of interactions and collaboration taking place between the government, Parliament and other relevant civil society actors.

In these concluding remarks, I will provide an outline of the main claims of this thesis. I will also recognise a variety of limitations on my analysis. Finally, I will suggest further areas of inquiry that arise from this work.

I. Main claims

In a nutshell, this thesis has argued that three constitutional committees, namely, the Joint Committee on Human Rights ("JCHR"), the Select Committee on the Constitution ("SCC") and the Delegated Powers and Regulatory Reform Committee ("DPRRC"), are the main drivers of parliamentary constitutional thinking in the UK law-making process. In pursuing their legislative scrutiny work, these committees must face significant challenges, both substantive and procedural. In terms of the former, as in the case of anyone operating under the UK unwritten constitution, constitutional committees struggle to work out the contents of constitutional principles, values, conventions, practices, doctrines and other standards. Each constitutional committee has its own approach to the constitution, and their legislative scrutiny work is underpinned by different conceptions of legislative scrutiny on constitutional grounds ("LSCG"). From a procedural point of view, committees' operation encounters significant difficulties to mainstream constitutional considerations among elected politicians, both in government and in Parliament. Yet,

constitutional committees have become necessary points of reference for bill teams, legislative drafters, and Law Officers. In Parliament, the House of Lords has followed with interest their reports, which inform their debates and are reflected in some peers' amendments to government legislation. Hence, whilst the UK experience suggests that a system of constitutional committees may not mainstream constitutional considerations among elected politicians, this case study shows that they have managed to operate as conduits through which constitutional considerations are channelled to political decision-making. This takes place through to a series of institutional interactions and collaboration between these committees and peers, academics and other legal experts, stakeholders, civil servants, and sometimes, with ministers and MPs.

The stakes were high. Changing the way political decision-making takes place may be too ambitious. Constitutional committee reports provide a highly valuable resource. They contain first quality assessments, drafted in clear and accessible language. MPs generally lack technical knowledge about constitutional matters and have insufficient time, energy and information to assess the constitutional implications of legislation. Constitutional committee reports could bridge that gap by informing parliamentary deliberations. However, political and policy considerations continue to be prioritized at the Commons. This House of Parliament is already heavily charged with significant constitutional functions other than legislative scrutiny, let alone on constitutional grounds. Therefore, the thesis claims that, as far as the UK is concerned, although these institutional arrangements have not met their normative expectation to mainstream constitutional considerations among elected politicians, they have managed to channel constitutional considerations into political decision-making.

These arguments can be categorised in a series of claims that are developed throughout the seven chapters of this thesis. These claims are as follows:

LSCG is a neglected subject matter in constitutional scholarship. In Chapter One, this thesis provided a theoretical framework to assess the work of constitutional committees. I provided a conceptualization of LSCG. The thesis claimed that there are three main LSCG conceptions. There is a legalistic conception, which understands the Constitution as a set of substantive –and morally informed– limits, as well as procedural limits imposed on legislative powers. Under this conception, assessing the

constitutional implications of legislation requires employing legal reasoning techniques such as interpretation, proportionality analysis and case law. This conception is directed towards the identification of "no-go areas" or restrictions on political decision-making. In terms of its constitutional philosophy, the legalistic conception is akin to moralised accounts of the Constitution, informed by a liberal understanding of constitutional democracy. Nevertheless, I have identified two strands of this conception, namely, hard and soft legalism. While the former is a highly uncompromised assessment based on first abstract principles, the latter is a more nuanced approach that is based upon the assumption that different branches of government pay due regard to the value of comity and therefore respect each other's legitimate scope of decision-making.

Although this view is mainstream in constitutional theory, there are two alternative understandings of LSCG. One conception of constitutional deliberation claims that the Constitution is a source of principles, values, conventions, doctrines and other standards that serve to promote rational debate among politicians. Constitutional considerations ought to be prioritized in political decision-making, from the early stages of the policy-making and legislative drafting, and throughout the formal stages of the legislative process. Constitutional deliberation does not have a clear normative grounding in terms of constitutional philosophy. However, it does have a strong commitment to the workings of representative democracy, in circumstances of fundamental disagreement among members of a political community about constitutional principles, values and other standards. However, this conception does hold procedural normative expectations. Democratic decisions should not be taken merely on a majoritarian basis. Inspired by the deliberative turn in democratic theory, constitutional deliberation is concerned with the quality of the procedure through which legislative decisions with constitutional implications are taken.

The other conception is one of constitutional construction and development. This conception has close connections with constitutional deliberation. However, in terms of its constitutional philosophy, it sits in stark contrast with the legalistic conception. Constitutional construction claims that constitutional standards are highly under-determined, and therefore cannot impose meaningful constraints on the democratic legislature. Rather than limiting, the Constitution empowers the legislature to develop

the content of its principles, values and other standards. In performing this function, the legislature enjoys a wide margin of discretion to choose between different alternatives. This conception expects legislation to be the product of rational action, grounded in deliberation. However, this view seems to be opposed to abstract rationalizations. Its scepticism not only comes from the idea of political disagreement about matters of political morality, as in the case of constitutional deliberation. It is also driven by a "conservative disposition" to change, an organic view about the development of constitutional principles, values and practices in different political communities, and therefore, an attachment to indigenous constitutional traditions.

This thesis claims that mere theorizations do not suffice. LSCG must be understood in context. My second claim is that these LSCG conceptions are shaped by two contingent considerations. Firstly, by the constitutional framework that is employed to assess legislation. There are countries with written Constitutions, and others with unwritten constitutions. Some countries have indigenous bills of rights, while others lack such statement of rights. Some countries are members of an international human rights protection system, or supranational organizations with law-making powers, such as the European Union, while others are not. Most countries provide a role for courts in constitutional review, although there is a spectrum from relative strength to relative weakness of the review power of the judiciary. Finally, there are countries that only recognise "interpretative" powers to courts. These institutional factors have an impact on LSCG conceptions. Secondly, the possibility of LSCG is dependent on the characteristics of a real-world legislature. Understanding the practice of LSCG requires deep knowledge of the internal dynamics of Parliament. If the legislature is bicameral, the analysis must look at the ethos, political culture and working practices of each House of Parliament. It must also bear in mind the relationship between the two chambers. A key component is the system of select committees: whether it is strong or weak, whether these committees have access to legal advisers, their capacity to gather external expert knowledge and views from the public and other stakeholders, and how select committees interact with the Houses of Parliament and government. Finally, the degree of independence that Parliament enjoys from the executive.

Following the methodology set out above, Chapters Three, Four and Five of this thesis discussed how the UK unwritten constitution shape the LSCG conceptions. Chapters Two and Six discussed the possibility of LSCG in the UK Parliament. Each of these two contingent considerations set out above give rise, respectively, to my third and fourth claims, which discuss substantive and procedural aspects of LSCG in the UK. Starting with the first point, the UK unwritten constitution raises significant challenges for LSCG. Its principles, values, conventions, doctrines and other standards are fraught with questions about pedigree and normative content. Constitutional assessments are further complicated by the fact that the constitution is unsettled. It mixes traditional and modern components. Although incremental constitutional reform has modernized certain aspects of the constitution, this project remains incomplete. The contemporary UK constitution is one of multiple layers and no clear constitutional philosophy. It remains essentially contested, and therefore cannot provide clear normative guidance about which of the LSCG conceptions should be preferred. The answer to this question therefore depends on broader normative debates about the UK constitution. It is beyond the scope of this work to address those debates. As far as this thesis is concerned, the main claim is that a theory of LSCG in the UK cannot provide an answer to this question. As with any constitutional debate in the UK, the aptness of each conception will have to be tested against the "coercion" of the arguments in support. Nevertheless, the thesis discusses the suitability of different conceptions to different aspects of the UK constitutional framework, and has presented a sceptical view about the hard approach to the legalistic LSCG conception. Be as it may, it is worth noting that a theory of LSCG in the UK requires the different parliamentary bodies to take seriously the existence of "non-legal" limits on Parliament's theoretically supreme legislative powers (Chapters Three and Seven).

Each constitutional committee approaches the UK constitution in different ways. Their work is also underpinned by different LSCG conceptions. The DPRRC engages with the government in a dynamic of justification and assessment. This committee managed to impose a burden of justification on the government, which is fulfilled by a dedicated memorandum. On this basis, the DPRRC conducts a meticulous black letter analysis of each clause delegating powers and providing for degrees of parliamentary oversight. For this reason, the DPRRC mainly aims at having an impact

on constitutional deliberation. However, I claim that this committee has refrained from clarifying the criteria to assess government legislation, and the constitutional standards that underpin its work. Arguably, this undermines the DPRRC's capacity to influence the government, and to improve deliberation further (Chapters Four and Seven).

In sharp contrast, the SCC engages deeply with the constitution, especially with its institutional and power-distributive aspects. Furthermore, rather than detailed analysis, the SCC focuses on broader trends, the key principles underlying legislation, and the provisions that raise significant constitutional concerns. In terms of LSCG conceptions, the SCC's analysis can develop in different ways. There are instances where the SCC must assess legislation promoting constitutional change. In these instances, the committee advocates for a careful and coherent development of the constitutional framework, and therefore, acts as an agent that promotes constitutional deliberation. In other instances, the SCC operates as a constitutional scrutiniser which assesses the impact of legislative proposals on the constitutional framework. This strand of work is directed towards reminding politicians about the existence of "non-legal" limits on legislative powers. I identify cases where the SCC develops the content of constitutional principles, values, conventions and doctrines into broad and flexible standards, open to qualification in light of political needs and circumstances. Then, the SCC employs these standards as benchmarks to assess legislative proposals and to make recommendations to achieve the same policy objectives in constitutionally consistent ways. This is an instance of nuanced and soft legalistic LSCG. Alternatively, there are cases, most notably on the territorial constitution, in which the SCC takes a more prudential approach. Either because of an incoherent development of the devolution settlements, or because the central government tends to forget the significance of regional autonomy, the SCC insists on the need for an appropriate distribution of powers between different sources of political authority. This is a prudential approach because it is directed towards the avoidance of political conflict. It reminds central government about the need to exercise self-restraint to maintain the unity of the state (Chapters Four and Seven).

Finally, the JCHR faces contradictory pressures emerging from the architecture of the HRA. There is pressure for the JCHR to prevent legislation from being found in breach of Convention rights, either by domestic courts or by the European Court of

Human Rights. On the other hand, there is an expectation that Parliament will develop its own approach to human rights protection, and that the JCHR will assist the legislature in this task. While the first pressure requires the JCHR to employ a legalistic conception of LSCG, the second pressure requires an alternative conception, either of constitutional construction and development, or of constitutional deliberation. I argued that the JCHR has opted for a legalistic conception of LSCG. The committee's analysis is framed mainly in terms of proportionality assessments, legal interpretation, case law and legal safeguards. Nevertheless, gradually, the JCHR moved from a hard to a soft approach to legalism by developing a less court-centred and more independent and evidence-based assessment, although one that continues to be framed in terms of legal analysis (Chapters Five and Seven).

The fourth claim concerns the operation of LSCG in the UK law-making practice (Chapters Two and Six). I argued that the three constitutional committees are the main drivers of constitutional thinking in the UK legislative process. There are five reasons for this. Constitutional committees are directly involved in legislative scrutiny; they are a permanent component of Parliament, they have expertise on the subject matter; they operate in a consensual and non-partisan basis; and they regularly engage in dialogue with the government, both at political and civil service level. Constitutional committees operate as mediators that offer high quality insights on difficult and technical constitutional issues through clear and accessible reports. In this way, constitutional committees can address two basic challenges that parliamentarians face to assess the constitutional implications of legislation. These are, on the one hand, the highly complex and technical nature of constitutional considerations, and, secondly, the lack of expertise, and of time and energy to devote to these matters.

Although constitutional committee reports provide a valuable source of information, the empirical evidence suggests that their remarks and recommendations have neither significantly impacted parliamentary debates, nor motivated a high number of governmental defeats at the Commons. Westminster factors have prevented MPs from engaging in constitutional assessments. The government still exerts significant control over the lower chamber. Party loyalties are still relevant. The logic of confrontation between the party in government and the main opposition party leads to the prioritization of policy issues and political considerations, thus leaving little

room for constitutional considerations in parliamentary debates. In sharp contrast, the Lords offer a natural forum for LSCG. The upper chamber operates in relative isolation from partisan politics, and relative independence from the executive. In addition, it faces less pressures over its parliamentary time, it can rely on the expertise of some of its members, and on the assistance of its constitutional committees. The Lords provide the ideal conditions for LSCG to flourish (Chapter Two). Not surprisingly, the empirical evidence suggests that peers regularly assess the constitutional implications of legislation, and engage with constitutional committee's reports.

The impact of constitutional committees at the formal stages of the legislative process is highly dependent on the capacity of the Lords to take forward their recommendations through amendments, and to defeat the government. In these cases, the government may back down and reach a compromise; or it may choose to attempt to revert these amendments at ping pong stage. If the government manages to reassert its parliamentary majority at the Commons, the Lords may exercise self-restraint. A major limitation of reliance on the Lords is that this House has understood its role as that of a revising chamber that prompts second-thoughts on the democratically legitimate lower chamber. The Lords will not challenge the primacy of the Commons, even if significant constitutional issues are at stake. Empirical data about successful amendments on government legislation suggests that the DPRRC is the most influential constitutional committee. In contrast, neither the SCC, nor the JCHR, can claim a significant rate of success in shaping legislative outcomes (Chapter Six).

Although these considerations canvas a rather modest picture about constitutional committees' influence, the evidence suggests that they exert a subtle and difficult to measure, but significant, preventive influence. The operation of constitutional committees has had an impact on bill teams, departmental lawyers, legislative drafters and the Law Officers. These bureaucratic experts are in charge of developing policy, performing internal governmental accountability checks, and preparing the case for the constitutionality of government bills. These actors are subject to soft law requirements to anticipate potential constitutional committees' negative reactions. They are encouraged to interact informally and behind the scenes with constitutional committees, and to engage in collaborative work with their legal advisers. By reinvigorating internal accountability checks at government,

constitutional committees have successfully promoted assessments about the constitutional implications of legislation at the early stages of the policy-making and legislative drafting. They have also imposed a duty to justify government proposals, and have promoted transparency and open government. In this way, preventive influence takes place by motivating political self-restraint (Chapter Six).

This takes me to my fifth and final claim. Statutory duties and long-standing political practices of governmental justification for its legislative proposals, as well as constitutional committees at the UK Parliament, have been theorised as institutional arrangements designed to promote political engagement with the constitutional implications of legislation, and political ownership of the constitution. However, a practice-oriented account of these institutional arrangements in the UK law-making process suggests that the main actors in the operation of constitutional committees are bureaucratic experts in government, and their interlocutors (peers, committee members, committee legal advisers) in Parliament. I claim that this should not be taken as a failure of the system. Instead, it shows that our normative expectations should be revisited. Politicians have a limited role on constitutional committees' operation. However, this is not a matter for serious concern in the UK, due to the existence of alternative avenues to channel constitutional considerations into political decision-making. On the one hand, constitutional committees operate as reason-demanding bodies, impacting and reinvigorating internal governmental legal accountability checks. On the other hand, they provide constitutionally informed recommendations to enlighten debates and facilitate rational legislative action on ministers, MPs and peers. Although elected politicians do not fully engage with these considerations, constitutional committees are operating as conduits through which constitutional considerations are channelled into political decision-making through a series of interactions. These interactions take place between ministers, departmental lawyers and legislative drafters; between these governmental lawyers and constitutional committees' legal advisers; between constitutional committees' reports and government's official responses; between constitutional committees and peers; and between constitutionally-aware peers and ministers and MPs (Chapter Six). In this way, constitutional committees are a welcome addition to UK law-making practice in terms of strengthening the accountability of government to Parliament by means of

demanding reasons, promoting governmental transparency and motivating political self-restraint.

II. Limitations of this work

The analysis contained in this thesis suffers from inevitable limitations coming from the lack of empirical research conducted for the purposes of this thesis. I have employed the primary sources, namely, committee reports, Bills' official documents, parliamentary debates, transcripts of oral and written evidence; as well as empirical studies conducted by political scientists. My analysis about the impact of constitutional committees would have greatly benefited from interviews with MPs, peers, committee members, legal advisers to constitutional committees, bill teams and government departmental lawyers, lawyers of the Office of the Parliamentary Counsel ("OPC"), ministers, and the Law Officers. Unfortunately, I did not have the time, funding and resources to conduct such interviews.[1] Nevertheless, I believe that this work provides a framework to conduct further empirical studies, as I shall explain in section III below. It is also worth mentioning that assessing impact is quite difficult. An argument could be made that this requires thinking in terms of "counterfactuals": whether –and to what extent– MPs and peers, civil servants, departmental lawyers and lawyers at the OPC would have considered the constitutional implications of legislation, had constitutional committees never come to exist.[2]

Secondly, the claims contained in Chapters Four and Five concerning each constitutional committee are based, among other sources, on my own assessment of a number of reports. Yet, word constraints have impeded me to provide additional in-depth case studies in Chapter Seven discussing the contribution of constitutional committees during the passage of concrete Bills. This would have provided additional illustrations about the claims made in this thesis. Although I submit that my two case studies have provided valuable illustrations of many claims made in this thesis, I recognise that questions may arise about the distinctiveness of those cases. The

[1] Note that had this work taken that direction, it would have resulted in quite a different thesis, employing a different methodology.

[2] Consider for instance the case of the JCHR. Counterfactuals are quite difficult. Arguably, Convention rights gained momentum in the UK due to the enactment of the HRA, hence, upon creation of this very committee. Furthermore, this also coincided with a trend towards more debate about human rights law in public law scholarship and these human rights gaining more political salience both at government and Parliament.

passage of the European Union (Withdrawal) Act 2018 has two features. Firstly, it is a rare example of a Bill in which constitutional issues gained significant political salience. Secondly, to a relevant extent, the controversy about the Bill revolved around the relationship between Parliament and the executive in the implementation of the Brexit referendum result. There was significant tension between a weak minority government trying to implement the result of the referendum, and a mainly remain-backing Parliament trying to exert significant policy influence over the process. This context made both the DPRRC and the SCC's remarks and recommendations on delegated powers attractive to MPs. Thus, these committees sought to protect the position of Parliament as the senior partner in the UK law-making process. As far as the prisoners' right to vote case is concerned, two features are worth mentioning. Firstly, although the *Hirst*[3] judgment gained significant political salience, this was mainly a factor of the controversy about the role of the European Court of Human Rights. Many MPs lamented the ability of this "foreign" court to "impose" a decision against the "will" of the democratically elected and "supreme" UK Parliament. A second feature of the prisoners' right to vote issue is that this is a case about monitoring the implementation of an adverse human rights judgment. Unfortunately, word constraints did not provide an opportunity to undertake an in-depth case study on the JCHR legislative scrutiny of a government bill.

III. What is next

Constitutional committees remain a matter of significant interest, and should be the object of further research.

A first area to be developed is more empirically informed work on the relationship between constitutional committees and Parliament. For instance, when assessing the impact of constitutional committee reports on parliamentary debates, the analysis should not be limited to a question about whether there are references to those reports, or whether their recommendations inspired amendments. The analysis should also incorporate a qualitative assessment about the reasons why MPs and peers employ these reports. This may shed light on a number of relevant questions: to what extent these reports are instrumentalised to make a point against the government, or employed

[3] Hirst v United Kingdom (No. 2) (2006) 42 EHRR 41.

as authoritative sources to make a point for a MP's own convenience? Do MPs employing constitutional committees' reports really gain a proper understanding of constitutional issues? To what extent are MPs learning, being educated on constitutional matters by these reports? What are the differences, in terms of understanding, between peers and MPs?

A second area of further research concerns the relationship between constitutional committees and the executive. This thesis has shown that these committees have become a point of reference for civil servants. Empirical studies could be conducted on the views of departmental lawyers, OPC lawyers and the Law Officers on constitutional committees, as well as the degree of knowledge of their main doctrines and constitutional standards.

A third area of research concerns the internal workings of constitutional committees. Further research is needed about the degree of involvement of constitutional committees' legal advisers, the degree of involvement of individual members in the committees' work, and on how divergences between committee members are solved.

Fourthly, the analysis of UK constitutional committees would benefit from comparative studies. There is an internal dimension to these studies. The work of the SCC could be compared with the role on constitutional change played in the past by Royal Commissions. On the other hand, the work of the DPRRC could be compared with the work that *ad hoc* parliamentary select committees, such as the 1952 Select Committee on Delegated Legislation,[4] or the 1971-73 Brooke committee,[5] as well as with the work performed by the House of Commons Procedure Committee on delegated powers in 1977-78,[6] and during the late 1990s and early 2000s.[7] There is also an external dimension. Constitutional committees could be compared with other select committees performing similar work in other jurisdictions. Australia would be a natural candidate.

[4] Select Committee on Delegated Legislation, Report (HC 1952-53, 310).
[5] Joint Committee on Delegated Legislation, *Report* (1971-72, HC 475, HL 184).
[6] Select Committee on Procedure, First Report (HC 1977-78, 588).
[7] Select Committee on Procedure, Delegated Legislation (HC 1999-00, 48); Select Committee on Procedure, Delegated Legislation: Proposals for a Sifting Committee (HC 2002-03, 501); Select Committee on Procedure, Delegated Legislation: Proposals for a Sifting Committee: The Government's Response to the Committee's First Report (HC 2002-03, 684).

Finally, a key issue that arises from this thesis is that constitutional scholarship should pay more attention to bureaucracies as guardians of legality and constitutionality.[8]

[8] Terence Daintith and Alan Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford University Press 1999) Ch7.

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