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Judicial disapproval as a constitutional technique

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In this article, I consider *judicial disapproval* as a form of non-binding review of the constitutionality of legislation. Judicial disapproval is epitomized by the "declaration of incompatibility" – a concept which is commonly thought to have been pioneered in the United Kingdom in the 1990s. I show that the concept in fact has a considerably longer history. In the 1940s, the concept was envisaged and endorsed by Britain's principal contributor to the drafting of the European Convention on Human Rights, David Maxwell Fyfe, and by Hersch Lauterpacht in his work on the incorporation of an international bill of rights into national legal systems. Variants on the concept were also examined and given some credence by American constitutional thinkers during the Revolutionary era and the early Republic. After considering the history of judicial disapproval as a constitutional technique, I offer some observations on the differences between judicial disapproval and *Marbury*-style judicial review. I conclude with a brief explanation as to why judicial disapproval is likely to persist as a form of rights review in the United Kingdom, whatever the fate of the Human Rights Act 1998.

I

When a nation's constitution is the supreme law of the land, and that nation's higher courts are responsible for enforcing the constitution, we say that the nation has a legal system which permits judicial review of legislation, with judges having the power to invalidate unconstitutional laws. In legal systems where judges do not have this power, the legislature normally has the last word on what is the law of the land, so that the judicial function is confined to developing the common law (where there is a body of common law) and interpreting the laws which the legislature enacts.

But this does not mean – certainly nowadays it does not mean – that when the legislature has overarching law-making authority, all a court can do

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with a statute is interpret and apply it. In various common law jurisdictions the judiciary, without prompting from the government or the legislature, is empowered formally to *disapprove* of a statutory provision on the basis that it falls short of the mark when judged in accordance with recognized human rights.[1] In Australia, the state of Victoria and the Capital Territory have enacted statutes conferring disapproval powers on their supreme courts.[2] Before these statutes were enacted, the Oireachtas had passed legislation enabling Ireland's High Court and Supreme Court to disapprove of any statutory or other legal rule which does not meet with the State's commitments as a signatory to the European Convention on Human Rights.[3] All of these three jurisdictions' provisions are modeled on the Human Rights Act (HRA) 1998, section 4, which enables the United Kingdom's higher courts to declare national statutes to be incompatible with rights guaranteed under the European Convention (ratified by the UK in 1951).[4] In this article, I shall treat section 4 of the HRA as the model law conferring a disapproval power on judges – though, as will become clear, my interest is not in laws which confer this power but rather in the history of the idea that courts given this power might be able to stymie legislatures which pass, or are minded to pass,

[1] Within some national and supra-national legal systems, there are rules enabling courts to make prompted disapprovals by issuing advisory opinions or answering reference questions regarding the compatibility of proposed or actual legislation with constitutional or treaty provisions. Canada's parliament conferred reference jurisdiction on the Supreme Court of Canada, for example, when the Court was established in 1875 (see now the Supreme Court Act (Canada) 1985, s 53); questions posed to the Court will sometimes concern the constitutionality of proposed legislation – see, e.g., *Reference re Securities Act* 2011 SCC 66. At the supra-national level, member states of the Organization of American States can seek advisory opinions from the Inter-American Court of Human Rights regarding the compatibility of domestic laws with relevant treaty provisions: see American Convention on Human Rights 1969, art 64.

[2] Victoria Charter of Human Rights and Responsibilities Act 2006, s 36(2); Human Rights Act 2004 (ACT), s 32(1)-(2).

[3] European Convention on Human Rights Act 2003 (Ireland), s 5(1). New Zealand's parliament has not conferred a similar power on judges to declare legislation inconsistent with the country's (statutory) Bill of Rights, but the courts assume the authority to exercise such a power (*Moonen v Board of Film and Literature Review* [2000] 2 NZLR 9 (CA); *R v Hansen* [2007] 3 NZLR 1 (SC)) and the High Court recently exercised it in *Taylor v A-G* [2015] NZHC 1706 (the decision is under appeal).

[4] There are also incompatibility provisions in the UK's laws governing the legislative competence of devolved assemblies: see Scotland Act 1998, s 29(2); Northern Ireland Act 1998, s 6(2); Government of Wales Act 2006, s 108(6).

statutes which are at variance with the constitution or with an incorporated treaty.[5]

By d*isapproval* I do not mean that a court must be commenting negatively on a law which falls short. The court could, indeed very likely will, be purporting to state a fact – that this law, considered in the light of human rights, does fall short – so that its assessment *amounts to* a disapproval. When I refer to judicial disapproval as a *constitutional technique*, I primarily have in mind a court pointing out to a legislature that an enacted law is incompatible with a right which, for one reason another (because it is contained in a nation's bill of rights, for example, or in a treaty incorporated into national law), is considered to be a fundamental – or constitutional, or human – right. Courts are, of course, disapproving of laws when they strike them down as unconstitutional. But what I am referring to as disapproval is emphatically not repudiation. A disapproval, to adopt the language of section 4(6) of the HRA, "does not affect the validity, continuing operation or enforcement of [a statutory] provision in respect of which it is given … and … is not binding on the parties to the proceedings in which it is made."[6]

This rather suggests that judicial disapproval is likely to be nothing but posturing – courts carping without consequence. But the reality, certainly in the UK, has so far been otherwise: declarations of incompatibility have almost always spurred legislative amendment.[7] Perhaps this is because ignoring a declaration of incompatibility is a potentially risky business: a government

[5] I will usually refer to laws simply as if they are being judged by reference to a constitution. Of course, the basis for judicial disapproval can – indeed, in those jurisdictions which currently confer judicial disapproval powers, will – be an apparent inconsistency between a national (or state) law and the content of an incorporating statute which does not have constitutional status.

[6] Human Rights Act 1998, s 4(6). The Australian and Irish statutes use much the same form of words: see the Victoria Charter of Human Rights and Responsibilities Act 2006, s 36(5); Human Rights Act 2004 (ACT), s 32(3); European Convention on Human Rights Act 2003 (Ireland), s 5(2). One should not think that a declaration of incompatibility, because it has no effect on the continued operation of the law and is not binding on the parties to a case, must therefore have no legal effect whatsoever. To take the example of the Human Rights Act 1998, a declaration, under s 10(1) of and sch 2 to the Act, might have a legal effect in the sense that it could be the basis for a minister removing an incompatibility by way of a remedial order.

[7] In Australia and Ireland, the statutes empowering courts to make declarations have, to date, been sought out infrequently and used hardly at all.

would be choosing to keep faith with a law which a higher domestic court considers out of line with a human rights treaty to which the UK is a signatory (with the possibility of that law being referred to the European Court of Human Rights (ECtHR)).[8] A declaration does not force the legislature to remedy domestic laws at variance with an international human rights norm, but it does compel it to choose between accepting a court's interpretation of the relevant norm or standing firm in the face of whatever should follow from that court having accorded it the status of human rights contravener. Rather curiously, some discern in this state of affairs evidence of an emerging "dialogue" model of rights protection, whereby judges are "afford[ed] … an opportunity to collaborate … with Parliament in the amendment of the statutory provision which is discovered to have overridden human rights."[9] Along with Canada's "notwithstanding mechanism", Stephen Gardbaum has argued, the declaration of incompatibility is one of the two "entirely novel" features of the "new Commonwealth" dialogue model of judicial review.[10]

[8] See *R v Secretary of State for the Home Department, ex p. Simms* [2000] 2 AC 115 (HL), 131 (Lord Hoffmann); also HL Deb 3 Nov 1997 vol 582 col 1229 (Lord Irvine, LC). To date parliament has, with one exception (prisoners' voting rights), resolved every incompatibility that the courts have brought to its attention. With legislation enacted since the coming into effect of the HRA, the likelihood of parliament standing by Convention-incompatible statutory provisions is diminished further by virtue of HRA, s 19(1), which requires the minister in charge of a bill, before its second reading, either to "make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights … or … make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill." For comparable (though not identical) Australian provisions, see Victoria Charter of Human Rights and Responsibilities Act 2006, s 28; Human Rights Act 2004 (ACT), s 37(3).

[9] *Nicklinson v Ministry of Justice* [2014] UKSC 38 at [204] (Lord Wilson). See also HC Deb 24 June 1998 vol 314 col 1141 (Jack Straw); Alison L. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2009), 115-43.

[10] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge: Cambridge UP, 2013), 29-30. Canada's notwithstanding clause – originally contained in a statutory provision (the Canadian Bill of Rights 1960, s 2) but given constitutional status under section 33 of the Charter of Rights and Freedoms 1982 – permits the Canadian parliament and provincial legislatures expressly to exempt particular laws from specified sections of the Charter (so that those laws take effect notwithstanding their possible conflict with certain Charter provisions).

Others have written at length about the inappropriateness of characterizing declarations of incompatibility as dialogue.[11] This article leaves that line of critique to one side and considers instead the presumption of novelty. That courts can satisfactorily vet laws for their constitutionality so long as they are empowered to declare legislation to be inconsistent with fundamental rights is an idea which is commonly thought have emerged in the UK in the years leading up to the enactment of the HRA. It is, in fact, a mistake to think thus. In sections III and IV, after explaining (in section II) how the section 4 declaration came to be a feature of UK law, I show that there is nothing distinctively late-twentieth century about the idea that judges might have some say over the content of legislation by making non-binding declarations regarding the unconstitutionality of statutes.

Besides being older than is commonly presumed, this idea, as I show in section V, originated, and a particular version of it was taken seriously in, of all places, America – the country which invented and has steadfastly stood by the form of constitutional adjudication to which judicial disapproval stands as an alternative. The notion that judges might prevent, or help prevent, legislatures from passing unconstitutional laws – either as well as or instead of striking down unconstitutional laws once passed – never took hold in the United States. In section VI, I move from history to analysis and offer an account of why it should never have taken hold there, before concluding (section VII) with some observations on judicial disapproval in the UK today.

II

That Gardbaum should consider section 4 of the HRA novel is entirely understandable. It was novel to those responsible for its enactment. As shadow Home Secretary in the mid-1990s, Jack Straw was in charge of working out how, in the event of Labour being returned to government, the

[11] See, e.g., Aileen Kavanagh, "The Lure and the Limits of Dialogue" (2016) 66 *UTLJ* 83, 99-106.

party would fulfil its pledge to incorporate the European Convention on Human Rights into UK law. Incorporation would mean that, when challenging public decision-making, aggrieved parties could seek to have Convention rights (the rights set out in articles 2-12 and 14 of the Convention) directly enforced in national courts. But incorporation was a thorny issue. If a court could hold that a public authority had not acted outside or misinterpreted the statutory powers conferred on it, but that the statute conferring those powers was nonetheless to be set aside because it contravened Convention rights, judges would be overriding the sovereignty of parliament. Could incorporation be achieved without putting an end to parliamentary sovereignty?

The most straightforward answer was that it could be so achieved, because whatever parliament enacted it could also repeal. This answer had already been espied in 1972, when the UK signed the Treaty of Rome and parliament passed the European Communities Act. Joining the European Economic Community[12] meant that, in cases of irreconcilable conflict between national legislation and European law which took direct effect in the UK, a British court would have to dis-apply the national legislation and enforce the European law instead.[13] It looked as if the writing was on the wall for parliamentary sovereignty. But, as some of those involved in the process which led to the UK joining the European Community were minded to emphasize, parliament, being precluded from binding itself and so able to undo whatever it has done, could still withdraw from its obligations under European law: sovereignty remained intact because what parliament had ceded it was at liberty to re-possess.[14] In a discussion document published in

[12] Which became the main component of the European Union, the European Community, when the Maastricht Treaty came into force in 1993. With the entry into force of the Lisbon Treaty of 2009, the European Community was absorbed into a consolidated European Union.
[13] See *R v Secretary of State for Transport, ex p. Factortame Ltd (No. 2)* [1991] 1 AC 603.
[14] See Lord Kilmuir, LC to Edward Heath, 14 Dec 1960, National Archives, PRO/FO 371/150369 (Kilmuir advising Heath – who was then responsible, as Lord Privy Seal, for the UK's EEC membership negotiations (it was under Heath's premiership that the UK ultimately joined the EEC in 1972) – that it would be a mistake to think "that entry into the Community would be irrevocable", since parliament "would retain in theory the liberty to

1996, Straw (writing with one of his front-bench colleagues) observed that this argument would apply no less to legislation incorporating the European Convention into national law: "parliamentary sovereignty … means that one Act of Parliament cannot bind a future Parliament…. A future Parliament and government could, if it chose, withdraw from the Convention and its obligations, and end incorporation of the ECHR."[15]

But this straightforward answer was, Straw appreciated, a little too straightforward. Once a statute incorporating the Convention had been enacted, the likelihood was that it would "enjoy a high degree of permanence in UK law."[16] That parliament could choose to repeal the statute did not mean that it very easily would. Just how permanent the legislation might be depended, furthermore, on whether it empowered the courts to strike down national legislation which contravened Convention rights. A statute according the courts this power would be all but formally entrenched within the UK's constitutional arrangements: if parliament were subsequently to enact another statute repealing the legislation incorporating the Convention, a court could presumably strike this repealing statute down, should it be challenged, on the basis that it offended against the UK's commitment to the European Convention.[17] There was a circle to be squared. On the one hand, if parliament were to enact an incorporating statute which gave the courts the power to override legislation, parliamentary sovereignty would be at an end. On the other, were it to enact a statute which denied the courts this overriding

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repeal" the legislation incorporating EEC law into domestic law); HL Deb 2 Aug 1962 vol 243 cols 421-2 (Lord Dilhorne, LC) ("Parliament could repeal the Act applying these treaties. It could not be prevented from doing so, but it must be recognized that in international law such a step could only be justified in exceptional circumstances"); HL Deb 13 Nov 1962 vol 244 cols 533-4 (Lord Dilhorne, LC); H. W. R. Wade, "The Judges' Dilemma", *The Times* 18 April 1972, p. 14; Edward Heath, *The Course of My Life: My Autobiography* (London: Hodder & Stoughton, 1998), 385, 716-7.

[15] Paul Boateng and Jack Straw, "Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK Law" (1997) 1 *European Human Rights L. Rev*. 71, 77.

[16] Ibid.

[17] If parliament had enacted an incorporating statute containing a provision expressly stating that the statute could not bind future parliaments – that any future parliament would be entitled to repeal it – this, had the courts been invested with a strike-down power, would have been subject to challenge on the same basis.

power, sovereignty would be preserved but Convention rights would be unenforceable in the UK courts. How could the courts be given a power to police statutes without abrogating parliamentary sovereignty?

The answer to this question is well known and easily summarized: parliament enacted legislation obliging the courts to strive, so far as is possible, to interpret domestic law so as to render it compatible with Convention norms and, should this not prove possible, to apply the domestic law but also issue a non-binding declaration of incompatibility. I am not concerned with the provenance of the interpretive obligation which parliament placed on the courts.[18] My only interest is in how the declaration of incompatibility idea came to be. Straw recalls that certain London-based academics were "hugely influential" on Labour's thinking about how to "find a path which reconciled the benefits of incorporation with the imperative of parliamentary sovereignty."[19] One of these academics, Francesca Klug, who in the mid-1990s was a researcher at The Human Rights Incorporation Project (HRIP) based at King's College, was "asked to advise Straw directly" on how the circle might be squared.[20] In June 1997, a month after Labour's election to power, she produced a paper – circulated to civil servants – in which she proposed a judicial "power of declaration" as a possible way of preserving parliamentary sovereignty while enhancing the courts' reviewing power.[21] A co-authored follow-up paper recommended that the courts, where they "cannot interpret statutes to conform with the Convention … be given a specific power of declaration that … an Act of Parliament (or section of it)

[18] The precursor to HRA, s 3 (which sets out the interpretive obligation) is commonly taken to be the New Zealand Bill of Rights Act 1990, s 6 ("Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning").
[19] Jack Straw, *Last Man Standing: Memoirs of a Political Survivor* (London: Pan, 2012), 273.
[20] Francesca Klug, *A Magna Carta for All Humanity: Homing in on Human Rights* (London: Routledge, 2015), 169.
[21] Francesca Klug, "Briefing on Incorporation of the European Convention on Human Rights into UK Law: The 'British Model'", unpublished paper (London: HRIP, 1997).

breaches the Convention".[22] In October 1997, the government produced a White Paper and a Human Rights Bill endorsing this proposal.[23]

The proposal solved the government's problem: judges could disapprove of a statute (declaring that it contravened a right, or rights, protected by the Human Rights Act), but they could not overturn it – and so parliament's sovereignty remained intact. Klug had already been associated with a similar proposal in the early 1990s in her capacity as principal author of the National Council for Civil Liberties' *A People's Charter*, a bill of rights blueprint – based on various international human rights treaties (including the European Convention), common law fundamental rights and Magna Carta – which, while not purporting to undermine parliament's sovereignty, proposed that, were the suggested bill implemented, judges should be able to express a view as to whether or not impugned statutes were inconsistent with its content.[24] But even this was not the first outing for the declaration of incompatibility concept. Before Klug or anyone else in the 1990s had considered how a UK bill of rights based on Convention rights could be enforced, others had entertained the concept as the key to enhancing the constitutional function of the judiciary while preserving the sovereignty of legislatures.

III

One of the principal architects of the European Convention was a Scotsman named David Maxwell Fyfe. Maxwell Fyfe spent the early part of his career as a barrister, mainly in the criminal courts of northwest England, and the mid-to-late part of his career as a Conservative politician. He served as Home Secretary between 1951 and 1954 and, from 1954 to 1962, he was the Lord

[22] Francesca Klug and Rabinder Singh, "The British Model of Incorporation: The Power of Declaration", unpublished paper (London: HRIP, 1997), para 1 (b).
[23] *Rights Brought Home: The Human Rights Bill*, Cm 3782 paras 2.9-2.10; Human Rights Bill 1997 (HC bill 119), clause 4; see also HL Deb 3 Nov 1997 vol 582 cols 1228-9 (Lord Irvine, LC).
[24] See Francesca Klug, *A People's Charter. Liberty's Bill of Rights: A Consultation Document* (London: NCCL, 1991), 21-4, 27, 86-7, 92-3, 96.

High Chancellor of Great Britain (Lord Kilmuir). About parliamentary sovereignty he tended to say what one might expect someone with this *résumé* to say: parliament "is supreme" (it "may make or change any law as it pleases"), so that "[w]hen once a judge has ascertained the law which governs an issue, he has no choice but to apply it."[25] But this could not be the end of the matter, Maxwell Fyfe thought, if the UK was to be a serious participant in the post-War European project. Along with the other key members of the "Juridical Section" of the European Movement's International Executive Committee, which produced the July 1949 draft of the European Convention, Maxwell Fyfe believed that the Convention – in contrast to the Universal Declaration of Human Rights – must be judicially enforceable. The Convention, he insisted, should "contain an undertaking by each [member] State to adopt as part of its municipal law the fundamental rights set out … and to give jurisdiction to its municipal courts to adjudicate upon the compatibility of legislative, administrative or other acts with those fundamental rights."[26]

What did Maxwell Fyfe mean when he said that a municipal court should be able to "adjudicate upon the compatibility" of (among other things) domestic statutes with Convention rights? Did he have in mind a power of judicial override, or simply the power to declare an inconsistency? It seems safe, for two reasons, to presume that he cannot have been thinking of the former. His observations about the supremacy of parliament and about courts adjudicating on compatibility were made in the same year – it seems almost inconceivable that he could simultaneously have been declaring parliamentary sovereignty to be a fact and arguing that the UK's courts must be able to strike down enacted laws. The second reason that Maxwell Fyfe was most likely envisaging a national court disapproving of, rather than striking down, Convention-

[25] David Maxwell Fyfe, "The British Courts and Parliament: The Judiciary in the British Constitution" (1949) 35 *ABAJ* 373, 373.
[26] David Maxwell Fyfe to Jean Drapier, 3 Jan 1949, Historical Archives of the European Union (Mouvement européen), Florence, ME-1392, box 691.

incompatible legislation is that his reflections on how Convention rights might be enforced were influenced by Hersch Lauterpacht.

During the 1940s, Lauterpacht drafted an international bill of rights for the UN Human Rights Commission – the bill is set out as chapter 6 of his book, *An International Bill of the Rights of Man* (1945)[27] – and played a significant role in the movement which culminated in the Universal Declaration of Human Rights. The Universal Declaration, drafted in 1948 and ratified in 1949, left him frustrated: declaration was all that it was – there was no legal machinery to ensure its enforcement.[28] Maxwell Fyfe, when he was serving on the Juridical Section of the European Movement's International Executive Committee, sought and received advice from Lauterpacht on the content and design of the European Convention.[29] After the draft Convention was published, Lauterpacht commended its authors for venturing where the United Nations had declined to tread. "When accepted", he observed, the draft Convention, "unlike … the Universal Declaration of Human Rights … will form an enforceable part of the law of nations and of the municipal law of the States which have adopted it."[30]

In 1950, reviewing the book in which these words appeared, Maxwell Fyfe remarked that Lauterpacht's "earlier work in this field" had done "much to inspire" him.[31] Lauterpacht, in the work he had produced in the mid-1940s on an international bill of rights, had paid particular attention to the question of how a bill, once ratified, could be enforced in a system founded on

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[27] Hersch Lauterpacht, *An International Bill of the Rights of Man* (Oxford: Oxford UP, 2013 [1945]), 69-74. The bill was submitted to the UN Human Rights Commission in 1947.

[28] See Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: Cambridge UP, 2010), 257.

[29] See *Political Adventure: The Memoirs of the Earl of Kilmuir* (London: Weidenfeld & Nicolson, 1964), 176.

[30] Hersch Lauterpacht, "The Proposed European Court of Human Rights" (1949) 33 *Transactions of the Grotius Society* 25, 40. The article is republished with revisions as chapter 18 of Hersch Lauterpacht, *International Law and Human Rights* (London: Stevens & Sons, 1950). Lauterpacht's statement turned out to be wrong. In August 1950, the Committee of Ministers of the Council of Europe determined that acceptance by member States of the jurisdiction of a supra-national court would be optional (article 46 of the European Convention). The jurisdiction of the ECtHR was made compulsory for all member States of the Council of Europe in 1998.

[31] David Maxwell Fyfe, "Human Rights" [review of Lauterpacht, *International Law and Human Rights*], *The Observer* 27 Aug 1950, p. 7.

parliamentary sovereignty. For "enforcement … of … the Bill of Rights … there must exist a judicial machinery … for testing for the conformity of legislative, judicial, and executive action with [its] provisions".[32] Whereas "enforcement would be relatively simple in countries which courts have the power to review the constitutionality of the acts of the legislature",[33] there are "serious obstacles" in "Great Britain, where the supremacy of Parliament is absolute".[34] Nevertheless, Lauterpacht thought, enforcement "short of full judicial review"[35] is perfectly possible there. For where

> no interpretation will be able to deprive of its obvious meaning an Act of Parliament clearly designed to change or to abrogate an obligation of the Bill of Rights … the courts, while giving effect to the statute, must be given the right – and must be under a duty – to declare that the statute is not in conformity with the Bill of Rights.[36]

Were a national court to "make a declaration" to this effect, it would not be "pass[ing] judgment upon the validity of the statute",[37] for "[n]o immediate *legal* result would attach to any such declaration."[38] Nevertheless, "a formal pronouncement declaring [a statute] inconsistent with the Bill of Rights" would be "of significant political potency in the domestic sphere", for "it constitutes a starting point for the … protection and enforcement" of human rights.[39] Lauterpacht's implication – the point which others have made explicitly apropos section 4 of the HRA – was that a declaration is unlikely to be entirely ineffective as a method for policing statutes because governments will invariably recognize that ignoring a declaration could prove politically

[32] Lauterpacht, *An International Bill of the Rights of Man*, 185. Note the resemblance of this statement to the one made some four years later by Maxwell Fyfe in his letter to Jean Drapier (quoted earlier) on the importance of giving jurisdiction to municipal courts to adjudicate upon the compatibility of legislative, administrative and other acts with fundamental rights.
[33] Lauterpacht, *An International Bill of the Rights of Man*, 186.
[34] Ibid 188.
[35] Ibid 190.
[36] Ibid 192.
[37] Ibid 193.
[38] Ibid 192-3. Emphasis in original.
[39] Ibid 193.

costly. In 2001, the UK's then head of the judiciary defended section 4 – Lauterpacht's thinking made law – using the exact same rationale.[40]

IV

So the declaration of incompatibility had been contemplated as a method for enforcing European Convention rights in the United Kingdom approximately half a century before the Labour government was presented with the concept in 1997; Lauterpacht and Maxwell Fyfe had both been wise to the concept, and indeed had endorsed it. But anyone intent on tracing the history of the idea that courts might effectively counter unconstitutional legislation by disapproving of it would not stop with these two men.

Perhaps the earliest formulation of a judicial technique resembling the declaration of incompatibility can be found in a pamphlet from the American Revolutionary era. In the 1760s, American colonists famously objected to the British parliament's attempt to tax them. The Bill of Rights 1689 provided that no taxes should be imposed without the authority of parliament. But the colonists, not being represented in parliament, had no say in whether parliament should be authorized to tax them. Laws levying money from those whom the legislature did not represent – this was the nub of the objection – violated the fundamental rights of British subjects on the American continent. A Boston lawyer named James Otis, in his *The Rights of the British Colonies Asserted and Proved* (1764), expressed the objection forthrightly:

> Now can there be any liberty, where property is taken away without consent? … [T]he imposition of taxes … in the colonies is absolutely irreconcilable with the rights of the colonists as British subjects and as men…. The very act of taxing, exercised over those who are not represented, appears to me to be depriving them of one of their most essential rights, as freemen; and if

[40] Lord Irvine, LC, "Sovereignty in Comparative Perspective: Constitutionalism in Britain and America" (2001) 76 *New York Univ. L. Rev.* 1, 19.

continued, seems to be in effect an entire disfranchisement of every civil right.[41]

Three years earlier, Otis had argued before the Superior Court of Massachusetts that a writ of assistance – a warrant vesting the British authorities with more or less permanent powers to search, without suspicion, any colonist's property for contraband – was "against the fundamental Principles of Law" [42] and so should be adjudged "void."[43] In support of this claim, Otis cited Sir Edward Coke's famous passage from *Bonham's case* (1610): "it appears in our books that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void".[44] Reliance on Coke's dictum almost eighty years after the Glorious Revolution, when parliament's supremacy over all other agencies of government had been secured, was a decidedly anachronistic manoeuvre. Like Coke, furthermore, Otis was not averse to claiming on other occasions that parliament's legislative authority in fact was supreme. "The Parliament of Great Britain have as the last resort been known to appeal to heaven and the longest sword", Otis wrote in 1762, "but God forbid that there ever should be occasion for anything of that kind again; indeed there is not the least danger of it since the glorious revolution, and the happy establishment resulting therefrom."[45] "[L]et the parliament lay what burdens they please on us, … it

[41] James Otis, *The Rights of the British Colonies Asserted and Proved* (Boston: Edes & Gill, 1764), 38. I adopt modern orthography when quoting from seventeenth- and eighteenth-century texts.

[42] "John Adams's Report of the First Argument in February 1761" (1865) 1 *Quincy's Massachusetts Reports (Appendix)* 469, 471. See also *James Otis's Speech on the Writs of Assistance 1761* (New York: Lovell & Co., 1906), 15.

[43] "John Adams's Report of the First Argument", 475.

[44] *Bonham's Case* (1610) 8 Co. Rep. 107a, 118a. See also "John Adams's Report of the First Argument", 475; and Horace Gray, Jr, "Were the Writs of Assistance Legal?", in ibid 512-540 at 520-25.

[45] James Otis, *A Vindication of the Conduct of the House of Representatives in the Province of the Massachusetts-Bay* (Boston: Edes & Gill, 1762), 32. See also Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts* (London: Lee & Pakeman, 1644), 36 ("the power and jurisdiction of the Parliament for making laws … is so transcendent and absolute, … it cannot be confined either for causes or persons").

is our duty to submit",[46] he remarked in *The Rights of the British Colonies Asserted and Proved*, for

> [t]he power of parliament is uncontrollable but by themselves…. They only can repeal their own acts. There would be an end of all government if one or a number of subjects or subordinate provinces should take upon them so far to judge of the justice of an act of parliament as to refuse obedience to it.[47]

Otis seemed to be saying that parliament could make whatever laws it wished to make, apart from when it could not. But in *The Rights of the British Colonies Asserted and Proved*, his argument – though still troublesome – was given slightly more nuance. The claim that unreasonable statutes "shall be held void and of no effect"[48] is still in evidence, as is Otis's soft-spot for Coke's argument in *Bonham's case* ("agreeable to the law of nature"[49] because "[t]he law of nature never invested [parliament] with a power of surrendering their own liberty"[50]). Certainly at one point in the pamphlet, however, Otis argues that unreasonable statutes – statutes contrary to the law of nature – are a matter for parliamentary self-correction. "Parliaments are in all cases to declare what is for the good of the whole", and "their declaration would be … void" were it "against … natural laws."[51] But if a statute is unreasonable, it will eventually "be adjudged [so] by the parliament itself, when convinced of their mistake. Upon this great principle parliaments repeal such acts, as soon as they find they have been mistaken".[52]

So parliament itself must come to the conclusion that it has erred. But the likelihood of it coming to this conclusion – this, for our purposes, is the crux of Otis's argument – is increased if "the judges of the executive courts have declared"[53] that it has erred. The courts, on this account, do not control unreasonable laws by nullifying them, but rather do so by helping parliament

[46] Otis, *The Rights of the British Colonies Asserted and Proved*, 40.
[47] Ibid 39.
[48] Ibid 22; and see also ibid 41.
[49] Ibid 72.
[50] Ibid 73-4.
[51] Ibid 47.
[52] Ibid.
[53] Ibid.

to see when its laws ought to be repealed or altered.[54] "If the supreme legislative errs, it is informed by the supreme executive of the King's courts…. This is government! This is a constitution!"[55] Only parliament can change the law, but the courts might prompt parliament to change the law by declaring a law to be incompatible with the law of nature.

Within the two decades following the ratification of the United States Constitution, the problem which Otis had posed – how courts might have power over legislation without the legislature being stripped of its supremacy – started to become irrelevant to US constitutional theory. Nevertheless, one aspect of his argument was replicated by one of the founders and early Supreme Court justices, James Wilson, in his lectures at the University of Pennsylvania in 1791-2. Any law contrary to the Constitution "is void, and has no operation", Wilson observed.[56] But when a court adjudges a statute to be void for unconstitutionality it is not really striking that statute down but rather (in this respect Wilson's argument echoes *Federalist 78*) declaring that the legislature's attempt to make this particular law was unsuccessful – because the legislated directive was, from the start, contrary to a higher law.[57] So it is that Wilson mounted a markedly tactful defence of judicial review: this manner of "regulation" – courts ruling that particular legislated directives were never laws in the first place – "is far from throwing any disparagement upon the legislative authority of the United States" and "does not confer upon

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[54] "[Otis] did not mean that courts could nullify statutory enactments, but only that the courts, in interpreting statutes in cases that came before them, may indicate their belief that 'the Parliament have erred or are mistaken in a matter of fact or of right …' Courts, Otis meant, are like public-spirited citizens, who have an obligation 'to show [Parliament] the truth,' but they have no authority to impose compliance; only Parliament could declare what is and what is not law." Bernard Bailyn, "Introduction [to Otis, *The Rights of the British Colonies Asserted and Proved*"], in *Pamphlets of the American Revolution*, ed. B Bailyn (Cambridge, Mass: Belknap Press, 1965), 409-418 at 417 (citing Otis, *The Rights of the British Colonies Asserted and Proved*, 41).

[55] Otis, *The Rights of the British Colonies Asserted and Proved*, 47.

[56] James Wilson, "Comparison of the Constitution of the United States, with that of Great Britain", in *The Works of the Honourable* [sic] *James Wilson, LL.D.*, 3 vols (Philadelphia: Lorenzo Press, 1804), I, 425-467 at 461-2.

[57] Cf. *Federalist 78* (Alexander Hamilton) ("[W]here the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter…. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental").

the judicial department a power superior … to that of the legislature", because a court is merely "declaring and enforcing the superior power of the constitution – the supreme law of the land."[58] Wilson was not making the same argument as Otis appeared to be making, for Wilson was convinced that an unreasonable (unconstitutional) enactment should not take effect; the incompatibility of the enactment with the constitution meant that the enactment could not be valid law. He was, nevertheless, like Otis, suggesting that the "salutary"[59] consequence of a court voiding an unconstitutional statute was that the legislature would likely enact a constitutionally compatible law the next time around.[60]

V

Before the ratification of the US Constitution – in the period between the War of Independence and the Constitutional Convention at Philadelphia in 1787 – some American states experimented with a form of review which enabled the courts to play a role in controlling the content of the law by alerting legislators to the faults in their bills before those bills were passed. During the War, many Americans became distrustful of local legislatures – particularly when those legislatures enacted laws interfering with private property rights to meet the demands of military mobilization. The principal (and uniquely American) response to this problem was the establishment of popular conventions – with authority superior to that of ordinary legislatures – to

[58] Wilson, "Comparison of the Constitution of the United States", 462. Essentially the same argument had been developed by another of the early US Supreme Court Justices, James Iredell (in his earlier capacity as an attorney before the North Carolina Supreme Court), in *Bayard v Singleton* (1787) 1 *Martin's Rep. (N.C.)* 42. See Philip Hamburger, *Law and Judicial Duty* (Cambridge, Mass.: Harvard UP, 2009) 462-6, 471-5.

[59] Wilson, "Comparison of the Constitution of the United States", 462.

[60] "The function of judicial review in Wilson's account … was to avoid the errors that may arise in legislation, perhaps not in the immediate perception of basic political principles, but in the legislative reasoning that constitutes their development." Shannon C. Stimson, *The American Revolution in the Law: Anglo American Jurisprudence before John Marshall* (Princeton, NJ: Princeton UP, 1990), 134.

create constitutions limiting the powers of all other branches of government.[61] Establishing constitutional limitations was, of course, something altogether different from getting legislatures to comply with those limitations. Various approaches to the problem of ensuring legislative compliance were devised by the states which drafted new constitutions after the Declaration of Independence. In September 1776, Pennsylvania established a "Council of Censors" – the scheme was replicated in Vermont – whose twenty-four members would be elected by the people every seven years and, among other things, charged with "recommend[ing] to the legislature the repealing of such laws as appear to [the Council] to have been enacted contrary to the principles of the [state] constitution." [62] Although the Pennsylvania and Vermont councils were empowered to make recommendations akin to declarations of incompatibility, the judiciary had no involvement in their activities.

However, another American conciliar innovation *did* involve the judiciary. The New York Constitution of 1777 established a Council *of Revision*: section 3 of the Constitution provided that the state's governor, the chancellor, "and the judges of the [state] supreme court" (or the governor along with the chancellor *or* the court) shall periodically assemble to compose "a council to revise all bills about to be passed into laws by the legislature", so as to try to ensure that "laws inconsistent with the spirit of this constitution, or with the public good," are not "hastily and unadvisedly passed".[63] The Council could veto any bill by a majority vote of its members, though the New York legislature – a bicameral assembly – could override the veto by a two-thirds vote in each house.[64]

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[61] See Gordon S. Wood, *The Creation of the American Republic 1776-1787* (Chapel Hill: University of North Carolina Press, 1998 [1969]), 318-19.

[62] Constitution of Pennsylvania 1776 § 47; also Constitution of Vermont 1786 § 40.

[63] Constitution of New York 1777 § 3.

[64] After a series of disputes with the legislature, the Council was abolished when New York adopted its second Constitution in 1821. During the years of its existence, the Council vetoed 169 bills and the legislature overrode 51 of these vetoes. See Alfred B. Street, *The Council of Revision of the State of New York* (Albany, NY: Gould, 1859), 7, 61.

By May 1787, when the Philadelphia Convention opened, the New York Council of Revision had issued fifty-eight vetoes, twenty-one of which were based on perceived violations of the 1777 Constitution.[65] When issuing Constitution-based vetoes, one historian has remarked, the Council not only "sounded like a court"[66] but employed "language and analysis that clearly foreshadowed judicial review."[67] It would obviously be a mistake, nevertheless, to think that this *was* judicial review. "[I]t is not to be supposed, that [the Council's] assent or objection to a bill can have the force of an adjudication", Chief Justice Duane remarked in 1784, "for what in such a case would be the fate of a law which prevailed against their sentiments?"[68]

The more immediate reason that this could not be judicial review was that judges on the Council of Revision were not involved in reviewing laws: section 3 of the Constitution only empowered the Council to consider and revise bills "before they become laws". The Council's function was distinguishable not only from judicial review but also from a non-binding judicial declaration that a statute is at variance with fundamental rights. For whereas the Council sought to shape the content of possible future laws, the court issuing a declaration addresses the law as it already is; in each instance, different types of document are being scrutinized (in the first instance a bill, in the second a statute), and at different points in time (in the first instance before, and in the latter after, enactment).

There is reason to be wary, then, of citing section 3 of the New York Constitution 1777 as an example of the declaration of incompatibility *avant la lettre*. The Council of Revision functioned not as would a court declaring an incompatibility but rather as would the French Conseil d'Etat (established by Napoleon in 1799) when it draws on *les principes généraux du droit* to advise

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[65] See Jeff Roedel, "Stoking the Doctrinal Furnace: Judicial Review and the New York Council of Revision" (1988) 69 *New York History* 261, 270.
[66] Ibid.
[67] Ibid 272. See also Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (Chapel Hill: University of North Carolina Press, 2005), 177.
[68] *Rutgers v Waddington* (27 Aug 1784), in *The Law Practice of Alexander Hamilton: Documents and Commentary. Volume I*, ed. J. Goebel, Jr (New York: Columbia UP, 1964), 392-419 at 416.

governments on the legality of bills before they are presented to parliament. If there is a modern equivalent to the Council of Revision within those jurisdictions which rely on judicial disapproval as a constitutional technique, it is not, strictly speaking, the court which issues a declaration of incompatibility but rather the committee responsible for advising a government on the constitutional or human rights implications of its bills and draft bills.[69]

Since, however, the point of a declaration of incompatibility is to make a legislature aware of a shortcoming in a law so that it might consider repealing or amending it, the court which grants such a declaration is, in effect, advising the legislature on what the content of an as-yet-to-be-enacted law should be. Though the language seems a little dramatic, a declaration, understood thus, is tantamount "to a pre-emptive strike against future legislation"[70] – an effort by the judiciary not only to alert the legislature to an existing error, as Otis might have put it, but also to try to ensure that the legislature does not proceed to make a different error. While it is important to emphasize that the revisionary and declaratory schemes are distinguishable in that the former concerns bills and the latter concerns laws, in other words, it would be a mistake to conclude that there is therefore no comparison to be made between the two. There is a comparison to be made, because the declaratory scheme has revisionary implications.

In the UK, the potential for declarations of incompatibility to have an impact on the content of future as well as existing statutes was recently highlighted in the case of *Nicklinson* (2014). In *Nicklinson*, the Supreme Court unanimously ruled that the so-called "margin of appreciation" conferred by the European Court of Human Rights on Council of Europe member states –

[69] An example is the UK's Joint Select Committee on Human Rights (JCHR). On its role, see David Feldman, "Democracy, Law, and Human Rights: Politics as Challenge and Opportunity", in *Parliaments and Human Rights: Redressing the Democratic Deficit*, ed. M. Hunt et al. (Oxford: Hart, 2015), 95-113. Whereas the New York legislature needed to obtain a two-thirds majority in both houses in order to override a Council veto, there is formal procedure which parliament has to abide by if it wishes to override an opinion of the JCHR.

[70] *R (on the application of Chester) v Secretary of State for Justice* [2009] EWHC 2923 (Admin) at [46] (Burton J).

the scope for a state authority to interfere with the exercise of a Convention right because insistence on the strict enforcement of that right might undermine the nation's pursuit of legitimate aims – meant that it was for the UK to decide whether its law on assisted suicide infringed article 8 of the Convention (which gives qualified protection to the right to respect for private life).[71] Five of the nine justices in *Nicklinson* took the view that had the Court wanted to issue a declaration of incompatibility under section 4 of the HRA – on the basis that the statutory prohibition on assisting suicide is incompatible with article 8 – it was constitutionally competent to do so. Two of those five justices were prepared to grant such a declaration immediately. The other three – Lord Neuberger, Lord Mance, and Lord Wilson – thought it better to give parliament the opportunity to repeal and replace the impugned legislation and, if parliament failed to do so (or failed to do so satisfactorily), only then to issue a declaration.[72] Quite how the law should be changed "is a controversial, difficult and sensitive moral and politico-social issue," Lord Neuberger observed, "which requires the assessment of many types of risk and the imposition of potentially complex regulations, and it is not a matter on which judges are particularly well informed or experienced."[73] Parliament had debated the matter "on at least six occasions"[74] since 2005 "and it is currently due to be debated in the House of Lords in the near future…. [T]his is a case where the legislature is and has been actively considering the

[71] When parliament decriminalized suicide in 1961, it also confirmed that assisted suicide remained a crime: Suicide Act 1961, ss 1-2. (Section 2(1) of the 1961 Act was repealed and re-enacted in the form of the Coroners and Justice Act 2009, s 59(2).)

[72] The position taken by these three judges, though it conveniently illustrates how the declaration of incompatibility concept can be invoked to try to shape the content of future laws, seems very strange. The point of courts issuing declarations of incompatibility under s 4 HRA is to alert parliament to rights concerns. These three judges wanted to hold back on issuing a declaration of incompatibility so that parliament could be alerted to a rights concern. There would seem to be no practical difference between making a declaration of incompatibility immediately and issuing a warning (or pre-declaration) that a declaration will probably be made if parliament refuses to act. The only obvious difference would seem to be that judges are expressly empowered to make declarations of incompatibility, whereas they are not statutorily authorized to make pre-declarations.

[73] *Nicklinson v Ministry of Justice*, at [84]. Unless otherwise indicated, my quotations from this case are from Lord Neuberger's judgment.

[74] Ibid at [51].

issue."[75] One of the primary obstacles to decriminalizing assisted suicide was that it could open the law to abuse.[76] But this obstacle might "be overcome, or at least circumnavigated" if a credible proposal could be devised "whereby Applicants could be helped to kill themselves, without appreciably endangering the lives of the weak and vulnerable".[77] Therefore, Lord Neuberger concluded, the Supreme Court, rather than granting a declaration of incompatibility, ought to give parliament the chance to re-legislate: "before making … a declaration, we should accord Parliament the opportunity of considering whether to amend section 2 [of the Suicide Act 1961] so as to enable Applicants, and, quite possibly others, to be assisted in ending their lives, subject of course to such regulations and other protective features as Parliament thinks appropriate, in the light of … the provisional views of this Court."[78] The point of raising the possibility of granting a declaration in this instance appears to have been not so much to disapprove of an existing law as to provide legislators with "an indication"[79] as to what they should do when they next debate assisted suicide: you should be changing the law on this issue – this seems to be the gist of the argument – and if, as seems likely, you do change the law, here are some factors which you perhaps ought to consider.[80]

VI

[75] Ibid at [116].
[76] See ibid at [88].
[77] Ibid at [89].
[78] Ibid at [113].
[79] Ibid at [117]. See also ibid [118] ("Parliament now has the opportunity to address the issue of whether section 2 should be relaxed or modified, and if so how, in the knowledge that, if it is not satisfactorily addressed, there is a real prospect that a further, and successful, application for a declaration of incompatibility may be made"), as well as Lord Wilson's observations at [197(f)] and [202].
[80] On 11 September 2015, the commons debated a private members' bill proposing that doctors in England and Wales be allowed to prescribe lethal doses of drugs to terminally ill patients capable of taking the drugs themselves and who were judged to have six months or less to live. MPs, who were given a free vote on the matter, rejected the bill by 330 votes to 118.

The idea that judges might control a law by alerting the legislature to the fact of that law's incompatibility with fundamental rights was not distinctive to the United Kingdom in the late-twentieth century. It has a history, we have now seen, reaching back to American dissident constitutional thought of the mid-eighteenth century.

But though the idea originated in America, it never took root there.[81] In 1787, some of the delegates at the Philadelphia Convention favoured establishing a federal Council of Revision with features similar to the Council which existed in New York.[82] Resolution 8 of the original Virginia Plan, drafted by James Madison and submitted to the Convention by Edmund Randolph, proposed "that the Executive [i.e., the President] and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate…. [D]issent of said Council shall be final, unless the act … be again passed".[83] In June, the proposal was rejected,[84] whereupon James Wilson and James Madison moved that it be reconsidered,[85] whereupon it was rejected again.[86] In August, Madison, supported by Wilson, sought to persuade delegates to accept an amended proposal – one which would have the executive and the judiciary operate separately when scrutinizing bills. Again, the motion failed.[87]

It would be wrong to say that the US rejected what the UK (and some other common law jurisdictions) came to embrace, because what the US

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81 Though occasionally the idea would resurface that a legislature ought to be able to re-enact nullified legislation by securing a two-thirds vote in favour of re-enactment: see William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton, NJ: Princeton UP, 1994), 194 n 3, 199-200.

82 See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan, 1913), 29-31, 34-5, 40, 43, 52-3 (discussing James Madison, George Mason, Edmund Randolph, James Wilson, and John F. Mercer as delegates who favoured establishing a revisionary council).

83 *The Records of the Federal Convention of 1787*, 3 vols, ed. M. Farrand (New Haven: Yale UP, 1911), I, 21.

84 The proposal was rejected by a vote of eight to three: see ibid I, 140.

85 See ibid I, 138.

86 This time the proposal was defeated four to three (with two delegates divided): see ibid II, 80.

87 See ibid II, 298-300. For a nuanced account of the debates accompanying the proposals, see J. M. Sosin, *The Aristocracy of the Long Robe* (New York: Greenwood Press, 1989), 227-50.

rejected and the UK embraced were different schemes. Certainly both schemes are aimed at – to borrow Wilson's words in support of a federal revisionary council – "counteracting … the improper views of the Legislature."[88] But conciliar revision and the declaration of incompatibility are distinct, it is important to keep in mind, in so far as the former enables judges to express a view on the wisdom of a proposed law whereas the latter is advice to the legislature regarding the congruence of an actual law with rights which, for one reason or another, are considered fundamental. Some of the reasons that delegates at the Philadelphia Convention gave for opposing a federal Council of Revision mirror criticisms – sometimes divergent and not always well-founded criticisms – of the declaration of incompatibility concept: that the revisionary power, being subject to legislative override, lacks the force of judicial review;[89] that the power, being one which enables judges to influence the content of legislation, is excessive;[90] that public confidence in the integrity of the judiciary might be undermined if controversy ensues from the courts having used the power;[91] and that the line separating the judicial

[88] *Records of the Federal Convention*, II, 73. In the 1820s, a variant on the Council of Revision model – one which did not involve the judiciary – was proposed for England by the influential parliamentary reformer, Major John Cartwright: see John Cartwright, *The English Constitution Produced and Illustrated* (London: Cleary, 1823), 254-5 ("If a precaution against precipitate legislation could be thought expedient, might it not … be effected, by the creation of a Council of Elders, few in number, and not under 45 years of age? By a fundamental law … it might be required that every Bill … should be submitted to such Council; that the Council should be required to discuss it … without any power to alter the Bill, any words thought unconstitutional to be underscored for reconsideration; … but … with … [t]he Legislature … having full authority … to adopt or reject whatever the Council might have suggested"). For most of the twentieth century – until the inauguration of the UK Supreme Court in October 2009 – law lords were able to (and sometimes would) play a role in the revisionary process by contributing to legislative debates in the upper house: see David Hope, "Voices from the Past – The Law Lords' Contribution to the Legislative Process" (2007) 123 *LQR* 547.

[89] See *Records of the Federal Convention*, II, 76 (Gouverneur Morris) ("[T]here is the justest ground to fear [the Executive's] want of firmness in resisting [legislative] encroachments…. [T]he auxiliary firmness and weight of the Judiciary [under the Council of Revision model] would not supply the deficiency").

[90] See, e.g., *Records of the Federal Convention*, II, 75 (Elbridge Gerry) ("It was making the expositors of the laws the legislators, which ought never to be done"). On the potential political ramifications of courts granting declarations of incompatibility see, e.g., *A v Secretary of State for the Home Department* [2004] UKHL 56 at [145] (Lord Scott).

[91] See *Records of the Federal Convention*, II, 77 (Luther Martin) ("[T]he Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature").

and legislative functions will become blurred.[92] However, most of the reasons that delegates gave for opposing a federal revisionary council can only be properly understood in the context of the Convention debates. Judicial review, some delegates contended, would make the revisionary power redundant.[93] A revisionary scheme would blur the separation of powers by combining the judicial *and executive* departments.[94] Judicial independence would be compromised[95] (and an executive aided by judges would probably be more dangerous than one with sole power to propose revisions[96]). Judges would very likely strike down laws which they had vetoed at bill stage but which the legislature nevertheless enacted.[97] These were arguments which were formulated, and which applied distinctively, as arguments against creating a Council of Revision. It would be foolish to try to re-cast them as objections which hold good, *mutatis mutandis*, against the declaration of incompatibility concept.

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[92] See *Records of the Federal Convention*, II, 75-6 (Gouverneur Morris). The main objection, as regards the Council of Censors proposal, was that the Council would operate much as the House of Lords did when judicial members contributed to legislative deliberations. See also *Federalist 47* (James Madison).

[93] See *Records of the Federal Convention*, II, 76 (Luther Martin) ("[T]he constitutionality of laws … will come before the judges in their proper character. In this character they have a negative on the laws. Join them with the executive in the revision and they will have a double negative").

[94] See *Records of the Federal Convention*, I, 140 (John Dickinson); ibid II, 74-5 (Elbridge Gerry) ("the Revisionary power … establish[es] an improper coalition between the Executive & Judiciary departments … making Statesmen of the Judges").

[95] See *Records of the Federal Convention*, I, 98 (Rufus King) ("Judges ought to be able to expound the law … free from the bias of having participated in its formation"); also *Federalist 73* (Alexander Hamilton). Three decades on from the Philadelphia Convention, Madison wrote to President Monroe of how he had thought that the creation of a federal Council of Revision would dispense with the need for judicial review: see James Madison to James Monroe, 27 Dec 1817, in *Letters and Other Writings of James Madison. Vol. III: 1816-1828* (Philadelphia: Lippincott & Co., 1867), 54-57 at 56.

[96] See, e.g., *Records of the Federal Convention*, I, 139 (Elbridge Gerry) ("the Executive, whilst standing alone would be more impartial than when he could be covered by the sanction and seduced by the sophistry of the Judges").

[97] See ibid II, 75 (Caleb Strong) ("The judges in exercising the function of expositors might be influenced by the part they had taken, in framing the laws"); also *Federalist 73* (Alexander Hamilton) ("the judges … might receive an improper bias, from having given a previous opinion in their revisionary capacity"). The worry turned out to be unfounded: see James T. Barry III, "The Council of Revision and the Limits of Judicial Power" (1989) 56 *Univ. Chicago L. Rev.* 235, 256.

Might the delegates at the Philadelphia Convention have approved a proposal that legislative action be controlled by requiring the federal courts to draw attention to the unconstitutionality of an enacted law but without those courts having the power to strike that law down? Since this proposal was never on the agenda, the question is simply unanswerable. Some contemporary legal scholars may well prefer that the United States had taken such a path.[98] Certainly judicial disapproval has one advantage over a judicial override power in that it allows for reasonable disagreement between legislatures and courts regarding the meaning, balancing, and protection of particular rights. If a court grants a declaration erroneously, or if the legislature would only be able to comply with a declaration by prioritizing one right over another (or others) which it had legislated to protect – for example, by acting on a declaration that its legislation providing rights to victims of hate speech is incompatible with a constitutional right to freedom of expression – the legislature still has the consolation that the declaration is not an invalidation: that there will only be a change to the law if the legislature resolves to change it.

But the prospect of judicial disapproval capturing the American constitutional imagination has never been likely since *Marbury v Madison*,[99] even presuming it ever was likely, for judicial review is an inherently more responsive form of rights protection than is the declaration of incompatibility. Consider this passage from a *New York Times* editorial, expressing incredulity over the content of clause 4 of the Human Rights Bill almost exactly a year before it received royal assent: if enacted, it

> would strengthen the rights of British citizens, but not by enough. It would allow the high courts to rule that a law did not comply with the European Convention. But it would be up to Parliament to overturn the law, and it could decide not to. The danger is obvious. If the American Congress could retain laws after the Supreme Court struck them down, freedoms would

[98] See, e.g., Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115 *Yale L. J.* 1346; Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton, NJ: Princeton UP, 1999), 154-76.
[99] (1803) 5 US 137.

> come and go with the political winds. Politicians do not always have rights in mind, and it is precisely the politically unpopular freedoms – the ones Parliament is most likely to step on – that need the most protection.[100]

On this account, the disadvantage of a declaration of incompatibility as compared with judicial review is that a declaration does not guarantee that a fundamental right will be protected: a court finds that a law infringes a right but, because it has to apply that law (and can see no way to read it down), it cannot remedy the infringement.[101] The comparison might be pushed a little further: a right which is confirmed by the legislature as a consequence of a court issuing a declaration, unlike a right which a court upholds by overturning a law denying that right, will not be protected immediately. Since the court which issues a declaration must still apply the law which occasions that declaration, complainants receive the good news that the court agrees that the law which they challenged is incompatible with (in the case of the UK) the relevant article(s) of the Convention and the bad news that this law still governs their case.[102]

It is important not to exaggerate this drawback. The fact that a declaration of incompatibility does not affect the validity of an impugned law does not mean that there will be an inordinately lengthy gap between a declaration being granted and the legislature taking action. In the UK, not only has parliament almost always resolved incompatibilities brought to its attention, but it often resolves those incompatibilities quickly. The HRA empowers ministers to expedite, by issuing a remedial order, the amendment or repeal of statutes (or, more typically, specific statutory provisions) declared

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[100] "Half-measures on British Freedoms", *New York Times* 17 Nov 1997 at A22.

[101] When a court reads down – when it makes a statutory inconvenience go away – it risks usurping the legislative function. The prospect of issuing a declaration of incompatibility might make judges unduly receptive to taking this risk: a court which balks at upholding a right while denying an attendant remedy, that is, might be moved to rewrite statutory language – *Ghaidan v Godin-Mendoza* [2004] UKHL 30 seems exemplary in this regard – so as to discover a non-existent compatibility and rule that an impugned law in fact protects the right which it was alleged not to protect.

[102] The incentive to challenge presumably diminishes when aggrieved parties cannot benefit from their own legal success (and diminishes yet further if they must bear their own costs): see Tom Hickman, "Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model" [2015] *NZ L. Rev*. 35, 53-4.

incompatible with Convention rights.[103] Furthermore, parliament has sometimes amended or repealed statutes so as to deal with incompatibilities before a court has had to issue a declaration.[104] Complainants whose objective in seeking a declaration is to see a Convention right enforced in their favour eventually, notwithstanding that a court cannot enforce it today, have good reason to be confident – given parliament's general attitude to declarations of incompatibility – that ultimately, and possibly fairly soon, their wishes will be granted.

It is in the nature of some rights, however, that they are only worth protecting if they are protected at the point when the court makes its ruling. Imagine two complainants, complainant *A* and complainant *B*, in a jurisdiction where the higher courts are allowed to declare enacted laws to be incompatible with the written constitution but are not permitted to strike laws down as unconstitutional. Imagine also that the legislature within that jurisdiction tends, like the UK parliament, to legislate fairly quickly to remove or repair laws which the courts declare constitutionally incompatible and that amending legislation will almost certainly operate only prospectively. Complainant *A*, for whom a court rules that a statute is indeed incompatible with an article of the constitution because it provides unequal state bereavement allowances to widows and widowers, may stand to lose little by having to wait for the legislature to fix the problem. But complainant *B*, who is the subject of an extradition order which (after he challenges it) is held by a court to derive from a statutory provision which is incompatible with an article of the constitution, might be expelled from the jurisdiction – and so might stand to lose a great deal – before the legislature resolves the incompatibility. In a jurisdiction where the judges enforce the constitution, and so have the last word on the law, constitutional rights are protected when courts make rulings upholding those rights. When the last word is left to the

[103] Human Rights Act 1998, s 10.

[104] See, e.g., *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2003] EWCA Civ 814; *R (on the application of Hooper and others) v Secretary of State for Work and Pensions* [2003] EWCA Civ 875.

legislature – when the court issuing a ruling can only point out that the law as it stands is at variance with the constitution, and that the legislature would be well advised to legislate again – there is a danger that a complainant might not be protected by the constitutional right which a court thinks should be upheld in his favour. The court, at the point when it rules, may well have no choice but to apply the law and deny the complainant that right.[105]

VII

In this article, I have sought to demonstrate that a judicial technique which is commonly considered to be a late-twentieth century innovation – courts controlling a statute not by invalidating it but rather by alerting the legislature to its constitutional impropriety so that the legislature might consider how, or if, to remedy the problem – has, in fact, a fairly long and detailed history. What lies in prospect for this technique? Anyone more inclined to look forwards than backwards might wonder whether judicial disapproval is destined to become what it once was – a quirky idea, entirely marginal to constitutional thought. Ireland's statutory provision enabling judicial disapproval has been – and, given the country's constitutional arrangements, seems destined to remain – barely utilized. In Australia, judicial declarations of human rights inconsistencies appear to have been ruled impermissible at the federal (as opposed to state) level.[106] And the primary example of a law authorizing judges to make such declarations –

[105] In Ireland, a complainant who is successful in seeking a declaration of incompatibility can apply to the Attorney General for damages (European Convention on Human Rights Act 2003, s 5(4)), though awards are only paid *ex gratia*. Presumably it would also be possible, in the jurisdictions which statutorily empower courts to make declarations of incompatibility, for governments and public authorities to reconsider their (lawful) decisions *ex proprio motu* – though again this would be entirely within the decision-maker's discretion.

[106] In *Momcilovic v The Queen* [2011] HCA 34 the validity of the Victoria Charter of Human Rights and Responsibilities Act 2006, s 36(2) was challenged as conferring on a state court a judicial power exceeding that conferred on the federal courts under sections 73-7 of the Commonwealth Constitution. The High Court of Australia held by 4-3 that the Victoria Supreme Court was duly empowered under s 36(2) but appeared to find that it would be constitutionally improper for a federal court to issue a declaration of inconsistency: see, in particular, *Momcilovic* at paras [92]-[93] (French, CJ).

section 4 of the HRA – is very likely living on borrowed time: the Conservative government has made clear its intention to repeal the Act and replace it with a British Bill of Rights.[107] If the HRA is scrapped, will judicial disapproval conceived as a constitutional technique more or less have had its day?

Most likely it will not. The obvious reason for answering thus is that if the HRA is replaced with a domestic Bill of Rights, cases will presumably then come to the courts in which statutory provisions are challenged as contrary to articles within the Bill. Since the government, in creating the Bill, would not seek to remove the sovereignty of parliament, the courts would not be vested with the power to strike down statutes. Presumably the strongest constitutional move available to a court would be a non-binding declaration that a statute is incompatible with the nation's Bill of Rights. The HRA would go, in other words, but the declaration of incompatibility would stay.

One might think that a yet more obvious reason for concluding that judicial disapproval will be part of our constitutional future is that it has always been a feature of the common law. But this would be to conflate two distinct phenomena. The capacity of a court formally to disapprove of a statutory provision which it considers to be inconsistent with fundamental rights depends upon parliament having empowered it to do so. In principle a court could similarly, irrespective of any power legislatively conferred on it, declare inconsistencies between statutory provisions and basic common law rights; and parliament could, if it wished, repeal or revise those provisions in

[107] Although Theresa May, David Cameron's successor as Prime Minister, can be expected to maintain the Conservative Party's commitment to repealing the Human Rights Act and replacing it with a domestic Bill of Rights, one can only wonder how eager the UK government will be to move quickly to fight this particular battle. Given that the vote to withdraw from the European Union (which took place three weeks before the finalized version of this article was submitted to the journal) is proving controversial and divisive, that the repeal of a statute often described as incorporating the ECHR into national law will likely rub at some of the same wounds as has the Referendum outcome, and that the government will have its hands full negotiating the terms of EU withdrawal once Article 50 of the Lisbon Treaty is invoked, it would not be surprising if the Human Rights Act were to be left undisturbed for quite some time.

light of what courts declare.[108] However, when a court disapproves of a statute not by parliamentary invitation but because it considers the statute to contravene a common law fundamental right, its action is more akin to reading down than to declaring an incompatibility: the statute will be presumed not to interfere with or abrogate liberty, security, access to the courts or any other right deemed fundamental at common law so long as its language can be interpreted to accommodate the presumption. Disapproval in this sense is perfectly consistent with parliamentary sovereignty, has long been evident in the courts, and may well be the most effective constitutional technique at the judiciary's disposal. But it is a form of disapproval different from that which has been examined in this study.

[108] See David Jenkins, "Common Law Declarations of Unconstitutionality" (2009) 7 *Int. J. Const. L.* 183.