Northern Ireland
Legal Quarterly
Vol. 76 No. AD1 (2025) 40–72
Commentaries and Notes DOI: 10.53386/nilq.v76iAD1.1206

The birth of a 'tacit' constitutional convention: *The Collaborative Constitution* and the effect of a declaration of incompatibility

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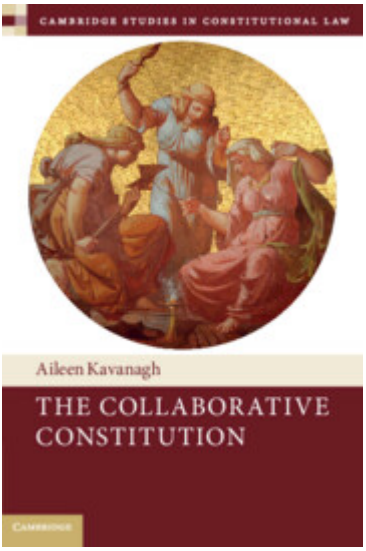

The Collaborative Constitution, Aileen Kavanagh (Cambridge University Press 2023) 300pp; paperback £34.99/hardback £120/ebook $44.99.

* The author is grateful to Gavin Phillipson, Graeme Cowie, Colm O'Cinneide, Aileen McHarg and Paul Bowen KC for their valuable comments on previous drafts. The usual disclaimer applies. This article is dedicated to the memory of Conor Gearty KC (Hon) who first encouraged the author to start writing in 2009, on the issues discussed in this article no less. I had the good fortune to bump into Conor in London, mere days before he died, and I thanked him for his help with getting this article to publication standard and reminded him of his early encouragement. He taught me Human Rights 31 years ago at KCL, we have been in contact consistently, and the shock is immense. The best teacher I ever had by a country mile – witty, crystal clear, pinpoint and whip smart. A devastating loss.

ABSTRACT

This book review article considers some of the core themes discussed in Aileen Kavanagh's *The Collaborative Constitution*, in particular its exploration of the concept of the separation of powers as it actually functions in the United Kingdom (UK). The first section addresses Kavanagh's well-received recent contribution to the long-running debate over 'constitutional dialogue'. The second section directly focuses on the 'nascent' convention that Kavanagh suggests has emerged in the UK and the evidence she offers for this suggestion. Kavanagh details the multiple mechanisms by which institutions collaborate to protect rights. The final section examines the decision by Kavanagh to label the purported convention she identifies as merely 'nascent'. The argument presented here is no less careful than Kavanagh herself to avoid any crude lapse into simply trading blows on who has the 'last word'. Instead, it considers whether we are witnessing the birth of a 'tacit' constitutional convention.

Keywords: declaration of incompatibility; Human Rights Act 1998; constitutional convention; dialogue theory; separation of powers.

INTRODUCTION

Aileen Kavanagh's latest book, *The Collaborative Constitution* (TCC), is an ambitious attempt to transcend the debate over 'whether courts or legislatures should have the last word on [fundamental] rights'.[1] Kavanagh is highly critical of attempts to collapse 'Manichean' constitutional discourse into 'constitutional showdowns' between Parliament and the courts.[2] She argues that such atavistic debates fail to account for the mundane, ordinary tasks undertaken by the institutions of the state.[3] She claims that focusing on the manifest 'quiet collaboration' of the three branches is more useful, more valuable and more informative of the actual and important workings of the constitution than the fetishisation of 'agonistic' constitutional 'flashpoints' indulged in by other constitutional commentators.[4]

Kavanagh's methodology explains why she refuses to be drawn on the question of which side she agrees with in recent major constitutional disputes. She is deliberately vague on where she stands on the outcome in the two famous *Miller* cases, for example, thereby pragmatically, even performatively, demonstrating her alternative methodological approach. That approach, 'grounded in practice',

1 TCC, 'Preface'.

2 Ibid 1 and 11.

3 *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, [2017] UKSC 5; [2017] 2 WLR 583; and *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2020] AC 373; [2019] UKSC 41; 3 WLR 589; [2019] 4 All ER 299.

4 Ibid 11–12.

expresses her roots in positivist jurisprudence, including in her acknowledgments a moving tribute to the late Joseph Raz who was once her doctoral supervisor.[5] It might be thought that the central focus placed on the importance of institutions by Raz, and also his own supervisor H L A Hart, quietly infuses much of the background texture of this book.[6] Indeed, Kavanagh explicitly adopts the Hartian idea of an 'internal point of view' and references the

> foundational Hartian point that all legal systems ultimately rely on a commitment of the key constitutional actors to abide by the rules of the constitutional game.[7]

The collaborative constitution, for Kavanagh, is fundamentally about how the institutions of the state work together. Throughout the book, Kavanagh rightly and persuasively portrays the diverse constitutional actors as motivated in large part to uphold institutional role fidelity.[8] She draws out the complex reality of the multiple elements within the executive, and indeed within Parliament, to illustrate her central argument that collaboration is a complicated dance between multifunctional branches of the state that defies any simplistic hierarchical taxonomy.

Underpinning her analysis, however, is a clear and overarching commitment to the protection of fundamental rights. Crucially, for Kavanagh, such rights protection goes far beyond the decisions of the courts asked to consider whether this or that executive body has breached an individual's rights, or whether a particular statutory provision contravenes the Human Rights Act 1998 (HRA) in some way. In a series of fluently written and coolly observed chapters, she details how human rights compliance has been pervasively and painstakingly embedded in a multiplicity of processes and systems across Whitehall and Westminster. Her monograph is thus a welcome corrective to literature that is too often overly focused on judicial decision-making in the human rights context.

Kavanagh's relentless focus on the ordinary and established processes that embed rights protection across the Government and Parliament consistently illustrates the pragmatic methodological commitments that she sets out early on. The apparent neutrality of much of the early parts of the book could easily lull the reader into missing the implications of Kavanagh's core argument, which is bold. It is true that Kavanagh eschews virtually all of the hyped-up 'constitutional showdown' issues that attract most comment in

5 Ibid xv and 14.

6 J Raz, *Concept of a Legal System* 2nd edn (Clarendon Press 1980); H L A Hart, *The Concept of Law* (Oxford University Press 1961).

7 TCC 10 and 15.

8 Ibid ch 2.4, especially 102–103.

regular constitutional discourse. Nonetheless, she absolutely does not shy away from confronting one of the most difficult and challenging tensions in the current constitutional settlement which is the effect on the relationship between the courts, the executive and Parliament caused by the HRA and, in particular, the effect of a declaration of incompatibility (DoI) under section 4 HRA.[9] As Kavanagh explains, a DoI is only handed down when the radical reconstructive statutory surgery mechanism available under section 3 HRA cannot stretch far enough to justify the required statutory meaning for compliance.[10] Long-standing doctrine has established that for judges to go beyond the 'core and essence … of the measure parliament had enacted' would be an illegitimate usurpation of the democratic process amounting to 'judicial vandalism'.[11]

Indeed, it could be argued that the spine of the core argument underpinning the whole book is constructed with the difficult issue of the effect of a DoI specifically in mind. This is perhaps demonstrated by the fact that the book culminates in a final substantive chapter that directly addresses a key question: whether a 'nascent' constitutional convention has now formed to the effect that a DoI from the courts requires the democratic branches to change the law in response, unless there are 'exceptional circumstances'.[12] It is this issue that forms the focus of this piece, using Kavanagh's rich monograph as a foil.

This article is structured in three sections. The first considers some of the core themes discussed in TCC, in particular its taxonomical commitment to the exploration of the concept of the separation of powers as it actually functions in the United Kingdom (UK). It also addresses Kavanagh's well-received recent contribution to the long-running debate over 'constitutional dialogue', reworked here for Chapter 2.[13] Like the book, this article treats Kavanagh's views on the dialogue debate as an illustrative gateway, and just one of the essential building blocks, for her core argument relating to the allegedly nascent constitutional convention.

The second section directly focuses on the 'nascent' convention that Kavanagh suggests has emerged in the UK and the evidence

9 '4 Declaration of incompatibility … (2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.'

10 TCC, 233–243.

11 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 111, per Lord Rodger of Earlsferry; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, para 30, per Lord Bingham; TCC, 239.

12 TCC 397.

13 A Kavanagh, 'The lure and limits of dialogue' (2016) 66(1) University of Toronto Law Journal 83–120.

she puts forward for this claim. Kavanagh believes that all three branches of the state have been co-opted into working towards the protection of human rights. Central to her argument is an issue that she believes is seriously undermined by dialogue theory: the finality and authoritative nature of judicial decisions. She is careful, given her prior warnings of the dangers of 'Manichean' thinking, to deny that the judiciary have the 'last word'; but on more than one occasion she reveals that the circumstances where she would regard it as appropriate for a court decision to be disregarded are tightly delimited.

The final section picks up the gauntlet laid down at the end of the previous section: the decision by Kavanagh to label the purported convention she identifies as merely 'nascent'. The argument here is no less careful than Kavanagh's to avoid any crude lapse into simply trading blows on who has the 'last word' in legal terms. Instead, it considers whether we are witnessing the birth of a 'tacit' constitutional convention. This idea is rooted in the sense of 'tacit understandings' famously identified by Sidney Lowe when he claimed that: 'British government is based upon a system of tacit understandings. But the understandings are not always understood.'[14] The latter part of his definition is no less crucial because it will be argued that different *levels* of knowledge and understanding are observable and important amongst the relevant constitutional actors. Whilst key decision-makers understand the nuances, others do not – thus arguably vindicating Lowe's observation. This section then considers whether the evidence marshalled by Kavanagh and others could be said to support the existence of such a tacit convention. The article suggests that a tacit convention has indeed formed, and that its power lies in recognising that a number of camps in the debate have a vested interest in denying the existence of any overt, binding obligation, but that should not be allowed to obscure a deeper constitutional reality.

CORE THEMES OF *THE COLLABORATIVE CONSTITUTION*

It is important to recognise that the title of *The Collaborative Constitution* itself frames its analysis of the constitution in terms of a 'collaborative' approach to understanding the relevant dynamics between the institutions of state. Infused within TCC is a particular view of the constitution that considers the relevant institutional relationships almost entirely through the prism of rights. Rights discourse underpins the whole of Kavanagh's analysis.

14 S Lowe, *The Governance of England* (T Fisher Unwin 1904) 12.

Separation of powers, rule of law and constitutionalism

TCC places a heavy focus on the doctrine of separation of powers in the UK constitution. As such, it is structured sequentially, even chronologically, by the process through which legislation must travel in terms of creation, application, judicial oversight and (where necessary) the return of legislation that has been subject to a DoI to Parliament and the executive for remedial action. Part II of TCC analyses 'Rights in politics', and squarely confronts the myriad ways in which processes and procedures have been embedded in the executive and legislature to smooth the compliance of legislation with norms protected under the HRA and European Convention on Human Rights (ECHR).

True to her positivist roots, Kavanagh aims to 'capture the constitutional reality on the ground'.[15] She points to the 'democratic mandate' secured for the 'Election Manifesto' of the winning party at a general election and rightly castigates the mistake of 'constitutional lawyers [who] treat the *Executive as evil* – the constitutional villain of the piece'.[16] Instead, she argues that the executive is an important 'pro-constitutional' actor 'worthy of our cautious and careful respect'.[17] This realistic reappraisal, indeed defence, of the role of the executive is welcome and necessary in a constitutional discourse that is at times somewhat fevered on the subject.[18]

Nonetheless, Kavanagh frames her analysis of the constitutional roles of the executive and legislature in unambiguously rights-centred terms, detailing the impact of a ministerial 'statement of compatibility'

15 TCC 127.

16 Ibid 125 and 127 (emphasis in the original text). For an analogous argument, see Timothy Endicott, 'The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller' (Policy Exchange 2017). See also Robert Craig, 'The Fixed-term Parliaments Act: out, out brief candle', in Richard Johnson and Yuan Yi Zhu (eds), *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart Publishing 2023) 129–132.

17 TCC 127.

18 See, for example, Tom Poole, 'The executive power project' (*London Review of Books* 2 April 2019); and David Dyzenhaus, 'The snake charmers' (*Verfassungsblog* 7 March 2022). See, in rebuttal, the sharp book review by Martin Loughlin of 'Hermann Heller and David Dyzenhaus, *Sovereignty: A Contribution to the Theory of Public and International Law*, Belinda Cooper (trans), (Oxford University Press 2019), in which Loughlin criticises Dyzenhaus, arguing that the 'invocation of such an ambiguous expression as "Schmittean" is a type of "dog whistle" politics that has no place in scholarly deliberation': (2020) 83(3) Modern Law Review 686–690.

under section 19 HRA,[19] as well as the introduction of 'Bill teams' who work with 'departmental lawyers' to identify and solve potential human rights problems and prepare 'ECHR memorandum'.[20] All these requirements are laid out in the 'Cabinet Office Guide to Making Legislation', designed 'to let human rights "run into the bloodstream of every department"'.[21] This is before even mentioning the influence of the Office of Parliamentary Counsel, the Law Officers and the Cabinet Committee on Parliamentary Business.[22]

A Bill must then run the gauntlet of the Joint Committee on Human Rights, the House of Lords Constitution Committee and other institutional checks which no less assiduously on Kavanagh's approach, assess potential legislation from a relentlessly human rights-centred perspective. In a section entitled 'Envisioning executive constitutionalism', she also frankly acknowledges the role of the civil service. She describes civil servants not as 'mere instruments of the Executive's will' but, on the contrary, she notes that civil servants 'often operate as relatively independent constraints on that will … striving to safeguard underlying constitutional values'. Kavanagh praises the 'multiple actors' operating as 'guardians of rights and the rule of law'.[23]

In his recent monograph, *Against Constitutionalism*, Martin Loughlin expressly warns of the creeping imperialism of a newly minted definition of 'constitutionalism' which seeks to impose a narrow, heavily rights-based hegemony under this new banner.[24] Although Loughlin is careful to confine his critiques to systems such as Germany, the methodological assumptions in TCC at times appear to vindicate his analysis in general terms. In illustrating the sheer level of embedded engagement in the processes of government and Parliament, Kavanagh reveals just how normalised and pervasive rights-based discourse has become across the political branches.

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19 HRA 1998: '19 Statements of compatibility. (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill— (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or (b) 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.'

20 TCC 131.

21 Ibid 131–132.

22 Ibid 132–136

23 Ibid 145.

24 Martin Loughlin, *Against Constitutionalism* (Harvard University Press 2020).

Dialogue theory – lawyers are unconsciously bilingual

Kavanagh's root-and-branch attack on dialogue theory is another key theme of TCC. Space precludes a detailed discussion of this issue, not least because her main chapter adapts and builds on a previously published article critiquing dialogue theory,[25] but Kavanagh's attack on dialogue theory forms an important building block in the argument she constructs in TCC. Her focus is on the tensions between the authoritative nature of judicial decisions, and indeed legislative instruments, and the more fluid and loose treatment of judicial and other norms resulting from the 'dialogue' framing.

Crucially, Kavanagh distinguishes the importance of complying with judicial decisions in a system purporting to respect the rule of law from the general power of Parliament to overrule judicial decisions in some circumstances.

> We should be careful not to conflate authority and finality. Judicial decisions on statutory interpretation and common law adjudication are still treated as authoritative rulings even though they can be overruled by the legislature.[26]

The challenge created by the dialogue metaphor to the authoritative nature of judgments is at the nub of her critique of this analogy, which has gained such purchase in the literature.[27] Kavanagh is rightly critical of 'letting the [dialogue] tail wag the dog', arguing that the analogy overtook the substance in important ways which 'resurrected … the adversarial paradigm of the Manichean narrative'.[28] She critiques both sides of the debate, claiming that dialogue 'became a capacious catch-all term which could include almost any characterisation of the institutional roles'.[29]

Much later in the monograph, Kavanagh returns to the dialogue theme, focusing again on the damage to the authoritative nature of

25 Kavanagh (n 13 above).

26 TCC 84.

27 See, for example, Peter Hogg and Allison Bushell, 'The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)' (1997) 35(1) Osgoode Hall Law Journal 75–109; Geoffrey Marshall, 'The lynchpin of parliamentary intention: lost, stolen or strained?' (2003) Public Law 236–248, 243; Francesca Klug, 'Judicial deference under the Human Rights Act 1998' (2003) 2 European Human Rights Law Review 125–133; Tom Hickman, 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' (2005) 2(Summer) Public Law 306–335; Danny Nicol, 'Are convention rights a no-go zone for Parliament' (2002) 3(Autumn) Public Law 438–448; Po Jen Yap, 'Defending dialogue' (2012) 2(Summer) Public Law 527–546; Jeff King, 'Institutional approaches to restraint' (2008) 283) Oxford Journal of Legal Studies 409–441.

28 TCC 77.

29 Ibid 79.

judgments caused by dialogue theory.[30] She is careful to emphasise that comity requires the courts to be cautious before issuing a DoI but is clear that, once a DoI is issued, there is a 'catalytic accountability effect', which leads to remedial steps being taken 'like an elegant piece of sophisticated clockwork'.[31] For Kavanagh, 'judicial declarations have a potency and potentiality which a literal textual reading cannot convey'.[32]

It is perhaps worth dwelling briefly on the distinction Kavanagh draws between authority and finality because the two concepts neatly illustrate the analogous distinction Kavanagh draws between constitutional collaboration, which connects to authority, and who has the 'last word', which connects to 'finality'. For Kavanagh, court decisions 'are still treated as authoritative rulings, even though they can be overruled by the legislature'.[33] The potential damage to the *authority* of judicial decisions arguably explains why Kavanagh is so viscerally opposed to dialogue theory and also why her defence of collaboration is so steely. Collaboration means that different institutions must respect their roles and the roles of other institutions, including judicial determinations. Collaboration absolutely does not mean, in a vague or unarticulated way, that institutions should somehow feel free to cross-pollinate or even intervene in each other's specialist domains. Such an interpretation of 'collaboration' would fatally misunderstand Kavanagh's entire project.

For Kavanagh, collaboration is fundamentally opposed to dialogue. Grasping the tension between the two concepts is a prerequisite to understanding the hard edges of her argument. Kavanagh is opposed to dialogue theory precisely because it is reductionist in its failure to account for the fundamental institutional boundaries between legislature, executive and judiciary. This is because dialogue theorists do not account for the fact that these institutions have incompatible perspectives, viewpoints and even language. It is, of course, possible for Parliament to override a court decision, but this is incredibly rare, incredibly serious, and when it is done it has critical implications for the separation of powers and the rule of law. It cannot be done lightly. Collaboration sounds far more anodyne than its actual meaning, which is considerably spikier, more rigid and more role-dependent than many may realise.

Kavanagh's critique of dialogue theory is compelling but could be taken further. A foundational premise of any kind of 'dialogue' is that the participants speak the same language. It is perhaps easy for

30 Ibid 251.
31 Ibid 254 and 262.
32 Ibid 262.
33 Ibid 84–85.

lawyers to overlook the sheer volume of highly specialised *language* that is unavoidably deployed in legal discourse. Consequently, lawyers often forget that they are, in a sense, bilingual. It follows, therefore, that the risk is not so much dialogue as 'monologue [with] judges doing the talking and legislatures the listening'.[34] The acquisition of even the most rudimentary understanding of the language of law takes a very long period of concentrated effort in order to acquire facility with concepts and words that are wholly alien to non-lawyers. Perhaps ironically, this point was much easier to demonstrate when there were a significant number of Latin terms in legal language that were manifestly incomprehensible to lay people. Lord Coke even claimed, admittedly somewhat implausibly, to have made the point about the specialised training and effort required to understand the law to the King himself once upon a time.[35]

The juridification of political discourse hands power to lawyers. As Alexis de Tocqueville argued, this is not necessarily optimal in a democracy because law is 'impenetrable to the uninitiated', putting lawyers into 'a distinct class', which he compares to Egyptian priests because a lawyer is the 'sole interpreter of an occult science'.[36] Thus, excessive reliance on legal terminology in political discourse risks entrenching highly technical and expert language which can serve to exclude ordinary people from political discourse. Unsurprisingly, perhaps, some lawyers are strongly in favour of recasting many political disputes into legal language, even if it renders political discourse arcane, inaccessible and at risk of capture by a minority of specialists. This is because lawyers are 'less afraid of tyranny than of arbitrary power'.[37] Any such recasting therefore inevitably increases the status and importance of those with the expertise to understand legal language. De Tocqueville laments that 'scarcely any political question arises in the United States which is not resolved, sooner or later, into a judicial question'.[38] It is suggested that the unavoidably exclusionary and specialised language of law significantly complicates claims that there can be meaningful dialogue between the courts and the democratic branches, the latter populated by only a small minority of lawyers. Exclusionary legal answers to properly political

34 Christopher Crawford, 'Dialogue and declarations of incompatibility under section 4 of the Human Rights Act 1998' (2013) 25 Denning Law Journal 43–89, 56.

35 *Prohibitions del Roy* (1607) 12 Co Rep 63. See further Sir Stephen Sedley, *Lions under the Throne* (Cambridge University Press 2015) 124–125.

36 Alexis De Tocqueville, *Democracy in America*, Henry Reeve (trans), Francis Bowen (ed) (Sever & Francis 1862) 354.

37 Ibid 351.

38 Ibid 357.

questions are unwelcome in what remains, unlike the United States, a political constitution.

Dialogue theory perpetuates this serious problem, but Kavanagh is right to draw attention to the potentially serious damage such a theory does to the authority of judgments due to the further, correlative, claim that, unlike the overwhelming majority of legal decisions and remedies, *some* judgments are not quite as authoritative as others. Facility with legal language, concepts and architecture is a painfully acquired skill. People who have studied law perhaps sometimes forget the work they needed to do to be able to differentiate between the absolutely binding nature of a declaration, injunction or an award of damages and a declaration of incompatibility handed down by a court because of a claimed breach of human rights.

Non-lawyers, for the most part, cannot reasonably be expected to comprehend such subtle differences, however glaring they might seem to experts. This difficulty perhaps segues into a further problem. Kavanagh quotes Lord Reed's seminal judgment in which he felt forced to make crystal clear exactly why courts do not generally issue coercive orders against the government, instead regularly handing down mere declarations. He stated that declarations are granted because the courts are entitled to 'trust' that the government will comply with the substantive decision, mentioning almost *en passant* the potential 'personal liability' of a minister 'acting outside his authority'.[39] Lord Reed's rightly unequivocal statement of principle is clearly aimed at quashing any possible doubts about whether court decisions should be obeyed, least of all by the Government. It might be thought that there is a risk of blurring the hard edges of this foundational rule if it turns out that some declarations are more absolute than others. The very existence of the apparent exception is the problem.

It would therefore be entirely understandable for legally unqualified politicians (who are subject to potential 'personal liability') to elide DoIs with injunctions, damages and other types of declarations and regard all court decisions as requiring unequivocal compliance. In general, this is to be welcomed. The law is the law. Where a court makes, say, a declaration or other legal determination that requires public officials to act in a certain way, it goes without saying that those officials must obey. Anything that undermines that automatic political reaction is seriously problematic. It is suggested that the wisdom of deliberately creating a category of legal remedy, namely DoIs, that is somehow an exception to this bright-line rule is questionable, however obvious the distinction might be to those

39 *Craig v Her Majesty's Advocate (for the Government of the United States of America)* [2022] UKSC 6, para 46.

who are legally trained and regardless of the skill of government legal advisers.

It can be no surprise, therefore, that a DoI triggers an identical reaction in many ministers, Members of Parliament (MPs) and others as any other judicial pronouncements. Kavanagh argues that parliamentarians generally regard themselves as effectively obliged to comply with the edicts of a court following a DoI.[40] This is stark evidence, it is suggested, of the failure of lawyers who think the distinction is obvious to realise their bilingual expertise. The reality is that for a vast number of political actors, the effect of a court decision is not just authoritative, it is unquestionable. It is suggested that dialogue theory is lacking insofar as it fails to account for this brute political fact.

JUST HOW 'NASCENT' IS KAVANAGH'S CONSTITUTIONAL CONVENTION?

The idea that a formal, binding constitutional convention has genuinely formed that requires the democratic branches to give effect to DoIs would be a matter of very considerable constitutional controversy. This would be true even if such a convention was caveated with an escape clause for 'exceptional circumstances'.[41] Gavin Phillipson has cautiously argued that a convention that 'Parliament will generally or normally so legislate in response to a DoI', but 'may exceptionally decide not to' is 'a more plausible convention' than an obligation to invariably comply.[42] Kavanagh does not go as far, claiming that there is a convention forming '*in statu nascendi*', a phrase first used by Adrian Vermeule.[43] She also endorses the phrasing of Jeff King that a convention may be 'emerging' and prays in aid a number of other authors who make similar claims.[44]

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40 TCC 363.

41 Ibid 397.

42 Gavin Phillipson, 'Richard Johnson & Yuan Yi Zhu, eds, *Sceptical Perspectives on the Changing Constitution of the United Kingdom*' (2025) 23(1) International Journal of Constitutional Law 320–326.

43 A Vermeule, 'The atrophy of constitutional powers' (2012) 32(3) Oxford Journal of Legal Studies 421–444, 442; TCC 363 and 397.

44 TCC 397. Kavanagh references: Jeff King, 'Parliament's role following declarations of incompatibility under the Human Rights Act' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 187; Vermeule (n 43 above) 442; Farrah Ahmed, Richard Albert and Adam Perry, 'Judging constitutional conventions' (2019) 17(3) International Journal of Constitutional Law 787–806. Philip Norton, *Governing Britain: Parliament, Ministers and our Ambiguous Constitution* (Manchester University Press 2020) 21.

Kavanagh makes some important claims about the effect of a DoI – and those claims are instructive in understanding the position that she ultimately appears to defend. She claims that the effect of a DoI is considerably more powerful than commonly realised:

> Whilst the declaration of incompatibility is nominally hortatory and theoretically advisory, in reality it has proved to be a much stronger form of remedy than first appears, not radically dissimilar in form and effect to judicial strike downs under supreme bills of rights.[45]

Kavanagh is careful to leave the door open to non-compliance in 'exceptional circumstances',[46] but what is really fascinating is the way she appears to deliberately blur the boundary between ordinary court orders and DoIs. We saw in the last section the difficulties created by the subtle difference between most ordinary remedies following a court determination and DoIs. In this monograph, Kavanagh seeks to significantly narrow the very gap, arguably comprehensible only to experts, generated by the unique status of DoIs in the HRA scheme. This gives rise to an 'emerging constitutional convention':[47]

> This does not preclude the government or parliament from rejecting a declaration of incompatibility in exceptional circumstances. But it certainly precludes them doing so simply because they disagree with it … the political obligation to comply with declarations is grounded in a second-order reason to comply with court rulings on rights *irrespective of whether the government agrees*.[48]

This is the nub of one of the most interesting central claims in Kavanagh's book, which is that we are close to a position where, absent exceptional circumstances, the democratic branches must implement changes to the law after a DoI. It also explains, perhaps, her visceral dislike of dialogue theory because it risks undermining the *authority* of judicial decisions and therefore, indirectly, the rule of law.[49] As we have seen, she is careful to differentiate between authority and finality, recognising that under the HRA a finding of a breach of human rights is not technically final.[50] This is also why she argues throughout the book that comity requires the courts to exercise considerable caution before issuing a DoI in the first place and give due deference on the merits of substantive human rights

45 TCC 260. See also Aileen Kavanagh, 'What's so weak about "weak form review"? The case of the UK Human Rights Act 1998' (2015) 13(4) International Journal of Constitutional Law 1008–1039, 1033: 'not dissimilar to a strike-down power'.

46 TCC 352.

47 Ibid 400.

48 Ibid (emphasis added).

49 Ibid 398.

50 Ibid 84.

issues.[51] These latter concerns are the mirror image of what she argues as the effect of a DoI, because they reflect the comity and due caution owed by the courts before taking the drastic step of issuing one. This is collaboration, not dialogue.

It might seem therefore that, for Kavanagh at least, the merely 'emerging' or 'nascent' constitutional convention is actually far stronger than the word 'nascent' would *prima facie* imply. This observation is arguably strengthened by her use of multiple examples of politicians shouldering arms entirely, pointing out that 'parliamentarians ... repeatedly used normative language to articulate a strong sense of obligation to comply', thus illustrating the potency of a combination of 'constitutional principle, including the rule of law, judicial independence, constitutional role-morality' as well as the powerful impact of international norms.[52]

It is not difficult to discern how the evidence marshalled by Kavanagh can be said to comply with the famous three-stage Jennings test for the existence of a convention that she uses to frame the question of whether a convention can be said to exist.[53] Jennings asks a) 'what are the precedents', b) do the relevant constitutional 'actors ... believe they are bound by a rule' and c) 'is there a reason for the rule'.[54] The general acceptance by parliamentarians of the binding nature of a DoI is perhaps most poignantly illustrated by Kavanagh telling the story of a plaintive intervention by Jack Straw in a debate on the treatment of sex offenders led by Theresa May, then Home Secretary.[55] As a former Home Secretary himself, Straw was one of the original architects of the HRA. He is quoted as pointing out to the Home Secretary that 'the government was not legally obliged to comply' with the controversial *Thompson* DoI, after she had said at the despatch box that 'we do have to make a change'.[56] Not only did Mrs May duck the point made by Mr Straw, but following a later question from another MP she even said that the Government had

51 Ibid 82–83. Kavanagh has elsewhere argued for at least 'minimal' but on occasion 'substantial' deference by the judges: see Aileen Kavanagh, 'Deference or defiance? The limits of the judicial role in constitutional adjudication in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2009) 184, 191ff and 215.

52 TCC 397.

53 Ibid 365.

54 Sir Ivor Jennings, *The Law and the Constitution* 5th edn (University of London Press 1959) 136.

55 HC Deb 16 February 2011, vol 523, col 961. The debate followed the DoI issued in *R (Thompson) v Secretary of State for the Home Department* [2010] UKSC 17.

56 TCC 388; *Thompson* (n 55 above); HC Deb 16 February 2011, vol 523, col 962.

'no further right of appeal through the Supreme Court mechanism'.[57] This highly revealing answer might be thought to confirm the claim that even senior ministers did not have the fullest grasp of the legal niceties in such matters, even with the high-quality legal advice available to them. Politicians are not bilingual, it seems.

The reader is no doubt left wondering whether Kavanagh must quietly think that the convention is fully formed and binding such that the courts, as a matter of convention though not strict law, now *do* have the last word – an interpretation that she has hinted at before.[58] Such a reading would, however, be far too crude and would do a serious disservice to the sophisticated nature of her argument. She carefully avoids this argumentative cul-de-sac, preferring to focus on the complex and rich interactions between the different institutions that she details in her book. This is a compelling methodological approach that this article endorses and seeks to replicate. As we will see later, one of the features of a tacit convention is that it can accommodate the complexity of the differing perspectives and variegated decision-making in this complex area.

In considering why she thinks that a convention is still merely nascent, one might have expected Kavanagh to point to the fact that not all constitutional actors yet agree that a fully formed convention currently exists. If so, this would mean that the *second* limb of the Jennings test would not be met. Not only does the list of sceptics include Jack Straw, it also, famously, includes Lady Hale in *Nicklinson* who argued that a DoI should be issued in that case and the democratic branch could simply decide 'to do nothing ... because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative'.[59]

Perhaps surprisingly, Kavanagh does not rely on the possible failure of the second limb of Jennings' test to resist claims of a fully fledged convention. Instead, she argues that there are insufficient precedents so far, which is the *first* limb of Jennings' test. This means that, all else being equal, it is just a matter of time before her nascent convention crystallises into a binding, general constitutional convention. She unpacks the 34 DoIs issued so far and points out that 30 of them were either completely uncontroversial or even *welcomed* by the Government and others.[60] The remaining four are insufficient, in her view, for it to be said that the existence of a convention is now settled. It is on this arguably quite thin reed that she continues to rest

57 HC Deb 16 February 2011, vol 523, col 968.

58 Kavanagh (n 45 above) 1029. See also Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 289.

59 *R (Nicklinson) v Ministry of Justice* [2015] AC 657, para 300.

60 TCC 326.

her claim that a convention that binds parliamentarians remains only 'emerging' or 'nascent'.[61]

There is a further reason why Kavanagh was perhaps wise to cleave to the first limb of Jennings' test, rather than the second, in her attempt seemingly to downplay the power of the alleged convention. It might well be argued that of all the relevant actors, the least likely to make the alleged mistake of thinking that a convention has formed would be the judges. After all, they are undoubtedly genuine constitutional experts. The last people to think that a DoI is constitutionally binding would surely be the judiciary. The problem with this argument is that for a fully binding convention to form, there is no *need* for judges to believe that parliamentarians must comply with a DoI. Only parliamentarians need to believe it. This is obvious, when considered carefully, because once a DoI is issued, judges have no further part to play. It suffices, therefore, for those charged with considering and amending the *status quo ante* to believe they have no choice but to comply. That, as Kavanagh has shown, is generally the case, even amongst ministers.

A TACIT CONSTITUTIONAL CONVENTION

This article claims that a novel 'tacit' convention operates in relation to the institutional responses to DoIs. The tacit convention is that DoIs cannot be ignored or disregarded, but instead must be positively addressed in some way, even if the response is nugatory or performative. The convention is tacit because, whilst some institutional actors are overtly convinced that there is an obligation to conform in some way, many with claimed expertise do not agree, for various reasons including some which are purely performative. There is, furthermore, a deeper level of understanding, and it is material. It evidences that – tacitly – the ultimate decision-makers do think, and more importantly act, as if DoIs are indeed operationally binding but in potentially subtle ways. This section seeks to explain these nuanced alternative viewpoints that arguably are illustrative of Lowe's explanatory claim about observable but tacit understandings operating at multiple levels of the British constitution.

There are at least three 'levels' of knowledge and understanding which various participants could possess in the context of the tacit convention defended in this article. Sitting at the first level are a large number of MPs, many ministers, and others. At this level, the convention is not that tacit at all. It is overt. As far as they are concerned, a DoI is binding on parliamentarians. This view can be grounded on whatever combination of rule of law, international obligation and

61 Ibid 400–401.

finality of court decisions that coalesces sufficiently to convince them of the existence of this binding rule. The understandings may not always be well understood, to use Lowe's phraseology, the grip on details no less so, but the position is clear, and this perspective is easy to follow.[62] In a context where the beliefs of the participants are determinative of the existence of a rule, the evidence that a large number of participants believe they are under a normative obligation to obey is both circular and eventually dispositive. The beliefs are upstream of the 'truth', or less provocatively perhaps, upstream of the existence of the rule.

At the second level are experts on the HRA who shake their heads at what they see as the intellectual errors made by the level-one crew. Their superior knowledge convinces them that the level-one people just do not understand the structure and cleverness of the HRA, permitting as it does Parliament to make an independent decision each time because section 4 HRA was specifically drafted so as not to have any legal effect. This includes those such as Goldsworthy, for example, who want Parliaments to 'feel free to override judicial interpretations after careful and conscientious reflection'.[63] Included in this camp are other doughty defenders of parliamentary sovereignty, such as Richard Ekins, who flatly deny any convention has formed, even 'nascently' and assert that such a convention would be 'unconstitutional'.[64]

Another camp includes those who fully *embrace* this alleged uncertainty as to the effect of a DoI, perhaps because they are concerned about how the democratic branches might respond if that uncertainty evaporated.[65] It is not possible to tell if this includes Kavanagh, but it very well might. This camp also appears to include the current Attorney General, Lord Hermer, who recently expressly described DoIs as 'non-binding' and claimed that the HRA 'framework … can co-exist with parliamentary sovereignty'. He also asserted that claims that there may be tension between 'parliamentary democracy and fundamental rights' are a 'false choice'.[66]

Both camps are, ironically, motivated to deny the existence of a fully formed constitutional convention. One camp wishes to preserve untrammelled freedom to manoeuvre for Parliament, the other the

62 Lowe (n 14 above).

63 Jeffrey Goldsworthy, 'Judicial review, legislative override, and democracy' (2003) 38 Wake Forest Law Review 451, 468.

64 Richard Ekins, 'Legislative freedom and its consequences' in Johnson and Zhu (eds) (n 16 above) 70.

65 See, for example, Francesca Klug, 'A response to the lecture' (2012) 83(3) Political Quarterly 466.

66 Richard Hermer, 'Attorney General's 2024 Bingham Lecture on the Rule of Law' The Honourable Society of Gray's Inn, 14 October 2024.

pretence of it. Both these second-level groups refuse to admit the existence of an official convention at a formal level. Both camps, using Lowe's framing, either do not fully understand, or – perhaps more generously – performatively refuse to accept the complicated tacit understandings that appear to be operative in reality.

There is a third level of understanding or knowledge. This level is interesting, nuanced and only tacitly accepted. It is subtle. It is like a spider's web that could one day be destroyed by one sweep of a parliamentary hand but at the same time is strong enough to catch some extraordinarily powerful legal bluebottles. The starting point is the curious and ironic fact that there has been almost complete compliance with a norm the existence of which is denied by different expert camps in the debate, albeit for very different reasons.

What distinguishes the third level from the first level is that third-level participants undoubtedly are real experts just like the second-level players. The distinction, however, is that the third-level players are bolstered by a tacit *understanding* amongst some of them. Those adopting this tacit perspective overtly acknowledge the formal claim that the democratic branches could *in theory* refuse to comply but at the same time quietly also know that the relevant decision-making processes actually operate on a very different basis. Much of Kavanagh's book is a study in the operational processes that have developed around *de facto* HRA compliance. Put more simply, these changes could be expressed as an example of the long-established distinction between the dignified and efficient aspects of the constitution in certain contexts. The remainder of this article will consider the third level of knowledge in relation to each of the three classical branches of state. We address two of the branches in the next subsection: legislature and executive.

The legislature

In his valuable empirical research, cited by Kavanagh,[67] King found that the attitude of MPs was that:

> Parliamentarians tend to view themselves as accepting and working with the judgments of the courts and not ordinarily being in a position to offer a contrary interpretation of the right once the court has ruled definitively on the issue.[68]

67 King (n 27 above).

68 King (n 44 above) 176. Kavanagh also cites King ibid 182–186; Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012) ch 6–9; Crawford (n 34 above); Chintan Chandrachud, *Balanced Constitutionalism: Courts and Legislatures in India and the United Kingdom* (Oxford University Press 2017) 105–108, 113–115; Alison Young, 'Is dialogue working under the Human Rights Act 1998?' (2011) 4 Public Law 773–800.

He goes on to say:

> that parliamentary views have been uneven, but when matters have come to a head, most have sided more with the view that there is some sort of obligation.[69]

King quotes Ken Clarke MP (as Home Secretary) as saying:

> If the Law Lords say that we have discriminatory and disproportionate legislation, I believe that there is an obligation on the whole House, not simply on the Government, to address that, and that is what we are doing.[70]

King summarises by drawing an extremely fine distinction between the existence of a convention and a belief by the main constitutional actors that a convention exists.

> It is not possible to conclude that there is a constitutional convention that there should be a legislative amendment as a reply to a declaration of incompatibility; however, evidence is mounting that one is perceived by the Government and some legislators to exist.[71]

Inadvertently, perhaps, King here almost perfectly expresses the distinction suggested in this article between a formal constitutional convention in the classic sense, and a tacit convention that in reality operates so as to bind the participants. It will be recalled that the existence of a convention is *constituted* by the perceptions and beliefs of the participants. So the compelling evidence King provides of the existence of such a perception in parliamentarians, but his simultaneous denial of the existence of an *actual*, formal convention, is illustrative of the exact distinction drawn in this review between an overt, acknowledged convention and a tacit one. If a convention is *perceived* to exist, why is King motivated to maintain the facade that it does not *actually* exist? This is especially important precisely because a perception amongst relevant actors that a binding convention exists is the very mechanism by which a convention is normally constituted and identified. These are subtle, but critical distinctions, and it is not difficult to understand why the existence of a formal convention, with all its implications, might be strategically denied by some people, nor why they might be untroubled about a tacit perceived obligation to respond to a DoI. They would thus have their constitutional cake and eat it too.

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69 King (n 44 above) 184.

70 Ibid 185; HC Deb 22 February 2005, vol 431, col 158.

71 King (n 44 above) 186.

The executive

Even more interesting is the issue of the perspective of ministers, as opposed to MPs *simpliciter*. Ministers have the benefit of expert departmental legal advice so it is difficult to see how they could be confused about the power of the democratic branches to just ignore a DoI. There is, however, some striking and direct evidence which may help explain why ministers appear to take the view that there is no choice about complying with a DoI.

A crucially important factor that is often overlooked is the effect of the requirement under ECHR procedural rules for applicants to have exhausted national remedies before they are permitted to bring a claim to the European Court of Human Rights (ECtHR). Article 35 of the ECHR states that applicants may only apply to the ECtHR 'after all national remedies have been exhausted'. All applicants must run the gamut of national law before an application to the Strasbourg court can be made. At a strategic level, it is perhaps unsurprising that the British Government has long required that claims must be appealed by applicants as far as possible domestically. This requirement inevitably reduces the flow of cases to Strasbourg.

The British Government has repeatedly sought to argue that the UK legal architecture complies with the ECHR and its requirements by providing an adequate remedy. On a number of occasions, the Government has argued that the structure of the HRA, and in particular the DoI procedure, provides an adequate remedy and therefore that applicants must pursue cases as far as they can in the UK even where their only possible remedy is a DoI. Applicants must therefore seek a DoI before they can apply to Strasbourg because a DoI is an adequate remedy. The Strasbourg court has held that the discretionary nature of the 'remedy' following a DoI means that the UK procedure is *not* fully in compliance with the ECHR requirements for an adequate remedy.[72] This further means that applications by the UK Government to strike out claims for failing to exhaust national procedures have always failed.

In *Burden*, the Government yet again tried to convince the ECtHR to change its mind about the consequences of a DoI, pointing out that every single DoI thus far had resulted in a change in the law.[73] The Government argued that as a matter of 'practical reality', the UK was in compliance.

> While as a matter of pure law it was true ... that such a declaration was not binding on the parties and gave rise to a power for the minister,

72 For example, *Hobbs v UK* App no 63684/00 (18 June 2002).

73 *Burden v UK* (2006) 21 BHRC 640, [2007] STC 252, 9 ITLR 535, [2007] WTLR 607.

> rather than a duty, to amend the offending legislation, this was to ignore the practical reality that a declaration of incompatibility was highly likely to lead to legislative amendment.[74]

The Grand Chamber of the ECtHR disagreed with the Government's characterisation of the DoI procedure as a virtually inevitable process.

> The Grand Chamber agrees with the Chamber that it cannot be excluded that *at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation*. In those circumstances ... applicants would be required first to exhaust this remedy before making an application to the Court ... This is not yet the case, however, and the Grand Chamber therefore rejects the Government's objection on grounds of non-exhaustion of domestic remedies.[75] (emphasis added)

The italicised phrase above was quoted by the then Government in its response which stated, somewhat disingenuously, but revealingly:

> The Government is of course pleased with the Grand Chamber's conclusion, which it considers an endorsement of its current approach to declarations of incompatibility.[76]

It follows that the executive, following *Burden*, arguably believes it is under a general *obligation* to comply with a DoI domestically in order to build the evidence that a DoI is an adequate remedy for the purposes of future ECHR litigation. There appears to be an ongoing policy to evidence a 'practice' that is 'so certain' as to form a 'binding obligation' by taking steps to bring the UK into line with ECHR jurisprudence. Advice from departmental lawyers would inevitably reflect that fact. The executive formally adopted a position in 2009 that DoIs must lead to amendment in order to supply evidence that would meet the criteria laid out by the court in *Burden*.[77] This policy has not been disclaimed by later governments.[78] Nor, however, has it crystallised into a *legal* obligation deliberately created by the democratic branches.

It is clear, then, that the executive thinks it is subject to a normative obligation. In those circumstances, it is something of a stretch to

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74 Ibid para 38. See further Kavanagh, *Constitutional Review* (n 58 above) 289.

75 *Burden* (n 73 above) para 36.

76 'Responding to Human Rights Judgments January 2009, Government Response to the Joint Committee on Human Rights' Thirty-first Report, Cm 7524 (2007–2008) para 38.

77 *Burden* (n 73 above)

78 I am grateful to Gavin Phillipson for raising the point that the actions of one government are not determinative for future governments. Nonetheless, the policy can reasonably be presumed to persist after 14 years of Conservative government without change.

describe the nature of any convention as merely nascent – at least from the perspective of the executive. It might be better to describe it as a tacit convention precisely because the decisions to amend following a DoI are not related to each case but form part of broader strategic and generally unacknowledged goal of presenting a case to Strasbourg that a DoI is an adequate remedy. This is far from being a formal convention, never mind a legal rule, but it has dramatic effects on the behaviour and beliefs of participants in the executive. As it happens, it does not appear to have worked.[79]

A further example of how practices in this area are so much more subtle and tacit than the simple application of a rigid or close-to-absolute constitutional rule is the response to the case of *Miranda*. In this case, the claimant was stopped, and journalistic material on a laptop was seized, by police officers at an airport under the Terrorism Act 2000.[80] The provisions entitled the police to 'request any document … of a kind specified by the officer'.[81] The relevant issue was whether this police action was compatible with Article 10 ECHR. The Court of Appeal held that the absence of 'adequate legal safeguards relating to journalistic material' breached Article 10 and a DoI was issued.[82] The Government responded to the DoI by amending the relevant Code of Practice to state that excluded material, which includes journalistic material, should not be the basis for a stop and seizure. Furthermore, the policy guidance now states that 'examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing is … excluded material'.[83]

The government response to *Miranda* is illustrative, it is suggested, of the existence of the tacit convention defended in this article. No legal changes resulted from the policy changes adopted by the executive in response to the DoI issued by the Court of Appeal. This example can be considered alongside the long-running saga in relation to prisoner votes, which is dealt with in detail below. It is hard to reconcile these official machinations with a near-absolute formal constitutional convention requiring legal amendment precisely because, as Ekins

79 'Assisted suicide and the right to private life: the enduring repercussions of Nicklinson – Stevie Martin' (*UK Human Rights Blog* 22 March 2017), confirming that a DoI still 'does not constitute an effective remedy'.

80 Terrorism Act 2000, para 2(1), sch 7.

81 Ibid s 5, sch 7.

82 *David Miranda v Secretary of State for the Home Department* [2016] EWCA Civ 6, [115].

83 Consultation outcome: response to the Home Office consultation on the code of practice for Schedule 3 (to the Counter-Terrorism and Border Security Act 2019) and modifications to the existing code of practice for Schedule 7 (to the Terrorism Act 2000) para 19.

points out, such a convention is hard to sustain where the law is not changed.[84] The evidence does not match the claimed rule.

In sharp contrast, these edge cases arguably significantly strengthen the claim that those who really know and understand the system would tacitly accept that DoIs must be complied with in reality either by amending the law or by adapting relevant binding policy or by making some other kind of concession, however nebulous or nugatory it might be. These are difficult examples for anyone who would defend the existence of a formal convention that the law must be changed unless there are exceptional circumstances. This is not least because the non-compliant examples are hardly 'exceptional' in any immediately obvious way.[85] Nonetheless, the borderline examples are paradigm instances illustrating the existence of a tacit convention. Their lightness is their strength. We now explore the most significant wrinkle in the smoothness of any narrative that might claim that a nascent, or even actual, constitutional convention has formed to change the law in virtually all cases, which is the saga of prisoner's votes.

Prisoner's dilemma: does the 'exception' prove the rule?

The protracted and politically painful prisoner vote saga was eventually resolved by a complicated administrative compromise between the UK and Strasbourg.[86] The story began with an ECHR decision in *Hirst* in 2005. It found that the 'blanket ban' on any prisoner voting in the UK was a breach of Article 3 of the First Protocol of the ECHR.[87] This was followed by a DoI that was issued domestically in *Smith v Scott* in 2007.[88] Various UK Government attempts to overturn the ECHR decision in a series of interventions in other cases finally came to an end on 22 May 2012 in *Scoppola*.[89] The ECtHR required the UK to bring forward proposals within six months of 11 April 2011 to remedy the situation.[90] After a further intervention in another case, a draft Bill was published on 22 November 2012, which set out three options.[91]

84 Ekins (n 64 above) 69–70.
85 Discussed further below.
86 'Secretary of State's oral statement on sentencing' 2 November 2017.
87 *Hirst v United Kingdom (No 2) – 74025/01* [2005] ECHR 681, para 82.
88 *Smith v Scott* 2007 SC 345.
89 *Scoppola v Italy (No 3)* (2012) 56 EHRR 663.
90 *Greens and MT v United Kingdom* (2011) EHRR 21, para 115.
91 *Scoppola v Italy (No 3) (Scoppola)* (2013) 56 EHRR 19; Ministry of Justice, Voting Eligibility (Prisoners): Draft Bill, November 2012.

Nonetheless, resolution of the issue was still further delayed. The Committee of Ministers then adopted an interim resolution in 2015.[92]

The denouement came in December 2017. The then UK Government announced that a provisional agreement had been reached with Strasbourg that resolved the dispute.[93] The measures permitted those 'in the community on a temporary licence' to vote, bringing them in line with those 'on licence using an electronic tag'.[94] At a subsequent meeting of the 'Ministers' deputies' at the Council of Europe on 5–7 December 2017, the situation was discussed, and a statement made that 'noted with satisfaction the package of administrative measures proposed by the authorities'.[95]

Crucially, the relevant legal provisions of the Representation of the People Act 1983 were not amended. This example would therefore appear to bolster those denying the existence of any formal constitutional convention requiring the law to be changed following a DoI. From the point of view of a tacit convention, the argument is rather different. First, it is important to note that, when the DoI and ECHR decision were generated, no action was immediately taken to resolve the issue. This is susceptible to at least two possible readings. On the one hand, it could vindicate those who claim that no requirement to comply exists or ever existed. On the other hand, it could mean that a norm exists but in this case it was *breached*. As Wittgenstein pointed out, a rule is only a rule if it can be broken.[96] The fact that the prisoner vote issue rumbled on for so many years suggests that the better view is not that there was no norm, but that the *tacit* norm was breached.[97]

The fascinating aspect of this case was that the failure to take immediate remedial action resulted in significant and continuing political commentary. Elliott believes that DoIs 'are invested with a degree of potency by virtue of the fact that they foreshadow the likely

92 Interim Resolution CM/ResDH(2015)251) Execution of the judgments of the European Court of Human Rights: Hirst and three other cases against the United Kingdom, 118.

93 'Secretary of State's oral statement on sentencing' (n 86 above).

94 David Lidington, Lord Chancellor and Secretary of State for Justice, HC Deb 25 November 2017, vol 630, cols 1007–1008.

95 Report of the decisions adopted by the Committee of Ministers CM/Del/Dec(2017)1302/H46-39, at 171–173. See further Elizabeth Adams, 'Prisoners' voting rights: case closed?' (*UK Constitutional Law Blog* 30 January 2019).

96 Ludwig Wittgenstein, *Philosophical Investigations*, P M S Hacker and Joachim Schulte (eds and trans) 4th edn (Wiley-Blackwell 2009) S185 and S201.

97 TCC 366–367.

outcome of litigation in Strasbourg'.[98] Whether the reason for the continued agitation was the international law element, or the rule of law or something else is not the crucial point. The point is that the issue refused to die – before eventually trivial remedial measures were implemented. Kavanagh appears somewhat conflicted on how to categorise the case. At one point she argues that 'if we code the prisoner voting case as one of compliance ... then we have a rate of 100 per cent compliance with every declaration of incompatibility'.[99] In the alternative, Kavanagh claims that, even if the solution proffered is considered to constitute non-compliance, 'this does not necessarily belie the existence of a convention' because 'one exception does not undo the norm'.[100]

From the point of view of a tacit convention, these machinations are but grist to the mill. The difficulty faced by Kavanagh and others in applying the Jennings test to these examples is hard to reconcile with the claim that a formal constitutional convention to change the law yet exists, even if only nascently. As we have seen, Kavanagh's explanation is that the Government's response must be 'coded' as either minimalist compliance despite no change to the law, or alternatively that the resolution in fact breaches the norm in some way. In fact, the requirement to do *something*, however minimal or even simply performative, perfectly captures and illustrates the nature of the tacit norm. Those who know and understand the relevant norms recognise that all that matters is that the Government must bend the knee, however reluctantly. That was achieved by the Government altering the administrative arrangements rather than changing the law.

These trivial changes were accepted precisely because the capitulation, however minuscule, preserved the power of the narrative, and incidentally the ECHR, and the overarching principle that these determinations are tacitly binding, if you understand the nuances properly. It might be thought that these delicate manoeuvres and overtly political balancing exercises, predicated on deep insider knowledge, speak rather to the perceived need for a compromise, however grubby, combined with a large dose of strategic signalling. The fairly overt power plays, on all sides, contrast significantly with the tone of Kavanagh's book which consistently pitches judicial and other decision-making in rather more genteel and high-flown terms. Kavanagh is right, however, to attack crude attempts to identify who

98 Mark Elliott, 'The right to die: deference, dialogue and the division of constitutional authority' (*Public Law for Everyone* 26 June 201). See further Mark Elliott and Robert Thomas, *Public Law* 4th edn (Oxford University Press 2020) 794.

99 TCC 366.

100 Ibid 366–367.

has the 'last word' as 'Manichean' precisely because what is really going on is so much richer than that tired binary. This case study is powerful evidence, it is suggested, of the tacit convention at the heart of this article.

What are 'exceptional circumstances'?

There is a further difficulty for the idea that there is a general obligation to change the law unless there are exceptional circumstances. The problem is that the non-compliant examples are hardly exceptional. Indeed, they are mundane. Resistance on the issues of prisoner votes or laptop searches is not obviously an exceptional or existential issue on the level of detention of alleged terrorists or the treatment of sex offenders or, say, national security in general terms.[101] Rather, compliance in the genuinely difficult, even exceptional cases, illustrates the very 'presumption of respecting and complying' that lies at the heart of Kavanagh's analysis.[102]

Furthermore, the steps taken in *Miranda* and *Hirst* were not presented by the Government as an *exception* to a general norm of compliance. They were treated as compliance. Nor are there any published criteria for what constitutes 'exceptional circumstances'. Indeed, the non-compliant examples would appear to fall squarely into the category to which Kavanagh strongly objects which is where the elected branches fail to amend the law 'just because they disagree with it'.[103] A formal convention that consists of an obligation to amend the law, except when decision-makers randomly decide not to, is not a convention in any easily comprehensible sense of the orthodox concept. Those who wish to claim that a comprehensible version of the convention that requires legal changes 'unless there are exceptional circumstances' have some way to go before the contours of such circumstances are sufficiently delineated. In contrast, the available evidence is a far better match for the existence of a *tacit* convention that was complied with in these examples, albeit with overt shows of reluctance and with minimal changes.

A TACIT CONVENTION AND THE JUDICIARY

As we have seen, the least likely actors to accept the existence of any purported norm, nascent or otherwise, would be the judiciary. Once the limits of section 3 HRA are reached, the only remaining option is a DoI. For traditionalists, what happens after a DoI is not the concern of

101 *Thompson* (n 55 above); *A v Secretary of State for the Home Department (Belmarsh)* [2004] UKHL 56.

102 TCC 191.

103 Ibid 400.

judges. There are, however, a number of straws in the wind that indicate, at a minimum, judicial knowledge and awareness of the powerful impact of a DoI in reality. This section addresses three examples in recent case law, the first of which is the case of *Nicklinson*.[104] This tragic case concerned the issue of people who wished to be assisted in bringing their lives to an end with dignity without those who help them to die being prosecuted. Nine Supreme Court judges heard the case and there was a three-way split. The dissenting judges claimed that in cases that raise such politically and ethically difficult issues, the courts should not interfere but leave the matter entirely to Parliament.[105]

The majority disagreed and claimed that they would be within their powers to issue a DoI in this kind of scenario if they considered that the law did not conform with relevant binding human rights norms. Indeed, two of the judges in the majority held that they would have issued a DoI in this particular case. As we saw earlier, Lady Hale said that a DoI should be issued.[106] What is fascinating about this case, and relevant for our purposes, is that three of the majority judges refused to issue a DoI. The reasons they gave were somewhat variegated but in essence it was argued that Parliament should be given the opportunity to *reconsider* the matter. Lord Neuberger expressly warned that if Parliament failed to take appropriate steps, then there could be little doubt that a fresh case would be brought and, in those circumstances, a DoI could not be ruled out on the next occasion.[107]

This raises some intriguing questions. The first issue with this decision is that it is difficult to see what prevented the majority from issuing a DoI other than a concern about the almost inexorable effect of doing so. One possible reason underlying the reluctance to grant a DoI could be precisely the claim that a DoI has important and virtually inevitable consequences. Threaded through their lordships' reasoning is the unstated awareness that a DoI would have a powerful impact on subsequent decision-making. Particularly striking is Lord Neuberger's stated concern that the sensitivity of the issues raised should make the courts more 'cautious' before issuing a DoI.

> First, the question ... raises a difficult, controversial and sensitive issue, with moral and religious dimensions, which undoubtedly justifies a relatively cautious approach ... Secondly, this is not a case ... where the incompatibility is simple to identify and simple to cure: ... this also suggests that the courts should, as it were, take matters relatively slowly.

104 *Nicklinson* (n 59 above).

105 It should be noted that the Terminally Ill Adults (End of Life) Bill is continuing its passage through the House of Lords as this article goes to press.

106 Ibid Lady Hale.

107 Ibid Lord Neuberger, para 118.

> Thirdly, section 2 has ... been considered on a number of occasions in Parliament ... so this is a case where the legislature is and has been actively considering the issue.[108]

It is difficult to follow the reasoning that caution is required on the part of the courts if it is the view of all relevant participants that a DoI is just a signalling mechanism in a dialogue between institutional actors with no real-world effects. On the contrary, it would appear that the judges were keenly aware that a DoI is considerably more consequential than that. It might fairly be pointed out that Lord Neuberger's reasoning is a very long way from what was thought to be the original aim which was that Parliament would be free to simply disregard DoIs. As we have seen, the example that was frequently cited in the debates in the House of Commons was the current law governing abortion. It was argued by the Home Secretary, Jack Straw, that if the courts issued a DoI on the basis that abortion was a breach of the ECHR, then Parliament would simply ignore it.

> It is possible that the Judicial Committee of the House of Lords could make a declaration that, subsequently, Ministers propose, and Parliament accepts, should not be accepted. The ... Member ... mentioned abortion, which provides a good example ... My guess ... is that whichever party was in power would have to say that it was sorry, that it did not and would not accept that, and that it was going to continue with the existing abortion legislation.[109]

Nicklinson raises issues no less delicate and challenging but the context has changed so radically that the courts now appear to be concerned lest a DoI close down the debate in Parliament and obstruct the exercise of the supposed discretion of the elected branches. It is suggested that this constitutes fairly strong evidence that the structure set up by the HRA of a DoI which automatically triggers various procedures in the parliamentary system is no longer operating in the way envisaged when one considers the debates in Parliament when the Bill was being passed. This is notwithstanding the fact that the Home Secretary also said that 'in the overwhelming majority of cases ... we shall have to accept it'.[110]

All concerned know the dramatic effect of a DoI, although it might not be openly acknowledged. The latter point, it is suggested, rather tends to bolster the claim that a tacit convention has formed, predicated on the disjunction between the official, formal position that changes are entirely for parliamentarians and the new reality understood by those at the 'third level' of knowledge who are cognisant of what is really going on. That knowledge and understanding is evidence of the

108 Ibid para 116.

109 HC Deb 21 October 1998, vol 317, col 1301.

110 Ibid.

tacit convention. Senior judges, as genuine and sophisticated experts, cannot fail to be aware of these political realities. Naturally, there is considerable divergence between different members of the judiciary as to the enthusiasm with which these fresh responsibilities have been embraced.

What is also interesting is how these strategic, knowing, deliberate and highly political judicial choices are glossed over by those who continue to insist on the 'irritatingly old-fashioned view that the role of the courts is to declare what the law is'.[111] The implicit and mythical idea that there is one objectively true legal answer is just not tenable at the margins. It might also be pointed out that these are waters from which previous generations of judges steered well clear. Nor can the current generation of judges be blamed. Parliament unfortunately forced them to engage with these issues when it threw the hospital pass to the courts inherent in passing the HRA.

The courts are fully aware that Parliament has considered the issues raised in *Nicklinson* on more than one occasion. As it turns out, Parliament has not in fact changed the law as yet. If a DoI had been granted, that DoI could have been ignored. Thus, the difficulties discussed earlier as to whether this would constitute a *breach* of the convention, or in fact demonstrate that the convention does not actually exist, would be raised again. By avoiding the confrontation, it might be thought that the judiciary may be seeking to preserve the effectiveness and usefulness of what has, over time, developed into a *de facto* judicial 'strike-down' power.[112] Having seen one thorny issue eventually resolved in relation to prisoner votes, there may be little appetite to precipitate another similar source of friction.

The Northern Ireland Human Rights Commission

The Supreme Court considered the vexed issue of abortion in certain situations in Northern Ireland in 2018. In that case, a DoI was refused.[113] A majority of the seven judges would have granted a DoI were it not for the fact that a bare majority held that one could not be technically granted due to an 'arid' procedural difficulty relating to the standing of the applicants.[114] A particularly important aspect

111 Gavin Phillipson, 'The Human Rights Act, dialogue and constitutional principles' in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press 2013) 39.

112 TCC 260; Kavanagh (n 45 above).

113 *Application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27.

114 Ibid per Lady Hale at para 11: 'there is no doubt that the NIHRC could readily have found women who either are or would be victims of an unlawful act under the Human Rights Act 1998'.

of this case is that the matter was a devolved one for the Northern Ireland Assembly to address. This is vital because Lord Mance twice hinted at the fact that there appeared to be little prospect of the Assembly addressing the issue if a DoI had in fact been granted.[115]

The gently expressed judicial concern about the likely reaction of the devolved legislature in this area is a subtle, but crucial, revelation because it seems to demonstrate a desire by some judges to preserve the efficacy of the new power that they have acquired under the tacit convention defended in this article. The political reality in Northern Ireland could easily mean that had such a DoI been granted, it might have been ignored. Some may suspect that the success of the highly technical procedural point, which did not persuade the minority of the court, could in part have been motivated by a desire not to end up with a DoI being ignored by the democratic branches, perhaps indefinitely.

This perhaps bolsters the argument that some judges are fully aware of the extension in their *de facto* power that has resulted from the conferral of the discretion to grant a DoI – and there may be considerable unstated reluctance to undermine its efficacy. If this is true, this perhaps bolsters the claim that a tacit convention has come into existence. If elements of the judiciary are actively working to maintain and preserve a very delicate but *de facto* judicial strike-down power, that rather tends to support the claim that a tacit convention has indeed formed.

Kelly

In *Kelly*, a recent Court of Appeal decision, there has been further sophisticated treatment of the norms surrounding issuing a DoI.[116] A previous DoI in *Steinfeld* had held that long-term heterosexual partners who did not wish to be married were discriminated against because they could not enter a civil partnership instead.[117] Parliament rectified the statute but did not do so retrospectively from the date of the DoI. The effect of making the change prospective only was to exclude the applicant in *Kelly*.

The judgments of LJ Laing and LJ Underhill are intriguing for a number of reasons. It is important to be clear from the start that all of the comments made about the DoI were *obiter dicta* and should be read in that context. Nevertheless, LJ Laing saw fit to say that the reason that she would not have issued a DoI was in part because she did not believe that a legislative amendment would follow.

115 Ibid paras 117 and 135.

116 *Kelly v Secretary of State for Work and Pensions* [2024] EWCA Civ 613.

117 *Steinfeld v Secretary of State for International Development* [2018] UKSC 32; [2020] AC 1.

> I do not consider it remotely likely, that if a declaration of incompatibility were made in this case, that the Government or Parliament would respond with a legislative remedy.[118]

Indeed, Westminster had already considered the previous DoI in the area and clearly decided to make the amendments that were made from the date of the judgment in *Steinfeld* rather than fully retrospectively.

The wording of LJ Laing's assessment of the likelihood of remedial action in the event of a DoI drew a direct response from LJ Underhill.

> I do not believe that it would be appropriate for this Court to make a declaration the only purpose of which could be to encourage the Government and Parliament to reconsider that decision. I prefer to express it that way rather than, as Elisabeth Laing LJ does at paras 84 and 86, in terms of whether they would be likely to *respond* to any such encouragement. Though what she says could not be misunderstood in context, it is worth making clear that if a court believes that a declaration should otherwise be made it should not be deterred by a belief that the Government or Parliament is unlikely to do anything in response. (emphasis added)

LJ Laing expressly endorsed the point made by LJ Underhill as to the appropriate meaning and intention of her own phrasing in paragraph 84 of her judgment.

LJ Laing's phrasing, LJ Underhill's response and LJ Laing's express endorsement of that response might be thought to raise rather more questions than they answer. Clearly, the learned justices were not saying, indeed they expressly deny, that the issuing of a DoI should generally be tactically withheld if it is likely that it would not lead to remedial action. The intriguing question is why did LJ Underhill believe that it was necessary to go to the trouble of *clarifying* that such a reading would be a misinterpretation, especially when this was followed by LJ Laing adopting that caveat? Would it not have been easier for the judge to have amended her draft judgment before publication so that it reflected LJ Underhill's more anodyne wording of the point at stake? Might this wording and caveat not be an example of fairly subtle messaging by LJ Laing in a way that nods to the reality of the existence of a tacit convention that is slowly creeping into the juristic consciousness as to the actual effects of a DoI?

This case could be seen as interesting evidence of what Kavanagh describes as the 'nudge' ploy that can sometimes be observed in use by deeply aware and knowledgeable judges who are fully conscious of the potential implications of their judgments.[119] It is therefore possible to read this decision as part of an ongoing, and knowing, example of signalling by the judiciary as to the contours of this significant new

118 *Kelly* (n 116 above) para 84.

119 TCC 311.

tacit convention. LJ Laing was arguably signalling to other judges, in a nod to the underlying but unstated norm, that they might want to hesitate before issuing a DoI in some circumstances. Why do this? One reason might be because the higher the level of compliance with DoIs, the more powerful the norm of compliance by the democratic branches becomes over time.

To put the same point in another way, it might be thought that LJ Underhill's short judgment was a performative statement of the orthodoxy that a DoI can be ignored by Government and Parliament as a matter of law. In contrast, it might equally be thought that LJ Laing's decision to run up a proverbial balloon, but then explicitly run it down again by endorsing LJ Underhill's caveat, has an overarching purpose and meaning that is not ultimately that difficult to discern to those who are wondering if a tacit convention has indeed formed. After all, it is not as if a Court of Appeal judge is in the habit, to adopt the instantly memorable words of Jason Beer KC in cross-examining the former Post Office CEO, Paula Vennells, of 'a misunderstanding between you and the keyboard you were typing on'.[120] As is evidenced here by the explicit cross-referencing, judges circulate their drafts with each other and tweak accordingly before publication. The judge consciously and deliberately used this particular wording. She then denied that it was possible to misinterpret it 'in context'. She then finally chose not to redraft it when the potential ambiguity in the wording was doubtless brought to her attention before publication. These unmistakable signals by such sophisticated experts cannot but invite speculation as to an underlying and important meta-narrative which may affect future judicial deliberations as to whether to grant DoIs in some contexts.

CONCLUSION

The Collaborative Constitution is a weighty, persuasive and mature account of the pervasive importance of human rights across the institutions of the modern UK. The use of the 'collaborative' idea evokes notions of cooperation and interaction that could easily lead the casual reader to think that the author has constructed a broad church in which diverse thinkers could find an ecumenical home. Who could be against 'collaboration'? This would be a serious mistake, no better illustrated than by Kavanagh's root-and-branch attack on dialogue theory for precisely falling into the trap of arguably being all things to all people. Kavanagh's conception of collaboration is far

120 Post Office Horizon IT Inquiry, Official Hearing Page, '23 May 2024 – Paula Vennells'.

steelier than might first be thought and she defends the construction of high walls, in effect, between the institutions of state.

The arc of the book bends towards its final chapter which confronts the difficult question of whether a constitutional convention has formed to the effect that a DoI must result in a change to the law by the democratic branches. This article has argued that a more nuanced and sophisticated account of the political and constitutional dynamics is possible than simply to claim that such a convention is merely 'nascent'. It has been suggested, building on Kavanagh's sophisticated argument, that a tacit convention has formed which explains, more accurately than either a formal or nascent convention, how the current norms surrounding the issuing of a DoI operate in practice. This is far removed from the tired, Manichean binary of who has the 'last word' between the courts and Parliament, instead involving a complex interplay of multiple actors collaborating to fulfil their respective roles.

The reality is far from either the increasingly discredited 'dialogue theory' or a formal, or even nascent, convention limiting the sovereignty of Parliament. Instead, a much richer and more interesting dynamic is in play which is evidenced in all three of the main branches, albeit at differing levels of sophistication and insight. This tacit convention is fragile, perhaps inevitably, but it should perhaps be noted that a new Labour Government, with a prime minister steeped in human rights discourse, is currently in power.[121] It might be thought that the novel tacit convention identified in this article in relation to findings of a breach of the HRA may strengthen considerably in the years to come, not least because it seems likely that the Labour Government and new Parliament would inevitably comply with any future DoIs. If the judiciary continue to make sophisticated and cautious decisions as to when to issue such DoIs, that may serve to embed the tacit convention that this article suggests has now formed.

121 Keir Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group 1999); F Klug and K Starmer, 'Standing back from the Human Rights Act: how effective is it five years on?' (2005) 4 (Winter) Public Law 716–728; K Starmer, 'Human rights and "terrorism": a rugged terrain' (2007) 46 Socialist Lawyer 12–17.