

REVIEW ESSAY

CONSTITUTIONAL ORTHODOXY IN THE
UNITED KINGDOM AND AUSTRALIA:
THE DEEPENING DIVIDE

Constitutional Review under the UK Human Rights Act
by Aileen Kavanagh (Cambridge: Cambridge
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Aileen Kavanagh's Constitutional Review under the UK Human Rights Act contains a lucid explanation and strong defence of the Human Rights Act 1998 (UK) c 42. On her account the Human Rights Act 1998 (UK) c 42 is very close to a formally entrenched bill of rights, conferring strong powers of constitutional review and insulated against most forms of repeal. This review assesses these claims and concludes that the argument, though powerful, does not fully justify its central claims. In the latter part of the essay, the review uses Kavanagh's account to reflect upon the growing divide between Australia and the United Kingdom as to fundamental understandings about public law.

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I INTRODUCTION

Aileen Kavanagh's book *Constitutional Review under the UK Human Rights Act*¹ aims to describe and defend the *Human Rights Act 1998* (UK) c 42 ('HRA') and the approach of the United Kingdom courts to its interpretation. It is an extremely impressive work that combines a thorough doctrinal analysis of a large body of complex case law with sustained and original arguments on larger themes.

The book is in three parts: in the first, Kavanagh addresses statutory interpretation under the *HRA*; the second part addresses the nature and proper place of judicial deference under the *HRA*; and the third part contains an analysis of the constitutional status of the *HRA* and a defence of the institution of constitutional review.² In each part, Kavanagh's account is strongly 'court-centred', giving the judiciary the principal role in determining the meaning of the rights protected by the *HRA*. Specifically, she argues that the power of interpretation found in s 3(1) confers a power to interpret legislation to conform to rights protected by the *HRA* even if to do so would be contrary to the intention of Parliament.³ Further, the power to issue declarations of incompatibility under s 4 confers on courts a power to render inconsistent legislation invalid.⁴ At least that is its practical effect, despite the provision that a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'.⁵

¹ Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009).

² For reasons of space, this review focuses on the first and third parts, largely omitting commentary on the chapters in Part II on deference.

³ *HRA* s 3(1) reads: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the *Convention* rights'.

⁴ Kavanagh, *Constitutional Review*, above n 1, 281–92.

⁵ *HRA* s 4(6)(a).

Finally, Kavanagh argues, the *HRA* is ‘immune from implied repeal’⁶ and can only be repealed if replaced by a similar law, making it ‘relatively entrenched’ as a practical matter.⁷

To anyone schooled in the orthodoxies of constitutional theory in Westminster systems, these propositions are startling. They challenge widely accepted ideas about statutory interpretation, parliamentary sovereignty and the nature of the *HRA*. The culmination of the argument is that the *HRA* is very close to a formally entrenched bill of rights conferring strong powers of constitutional review.

The argument is both descriptive and justificatory. That is, Kavanagh claims to be describing the courts’ approach to the *HRA* but also argues that this approach is correct. In this review, I examine both aspects of her argument. In relation to her justification of the *HRA* as a quasi-entrenched bill of rights conferring strong powers of review, I conclude that while her argument is powerful, it does not fully justify its central claims.

However, even if her justification is incomplete, Kavanagh’s descriptive account of the practice of the United Kingdom courts under the *HRA* deserves close attention. In the latter part of the essay, I use her account to reflect upon the growing divide between Australia and the United Kingdom as to standard assumptions underlying public law.

This essay is in three parts. First, I outline Kavanagh’s argument; second, I examine the justificatory elements of her argument and question its strength. Finally, I draw a comparison with the approach of Australian courts — exemplified by the High Court in *Momcilovic v The Queen* (*‘Momcilovic’*)⁸ — and reflect upon the deep cleavages in fundamental understandings about public law that this comparison reveals.

II INTERPRETATION OF THE *HRA*: SECTIONS 2, 3 AND 4

The general direction of Kavanagh’s argument is established immediately. She argues that s 3(1) enacts a ‘strong presumption of statutory interpretation’⁹ in favour of an interpretation consistent with rights protected by the *Convention for the Protection of Human Rights and Fundamental Freedoms* (*‘ECHR’*).¹⁰ By

⁶ Kavanagh, *Constitutional Review*, above n 1, 303; see at 294–303.

⁷ *Ibid* 303–7.

⁸ (2011) 245 CLR 1.

⁹ Kavanagh, *Constitutional Review*, above n 1, ch 4.

¹⁰ Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights*

this she means that s 3(1) can be used to reach an interpretation contrary to the intention of Parliament (that is, contrary to the intention that would have been ascribed to Parliament under rules of statutory interpretation as they existed prior to the enactment of the *HRA*). More specifically, she takes the view that a court may, in effect, amend the statute by reading it as if words were added to the statutory text, giving it a more expansive meaning. Alternatively, courts may give statutory language a narrower interpretation than rules of statutory interpretation might otherwise permit.

Her argument relies partly on the decision of the House of Lords in *Ghaidan v Godin-Mendoza*¹¹ but it is also derived from her understanding of statutory interpretation. Critics of the courts' use of s 3(1) rely, Kavanagh argues, on a false conception of statutory interpretation as entirely concerned with determining 'linguistic meaning' that can be 'discovered'. To the contrary, she argues, statutory interpretation necessarily involves evaluative reasoning as legislation is drafted in broad terms, the interpretation of which requires judgement and must then be justified in terms of political morality.¹² There is, therefore, *no* plausible conception of judicial reasoning pursuant to which judges interpreting the *HRA* — or any other statute for that matter — can be cast as simply implementing a 'discoverable meaning' of the statute.

Kavanagh also claims that the presumption enacted by s 3(1) is rebuttable only where an interpretation conforming to *ECHR* rights would be contrary to 'fundamental features' of the statute under consideration¹³ or where such an interpretation would involve making 'radical' decisions that would require legislative deliberation.¹⁴

The prominence given to s 3(1) in this analysis of the scheme of the *HRA* is matched by the relative insignificance attributed to s 4. Kavanagh adopts Lord Steyn's conception of the declaration of incompatibility as 'a measure of last resort'.¹⁵ Her argument is partly that this position follows from the narrowly defined nature of exceptions to the s 3(1) presumption. Because judges will usually be able to reinterpret law to conform to *ECHR* rights, it

and Fundamental Freedoms, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).

¹¹ [2004] 2 AC 557. This case is cited and summarised in Kavanagh, *Constitutional Review*, above n 1, 88–91.

¹² Kavanagh, *Constitutional Review*, above n 1, 30.

¹³ A 'fundamental feature' is not simply a provision central to the purpose of the statute. Rather it is one 'so embedded in the fabric of the statute, that it cannot be removed or changed by way of the necessarily piecemeal tool of judicial rectification': *ibid* 39 (emphasis altered).

¹⁴ *Ibid*.

¹⁵ *Ibid* 121, quoting *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 573 [39].

follows that they will only rarely have to resort to s 4 and declare legislation incompatible.

Kavanagh also justifies this interpretation of s 4 as a matter of institutional incentive and as a matter of justice. Judges will naturally prefer a s 3(1) interpretation over a s 4 declaration, given that in most cases a declaration will not provide a legal remedy for the individual litigant. Thus a preference for s 3(1) over s 4 respects the importance of doing justice to litigants. Kavanagh considers, and quickly rejects, the argument that more frequent use of s 4 would promote 'dialogue'. Interpretation under s 3(1), she argues, also promotes dialogue: Parliament may choose to respond to, or to accept, a s 3(1) interpretation just as it can a declaration of incompatibility, while at the same time allowing a remedy for the individual.¹⁶

As I have related it, Kavanagh's account of the relationship between ss 3(1) and 4 is an emphatic argument for the primacy of the interpretation power over the power to give declarations of inconsistency. The final element of her analysis of the basic structure of the *HRA* lies in s 2, which imposes an obligation on courts to 'take into account' any relevant case law produced by the European Court of Human Rights ('ECtHR') in Strasbourg. On Kavanagh's reading, s 2 is not a weak obligation to consider, rather than follow, the case law of the ECtHR. On the contrary, ECtHR precedent has 'a binding status similar to that accorded by the House of Lords to its own precedents'.¹⁷ Significantly, Kavanagh holds that the *ECHR* operates both as a 'floor' and as a 'ceiling'.¹⁸ The United Kingdom courts can neither limit a right that is clearly and consistently applied by the ECtHR, nor can they 'outpace' Strasbourg.¹⁹

III PROPORTIONALITY UNDER THE *HRA*

The second part of the book addresses the question of deference. Particularly significant for this review is Kavanagh's account of the proportionality doctrine as used by the United Kingdom courts.

To begin with, Kavanagh describes the three separate inquiries involved in proportionality analysis, commonly known as 'suitability' or 'necessity', 'minimal impairment' and 'balancing', quoting a well-known formulation of the Privy Council:

¹⁶ Kavanagh, *Constitutional Review*, above n 1, 128–32.

¹⁷ *Ibid* 144.

¹⁸ *Ibid* 160–1.

¹⁹ *Ibid* 153.

the court would ask itself whether:

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the legislative measures designed to meet the objective are rationally connected to it; and
- (iii) the means used to impair the right of [sic] freedom are no more than is necessary to accomplish the objective.²⁰

Second, Kavanagh draws a strong link between proportionality and deference. She draws a conceptual distinction between the method prescribed by the proportionality test and the notion of deference, which describes ‘the intensity with which that method is applied’.²¹ Proportionality, therefore, requires no particular intensity; rather, it is a ‘variable’ standard that ‘can be applied more or less deferentially’.²² Thus, because of this variable intensity, proportionality is intimately related to ideas of deference.

Turning then to questions of deference, Kavanagh’s central point is that proportionality is a standard of *review* and not a mechanism for the substitution of the primary decision. For this reason, proportionality requires sensitivity to the limits of the judicial role in terms of expertise, competence and legitimacy. With regard to its intensity, Kavanagh argues that proportionality places the onus on the state to demonstrate proportionality, that the justificatory burden is substantial, that courts may evaluate the ‘facts underlying the decision and its justification’,²³ and that they do so with reference to the ‘current effect’ of a challenged law rather than ‘the position when the legislation was enacted or came into force’.²⁴

Having laid the elements of proportionality bare, Kavanagh then seeks to show that this method is not novel but bears considerable similarity to *Wednesbury* unreasonableness.²⁵ She concludes, ‘*Wednesbury* and proportion-

²⁰ Ibid 234, quoting *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde for Lords Browne-Wilkinson, Lloyd, Hoffmann and Clyde).

²¹ Kavanagh, *Constitutional Review*, above n 1, 237 (emphasis altered).

²² Ibid.

²³ Ibid 242.

²⁴ Ibid, quoting *Wilson v First County Trust Ltd [No 2]* [2004] 1 AC 816, 842 [62] (Lord Nicholls).

²⁵ See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene MR).

ality are different ways of asking the same question, namely, whether an infringement of *Convention* rights is justifiable in the context of the particular case'.²⁶

In doing so, she methodically addresses claims that proportionality is inherently less deferential (or more 'intense') than the *Wednesbury* standard.²⁷ Properly understood, she argues, proportionality does not allow the substitution of the court's assessment of the merits of a law. Rather, like *Wednesbury*, it requires an assessment of whether a decision is within a range of rational or reasonable decisions. Conversely, the *Wednesbury* unreasonableness standard, like proportionality, requires a consideration of the 'balance struck' between competing interests. Finally, like proportionality, *Wednesbury* unreasonableness is inherently variable and is not inherently less intrusive than proportionality. As she sums up her view: 'the form of the test adopted is less important than the willingness or ability of the courts to interfere with the decisions of the elected branches'.²⁸

But though she considers proportionality to be conceptually similar to previous approaches and not necessarily a more intensive form of review, Kavanagh does argue that proportionality has distinct advantages. First, although she argues that proportionality is not *inherently* less deferential, in practice it has legitimised increased scrutiny of government action.²⁹ The *Wednesbury* standard had been so long associated with highly deferential review of government action that the adoption of the proportionality standard marked an important break with that tradition, allowing for more intense review, aided by the clear placing of the onus of proof on the state or decision-maker defending its actions. Lastly, and echoing many analyses of proportionality, she claims that proportionality provides a more carefully structured inquiry.³⁰

²⁶ Kavanagh, *Constitutional Review*, above n 1, 246. I have made a similar argument in the context of Australian constitutional law. Namely, I argue that 'proportionality' is conceptually equivalent to the 'reasonably appropriate and adapted' standard: see Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668.

²⁷ Kavanagh, *Constitutional Review*, above n 1, 245–7.

²⁸ *Ibid* 251.

²⁹ *Ibid* 253.

³⁰ *Ibid* 255. For other analyses, see the sources cited by Kavanagh: at 255 n 101.

IV THE NATURE OF THE *HRA* AS A ‘BILL OF RIGHTS’

In the final part of the book, Kavanagh advances her argument that the *HRA* closely resembles, and operates in practice as, an entrenched bill of rights.

In her earlier argument on s 3(1), Kavanagh walked a fine line by seeking to emphasise the strength of the interpretive power conferred by s 3(1) and the continuity of the *HRA* with previous practice.³¹ In the same vein, she now argues that the *HRA* is very close to an entrenched bill of rights with a power for courts to ‘strike down’ legislation but at the same time maintains that it represents a modest realignment of the constitutional order.

To make this argument, she first casts the s 4 declaration of incompatibility as something close to a power to strike down legislation. As a matter of practice, she points out, declarations of incompatibility have invariably met with a legislative response designed to ensure compliance with the violated right. This response is more, she argues, than evidence of the political difficulty of ignoring a declaration. The full strength of s 4 must take into account the legal repercussions — an almost inevitable adverse finding by the ECtHR. Thus s 4 identifies a legal wrong, and ignoring a declaration will have legal consequences that make it in effect impossible for the Parliament not to respond. The result brings s 4 very close to a strike-down power.³²

This argument foreshadows her overall position with respect to the *HRA*. Despite the lack of formal supremacy, Kavanagh regards the *HRA* as akin to an entrenched, formally supreme bill of rights: it is legally pervasive (providing a framework against which all other statutes are tested),³³ it is not subject to the doctrine of implied repeal,³⁴ and express repeal is both politically unlikely³⁵ and — unless the *HRA* was replaced with a similar, perhaps even more rights-protective, regime — would involve repudiating the obligations assumed under the *ECHR*.³⁶ The *HRA* is thus both ‘relatively entrenched’ and

³¹ Ibid 108–9.

³² Ibid 281–92, 320–2.

³³ Ibid 294–5.

³⁴ Ibid 315, 317.

³⁵ Kavanagh puts store in the fact that so far, even in the contexts of national security and criminal justice (the two areas on which political statements recommending repeal or amendment have been made), the Government has never ignored a declaration of incompatibility, making it ‘unlikely that they would be prepared to incur the far greater political cost of repealing or restricting’ the *HRA*: Kavanagh, *Constitutional Review*, above n 1, 305.

³⁶ Ibid.

allows the courts, in practical if not formal terms, to disapply inconsistent legislation.³⁷

An obvious tension arises between this account and the principle of parliamentary sovereignty, which at least on its orthodox account regards the power of parliament as unconstrained.³⁸ In response, Kavanagh challenges the frequently made claim that the *HRA* reconciles rights review and parliamentary sovereignty. On her account of the *HRA*, it puts in place legal structures, rather than just political mechanisms, that constrain Parliament and thus qualify the principle of parliamentary sovereignty, as traditionally understood. However, this qualification of parliamentary sovereignty serves only to confirm the trend, evident at least since *Factortame Ltd v Secretary of State for Transport*,³⁹ towards judicial limitations on parliamentary sovereignty.⁴⁰

So far Kavanagh's doubts about parliamentary sovereignty lead her to argue that the principle is not 'absolute'.⁴¹ She does not deny, however, that it has some salience. One might think, then, that parliamentary sovereignty might have a residual role in relation to the *HRA*. Perhaps attention to parliamentary sovereignty should influence the reading of ss 3(1) and 4, counselling greater attention to parliamentary intention or supporting the use of s 4, which might encourage a legislative response and also enliven special powers of amendment.

However, the accommodation made for parliamentary sovereignty comes entirely within Kavanagh's argument about deference. At most, she says, parliamentary sovereignty can be understood as a principle that requires courts to have due respect for the competence, expertise and — crucially for this part of the argument — legitimacy of Parliament, by showing restraint in appropriate circumstances.⁴² However, as made clear in her earlier chapters on deference, there should be no *routine* assumption that Parliament has superior democratic legitimacy and consequently no routine assumption of deference, beyond the minimal deference due to all constitutional actors, on these grounds.⁴³ Anything more than this minimal deference will only be due when

³⁷ Ibid 322.

³⁸ Ibid 314.

³⁹ [1990] 2 AC 85. See also *R v Secretary of State for Transport; Ex Parte Factortame Ltd* [No 2] [1991] 1 AC 603. The case is discussed in Kavanagh, *Constitutional Review*, above n 1, 325–7.

⁴⁰ *R (Jackson) v A-G (UK)* [2006] 1 AC 262. The case is discussed in Kavanagh, *Constitutional Review*, above n 1, 326–7.

⁴¹ Kavanagh, *Constitutional Review*, above n 1, 324–37.

⁴² Ibid 332.

⁴³ Ibid 192.

judges believe that it is inappropriate for them to change the law on a particularly sensitive and controversial issue, because such a decision would have a greater chance of being accepted in society if it were introduced by the elected branches of government.⁴⁴

With the principle of parliamentary sovereignty confined within the bounds of ‘deference,’ Kavanagh goes on to reject any suggestion that it might be relevant to determining the relative appropriateness of the remedies provided by ss 3(1) and 4 or the place of parliamentary intention in interpretation under s 3(1). She therefore specifically rejects Jeffrey Goldsworthy’s account of statutory interpretation, pursuant to which adherence to ‘legislative intention’ is indispensable to the preservation of ‘legislative supremacy’.⁴⁵

V JUSTIFICATION FOR CONSTITUTIONAL REVIEW

For much of the book so far, Kavanagh’s argument is either ‘analytical’ or ‘conceptual’ (in the sense that she argues that her position is derived from agreed or incontrovertible premises), ‘historical’ (in the sense that she argues that her positions reflect established or emerging practice) or ‘doctrinal’ (in that she relies upon the decided case law under the *HRA*).⁴⁶

In the final three chapters of the book, Kavanagh shifts gears to a defence of constitutional review as a matter of political morality. Kavanagh defends constitutional review as the best way to protect rights. In support of this position, she makes a range of arguments designed to show the institutional advantages of courts: that they are better placed to resist the pressures of partisan politics and short-term interests, and to protect minorities inadequately represented in majoritarian politics. She also makes a range of arguments about the special capacity of adjudication of individual disputes to allow individual participation and to focus upon the circumstances of particular cases. Further, she emphasises the capacity of constitutional litigation to produce broader cultural and political effects by raising public

⁴⁴ Ibid 193.

⁴⁵ Ibid 332–6. See Jeffrey Goldsworthy, ‘Parliamentary Sovereignty and Statutory Interpretation’ in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, 2004) 187. See also Richard Ekins and Jeffrey Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36 *Sydney Law Review* 39.

⁴⁶ For the most part, Kavanagh defends the record of courts with respect to the *HRA*. But she is not wholly uncritical: see, eg, Kavanagh, *Constitutional Review*, above n 1, 54–5, where she critiques the ‘semantic lottery’ of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

consciousness about rights as well as focusing legislative attention during the lawmaking process.

In defending this position, Kavanagh is on very well-travelled ground. Her account is nonetheless interesting, insightful and at points original. It is hardly surprising, however, that it fails to put the debate to bed. Kavanagh's argument is at its most effective when she draws attention to an imbalance in the accounts of the relative competencies of courts and parliaments that she finds in some arguments against constitutional review.⁴⁷ Her defence of the institutional advantages of courts is, however, less convincing. A number of questions about Kavanagh's confidence in courts spring to mind.

A Will Courts Protect Rights?

The first of these is whether courts will really be able to resist Parliament on rights questions over the long term. Despite the apparent insulation of courts from the political process, British 'political constitutionalists' have long been suspicious of the politics of courts and have questioned the capacity of courts to resist parliamentary majorities and adequately protect rights.⁴⁸

Kavanagh's first response to these arguments is to reject the extension of this critique to the performance of the courts under the *HRA*.⁴⁹ Kavanagh finds it especially significant that, even in the dramatic times following the 9/11 and 7/7 terrorist attacks, the United Kingdom courts have resisted Parliament and used the *HRA* to enforce human rights standards and limit its powers to regulate terrorism.⁵⁰ But the life of the *HRA* so far is a rather short span of time over which to make that assessment. Certainly, courts in other countries — most notably the United States — have shown only a limited capacity to resist legislatures when their record is viewed over the longer term.⁵¹ It is possible that the United Kingdom courts will remain immune to the pressure affecting courts in the United States, but Kavanagh has not provided us with a reason for such confidence. Indeed, her argument for a

⁴⁷ Kavanagh, *Constitutional Review*, above n 1, 376.

⁴⁸ Kavanagh discusses in particular the work of Keith Ewing and Adam Tomkins: *ibid* 381–8. See Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

⁴⁹ See also Stephen Gardbaum, 'Reassessing the New Commonwealth Model of Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 167.

⁵⁰ Kavanagh, *Constitutional Review*, above n 1, 381–5.

⁵¹ See Robert G McCloskey, *The American Supreme Court* (University of Chicago Press, 5th ed, 2010).

highly court-centric understanding of the *HRA* gives courts in the United Kingdom powers much closer to their United States counterparts than might otherwise have been thought. This feature of her argument makes the United States experience particularly challenging.

Kavanagh's second line of response is to concede that courts have sometimes failed and probably continue to fail in the protection of rights, but to argue that this possibility strengthens rather than weakens her argument. Indeed, she argues that the very idea that courts have 'failed' to protect rights presupposes that it is their constitutional duty to protect rights.⁵² In making this point, Kavanagh has identified an apparent contradiction at the heart of democratic scepticism of rights review. On the one hand, democratic sceptics deride constitutional review as a strongly counter-majoritarian institution while at the same time criticising courts' incapacity to resist parliaments and protect rights. A true democratic sceptic, she argues, would be comfortable with judicial deference to parliaments.

In further support of her argument, she questions the significance of the courts' mixed record on rights. That there have been some failures does not demonstrate the overall futility of constitutional rights review.⁵³ Rather, the burden of the case for the *HRA*, she reminds the reader, is not to show that every decision made is a good one but that the *HRA* improves human rights protection as compared with the status quo before enactment.

B *Can Courts Protect Rights?*

These are powerful points but this line of argument does not seem to factor in the possibility of judicial error, including the sometimes unexpected negative or self-defeating effects of the exercise of a power of constitutional review. There is a philosophical and a practical point to be made here. The philosophical point is that Kavanagh's argument makes no allowance for the very difficult, contested nature of rights questions. She appears entirely confident that courts, at least when they act to constrain parliament, will usually do so for the good. She appears not to be troubled by, and does not directly respond to, Jeremy Waldron's influential work on rights disagreement, which relies on the reasonable and intractable disagreement about the meaning of rights (as

⁵² Kavanagh, *Constitutional Review*, above n 1, 387.

⁵³ *Ibid* 388.

well as disagreement about how best to decide rights questions) to question the suitability or capacity of courts to resolve these issues.⁵⁴

Kavanagh does make arguments as to the institutional advantages of courts, which she has advanced in other contexts in response to the Waldronian argument.⁵⁵ But while she makes a strong case for the inclusion of adjudication as *an element* of the decision-making process, Kavanagh has not explained why that power should be final and not subject to revision. If one takes reasonable disagreement about rights seriously and recognises the potentially negative effects of constitutional review, there should be a real possibility for parliaments to override judicial decisions. The case for some kind of parliamentary check on the judiciary is strengthened further if one accepts (as Kavanagh does) that the principle of parliamentary sovereignty, while qualified, has some role to play in British constitutionalism.

The more practical point is that the institutional limitations of courts mean that they may unwittingly use their powers in counterproductive ways. Kavanagh's argument appears to proceed on the basis that either courts will improve the status quo prior to the *HRA* or they will leave the pre-*HRA* position in place. However, constitutional review might sometimes make the situation *worse*. It is possible that judicial decisions on constitutional rights will misjudge their real world effects, be ineffective to produce the social change needed to realise rights protection, or provoke backlash that hardens conflict or debilitates legislative processes.⁵⁶ If any of these possibilities are taken seriously, then the argument for 'strong form' constitutional review considerably weakens.⁵⁷

⁵⁴ See Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999).

⁵⁵ Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451.

⁵⁶ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999) 138–53.

⁵⁷ To the extent that Kavanagh recognises these possibilities, her analysis suggests that they are to be dealt with through the mechanism of deference. The possibility of backlash or other counterproductive effects provide a reason for judges to defer to parliament: see also Aileen Kavanagh, 'Judicial Restraint in the Pursuit of Justice' (2010) 60 *University of Toronto Law Journal* 23. But this argument leaves the judgement as to the likelihood of these effects to courts themselves. The same institutional limitations which make judges unable always to assess the likely effects of their judgments would surely also cloud their capacity to predict when backlash and other counterproductive effects are likely. Put simply, courts are not well placed to understand the full effects of their judgments and may well misjudge when deference is due. For these reasons, deference cannot be fully relied upon as a response to the institutional limitations of courts.

In this light, it is worth remembering that the burden of Kavanagh's argument is not simply to justify the enactment of the *HRA*, nor to provide an argument for some kind of a judicial role in the resolution of rights questions. She needs to provide an argument for her interpretation of the *HRA*, with its highly court-centric features. In other words, hers is not an argument for weak form judicial review as it is usually understood. It is an argument for a strong form of judicial review, or at least something very close to it.

Finally, the possibility of error and unintended negative effects dissolves the apparent tension she identified in democratic scepticism. It is not inconsistent to criticise courts for offering only weak resistance to legislative majorities *and* to criticise their capacity to make good decisions on the occasions that they do act against legislatures. It is possible that judicial review might be both a weak instrument and not an especially good tool for rights protection when it is wielded.⁵⁸ This view of constitutional review is bleak indeed, but it remains a possibility despite Kavanagh's defence.

In short, then, the case for the strong form of constitutional review that Kavanagh advocates is weaker than her arguments admit. Both the theoretical underpinnings of constitutional review and its capacity to protect constitutional values remain deeply contested by arguments Kavanagh does not fully counter.

The explanation for the absence of a full justification may lie in the structure of the book. The early parts carefully detail how the *HRA* operates, and it is from this analysis that Kavanagh appears to draw her claim that the *HRA* is quasi-entrenched and implements a strong form judicial review. It is her descriptive account, which shows that the *HRA* in practice is quite different from the weak 'dialogic' model that it appears to implement, that provides the foundation of her defence of the *HRA*.

Yet when the argument shifts from a description and analysis to justification, something more is required. In this respect, the deepest worry inspired by this account is not its defence of judicial review *per se* as its defence in this context. Whatever the merits of strong forms of judicial review, it is especially concerning that the *HRA* was publicly defended — including in formal parliamentary proceedings⁵⁹ — as preserving an orthodox understanding of parliamentary sovereignty. Kavanagh's account thus justifies the implementation of entrenched constitutionalism with strong form rights review in the

⁵⁸ Mark Tushnet holds something like this view of judicial review: see Tushnet, above n 56, 153. Admittedly his view is formed in relation to strong form judicial review, but Kavanagh's argument is for a form of judicial review that approaches strong form review.

⁵⁹ See Kavanagh, *Constitutional Review*, above n 1, 14.

face of a clear intention to the contrary and without ever subjecting that reform to forthright public scrutiny.

VI AN AUSTRALIAN COMPARISON

At this point, an Australian comparison is unavoidable. Two Australian jurisdictions, the Australian Capital Territory and Victoria, have statutes that resemble the *HRA*.⁶⁰ Like the *HRA*, these statutes confer powers of interpretation and a power to issue declarations that are analogous to the powers conferred by ss 3 and 4 of the *HRA*. In the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*'Charter'*), the analogous sections are s 32(1), which provides that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'; and s 36, which confers a power to issue a declaration of 'inconsistent interpretation' if 'in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right'.

Moreover, the statutes seem to point the courts towards a proportionality analysis by including general limitations clauses.⁶¹ In the case of the *Charter*, s 7 contains a general limitation provision. Section 7(2) provides at its core: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. The closest model for the general limitation provisions in the Australian statutes would appear to be s 1 of the *Canadian Charter of Rights and Freedoms*.⁶² Section 1 includes a similar limitation clause which, pertinently for this analysis, is applied by the Canadian courts through a proportionality analysis.⁶³

Despite the similarities, the Australian courts do not seem inclined to treat the Australian analogues to the *HRA* in anything like the same manner. The most important decision on this question is the High Court's decision in

⁶⁰ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic). On the 'reengineering' of weak form judicial review in Australia, see Scott Stephenson, 'Constitutional Reengineering: Dialogue's Migration from Canada to Australia' (2013) 11 *International Journal of Constitutional Law* 870.

⁶¹ See Justice Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85.

⁶² *Canada Act 1982* (UK) c 11, sch B pt I.

⁶³ *R v Oakes* [1986] 1 SCR 103, 139 (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ).

*Momcilovic*⁶⁴ on various aspects of the *Charter*.⁶⁵ Three central points of distinction emerge. First, the kind of interpretation accepted in *Ghaidan v Godin-Mendoza* (a ‘remedial’ interpretation)⁶⁶ was not permitted by the *Charter*.⁶⁷ Rather the reference to ‘purpose’ in s 32 was understood as a reference to legislative ‘intention’ ascertained by ordinary means of statutory interpretation, and therefore the section does not authorise any departure from parliamentary intention.⁶⁸ Second, unlike the United Kingdom courts, which have apparently embraced proportionality analysis as a method of determining the limits on rights, *Momcilovic* raises questions about the ‘balancing’ task that proportionality requires.⁶⁹ Finally, the High Court allows only a limited operation for s 36 of the *Charter*, the declaration power.⁷⁰

The basis of these findings lies in the distinctly Australian constitutional context and the separation of judicial power that the *Constitution* requires. Two principles of Australian constitutional law are especially relevant:

- 1 The principle from *R v Kirby; Ex parte Boilermakers’ Society of Australia* (*Boilermakers*’), that courts formed under ch III of the *Constitution* (that is, the federal courts) may exercise *only* the ‘judicial power of the Commonwealth’ together with incidental non-judicial powers,⁷¹ and
- 2 A related principle, from *Kable v Director of Public Prosecutions (NSW)* (*Kable*’), that applies to state courts and arises from the conferral on them of a power to exercise federal jurisdiction.⁷² Though not bound by all the

⁶⁴ (2011) 245 CLR 1.

⁶⁵ See Will Bateman and James Stellios, ‘Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights’ (2012) 36 *Melbourne University Law Review* 1.

⁶⁶ [2004] 2 AC 557, 577 [50] (Lord Steyn).

⁶⁷ *Momcilovic* (2011) 245 CLR 1, 47–8 [46], 55 [62] (French CJ), 83–7 [146], 92–3 [170]–[171] (Gummow J), 123 [280] (Hayne J), 210 [544]–[545] (Crennan and Kiefel JJ), 250 [684] (Bell J).

⁶⁸ *Ibid* 50 [50] (French CJ), 92 [170] (Gummow J), 123 [280] (Hayne J), 175 [441] (Heydon J), 217 [565]–[566] (Crennan and Kiefel JJ), 250 [684] (Bell J).

⁶⁹ *Ibid* 49–50 [49]–[51] (French CJ), 87–8 [150]–[152] (Gummow J), 123 [280] (Hayne J), 211 [546] (Crennan and Kiefel JJ).

⁷⁰ *Ibid* 59–70 [75]–[100] (French CJ), 93–7 [172]–[189] (Gummow J), 123 [280] (Hayne J), 218 [567], 219–20 [574]–[576] (Crennan and Kiefel JJ), 241 [661] (Bell J).

⁷¹ (1956) 94 CLR 254, 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). Strictly, we are referring here only to the ‘second limb’ of that principle. In addition, ch III requires that only courts formed in accordance with ch III can exercise the judicial power of the Commonwealth (the ‘first limb’ of the *Boilermakers*’ principle): at 270. The High Court’s judgment was affirmed on appeal to the Privy Council: *A-G (Cth) v The Queen* (1957) 95 CLR 529.

⁷² (1996) 189 CLR 51.

principles derived from ch III, a state court may not exercise a function inconsistent with the ‘institutional integrity’ necessary for the continued exercise of federal jurisdiction.

The High Court’s findings were complex, but it ultimately found that the core provisions of the *Charter* were consistent with these principles and therefore valid. However, there were significant qualifications to these findings.

A *The Constitutional Status of the s 36 Declarations Power*

With respect to s 36, the Court unanimously found that the power to issue a declaration was not a ‘judicial power’ because it had no effect on the resolution of the legal issues before the Court.⁷³ By majority, the Court also held that it was not a power ‘incidental’ to the exercise of judicial power.⁷⁴ For this reason, the *Boilermakers’* principle prevents ch III courts from exercising the power conferred by s 36, and the Parliament from conferring any such powers on a ch III court. In addition, for reasons that turn on the operation of the *Judiciary Act 1903* (Cth), the power cannot be exercised by non-ch III courts in the exercise of federal jurisdiction.⁷⁵ However, the declaration power can be exercised by state courts in the exercise of state jurisdiction because the High Court held, also by majority, that the power conferred by s 36 was, nonetheless, consistent with the institutional integrity of state courts.⁷⁶

B *The Constitutional Status of the s 32 Interpretation Power and the Limitation Clause*

With respect to s 32, which was also found to be constitutionally valid,⁷⁷ there are other important constitutional caveats. First, had the High Court accepted

⁷³ *Momcilovic* (2011) 245 CLR 1, 65 [89] (French CJ), 96 [184]–[185], 96–7 [187] (Gummow J), 123 [280] (Hayne J), 185 [457] (Heydon J), 222 [584] (Crennan and Kiefel JJ), 241 [661] (Bell J).

⁷⁴ *Ibid* 65–6 [90]–[91] (French CJ), 96–7 [187] (Gummow J), 123 [280] (Hayne J), 241 [661] (Bell J). Crennan and Kiefel JJ dissented on this point: at 223–9 [589]–[606].

⁷⁵ *Ibid* 68–70 [98]–[100] (French CJ), 99–100 [201]–[205] (Gummow J), 123 [280] (Hayne J), 224–6 [593]–[597] (Crennan and Kiefel JJ), 241 [661] (Bell J).

⁷⁶ *Ibid* 66–8 [92]–[97] (French CJ), 226–9 [598]–[606] (Crennan and Kiefel JJ), 241 [661] (Bell J). Gummow J, Hayne J and Heydon J dissented on this point: at 93–7 [175]–[188] (Gummow J), 123 [280] (Hayne J), 185 [457] (Heydon J).

⁷⁷ The majority (Heydon J dissenting) held that s 32 did not authorise remedial interpretations. It follows that the section does not confer a role on the courts that could be said to be inconsistent with judicial process and therefore invalid: *ibid* 50 [50]–[51] (French CJ),

as a matter of statutory interpretation that s 32 authorised remedial interpretations, questions would have arisen as to whether that power was valid.⁷⁸ A power to give remedial interpretations might have been found to be constitutionally invalid on the grounds that a power to depart from Parliament's intention conferred a power that was either not 'judicial' (and therefore inconsistent with the *Boilermakers'* principle) or inconsistent with the integrity of state courts (and therefore inconsistent with the *Kable* principle). Indeed, the only judge who found that s 32 authorised a remedial interpretation — Heydon J — also found that s 32 was invalid as it was contrary to both the *Boilermakers'* principle and the *Kable* principle.⁷⁹ Thus the preclusion of remedial interpretations might be taken to reflect the constitutional context as well as the particular language of the statute.

Second, when the High Court considered the relationship between ss 32 and 7(2) — the general limitation clause — of the *Charter*, further evidence of the Australian courts' distinctive approach emerges. Of the six judges who held that s 32 was valid, three (French CJ and Crennan and Kiefel JJ) also held that when a court applies the interpretive provision in s 32 of the *Charter*, the 'justification provision' in s 7(2) has no application.⁸⁰ To explain this in another way, three judges held that when a court interprets a Victorian law to be consistent with human rights (in the manner provided for by s 32), the court should *not* take into account the 'reasonable limits' on the right. It considers only the 'right' unlimited by the reasonable necessities of a free and democratic society.⁸¹

The reasoning of these judges is not entirely clear as the issue was not central to the case, but a clearer picture begins to emerge (and greater doubts arise about s 7(2)) when one adds Heydon J's dissent to the mix. Heydon J takes the view that s 7(2) does apply when s 32 is relied on, but for this reason he finds s 32 (and with it s 36 and the *Charter* as a whole) to be invalid.⁸²

83–7 [146] (Gummow J), 123 [280] (Hayne J), 210 [545], 217 [565] (Crennan and Kiefel JJ), 250 [684] (Bell J).

⁷⁸ In addition, because Ms Momcilovic's residence was in Queensland at the time of her trial, the Victorian courts were exercising federal jurisdiction in relation to her matter: see *Constitution* s 75(iv). As a result, it would also be relevant to consider whether the power conferred by s 32 of the *Charter* was non-judicial in nature. For further explanation of this point, see Bateman and Stellios, above n 65, 11–13.

⁷⁹ *Momcilovic* (2011) 245 CLR 1, 183–4 [454].

⁸⁰ *Ibid* 44 [35] (French CJ), 219–20 [572]–[574] (Crennan and Kiefel JJ).

⁸¹ Moreover, though I will leave this to one side, Crennan and Kiefel JJ also held that s 7(2) has no application when a court issues a declaration of inconsistent interpretation: *ibid* 224 [590].

⁸² *Ibid* 163–4 [408]–[409], 173–4 [434], 175 [439].

Section 7(2) confers a function that cannot be exercised by courts (state or federal) because it is too vague to be capable of application by a court and involves a kind of judgement that is impermissible for judges to make. The greatest flaw is that it requires a right to be balanced against other rights and interests.

Here is how Heydon J describes the problem:

s 7(2) does not talk of ‘balancing’ ... [but] that is the process it involves. But the things to be balanced or weighed are not readily comparable — the nature of a right and various aspects of a limitation on it, the nature of a right and other rights, ... could include many matters of practical expediency of which courts know nothing, social interests about which it is dangerous for courts to speculate and considerations of morality on which the opinions of the governed may sharply differ from those of the courts. It is for legislatures to decide what is expedient in practice, what social claims must be accepted, and what moral outcomes are to be favoured — not courts.⁸³

In finding s 7(2) invalid, Heydon J took the view that the power is not only non-judicial (which would prevent its application by federal courts like the High Court which are created pursuant to ch III of the *Constitution*), but is also so deeply incompatible with the judicial role that state courts are also barred from applying it.⁸⁴ Concerns along these lines may well be underlying the other judges’ reasons as well. That much is strongly suggested by French CJ. In particular, in explaining his view that s 7(2) is not part of the interpretive process, French CJ said the following:

the justification of limitations on human rights is a matter for the Parliament. That accords with the constitutional relationship between the Parliament and the judiciary which, to the extent that it can validly be disturbed, is not to be so disturbed except by clear words.⁸⁵

It is also suggested by the following passage in the judgment of Crennan and Kiefel JJ who, having ruled out the possibility that s 7(2) operates with ss 32 and 36, concluded:

It is not necessary to determine whether [s 7(2)] has any other consequences, although it is difficult to discern that it might. It might operate as a statement of

⁸³ Ibid 171 [430].

⁸⁴ Ibid 172–5 [433]–[439].

⁸⁵ Ibid 44 [36].

principle directed to the legislature, but it forms no part of the role of the courts ...⁸⁶

It seems, therefore, that, according to a majority of the High Court in *Momcilovic*, the role imposed by s 7(2) is one for the legislature and not the courts.

These passages do not address proportionality analysis directly. However, they do indicate that the High Court is uncomfortable about elements of that form of analysis. After all, the balancing that so troubles Heydon J, which he claims will bring courts to question the wisdom of public policy, is part of the proportionality analysis which s 7(2) appears to contemplate.

C *Competing Conceptions of the Judicial Role*

This long digression into some of the more arcane aspects of Australian constitutional law is made to underscore the vast differences between Australia and the United Kingdom when it comes to judicial review of rights.

The United Kingdom courts, at least on Kavanagh's analysis, have strong review powers pursuant to a quasi-entrenched *HRA*. By contrast, the High Court in *Momcilovic* limits the application of such charters, giving the Australian courts weaker powers of interpretation, limiting the power of declarations and, it seems, limiting the application of a general limitations clause (and the proportionality analysis it would entail) in the course of applying such a provision. In short, while the United Kingdom courts appear to have assumed a *stronger* power of judicial review than initially intended or expected, the Australian courts are determinedly proceeding in the opposite direction and *declining* to exercise powers conferred upon them.

Clearly, a very different set of considerations are at play in Australia. The explanation obviously lies in its written constitution and the distinct demands of ch III. Yet, on closer reflection, the depth of the difference remains puzzling. The High Court's reasoning is driven by a conception of what is intrinsic to the nature of a court and the exercise of judicial power. The concept of judicial power is constitutionally defined, yet it also draws on traditional understandings of the role of courts.⁸⁷ On such questions,⁸⁸

⁸⁶ Ibid 220 [575].

⁸⁷ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *Boilermakers' (1956) 94 CLR 254, 307* (Williams J).

⁸⁸ The historical functions of courts are relevant to the determination of the nature of judicial power: see, eg, *Pasini v Mexico* (2002) 209 CLR 246, 267 [59] (Kirby J), discussing the 'chameleon power'. See also Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 3rd ed, 2012) 506–7 [9.19].

Australian and United Kingdom courts might be expected, by virtue of their common heritage, to hold similar views. But a comparison with Kavanagh's analysis reveals that the difference between the United Kingdom and Australian courts may lie in fundamental conceptions about the role of the judiciary rather than contingent aspects of constitutional structures. The Australian constitutional conception of judicial power is notably 'legalist'. That is, it reflects a preference of the Australian courts — and especially the High Court — for the view that judges deciding hard questions of constitutional law should do so, as far as they possibly can, by reference only to legal materials and without recourse to other matters such as considerations of political morality or policy preferences. Thus the starting point for the Australian constitutional conception of judicial power is that it is characterised by the application of law to facts and the determination of pre-existing rights and liabilities rather than the determination of rights and liabilities for the future.

Influenced by this conception of the judicial role, the High Court insists upon limiting the s 32 interpretation power by reference to the concept of parliamentary intention and eschews the making of remedial interpretations, not only as a matter of statutory interpretation but *as required by the concept of judicial power*. Crucially, on Kavanagh's view, the strength of the United Kingdom courts' powers, including the power to give remedial interpretations, lies also in the nature of judicial power, albeit a very different conception of that power. That is, it is *in the nature of statutory interpretation* that courts make independent judgements on the basis of political morality. In other words, the task of rendering laws compatible with human rights is inevitably and intrinsically part of the judicial role.

The striking differences are repeated in relation to other points of divergence. The United Kingdom courts reveal no particular sensitivity about the balancing task involved in proportionality and readily adopt the test even though there is no explicit limitation clause in the *HRA*. By contrast, even though s 7(2) of the *Charter* seems designed to implement a proportionality test, the High Court appears to regard that form of inquiry, in this context,⁸⁹ as inherently non-judicial. And while Kavanagh argues that the United Kingdom practice shows that the power conferred by s 4 of the *HRA* to make declarations of inconsistency is weak in theory but strong in fact, even the

⁸⁹ The High Court's reticence about balancing in this context is especially puzzling given that it accepts the use of a proportionality analysis, which I have argued elsewhere includes a balancing inquiry, in relation to other aspects of constitutional law: Stone, above n 26. See generally Justice Kiefel, above n 61.

weak form of power conferred by s 36 of the *Charter* is regarded as constitutionally impermissible in Australia, at least for courts bound by the separation of judicial power.

In short, while weak form judicial review is partially eschewed by the Australian courts, the United Kingdom position — at least as related by Kavanagh — is that there is no such thing as weak judicial review. It is intrinsically the task of courts to review laws for compliance with fundamental requirements of justice and to do so in ways from which the Parliament cannot, as a practical matter, depart. Viewed in this light, the differences between the United Kingdom and Australia run very deep indeed. They are not simply the consequence of particular constitutional structures. Rather, they are located deep within competing conceptions of the judicial role.

VII CONCLUSION

Kavanagh has produced a theoretically rich and thought-provoking vision of constitutional review under the *HRA*. She makes many insightful, powerful arguments that should be read by all scholars interested in constitutional review in the United Kingdom. Anyone who wishes to maintain a more orthodox understanding of British constitutionalism will now have to grapple with Kavanagh's account.

But the importance of her analysis runs deeper than its significance for understanding the *HRA*. Kavanagh's analysis contains an implicit conception of the judicial role according to which judicial review, by its very nature, involves strong powers of review, including extensive capacity to reinterpret laws and minimal duties of deference. Moreover, as the comparative element of this essay reveals, her account provides an especially provocative challenge for orthodox Australian constitutionalists because, also relying on its conception of the judicial role, the High Court appears to be proceeding in the opposite direction towards a weaker role for courts in the protection of human rights.