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Résumé de l'article

Il existe certainement une tendance, chez les avocats, à penser qu'il incombe exclusivement aux tribunaux de définir et d'énoncer les principes constitutionnels et de les protéger. Quand on pense aux principes constitutionnels dans le contexte canadien, les décisions judiciaires (comme le Renvoi relatif à la sécession*) viennent d'abord à l'esprit de nombreux juristes, et il est désormais assez évident que la Cour suprême du Canada se considère comme la gardienne de ces principes.*

Nous estimons que le processus législatif peut aussi générer d'importants principes constitutionnels et les protéger. Au sein du Parlement, les greffiers et d'autres acteurs jouent le rôle de gardiens de ces principes. Avant même que les projets de loi ne soient soumis au processus d'examen parlementaire, on peut voir que les acteurs non judiciaires élaborent des principes constitutionnels et les protègent. Les rédacteurs législatifs agissent, dans leurs nombreuses discussions avec les ministres, les autres fonctionnaires et les conseillers stratégiques, en tant que gardiens des principes et cherchent à établir un équilibre entre la protection des fondements constitutionnels et l'avancement des objectifs de la politique gouvernementale.

Ces caractéristiques du processus législatif remettent en cause l'idée selon laquelle les tribunaux sont au coeur de l'élaboration et de la protection des principes constitutionnels.

The Generation and Guardianship of Constitutional Principles

Paul Daly*

ABSTRACT

There is a tendency, certainly amongst lawyers, to think that it is exclusively the role of the courts to develop or identify constitutional principles and then to guard them. When considering constitutional principles in the Canadian setting, judicial pronouncements (as in the Secession Reference*) spring first to many lawyerly minds and it now seems quite clear that the Supreme Court of Canada sees itself as the guardian of these constitutional principles.*

We will argue that the legislative process can also generate and guard important constitutional principles. Within Parliament, clerks and other players act as the guardians of these principles. Even before bills undergo the parliamentary scrutiny process, generation and guardianship of constitutional principles by non-judicial actors can be perceived. Legislative drafters act, in their iterative discussions with ministers, other civil servants and policy advisors, as guardians of principles, striving to strike a balance between the protection of constitutional fundamentals and the advancement of governmental policy goals.

These features of the legislative process undermine the notion that courts are central to the generation and guardianship of constitutional principles.

KEYWORDS:

Westminster, Parliament, constitutional principles, judicial review, guardians, legislative process.

RÉSUMÉ

Il existe certainement une tendance, chez les avocats, à penser qu'il incombe exclusivement aux tribunaux de définir et d'énoncer les principes constitutionnels et de les protéger. Quand on pense aux principes constitutionnels dans le contexte canadien, les décisions judiciaires (comme le Renvoi relatif à la sécession*) viennent d'abord à l'esprit de nombreux juristes, et il est désormais assez évident que la Cour suprême du Canada se considère comme la gardienne de ces principes.*

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Nous estimons que le processus législatif peut aussi générer d'importants principes constitutionnels et les protéger. Au sein du Parlement, les greffiers et d'autres acteurs jouent le rôle de gardiens de ces principes. Avant même que les projets de loi ne soient soumis au processus d'examen parlementaire, on peut voir que les acteurs non judiciaires élaborent des principes constitutionnels et les protègent. Les rédacteurs législatifs agissent, dans leurs nombreuses discussions avec les ministres, les autres fonctionnaires et les conseillers stratégiques, en tant que gardiens des principes et cherchent à établir un équilibre entre la protection des fondements constitutionnels et l'avancement des objectifs de la politique gouvernementale.

Ces caractéristiques du processus législatif remettent en cause l'idée selon laquelle les tribunaux sont au cœur de l'élaboration et de la protection des principes constitutionnels.

MOTS-CLÉS :

Westminster, Parlement, principes constitutionnels, contrôle judiciaire, gardiens, processus législatif.

SOMMAIRE

INTRODUCTION

There is a tendency, certainly amongst lawyers, to think that it is exclusively the role of the courts to develop or identify constitutional principles and then to guard them. Courts, as Ronald Dworkin memorably put it, are forums of "principle," with matters of "policy" falling to the political branches of government. When considering constitutional

principles in the Canadian setting, for instance, judicial pronouncements (as in the *Secession Reference*) spring first to many lawyerly minds and it now seems quite clear that the Supreme Court of Canada sees itself as the guardian of these constitutional principles. Much the same can be said of the United Kingdom (UK).

Painting with deliberately broad strokes, we will illustrate in this paper, by particular reference to the UK and Canada (and occasional reference to Australia and Ireland) that the Westminster-style legislative process can also generate and guard important constitutional principles: participation, individual self-realization, electoral legitimacy and protection of regional interests. These principles are manifest in different ways—in constitutional provisions, constitutional conventions and internal procedures—and permeate the legislative process.

To begin with, the ordinary legislative process ensures participation in the law-making process and democratic deliberation outside the walls of Parliament. Variations of the ordinary legislative process also generate constitutional principles. Rigorous procedures for hybrid bills ensure that fundamental individual interests—especially property rights—are given as high a standard of protection as the legislative process can provide. The subordinate position of unelected upper chambers in relation to law-making (especially in relation to money bills) generates principles relating to the meaning of representative democracy and responsible government.

Within Parliament, clerks and other players act as the guardians of these principles. Even before bills undergo the parliamentary scrutiny process, generation and guardianship of constitutional principles by non-judicial actors can be perceived. The legislative drafting process has generated constitutional principles, such as non-retroactivity, a core component of most understandings of the rule of law. Legislative drafters act, in their iterative discussions with ministers, other civil servants and policy advisors, as guardians of principles, striving to strike a balance between the protection of constitutional fundamentals and the advancement of governmental policy goals.

These features of the legislative process undermine the notion that courts can claim the generation and guardianship of constitutional principles as their exclusive territory. In Part I, we will discuss how courts can be seen as the generators and guardians of constitutional principles. In Part II, we will discuss how the process of parliamentary

scrutiny of legislation can be seen to generate and guard constitutional principles. In Part III, we will describe the role of clerks and legislative drafters and discuss their role in the generation and guardianship of constitutional principles.

Before that, however, we must engage in some terminological and methodological throat clearing. What do we mean by constitutional principles? As Han-Ru Zhou has observed, "[t]o most of us, our understanding of what a principle is, has a persistent scent of 'I know it when I see it.'"[1] For present purposes, by a "principle" we mean a higher-order norm which justifies a given rule (which, in turn, can be found in a constitutional provision, a statute or piece of delegated legislation, a constitutional convention or simply, a practice). Here we are trading off the classic Dworkinian distinction between rules—with their all-or-nothing, hard-edged quality—and principles—characterized by weight. In this sense, a "principle" provides higher-order justificatory weight to a rule. As such, the principle might be manifest in different ways in different jurisdictions. By a "constitutional" principle, we mean a principle which inheres in a Constitution—that is to say, it is not a principle drawn from a fully developed moral or political theory. Lastly, the relationship between rules and principles is fluid: when we say that a particular rule "generates" a principle, we mean that the rule can be justified in terms of a principle which may well be a new principle rather than an existing principle. To the question, "What comes first, the rule or the principle?" our answer (for present purposes) is 'It depends.' The constitutional principles we discuss in this article are as follows:

> *Participation*: the ability of individuals to participate in decisional processes which interest or concern them;
>
> *Individual Self-Realization*: the protection of individual interests which allow individuals to plan their affairs and to be treated with respect by officials;
>
> *Electoral legitimacy*: ensuring that mandates won by those who have faced (and will again face) the judgment of the electorate are respected;
>
> *Federalism*: the protection of regional interests and the autonomy of self-governing parts of a polity.

1. Han-Ru Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019) 67:4 Am J Comp L 889 at 890.

We will argue that the legislative process is capable (as is the judicial process) of generating and protecting such principles.[2] Because our argument is directed at what the legislative process is capable of doing, it is unnecessary to provide any detailed justification for the constitutional principles we have identified. We ask the reader to take it as given that these are normatively desirable principles. Of course, in situations where these principles come into conflict, difficult questions arise about how to strike an appropriate balance between them; and where rules do not accurately instantiate these principles there may be a need to reform the rules or rethink the principles. Those are interesting issues. But they are for another article.

What do we mean by the "Westminster-style" process? We refer in this article to Australia, Canada and Ireland. These are several of the former dominions of the UK, in which parliamentary government and the common law have long been implanted.[3] Of course, even "Westminster at Westminster is itself a movable feast:"[4] the Westminster of today is not the Westminster of 2000, which itself was very different to the Westminster of 1900. Describing and analyzing a moving target is, needless to say, a difficult task. Nonetheless, as Rhodes, Wanna and Weller explain, "Westminster" provides a useful focal point for study:

> Westminster *describes* how government might be conceived and organized. It provides a set of beliefs and a shared inheritance that creates expectations, and hands down practices that guide and justify behaviour. The practices of Westminster systems have shown remarkable resilience, surviving under different regimes and in different circumstances across the world.[5]

These beliefs and practices include "accepted conventions and rules; attitudes to authority and legitimacy; the accountable exercise of power; the representation of citizens; and various ways to govern and integrate regionalism."[6] Legislation is made by elected representatives and (sometimes) by unelected members of a second chamber, interpreted by an independent judiciary and given effect by a permanent

2. Our focus is on legislative *process*, specifically. Legislation can also generate constitutional principles. But that is a topic for another day.

3. See *Statute of Westminster 1931* (UK), 22 & 23 Geo V, c 4, s 1.

4. Roderick A W Rhodes, John Wanna & Patrick Weller, *Comparing Westminster* (Oxford: Oxford University Press, 2009) at 3.

5. *Ibid* [emphasis in original].

6. Rhodes, Wanna & Weller, *supra* note 4 at 2–3.

civil service, independent agencies and frontline administrative decision makers. As a result, the findings of many national studies will be "to some extent applicable to all legislatures."[7]

Let us again reiterate that we will paint in broad strokes in the pages that follow. Of course, not every judge sees the judicial role as constitutional guardianship.[8] Sure, not every rule is backed by a justificatory principle. And, yes, political actors might not always provide optimal protection for constitutional principles. Our purpose in putting pen to paper is simply to highlight what seems to us to be undeniable: the legislative process can generate constitutional principles, which political actors can guard. Just because something is a "constitutional" "principle" does not necessarily mean it is the exclusive preserve of lawyers.

I. COURTS AS CONSTITUTIONAL GUARDIANS

In *Reference re Secession of Quebec*,[9] the Supreme Court of Canada identified four unwritten constitutional principles. Building on the reference by a majority of the Court in *OPSEU v Ontario (AG)*, to Canada's "basic constitutional structure,"[10] the Court in the *Secession Reference* wrote of "an internal architecture," whereby "[t]he individual elements of the Constitution," including its unwritten principles, "are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole."[11] The four unwritten principles were federalism, democracy, constitutionalism and the rule of law, and the protection of minorities: "The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction;"[12] according to the principle of democracy, "a sovereign people exercises its right to self-government through the democratic process […] [and] a functioning democracy

7. Meg Russell & Daniel Gover, *Legislation at Westminster* (Oxford: Oxford University Press, 2018) at 260.

8. See the analysis in Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (McGill-Queen's University Press, Montreal and Kingston, 2010).

9. *Reference re Secession of Quebec*, 1998 SCC 217, 1998 CanLII 838 (SCC) [*Secession Reference*].

10. *Ibid* at para 50.

11. *Ibid*. See also *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21, [2014] 1 SCR 133 [*Reference re Supreme Court Act]*.

12. *Secession Reference*, *supra* note 9 at para 58.

requires a continuous process of discussion;"[13] "the constitutionalism principle requires that all government action comply with the Constitution" whilst the related rule of law principle "requires that all government action must comply with the law, including the Constitution;"[14] and finally the principle of protection of minorities underlies "a number of specific constitutional provisions protecting minority language, religion and education rights."[15]

These constitutional principles were generated in part from constitutional text and history but mostly from the Supreme Court of Canada's own decided cases. Furthermore, the courts are the "guardians of the Constitution and of individuals' rights under it."[16] It is also quite clear that the Court sees itself, from its perch at the apex of the Canadian legal system, as a guarantor of fundamental principles. In *Reference re Supreme Court Act, ss 5 and 6*,[17] the Court held that it is a permanent feature of Canada's legal landscape. The "unilateral power" exercisable by Parliament under section 101 of the *Constitution Act, 1867* had been "overtaken by the Court's *evolution* in the structure of the Constitution, as recognized in Part V [emphasis added]" of the patriated *Constitution Act, 1982* and was henceforth restricted to "routine amendments necessary for the continued maintenance of the Supreme Court."[18] At the time of Confederation, the Judicial Committee of the Privy Council was the general court of appeal. Several years elapsed before a domestic high court was created.[19] It was not until 1949 and the abolition of appeals to London that the Supreme Court became the authoritative interpreter of Canadian law, "the keystone to Canada's unified court system."[20] Its role "was further enhanced as the 20th century unfolded."[21] Significantly, the abolition of civil appeals 'as of right' freed its judges up to "focus on questions of public legal importance."[22] Finally, the adoption of section 52 of the *Constitution Act, 1982*, which expressed the Constitution to be the "supreme law of Canada," required

13. *Ibid* at paras 64, 68.
14. *Ibid* at para 72.
15. *Ibid* at para 79.
16. *Hunter et al v Southam Inc*, 1984 SCC 145 at para 169, [1984] 2 RCS 145.
17. *Reference re Supreme Court Act*, *supra* note 11.
18. *Ibid* at para 101.
19. *Supreme and Exchequer Court Act*, RSC 1875, c 135.
20. *Reference re Supreme Court Act*, *supra* note 11 at para 84.
21. *Ibid* at para 86.
22. *Ibid*.

"[t]he existence of an independent and impartial judicial arbiter."[23] This justified the conclusion that the patriation of the Constitution "confirmed the constitutional protection of the essential features of the Supreme Court."[24]

The UK Supreme Court, too, is a generator and soi-disant guarantor of constitutional principles. The creation of the Court by section 23(1) of the *Constitutional Reform Act, 2005* came during a period of intense constitutional change,[25] in which reforms were adopted by legislation, notably to protect fundamental rights through the *Human Rights Act, 1998* and to devolve powers to Northern Ireland, Scotland and Wales. Against this background of constitutional reform, the former President of the Court has remarked: "In a sense undreamt of in Victorian times, the Supreme Court has become a real constitutional court."[26] In its jurisprudence on human rights and parliamentary sovereignty, the Court has venerated the common law and suggested that the role of the courts is now seen as fundamental to the constitutional order.[27]

The most notable decision in this regard is *R (HS2 Action Alliance Ltd) v Secretary of State for Transport*.[28] Here, the issue was the relationship between UK constitutional law and principles of European Union (EU) law. Although UK courts had heretofore accepted the primacy of EU law in all its relevant forms,[29] the question arose in *HS2 Alliance* whether EU law required the UK courts to scrutinize proceedings in Parliament, in violation of the principle of parliamentary privilege. In *obiter*—because the conflict was held not to arise in this context—however, the Court signalled a different approach: "If there is a conflict between a constitutional principle, such as that embodied in section 9 of the *Bill of Rights*, and EU law, that conflict has to be resolved by our courts

23. *Ibid* at para 89.

24. *Ibid* at para 90.

25. Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: Oxford University Press, 2013) at 3, describes the reforms under the New Labour government in the late 1990s and early 2000s as a "more radical set of constitutional reforms" than those enacted by any government since the First World War.

26. Lady Hale, "The Supreme Court in the United Kingdom Constitution", The Bryce Lecture 2015, Somerville College, Oxford, 5 February 2015 at 2.

27. Paul Daly, "A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom" (2015) 41: 1 Queen's LJ 1.

28. *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3 [*HS2 Alliance*].

29. See, generally, Paul P Craig, "Sovereignty of the United Kingdom Parliament After *Factortame*" (1991) 11 YB Eur L 221.

as an issue arising under the constitutional law of the UK."[30] On behalf of their colleagues, Lord Neuberger and Lord Mance took the opportunity to state, more expansively:

> The UK has no written constitution, but we have a number of constitutional instruments. They include *Magna Carta*, the *Petition of Right 1628*, the *Bill of Rights* and (in Scotland) the *Claim of Rights Act 1689*, the *Act of Settlement 1701* and the *Act of Union 1707*. The *European Communities Act 1972*, the *Human Rights Act, 1998* and the *Constitutional Reform Act 2005* may now be added to this list. The common law itself also recognizes certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for UK law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognized at common law, of which Parliament when it enacted the *European Communities Act 1972* did not either contemplate or authorize the abrogation.[31]

Taken together with the Court's renewed emphasis on the common law, the decision in *HS2 Alliance* represents a clear statement about the Court's role as guardian of an autochthonous constitutional tradition. Constitutional guardianship was also a major theme of Brexit-related litigation about executive power.

In *R (Miller) v Secretary of State for Exiting the European Union*,[32] the UK Supreme Court considered whether Britain's departure from the EU could be triggered by the executive acting alone under section 50 of the *Treaty on European Union*. By majority, the Supreme Court held that it could not. The problem, in the view of the majority judges, was that the executive proposed "to withdraw from the Treaties and so cut off the source of EU law entirely," by use of the royal prerogative.[33] This would involve "a unilateral action by the relevant constitutional bodies which effects a fundamental change in the constitutional arrangements of the UK."[34] The key move was to envisage EU law as a distinct "source" of law—created by the EU's "legislative institutions […]

30. *HS2 Alliance*, *supra* note 28 at para 79.

31. *Ibid* at para 207. Although the devolution statutes are not mentioned in this passage, they could conceivably be given a similar status.

32. *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2017] 2 WLR 583 [*Miller*].

33. *Ibid* at para 79.

34. *Ibid* at para 78.

without the specific sanction of any UK institution"—given "automatic and overriding effect" by the 1972 Act.[35] It followed that "[i]t would be inconsistent with long-standing and fundamental principle for such a far-reaching change to the UK constitutional arrangements to be brought about by ministerial decision or ministerial action alone."[36] Rather, "it must be effected in the only way that the UK constitution recognizes, namely by parliamentary legislation."[37]

At issue in *R (Miller) v Prime Minister*,[38] sometimes known as *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) or Miller/Cherry*,[39] or even *The Case of Prorogations*, was the prorogation of Parliament for six weeks with the clock ticking down to a "No-Deal" Brexit. In a judgment written by Lady Hale and Lord Reed, the Court held that Prime Minister Johnson's advice to prorogue Parliament was unlawful. Lady Hale and Lord Reed relied on constitutional principles to determine the scope of the power to prorogue Parliament. As they emphasized, "the boundaries of a prerogative power relating to the operation of Parliament are likely to be illuminated, and indeed determined, by the fundamental principles of our constitutional law."[40] They went on to identify "[t]wo fundamental principles of our constitutional law [as] relevant to the present case," namely parliamentary sovereignty and ministerial accountability to Parliament.[41] Having regard to these fundamental constitutional principles, Lady Hale and Lord Reed set out the test for adjudicating on the lawfulness of exercises of the prorogation prerogative:

35. *Ibid* at para 61.

36. *Ibid* at para 81.

37. *Ibid* at para 82. In addition, the triggering of section 50 would represent the firing of a bullet which, once the negotiation period had run its course, would explode a variety of rights held by individuals. This was a discrete basis for holding that legislative authorization was necessary to begin the Brexit process.

38. *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)*, [2019] UKSC 41 [*Miller 2*].

39. In view of the fact that the UK Supreme Court heard the matter on appeal from both the English and Scottish courts. The proceedings in Scotland were brought by Joanna Cherry.

40. *Miller 2*, *supra* note 38 at para 38.

41. *Ibid* at para 41.

> [A] decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.[42]

The advice to prorogue Parliament in this case did not meet this test. In both of these cases, especially *The Case of Prorogations*, constitutional fundamentals were front and centre, with the UK Supreme Court acting as their guardian.

II. CONSTITUTIONAL PRINCIPLES IN THE LEGISLATIVE PROCESS

At its simplest, legislation is a carefully arranged collection of words: "An Act of Parliament is words on a page."[43] Almost invariably, these words are arranged in "Parts," which have "Sections," which in turn have "Sub-sections;" sometimes, the "Parts" are followed by "Schedules," containing "Paragraphs" and "Articles." At the very beginning of the legislation, the reader will find the "short title" of the legislation, some information on how it should be classified (e.g., 2018 Chapter 12), its "long title" and then, at least if the reader is consulting legislation passed by the Westminster Parliament: "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows […]."[44] The solemn reproduction of this particular phrase, following a short and long title and classification information, signifies that the carefully

42. *Ibid* at para 50.

43. Sir John Laws, "The Common Law and State Power" in *The Common Law Constitution* (Cambridge: Cambridge University Press, 2014) 3, at 6.

44. Different words of enactment attach to legislation passed under the *Parliament Acts, 1911* and *1949* (that is, without the consent of the House of Lords), namely: "Be it enacted by The Queen's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in accordance with the provisions of the *Parliament Acts 1911* and *1949*, and by the authority of the same, as follow […]." See the *Parliament Act 1911*, s 4(1). Such legislation is also accompanied by certifications by the Speaker of the House of Commons that Parliament complied with the provisions of the *Parliament Acts 1911* and *1949*. See the *Parliament Act 1911*, s 2, *passim*. See further the discussion in *Jackson v AG*, [2006] 1 AC 262. See also *Royal Assent Act 1967*, c 23.

arranged words have been adopted pursuant to a set of parliamentary procedures designed to produce legislation, "intended as an act of norm creation on the part of the legislator."[45]

There is a well-known process for making legislation. "Ordinary" bills pass through a series of stages in the lower and upper house before being sent for royal assent. The "ordinary" process contrasts with the processes used for other types of proposed legislation, such as hybrid bills, money bills. Discussion of these different processes will draw out important constitutional principles—respect for individual self-realization, participation, electoral legitimacy and protection of regional interests—and highlight the tension between efficient enactment of legislation and effective scrutiny of bills. Courts have a tendency to treat the legislative process as a monolith. The Supreme Court of Canada's confident conclusion in *Mikisew Cree First Nation v Canada (GG in Council)* that the "law-making process" consists of "the development, passage, and enactment of legislation" is a good example.[46] Such judicial incuriousness perhaps has its origins in the principle of parliamentary privilege, which dictates that courts cannot look behind the formal process of enactment.[47] Parliamentary privilege prevents judges from scrutinizing the legislative process (and much else besides[48]), but it imposes no constraint on mere mortals. Accordingly, in this part, we will lay out the constitutional significance of the different legislative processes that exist.

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45. John Gardner, "Some Types of Law" in Douglas Edlin, ed, *Common Law Theory* (Cambridge: Cambridge University Press, 2007) 51 at 56. For the most part, these formal characteristics are uncontroversial. The long and short titles have important legal and political significance that goes beyond their formal role—a long title might be written so as to galvanise partisans (the "Great Reform Act," or some such; American short titles are often gaudier), whilst the "scope" of the legislation as set out in the short title constrains how it may be dealt with in Parliament.

46. *Mikisew Cree First Nation v Canada (GG in Council)*, 2018 SCC 40, [2018] 2 SCR 765 at para 32, *per* Karakatsanis J (Wagner CJ and Gascon J concurring). Brown J, with whom three other judges agreed (at para 148), went at least as far, if not further: "the entire law-making process—from initial policy development to and including royal assent—is an exercise of legislative power which is immune from judicial interference" (at para 117).

47. As Lord Campbell explained in *Dalkeith Railway Co v Wauchope* (1842), 8 Cl & Fin 710 at 725:
> All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages.

48. See, generally, *Duffy v Canada (Senate)*, 2020 ONCA 536.

A. Participation

At Westminster, the standard legislative procedure involves five stages in each chamber. To begin with, a bill is introduced. It will then have its Second Reading, the point at which the policy of the bill is debated. Bills that survive Second Reading move to the Committee Stage, where they are examined by a committee of the chamber, sometimes with evidence being taken from expert witnesses or ordinary citizens. At Report Stage, the report of the committee is considered, a process that includes discussion and voting on proposed amendments to the bill. Finally, at Third Reading, the chamber takes a final vote on the bill as amended. "When a bill is passed by the Commons, it is taken to the Lords by a Commons Clerk."[49] Although there are differences in the fine print of these procedures—for instance, the minimum time period to be permitted between stages varies as between the Commons and Lords—they are essentially the mirror image. There is a convention that two weekends will pass between first and second reading in the Commons,[50] with a fourteen-day period observed in the Lords.[51]

This time allows for citizen participation in the legislative process:

> Long-standing parliamentary tradition makes it clear that the only procedure due to any citizen of Canada is that proposed legislation receive [*sic*] three readings in the Senate and House of Commons and that it receive [*sic*] Royal Assent. Once that process is completed, legislation within Parliament's competence is unassailable.[52]

Citizens need not participate directly—indeed, most are unlikely to be invited to contribute in a formal capacity at any stage—but may make their voice heard through Members of Parliament, interest groups, social media or traditional media. As the Supreme Court of Canada observed in the *Secession Reference*, "a functioning democracy requires a continuous process of discussion."[53] Relatedly, the openness of proceedings in Parliament to members of the public ensures

49. Cabinet Office, *Guide to Making Legislation* (April 2017) at para 3.33 [*Guide to Making Legislation*].

50. *Ibid* at para 3.26.

51. *Ibid* at para 3.35.

52. *Authorson v Canada (AG)*, 2003 SCC 39, [2003] 2 SCR 40 at para 37.

53. *Secession Reference*, *supra* note 9 at para 68.

protection for the principle of participation. Moves towards "pre-legislative scrutiny," whereby proposed legislation is subject to a period of notice and comment *before* its introduction to the legislature, provide further vigour to the principle of participation.[54] Indeed, the principle of individual self-realization is also generated by citizen access to parliamentary debates, as individuals can choose how they wish to involve themselves (or not) in the legislative process.

It is useful to say a word here about the role of backbench Members of Parliament. Consider private members' bills. No matter what the system for treating them is, they are singularly unlikely to be enacted. For example, at Westminster, there is an annual lottery, with 20 slots given to a lucky handful of Members of Parliament. Obtaining a further slot to introduce and debate the bill is also difficult, with limited time available for private members' bills. Where there is opposition to a particular private member's bill, means exist of ensuring it does not further proceed, for instance, by having it "talked out" by other members. Can Members of Parliament (MPs) really represent their constituents if their right to initiate legislation is so tightly constrained? Not all private member's bills are doomed to failure. On occasion the government will choose to support a private member's bill, in which case, "the lead policy division will need to provide Ministers with the same type of support as for a government bill."[55] On other occasions, the introduction of a private member's bill—with dissemination to favourable media outlets—will serve an agenda-setting function.[56] For this reason, indeed, slots for private members' bills are highly coveted in those systems that ration them.

More generally, whilst contributing to the making of legislation might be a function of Members of Parliament, initiating legislation is only a small (albeit high-profile) component of that function; Members might also propose amendments formally or lobby for them informally: "it is fairly common that a government backbencher, opposition member, or non-party parliamentarian proposes a committee stage amendment, which is then responded to with a government amendment

54. See, generally, Jessica Mulley & Helen Kinghorn, "Pre-Legislative Scrutiny in Parliament" in Alexander Horne & Andrew Le Sueur, eds, *Parliament: Legislation and Accountability* (Oxford: Hart Publishing, 2016) at 39.

55. *Guide to Making Legislation*, *supra* note 49 at para 46.3.

56. Kelly Blidook, "Exploring the Role of 'Legislators' in Canada: Do Members of Parliament Influence Policy?" (2010) 16:1 Journal of Legislative Studies 32.

at report."[57] Furthermore, Members of Parliament frame—by way of their "anticipated reactions" to government proposals—the context in which government bills are put forward; they exercise influence preventively rather than reactively: "the key time for government to consider anticipated reactions, and avoid unnecessary conflict, is instead before a bill is actually introduced."[58] In each of these ways, notwithstanding the limitations on their ability to initiate legislation, Members of Parliament can facilitate citizen participation in the legislative process.

In these ways, the legislative process generates a principle of participation.

B. Individual Self-Realization

As a preliminary matter, there is a distinction to be drawn in the context of the UK Parliament between private and hybrid bills. "Private acts confer private and particular rights or are local and personal in their effect."[59] They are "bills for the particular interest or benefit of any person or persons, public company or corporation, or local authority, and are promoted by the interested parties themselves by means of petitions deposited in accordance with the standing orders relating to private business;"[60] these standing orders include provision for the "payment of fees by the promoters," an "indispensable condition of its progress."[61] A hybrid bill, by contrast, is "a public bill which affects a particular private interest in a manner different from the private interests of other persons or bodies of the same category or class."[62] A parliamentary agent, an outside lawyer, is engaged to manage the process, liaising with the parliamentary authorities and ensuring that the relevant standing orders are complied with. For the most part, it proceeds through Parliament as a public bill would. However, there is "an additional select committee stage after the second reading in each House,

57. Russell & Gover, *supra* note 7 at 36.

58. Meg Russell, Daniel Gover & Kristina Wollter, "Does the Executive Dominate the Westminster Legislative Process? Six Reasons for Doubt" (2016) 69 Parliamentary Affairs 286 at 301.

59. Richard Rogers & Rhodri Walters, *How Parliament Works,* 7th ed (London: Routledge, 2015) at 173.

60. Sir Malcolm Jack, *Erskine May: Parliamentary Practice,* 24th ed (London: LexisNexis, 2011) at 525.

61. *Ibid* at 921.

62. Hansard, *House of Commons Debates*, 45-1, No 3 (10 December 1962) at 2698.

at which objectors whose interests are directly and specifically affected by the bill (including local authorities) may petition against the bill and be heard."[63]

Hybrid bills provide extensive protection for individual interests. To begin with, appropriate notice must be given to those whose interests may be affected: "usually there will be a need for advertisements in the press, serving of notices on affected persons and depositing of plans and of copies of the bill."[64] Petitioners and the sponsoring government department alike are heard in the select committee to which the hybrid bill has been referred. The committee is under an obligation to act judicially in hearing from interested parties, after which it proceeds to a clause-by-clause study of the bill.[65] At the conclusion of its proceedings the select committee may recommend that the bill should not proceed. Otherwise, however, the bill continues on its journey as an ordinary public bill would. The bill may also be referred to a select committee in the upper chamber but given the due process afforded petitioners in the lower chamber it will generally be unnecessary to provide them with any further procedural protections. As the procedure is "longer and more expensive," the Cabinet Office advises that hybrid bills "are best avoided wherever possible."[66]

These rigorous procedures are designed to give extra protection to individuals whose personal interests, especially vested rights, will be affected by legislation. They generate, in other words, the principle of individual self-realization.[67]

C. Electoral Legitimacy

Electoral legitimacy plays an important role in regulating the relationship between lower and upper houses in the Westminster tradition. Money bills are perhaps the best example of the weight accorded to

63. *HS2 Alliance*, *supra* note 28 at para 57.

64. *Guide to Making Legislation*, *supra* note 49 at para 44.7.

65. *Ibid* at para 44.11.

66. *Ibid* at para 44.0.

67. In addition, the hybrid bill procedure might, in certain circumstances, be combined with pre-legislative scrutiny of government policy proposals to give effect to the principle of participation. See e.g., *HS2 Alliance*, *supra* note 28 at paras 8–12.

the principle of electoral legitimacy.[68] In most systems operating in the Westminster tradition, money bills are the preserve of the lower house.

A reader of the Canadian Constitution learns, for example, that "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons."[69] In Ireland, Dáil Éireann, the representative lower house, has the sole and exclusive power to initiate money bills. Seanad Éireann, the upper house, may propose amendments, but it may do so only within a narrow 21-day window and, in any event, the Dáil decides whether or not to accept its amendments; the upper house's power is recommendatory only, such that money bills can be adopted in face of the Seanad's opposition or inaction.[70] At Westminster, the enacting formula for money bills is different from the enacting formula for other legislation: "the usual formula is preceded by certain words which define the sole responsibility of the Commons for the grant of money or duties."[71] There, money bills are regulated by the *Parliament Acts, 1911* and *1949*. Section 1(1) of the *Parliament Act, 1911* provides that money bills shall be presented for royal assent if they have not been passed by the House of Lords "within one month" after being sent up from the House of Commons and become law "notwithstanding that the House of Lords have not consented to the Bill."

These provisions and practices relating to money bills underline the importance of electoral legitimacy. Decisions about the raising of taxes are to be taken by a representative body, one composed of members who have run an electoral gauntlet.

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68. *Ireland's Constitution of 1937,* s 22.1.1 provides a useful definition:
[A statute which] contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; matters subordinate and incidental to these matters or any of them.

69. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 53. This applies to Parliament, which sits at the federal level of government. See also *ibid*, s 90, making the same provision for provincial legislatures. For discussion, see the dissenting reasons of Ottenbreit and Caldwell JJA in *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40.

70. *Ireland's Constitution of 1937*, s 21.

71. Sir Jack, *supra* note 60 at 528.

Unsurprisingly, given the popular aspect of the composition of its Senate, the Australian position is slightly different. Under section 53 of the *Commonwealth of Australia Constitution Act*, the Senate can reject money bills outright but cannot amend them:

> [m]ay at any stage return [such legislation] to the House of Representatives […] requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Acknowledgement that the financial initiative rests in the lower house does not, however, mean there is never any controversy. It usually takes two forms, one relating to "what qualifies for inclusion in legislation appropriating expenditure for the ordinary annual services of the government" and one to amendments:

> When the House does not agree, the Senate will frequently press its case. The right of the Senate to "press" requests has long been contested. The House has developed a suite of responses to Senate requests for amendment, including pressed requests; in particular, especially when there is some urgency about the legislation, the House will accept the amendment but will resolve to refrain from the determination of its constitutional rights.[72]

The electoral legitimacy principle is often given effect in specific provisions of written constitutions. In Ireland, the Senate may only delay—never block—bills passed by the lower house. In Canada, section 26 of the *Constitution Act, 1867* contains a tiebreaker provision.[73] It has only been used once, in 1990. When the Senate blocked legislation to implement the *North American Free Trade Agreement* (NAFTA) in 1988, Conservative Prime Minister Mulroney advised a dissolution and won the subsequent election, whereupon the Senate's opposition also dissolved.

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72. J R Nethercote, "Parliament" in Brian Galligan & Scott Brenton, eds, *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge: Cambridge University Press, 2015) 137 at 146.

73. This provision provides as follows:
If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly.

However, the Senate—in which a majority of members were Liberals—then blocked legislation to introduce a new tax, which was the trigger for Mulroney to advise the Governor General to appoint new senators.[74]

Finally, in Australia, section 57 of the *Commonwealth of Australia Constitution Act* provides for a "double dissolution"—a dissolution of both Houses of Parliament—where the Senate repeatedly refuses a bill passed by the lower house.

At Westminster, the relationship between lower and upper houses is (aside from the *Parliament Acts, 1911* and *1949*),[75] purely regulated by convention.

The *Salisbury Convention* was born out of post-War circumstances, where a Labour government was swept to power on a wave of support for radical economic reforms including, most notably, nationalization of industry. Lord Salisbury, as a prominent Conservative peer, proposed the eponymous convention. As he later described it:

> [W]hat had been in the Labour Party programme at the preceding General Election should be regarded as having been approved by the British people. Therefore we passed all the nationalization Bills, although we cordially disliked them, on the

74. See, generally, C E S Franks, "The Canadian Senate in Modern Times" in Serge Joyal, ed, *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston: McGill-Queen's, 2003) 177.

75. This legislation removed the House of Lords' veto over legislation, replacing it with a two-year (and then one-year) suspensory veto. The lengthy crisis leading up to the enactment of the *Parliament Act, 1911*, 1 and 2 Geo V, c 13, was "by some margin the most acute to afflict [the UK] during the twentieth century" (*Jackson v AG*, *supra* note 44 at para 8, *per* Lord Bingham). The crisis was long because it extended over many years of Liberal ministries passing legislation through the House of Commons only to see it founder on the rocks of an embedded Conservative majority in the then-hereditary House of Lords. Indeed, the crisis might be said to extend back to 1893 and the demise of William Gladstone's second Home Rule Bill. Rejection by the House of Lords even of central planks of a ministry's manifesto (as with the second Home Rule Bill) could perhaps be justified on the basis of the "referendal theory" developed by the Marquis of Salisbury: a Prime Minister outraged by the rejection of a bill by the House of Lords could request a dissolution and fight an election on the particular issue that had provoked the Upper Chamber to adopt a posture of defiance. An escalation occurred in 1909, when the House of Lords rejected a Finance Bill. A referendal general election followed in January 1910, with the Liberals winning a slim majority of two in the House of Commons. Negotiations then took place and when they proved fruitless, another general election was conducted in December 1910, in which the results were substantially the same as its January predecessor. With the Liberal Prime Minister threatening to advise the King to name enough Liberal peers to pass legislation, the peers relented and agreed to the replacement of their absolute veto with a temporary suspensory veto in the *Parliament Act, 1911*. The suspensory period was reduced from two years to one in the *Parliament Act, 1949*, c 103 (Regnal 12, 13 and 14 Geo 6).

> second reading and did our best to improve them and make them more workable on Committee stage. When measures were introduced which had not been in the Labour Party manifesto at the preceding election we reserved full liberty of action.[76]

Key here is the notion of a manifesto commitment. This leads to a distinction between different types of amendment, those designed to probe, to improve and to wreck. Under the terms of the *Salisbury Convention*, the latter is ruled out. But the others are fair game: "the Lords should, if they saw fit, amend, but should not destroy or alter beyond recognition, any Bill on which the country had, by implication, given its verdict. The Lords, in other words, should not frustrate the declared will of the people."[77] In some circumstances, "which the Government described as wrecking amendments," have been proposed in the House of Lords in respect of legislation designed to give effect to manifesto commitments, but only to delay, rather than block, the measures: "In none of those cases did the Lords oppose the measures in the last ditch."[78]

The point is that according to the principle of electoral legitimacy, major policy decisions should be taken by elected representatives. The principle plays out differently in different systems: the Australian position, where senators are elected, is different from the Canadian, where senators are appointed. The principle manifests itself differently too, in written constitutional provisions or in unwritten constitutional conventions. In all of these instances, however, the principle of electoral legitimacy is generated.

D. Protection of Regional Interests

A legislative process can be constructed to protect regional interests and implement the principle of federalism. Canada is an obvious example. Senators, who sit in the upper house, are appointed on a regional basis.[79] As the Supreme Court of Canada has explained:

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76. Marquis of Salisbury, 261 HL Deb 66 (4 November 1964).

77. Peter A R Carrington, *Reflecting on Things Past: The Memoirs of Peter Lord Carrington* (New York, Harper Collins, 1988) at 77–78.

78. Rodney Brazier, "Defending the Hereditaries: The Salisbury Convention" (1998) 3 Public Law 371 at 374.

79. See *Constitution Act, 1867*, *supra* note 69, s 22:
> In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:

> While representation in the House of Commons was proportional to the population of the new Canadian provinces, each region was provided equal representation in the Senate irrespective of the population. This was intended to assure the regions that their voices would continue to be heard in the legislative process even though they might become minorities within the overall population of Canada.[80]

The Australian Constitution also ensures regional representation in the upper house,[81] although there the senators are directly elected, on the same franchise as the lower house.[82]

The UK is not a federation, of course. However, the devolution of legislative authority to Northern Ireland, Scotland and Wales has occasioned reflection in Britain on the need to reserve powers to England. In the late 1970s, in debates over devolution, Tam Dalyell posed the "West Lothian" question:

> For how long will English constituencies and English Honourable members tolerate […] at least 119 Honourable Members from Scotland, Wales and Northern Ireland exercising an important, and probably often decisive, effect on English politics while they themselves have no say in the same matters in Scotland, Wales and Northern Ireland?[83]

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1. Ontario;
2. Quebec;
3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;

which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory and the Northwest Territories shall be entitled to be represented in the Senate by one member each. In the Case of Quebec each of the Twenty-four senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.

80. *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 RCS 704 at para 15.

81. *Commonwealth of Australia Constitution Act*, s 7.

82. *Ibid*, s 8.

83. Colin Pilkington, *Devolution in Britain Today* (Manchester: Manchester University Press, 2002) at 165.

Many years passed before the West Lothian question received a considered response—one should mention the quip of Lord Chancellor Derry Irvine, who remarked that the best answer to the West Lothian question was to stop asking it—in the recommendations of the McKay Commission.[84] The Commission proposed that an additional stage be added to the ordinary legislation process in respect of bills relating only to England. This change was effected by means of an amendment to the Standing Orders of the House of Commons.[85] The so-called "English votes for English laws" (EVEL) procedure operates as follows. When bills are certified as England only, the committee which examines the bill is chosen only from MPs representing English constituencies (and, if the bill is examined on the floor of the House, only English MPs will participate). Moreover, on its exit from the committee, the bill is considered by a Legislative Grand Committee:

> If the whole Bill or certain provisions of it are certified by the Speaker as relating exclusively to England and Wales, and/or England, and as within devolved legislative competence, a consent motion must be passed by MPs representing constituencies in England and Wales, and/or England, either in relation to the whole bill or particular parts of the Bill concerned, before it can proceed to Third Reading.[86]

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84. Sir William McKay (Chair), "Report of the Commission on the Consequences of Devolution for the House of Commons" (The McKay Commission, announced by HM Government, 17 January 2012), (25 March 2013), online: <webarchive.nationalarchives.gov.uk/20130403030728/http://tmc.independent.gov.uk/wp-content/uploads/2013/03/The-McKay-Commission_Main-Report_25-March-20131.pdf> [McKay Commission].

85. Standing Orders of the Commons, No 83 provides:
(1) A bill certified by the Speaker under Standing Order No 83J as relating exclusively to England and being within devolved legislative competence may only be committed to —
(a) a public bill committee (to which Standing Order No 86(2)(iv) (Nomination of general committees) applies), or
(b) the Legislative Grand Committee (England).
(2) A bill whose current certification by the Speaker (whether under Standing Order No 83J or 83L) is that it relates exclusively to England and is within devolved legislative competence may only be recommitted to—
(a) a public bill committee (to which Standing Order No 86(2)(iv) (Nomination of general committees) applies), or
(b) the Legislative Grand Committee (England).

86. UK Parliament, "English Votes for English Laws: House of Commons Bill Procedure", online: *UK Parliament*<www.parliament.uk/about/how/laws/bills/public/english-votes-for-english-laws/> (last visited 27 March 2021) [English Votes].

Provision is also made for reconsideration of proposed legislation blocked by English MPs but ultimately these MPs can decide not to yield: the EVEL procedure gives them an effective veto.[87]

Another tool in the UK constitutional arsenal is the Sewel Convention. This constitutional convention regulates Parliament's ability to legislate in respect of matters which have been devolved to the legislative assemblies. What Parliament gives, it can take away. But according to the Sewel Convention, Parliament "will not normally legislate with regard to devolved matters without the consent" of the legislative assemblies.[88] The standing orders of the legislative assemblies provide for legislative consent motions, which are triggered by UK legislation with regard to devolved matters.[89] The edges of the Sewel Convention are, perhaps, not as hard as those of the EVEL process: there is, here, no veto. Moreover, as a constitutional convention, the Sewel Convention is not enforceable by the courts even in its statutory form: "Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers."[90] Nonetheless, where legislative consent is refused and Parliament proceeds regardless, there may be a political price for Westminster to pay.

In these ways the principle of the protection of regional interests is generated by the legislative process.

III. GUARDIANSHIP

The important principles generated by the legislative scrutiny process require guardianship. As has been emphasized many times in the past, safeguards in the Westminster system are ultimately political,

87. One recent academic study cautions, however, that "despite the considerable energy expended on these changes and the inconvenience they have caused for parliament and government alike, it is not clear that they have fundamentally changed the rules of the legislative game along the lines anticipated by their supporters." Daniel Gover & Michael Kenny, "Answering the West Lothian Question? A Critical Assessment of 'English Votes for English Laws' in the UK Parliament" (2018) 71:4 Parliamentary Affairs 760 at 779.

88. *Scotland Act, 1998*, c 46, s 28(8), as inserted by *Scotland Act, 2016*, c 11, s 2; *Government of Wales Act, 2006*, c 32, s 107(6), as inserted by *Wales Act, 2017*, c 4, s 2. There is no equivalent provision for Northern Ireland. Given, however, that the Sewel Convention is non-justiciable, even in its statutory form, this is of no legal significance: *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, [2017] 2 WLR 583 at para 148 [*Miller EU*)].

89. House of Commons Library, *Research Briefing. Brexit: Devolution and Legislative Consent*, No 08274, 29 March 2018 at 8–22.

90. *Miller EU*, *supra* note 88 at para 146.

exerted by the electorate which politicians will have to face at the polls at some point (or, if they act particularly egregiously, in the streets before an election is even scheduled). Emergency legislation, for example, allows parliamentarians to speed through the procedures outlined in the previous section. During the Brexit process in the UK, the so-called Benn-Burt Bill, which became the *European Union (Withdrawal) (No 2) Act, 2019,* passed through the House of Commons in a single day and completed its passage through the House of Lords over a weekend to be presented for Royal Assent the following Monday. Indeed, courts have steadfastly refused to examine the inner workings of Parliament: that door is barred to them by parliamentary privilege, a constitutional principle which enjoys fundamental status in Westminster-style legal orders.[91]

Politicians can abuse the power to enact legislation without regard for the principles outlined in the previous section. Equally, however, and here the historical record is relatively charitable, they might take seriously their responsibilities as custodians of a sound legislative process.[92] At Westminster, legislation of "constitutional" significance is marked out by special procedural treatment. Whereas "the norm in the Commons is to commit bills to a relatively small public bill committee, which meets 'off the floor' of the chamber in a separate committee room,"[93] a different approach applies to proposed legislation of constitutional significance:

> In the case of primary legislation, there is a convention that, after being introduced into Parliament, bills of "first-class constitutional importance" are referred in their committee stage to a Committee of the Whole House rather than a public bill committee. The decision to refer bills in this way is made by the government's business managers.[94]

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91. See the discussion in *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667. In Ireland, the courts will intervene in the legislative process to secure constitutional rights, at least in some circumstances. See most recently *Kerins v McGuinness*, [2019] IESC 11.

92. See also Grégoire Webber et al, *Legislated Rights* (Cambridge: Cambridge University Press, 2017).

93. Russell & Gover, *supra* note 7 at 34.

94. Andrew Blick, David Howarth & Nat le Roux, *Distinguishing Constitutional Legislation: A Modest Proposal* (London: The Constitution Society, 2014) at 11.

This process is controlled by the government of the day, exacerbated by the conceptual "problem of the definition of what should be subject to special treatment."[95] Nonetheless, a heavy political price would be exacted against a failure to abide by this convention.

More importantly, there are individuals whose institutional positions require them to act as guardians. The clerks, who act through the Speaker, are important actors in this regard, as are legislative drafters.

A. Clerks

In the Westminster tradition, the Speaker of the lower house invariably has an important role to play, in particular, in certifying whether a special procedure applies to the given bill. To take one example, final decisions on whether proposed legislation is a money bill or not typically rest in the discretion of the Speaker. The determination of whether a proposed piece of Westminster legislation is a money bill[96] is for the Speaker of the House of Commons,[97] a determination which is unreviewable.[98] Similarly, in respect of the English votes for English laws (EVEL) procedure for example, the Speaker of the House of Commons must determine, "whether in his opinion whole Government Bills, elements of Bills and proposals to change Bills in the form of new clauses, new schedules and amendments are to pass through the process."[99] In Canada, whether an "omnibus bill" is acceptable is a matter for the Speaker of the House of Commons:

> [W]here do we stop? Where is the point of no return? […]. We might reach the point where we would have only one bill, a bill at the start of the session for the improvement of the quality of life in Canada which would include every single proposed piece of legislation for the session. That would be an omnibus bill with

95. Deputy Prime Minister, "The Government Response to the House of Lords Constitution Committee Report, 'The Process of Constitutional Change'", (21 September 2011) at para 27, online: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238144/8181.pdf>.

96. See *Parliament Act, 1911*, *supra* note 75, s 1(2). A slight amendment was effected by the *National Loans Act 1968*, c 13, s 1(5).

97. See *Parliament Act, 1911*, *supra* note 75, s 1(3).

98. *Ibid*, s 3: "Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law."

99. English Votes, *supra* note 86.

> a capital "O" and a capital "B." But would it be acceptable legislation? There must be a point where we go beyond what is acceptable from a strictly parliamentary standpoint.[100]

As has been noted, however, Canada's speakers have been quite permissive in respect of omnibus legislation which, in recent years, has been the vehicle for changes to the composition of the Supreme Court (though the provisions in question were later found unconstitutional) and the introduction of deferred prosecution agreements to the Canadian criminal justice system.[101]

A speaker's powers of certification are very broad (and, by virtue of the principle of parliamentary privilege, beyond the scope of judicial oversight[102]). However, a speaker is more than the person who happens to be occupying the office at a particular point in time. The speaker's office is staffed by experts in parliamentary procedure:

> In particular, the two senior Clerks represent a degree of continuity and corporate memory, and bring a degree of practical authority and sphere of influence that is at least as high as that of a departmental Permanent Secretary, possibly much higher: a "decision" of the Clerk is unlikely to be referred to the Speaker unless the Clerk decides to refer it, and the Speaker in either House is likely to rely very heavily on advice tendered by the senior Clerk of that House, and depart from it only for very pressing political reasons.[103]

They even have a sacred text, *Erskine May*, which has "quasi-constitutional status" and is "[r]egarded as the 'bible' of parliamentary practice in the UK" and considered as "influential parliamentary reference points in the former colonies."[104] They are, in short, the guardians of propriety in the legislative process and can intervene to ensure that constitutional fundamentals are respected.

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100. Ottawa, *Journals of the House of Commons*, Journals, 28-3, vol 117, No 62 (26 January 1971) at 260 (Speaker Lamoureux).

101. See, generally, Adam Dodek, "Omnibus Bills: Constitutional Constraints and Legislative Liberations" (2017) 48:1 Ottawa L Rev 1.

102. *Cf Austin v Commonwealth*, (2003) 215 CLR 185; *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (Vict), (2004) 220 CLR 388.

103. Daniel Greenberg, "The Realities of the *Parliament Act, 1911*" in David Feldman, ed, *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2016) 187 at 210.

104. Rhodes, Wann & Weller, *supra* note 4 at 6.

B. Drafters[105]

According to an idealized version of the legislative process, "the politicians determine the broad content, the officials work out detail and Parliamentary Counsel (the government's legislative draughtsmen and women) produce the text."[106] Plainly, however, the process of making policy and turning it into law is not linear:

> [T]he passage of a bill through parliament also tells only part of the story. Where public policy scholars describe the policy-making process as a cycle, or a series of stages, parliament's input might be expected to occur at the decision-making stage. But before a bill is presented to parliament, the issue that it deals with must first have been brought to government's attention ("agenda setting"), and the policy been formulated. These prior stages often require much preparation—and frequently also consultation—on the part of government. The extent of discussion at this point is potentially important to the later parliamentary passage of a bill. Indeed, when preparing its policy government may well seek to anticipate parliament's likely reaction.[107]

In the UK Parliament, any proposed piece of legislation will be handled in the first instance by a "bill team," managed by a "bill manager" who is responsible to a senior civil servant. Meanwhile, the Permanent Secretary and Minister of the relevant department maintain oversight of the governance structure developed to manage the bill.[108] There is some attraction to the view "that a drafter should leave policy decisions entirely to others," because "a drafter has not been elected or appointed to make policy."[109] However, "if drafters deferred to elected and appointed officials on every policy issue, those persons would spend

105. See, generally, Philip Sales, "The Contribution of Legislative Drafting to the Rule of Law" (2018) 77:3 Cambridge LJ 630.

106. Emma Crewe, *The House of Commons: An Anthropology of MPs at Work* (London: Bloomsbury, 2015) at 195.

107. Russell & Gover, *supra* note 7 at 46.

108. Stephen "Laws, Giving Effect to Policy in Legislation: How to Avoid Missing the Point" (2011) 32:1 Statute Law Review 1 [Laws,"Giving Effect"].

109. Jack Stark, *The Art of the Statute* (Colorado: Rothman and Co, 1996) at 17.

an inordinate amount of time making picayune decisions and drafters would do very little drafting."[110] These drafters are a coherent group of experts, imbued with the importance of constitutional principle:

> Within that specialist group, principles and practices were passed on by tradition, discussion and by an intensive form of one-to-one training through which each generation transmitted its understanding to the next. This ensured a continuity of understanding of fundamental constitutional principle, while leaving room for innovation by the rising generation in appropriate areas.[111]

The process of translating policy into law is iterative, not hierarchical and linear. The "process of turning instructions into drafting often throws up new questions of policy, and for most bills there will be a continuing dialogue between the sponsoring department and the parliamentary counsel while the bill is being drafted."[112] The fact that the policy-making process is non-linear casts doubt on the Supreme Court of Canada's confident assertions in *Mikisew Cree* that law-making includes the early stages of policy development.

Indeed, "the notion that drafters consider neither policy nor substance is a myth."[113] An immediate breach in the law/policy or drafting/substance divide can be found in the Office of Parliamentary Counsel's *Working with Parliamentary Counsel*: "Government policy which depends on the enactment of legislation will not be delivered unless the

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110. *Ibid*.

111. Daniel Greenberg, "Dangerous Trends in Modern Legislation" (2015) 1 Public Law 96 at 6.

112. Richard Rogers & Rhodri Walters, *supra* note 59 at 195. See also Edward Page, "Their Word Is Law: Parliamentary Counsel and Creative Policy Analysis" [2009] 4 Public Law 790 at 790:

> Despite the blossoming of theoretical approaches to public policy in the past 40 years, the dominant view of policy-making remains top-down: a policy is "made," in the sense of general principles agreed, approved and legitimised by leading politicians, bureaucrats, interest group members or judges; and then it is carried out (or not carried out) by those lower down. Yet policy is better seen as a production process involving people at all levels adding different bits to the overall product, although it is hardly a linear process that starts with agreement on principle which is followed by elaboration of detail. Issues can be raised at a very late stage in the process, ostensibly about matters of fine detail, that fundamentally shape the nature of the resulting policy. The settling of strategic objectives and agreement on the tactics to be used to pursue them is only part of the production process.

113. Constantin Stefanou, "Drafters, Drafting and the Policy Process" in Constantin Stefanou & Helen Xanthaki, *Drafting Legislation: A Modern Approach* (London: Ashgate, 2008) 321 at 325.

legislation is properly drafted and effective."[114] Indeed, a drafter might be able to dissuade his or her political masters from introducing legislation at all.[115] Drafting is an "arty science," "a liberal discipline where theoretical principles guide the drafter to conscious decisions made in a series of subjective empirical and concrete choices."[116] Legislation is designed to achieve policy goals but is drafted by lawyers (and often designed to be interpreted by them) so legal values are never far from the surface. This requires drafters and policymakers to engage in an iterative process, translating policy into law—"Parliamentary Counsel need to act in a way that is similar to the role of the translator"[117]—but also feeding legal values back into policy. Indeed, a drafter might be said to "owe a responsibility to the law and statute book as well as to the minister whose policy they are responsible for translating into statutory form."[118]

Accordingly, drafters are able to "act as the internal guardians of values customarily regarded as integral to the legal order such as those of non-retrospection, proper use of delegation, and respect for the liberties of the subject."[119] Others include "compliance with international law, clarity, and proportionality in the sense of the avoidance of excessive interference with personal liberty."[120] In situations where proposed legislation puts these values in jeopardy, drafters can take a sober second look and suggest to their political masters that the values need not be compromised at all—they can always say, drawing on their

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114. The Parliamentary Counsel, *Working with Parliamentary Counsel* (6 December 2011) at 11, online: <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/62668/WWPC_6_Dec_2011.pdf>.

115. Laws, "Giving Effect", *supra* note 108 at 7:
> Parliamentary Counsel have both the experience and the authority to be able to challenge the policy by asking whether "we should be starting from here." This is one of the important policy functions they have in practice [...] the past though it has also inhibited Parliamentary Counsel from that necessary early involvement. They have wanted to retain their objectivity until the eventual solution could be tested against the original problem. However, there is also an obvious practical difficulty in waiting until the building is largely constructed before testing the soundness of the foundations. Recent practice has taken this into account to produce a little more flexibility and pragmatism from us in deciding at what stage to become involved in policy questions.

116. Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Oxford: Hart Publishing, 2014) at 15.

117. Laws, "Giving Effect", *supra* note 108 at 16.

118. Terence Daintith & Alan Page, *The Executive and the Constitution* (Oxford: Oxford University Press, 1999) at 256.

119. *Ibid* at 254.

120. *Ibid*.

expertise and the mystique of the institutional role they occupy that "we don't do things this way here." Accordingly, the view that "[c]learly drafters' views on a policy are not going to influence the philosophy of a government's approach to policymaking"[121] is overstated:

> The process of legal change through legislation involves both politics and law. The process involves balancing political and legal factors that affect both the legislative process and the content and implementation of legislation. An examination of how these balances are struck reveals that politics and law involve divergent approaches to legal effectiveness, are influenced by different values, necessitate different approaches to the same values and require the use of different decision-making techniques.[122]

That is not necessarily to say that drafters pushing back and insisting on legal values is undemocratic simply by virtue of the unelected and unaccountable (at least politically) character of the drafter.[123] A determined civil servant, minister or special advisor can, ultimately, bends the drafter to his will. But in forcing the drafter to compromise on legal values, the civil servant, minister or special advisor is confronted with the cost of implementing policy in his desired fashion and may well decide that the price is not worth paying.

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121. Stefanou, *supra* note 113 at 331.

122. Sir Stephen Laws, "Legislation and Politics" in David Feldman, ed, *Law in Politics, Politics in Law* (Oxford: Hart Publishing, 2013) 90 at 126 [Laws, "Legislation and Politics"].

123. As Page, *supra* note 112 at 808, comments:
> [P]art of the point of devising a clear logic to a piece of legislation and trying to ensure that the Bill reflects this logic, as well as of seeking to make sure its contents are defensible (for example, they do not confer unusual powers on a Minister, or create disproportionate penalties, or contain vague or contradictory provisions) is to make it a Bill less susceptible to being pulled apart, or unravelling, in Parliament.

Cf Laws, "Legislation and Politics", *supra* note 122 at 117:
> The dynamics in the process of policy implementation through legislative change are incompatible with many of the underlying values of the law. Policymakers often want to take the risk of putting a ratchet on change to ensure its effectiveness. Lawyers whose perspective and training makes [*sic*] them naturally more cautious and risk-averse prefer to keep their options open, in case they have not thought of something. Paradoxically, they have this preference despite the lack of certainty that results from the flexibility of a reverse gear.

CONCLUSION

The object of this paper has been to suggest that the legislative process is as capable as the judicial process at generating and protecting constitutional principles. We began by describing how the Canadian and British apex courts generate and protect constitutional principles (Part I). Then we identified the principles of participation, individual self-realization, electoral legitimacy and protection of regional interests as principles generated by the legislative process (Part II). Moreover, we noted how clerks and drafters act as guardians of these principles (Part III). Without wishing to insert this paper into heated debates about the respective merits of "legal" and "political" constitutionalism, we would nonetheless note that the discussion in Parts II and III should serve as a corrective against the suggestion that the generation and protection of constitutional principles are solely the role of the courts. Our (hopefully) uncontroversial point is that a Westminster-style legislative process can also play a role in this regard, which should be borne in mind in debates between legal and political constitutionalists.