

## Chapter 1

# The United Kingdom's Human Rights Project in Constitutional and Comparative Perspective

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### Introduction

Narratives on the United Kingdom's Human Rights Act (HRA)—passed in 1998 and coming into effect, for the most part, in October 2000<sup>1</sup>—are typically characterised by their paradoxical nature. During its short existence the Act has been variously portrayed as both democratic and counter-majoritarian,<sup>2</sup> as an effective remedial instrument and as a “futile” gesture,<sup>3</sup> as a virtually entrenched cornerstone of our constitution and as an ordinary statute susceptible to the ebb and flow of contemporary political opinion.<sup>4</sup>

In the legal realm, far-reaching statements of the Act's significance are not hard to find. The Act is hailed as a “constitutional statute” which enjoys the limited protection from implied repeal that that status conveys.<sup>5</sup> It has been termed a “higher-order” provision,<sup>6</sup> and has been referred to as one of the foundations of a new constitutional order, under which the established doctrine of parliamentary sovereignty—and therefore the primacy of political actors within the constitutional sphere—has irreversibly conceded ground to the substantive

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<sup>1</sup> The protections afforded by the Human Rights Act 1998 had been operational in respect of the activities of the devolved administrations since their establishment in 1999 (See: Scotland Act 1998; Northern Ireland Act 1998; Government of Wales Act 1998).

<sup>2</sup> Cf. *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [42] (Lord Bingham) with J. Allan, ‘Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-first century’ (2006) 17 K.C.L.J. 1.

<sup>3</sup> Cf. K. D.Ewing, ‘The Futility of the Human Rights Act’ [2004] P.L. 829 with A. Lester, ‘The Utility of the Human Rights Act: A Reply to Professor Ewing’ [2005] P.L. 249.

<sup>4</sup> Cf. *Jackson and others v Her Majesty's Attorney-General* [2005] UKHL 56; [2006] 1 A.C. 262, at [102] (Lord Steyn) and The Conservative Party, *Invitation to Join the Government of Britain* (2010), p.79.

<sup>5</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); [2003] Q.B. 151.

<sup>6</sup> F. Klug, ‘A Bill of Rights: Do we need one or do we already have one?’ [2007] P.L. 701, 708.

constitutional morality of the rule of law.<sup>7</sup> From this perspective, the Act is marked out as having tempered the absolutism of Dicey's conception of the legal powers of Parliament,<sup>8</sup> and has been argued to have helped to cement the United Kingdom's transition from parliamentary to constitutional democracy.<sup>9</sup>

Yet at the 2010 General Election, the future of the HRA provided the backdrop to one of the many inter-party skirmishes of the election campaign, with the Conservative party committed to its repeal and replacement with a British Bill of Rights.<sup>10</sup> In this sphere, the "higher order" and "constitutional" epithets count for little. The responses of the law and of politics could hardly be more starkly opposed.

Responses to the Act, and the protections it provides, have been—and continue to be—polarised. As a result, the broad-based "culture of rights"<sup>11</sup> that the first Blair administration promised would be generated by its human rights project has failed to materialise. In the context of this continued popular and political uncertainty, this book seeks to examine the undoubted influence of the HRA across the three constitutional spheres within which it can be seen to operate: within the un-codified constitution of the United Kingdom, within the context of the supervisory jurisdiction of the European Court of Human Rights, and finally, on the international plane as the subject of ongoing transnational 'conversations' on rights and the instruments that protect them.<sup>12</sup> In order to assess the potential legacy of the HRA—and to provide a counterpoint to the Act's continued political fragility—the authors seek to identify trends and developments that hold the potential to outlast the Act that gave rise to them.

This volume brings together a collection of internationally-renowned scholars and lawyers in order to examine the lasting constitutional legacy of the Human Rights Act at a time when its political future is yet to be secured. In the context of debates over the introduction of a Bill of Rights for the United Kingdom, this set of essays examines the clear

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<sup>7</sup> See for instance: V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009) and *Jackson v Attorney-General* [2005] UKHL 56, paras.000-000 (Lord Steyn).

<sup>8</sup> A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (3<sup>rd</sup> ed) (London: Macmillan, 1889).

<sup>9</sup> J. Jowell, "Beyond the Rule of Law: Towards constitutional judicial review" [2000] P.L. 671.

<sup>10</sup> The Conservative Party, *Invitation to Join the Government of Britain* (2010), p.79. The Labour Party and Liberal Democrats campaigned for the retention of the Act: Labour Party, *A Future Fair for All* (2010), p.93; Liberal Democrats, *Manifesto 2010* (2010), p.94.

<sup>11</sup> HL Debs, vol 582, col 1228, 3 November 1997 (Lord Irvine of Lairg QC).

<sup>12</sup> C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 O.J.L.S. 499.

effects of the Act on constitutional doctrine, on the formal (and informal) interactions between the branches of government (at central and devolved levels), and on legal reasoning within, and before, the courts. It examines the nature of the relationships between national bodies and the enforcement structures of the European Court of Human Rights, examining the capacity of decision-making under the HRA to generate an extra-jurisdictional influence on decisions taken by the European Court of Human Rights. The migration of constitutional ideas and of jurisprudential trends of reasoning is also examined beyond the Convention system; with the interplay between the Human Rights Act, the New Zealand Bill of Rights Act, the Victorian Charter of Rights and the ACT Human Rights Act demonstrating the spread of the statutory bill of rights model within systems of parliamentary sovereignty and the continued exchange of ideas across the common law world. Finally, the book turns to the United Kingdom's own Bill of Rights debate, asking what lessons from the Human Rights Act experiment—and from other jurisdictions experiences of Bill of Rights design—can be carried forward to the debates over the future course of rights protection in the United Kingdom and what shape a future Bill of Rights for the United Kingdom might take.

### **The Human Rights Act 1998—A Short History**

May 1997 saw the election of the first Blair administration with manifesto commitments to implement an unprecedented array of constitutional reforms; the abolition of the hereditary principle as a criteria governing membership of the House of Lords, the enactment of Freedom of Information legislation, devolution to Scotland, Wales and Northern Ireland, reform of the party funding mechanisms and reform of the House of Commons were all a part of the new government's ambitious scheme.<sup>13</sup> The introduction of a statute designed to incorporate the European Convention on Human Rights into domestic law was one of the key elements of this new constitutional landscape. The enactment of the HRA in 1998 marked the culmination of a thirty-year campaign for access to the Convention Rights in domestic courts<sup>14</sup> and, for many, provided a tonic for the steady erosion of civil liberties that had taken place during the preceding years of Conservative rule.<sup>15</sup>

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<sup>13</sup> *New Labour: Because Britain Deserves Better* (London, Labour Party, 1997).

<sup>14</sup> See eg: A. Lester, *Democracy and Individual Rights* (London: Fabian Society, 1969); Lord Scarman, *English Law—The New Dimension* (London: Stevens and Sons, 1974).

<sup>15</sup> R. Dworkin, *A Bill of Rights for Britain* (London: Chatto and Windus, 1990); K. D. Ewing and C. A. Gearty, *Freedom Under Thatcher* (Oxford: Oxford University Press, 1990).

The structure of the HRA differed from that associated with *constitutional* Bills of Rights elsewhere. The Labour Government was careful in its attempts to provide a *statutory* protection for rights, while ultimately preserving the primacy of Parliament. As a result, the judges would not find themselves empowered to strike down legislation which contravened the requirements of the Convention, but would instead be permitted to interpret statutory language—so far as that was possible—in order to achieve compatibility.<sup>16</sup> If such an interpretation was not possible, then the Act provided courts with a novel, non-coercive, remedial order—the declaration of incompatibility<sup>17</sup>—which would serve to highlight to the government and Parliament the specific inconsistency between domestic statute and the Convention Rights.<sup>18</sup> Hence, Parliamentary sovereignty was preserved through denying the courts the power to invalidate legislation,<sup>19</sup> and by leaving the elected branches of government with the choice of whether or not to remedy legislation that the courts had identified as contravening the standards required by the Convention. While the protections to be afforded by the Act extended to *all* public bodies—making it unlawful for them to act in a way which was incompatible with one or more of the Convention Rights<sup>20</sup>—and to private persons exercising public functions,<sup>21</sup> Parliament was explicitly excluded from potential liability.<sup>22</sup> Under the provisions of the Act, legal scrutiny was designed to run in train with ‘political rights review.’<sup>23</sup> Upon introducing draft legislation into Parliament, the responsible Minister would be required to make a statement as to the compatibility of the proposed measure in order to provoke rights-focused scrutiny.<sup>24</sup> Ultimately however, Parliament’s legislative power would not be subject to substantive restrictions; the autonomy of the legislature was, in form at least, preserved. In setting up this division of power, the Human Rights Act attempted to reconcile an expanded role for the judges in rights protection, with traditional constitutional doctrine and with the scrutiny mechanisms of the political constitution.

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<sup>16</sup> Section 3(1) HRA 1998.

<sup>17</sup> Section 4 HRA 1998.

<sup>18</sup> Section 1(1) HRA 1998.

<sup>19</sup> See eg: HC Debs, Vol.306, Col.722, 16<sup>th</sup> February 1998 (Mr Jack Straw).

<sup>20</sup> Section 6(1) HRA 1998.

<sup>21</sup> Section 6(3)(b) HRA 1998.

<sup>22</sup> Section 6(6) HRA 1998.

<sup>23</sup> The phrase is Janet Hiebert’s (see: J. L. Hiebert, “New Constitutional Ideas: Can new parliamentary models resist judicial dominance when interpreting rights” (2003-2004) 82 *Texas Law Review* 163).

<sup>24</sup> Section 19 HRA 1998.

Yet in other respects, the Human Rights Act was a marked departure. While sovereignty was essentially preserved, the separation of powers—the constitutional division of labour between courts, executive and Parliament—was in practice quite radically altered. The Human Rights Act provided the courts with the tools to hold the executive to account for breaches of fundamental rights, and to scrutinise parliamentary legislation—traditionally substantially immune from such scrutiny<sup>25</sup>—for compatibility with the protections afforded by the Convention Rights. These new powers of review were, prior to the implantation of the HRA, thought of as being beyond the constitutional Rubicon.<sup>26</sup> As a result, the classic account of sovereignty, under which parliament legislated subject to no constitutional reservations,<sup>27</sup> had—though ceding to the courts these powers of proto-constitutional review—arguably given way to a more cohesive system of checks and balances.

The design of the HRA therefore attempted to blend the radical with the orthodox; rights would be judicially-protected, but not at the (explicit at least) expense of Parliament's sovereignty. It is perhaps no surprise then that as a result, much of the substantive debate over the correct application of the HRA is to be found in the reconciliation of this expanded judicial role with the ideal of democratic governance.<sup>28</sup> In spite of its novel structure, the HRA has not been allowed to escape the anti-democratic accusations that dog constitutional Bills of Rights.<sup>29</sup> And for all its successes in making available remedies for the infringement of individual rights,<sup>30</sup> nor has it been able to escape the suggestion—levelled by Lord McCluskey on its introduction—that the Act would provide “a field day for crackpots, a pain in the neck for ... legislators and a goldmine for lawyers.”<sup>31</sup> Throughout its short life the Act

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<sup>25</sup> Cf. the limited exceptions to this rule in *R. v Secretary of State for Transport, ex parte Factortame (No.2)* [1991] 1 A.C. 603 and *Jackson v Attorney-General* [2006] 1 A.C. 262.

<sup>26</sup> F. Klug, ‘The Human Rights Act—A “Third Way” or “Third Wave” Bill of Rights’ [2001] E.H.R.L.R. 361, 370. Ewing has described the change brought about by the HRA as “unquestionably the most significant formal redistribution of political power in this country since [the Parliament Act] 1911, and perhaps since [the Bill of Rights] 1688” (“The Human Rights Act and Parliamentary Democracy” (1999) 62 M.L.R. 79, 79).

<sup>27</sup> G. Marshall, *Constitutional Theory* (Oxford: Clarendon, 1971), p.74.

<sup>28</sup> For one of the most compelling attempts to address this particular issue see: C. A. Gearty, *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004).

<sup>29</sup> A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the bar of politics* (Indianapolis: Bobbs-Merrill, 1962); J. Waldron, “The Core of the Case against Judicial Review” (2006) 115 *Yale Law Journal* 1346.

<sup>30</sup> L. Matthews, S. Sceats, S. Hosali and J. Candler, *The Human Rights Act—Changing Lives* (London: British Institute of Human Rights, 2008).

<sup>31</sup> *Scotland on Sunday*, 6<sup>th</sup> February 2000.

has provoked opposition from the popular press and (on occasion) from across the political sphere. It has become commonplace to read that the HRA provides convicted criminals with a “right” to pornography,<sup>32</sup> that a culture of compensation—fuelled by the HRA—is “running riot” in the United Kingdom,<sup>33</sup> that the Act allows judges to wantonly interfere with executive decisions in defiance of “common sense”,<sup>34</sup> provides an invitation to the unelected judges to illegitimately engineer a legal right to privacy,<sup>35</sup> and so on. A Department of Constitutional Affairs Review of the Act, published in 2006,<sup>36</sup> did little to correct the series of damaging myths and half-truths that had by that point virtually drowned out discussions of the Act’s merits. By 2012, little had changed—the Equality and Human Rights Commission concluded in a far-reaching review that the Convention and Human Rights Act were a firm foundation but that, nevertheless, that the government had some way to go (not least in its policies and legislation) in ensuring that the Convention rights were enjoyed by everyone living in Britain.<sup>37</sup> To say that the Act has “failed to attract sufficient symbolic significance to become embedded in the national consciousness” is something of an understatement.<sup>38</sup>

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<sup>32</sup> See: “Tories Target Human Rights”, *Daily Telegraph*, 17 August 2004. Far from being successful, the applicant—the convicted serial killer Dennis Nilsen—was in fact denied leave to appeal at permission stage.

<sup>33</sup> Michael Howard MP, “Time to liberate the country from Human Rights laws”, 18<sup>th</sup> March 2005. At the time of Howard’s speech, damages had actually been awarded in a mere three cases under the Human Rights Act (see: I. Leigh and R. Masterman, *Making Rights Real: The Human Rights Act in its first decade* (Oxford: Hart, 2008), pp.273-282).

<sup>34</sup> Comments attributed to Tony Blair in the aftermath of the “Afghan Hijackers” decision—*R. (on the application of S) v Secretary of State for the Home Department*[2006] EWHC 1111 (Admin) — (“Afghans who fled Taliban by hijacking airliner given permission to remain in Britain”, *The Guardian*, 11 May 2006). On appeal, the Court of Appeal found the criticised decision have been “impeccable” (*R. (on the application of S) v Secretary of State for the Home Department* [2006] EWCA Civ 1157, 0000.)

<sup>35</sup> See the widely-publicised comments of Paul Dacre (editor of the *Daily Mail*) in response to a series of decisions taken in the High Court by Mr Justice Eady; “The Threat to our press”, *The Guardian*, 10 November 2008; “Judge has created privacy law by back door, says *Mail* editor Paul Dacre”, *The Times*, 10 November 2008.

<sup>36</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (July 2006). (on which see: Joint Committee on Human Rights, *The Human Rights Act: The DCA and Home Office Reviews* (2005-2006), HL278/HC1716).

<sup>37</sup> Equality and Human Rights Commission, *Human Rights Review 2012* (Manchester: Equality and Human Rights Commission, 2012).

<sup>38</sup> Francesca Klug, “Enshrine These Rights” *The Guardian*, 27 June 2006, and letter to *The Observer*, “Parliament—A Danger to Freedom”, 9 April 2006.

Yet at the same time, the Act has brought discussions of rights to the fore in both legal and political contexts. The protections afforded by the Act have formed the hub of discussions over the necessity and proportionality of anti-terrorism legislation,<sup>39</sup> have informed debates over—*inter alia*—the legal status of same-sex partnerships,<sup>40</sup> acquired gender recognition,<sup>41</sup> the availability of enforceable privacy rights against the press,<sup>42</sup> and have served to underpin reform of the structure of government itself.<sup>43</sup> Giving effect to the HRA has prompted changes to the cultures and processes of political and legal decision-making which might be seen to have lasting impact, within the constitution, on the United Kingdom's relationships with Strasbourg, and in the international context in which the credence of legally-enforceable human rights continues to gain currency.

### **Part I—The Human Rights Act in Constitutional Perspective**

The relationship between political and judicial power is a vexed one, especially controversial in a state—such as the United Kingdom—that lacks a foundational constitutional document from which the elected branches and judiciary draw their powers. The absence of a written constitution has necessarily shaped the particular form that controversy over judicial supremacy has taken in the United Kingdom. Commentators on all sides appeal to the twin doctrines of the rule of the law and parliamentary sovereignty, but ambiguity about these key concepts and their specific application gives considerable scope for disagreement and misunderstanding.

The most generous version argues that there is no conflict of values over the Human Rights Act 1998, that the scheme itself has created an entirely new constitutional model within which parliamentary sovereignty and judicial supremacy have been reconciled. This scheme of rights protection has been variously labelled the British,<sup>44</sup> Westminster<sup>45</sup> or

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<sup>39</sup> See for example: *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68; Joint Committee on Human Rights, *Counter-Terrorism and Human Rights: Bringing Human Rights Back In*, HL86/HC111 (March 2010).

<sup>40</sup> Civil Partnerships Act 2004.

<sup>41</sup> Gender Recognition Act 2004.

<sup>42</sup> *Campbell v Mirror Group Newspapers* [2004] UKHL 22; [2004] 2 A.C. 457.

<sup>43</sup> Constitutional Reform Act 2005.

<sup>44</sup> By the Home Secretary responsible for its introduction, Jack Straw.

<sup>45</sup> D. Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (Oxford: Oxford University Press, 2010).

New Commonwealth Model.<sup>46</sup> Supporters of this view emphasise that the interpretive power in s.3(1) is the Act's main remedial tool, stress the primacy of the political inherent in the declaration of incompatibility under s.4 and remind that the courts have no power to strike down primary legislation for incompatibility with the Convention. The role of legislatures in rights scrutiny and protection under the new Commonwealth model provides a foil to, and is designed to avoid, excessively robust judicial enforcement.<sup>47</sup> As a result, it is argued that the new Commonwealth model holds the potential to avoid the charges of judicio-centricity that have been levelled at other, constitutional, rights instruments.

Academic sceptics meanwhile decry the inability of judicially-policed rights instruments to effectively manage the competing imperatives of individual liberty and democratic governance. As such, many commentators have added the HRA to the canon of legislative and other developments that have in recent years precipitated the steady decline of representative, and participatory, democracy and cemented the 'juridification' of the constitution.<sup>48</sup> Continued debate over the seemingly irreconcilable paradigms of representative governance and the judicial protection of human rights—and the successes or otherwise of the HRA's pragmatic middle ground between challenges of remedial inadequacy and judicial overkill<sup>49</sup>—is unsurprising and an inevitable consequence of the counter-majoritarian tendencies of legal rights instruments.<sup>50</sup>

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<sup>46</sup> S. Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49 *American Journal of Comparative Law* 707; S. Gardbaum, "Reassessing the New Commonwealth Model of Constitutionalism," (2010) 8 *International Journal of Constitutional Law* 167.

<sup>47</sup> For example: D Nicol, "Law and Politics after the Human Rights Act" [2006] P.L. 722; D. Feldman, "The Impact of Human Rights on the UK Legislative Process" (2004) 25 *Statute Law Review* 91; J Hiebert, "Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?" (2006) 4 *International Journal of Constitutional Law* 1; J Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006) 69 M.L.R. 7; J Hiebert, "Interpreting a Bill of Rights: The Importance of Legislative Rights Review" (2005) 35 *British Journal of Political Studies* 235 and J Hiebert, "A Hybrid-Approach to Protect Rights? An Argument in Favour of Supplementing Canadian Judicial Review with Australia's Model of Parliamentary Scrutiny" (1998) 26 *Federal Law Review* 115; C. Evans and S. Evans, 'Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights' [2006] P.L. 785.

<sup>48</sup> For example: M. Bevir, "The Westminster Model, Governance and Judicial reform" (2008) 61 *Parliamentary Affairs* 559.

<sup>49</sup> See for example" C. A. Gearty, "Reconciling Parliamentary Democracy and Human Rights" (2002) 118 LQR 248; A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009).

<sup>50</sup> J. Allan, "Bills of Rights and Judicial Power: A Liberal's Quandary" (1996) 16 O.J.L.S. 337.



However, whether there is a real difference between the Westminster model and conventional “strong form”<sup>51</sup> review depends crucially on institutional behaviour – both of the courts and of politicians.<sup>52</sup> On the one hand, much has been written of judicial self-restraint within this model which, now that earlier terminological confusion has been settled,<sup>53</sup> is invariably referred to as “deference”.<sup>54</sup> This suggests that institutional conflict can be avoided by judges recognising the limitations of their role and the greater legitimacy of political actors, at least in relation to certain types of question that may arise for interpretation under the HRA.

On the other hand, are those who argue that the differences between strong and weak form review are cosmetic or minimal because of the constraints within which the executive and Parliament operate, both politically and legally. Commentators such as Keith Ewing argue that once the courts have declared legislation incompatible the ability of Parliament to disregard this judgment is theoretical only. In practice nearly all declarations of incompatibility have been “followed”,<sup>55</sup> giving rise to the suggestion that the elected branches do so as a matter of routine.<sup>56</sup> But what does this show precisely? The same comment could be made of adverse judgments from the European Court of Human Rights against the United Kingdom. In both cases one could conclude that the United Kingdom is a state governed by the rule of law in which judgments from independent courts are highly

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<sup>51</sup> The terms strong and weak review were coined by the US scholar Mark Tushnet and have been widely adopted. See, for instance: M. Tushnet, “New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries” (2003) 38 *Wake Forest Law Review* 813.

<sup>52</sup> See also see W. Sadurski, “Judicial Review and the Protection of Constitutional Rights” (2002) 22 *O.J.L.S.* 275.

<sup>53</sup> Early case-law referred to a “discretionary area of judgment” especially in relation to the restriction of qualified rights: *R. v DPP ex parte Kebilene* [2002] A.C. 326, 381 (Lord Hope).

<sup>54</sup> J. Jowell, “Deference, Servility, Civility or Institutional Capacity” [2003] P.L. 592; M. Hunt, “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in N. Bamforth and P. Leyland (eds) *Public Law in a Multi-layered Constitution* (Oxford: Hart Publishing, 2003); Lord Steyn, “Deference: a Tangled Story” [2005] P.L. 346; A. Kavanagh, “Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication” in G. Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008) 184; A. Young, “In Defence of Due Deference” (2009) 73 *M.L.R.* 554.

<sup>55</sup> K. D. Ewing, “The Futility of the Human Rights Act” [2004] P.L. 829.

<sup>56</sup> A. Kavanagh, “Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication” in G. Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008), p.214.

respected. To suggest that this somehow demonstrates that parliamentary sovereignty is a dead letter is to ignore two important points. Firstly there is the possibility that an exceptional case may arise. The very fact that questions about whether certain counter-terrorist powers or prisoners' voting rights judgments should be implemented arise affirms that all involved believe in the existence of the exception.<sup>57</sup> Secondly, we can refer to what Ronald Dworkin calls, in another context, the distinction between "strong" and "weak" discretion.<sup>58</sup> Even if, after a period of suitable observation, we were to conclude that a declaration of incompatibility is in end result to a strike down of legislation, political actors nevertheless retain decisive influence over the timing, the form and the extent of legislative change by way of response. The inability of the courts to legislate in a judgment that is fact- and context-specific (often referred to as a constraint on the interpretative power under section 3) is a real practical constraint.

In Chapter 2, "The Human Rights Act, Dialogue and Constitutional Principles," Gavin Phillipson considers different perspectives on the relationship between the HRA and existing constitutional principles. Identifying two contrasting views on the matter, corresponding broadly to the political-liberal constitutionalist divide, he argues that each contains something of a paradox. His chapter then goes on to consider two more specific views of the HRA which impliedly or explicitly seek to "read down" the powers it grants the judges: one accuses the judges of having over-used their powers under the HRA, reducing its distinctiveness as a "third wave" or "dialogic" Bill of Rights; the other suggests that the judicial role in such dialogue should be regarded as merely "posing principles" to the other branches. Neither view can be squared, Phillipson suggests, with the political and legal realities; considering the recent governmental reaction to the Sex Offenders Register judgment, he contends that it is not the judges but the democratic branches that currently pose the biggest obstacle to genuinely principled dialogue on rights controversies.

However, the democratically appealing claim that Parliament has a role to play in the protection of human rights itself conceals a number of difficulties. First, the current coalition arrangements force a sober reassessment of exactly why supporters of the political constitution<sup>59</sup> can claim moral superiority for Westminster over the "colonels in horsehair".

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<sup>57</sup> See Murray, ch.00.

<sup>58</sup> R. Dworkin, "The Model of Rules I" in *Taking Rights Seriously* (Harvard University Press, 1978), p.33 ff.

<sup>59</sup> A body of "rights skeptical" scholarship in this vein builds on the seminal work of the late John Griffith: "The Political Constitution"(1979) M.L.R. 1. Thomas Poole summarizes Griffith's position as a belief that rights discourse corrupts law and politics: T. Poole, "Tilting at Windmills? Truth and Illusion in 'The Political

Even in those narrow areas where controversial human rights questions are in issue, the coalition partners have found the need to compromise on manifesto commitments endorsed by the electorate. Both parties have had to revise their human rights policies in order to form a working partnership: for the Conservatives this has meant postponing their ambitions to replace the Human Rights Act, for the Liberal Democrats it has meant, *inter alia*, watering down their plans to scrap control orders. At the time of writing some of these disagreements remain unresolved, notably the future of the Human Rights Act itself which awaits the report of a Commission.<sup>60</sup> Accountability for these decisions is at best the nebulous one of accountability to the electorate at the next election. Then there is the question of whether the effectiveness of Parliament's role in rights-scrutiny lives up to the democratic ideal.

Central to this calculation is the place of the Joint Committee on Human Rights (JCHR) within the scheme for human rights protection. Commentators have argued that the shift in the JCHR's work from its early emphasis on Bill scrutiny for Convention compatibility has been towards thematic reporting and monitoring of compliance with incompatibility judgments has been beneficial. The JCHR is much admired overseas as a model for parliamentary scrutiny of human rights.<sup>61</sup> Nevertheless, measuring the true impact of the Committee's work is far from simple. Recently published quantitative research confirms that the JCHR's reports have been referred to with greater frequency in parliamentary debates since 2005-6.<sup>62</sup> This however masks repeated citation by a small number of MPs and Peers and high proportion of self-citation by some JCHR members.<sup>63</sup> The same study could only point to a small number of instances (16 over 5 years) where amendments to Bills before Parliament could be clearly attributed to JCHR reports, although the "educative" effect in raising awareness of human rights among parliamentarians is almost

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Constitution" (2007) 70 M.L.R. 250. For examples of more recent rights-sceptical scholarship: T. Campbell, K. D. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001); K. D. Ewing, *The Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (Oxford: Oxford University Press, 2010).

<sup>60</sup> On which see chs.00 and 00.

<sup>61</sup> The Council of Europe has called on national parliaments to strengthen their protection of human rights: Committee on Legal Affairs and Human Rights, *National parliaments: guarantors of human rights in Europe* (Rapporteur: Mr Christos Pourgourides), Parliamentary Assembly Doc.12636 (6 June 2011) <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12866&Language=EN>

<sup>62</sup> M. Hunt, H. Hooper and P. Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit*, (AHRC, 2012).

<sup>63</sup> *Ibid.*, p.24.

certainly broader. After more than a decade of the JCHRs operation it would appear that the creation of a rights culture is not yet secure where parliamentary debate is concerned.

Parliamentarians were naturally keen to safeguard under the Act their own freedom of action as legislators. While the HRA provides that decisions of public bodies<sup>64</sup>—or private bodies exercising public functions<sup>65</sup>—are unlawful insofar as they contravene the requirements of one or more of the Convention Rights, legislative decisions taken by Parliament which are similarly incompatible with the Convention Rights remain of full legal effect.<sup>66</sup> In order to preserve the ability of Parliament to legislate subject to no legal constraints, domestic courts may not strike down or otherwise invalidate primary legislation which contravenes the requirements of the Convention. Instead, the HRA—under s.4—provides that courts might issue a declaration of primary legislation’s incompatibility with the Convention. Such a declaration is of no legal effect on the parties to the case, on government or on Parliament. The coercive force of a declaration of incompatibility instead can be found in the political pressure that will result from the finding of a superior court that domestic legislation does not meet the standards which the United Kingdom can be expected to adhere as a party to the European Convention on Human Rights.<sup>67</sup> While in practice, the issue of a declaration of incompatibility has resulted in legislative change—or of the initiation of a process designed to remedy the legislative incompatibility—such change has not necessarily been a timely or direct response to the declaration issued.

The novelty of this process has given rise to much discussion about its place within “dialogue” between the courts and the political branches of the state. One judge has gone so far as to remark that that declarations of incompatibility are “essentially political in character rather than legal.”<sup>68</sup> Indeed there is some debate over whether it can be seen as a remedy at all because of the lack of tangible individualised benefits to the litigant to whom a declaration is awarded, both in domestic law and from the perspective of effectiveness under Article 13

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<sup>64</sup> Section 6(1) HRA 1998.

<sup>65</sup> Section 6(3)(b) HRA 1998.

<sup>66</sup> Sections 3(2) and 4(6) HRA 1998.

<sup>67</sup> Though, as we have seen, the difference between the declaration of incompatibility and a clear power of “strike down” has been argued by some to be of form alone (see eg: T. Campbell, “Incorporation through Interpretation” in T. Campbell, K. D. Ewing and A. Tomkins, *Sceptical Essays on Human Rights* (Oxford: Oxford University Press, 2001).

<sup>68</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68, at [145] (Lord Scott).

of the Convention system as a whole.<sup>69</sup> In chapter 3 Colin Murray examines the declaration of incompatibility within the broader context of inter-action between the judiciary and the other branches. Murray's analysis suggests that post-HRA "dialogue" should be understood against a wider time-frame and in the context of more informal modes of inter-action. Seen in this way the volume and intensity of judicial attempts to promote law reform has grown since 2000 but this process is by no means such a constitutional novelty as some have suggested. Nevertheless at times there has been a lack of parliamentary engagement, so much so that the judges have frequently been "dancing without a partner" or with one that shows at best only token interest.

In one part of the United Kingdom—Scotland—the effect of incorporation of Convention rights has produced dramatic constitutional change since limitation the powers of the Scottish Parliament and Scottish ministers are limited by the Human Rights Act, in contrast to Westminster. In a historical survey Aidan O'Neill QC shows how the UK Supreme Court's handling of Scottish criminal appeals is, on the one hand, providing an injection of external influence to a criminal justice system that remained distinct and to some extent isolated since the Act of Union. On the other, hand as O'Neill demonstrates this development is proving immensely controversial with Scottish politicians and judges, so much so that it has become a prominent issue in debates about Scotland's future.

## **Part II—Domestic Protections within a European Framework**

Consideration of the effectiveness of domestic human rights protection cannot take place without placing the Human Rights Act in the context of the Convention system as a whole. More than 50 years after hearing its first case the European Court of Human Rights is a victim of its own success. The growth in the Court's workload and the expansion of the Council of Europe after 1989 produced a backlog of more than 120,000 petitions, although this is beginning to reduce as a result of implementing procedural reforms under the 14<sup>th</sup> Protocol to the Convention. The growing reach of the Convention jurisprudence under the "living tree" doctrine intermittently causes an acute political reaction from some governments. In the UK's case, the Court's decisions concerning prisoner's voting and deportation of terrorist suspects are instances in point. One possible solution to workload and

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<sup>69</sup> See for example *R (on the application of Chester) v Secretary of State for Justice* [2009] EWHC 2923 (Admin); [2010] H.R.L.R. 6; *Burden v United Kingdom* (2008) 47 E.H.R.R. 38. For commentary see: I. Leigh and R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Oxford: Hart Publishing, 2008), ch.5.

controversial decisions would appear to be give greater prominence to national protection of human rights and to restrict the role of the European Court of Human Rights.<sup>70</sup> It is no surprise then that the UK government used its chairmanship of the Council of Europe in 2011-12 to promote an inter-governmental declaration (the Brighton declaration) that stressed the principle of subsidiarity in reform of the Court.<sup>71</sup> Apart from exhortations that the Court should give greater prominence to the margin of appreciation, in practical terms this translated into a proposal that cases be inadmissible as manifestly ill-founded if they have been properly considered by a domestic court according to well-established Convention jurisprudence unless the European Court of Human Rights considers a that a serious question of interpretation is raised.<sup>72</sup> If this proposal becomes a treaty amendment the treatment of Strasbourg jurisprudence by domestic courts will be increasingly important in future.

The “Convention rights” as given effect by s.1(1) of the Human Rights Act enjoy a symbiotic relationship with the Convention Rights as enforced by the European Court of Human Rights. Though the Human Rights Act is an instrument passed by the Parliament of the United Kingdom, its effects and implications cannot be fully assessed without reference to the provisions of the treaty to which it gives further effect, or to the decisions of the Strasbourg-based enforcement bodies that police member states’ obligations under the Convention. The domesticated “Convention Rights” cannot therefore be completely divorced from their Strasbourg cousins, for it is in the European Convention and its attendant jurisprudence that authority as to their meaning and scope of application can be found.<sup>73</sup> The relationship between the Convention organs and national authorities is not—contrary to the frequent claims of politicians—however, one directional. The “living” jurisprudence of the European Court of Human Rights on the meaning and interpretation of the Convention feeds on decisions taken by the national authorities of member states. The interpretations of the rights enforced at the national level under the Human Rights Act are therefore linked to those enforced by the European Court of Human Rights, and vice versa. The primary contributors to this particular “dialogue” on the content of the protections afforded by the Convention prior to the implementation of the HRA were the Strasbourg enforcement bodies and the

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<sup>70</sup> See: ch.00, pp.00-00.

<sup>71</sup> High Level Conference on the Future of the European Court of Human Rights:, Brighton Declaration, 19 April 2012. <http://www.coe.int/en/20120419-brighton-declaration/>

<sup>72</sup> Brighton Declaration, at [15.d].

<sup>73</sup> A. Kavanagh, *Constitutional Adjudication under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), p.156.

United Kingdom Parliament, with the unincorporated Convention being—for the most part—of limited utility in the hands of domestic courts.<sup>74</sup> In permitting Convention questions to be posed in domestic courts, the HRA enabled, for the first time, United Kingdom courts to be regarded as being legitimate contributors to this inter-institutional debate.

The very fact of an existing substantial body of jurisprudence from the European Court of Human Right interpreting the meaning of Convention rights (and binding the United Kingdom) necessarily means that so-called “dialogue” models of rights have only a limited sphere in which to operate. But setting the structural constraints imposed by the Convention itself to one side, the HRA has seen the development of a home-grown limitation on the powers of courts to effectively contribute to this wider discussion on the meaning of the Convention. Roger Masterman’s chapter, “Deconstructing the Mirror Principle”, examines the idea that domestic courts should, in giving effect to the Convention Rights at the domestic level, do “no less, but certainly no more”<sup>75</sup> than the European Court of Human Rights. This so-called “mirror principle”<sup>76</sup> has become something of a mantra for the higher courts in giving effect to the Human Rights Act, but—as Masterman argues—provides an inaccurate and inadequate account of the processes of reconciling Strasbourg authority with domestic common law and statute. On this analysis, the notable decision of the UK Supreme Court in *R. v Horncastle*<sup>77</sup> forms a part of a much broader trend away from unquestioning or slavish implementation of the Strasbourg jurisprudence at the domestic level. Merris Amos considers the interplay between courts at the national and Strasbourg levels from a different angle, demonstrating—and providing a further argument on which to reject the ‘mirror principle’ in so doing—that decisions of the United Kingdom courts are closely scrutinised (and responded to) by the European Court of Human Rights. In assessing the state of this emergent dialogue, Amos examines how it impacts on the relationships between the United Kingdom authorities and the Convention organs, and its consequences for effective rights protection at the national level.

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<sup>74</sup> *R. v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696.

<sup>75</sup> *R. (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 A.C. 323, para.00 (Lord Bingham).

<sup>76</sup> On which see: J. Lewis, “The European Ceiling on Rights” [2007] P.L. 720; R. Masterman, “Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and ‘the Convention rights’ in domestic law” in H. Fenwick, G. Phillipson and R. Masterman, *Judicial Reasoning under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2007).

<sup>77</sup> [2009] UKSC 14; 2 A.C. 373.

### **Part III—A Permanent Revolution in Legal Reasoning?**

In Part III the focus of the discussion turns to the emerging record of responses to rights-based argument among members of the United Kingdom's highest courts, the ability of judges to produce reasoning that is persuasive to international judges, the continuing utility of the common law in protecting human rights, and the differing techniques of legal argument required of advocates advancing human rights claims.

The ways in which legal argument and reasoning has adapted to the incorporation into United Kingdom law of a substantial body of extrinsic law are topics worthy of specific investigation in considering the long-term impact of the HRA.<sup>78</sup> It can be argued that, since, unlike many European legal systems, the common law underwent no historical process of "reception" of Roman Law, the infusion of Convention jurisprudence represents the greatest injection of external juristic material since its formative medieval period.<sup>79</sup> This development raises a number of pertinent questions: the tensions and differences if any between indigenous methods of rights protection and the Convention approach; the effect on procedural aspects of "lawyering", namely litigation strategy, advocacy and proof; the impact on the means by which judicial decisions are reached and justified or presented.

Sir Jack Beatson ('Human Rights and Judicial Technique') provides a judicial perspective on the impact of the Act on public law litigation and statutory interpretation. He argues that the impact of the HRA should be assessed in the context of a broader revolution in public law since the 1960s. On this measure the Act has led to changes of a different order to the developments in the period between 1963 and 1984,<sup>80</sup> when modern public law was formed in the United Kingdom but, he suggests, these changes are not irreversible. The tension between the competing interpretations of the Human Rights Act itself (highlighted above by Gavin Phillipson) plays out ultimately at this level of judicial technique. While the dominant view is that the HRA simply provides a domestic remedy for breach of the United

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<sup>78</sup> For a study of the impact on the former House of Lords see T. Poole and S. Shah 'The Law Lords and Human Rights' (2011) 74 M.L.R. 79.

<sup>79</sup> Although Lord Denning famously described European Community law as 'an incoming tide' (see *Bulmer (HP) Ltd v J Bollinger SA* [1974] Ch. 401, 418-19) the pervasiveness and reach of the Convention rights is significantly greater by virtue of the general application of the HRA.

<sup>80</sup> The dates respectively of the seminal decisions in *Ridge v Baldwin* [1964] A.C. 40 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374



Kingdom's international obligations<sup>81</sup> there are nevertheless continuing indications of an alternative view that it is a constitutionally significant measure creating a new domestic law of human rights.<sup>82</sup>

Human rights adjudication has introduced new terminology, especially proportionality<sup>83</sup> and the related question of the "necessity" of restrictions on qualified rights.<sup>84</sup> The questions raised are whether, or to what extent, this modifies the conventional view that a court should not substitute its judgment for that of the official or public body under review and the differences between these new concepts and those under common law public law. Beatson considers here the implications of the use of "deference", "respect", "margin of discretion", "institutional capacity or competence" or "weight" used to describe what used to be called "justiciability". Moreover there are constraints which result from the adversarial nature of adjudication and ways of dealing with them: the judges are not dealing with constitutional questions in abstract.

Specific consideration is given to the idea of common law fundamental rights.<sup>85</sup> While there is some debate about the origins of these rights<sup>86</sup> their potential significance is clear: in the short-term reliance on established common law doctrine is one means by which hostility to the HRA and European Convention can be deflected by pointing to the *Britishness* of at least some human rights standards. While in the longer-run, fundamental common law rights are a resource available to rights-conscious judges if a future government were to repeal or substantially amend the Act, without allowing domestic law to return (as Sir Jack Beatson puts it) to the "wilderness years."<sup>87</sup> Nevertheless, the status of the common law

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<sup>81</sup> See, for example, Lord Bingham's speech in *R (on the application of SB) v Denbigh High School Governors* [2006] UKHL 15, at [29].

<sup>82</sup> For example, Lord Scott in *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, at [44]-[46].

<sup>83</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532, at [26]-[27]. See generally J.Beatson, S.Grosz, T.Hickman, R.Singh with S. Palmer, *Human Rights: Judicial Protection in the United Kingdom* (London, 2008), pp.195-254.

<sup>84</sup> Especially Arts. 8-11 of the ECHR.

<sup>85</sup> *R v Lord Chancellor, ex parte Witham* [1998] Q.B. 575; *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 A.C. 115.

<sup>86</sup> I. Leigh and R. Masterman, *Making Rights Real: the Human Rights Act in its First Decade* (Oxford: Hart Publishing, 2008), pp.10-12.

<sup>87</sup> J.Beatson, S.Grosz, T.Hickman, R.Singh with S. Palmer, *Human Rights: Judicial Protection in the United Kingdom* (London: Sweet and Maxwell, 2008), p.82 and p.378.

rights jurisdiction leaves some unresolved questions. Some have clear parallels with the operation of the Human Rights Act itself, such as the at times unclear relationship between the twin-track approaches taken by the Convention and domestic law. Others arise independently; for instance, how the judiciary should approach the restriction of common law fundamental rights without the benefit of a text like the Convention which sets out the grounds for limitation. Yet more are common to rights discussions across the globe, where seeking to legitimise the increased susceptibility of policy decisions to judicial rights-based scrutiny is a perennial concern. But for those seeking to reform the bases on which human rights are protected in the United Kingdom, addressing all of these questions will be an essential precursor to the introduction of any successor instrument to the Human Rights Act which is designed to be consistent with our constitutional heritage.

The changing judicial role under the Human Rights Act is accompanied by implications for legal procedure. Sir Rabinder Singh explores a number of these in “The Impact of the Human Rights Act on Advocacy.” The implementation of the Act has affected the kind of evidence which it is necessary and appropriate to deploy in litigation, whether the advocate is acting for the claimant or for the defendant. Where the court is required to adjudicate on the compatibility of primary legislation with the Convention rights,<sup>88</sup> questions may arise as to the extent to which it is permissible to refer to statements made in Parliament in order to support or challenge the compatibility of primary legislation. The traditional rule that disclosure is not automatic in public law proceedings, in contrast to ordinary civil litigation, has been modified in order to allow the court to perform its role under the Human Rights Act to decide questions of proportionality.<sup>89</sup> Litigation under the Human Rights Act is more likely than traditional judicial review to require live evidence and cross-examination when it is necessary to decide disputed facts where previously there would have been written evidence only.<sup>90</sup> Moreover the expanded canvas of human rights litigation has made the courts more receptive to third party interveners, especially statutory bodies (for instance the

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<sup>88</sup> A contrast can be seen between what is permissible within the constitutional principles of the United Kingdom (e.g. *Wilson v First County Trust (No.2)* [2004] 1 A.C. 816) and what may be done by the European Court of Human Rights (e.g. *Hirst v United Kingdom (No. 2)* (2006) 42 E.H.R.R. 849).

<sup>89</sup> *Tweed v Parades Commission for Northern Ireland* [2007] 1 A.C. 650.

<sup>90</sup> For example *R (Wilkinson) v Broadmoor Special Authority* [2002] 1 W.L.R. 419; Cf. *R (N) v M* [2003] 1 WLR 562.

Equality and Human Rights Commission) and NGOs, in proceedings under the Human Rights Act, placing special responsibilities upon advocates.<sup>91</sup>

#### **Part IV—The Human Rights Act on the International Plane**

The HRA is arguably as notable for those comparable instruments from which it took inspiration as those constitutional templates which were rejected by its framers. In fact, as Conor Gearty has argued, it is in the rejection of the “orthodox precedents” of constitutional Bills of Rights—specifically, those that enable the courts to invalidate primary legislation—that the “genius” of the HRA can be found.<sup>92</sup> Questions of constitutional design and of the migration of institutional and jurisprudential models<sup>93</sup> form the subject of Part IV, which examines the impact of the HRA and judicial approaches to its interpretation, in Australia, New Zealand and Hong Kong. In the context of recently enacted Bills of Rights Acts in Victoria and the Australian Capital Territory, and the Australian Government’s consultation on a national Bill of Rights for Australia,<sup>94</sup> the influence of the HRA model has been apparent in the design of, and proposals for, Australian Bills of Rights.<sup>95</sup> While the New Zealand Bill of Rights Act (BORA) has served as inspiration for the HRA, and in turn has seen jurisprudential developments in the United Kingdom considered in the decisions of the New Zealand Supreme Court.

The potential for statutory bill of rights to reconcile the imperatives of individual rights with those of democratic governance is the core feature which distinguishes them from more obviously constitutional instruments. The relative force of the sovereignty doctrine, and its ability to condition the nature of judicial interpretative techniques under their respective rights instruments, is considered by Sir Anthony Mason in the context of developments in Australia, New Zealand and Hong Kong. Comparing those jurisdictions with the experience under the Human Rights Act, Sir Anthony argues that constitutional and

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<sup>91</sup> Interveners often add value to a case but care needs to be taken that the intervener does not become “an additional counsel for one of the parties”: *E v Chief Constable of the RUC* [2009] 1 A.C. 536, at [2]-[3] (Lord Hoffmann).

<sup>92</sup> C. Gearty, *Can Human Rights Survive?* (Cambridge: Cambridge University Press, 2006), pp.94-98.

<sup>93</sup> On which see generally: S. Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007).

<sup>94</sup> <http://www.humanrightsconsultation.gov.au/>

<sup>95</sup> C. Evans and S. Evans, *Australian Bills of Rights: The law of the Victorian Charter and the ACT Human Rights Act* (Chatswood, NSW: LexisNexis Butterworths, 2008).

political cultures are as relevant to the operation of a constitutional or statutory rights instrument as the provisions of the instrument itself. Simon Evans and Julia Watson meanwhile address the influence of the Human Rights Act on the design and implementation of the ACT Human Rights Act and, in particular, the Victorian Charter of Rights and Freedoms. While the Victorian Charter shares structural similarities with the Human Rights Act, a number of subtle linguistic and substantive differences give that instrument a different character to its United Kingdom counterpart.<sup>96</sup> Evans and Watson address issues of convergence and divergence between the United Kingdom’s HRA and the Australian experience of statutory rights protection.

Given that the HRA itself is the product of constitutional borrowing—taking much of its inspiration from the earlier New Zealand Bill of Rights Act—Petra Butler’s chapter on the relationship between the HRA and the BORA is of a slightly different order, charting the symbiotic relationship between the two rights instruments. While the HRA was closely modelled on the BORA, it differs in a number of notable respects. First, the HRA’s interpretative clause is linguistically stronger than its New Zealand counterpart,<sup>97</sup> secondly, the HRA provides for judicially enforceable remedies, and for the novel declaration of incompatibility. While the BORA contained no express remedies clause, implied remedies have been read into its provisions through judicial interpretation. The implication of a general remedies provision into the BORA pre-dated the implementation of the HRA,<sup>98</sup> but the subsequent development of an implied declaration of inconsistent interpretation has a clear heritage in the HRA’s own declaration of incompatibility. Further to this, the New Zealand Supreme Court has relied heavily on United Kingdom case-law—particularly in resolving issues concerning the available interpretative latitude under s.6 of the BORA and the degree of deference to be afforded to the elected branches of the state. As Butler’s chapter demonstrates, the exchange of constitutional ideas between common law courts is a vibrant, two-way, process.

## **Part V— Amendment, Repeal or a Bill of Rights for the UK?**

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<sup>96</sup> On which see: R. Masterman, “Interpretations, Declarations and Dialogue: Rights Protection under the Human Rights Act and Victorian Charter of Rights and Responsibilities” [2009] P.L. 112.

<sup>97</sup> Section 6 of the New Zealand Bill of Rights Act 1990 provides: “Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

<sup>98</sup> *Simpson v Attorney-General (Baigent’s Case)* [1994] 3 N.Z.L.R. 66.

Following the establishment of the Conservative/Liberal Democrat coalition government in May 2010, the Conservative policy to repeal the Act was replaced by an apparently watered-down commitment to establish a Commission to:

... investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in British law, and protects and extends British liberties.<sup>99</sup>

This signals something of a reprieve for the HRA, certainly in comparison with earlier Conservative statements indicating that it would be repealed and placed with a British Bill of Rights (without the promises to continue to enshrine them in British law and build upon them).<sup>100</sup> Advocates of the HRA had expected a period of frantic debate and defence after the election. Instead, at least in the short term, potential reform of the Act has effectively been kicked into the long grass. While the Bill of Rights Commission was appointed in March 2011 (and given until the end of 2012 to report), reports at the time of writing speculated that the Commissioners were unlikely to be able to agree a firm template for either change or stasis.<sup>101</sup> Thus, the Coalition looks likely to give the HRA further time to establish itself within judicial and legal culture.

Secondly, the effect of financial cuts cannot be ignored. The Commission for Equality and Human Rights may have been spared from sudden quangocide (after appearing on an initial leaked list of public bodies under consideration for culling)<sup>102</sup> but it is nevertheless listed as a public body over which ministers have obtained powers in the Public Bodies Act 2012<sup>103</sup> to modify constitutional arrangements, funding arrangements and to amend or transfer functions. Even following the survival of the Equality and Human Rights Commission, the scale of the economies announced by the Ministry of Justice have serious

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<sup>99</sup> *The Coalition: Our Programme for Government* (2010), p.11.

<sup>100</sup> For instance, D. Cameron, “Balancing Freedom and Security—A Modern British Bill of Rights”, speech to the Centre for Policy Studies, London, 26 June 2006.

<sup>101</sup> For evidence of apparent disagreements within the Commission, see: M. Pinto-Duschinski, “Commission must not compromise by recommending bill identical to the HRA”, *The Guardian*, 13 March 2012.

<sup>102</sup> *Daily Telegraph*, 23 September 2010.

<sup>103</sup> Schedules 3-5.

implications.<sup>104</sup> The practical impact of the HRA will be muted by cuts to legal aid which may severely curtail its deployment in increasing the accountability of public power. The search for economies in the health field may likewise have broad implications for disabled groups.<sup>105</sup>

In the longer term more fundamental debate about repeal of the HRA will surely re-emerge, particularly as a by-product of the Coalition partners wishing to reassert clearly identities as the next election approaches. Whereas the Conservative party manifesto for the 2010 general election pledged to repeal the HRA and replace it with a “modern, British Bill of Rights,” the Liberal Democrats advocated a written constitution as, among other purposes, the vehicle for consulting upon additional rights to the Human Rights Act and the mechanisms for enforcing them, and committed to a citizens’ convention to determine its contents, subject to a national referendum. The process of reform is still highly pertinent, especially in the light of the ongoing work of the Bill of Rights Commission. The United Kingdom could benefit in this regard from studying overseas experiences, as Alice Donald argues in her chapter.<sup>106</sup> From an examination of processes for developing Bills of Rights in several Commonwealth jurisdictions she distinguishes between elite-led (Canada and New Zealand) and more participatory processes (Australia and Northern Ireland). Meanwhile some, over time, became a hybrid of the two (South Africa). Donald identifies the methods and approaches that might be used to create a “UK” or “British” Bill of Rights, and places these in the context of the emergent idea of participation as both a right and a pre-condition to democratic legitimacy and popular ownership of the resulting constitutional document. As she acknowledges there are obstacles to the creation of consensus in favour of a new Bill of Rights, including low levels of public understanding and enthusiasm for the project, and the legal, constitutional and political implications of devolution. Nevertheless, based upon the evidence from comparable jurisdictions, Donald proposes principles which might underpin the conduct of any future process in the UK and against which it might be held up to scrutiny.

Moreover, the Coalition is proceeding to repeal of statutory initiatives taken by the Labour government—notably in the field of counter-terrorism—which, in practice, challenged its commitment to its own creation, the HRA. Several landmark changes have been announced: repeal of the Identity Cards Act 2006 and the destruction of information

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<sup>104</sup> Ministry of Justice, *Proposals for Reform of Legal Aid in England and Wales*, November 2010.

<sup>105</sup> Equality and Human Rights Commission, *Parliamentary Briefing on Health and Social Care Bill*, January 2011.

<sup>106</sup> Ch.00.

recorded in the National Identity Register, the proposed reduction of the power to detain suspected terrorists without charge to 14 days, narrowing the use of stop and search powers and the replacement of control orders with Terrorism Prevention and Investigation Measures. Helen Fenwick (“Conservative anti-HRA rhetoric, the Bill of Rights ‘solution’ and the role of the Bill of Rights’ Commission”) argues that these initiatives should not be mistaken for a pro-rights stance within government, arguing that the Conservative agenda clearly appears to be to enhance the autonomy of the Westminster Parliament at the expense of both Strasbourg’s influence and the maintenance of ECHR standards. Against this backdrop, Fenwick examines the role of the Bill of Rights Commission, considering the potential for any future Bill of Rights to rebalance the relationships between Parliament and courts (both domestic and European) through diluting the influence of Strasbourg jurisprudence (via a revision of the duty under s.2(1) of the HRA) or inserting a ‘re-balancing’ provision in a new Bill of Rights going beyond the exceptions and derogation system of the ECHR.

At a time when the future of the HRA is yet to be determined, our hope is that this collection will make a significant contribution to assessing the lasting impact of the United Kingdom’s human rights project, and towards shaping the nature of the debates yet to come.