THE MAGNETISM OF THE HUMAN RIGHTS ACT 1998

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I INTRODUCTION

It is a privilege to have been invited to speak at this conference in honour of Sir Ivor Richardson. In addition to his many other accomplished roles, Sir Ivor has presided with great distinction over a powerful Court of Appeal, whose enlightened case law and collegial solidarity are admired in the United Kingdom and across the Commonwealth. It is also a particular pleasure to return to New Zealand, on this occasion together with my wife, Katya. When I came to Auckland to attend the Commonwealth Conference in 1990, so brilliantly organised by Dame Sian Elias, I was overwhelmed by your hospitality and awed by the beauty of your country.

In *Lives of the Chief Justices*,[1] Campbell propagated the pleasant myth that, in *Somersett's case*,[2] Lord Mansfield had "first established the grand doctrine that the air of England is too pure to be breathed by a slave". In reality, Mansfield's ambivalent role towards the abolition of slavery was rather less impressive.[3]

In *Lange v Atkinson*,[4] New Zealand's Court of Appeal proclaimed another grand doctrine. They found the constitutional air of New Zealand too pure to be contaminated by uncertain English common law restrictions on political expression imposed by defamation law. When diplomatically explaining its reasons for departing from the English law, the Court of Appeal referred to differences between the New Zealand and the

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1 Baron John Campbell *Lives of the Chief Justices of England: Volume 2* (John Murray, London, 1849) 418. Lord Denning gave modern currency to the myth: see Lord Denning *Landmarks in the Law* (Butterworths, London, 1984) 219.

2 *The Case of James Somersett* (1772) 20 St Tr 1 (CP).

3 See Anthony Lester and Geoffrey Bindman *Race and Law* (Penquin, Harmondsworth, 1972) 30-34.

4 *Lange v Atkinson* [2000] 3 NZLR 385 (CA).

United Kingdom constitutional structures, such as its proportional system of parliamentary elections, its freedom of information legislation, and its New Zealand Bill of Rights Act, as well as to the fact that New Zealand has not encountered the worst excesses of the English national daily tabloids. On the basis of such nice distinctions, the Court of Appeal was able to preserve judicial comity with the Judicial Committee of the Privy Council, including its former President, Lord Cooke of Thorndon, and to explain why freedom of political expression in New Zealand should enjoy more breathing space than is given in English law by the qualified defence of media privilege recently propounded by the Law Lords in *Reynolds*.[5]

Both as a liberal democrat and as counsel in the *Reynolds* case, I was delighted with the outcome of *Lange* for open, democratic, and accountable government and an enlightened citizenry in your progressive Realm. I envy you your electoral system based on proportional representation, and your freedom of information legislation. But my delight at the *Lange* decision is qualified by disappointment that the British media and their readers do not yet enjoy the same breathing space for freedom of speech in communicating information and opinions about the workings of government and other matters of public interest. I hope that our Law Lords may yet be influenced by the enlightened approach of Chief Justice Sian Elias, in her landmark judgment in *Lange*,[6] and by the Court of Appeal's reasons for not following *Reynolds*.[7]

In spite of the distinctions made by the Court of Appeal, we continue to share a common political and legal heritage, and have much to learn from each other in developing our public philosophy and our systems of government. What I have to say will illustrate how much we share in common in our two political and legal cultures, in giving effect to the fundamental human rights protected by the United Nations Covenant on Civil and Political Rights, and by the European Convention on Human Rights.

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5 *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL). According to the Discussion Paper: *Reshaping New Zealand's Appeal Structure*, (Office of the Attorney-General, December 2000) para 17, "Some commentators have suggested that Privy Council decisions are of better quality than those made by New Zealand Courts. There is simply no evidence to support this suggestion."

6 *Lange v Atkinson* [1997] 2 NZLR 22 (HC).

7 I declare a professional interest as counsel not only in *Reynolds*, but also in the multiple appeals in *Loutchansky v Times Newspapers Ltd* [2001] 3 WLR 404 (EWCA); and *Loutchansky v Times Newspapers Ltd (No.2)* [2002] 1 All ER 652 (EWCA). Since delivering this paper, the House of Lords has refused leave to appeal.

II CONSTITUTIONAL DEVELOPMENTS IN THE UNITED KINGDOM

Just as in New Zealand, so too in the United Kingdom, there have been important changes to develop new constitutional principles and structures.[8] During the past half century, the process of constitutional adaptation has been actively carried out by the Judges. When interpreting the common law and legislation, British Courts have:

- Developed a distinct system of public law based on principles of legality and fair and rational administrative decision-taking, with generous rules about legal standing and flexible judicial remedies;
- Recognised that the individual has fundamental constitutional rights, and that the executive cannot use prerogative powers derived from the Crown to place itself beyond the rule of law and the reach of judicial review;
- Applied public law principles to "private" institutions exercising public powers;
- Worked out a practical way to reconcile the supremacy of European Community law with Parliamentary sovereignty, interpreting the European Communities Act 1972 as a unique constitutional measure;
- Introduced a purposive and contextual approach to statutory interpretation, the context including the use of extrinsic evidence, such as official reports and Parliamentary debates;
- Drawn upon the standards and values contained in the international human rights treaties by which the United Kingdom is bound (notably, the European Convention on Human Rights, even though it had not been incorporated into United Kingdom law by an Act of Parliament), European Community law, and the comparative constitutional case law of other democratic countries, to give greater weight to human rights when interpreting legislation, developing the common law, and making choices on issues of legal public policy;
- Given a generous interpretation to entrenched constitutional guarantees of human rights (sitting as the Judicial Committee of the Privy Council in appeals from other Commonwealth countries);[9] and

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8 See generally Anthony Lester "Developing Constitutional Principles of Public Law" [2001] PL 684.

9 *Minister of Home Affairs v Fisher* [1980] AC 319, 328 (PC) Lord Wilberforce. This approach has been adopted by the New Zealand Court of Appeal interpreting the New Zealand Bill of Rights Act 1990 ("NZBORA"): *Ministry of Transport v Noort* [1992] 3 NZLR 260, 268 (CA) Cooke P (as he then was) who called for a reading of the NZBORA to avoid "the austerity of tabulated legalism".

- Recognised positive constitutional rights in the common law, notably, to free expression, equality of treatment without discrimination, and access to justice.

These constitutional principles have been evolved by the judiciary without great public controversy.[10] They have had a significant influence upon the public philosophy and the day-to-day operation of the British system of government and law.

The executive and legislative branches of government have also profoundly changed the British constitution, by:

- Accepting, since 1966, the jurisdiction of the European Court of Human Rights to decide complaints of breaches of the European Convention by Parliament, government, the judiciary, or other public authorities;
- Joining the European Community in 1973, and accepting an ever greater sharing of political sovereignty with the institutions of a European Union;
- Creating positive rights to equal treatment without race, sex, or disability discrimination (and, in Northern Ireland, without discrimination based upon religious belief or political opinion), in a series of measures first introduced in the mid-1970s;
- Nationalising industries and services, mainly in the 1940s, and privatising them, especially in the 1980s and 1990s;
- Making European Convention rights directly enforceable in British Courts by means of the Human Rights Act 1998;
- Devolving legislative and executive powers to a Scottish Parliament, Welsh Assembly, and Northern Ireland Assembly, and their elected administrators, under three separate (and different) 1998 statutes;
- Creating a framework for political and legal co-operation across the border between Northern Ireland and the Republic of Ireland in the Good Friday Agreement 1998;
- Enacting the Race Relations (Amendment) Act 2000, making public authorities liable for indirect and direct racial discrimination in providing their services, and imposing positive duties on public authorities to promote racial equality and eliminate racial discrimination;

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10 With exceptions for Privy Council decisions considered too "liberal" by the governments of Commonwealth countries in the Caribbean and South East Asia, and exceptions for some judicial findings concerning Ministerial abuses of power.

- Enacting (but not yet bringing into force) the Freedom of Information Act 2000, to create a public right of access to information held by central and local government and many other public authorities;
- Using referenda to submit key constitutional issues to direct popular vote, as with the referendum on membership of the European Community in 1975, the regional referenda held in Northern Ireland, Wales, and Scotland on the creation of the devolved assemblies, and the commitment by all the main parties to hold a referendum on whether the United Kingdom should adopt the European single currency.
- Enacting the Political Parties, Elections and Referendums Act 2000, establishing an Electoral Commission, and regulating the registration and finances of political parties, political donations and expenditure, election and referendum campaigns, and the conduct of referenda; and
- Removing most of the hereditary element in the House of Lords, without emulating New Zealand's decision to opt for a unicameral Parliament.

There is no political consensus about these government-driven constitutional changes, even though (with the exception of the use of prerogative powers to accept the jurisdiction of the European Court of Human Rights) they have all been approved by the democratically elected House of Commons. Many of the changes introduced by Tony Blair's New Labour administration (with Liberal Democrat support) are still contested by the Conservatives, and the constitutional resettlement is unnecessarily complex and incomplete. A future Government will surely have to introduce a coherent constitutional charter, including a federal framework and a British Bill of Rights, together with an independent Supreme Court from which the Lord Chancellor is excluded.

III BACKGROUND TO THE UK HUMAN RIGHTS ACT 1998

I shall discuss the practical impact of the most successful of the Blair Government's constitutional reforms – the Human Rights Act 1998, which came into force on 2 October, 2000. I should declare my personal interest. I campaigned for some thirty years for the incorporation of the European Convention on Human Rights into United Kingdom law, so that our courts would be able to provide speedy and effective remedies for breaches of Convention rights.[11] The enactment of New Zealand's Bill of Rights Act in 1990 gave me hope that we might follow suit in the United Kingdom.

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11 See Anthony Lester and David Pannick *Human Rights Law and Practice* (1999) paras 1.34-1.44.

In 1994, soon after I was appointed to the House of Lords, I introduced a Private Member's Bill[12] designed to give the Convention rights a similar status in United Kingdom law to that of directly effective European Community law or of the Canadian Charter of Rights. It would have empowered the courts to strike down inconsistent existing and future Acts of Parliament, imposed a duty on public authorities to comply with the Convention, and created effective remedies (including damages) for breaches of Convention rights. The Bill had a turbulent passage through the Lords. It was mutilated by wrecking amendments, supported by Conservative Ministers.

Fortunately, senior Judges including the Lord Chief Justice, Lord Taylor of Gosforth, Lord Browne-Wilkinson, and the present Lord Chief Justice, Lord Woolf of Barnes, supported the Bill. But given the political climate of concern about threats to Parliamentary sovereignty, perceived to come from the supremacy of European Community law, they suggested that it would be prudent to devise a measure (modelled upon the New Zealand Bill of Rights Act), that did not give the courts the express power to strike down inconsistent legislation.

I heeded their wise pragmatic advice. My second Private Member's Bill, introduced in 1996,[13] was a strengthened version of the New Zealand Act. It was closer to Sir Geoffrey Palmer's original model than the version that was eventually enacted.[14] In preparing my Bill, I was much assisted by Sir Kenneth Keith, who had advised Sir Geoffrey, and who had been Chairman of the New Zealand Law Commission before being appointed to the New Zealand Court of Appeal. So it was that a strengthened version of the New Zealand Bill, via my second Private Member's Bill, influenced the Blair administration when it won office in May 1997.[15]

Although I can say that the Human Rights Act 1998 has an important New Zealand pedigree, we can only guess at the extent of its New Zealand parentage. This is because the Lord Chancellor and the Home Secretary have refused me access, for another 28 years, to the civil service policy studies upon which Ministerial decisions were made in shaping the Bill. I cannot imagine what embarrassing official secrets need to be so closely guarded

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12 For the Second Reading debate on the first Human Rights Bill, see (25 January 1993) 560 HLD col 144.

13 For the Second Reading debate on the second Human Rights Bill, see (5 February 1997) 568 HLD col 1725.

14 See, Sir Geoffrey Palmer and Matthew Palmer *Bridled Power – New Zealand Government Under MMP* (3 ed, Oxford University Press, Auckland, 1997), and in particular chapter 15 entitled "The New Zealand Bill of Rights Act" 264-277.

15 In October 1997, the Government published a White Paper *Rights Brought Home* (1997) CM 3782, together with the Bill itself.

against public disclosure - probably nothing more than the *amour propre* of Ministers and their advisers.[16]

However, the Human Rights Act 1998 is elegant, imaginative, subtle and concise, owing much to the creative insight and skill of the First Parliamentary Counsel, Sir Christopher Jenkins. It is the linchpin of the constitutional re-settlement of the different nations and regions of the United Kingdom, guaranteeing the fundamental rights and freedoms of everyone within the United Kingdom jurisdiction. In 1998, three centuries after Parliament won its own constitutional rights, Parliament belatedly recognised that the peoples of the United Kingdom are endowed with positive constitutional rights enforceable against the public authorities of the State. A half a century after the European Convention on Human Rights was drafted, the Human Rights Act linked fundamental human rights and freedoms with the written and unwritten laws of the United Kingdom, enabling British Courts to provide effective remedies. The hugely overloaded European Court of Human Rights, to which some 800 million women and men in forty-three States have direct access,[17] is now able to work in partnership with British courts, instead of acting in place of them.

It is a measure of the significance of this measure that the Government delayed bringing it fully into force for almost two years after its enactment. During that hiatus, some £4.5 million of public money was spent on training members of every court and tribunal in the land in preparation for the coming into force of the Act on 2 October 2000.[18] The Home Office had lead responsibility for the policy of the Human Rights Act and co-ordinated departmental preparations for its implementation within government.[19]

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16 However, relief may be at hand. I have complained to the Parliamentary Commissioner for Administration of this refusal as an act of maladministration. If that complaint fails, I shall have recourse to the Information Commissioner, when the Government is at last compelled to bring the Freedom of Information Act 2000 fully into force, in 2005.

17 The number of complaints to the Court increased by over 500% between 1993 and 2000. "The system is seriously overloaded and, with the relatively limited resources available to it, the Court's ability to respond is in danger". "Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights" (27 September 2001) EG 1, 4.

18 See generally, Amanda Finlay "The Human Rights Act: The Lord Chancellor's Department's Preparations for Implementation" [1999] EHLR 512.

19 Working with the Human Rights Task Force, the Home Office published guidance on the Human Rights Act for public authorities; issued recommendations on good practice to all government departments; assisted with extensive internal training human rights programmes for government staff and instigated a review of legislation, policies and working practices, government-wide: see "Minutes of Evidence before the Joint Committee on Human Rights" (14th March 2001), and *Human Rights Comes to Life*: *The Human Rights Act 1998, Guidance for Departments* (2 ed, Cabinet Office Secretariat, 2000).

Nothing on such a scale had ever been done before, notably, to prepare the judiciary for entry into the European Community.

At first sight, it might have seemed a curious use of public money, given that the United Kingdom had been bound by the European Convention for half a century, and that British lawyers had played a conspicuous role on developing the case law of the European Court and Commission of Human Rights. But it proved to be a valuable use of public resources. During the hiatus, the legal profession, the civil service, public authorities and NGOs organised training programmes, and a large number of human rights law books and specialist law reports and law reviews were launched. That period of careful preparation helped to ensure that (contrary to the wild predictions of its critics in the right-wing sections of the media[20]) the Human Rights Act has not been abused, and that the Courts have not become clogged with unmeritorious cases.[21]

The Act is based upon a mature theory of the nature of Parliamentary democracy, constitutional government and the nature of the judicial process. The notion of sovereignty that it reflects is neither a metaphysical dogma nor a rigid mechanical rule. It is a flexible notion rooted in the political reality of the sharing of power between the legislature, the executive, and the judiciary that is needed to meet the changing needs of a modern democratic society.[22]

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20 It was suggested, for example, that local authorities might have to withdraw "wheelie-bins" and be made to cut down leylandii hedges (13 July 2000) *The Times*. For a critique of the Tabloid coverage of the coming into force of the Human Rights Act, see Francesca Klug "Target of the Tabloids" (14 July 2000) *The Guardian* London.

21 Of the cases received in the Administrative Court from 2 October 2000 to 31 December 2001, some 19% were identified as raising Human Rights Act issues. The 1998 Act has not, however, generated a large increase in the caseload of the Administrative Court. Practice Statement (Administrative Court: Annual Statement) [2002] 1 All ER 633.

22 As Lord Hoffmann observed in *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115, 131 (HL):

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The HRA will not detract from this power … But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may be passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way, the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from

The Act reconciles formal adherence to the doctrine of Parliamentary sovereignty,[23] with the need to enable the courts to provide effective legal remedies for breaches of Convention rights.[24] It is a constitutionally holistic measure: each branch of government – the legislature and executive, as well as the judiciary – is expected to use its public powers compatibly with Convention rights. Apart from Parliament itself,[25] the Act imposes a duty upon public authorities, including the Courts to act in a way that is compatible with the Convention rights.[26] It also enables claims to be made against public authorities for breaches of that constitutional duty,[27] and empowers the Courts to grant just and appropriate relief and remedies,[28] including damages. Its impact is all-pervasive.

During its brief life, the Act has created a magnetic field in which all three branches of the government must work to secure a fair balance between individual rights and the general interest of the community.

According to traditional English constitutional theory, the Human Rights Act is merely an ordinary statute, subordinate to the doctrine of absolute parliamentary supremacy.[29] In

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those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

23 See further, Nicholas Bamforth "Parliamentary sovereignty and the Human Rights Act 1998" [1998] PL 572.

24 Compare, Lord Bingham CJ in *Brown v Stott* [2001] 2 WLR 817, 834-835 (PC): "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies …".

25 The broad definition of "public authority" in the Human Rights Act 1998, s 6 does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament: see the Human Rights Act 1998, s 6(3). However, it includes the House of Lords in its judicial capacity: see the Human Rights Act 1998, s 6(4).

26 Human Rights Act 1998, s 6 (UK).

27 Human Rights Act 1998, s 7 (UK).

28 Human Rights Act 1998, s 8 (UK).

29 For an early judicial statement on this, see Lord Steyn in *Reg v DPP ex parte Kebilene* [2000] 2 AC 226 (HL): "It is crystal clear that the carefully and subtly drafted Human Rights Act 1998 preserves the principle of parliamentary sovereignty. In a case of incompatibility, which cannot be avoided by interpretation under s 3(1) [of the HRA], the courts may not disapply the legislation. The court may merely issue a declaration of incompatibility …".

reality, however, Dicey's insistence that every Act of Parliament is of equal value in the eyes of the law, and that no Act can trump a later statute, is no longer true.[30]

The Courts have recognised that the Human Rights Act is no ordinary law. It is a fundamental constitutional measure of greater contemporary significance to the protection of human rights than any previous constitutional measure.[31] In the absence of a clear Parliamentary intention to amend the Human Rights Act or to limit the protection of the Convention rights it embodies, the Courts give it precedence over subsequent legislation.[32]

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30 Alfred Venn Dicey *Introduction to the Study of the Constitution* (10 ed, Macmillan, London, 1959). Even Dicey was not able to practise his austere constitutional precepts when it came to Asquith's Irish Home Rule Bill, to which Dicey denied legitimacy on the ground that it over-rode the wishes of the Protestant majority in Northern Ireland. In spite of his cherished principles of parliamentary sovereignty and the rule of law, Dicey contended that, if enacted, the Bill would have no constitutional validity as a law; he also argued that it would be justifiable for the Ulster Unionists to resort to rebellion, if necessary, to prevent Irish Home Rule: see Alfred Venn Dicey *A Fool's Paradise: Being a Constitutionalist's Criticism on the Home Rule Bill of 1912* (1913), at xxix, 121, and 127.

31 Except for the European Communities Act in areas where Community law governs and protects human rights, for example, in forbidding discrimination based on nationality or sex, and specific human rights legislation, such as the Sex Discrimination Act 1975 and the Race Relations Act 1976.

32 See for example, *Thoburn & Ors v Sunderland City Council & Ors* [2002] EWHC 195; [2002] 3 WLR 247 (EWCA) paras 63-64 per Laws LJ:

> In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental … And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional statutes'. The two categories must be distinguished on a principled basis … Examples [of constitutional statutes] are the Magna Carta, the Bill of Rights 1689 … the HRA [Human Rights Act] ….
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> Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes …
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> This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution … But it preserves the sovereignty of the legislature and the flexibility of our unmodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand …

The deliberate omission from the Human Rights Act of the equivalent of section 4 of the New Zealand Bill of Rights Act 1990 is significant. It has avoided the risk that the Courts would have applied the doctrine of implied repeal to the interpretation of the Act, with the result that a future Parliament would have been deemed to have intended, by implication, to depart from Convention rights in a later statute. Such an approach would have undermined the effectiveness of the Act in securing compatibility between future legislation and Convention rights.[33]

The ghost of the doctrine of implied repeal, preserved by section 4 of the Bill of Rights Act, continues to haunt the jurisprudence of New Zealand's Court of Appeal.[34] I hope it is not presumptuous to suggest that your system would be improved if section 4 were repealed, in accordance with Sir Geoffrey Palmer's original design.

IV READING LEGISLATION TO BE COMPATIBLE WITH HUMAN RIGHTS

Section 3 of the Human Rights Act is pivotal to the new constitutional system.[35] It imposes a duty on courts and tribunals to strive to avoid incompatibility between domestic legislation and the Convention. It commands that, "So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible the Convention rights".[36] The key words are "possible" and "must". As the White Paper explained:[37]

> This goes beyond the present rule which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret

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33 During the Parliamentary debates, Lord Simon of Glaisdale attempted to amend the Bill to preserve the doctrine of implied repeal: (18 November 1997) 583 HLD col 518-519. The Lord Chancellor opposed the amendment ((18 November 1997) 583 HLD col 522) on the ground that s 3 involves "a wholly different scheme" which "rejects the route of the doctrine of implied repeal".

34 Andrew Butler "Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand" [2001] PL 586, discussing the nuances of the various judgments of the New Zealand Court of Appeal *R v Poumako* [2000] 2 NZLR 695 (CA); and *R v Pora* [2001] 2 NZLR 37 (CA).

35 Compare with s 6 of the NZBORA.

36 "Convention rights" are defined in s 1(1) of the Human Rights Act. They are the rights guaranteed under Articles 2 to 12, and 14 of the Convention, Articles 1 to 3 of the First Protocol to the Convention, and Articles 1 and 2 of the Sixth Protocol to the Convention. Article 13 is not included, but the courts will no doubt continue to have regard to the need to provide effective remedies for breaches of Convention rights, in accordance with Article 13.

37 White Paper *Rights Brought Home* (1997) CM 3782, paragraph 2.7.

> legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.[38]

Section 3 requires courts and tribunals, using techniques developed by Commonwealth and United States courts, to construe constitutional Bills of Rights, to interpret apparently unbridled powers to ensure they are exercised in accordance with Convention rights, and to read into legislation necessary procedural safeguards of Convention rights.[39]

Although our Courts have been required to adopt new interpretative techniques, by and large, they have been careful not to usurp the legislative powers of Parliament by adopting a construction which it could not be supposed that Parliament had intended by enacting the Human Rights Act, and by previously or subsequently enacting the impugned statutory provision.[40] Where only a fanciful or perverse construction is possible to make the statute compatible with Convention rights, or where the problem created by the apparent mismatch between the statute and Convention rights requires extensive redrafting and choice among different legislative options, the courts will make a

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38 Compare with s 6 of the NZBORA; *R v Phillips* [1991] 3 NZLR 175, 177 (CA) Cooke P, and *Ministry of Transport v Noort* [1992] 3 NZLR 260, 272 (CA) Cooke P.

39 See Lord Lester of Herne Hill QC "The Art of the Possible: Interpreting Statutes Under the Human Rights Act"[1998] EHRLR 665; Francis Bennion "What Interpretation is 'Possible' Under Section 3(1) of the Human Rights Act 1998?" [2000] PL 77. Lord Steyn, "Incorporation and Devolution – A Few Reflections on the Changing Scene" [1998] EHRLR 153; Stephen Grosz, Jack Beatson and Peter Duffy *Human Rights. The 1998 Act and the European Convention* (Sweet and Maxwell, London, 2000) 33-52.

40 In *R v Offen and Others* [2001] 1 WLR 253 (EWCA), the Court of Appeal was asked to determine the compatibility of the Crime (Sentences) Act 1997, s 2 (which required the imposition of a mandatory life sentence where a defendant is convicted of a second serious offence *unless* "exceptional circumstances" exist for not so doing) with Article 5 of the Convention. The word 'exceptional' in the legislation had previously been given a narrow construction by the courts with draconian results. Supported by s 3 of the Human Rights Act, the Court of Appeal interpreted the word "exceptional" constructively to determine that the true intention of Parliament regarding the provision was to ensure that those who were a danger to the public were sent to prison for life, and those who were not such a danger to the public were not. Thus, it was an exceptional situation, so far as Parliament was concerned, if an offender committed three serious offences but was not a danger to the public.

In *Donoghue v Poplar Housing and Regeneration Community Association Limited* [2001] EWCA 595; [2002] QB 48, 73 (EWCA) Lord Woolf CJ, said, "The most difficult task which courts face is distinguishing between legislation and interpretation. Here practical experience of seeking to apply section 3 will provide the best guide. However, if it is necessary to obtain compliance to radically alter the effect of the legislation this will be an indication that more than interpretation is involved."

The New Zealand Court of Appeal adopted a similar approach in *Moonen v Film and Literature Board of Review* [1999] 5 HRNZ 224, 233 (CA).

declaration of incompatibility. By doing so, they mark the boundary between the powers of the judiciary, the legislature, and the executive, in deciding how the constitutional principles contained in the Act are to be applied.

This boundary is not always easy to define, as the House of Lords decision in *In Re S*[41] demonstrates. The appeal concerned the impact of the Human Rights Act 1998 on Parts III and IV of the Children Act 1989. The Court of Appeal had made major adjustments to the construction and application of the Children Act. The question before the House of Lords was whether the Courts had power under section 3 of the Human Rights Act to introduce such a wide range of rights and liabilities into the statutory scheme, which had not been sanctioned by Parliament. The House of Lords were unable to justify the judicial innovations of the Court of Appeal, as a legitimate interpretative exercise in accordance with section 3. Lord Nicholls stated:

> [t]he reach of this tool [section 3] is not unlimited. Section 3 is concerned with interpretation … The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty … For present purposes it is sufficient to state that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate.

The House of Lords concluded that the Court of Appeal had passed well beyond the boundary of interpretation, and had amended the Children Act with far-reaching practical ramifications for local authorities and their care of children.

The recent case law has made clear that the power to read legislation robustly to comply with Convention rights is limited by the constitutional separation of powers in a Parliamentary system of government. Section 3 does not authorise the Courts to usurp the law-making powers exclusively vested in Parliament. The Lord Chancellor foresaw, during the debates on the Bill, that "in [ninety-nine per cent] of the cases that will arise, there will be no need for judicial declarations of incompatibility".[42] However, as the Lord Chancellor also observed,[43] the Act "does not allow the courts to set aside or ignore Acts of Parliament. [Section] 3 preserves the effect of primary legislation which is incompatible

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41 *In Re S (FC) (Appellant), In Re S and Others (Respondents) In Re W and Others (Respondents) (First Appeal) (FC) In Re W and Others (Respondents) (Second Appeal) (Conjoined Appeals)* [2002] UKHL 10 (HL).

42 (5 February 1998) 585 HLD 840.

43 (3 November 1997) 583 HLD cols 1230-1231.

with the Convention. It does the same for secondary legislation where it is inevitably incompatible because of the terms of the parent statute".

The most controversial use of section 3 has been made by the House of Lords in *R v A*.[44] The Youth Justice and Criminal Evidence Act 1999 precluded the Court from giving leave to cross-examine an alleged victim of rape about her previous sexual experience, except in limited circumstances. The defendant alleged that the restriction was incompatible with his Convention right to a fair criminal trial. A majority of the House of Lords used section 3 of the Human Rights Act to read down the exclusion. In his powerful dissenting speech, Lord Hope observed[45] that the whole point of the statutory provision, as had been made clear during the Parliament debates, was to address the mischief thought to have arisen due to the width of the discretion given to the trial judge. In his view, it was not possible, without contradicting the plain intention of Parliament, to read in a provision that would enable the Court to exercise a wider discretion. It is at least arguable that the Law Lords went too far on this occasion.

V DECLARATIONS OF INCOMPATIBILITY

If the Court finds itself unable to use section 3 to achieve compatibility by finding a possible reading that complies with the Convention rights, it is empowered by section 4 to make a declaration of incompatibility.[46] A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so.[47]

The declaration of incompatibility is not an effective remedy for the victim who is unable to obtain a judicial remedy for breach of a Convention right. This is because by definition the breach is authorised and required by legislation that cannot possibly be read to be compatible. The offending legislation remains valid and effective, unless and until legislative amendments are made.[48] Parliamentary sovereignty is maintained, and

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44 *R v A (No 2)* [2001] 2 WLR 1546 (HL).

45 *R v A (No 2)* [2001] 2 WLR 1546, 1593 (HL) Lord Hope.

46 The political compromise represented by an interpretative Bill of Rights of the kind contained in the Human Rights Act was envisaged by Professor Hersch Lauterpacht (later, Judge Sir Hersch Lauterpacht, British Judge on the International Court of Justice) in his brilliantly original and prophetic study of the need for an "International Bill of Rights" published in 1945. Hersch Lauterpacht *An International Bill of the Rights of Man* (Columbia University Press, New York, 1945). Lauterpacht suggested that, in situations where no interpretation will be able to deprive of its obvious meaning, an Act of Parliament clearly designed to change or to abrogate an obligation of the Bill of Rights, the courts, while giving effect to the statute, should be given the right - and must be under the duty - to declare that the statute is not in conformity with the Bill of Rights.

47 *R v A (No 2)* [2001] 2 WLR 1546, 1563 (HL) Lord Steyn.

48 Human Rights Act 1998 (UK), s 4(6).

Parliament's sovereign powers remain intact in deciding whether to approve legislation to remove the incompatibility.

However, there is practical value to the victim in the sense that the declaration of incompatibility will give powerful support to any subsequent proceedings before the European Court of Human Rights. In that way, it provides a healthy incentive to the Government to take speedy remedial action, rather than to face the likelihood of eventual defeat before the European Court. There is also practical value to the executive and legislative branches, because a declaration of incompatibility enables the Government to take speedy remedial action by introducing a so-called remedial order[49] to remove the incompatibility without the need to have recourse to primary legislation.

VI CHOOSING BETWEEN SECTION 3 AND SECTION 4

To choose when to use section 3 and when to use section 4 of the Human Rights Act requires the Courts to respect the constitutional principles of Parliamentary democracy under the rule of law and the separation of powers. They need, where possible, to secure compliance with the Convention rights, and to provide effective remedies for breaches of those rights. On the other hand, they need to recognise that the democratic imperative is well served when the Government takes remedial action, under section 10, with the remedial order being scrutinised by the Parliamentary Joint Select Committee on Human Rights and by both Houses under the affirmative resolution procedure. A balance has to be maintained by the Courts between respect for the legislative sovereignty of Parliament and the need to provide effective remedies for breaches of Convention rights.

Where the surgery required to make legislation compatible with Convention rights is extensive and invasive, and where important policy choices remain open to give effect to the Court's decision, the principles of legal certainty and the separation of powers lead Courts to defer to Parliament by making a declaration of incompatibility rather than attempting judicial amendment. Indeed, such deference may be shown even in legal systems where the Court has the power to strike down legislation as being unconstitutional.[50]

As Lord Hope has emphasised,[51] when recourse is had to section 3 of the Human Rights Act:

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49 Human Rights Act 1998 (UK), s 10.

50 See for example, *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries and Housing* [2001] 2 WLR 1622 (PC); and contrast with *Vriend v Alberta* [1998] 1 SCR 493.

51 *R v Lambert* [2001] 3 WLR 206 (HL).

> [g]reat care must be taken in cases where a different meaning has to be given to the legislation from the ordinary meaning of the words used by the legislator, to identify precisely the word or phrase which, if given its ordinary meaning, would otherwise be incompatible. Just as much care must then be taken to say how the word or phrase is to be construed if it is to be made compatible.

There was a good example of the use of the declaration of incompatibility in a recent case.[52] A majority of the Court of Appeal decided that a statutory scheme which inflicted fixed and cumulative penalties upon lorry drivers and haulage companies for bringing clandestine entrants into the UK was unfair to the carriers and in breach of their Convention rights to a fair trial and to property. It had been submitted on the Home Secretary's behalf that any apparent incompatibility could be removed by robust judicial interpretation. However, the Court held that it could not create a wholly different scheme, so as to provide an acceptable alternative means of immigration control. To create a fresh scheme, purportedly under section 3, would be failing to show the judicial deference owed to Parliament as legislators.

VI REMEDIAL ORDERS

Where legislation has been declared to be incompatible by a United Kingdom Court,[53] or where the European Court of Human Rights has found legislation to be incompatible, the Human Rights Act empowers the taking of remedial action, by means of subordinate legislation, using a special 'fast-track' legislative procedure with enhanced Parliamentary scrutiny.[54] In the absence of express statutory authority, New Zealand's Court of Appeal has found it possible to make declarations of inconsistency with the Bill of Rights Act.[55]

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52 *International Transport Roth GmbH and Others v Secretary of State for the Home Department* [2002 EWCA Civ 158, [2002] 3 WLR 344 (EWCA). I should declare an interest as Counsel for some of the Respondents. At the time of writing, it seems likely that the Government will make a remedial order rather than pursue an appeal to the House of Lords.

53 Only the senior courts have the power to make a declaration of incompatibility: see Human Rights Act 1998 (UK), s 4(5).

54 Human Rights Act 1998 (UK), s 10, and schedule 2.

55 See *Moonen v Film and Literature Board of Review* [1999] 5 HRNZ 224, 234 (CA) relying upon s 5 of the NZBORA. Thomas J addressed the point directly in *Quilter v Attorney* General [1998] 1 NZLR 523 (CA), and concluded in *R v Poumako* [2000] 2 NZLR 69, 71 (CA) that "it would be a serious error not to proclaim a violation if and when a violation is found to exist in the law, whether it be the common law, statutory law or the administration of the law …". Thomas J endorsed the need for such a judicial power, its usefulness, and the impact that it might have upon parliamentary sovereignty. Whilst it now appears settled that the judges have such a power of scrutiny, its scope remains largely undefined. This has been highlighted by the Judges' Rules Committee (in its Minutes of 6 July 2000) which noted, "[t]he issue … is whether or not [the Committee] should make rules about indications of inconsistency". The Committee referred to United Kingdom

However, because there are no provisions equivalent to section 4 and section 10 of the Human Rights Act, such a declaration may at best serve as an indicator to Parliament, and to the United Nations Human Rights Committee should it come to consider the issue. In the light of United Kingdom experience, that appears to be a significant weakness in the New Zealand scheme.

Thanks to the robust way in which the Courts have applied section 3 of the Human Rights Act, the Court of Appeal has so far found it necessary to make declarations of incompatibility in only three instances.[56]

VII APPLYING THE PRINCIPLE OF PROPORTIONALITY

For many years, the principle of proportionality was regarded as novel and dangerous, encouraging judges to substitute their views of the merits of legislation or administrative action for those of democratically elected legislators and Ministers. That was one reason why the House of Lords felt unable, in *Brind*,[57] to decide that Ministers were bound to comply with the Convention rights when exercising their public powers. As a result, Ministers were bound to act rationally in the *Wednesbury* sense,[58] but not to exercise a sense of proportion by ensuring that their powers were not used excessively.[59]

Section 6 of the Human Rights Act filled the *Brind* gap by requiring public authorities to act in a way that is compatible with the Convention rights, including complying with the principle of proportionality. The way in which the Courts have applied the principle shows a keen sense of proportion about the nature and limits of the judicial process.

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practice on the point, noting that a declaration of incompatibility made by the courts does not affect the validity of the statute. See <http://www.courts.govt.nz/rulescommittee/minutes/june00.doc>.

56 *H v Mental Health Review Tribunal N&E London Region* [2001] 3 WLR 512 (EWCA); *Wilson v First County Trust Ltd (No 2)* [2001] 3 WLR 42 (EWCA); and *International Transport Roth GmbH and Others v Secretary of State for the Home Department* [2002] 3 WLR 344 (EWCA). The High Court of Northern Ireland has also made a declaration of incompatibility in *Re McR, an Application for Judicial Review* [2002] NIQB 58, in so far as s 62 of the Offences against the Person Act 1861 purports to make heterosexual buggery between consenting adults a criminal offence.

57 *R v Secretary of State for the Home Department; ex parte Brind* [1991] 2 AC 696 (HL).

58 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (EWCA).

59 See Jeffrey Jowell and Anthony Lester "Beyond *Wednesbury*: Towards Substantive Principles of Administrative Law" [1987] PL 386; "Proportionality: Neither Novel Nor Dangerous" in Jeffrey Jowell and Dawn Oliver (eds) *New Directions in Judicial Review* (Stevens, London, 1988).

In applying this principle, the Court asks itself whether:[60]

(1) The legislative objective is sufficiently important to justify limiting a Convention right;

(2) The means used to impair the Convention right are rationally connected to it; and

(3) The means used to impair the Convention right are no more than is necessary to accomplish that objective.

This approach is, of course, well known across the Commonwealth; and, for some thirty years, British Courts have acquired experience in applying the principle when deciding, in areas where European Community law governs, whether a statutory rule is necessary and proportionate to the legislative aim. This has involved the judicial review of Acts of Parliament against European standards, requiring the courts to evaluate the measure's impact in the light of its aims, having regard to evidence about its policy and the social and economic context in which it operates.[61] That is also what is required in interpreting legislation to be compatible with Convention rights.

VIII JUDICIAL DEFERENCE TO THE LEGISLATIVE AND EXECUTIVE BRANCHES

That raises the crucial question of the degree of deference owed by the Courts to the Legislature and the Executive in relation to the means used to achieve social and economic goals.[62] Simon Brown LJ observed in *Roth* (the lorry drivers' case) that:[63]

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60 *R (Daly) v Home Secretary* [2001] 2 WLR 1622 (HL), at 1634-36, per Lord Steyn, following Elloy *de Freitas v The Permanent Secretary of the Ministry of Agriculture, Fisheries, Land and Housing* [1999] AC 69, 80 (PC), per Lord Clyde.

61 See for example, *R v Employment Secretary, ex parte Equal Opportunities Commission* [1995] 1 AC 1 (HL).

62 In *R v DPP ex p Kebilene* [2000] 2 AC 226 (HL) Lord Hope explained that: "In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention … It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection …". See, also, *Brown v Stott* [2001] 2 WLR 817, 834-835, 842 (PC) Lord Bingham CJ.

63 *International Transport Roth GmbH and Others v Secretary of State for the Home Department* [2002] 3 WLR 344, 357 (EWCA) Simon Brown LJ.

> Judges nowadays have no alternative but to apply the Human Rights Act. Constitutional dangers exist in too little activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.

In the same case, Jonathan Parker LJ noted that:[64]

> In one sense the interpretative obligation in section 3 is the corollary of 'deference', in that the point at which interpretation shades into legislation will inevitably be affected by the degree of 'deference' which the courts should accord to the legislative body in recognising its discretionary area of judgment … [T]here is to this extent a degree of tension between the scope of the interpretative obligation placed on the courts by section 3 on the one hand, and the extent of the legislature's discretionary area of judgment on the other.

In his dissenting judgment, Laws LJ distilled the following principles from the developing case law:[65]

(1) Greater judicial deference is paid to an Act of Parliament than to a decision of the executive or a subordinate measure.[66]

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64 *International Transport Roth GmbH and Others v Secretary of State for the Home Department* [2002] 3 WLR 344, 364 (EWCA) Jonathon Parker LJ.

65 *International Transport Roth GmbH and Others v Secretary of State for the Home Department* [2002] 3 WLR 344, 381 (EWCA) Laws LJ.

66 Compare *R v Lambert* [2001] 3 WLR 206, 225 (EWCA) which concerned the imposition of a reverse burden of proof in a criminal statute, the Misuse of Drugs Act 1871. Lord Woolf sitting in the Court of Appeal (Criminal Division) stated:

> It is also important to have in mind that legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention. The courts are required to balance the competing interests involved.

In *Poplar v Donoghue* [2001] 3 WLR 183, 193 (EWCA), the Court of Appeal considered whether in seeking an order for possession of a dwelling-house under s 21(4) of the Housing Act 1988, the claimant Housing Association was contravening the defendant's right to respect for her private and family life and her home under Article 8(1) of the Convention. Lord Woolf stated that:

> In considering whether Poplar can rely on article 8(2), the court has to pay considerable attention to the fact that Parliament intended when enacting section 21(4) of the 1988 act to give preference to the needs of those dependent on social housing as a whole over those in the position of the defendant. The economic and other implications of any policy in this area are extremely complex and far-reaching. This is an area where, in our judgment, the courts must read the decisions of Parliament as to what is in the public interest with particular deference. The limited role given to the court under section 21(4) is a legislative policy decision. The correctness of this

(2) There is greater scope for deference where the Convention right requires a balance to be struck, rather than where the Convention right in question is stated in terms which are unqualified.[67]

(3) Greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts.

(4) Greater or lesser deference will be due according to whether the subject matter lies more readily within the expertise of the democratic powers or the courts.

IX THE NEW DUTY UPON PUBLIC AUTHORITIES

The Act radically alters the position of public authorities, filling the *Brind* gap by creating a new constitutional or public law tort for which there is direct liability. There is a breach of the section 6 duty, whenever a public authority acts in a way which is incompatible with the Convention rights. Proceedings may be brought directly against the public authority;[68] and there is an express power to award damages for the unlawful action of a public authority, where this is necessary to afford just satisfaction to the victim.[69] The concept of "public authority" is expansively defined to include "any person certain of whose functions are functions of a public nature.[70] Accordingly, a private body

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> decision is more appropriate for Parliament than the courts and the Human Rights Act 1998 does not require the courts to disregard the decisions of Parliament in relation to situations of this sort when deciding whether there has been a breach of the Convention.

67 *Reg v DPP; ex parte Kebilene* [2000] 2 AC 226, 381 (HL) Lord Hope.

68 Human Rights Act 1998 (UK), s 7(1)(a).

69 Human Rights Act 1998 (UK), s 8. See, for example, Duncan Fairgrieve "The Human Rights Act 1998, Damages and Tort Law" [2001] PL 695. Compare *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA).

70 Human Rights Act 1998, s 6(3)(b). In *Donoghue v Poplar Housing and Regeneration Community Association Ltd* [2002] 3 WLR 183, the Court of Appeal held that the definition of a public authority and what constitutes a public function should be given a generous interpretation. Any person or body whose functions are of a public nature constitute public authorities for the purposes of s 6. Hybrid bodies, which have functions of a public and private nature, are public authorities but *not* in relation to acts of a private nature. What makes an act which would otherwise be private, public is, in Lord Woolf's words (at 198):

> A feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public.

must act compatibly with Convention rights where, for example, it administers a prison, runs a railway, or deals as a regulatory body with complaints against the press.

X THE IMPACT UPON PRIVATE LAW RELATIONSHIPS

Courts and tribunals are also defined as public authorities,[71] and are therefore bound to act compatibly with the Convention rights in declaring the common law and interpreting legislation. The fact that courts and tribunals have a duty as public authorities to act compatibly with the Convention is significant because of the potential "horizontal effect" upon private law relationships.[72] Through the inclusion of courts and tribunals as public authorities, then, the Human Rights Act arguably indirectly extends its scope to the application of Convention rights in the context of private law relationships.[73] Indeed, the Lord Chancellor made it clear, during the debates on the Bill,[74] that the duty of acting compatibly with the Convention rights was intended to apply not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals.

The Act is especially likely to have an impact upon private law relationships where the European Convention imposes positive obligations on the state to protect individuals against breaches of their rights.[75]

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71 Human Rights Act 1998 (UK), s 6(3)(a). Compare with s 3(a) of the NZBORA, which applies the Bill of Rights more restrictively to acts done by the legislative, executive, or judicial branches of the government of New Zealand.

72 See further, for example, Murray Hunt ″The 'Horizontal Effect' of the Human Rights Act″ [1998] PL 423; The 1998 Act and the European Convention (1999), section 4-46; Lord Justice Buxton ″The Human Rights act and Private Law″ (2000) 116 LQR 48; Sir William Wade ″Horizons of Horizontality″ (2000) 116 LQR 217; Antony Lester and David Pannick "The Impact of the Human Rights Act on Private Law: The Knight's Move" (2000) 116 LQR 380; Sir William Wade and Christopher E Forsyth *Administrative Law* (8 ed, Oxford, Clarendon Press 2000) Appendix 2; and Tom de la Mare and Kate Gallafent "The Horizontal Effect of the Human Rights Act 1998" [2001] JR 29.

73 This point has not yet arisen directly for determination in New Zealand, although it was assumed by Hardie Boys J in *Baigent's case* [1994] 3 NZLR 667 (CA), and by Elias J in *Lange v Atkinson* [1997] 2 NZLR 22 (HC).

74 (24 November 1997) 583 HLD col 783.

75 In *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, 132 (ECHR) paragraphs 26-27, the European Court of Human Rights recalled that it has:

> [c]onsistently held that the responsibility of a state is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that state of its obligation under Article 1 to secure those rights and freedoms in its domestic law to everyone within its jurisdiction … [T]he state cannot absolve itself from responsibility by delegating its obligation to private bodies or individuals.

As certain sections of the British media feared that the Convention right to respect for private life[76] would be extended by the Courts beyond public authorities to unwarranted intrusions upon personal privacy by the media, this led them to oppose the Human Rights Bill and to press for an immunity for the media. They failed in their campaign, even though they damaged public support for the measure.[77] In the case of *A v B plc and another*, the appeal concerned an interim injunction granted to a married professional footballer preventing a newspaper disclosing or publishing any information concerning his sexual relationships with two women. In a reserved judgment, the Court of Appeal held:[78]

> [h]ere the conflict between one party's right to privacy and the other party's right of freedom of expression was especially acute … In drawing up a balance sheet between the respective interests of the parties the courts should not act as censors or arbiters of good taste. That was the task of others … Frequently what was required was not a technical approach to the law but a balancing of the facts. The weight which should be attached to each relevant consideration would vary depending on the precise circumstances.

The Court of Appeal made clear in *A v B* that the courts are not justified in interfering with the freedom of the press simply because there is no identifiable special public interest in particular material being published:[79]

> [a]ny interference with the press had to be justified because it inevitably had some effect on the ability of the press to perform its role in society … Regardless of the quality of the material which it was intended to publish, prima facie, the court should not interfere with its publication.

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76 Article 8 of the European Convention on Human Rights.

77 The media were not alone in seeking immunity. So did the Church of England. Geoffrey Robertson QC and Andrew Nicol QC commented acidly in *Media Law* (4 ed, Sweet & Maxwell, London, 2002) 61, that:

> The passage of the Human Rights Act through Parliament was marked by a display of a very English hypocrisy: the two institutions which preach loudest about human rights – the church of England and the press of England – both wanted to be exempted from it. The church because it wanted to keep on discriminating and the press because it wanted to invade privacy. Although God was given only a minor dispensation, Rupert Murdoch and his local vicar, Lord Wakeham (Chairman of the Press Complaints Commission), managed to persuade the Government to insert a novel provision to entrench 'freedom of expression'.

The compromise, contained in Section 12 of the Human Rights Act, discourages prior restraints on media publications, but fortunately does not immunise the media against liability for privacy intrusion.

78 *A v B plc and another* [2002] EWCA Civ 337, para 11, Lord Woolfe CJ.

79 *A v B plc and another*, above.

The main focus of the Convention is upon protecting the individual against the abuse of power by the public authorities of the state. However, like other national constitutional charters of human rights, it is necessary to extend protection beyond the State and its agents to "private governments" – those bodies that are private in form, but public in substance. The Courts have a duty of acting compatibly with the Convention not only in cases involving other public authorities in this extended sense, but also in developing the common law when deciding cases between private persons. For example, the media should celebrate rather than attack the impact of the Human Rights Act in giving greater weight to freedom of expression by way of defence to defamation claims as between private parties.[80]

One key question is whether the House of Lords will have recourse to the Human Rights Act and develop a right of personal privacy, whether by developing the existing torts, such as trespass and breach of confidence incrementally,[81] or by recognising a new free-standing cause of action. My guess is that they will adopt an incremental approach. Indeed, that is the approach of the Court of Appeal in *A v B plc.*

XI SCRUTINY OF LEGISLATION UNDER THE HUMAN RIGHTS ACT

The international obligations that bind Parliament when it exercises its sovereign law-making powers make it especially important for each House of Parliament to be well informed about the implications for the protection of human rights of proposed legislation. Parliament also needs to be well informed where the Government takes remedial action to amend a statutory provision declared by a United Kingdom Court to be incompatible with Convention rights.

It is instructive to compare the scrutiny machinery of our two systems. The final report of the Justice and Law Reform Committee,[82] on the proposals in Sir Geoffrey Palmer's radical 1985 White Paper *A Bill of Rights for New Zealand?*, considered that the scrutiny of legislative proposals for consistency with the Bill of Rights should be strengthened. It proposed the inclusion of a provision requiring the Attorney-General to report to

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80 See for example, *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL); *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 (HL)

81 As suggested by Sedley LJ in *Douglas v Hello! Ltd* [2001] 2 WLR 992 (EWCA), at 1025G-29G; but apparently over-ruled by the Court of Appeal in *Home Office v Wainwright* [2001] EWCA Civ 2081, paras 48-55 and 78-89, Buxton LJ.

82 *Final Report of the Justice and Law Reform Committee on a White Paper on A Bill of Rights for New Zealand* [1988] AJHR I 8C.

Parliament if a Bill derogates from the Bill of Rights. That recommendation was later enacted as section 7 of the New Zealand Bill of Rights Act 1990.[83]

Section 19 of the United Kingdom Human Rights Act goes much further. It requires the Minister in charge of every Bill, in either House of Parliament, before the Second Reading of the Bill, either to make a statement that in his view the Bill's provisions are compatible with the Convention rights, or to make a statement that, although he is unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill. When section 19 was included, few in Whitehall or Westminster appreciated how significant its practical impact would be upon the preparation and parliamentary scrutiny of legislation.

What has given section 19 its political potency is the Parliamentary Joint Select Committee on Human Rights,[84] of which I am privileged to be a member. The Select Committee, well-armed with its expert legal adviser, Professor David Feldman, and two Parliamentary Clerks, is able to monitor the operation of section 19 speedily and effectively, and to report to each House of Parliament our views as to the compatibility or lack of compatibility of legislative proposals. It focuses not only on the Convention, but also the other international human rights instruments by which the United Kingdom is bound, even though they have not been made directly effective in United Kingdom law.

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83 Clause 3 of my second Private Member's Bill took a leaf out of the NZBORA by providing that where a Bill introduced into either House of Parliament by a Minister of the Crown contains any provision which is or appears to be inconsistent with the Convention rights, notification shall be sent by the Minister to the Lord Chancellor and to the Speaker of the House of Commons drawing attention to the inconsistency or apparent inconsistency and explaining the reasons for the inconsistency or apparent inconsistency.

84 The Committee was envisaged in the White Paper *Rights Brought Home* (1997) CM 3782, paragraphs 3.7-3.8. However, the Government delayed the creation of such a committee. On 14 December 1998, the Leader of the House of Commons, Margaret Beckett MP said: "I am pleased to announce today that both houses will be asked to appoint a Joint Committee on Human Rights. It is intended to set up that Committee before the Human Rights Act 1998 comes fully into force so that it will have time to prepare its work" (14 December 1998) 332 HLD col 604. See further, Robert Blackburn "A Human Rights Committee for the UK Parliament – The Options" [1998] EHRLR 534-555. However, the Joint Committee on Human Rights was not established for another three years. The first meeting of the Committee was not held until 31 January 2001. Its origin lay in a proposal made in 1994 by Lords Simon of Glaisdale, Alexander of Weedon, Irvine of Lairg, and myself, that the House of Lords should set up systems to check Bills against the European Convention on Human Rights and other human rights treaties: see Second Reading debate on Human Rights Bill (16 February 1998) 306 HLD col 855 by Mike O'Brien MP, Minister of State. I had canvassed this idea in my maiden speech shortly after being appointed to the House of Lords: (23 November 1993) 550 HLD col 170.

The Justice and Law Reform Committee's report on the White Paper proposed a similar scrutiny committee for New Zealand,[85] but the proposal was not adopted. Once again, an idea conceived, but not ultimately implemented, in New Zealand has taken root in British soil, providing strengthened parliamentary scrutiny of the executive.

The New Zealand Cabinet Manual[86] requires Ministers to draw attention to any aspects of Bills that have implications for, or may be affected by, the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993. The British Cabinet Office Guidance to Departments is more detailed. It requires two stages of advice to Ministers as to the compatibility of Bills.[87] At the policy approval stage, a general assessment is to be made, not necessarily as a free-standing document, to alert Ministers to substantive European Human Rights Convention considerations. Once the Bill is drafted, departmental lawyers, in consultation with the Law Officers and the Foreign and Commonwealth Office, prepare a more formal document. This document goes to the Cabinet Legislation Committee and forms the basis of the section 19 statement in each House.

The Guidance to Government Departments sets out the criteria for making a section 19 statement of compatibility: "A Minister must be clear that, at a minimum, the balance of argument supports the views that the provisions are compatible" and that the statement "will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court".[88] The Guidance also covers the question of disclosure to Parliament of the thinking behind section 19 statements, stating "[t]he Minister should be ready to give a general outline of the arguments which led him or her to the conclusion reflected in the statement. Although it would not normally be appropriate to disclose to Parliament the legal advice to Ministers (or to involve Counsel in Committee proceedings if it is a draft

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85 The Committee suggested (*Final Report of the Justice and Law Reform Committee on a White Paper on A Bill of Rights for New Zealand* [1988] AJHR I 8C 11) that Standing Orders could be amended to establish a Parliamentary Select Committee to examine Bill of Rights matters. In particular, all Bills and Regulations could stand referred to the Committee, which would be empowered to examine them and report to the House on any inconsistency with any of the rights in the Bill. The Committee could also be empowered to examine any enactments and report to the House on such enactments either on its own initiative or on receipt of a written complaint from a member of the public.

86 The New Zealand Cabinet Manual (2001), see the section on Compliance with Legal Principles and Obligations, paragraphs 5.35-5.39. Section 5 of the NZBORA requires limitations on rights and freedoms to be reasonable, to be prescribed by law and demonstrably justified in a free and democratic society.

87 The British Cabinet Office Guidance to Departments, para 34.

88 The British Cabinet Office Guidance to Departments, para 36.

Bill) officials should ensure that the Minister is briefed in such a way as to enable him or her at least to identify the Convention points considered and the broad lines of the argument". [89]

The Government argued, when the Human Rights Act was enacted in 1998, that a debate in Parliament provides the best forum in which the person responsible can explain his or her thinking on the compatibility of the provisions of the Bill with the Convention rights. As Lord Williams has explained "we believe that the best forum in which to raise issues concerning the compatibility of a Bill with the Convention rights is the Parliamentary proceeding on the Bill".[90]

The Joint Committee on Human Rights urged Ministers to give a written statement at an earlier stage, ideally upon publication of a Bill, so as to enable the Committee to carry out its scrutiny work more efficiently and to give timely advice during the passage of legislation. The Government has now responded positively.[91] Since 1 January 2002, the Explanatory Notes published with every Government Bill contain an outline of the Government's views on compatibility. The Joint Select Committee continues to press for fuller statements of reasons, without seeking the disclosure of government legal advice as such. Recently, in response to a parliamentary question I tabled, the Government has confirmed that the Explanatory Notes relating to a Bill will be updated when a Bill is transferred from the House of Commons to the House of Lords, and again on completion of the Bill's passage in order to take account of any amendments to the Bill or any significant human rights issues raised in debate.[92]

Section 19 does not apply to delegated legislation. However the Guidance to Departments explains[93] that, "as a matter of good practice", Ministers should "volunteer a view" on compatibility in respect of affirmative instruments and secondary legislation which amends primary legislation.[94]

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89 The British Cabinet Office Guidance to Departments, para 39.

90 See Lord Williams of Mostyn's Written Answer, (10 December 1998) 595 HLD WA 116.

91 "The Government have agreed changes to the relevant guidance so that the explanatory notes of all government Bills first introduced after 1 January 2002 will draw attention to the main convention issues raised by a Bill. I hope that this will further assist Parliament in its debates on these matters": The Lord Chancellor's Written Answer, (18 December 2001) 630 HLD WA 43.

92 (19 March 2002) 632 HLD WA 127.

93 The British Cabinet Office Guidance to Departments, para 40.

94 This follows an undertaking given by Lord Williams of Mostyn during the passage of the Immigration and Asylum Bill 1999, in response to a report by the Lords Delegated Powers and Deregulation Committee, 22nd Report 1998-99; (2 November 1999) 606 HLD col 737.

Section 7 of New Zealand's Bill of Rights Act[95] requires the Attorney-General to bring to the attention of the House of Representatives any provision in a Government Bill that appears to be inconsistent with the Bill of Rights.[96] The Attorney-General has an obligation to disclose what must in substance have been the legal advice that she has given to her colleagues in Government. By contrast, in the United Kingdom, it is the Joint Committee on Human Rights, rather than the Law Officers, that gives legal advice to Parliament both on the compatibility and incompatibility of Government measures.

It is beyond the scope of this lecture to examine the scrutiny work undertaken by the Joint Committee in any detail.[97] It may fairly be claimed that, within only a year of its existence, the Committee has made its mark in Whitehall and Westminster, significantly influencing the preparation and content of legislation, and improving parliamentary scrutiny to secure better compliance with the Convention rights, and the principles of legal certainty and proportionality.

XII CONCLUSION

The Human Rights Act weaves Convention rights into the warp and woof of UK common law and statute law. Convention rights are given effect through and not around United Kingdom statute law and common law, through the Courts in interpreting, declaring, and giving effect to written and unwritten law compatibly with Convention rights.

Wisely, the Act does not require the Courts to interpret and apply Convention rights by treating the Strasbourg case law as binding precedent. They must have regard to the Strasbourg jurisprudence,[98] but are not bound to follow it. The European Court has recognised that: "By reason of their direct and continuous contact with the vital forces of

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95 See also, Standing Order 260(2) of the Standing Orders of the House of Representatives.

96 The promulgation of s 2(4) of the Criminal Justice Amendment Act No 2 (1999), in breach of the rule against retrospective penalties, illustrates the limitations of section 7 of the NZBORA. The Attorney-General's responsibility under section 7 of the NZBORA to report on apparent inconsistencies extends only to the introductory stage of government Bills. Section 2(4) was introduced as an opposition amendment and consequently was not apparently subject to full scrutiny for NZBORA compliance. This may be contrasted with scrutiny by the Joint Committee on Human Rights, which may extend to amendments tabled during the passage of legislation. See further, the recommendations of JUSTICE, the British section of the International Commission of Jurists, in their Report, "Auditing for Rights" (2001) 32.

97 See David Feldman "Parliamentary Scrutiny of Legislation and Human Rights" [2002] PL 323.

98 Human Rights Act 1998 (UK), s 2.

their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions".[99]

The elastic and elusive Strasbourg doctrine of the so-called "margin of appreciation" is applied by the European Court on the basis of ad hoc pragmatic judgments, sometimes lacking in clear and consistent principles. The developing principles contained in the constitutional case law of courts in other common law countries – such as the Constitutional Court of South Africa, the Supreme Courts of the United States, Canada and India, the High Court of Australia, and the Court of Appeal of New Zealand – are likely to be at least as persuasive in the United Kingdom, as the Strasbourg case law. And, in turn, United Kingdom human rights jurisprudence is likely to influence the jurisprudence of the European Court of Human Rights.

As I have attempted to explain, the Human Rights Act is exerting a magnetic force over the entire political and legal system. Its success depends upon the active engagement of all three branches of government, and upon a well educated, enlightened, public-spirited independent legal profession, and a free and professional press. British advocates are learning new ways of presenting. Courts are learning new ways of evaluating evidence and argument about legal policy where challenges are made to statutes, administrative decisions, and common law precedents alleged to breach Convention rights. Courts are evaluating evidence and argument about whether the law is too vague to satisfy the constitutional principle of legal certainty, whether the law sweeps too broadly to satisfy the constitutional principle of proportionality, whether the law strikes a fair balance between conflicting rights, whether a rule of evidence or procedure is compatible with the constitutional right to a fair trial, whether a difference of treatment is objectively justifiable, how an Act of Parliament can best be read to comply with Convention rights, and what kind of remedy can best meet the justice of the case. We live in interesting legal times.

The constitutional arrangements governing the United Kingdom and its inhabitants remain in a state of transition and evolution. The reforms undertaken by the New Labour Government between 1997 and 2000 were not the fruits of a grand design. They were, as I have said, piecemeal and politically pragmatic measures,[100] lacking consistent principles and (with the honourable exception of the Human Rights Act) an accessible written text. The second Blair administration is not willing to devote as much energy to constitutional reform as did his first administration, so as to turn the present hotchpotch into a comprehensive and coherent new settlement.

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99 *Buckley v United Kingdom* (1996) 23 EHRR 101, 129 (ECHR).

100 For a different approach to constitutional reform see Anthony Lester QC "Can we Achieve a New Constitutional Settlement" in Collin Crouch and David Marquand (eds) *Re-inventing Collective Action: From the Global to the Local* (Blackwell Publishers, Oxford, 1995).

Meanwhile, it will be for the judiciary to develop the constitutional principles of public law needed in the twenty-first century and to do their best to make the new arrangements work to the benefit of our fellow citizens. Certainly, the institutional and legal safeguards against the misuse of executive and legislative powers are much stronger than they were before the enactment of the Human Rights Act.

It may be subversive in the eyes of the legislative and executive branches to suggest that British guiding constitutional principles are, in the words of Oliver Wendell Holmes,[101] "raised above the reach of statute and State", but in reality our adherence to European and international human rights law has had that effect. In your country and in mine, a new body of jurisprudence is arising to reflect our changing constitutions. We shall surely continue to be enriched by the experience of each other in translating our constitutional guarantees of human rights into practical reality.

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101 On 4th February 1901, upon the centennial of the appointment of John Marshall as Chief Justice of the United States, the Supreme Judicial Court in Boston, presided over by the Chief Justice of Massachusetts, Oliver Wendell Holmes Jr observed:

> The setting aside of this day in honor of a great judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall's side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our corner-stone. To the more abstract but farther-reaching contemplation of the lawyer, it stands for the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheard-of authority and duty.

Oliver Wendell Holmes Jr "John Marshall" in Max Lerner *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (Modern Library, New York, 1954) 382; 383-84, cited by Judge Louis H. Pollak, on 5 February 2001, at the bicentennial of Marshall's swearing in, when moving the United States Court of Appeals of the Third Circuit, in Philadelphia, to reaffirm their appreciation of Chief Justice Marshall's character and work.