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The Human Rights Act 1998: A Bill of Rights for Britain?

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2009



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Abstract

On the eve of the tenth anniversary of the coming into force of the Human Rights Act 1998 (HRA), this thesis endeavours to explore the extent to which New Labour's flagship piece of legislation can be considered a Bill of Rights for Britain. It explores the debate surrounding the characteristics of Bills of Rights in comparison to the traditional UK approach towards human rights protection, arguing that a compromise between the two positions exists in the form of third wave Bills of Rights; a model which increases the power of the judiciary whilst still preserving parliamentary sovereignty.

Although the HRA has the potential on paper to be a third wave Bill of Rights, it is argued that it can only be so if the judiciary takes a relatively expansive approach towards its key provisions: sections 2, 3, 4 and 6. Much of the thesis therefore focuses on finding traces of such expansive judicial reasoning, discovering that the judiciary's application of the Act has been distinctively uneven. In some instances, the judiciary have taken a severely restrictive approach towards the HRA, whilst in others they have taken a more expansive approach akin to a third wave Bill of Rights. However, despite any inconsistency, this thesis nevertheless argues that a general trend by the judiciary, to move beyond the traditional British model of human rights protection towards a Bill of Rights, is beginning to emerge.

The thesis also argues that the HRA must, in order to be considered a Bill of Rights, have the support and backing of the public. This, however, has not happened; despite the fact that the HRA displays many of the general characteristics of Bills of Rights, as well as also reflecting British legal tradition. With calls for the repeal and replacement of the HRA, it appears unlikely that it will have the time needed to fulfil its potential as a Bill of Rights for Britain.

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Introduction and Approach

In 1998, the Human Rights Act 1998 (HRA) was passed by Parliament, thus integrating the rights contained in the European Convention on Human Rights (ECHR) into UK domestic law. Undeniably the HRA amounts to 'one of the most important statutes ever passed in the United Kingdom,' and has 'the scope to change the way we think about our identity as citizens of our country.'¹ However, in the ten years since its enactment, in what has been described as the 'Human Rights Act Era,' its reception has been far from universal and its success far from certain.

Because of the UK's traditional belief in the sovereignty of Parliament, the idea of introducing a Bill of Rights, much like that found in the United States, has long held fascination. With the introduction of the HRA appearing to 'herald a new dawn for civil liberties,'² as well as an increasingly popular global trend towards greater human rights protection through the adoption of legal constitutional systems, questions have arisen over whether the 1998 Act can be seen as the UK's equivalent of a Bill of Rights and therefore of her final acceptance of legal constitutionalism.

At the very least, the HRA could be said to 'have what 'constitutional' status UK law allows.'³ However, such a remark still provides very little insight into the true role of the HRA in a twenty-first century Britain which wishes to embark on greater human rights protection and ultimately implies that very little change has taken place. Indeed, it could be argued that the HRA is nothing more than constitutional window dressing for an Act of Parliament designed to preserve and ensure the continuing survival of parliamentary sovereignty; for the HRA to be considered as a true Bill of Rights for Britain it must embrace fully the characteristics of legal constitutionalism.

Alternatively, it could be argued that the HRA was introduced as the result of growing tensions between supporters of the traditional parliamentary system (where the legislature is supreme) and advocates of a more legal constitutional system (where the constitution is often supreme and insulated from arbitrary amendment by the legislature); a system of government which is most typically characterised by a written constitution and a Bill of Rights. Therefore, the HRA could be seen as a compromise between these two opposing views, thus amounting to what

¹ Hoffman, D. and Rowe, J. *Human Rights in the UK: A general introduction to the Human Rights Act* (London: Longman, 2003) 1.

² Fenwick, H. M. *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 157.

³ Fenwick, H. M. Phillipson, G. and Masterman, R. *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 1. See also *Thoburn v Sunderland City Council* [2003] QB 151 (CA) [62] and *Brown v Stott* [2003] 1 AC 681, 703 (Lord Bingham).

has been dubbed as a third wave Bill of Rights, where greater human rights protection exists but not at the expense of the legislature's power.

Such a premise, although ordinarily providing a strong enough basis for any investigation into the status of the HRA, is further strengthened by the fact that the HRA, unlike many charters of rights, purports to incorporate an international treaty. It has been suggested by one commentator that '[a]n important aspect of the reorientation of the United Kingdom's constitution towards a culture of human rights is that it draws upon not one but two new sources of law. One is the pervasive Human Rights Act 1998; the other is the overarching European Convention on Human Rights.⁴ However, it is submitted here that this distinguishing element of the new age of UK constitutionalism doubles also as the principal reason as to why the HRA's success and status is in serious question.

Instead of two distinctive areas of law the HRA could be seen as a mere domestic equivalent of the ECHR, thus allowing easier access to the rights contained under the ECHR.⁵ This is supported by the Act's aim of giving 'further effect' to the Convention rights of the ECHR and the lack of any express recognition of the Act as a Bill of Rights for Britain by its framers. For the HRA to be seen as a Bill of Rights, domestic rights, which can go beyond the limitations of the ECHR at Strasbourg and encourages greater human rights dialogue between the arms of state, must be created. In this sense, the HRA must move UK law away from the traditional constraints of the Westminster system and further towards legal constitutionalism. As already noted, the degree by which this occurs is also relevant to whether the HRA can be viewed as a third wave Bill of Rights or as nothing more than a cosmetic change.

Therefore, because of the multi-layered confusion surrounding the status and role of the HRA, the aim of this thesis is to consider the extent to which the HRA can be viewed as a *de facto* Bill of Rights for Britain. In order to assess the extent to which the HRA has, if at all, moved the UK away from the traditional parliamentary system of government, a clear understanding of what amounts to a Bill of Rights, and thus the extent to which a third wave Bill of Rights fits comfortably within this category, must first be ascertained. Such a task, however, is difficult, as there is no single universal definition for Bills of Rights; as noted by Darrow and Alston,

⁴ Grosz, S, Beatson, J. and Duffy, P. *Human Rights: The 1998 Act and the European Convention* (London: Sweet and Maxwell, 2000) vii.

⁵ See Warbrick, C. 'The European Convention on Human Rights and the Human Rights Act: The View from the Outside' in Fenwick, H.M. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) and Lewis, J. 'The European ceiling on human rights' (2007) *PL* 720.

'there is no single model, nor even a standard definition of what constitutes a bill of rights.'⁶ Any attempts at forming a definition ultimately fail in their task, succeeding only in identifying the various characteristics of Bills of Rights, each of which is open to arguably wider or narrower interpretation. Therefore, the thesis will consider these various characteristics of Bills of Rights, exploring the difference between them and the parliamentary system and demonstrating, not only that third wave Bill of Rights can fall under the traditional understanding of Bills of Rights, but that the traditional parliamentary system shares much in common with the legal constitutional approach. Ultimately, it will be shown that the degree of change needed to move the HRA into the realm of Bills of Rights is not as great as is often believed.

It is also the aim of this thesis to show that despite the fact that the HRA has the potential to be read as a third wave Bill of Rights, and thus a *de facto* Bill of Rights for Britain, this has not necessarily been the result in practice. As argued by Sir Stephen Sedley '... the vigour of a constitution has far less to do with its formal provisions than with the energy and imagination deployed by the courts in interpreting and applying them.'⁷ In other words, no matter what the intention behind the HRA or its function on paper, it is its application in practice which ultimately decides its status; just because the HRA does not resemble the American Bill of Rights on paper, does not automatically mean that it also does not in practice. Because of this, the application of the HRA's key provisions will be examined in detail,⁸ demonstrating that the legal status of the HRA has been frustrated because of inconsistent application by the judiciary that, in some regards, have failed to move UK human rights law beyond the tradition Westminster model, yet in others, have moved it into the realm of a third wave Bill of Rights.

However, although forming the bulk of the analysis, this is by no means the limit of the investigation; the impact of the HRA on the public at large will also be considered. One of the principal aims of the HRA was to 'improve awareness of human rights issues throughout our [UK] society.'⁹ It is argued that such an aim by the framers of the HRA is one of the few expressed that indicates an intention to, at the very least, have the educative effect that Bills

⁶ Darrow, M. and Alston, P. 'Bills of Rights in Comparative Perspective' in Alston, P. (ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999) 472.

⁷ Sedley, Sir S. 'The Sound of Silence: Constitutional Law without a Constitution' (1994) 110 *LQR* 270, 275.

⁸ Specifically sections 3, 4 and 6 HRA.

⁹ *Bringing Rights Home: Labour's plans to Incorporate the ECHR into UK Law* (Labour Party consultation document, 1996), 14 and Hansard HL vol 582 col 1228 (3 November 1997): 'A culture of awareness of human rights will develop.'

of Rights have on the general population of the country.¹⁰ In order for this to be achieved, a Bill of Rights must, to some degree, be tailored to the people it protects. As argued by John Wadham, a 'Bill of Rights, in order to be meaningful and to have a real effect and to be of real use needs to be known about and supported by the communities and peoples that it is designed to be used by. The support of lawyers and judges is not enough.'¹¹ Therefore, from this, it would appear essential to the success of any attempt at legislative protection of fundamental human rights for there to be widespread popular support and belief in democracy if a true Bill of Rights is to emerge and help in creating or preserving a civil rights society. Thus, this issue becomes fundamental to the whole question surrounding the status of the HRA as a Bill of Rights and will be considered with as much weight as the legal question surrounding the impact of the HRA on the judiciary and judicial reasoning.

¹⁰ As seen in the United States where knowledge of the American Bill of Rights is widespread amongst its population.

¹¹ Wadham, J. 'Why Incorporation of the European Convention on Human Rights is not enough' in Gordon, R. and Wilmot-Smith, R. (eds.) *Human Rights in the United Kingdom* (Oxford: Oxford University Press, 1996) 35.

Chapter One

UK Constitutionalism and Bills of Rights Explored

As correctly stated by Lord Woolf, '[t]he recognition of the need to adhere to the rule of law by protecting human rights is essential to the proper functioning of democracy.'¹ Indeed, it would appear uncontroversial to say that this is a belief held by all people and all nations who object to the oppression of the individual; the only question, as rightly identified by Lord Irvine, is in deciding 'how best to achieve the protection of the individual.'²

Thus, there are two principal models for protecting human rights: the UK constitutional approach and the legal constitutional approach. Both of these concepts are discussed in depth below. If there is to be an accurate analysis of the extent to which, if at all, the Human Rights Act 1998 (HRA) can be considered a Bill of Rights for Britain, the UK's traditional approach must first be outlined and the key characteristics of Bills of Rights then identified in order to illustrate (1) the compatibility of the two concepts, and (2) the changes, if any, introduced by the text of the HRA, as well as by judicial reasoning under the HRA, to the traditional protection of individual rights in Britain.

1. UK Constitutionalism and Negative Rights

To begin, it must first be noted that there is no universally accepted view of UK constitutionalism. The purpose of this discussion will be to outline some of the common characteristics of the UK approach towards constitutional government, whilst taking care to highlight some of the principal areas of controversy. Therefore, the analysis will begin with a discussion of the traditional Diceyan view of the UK constitution and its two main pillars: parliamentary sovereignty and the Rule of Law.³

1.1 Parliamentary Sovereignty

Parliamentary sovereignty means simply that Parliament, the legislature of the United Kingdom of Great Britain and Northern Ireland, is supreme and can 'make and unmake any law whatever,'⁴ with its authority derived firmly from the fact that Parliament is 'elected,

¹ Woolf, Lord H. 'Human Rights – Have the Public benefited,' The British Academy Thank-Offering to Britain Lecture, 15 October 2002.

² Irvine, Lord D. *Human Rights, Constitutional Law and the Development of the English Legal System Selected Essays* (Oxford: Hart Publishing, 2003) 5.

³ See Dicey, A.V. *An Introduction to the Study of the Law of the Constitution* (10th edn, 1959).

⁴ *Ibid* xxxiv-xxxv.

accountable and representative.⁵ Thus, advocates of legal positivism would argue that 'the only rights that courts are able to identify flow not from moral values or moral consensus, but from the sovereign itself,⁶ thus resulting in law passed by Parliament which imparts 'only narrow and tightly defined areas of liberty.'⁷ It could therefore be argued that civil liberties in the UK are in the exclusive realm of the legislature. The examples of this are various and numerous and could be argued to consist of, but not limited to, a number of key pieces of legislation such as: the Equal Pay Act 1970, the Race Relations Act 1976, the Sex Discrimination Act 1986, the Disability Discrimination Act 1995, and the Representation of the People Act 2000. The HRA is also a piece of parliamentary legislation, thus providing a poignant example of the impact of Parliament in the area of rights.

However, although this stance holds much weight, it has been equally argued that the protection of individual rights in the UK is not the primary responsibility of Parliament, but of the judiciary under the common law. This interpretation of UK constitutionalism is centred around the concept of 'negative liberty'⁸ – the idea that civil rights are derived from what is not expressly restricted by the legislature as opposed to what is expressly permitted by the legislature.⁹ It could therefore be said that '[c]ivil liberties have traditionally been defined as residual, not entrenched as in other countries.'¹⁰ From this, the courts, through the common law, have developed a catalogue of rights ranging from rights of due process to freedom of speech,¹¹ thus leading to their dubbing by some commentators as 'common law rights.'¹² However, despite their residual nature, some have even argued that they have still been given a positive value, so that, within the realm of the common law at least, they are 'perceived as an interest or value entitled to independent weight in an argument.'¹³ The validity of the common law rights interpretation is, however, open to debate.

⁵ *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) <<http://www.archive.official-documents.co.uk/document/hoffice/rights/intro.htm>> accessed 12.08.2009 [2.13].

⁶ Hickman, T.R. 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' (2005) *PL* 306, 312.

⁷ Fenwick, H.M. *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 123.

⁸ *Ibid* 1.

⁹ Hyre, J. 'The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights under the Human Rights Act of 1998' (2004-2005) 73 *Fordham L. Rev.* 423, 435.

¹⁰ Fenwick (n 7) 1.

¹¹ Doyle, J. and Wells, B. 'How far can the common law go towards protecting human rights?' in Alston, P. (ed.) *Promoting Human Rights through Bills of Rights* (Oxford: Oxford University Press, 1999) 17.

¹² See *Simms* [2000] 2 AC 115, 11-12 (Lord Hoffmann) and *ibid* 26.

¹³ Allan, T.R.S. 'Constitutional Rights and Common Law' (1991) 11 *OJLS* 435, 459.

1.2 The Rule of Law

The basis for the more radical common law rights interpretation can be said to be A V Dicey's doctrine of the Rule of Law. As Palmer notes, the Rule of Law is 'a heavily contested concept, the meaning of which has been debated often.'¹⁴ However, despite this, it is a widely held belief that the doctrine's core principle is that 'the exercise of all power, public or private, [should] be subject to limitation by law.'¹⁵ Thus, the Rule of Law could be described as 'a principle of institutional morality inherent in any constitutional democracy,'¹⁶ a convention of constraint which implores the legislature, as well as all the other arms of state, to promote 'the core institutional values of legality, certainty, consistency, due process and access to justice,'¹⁷ all of which could be described as synonymous with civil rights and therefore Bills of Rights.¹⁸

1.3 Judicial Review and the Power of Interpretation

Nevertheless, the judiciary's traditional power of review of administrative actions of the executive and the legislature can hardly be seen as significant. Traditionally, it was Parliament which overlooked actions by the executive. However, as the mechanics of government became ever more complex with the emergence of dominant political parties, this accountability function began to suffer. Therefore, as argued by Mark Elliott, it was the judiciary who had 'to fill this accountability deficit by requiring – through judicial review – that the executive exercises its power fairly, reasonably and consistently with the scheme which Parliament, in the first place, prescribed in the enabling legislation.'¹⁹ The traditional justification for this review of administrative actions of the executive is the *ultra vires* principle. The ground for review is that the executive action goes beyond the powers granted to them by Parliament. In other words, 'judicial review does not challenge but fulfils the intention of Parliament,'²⁰ and in so doing reinforces Parliamentary sovereignty. In this sense, the *ultra vires* principle has *structural coherence*²¹ – it complements the UK's traditional centralisation of legitimate power within the legislature – hence the judiciary's opposition towards merits

¹⁴ Palmer, G. 'The New Zealand Constitution and the Power of the Courts' (2005-2006) 15 *Transnat'l L. & Contemp. Probs.* 551, 570-571.

¹⁵ *Ibid* 571.

¹⁶ Jowell, J. 'The Rule of Law and Its Underlying Values', in Jeffrey Jowell and Dawn Oliver (ed.) *The Changing Constitution* (Oxford: Oxford University Press, 2007) 5.

¹⁷ *Ibid* 24.

¹⁸ *Ibid* 21.

¹⁹ Elliott, M. *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2003) 1-2.

²⁰ Forsyth, C.F. 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review (1996) 55 *CLJ* 122, 136-137.

²¹ Elliott (n 19) 23.

review and their belief that they should not substitute the decisions of elected officials with their own; Parliament is sovereign, not the judiciary.

This does not automatically mean that the common law rights interpretation is completely unfounded. Although the *ultra vires* principle is accepted by some as a sound justification and explanation of the judiciary's role within the UK constitutional framework, the principle fails in practice to live up to its reputation as an overly restrictive, if not circular, understanding of judicial review in the UK. As argued by Elliott, the *ultra vires* principle lacks what he calls *internal coherence*.²² In other words, his criticism is that *ultra vires* applies to non-statutory power. Since legislation is often silent on how a discretionary power is to be used, it is left up to the courts to effectively decide on Parliament's behalf.²³ However, Elliott also asserts that the principle has been used to justify the review of executive action even where an ouster clause exists.²⁴ As a result, it could be argued that judicial review is enforced independently of Parliamentary legislation. Therefore, if the *ultra vires* principle is truly the only basis for judicial review of executive action, the principle's focus on 'good administration' – the Rule of Law's institutional morality – seems misplaced if all authority for judicial review is to be found from the sovereignty of Parliament. If so, the common law rights interpretation may indeed be the most fitting explanation of the UK's position on judicial review.

However, despite the debate surrounding the judicial review of executive actions, it must be stressed that the UK judiciary, unlike other jurisdictions such as the United States of America, cannot declare null and void acts of the legislature. In other words, there is no strong legislative review under UK constitutionalism. As will be seen later in this chapter, a fully codified and entrenched constitution can give judges the authority needed to question the merits of a decision by the other two arms of state. Even though there is some evidence to suggest that the UK courts can and do make decisions contrary to the express wishes of Parliament, it must be reinforced that such displays of activism have been restricted to ouster clauses. As Elliott notes, 'English courts traditionally adopt a very robust attitude towards statutory provisions which purport to interfere with the operation of their supervisory jurisdiction.'²⁵ It is submitted that this 'robust' attitude towards the scope of their supervisory role reinforces the view that the sovereignty of Parliament is limited by the Rule of Law; if Parliament could pass a piece of legislation which diluted the power of judges to scrutinise the executive there would be no limited government as epitomised by the Rule of Law.

²² *Ibid* 26.

²³ *Ibid* 27.

²⁴ *Ibid* 30.

²⁵ Elliott (n 19) 30.

Despite this, it could be argued that the courts protect the fundamental rights of the common law in two distinct ways beyond the traditional scope of judicial review which could compensate for the lack of judicial strike down: 'first, by interpreting 'value-laden' expressions in statutes so as to protect rights; secondly, by the use of presumptions.'²⁶ The use of presumptions with regards to statutory interpretation by the courts is by far the more significant of the two methods. On the face of it, the idea of presumptions would perhaps invoke a sense of legal positivism, of judges acting 'like administrative officials working underneath a sovereign'²⁷ for the sole purpose of ascertaining Parliament's intention. However, Doyle disagrees, arguing that '[t]hese common law presumptions are not generally used for the sole or even the main purpose of ascertaining Parliamentary intention, rather, the courts presume that Parliament had a certain intent,'²⁸ thus leading some to argue that the use of such presumptions 'no longer have anything to do with the intent of the legislature; they are a means of controlling that intent.'²⁹

1.4 Judicial Deference

However, despite the potential scope of such powers of interpretation, they are nevertheless limited by the British constitution according 'a relatively minimal role to the judiciary.'³⁰ In other words, the judiciary are still subject to the overarching sovereignty of Parliament.³¹ The reality of this is reflected most profoundly by the judiciary's traditional deference towards the legislature on matters of human rights, as presumptions can still be rebutted by the express words of Parliament.³²

Despite the argument that it is English judges who are the *de facto* 'framers' and protectors of civil rights, it could alternatively be argued that their power to do so is as residual as the very rights they enforce; in so far as Parliament has permitted them to construe rights in the way that they have, hence their deference. As noted by Gearty, 'the courts have traditionally interpreted Acts of Parliament in a narrow fashion, rarely seeking to destabilize or embellish the ordinary meaning of statutes that have come before them for adjudication,'³³ clear recognition by the judiciary that it is Parliament, and not judges, who have the final say.

²⁶ Doyle and Wells (n 11) 54.

²⁷ Hickman (n 6) 322.

²⁸ Doyle and Wells (n 11) 55.

²⁹ Tremblay 242 from *Ibid* 55-56.

³⁰ Gearty, C. 'Principles of Human Rights Adjudication (Oxford: Oxford University Press, 2004), 24.

³¹ See *Simms* (n 12).

³² For more detail see Doyle and Wells (n 11) 56.

³³ Gearty (n 30) 24.

Therefore, the moral constraint of the Rule of Law upon Parliament in light of these truths, despite it arguably providing the basis for civil rights protection in Britain, amounts to informal and intangible protection, though by no means inadequate protection in principle and reasoning.³⁴ Though such a reality would be heavily criticised in other countries, the principle should not be examined in isolation from the rest of the UK's constitutional arrangements. In fact, one could argue that the intangible and informal Rule of Law doctrine aptly complements the UK's most distinctive constitutional concept – the equally informal and intangible unwritten constitution.

1.5 *The Unwritten Constitution*

It could be argued that a fully entrenched codified constitution and Bill of Rights is not essential for the protection of civil liberties and human rights³⁵ and that its absence does not 'necessarily mean that they [rights] were inevitably less well protected,'³⁶ especially when one considers that 'not all constitutional texts are committed to the principles and serve the ends of constitutionalism.'³⁷ As succinctly argued by Daniel Lev, the principles of constitutionalism should apply to states 'with or without a written constitution.'³⁸ Although there is widespread agreement with this submission that a written constitution is 'not a sufficient condition for liberty to thrive again in Britain,' the argument that it may nevertheless be 'a necessary one'³⁹ still finds prevalence. Indeed, it cannot be denied that when it comes to issues surrounding human rights protection, there seems to have consistently been a strong argument in favour of a written general declaration of rights for Britain, despite the fact that such an act of formality would sit out of place in a constitutional state built and preserved by a thirst for informality.

In the end, what must become apparent by this description of the traditional British approach to constitutionalism and civil rights is that it is completely non-legal; a 'Political Constitution'⁴⁰ as Professor Griffith described it in his influential article of 1979. The fundamental principle behind the political constitution of the United Kingdom, behind the sovereignty of Parliament and the lack of a formal codified document, is that of democracy and the idea that 'sovereignty

³⁴ Fenwick (n 7) 1: '[I]t was often said that civil liberties in the UK were in a more precarious position than they were in other democracies, although this did not necessarily mean that they were inevitably less well protected.'

³⁵ Dworkin, R. *A Bill of Rights for Britain* (London: Chalto and Windus, 1990) 14.

³⁶ Fenwick (n 7) 1.

³⁷ Henkin, L. 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' (1992-1993) 14 *Cardozo L. Rev.* 533, 535.

³⁸ As argued by Daniel Lev in Miller, R. 'A Shared Constitutionalism: Stem Cells and the case for Transatlanticism' (2005-2006) 22 *J Contemp. Health L. & Pol'y* 476, 480.

³⁹ Dworkin (n 35) 14.

⁴⁰ Griffith, J.A.G. 'The Political Constitution' (1979) 42 *MLR* 1.

resides in the people.⁴¹ Therefore, because of this, the constitution places many issues, if not all issues, within the realm of politics as opposed to law,⁴² thus preserving the fundamental dichotomy of democracy: 'that the law cannot be a substitute for politics.'⁴³ The people must have the final say.

Though there is obvious merit with this idea, it is also the principal criticism of the UK constitution with regards to the protection of human rights,⁴⁴ especially since it arguably perpetuates, as Gearty asserts, 'political parties fighting savagely for control of the parliamentary process through which each could, if successful, impose its preferred vision of right and just conduct on the community as a whole.'⁴⁵ This is, however, a gross exaggeration. Even though this is theoretically possible and did, to an extent, occur between the 1970s and the 1980s in the form of a radical change from socialist policies towards a greater free market economy, it ignores the conventional constraints upon legislators to act within the Rule of Law. Such political feuding is, arguably, the inevitable price to be paid for such a flexible system of constitutional government.

Therefore, it can be said that UK constitutionalism and its protection of fundamental rights is underpinned by a number of key principles: the sovereignty of Parliament, the Rule of Law, and the unwritten constitution. How, therefore, does such a system of individual rights protection differ from those with a Bill of Rights?

2. Positive Rights and the Characteristics of Bills of Rights

As outlined above, the traditional approach towards civil rights in the UK could be described as residual or negative due to the overarching authority of parliamentary sovereignty within the political constitution of the United Kingdom. As stated by Gardbaum, '[p]rior to 1945, the model of legislative supremacy ... was the dominant model of constitutionalism throughout the world, particularly with respect to the issue of individual rights and civil liberties.'⁴⁶ However, the popularity of this model ultimately declined and a greater belief in Bills of Rights emerged, making the traditional UK approach towards constitutionalism all but redundant. Essential to the idea of Bills of Rights is 'positive rights' – a concept which stands in stark contrast to UK constitutionalism.

⁴¹ *Ibid* 3.

⁴² See Gearty (n 30) 24.

⁴³ Griffith (n 40) 16.

⁴⁴ See Dworkin (n 35) 1.

⁴⁵ Gearty (n 30) 24.

⁴⁶ Gardbaum, S. 'The New Commonwealth Model of Constitutionalism' (2001) 49 *Am. J. Comp.L.* 707, 713.

2.1 Positive Rights

Positive rights are simply the opposite of negative rights; they are not residual but entitlements which are prescribed by law and free-standing. This, however, is not in and of itself at issue when one is assessing the change in human rights protection within the UK. Parliament could also create such free-standing positive rights which, if one follows the traditional Diceyan view of constitutionalism, would be enforced vigorously by the courts as, from a legal positivist perspective, they must be like 'an agent striving to interpret and apply statutes equitably, so as better to serve the legislature's values, intentions and purposes.'⁴⁷ Because of this, positive rights also place a duty upon the state to actively uphold such rights and not to infringe them. Such positive duties undeniably require some form of legal enforcement in order to ensure their success; legal enforcement which often finds expression in the form of a Bill of Rights with an empowered judiciary. This is supported by Fenwick, who argues that '[d]emocracies across the world that have adopted a Bill or Charter of Rights have entrusted its application largely to the judiciary on the basis that among such sources of power, they are best placed to ensure the delivery of the rights to citizens.'⁴⁸ How much power and in what capacity such power may be exercised is, however, open to debate and the main reason as to why a Bill of Rights has no single identifiable definition. Because of this, the most famous Bill of Rights, which is also the longest surviving, will be examined: the American Bill of Rights, which in 1791, along with the French in 1789, protected individual rights in a way never seen before, in what has been described as 'the first age of human rights.'⁴⁹

2.2 American Constitutionalism - entrenchment and judicial review

The American constitution, in its structure and enforcement, could be accurately described as the polar opposite to the UK constitution.⁵⁰ This is supported by Gardbaum, who argues that American constitutionalism 'was framed first and foremost in direct contrast to the British constitution' which envisaged a 'system of government premised on the notion that legislative power is legally limited.'⁵¹

As a result, the American Legislature, known as Congress, is not supreme; it is the written constitution which is the highest law in the land by which all subsequent policy and legislation

⁴⁷ Goldsworthy, J. 'Legislative Intentions, Legislative Supremacy, and Legal Positivism' in Goldsworthy, J. and Campbell, T. (eds.) *Legal Interpretation in Democratic States* (Ashgate, Aldershot, 2002) 66.

⁴⁸ Fenwick (n 7) 115.

⁴⁹ Klug, F. 'A Bill of Rights and Secular Ethics' in Gordon, R. and Wilmot-Smith, R. (eds.) *Human Rights in the United Kingdom* (Oxford: Oxford University Press, 1996) 41-42.

⁵⁰ *Ibid* 712.

⁵¹ Gardbaum (n 46) 711.

would be subject,⁵² an element of the American constitution which is so profound that some see it as essential to the whole concept of limited government and constitutionalism.⁵³

Because of this, the American Bill of Rights (the first ten amendments of the constitution) is also 'higher law' – thus placing the rights of man, to a great extent, outside the realm of politics and within the realm of legal enforcement.⁵⁴

Due to their status as higher law, the rights contained in the American Bill of Rights are often described as 'inalienable rights'⁵⁵ based on the idea that they are absolute and thus entrenched – free from change by the legislature except by official amendment⁵⁶ and free from politics.⁵⁷ It has thus been argued that this 'Enlightenment belief in inalienable rights, wholly or not, is clearly incompatible with Parliamentary absolutism,⁵⁸ as such a legal constitution places judges in a more powerful and influential position than in the UK; they are more equal in power to the legislature⁵⁹ and do not act as the mere enforcer of its will as the sole source of positive law.⁶⁰

Therefore, the American model of judicial, or constitutional, review is best characterised by the judiciary's power to declare statutes passed by the legislature as incompatible with the constitution and thus make them null and void.⁶¹ Because of this overwhelming power of review, many other systems of judicial review have been viewed as wholly inadequate by comparison, such as the UK model, which has been described as a 'weak form of judicial review.'⁶² The justification for this increase in judicial power was best stated by Alexander Hamilton. Writing in the eighteenth century, Hamilton made it clear that the power of judges does not 'by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the

⁵² Klug (n 49) 42.

⁵³ Henkin (n 37).

⁵⁴ See Griffith (n 40) 16.

⁵⁵ See the American Declaration of Independence July 4 1776.

⁵⁶ Two thirds of Congress and three fifths of all states are required to amend the constitution.

⁵⁷ Hickman (n 6) 313.

⁵⁸ Marr, A. 'Rights and Rites for a New Britain' in Gordon, R. and Wilmot-Smith, R. (eds.) *Human Rights in the United Kingdom* (Oxford: Oxford University Press, 1996) 15.

⁵⁹ It must also be noted, however, that such a power of judicial review is not expressly permitted by the US constitution.

⁶⁰ See Austin, J. *The Province of Jurisprudence Determined* (2nd edn, 1861) 121.

⁶¹ See *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

⁶² Tushnet, M. 'Weak-Form Judicial Review: Its Implications for Legislatures' (2004) 2 *N.Z. J. Pub. Int'l L.*

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Constitution, the judges ought to be governed by the latter rather than the former.⁶³ In this sense, the American model, like the UK, places the wishes of the people first. The key difference between the two models is with the principle's embodiment. In the UK the legislature represents the will of the people in the form of statutes; in America the will of the people is embodied by the constitution. However, as will be shown, this respect for the supremacy of the masses nevertheless finds expression in the form of legislative supremacy in America, albeit hollow supremacy.

The rights contained within the American Bill of Rights are defined in simple and absolute terms, for example 'freedom of speech' under the first amendment.⁶⁴ However, just because the American constitution is drafted in simple and absolute terms, does not automatically mean that the judiciary are less sophisticated with their adjudication. As argued by Sharpe, rights in America are flexible, forever changing yet everlasting, in which judges must 'grapple with justifications for rights and freedoms taking a more philosophical approach to legal reasoning.'⁶⁵ This approach, also known as the 'living tree interpretation' of Bills of Rights,⁶⁶ advocates the most expansive form of judicial review, as it encourages the scope of protected rights under a constitution to be increased in order to cover more individuals and issues.⁶⁷ In contrast, the traditional British approach is the complete opposite; it aims to restrict how the judges interpret rights by making statutes as specific as possible so as to preserve the superiority of Parliament. Change should be recognised and instigated by the legislature, not the judiciary.⁶⁸ However, despite this, the 'living tree interpretation' is not necessarily the correct interpretation of the American Bill of Rights. Originalism, in contrast, argues that the Bill of Rights has fixed meanings; in other words, that the original intentions of the framers or the original meanings of the words are non-negotiable and cannot be extended to include individuals or issues not foreseen by the Founding Fathers. Any meaning beyond the original would lack legitimacy and would simply be the work of unelected and thus unaccountable

⁶³ Hamilton, Madison, and Jay, *The Federalist* (1787-8; Everyman edn, 1911) 397f, as cited in Jaconelli, J. *Enacting a Bill of Rights* (Oxford: Clarendon Press, 1980) 202.

⁶⁴ The First Amendment to the United States Constitution read as follows: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

⁶⁵ Quote from Fenwick, H. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007), 1. See Sharpe, R.J. 'The Impact of a Bill of Rights on the Role of the Judiciary: A Canadian Perspective,' and Darrow, M. and Alston, P. 'Bills of Rights in comparative perspective' in P Alston (ed) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999).

⁶⁶ The phrase was first used by Lord Sankey in *Edwards v Canada* (Attorney General) [1930] AC 123.

⁶⁷ See Huscroft, G. 'The Trouble with Living Tree Interpretation' (2006) 25 *U. Queensland L.J.* 3.

⁶⁸ This is known as the 'argument from democracy.' See Fenwick (n 7) 149.

judges. Such a view is not too dissimilar from that of the traditional UK approach, as it believes that judicial interpretation should be kept to a minimum and that the courts should only operate within the remit of the constitution, much like UK judges should operate within the remit of legislation and precedent. It must be noted, however, that despite this consensus between the traditional Diceyan approach and the Originalist approach, the Originalist position does not forego the power of judicial strike down; its focus is on protecting the entrenched meanings and values of the constitution, not the legislature as in the UK. It is also important to note that although the Originalist interpretation has had some prominent followers, such as Scalia J in *Lawrence v Texas*,⁶⁹ it is by no means the favoured view of the workings of the American or any other nation with a Bill of Rights. This is supported by Huscroft, who notes that 'the living tree-style interpretation is common not only in Canada and South Africa, which have constitutional bills of rights, but also in countries with statutory bills of rights, including New Zealand.'⁷⁰

2.3 A Bill of Rights Defined?

From the description of the American model of civil rights protection and constitutional government, the following can be said to be fundamental characteristics of the American Bill of Rights: the rights must be broad and codified in a single document and must be seen as 'higher law' and thus supreme. Because of this, the rights will most likely have to form part of the constitution itself in order to be entrenched, and, most crucially, the judiciary must be able to strike down incompatible legislation with such entrenched rights.

This American method of protecting individual rights via an entrenched Bill of Rights has proved very popular over the last half a century, with the growth in world constitutionalism since 1945 being 'the growth of the model of constitutionalism invented in the United States.'⁷¹ Due to this fact, some have come to adopt a strict view of Bills of Rights, arguing that '[c]onstitutionalism is a particularly American product,⁷² in which there is no middle ground between the parliamentary view of constitutionalism and the American.'⁷³ It is submitted, however, that such a view is unfounded. Despite the obvious impact American constitutionalism has had on the western world, there has nevertheless been 'a deliberate rejection of the American model of constitutionalism and its perceived excesses of judicial

⁶⁹ 539 US 558 (2003).

⁷⁰ Huscroft (n 67) 9.

⁷¹ Gardbaum (n 46) 708.

⁷² Blaustein, A.P. 'Our Most Important Export: The Influence of the United States Constitution Abroad' (1987-1988) 3 *Conn. J. Int'l L.* 15, 17.

⁷³ See *Marbury v Madison* (n 61) 177 (Chief Justice John Marshall) and Gardbaum (n 46) 708.

power⁷⁴ and thus of its fundamental requirements. This view is supported by Epstein *et al*, who note that when a nation decides upon the form of its constitutional court 'they do not always or even often merely mimic the United States.'⁷⁵ Examples of Bill of Rights models which have rejected the American model are considered below.

2.4 Third Wave Bills of Rights

As argued above, it is primarily the power which one assigns to the judiciary in the form of judicial review of legislation which is key to distinguishing UK constitutionalism from American constitutionalism; the UK grants sovereignty to the legislature and in America sovereignty is vested in the constitution. As a result of this, under the American model, judges are to be seen as the ultimate protectors of human rights, representing a fear of the unrestrained will of the majority. In contrast, under the UK model of constitutionalism, it has been argued that 'the people need Parliament to protect them from the judges, not merely the judges to protect them from Parliament.'⁷⁶ Both positions seem irreconcilable at first glance, but it has been suggested that the constitutional reforms made in countries such as Canada and New Zealand reconcile these two conflicting fears and amount to a 'third model of constitutionalism'⁷⁷ or a 'third wave'⁷⁸ Bill of Rights.

Third wave Bills of Rights attempt to reconcile the two above positions, unlike its American counterpart, by preserving some degree of legislative involvement on issues of fundamental rights. However, Canada and New Zealand both approach this reconciliation differently.

The first third wave Bill of Rights, the Canadian Charter of Rights and freedoms 1982, provides for this legislative supremacy under section 33 of the Charter. Constituting a 'compromise between traditional parliamentary sovereignty and the American model of constitutionalism,'⁷⁹ this 'notwithstanding clause' permits Parliament to temporarily override the higher law of sections 2 and 7-15 for up to five years subject to renewal by Parliament.⁸⁰ However, when section 33 is not invoked, the judiciary can, like the American judiciary, strike down legislation if deemed incompatible with the Charter. If legislation is declared null and

⁷⁴ Gardbaum (n 46) 710.

⁷⁵ Epstein, L. Shvestova, O. and Knight, J. 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Soc'y Rev.* 117, 120.

⁷⁶ Ewing, K.D. and Gearty, C.A. *Freedom under Thatcher* (1989), 270-271.

⁷⁷ Gardbaum (n 46) 719.

⁷⁸ Klug, F. 'The Human Rights Act – a "third way" or "third wave" Bill of Rights' (2001) *EHRLR* 361.

⁷⁹ Gardbaum (n 46) 722.

⁸⁰ It must be noted that the federal government of Canada, unlike a number of Canadian provinces, has never invoked section 33.

void, the legislature can then draft and pass new legislation designed to address the infringement.

However, under section 4 of the New Zealand Bill of Rights Act 1990, unlike in Canada, the power of the courts to strike down incompatible legislation, other than subordinate legislation, is nowhere to be found. Traditional parliamentary supremacy is therefore preserved. If an infringement is found by the judiciary, they can issue a declaration of inconsistency towards the offending piece of legislation. Although the declaration does not affect the validity and continuing operation of the offending statute, the issuing of such a declaration allows the legislature to amend, repeal, or replace the statute. The legislature can, under the Act, also choose to ignore the judiciary's declaration.

Because of this, it has been argued by some that such a Bill of Rights 'is a fraud.'⁸¹ Undeniably, such retention of legislative supremacy is at odds with the traditional American approach towards civil rights protection, and the view that 'democracy is not the same as majority rule, and that in a real democracy liberty and minorities have legal protection in the form of a written constitution that even Parliament cannot change to suit its whim or policy.'⁸² Although both the Canadian Charter and the New Zealand Bill of Rights are the result of statute law, and therefore subject to repeal, it must be stressed that the Canadian Charter, as an Act of Parliament in Westminster, can only be repealed by the British Parliament. Under s 52 of the Constitution Act 1982, the Canadian Charter is given the same entrenched supreme status as the constitution itself. Consequently, the Canadian Parliament cannot repeal the Charter itself. The Canadian Charter can therefore be best described as a constitutional Bill of Rights, with the New Zealand Bill of Rights best described as a statutory Bill of Rights.

Nevertheless, such a distinction may be viewed as incidental by virtue of the fact that, under both instruments, the legislature can infringe the rights contained under them without suffering any legal consequence for doing so. However, despite this, it is submitted that the preservation of a legislative supremacy, of any degree, does not necessarily mean that the third wave Bill of Rights fails in its primary responsibility of protecting individuals from an oppressive state; a third wave model simply finds a different mechanism beyond unequivocal entrenchment: democratic dialogue.

The theory of democratic dialogue was first conceived by Hogg and Bushell in the context of the Canadian Charter. The concept, as argued by Hogg and Bushell, is as follows:

⁸¹ Klug, F. 'A bill of rights: do we need one or do we already have one?' (2007) *PL* 701, 705.

⁸² Dworkin (n 35) 13, paraphrasing Francois Furet.

Where a judicial decision is open to legislative reversal, modification or avoidance, than it is meaningful to regard the relationship between the courts and the competent legislative body as a dialogue ... the judicial decision causes a public debate in which the *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplish the social and economic objectives that the judicial decision has impeded.⁸³

Therefore, it could be said that third wave Bills of Rights, because of their conceptual basis in the theory of democratic dialogue, place all of the arms of state on a more equal footing, as they encourages the courts to make claims of incompatibility (either by striking down an Act of Congress in Canada or by issuing declarations of inconsistency in New Zealand⁸⁴) while at the same time preserving the power of elected representatives to amend or reinstate the legislation in question (Canada) or simply ignore any declaration (New Zealand). In this sense, the judges do not have the final say. This shared responsibility between the arms of state gives each branch of government a say within the field of human rights, and thus prevents the vesting of absolute supremacy on the issue of human rights in the judiciary as it arguably does in America, although the two are not as equal in power as they are in the United States.

Though strict believers in the American model of constitutionalism would, perhaps, find the adoption of the democratic dialogue model as somewhat self-defeating due to the prevailing power of the legislature, especially so in New Zealand which fits the UK model of constitutionalism the best, they may also be somewhat perplexed by the assertion submitted here that America also allows for the supremacy of federal and state legislatures in the form of constitutional amendments,⁸⁵ thus potentially demonstrating similar, albeit weaker, third wave characteristics.

Because of the fact that constitutional amendments by Congress and the States are very difficult to obtain,⁸⁶ America is not as susceptible to majority rule as in Canada or New Zealand, despite the fact that the federal and state legislatures together have the power to override the

⁸³ Hogg, P. and Bushell, A. 'The *Charter* Dialogue between Courts and Legislators (Or perhaps the *Charter of Rights* isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75, 79-80.

⁸⁴ Taggart, M. 'Tugging on Superman's cape: lessons from experience with the New Zealand Bill of Rights Act 1990' [1998] *PL* 266, 280.

⁸⁵ Jaconelli (n 63) 204: 'In the first place, the power of constitutional amendment gives the final word to the political organs of the State. But, as has already been seen, the ease with which this power may be invoked will vary from country to country. In the U.S.A. it has proved a very cumbersome instrument.'

⁸⁶ Two thirds of Congress and three fifths of all states are required to amend the constitution.

constitutional rulings of the Supreme Court. Although this may be true, it would appear inaccurate to suggest that such perceived equality produces the same level of dialogue between the executive, legislature and judiciary as it arguably does for third wave Bills of Rights due to the adversarial nature of the doctrine of separation of powers as utilized in America.⁸⁷

It would be a mistake, however, to assume that the American judiciary is completely unsympathetic to the need for boundaries on their own power. Alexander Bickel makes the argument for the existence of 'passive virtues' within the judiciary.⁸⁸ In other words, rules of adjudication which show that the judiciary can and does have regard to the limits of its power and legitimacy in certain issues. Known as the 'last resort rule,' Justice Brandeis in *Ashwander v Tennessee Valley Authority* held that, when deciding a case, a federal court must avoid a constitutional issue if there is another ground by which to resolve the legal issue.⁸⁹ In other words, the courts must refuse to decide cases on such broad constitutional grounds if narrower grounds can be found. Thus, it could be argued that the judiciary's use of this rule demonstrates an acceptance of 'the necessity, if government is to function constitutionally, for each to keep within its power, including the courts,'⁹⁰ and, as a result, brings the American Bill of Rights closer to the dialogue model as epitomised by third wave Bills of Rights. However, as argued by Tom Hickman, this dialogical argument, as advocated in part by Alexander Bickel, is somewhat 'divorced from the strong judicial role that he [otherwise] approved';⁹¹ the judiciary can still declare null and void Acts of Congress and, as a result, a strong judiciary is a key characteristic of the American Bill of Rights model. Therefore, for the purposes of this thesis, the American Bill of Rights will be treated as separate and distinct from the third wave model.

3. Conclusions on Bills of Rights

In conclusion, although there are many key differences between UK and legal constitutionalism, the two approaches still share many of the same principles. Despite the mechanical differences between the two models of constitutionalism, neither the judiciary nor the legislature, in either system, has completely fixed roles. The roles of both arms of state are open to narrow and expansive interpretations which can make the legal constitutional approach more akin to UK constitutionalism and vice versa. This is perhaps best illustrated by the fact that there are many characteristics of a Bill of Rights beyond the type endorsed by

⁸⁷ For further reading please see Mayeux, K.A. "'Separation of Powers": Struggling to Keep them Apart' (1986-1987) 13 *S. U. L. Rev* 103.

⁸⁸ Bickel, A.M. *The Least Dangerous Branch* (Indianapolis: Bobbs-Merril, 1962) Chapter Four.

⁸⁹ 297 US 288 (1936).

⁹⁰ *Rescue Army v Municipal Court of LA*, 331 US 549, 571 (1947) (Justice Rutledge).

⁹¹ Hickman (n 6) 318.

America. The introduction of third wave Bills of Rights stands as testament to the fact that a compromise between UK constitutionalism and legal constitutionalism can occur successfully.

However, despite this, it must be emphasised that there are certain characteristics which are essential for the existence of both an American and a third wave Bill of Rights. For example, there must be, to some degree, an increase in judicial power beyond that endorsed by the UK parliamentary model in order for the HRA to be a Bill of Rights.

Such empowerment must allow for the constitutional review of legislation; it does not, however, need to completely surrender the legitimate power of the legislature.⁹² In other words, the HRA does not need to adopt the strict American model in order to be a Bill of Rights. The HRA could, under a third wave model, produce a co-operative constitution based on greater dialogue between the three arms of state whilst still preserving the overarching supremacy of Parliament.

Likewise, this empowerment must also allow for the judicial review of executive decisions and acts in light of relevant constitutional guarantees or principles as embodied by the Bill itself. Procedural review and deference towards the executive must be replaced by a more principled approach which recognises the importance of the constitutional guarantees at issue and which seeks to ensure limited government through them.

It is also submitted that a strong indicator of a Bill of Rights is the emergence of a culture of rights among public officials. The development of horizontal effect, though not necessary for the existence of a Bill of Rights, can nevertheless be evidence of the emergence of a culture of rights where by the judiciary develop the existing common law in light of the constitutional guarantees.

Although not an essential characteristic of a Bill of Rights, it must be stressed that a Bill of Rights requires the popular support of the wider public. Without such widespread support, a Bill of Rights is unlikely to survive. Consequently, in order to secure the necessary popular support, a Bill of Rights must be relevant to the people it governs. In this sense, it needs to be tailored to suit the culture and tradition of society, whilst simultaneously performing its task as a fair limit on governmental power.

All of these factors will be considered in the analysis below concerning the question of whether the HRA amounts to a Bill of Rights for Britain or not. However, it must stressed that

⁹² Jaconelli (n 63) 35: '[T]he effect of this device [direct judicial review] is to leave the final word (if only for a short run) with the courts. The minority of systems do in fact leave the final say with the courts even in the long run: no political process or constitutional amendment is capable of circumventing the fundamental rights guarantees as interpreted by the supreme court of the land.'

a statute which empowers the judiciary means very little if they fail to use their new powers in the way intended by its framers. If the courts adopt an overly activist approach they could potentially politicise an otherwise legal power, and thus transform the judiciary into unelected and thus unaccountable politicians in wigs. Likewise, a failure to embrace their new powers could have the opposite effect of failing to move the HRA into the expansive direction required to make it a Bill of Rights for Britain.

Chapter Two

The Bill of Rights Debate, Incorporation and the Human Rights Act 1998

If one wishes to consider the question of whether the Human Rights Act 1998 (HRA) is or could ever be considered as a Bill of Rights for Britain, one must give due consideration not only to the intention of its drafters but to the context of its drafting; it is only with the consideration of both that a true understanding of the confusion and disagreement with regards to the constitutional status and impact of the HRA can be ascertained.

Therefore, the long term reasons for change will be evaluated, with consideration given to the possibility that it was the conflict between the UK constitutional approach and the American (or legal) approach which resulted in the creation of the HRA as a compromise between the two; in other words, an attempt by the government to maintain parliamentary supremacy whilst also guaranteeing greater protection for human rights. However, although it will be shown that a decline in people's belief in the effectiveness of UK constitutionalism to protect human rights, in the face of the popularity of legal constitutionalism abroad, did provide a basis for the passing of the HRA, it will also be shown that the Act's inception and form were equally dependant upon the European Convention on Human Rights (ECHR). It will be argued that it was the government's aim of incorporating the ECHR, as well as an absence of clarity on their behalf in communicating the HRA's true intentions, which has caused much of the confusion surrounding it.

From this, the discussion will conclude with a brief analysis of the passage and framework of the HRA, which will highlight the various interpretations given of the Act's constitutional status in light of the government's confusing aims and provide an introduction to the detailed analysis of the HRA which will take place in the next three chapters.

1. A Belief in Parliament and a Disbelief in Bills of Rights

As seen in the previous chapter, the UK has adopted a system of negative rights; in other words, that citizens may enjoy whatever is not expressly prohibited by the sovereign. As a result, it has most famously been proclaimed that 'we have no need for a Bill of Rights because we have freedom.'¹ This claim of 'freedom under the law' embodies a fundamental belief which has been long held in Britain, a belief that Parliament and the Rule of Law have been

¹ The Rt Hon John Major MP, quoted by Lord Irvine of Lairg QC, HL Debs, vol 582, col 1228 (3 November 1997).

and will always be successful in embodying the ideals of freedom and liberty,² a claim which some would say is self evident by the UK's long standing human rights record.³ However, such a belief in not only the success but the superiority of the Diceyan model of individual rights protection is down more to a belief in the failure of Bills of Rights than to the merits of legislative superiority.

For example, as suggested by Fenwick, there has been 'a degree of suspicion and distrust' surrounding Bills of Rights, which have traditionally been viewed as 'high-sounding documents which are ineffective in practice, but dangerous because they create complacency as to liberty.'⁴ It has been argued by some prominent legal scholars that a nation with a Bill of Rights will inevitably have 'fewer actual human rights than Britain because the escape clauses are used, often quite ruthlessly,⁵ something which some see as a distinctive characteristic 'of a primitive, undeveloped legal system.'⁶

From this, it can be inferred that, to many traditional Diceyan parliamentarians, a Bill of Rights promises more than it can deliver, leading to more negative than positive outcomes. The extent to which such a claim is true is unclear, but it is submitted here that such claims are, to a large extent, unjustified. Although it cannot be denied that the United States for many decades displayed a high level of hypocrisy in supporting a constitution which permitted slavery yet at the same time declared that all men were equal, it hardly stumped the growth of constitutional debate. In the end, America went to war with itself over the issue of slavery and as a result can hardly be accused of taking restrictions on fundamental freedoms lightly.

For Britain, however, this belief in Parliament and a disbelief in Bills of Rights was the principal obstacle in the way of constitutional reform to provide greater protection for individual rights. However, despite this, such a conclusion fails to address whether there was any real need for reform; as argued previously, what matters in assessing the protection of human rights is what happens in practice, not what happens on paper.

² Fenwick, H. M. *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 115.

³ See *Attorney-General v Guardian Newspapers Ltd. (No. 2)* [1990] 1 AC 109, 283 (Lord Goff): 'I can see no inconsistency between English law upon this subject and Article 10 ... This is scarcely surprising since we may pride ourselves on the fact that freedom of speech has existed in this country perhaps so long, if not longer than ... in any other country.'

⁴ Fenwick (n 2) 146.

⁵ Hansard HL vol 369 cols 784-85 (Lord Hailsham).

⁶ Fenwick (n 2) 146.

2. The Bill of Rights Debate – the Thatcher years and the erosion of civil liberties

The belief in a sustainable civil rights society perpetuated and maintained by parliamentary sovereignty and the Rule of Law lost ground in the second half of the twentieth century due to one principal reason: the persistent threat from 'elective dictatorship'.⁷ As argued by Dworkin, 'Great Britain was once a fortress for freedom ... But now Britain offers less formal protection to central freedoms than most of its neighbours in Europe.'⁸ This assertion was indeed supported by a number of academics who cite numerous events and issues, mainly from the 1980s and early 1990s,⁹ which they believe have had the effect of eroding this legal tradition which was once 'irradiated with liberal ideas.'¹⁰ Primarily, it was the election of Margaret Thatcher in 1979 which seemed to give real resonance to arguments in favour of reform in the form of a Bill of Rights. As argued by Fenwick, there was a 'post-war understanding as to the use of Parliamentary power in British politics,¹¹ until the Thatcher Government of 1979 'dismantled much of the consensus'¹² and brought the walls of Britain's fortress of freedom crashing down around our heads.

Displaying a 'mundane and corrupting insensitivity to liberty,'¹³ serious doubts arose over the adequacy of the parliamentary government and human rights protection. However, as correctly asserted by Ewing and Gearty, Thatcher had not dramatically altered the UK system of government in order to pursue her political, economic and social policies, but rather she had 'merely utilised to the full the scope for untrammelled power latent in the British Constitution but obscured by the hesitancy and scruples of the previous, consensus-based political leaders.'¹⁴ Arguably, the cracks in the nearly three hundred-year-old constitutional monarchy – the 'Queen-under-Parliament' – were beginning to show, and to many it devalued the nation in the eyes of its international partners.

However, although such commentators clearly believe that parliamentary democracy is not as effective as it once was in protecting fundamental liberties, they also seem to believe that a

⁷ Lord Hailsham 1976.

⁸ Dworkin, R. *A Bill of Rights for Britain* (London: Chalto and Windus, 1990) 1.

⁹ Fenwick, H. M. and Phillipson, G. *Text, Cases & Materials on Public Law & Human Rights* (2nd edn, Cavendish Publishing Limited, Norfolk, 2005) 850.

¹⁰ Dworkin (n 8) 1.

¹¹ Fenwick (n 2) 158.

¹² See Fraser, D. 'Post-War Consensus: A debate not long enough' [2000] 53(2) *Parliamentary Affairs* 347.

¹³ Dworkin, R. *Index on Censorship* (1988) 7-8.

¹⁴ Ewing, K.D. and Gearty, C.A. *Freedom under Thatcher* (1989) 7.

Bill of Rights was not only needed to cure these ills which plagued British political society,¹⁵ but that they are the best form of constitutional protection available.¹⁶ Such a position, however, takes a somewhat limited view of Bill of Rights and thus could be seen as no more credible a critique of parliamentary democracy as parliamentary democracy's critique of Bills of Rights. As argued by Klug, there is 'the common assumption in this – as in many other areas – that the American model is the gold standard which all others necessarily follow.'¹⁷ Indeed, in Dworkin's opinion '[t]he United States was born committed to that idea of democracy, and now every member of the European Community but Britain accepts it,'¹⁸ an outlook which suggests not only that an American Bill of Rights is the most democratic, but that its absence within the British constitutional system is somehow undemocratic. However, the adoption of the American Bill of Rights model would also mean the acceptance of fully entrenched rights and strong form judicial review, something which is greatly opposed, not only by parliamentarians, but by other critics of the supposed erosion of civil liberties within Britain,¹⁹ and by other democratic nations as well.²⁰ Therefore the UK parliamentary system began to fail in practice, thus arguably pushing many to look towards Bills of Rights as the cure to these ills which plagued British society. Because of this, it could be argued that the HRA was the direct result of the oppression suffered during the eighteen years of Conservative rule.

This is supported by a green paper published by the labour party in 1997 entitled *Bringing Rights Home: Labour's Plans to Incorporate the ECHR into UK Law*.²¹ It outlined the party's key objectives if it were to become the newly elected government: to 'change the relationship between the state and the citizen, and to redress the dilution of individual rights by an over-centralising government that has taken place over the past two decades.'²² However, despite how the Thatcher years would appear to have been essential to New Labour's plans for constitutional reform, it is submitted here that their plans for reform of human rights protection was not as far reaching or as revolutionary as it first may appear. This is because of

¹⁵ See Leigh, I.D. and Masterman, R. *Making Rights Real: the Enforcement of the Human Rights Act* (Oxford: Hart Publishing, 2007) 10 and Hailsham, Lord. *The Dilemma of Democracy* (London, Collins, 1978).

¹⁶ Zander, M. *A Bill of Rights?* (Sweet & Maxwell, 1997) vii: 'A working Bill of Rights is therefore a resource that no fully developed democracy should be without.'

¹⁷ Klug, F. 'A Bill of Rights and Secular Ethics' in Gordon, R. and Wilmot-Smith, R. (eds.) *Human Rights in the United Kingdom* (Oxford: Oxford University Press, 1996) 41.

¹⁸ Dworkin (n 8) 13.

¹⁹ Ewing, K.D. and Gearty, C.A. *Democracy or a Bill of Rights* (1991) 5-6. For a rebuttal see Zander (n 16) 78.

²⁰ For an example see the Canadian Charter of Fundamental Rights and Freedoms and the New Zealand Bill of Rights Act 1990.

²¹ (Labour Party consultation document, 1996).

²² *Ibid.*

the method by which New Labour planned to rectify the perceived shortcomings of the UK parliamentary system; their aim of rebalancing the relationship between the state and the individual was to be achieved through the introduction of the ECHR into domestic law and not through a formal home grown Bill of Rights.

3. Incorporation of the European Convention on Human Rights

The HRA was intended to incorporate the ECHR in order to give 'Convention rights a formal status in domestic law.'²³ Incorporation had been a major issue for many decades in the UK, with incorporation first proposed in 1968 by Anthony Lester QC. As argued by Leigh and Masterman, '[t]he apparent failure of the democratic process to protect rights, coupled with the perception of the increasingly strong executive branch ensured that the campaign for incorporation of the European Convention on Human Rights steadily gained momentum.'²⁴ Undeniably, the large number of individual petitions to Strasbourg since the adoption of Article 26 ECHR in 1966²⁵ illustrated the major inadequacy of the common law to uphold human rights under Thatcher. As argued by Fenwick, the enormous increase in the number of applications from the UK since the Convention was ratified 'suggests that before the HRA was enacted it was seen as a guardian of human rights by UK citizens,²⁶ as 'liberty was receiving a significant measure of protection as a result of the impact of the European Convention on Human Rights at the international level, rather than being the result of decisions of the judiciary applying the common law.'²⁷

From this, the incorporation of the ECHR into domestic law as a *de facto* Bill of Rights for Britain, and thus as a remedy for the failings of the common law to protect civil liberties, can be seen as a non-issue; the majority of commentators and politicians found the domestication of the Convention as the easiest way for the UK to achieve a Bill of Rights.²⁸ As argued by Dworkin, if Parliament would simply 'enact a statute providing that the principles of the Convention [ECHR] are hence forth part of the law of Britain, enforceable by British judges in British courts,'²⁹ a Bill of Rights would be easily acquired with minimum effort. Zander agreed, stating in 1997 that '[i]t is not quite so widely known that the United Kingdom has available to

²³ Coppel, J. *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (Chichester: J. Wiley, c1999) 4.

²⁴ Leigh and Masterman (n 15) 10.

²⁵ See Lyon, A. *Constitutional History of the United Kingdom* (Cavendish Publishing Limited, 2003) 446: 50 applications between 1966 and 1997.

²⁶ Fenwick (n 2) 19-20.

²⁷ *Ibid* 159.

²⁸ For objections to the incorporation of the ECHR see Gearty, C.A. and Ewing, K.D. 'Rocky foundations for Labour's new rights' (1997) EHRLR 146.

²⁹ Dworkin (n 8) 15-16.

it a Bill of Rights in the form of the European Convention on Human Rights.³⁰ This view was also supported by the Select Committee on a Bill of Rights, who stated that '[t]o attempt to formulate de novo a set of fundamental rights which would command the necessary general assent would be a fruitless exercise.'³¹

Although the ECHR could be described as an 'international bill of Rights',³² it is argued here that the use of the ECHR as the basis for the HRA was by no means a foregone conclusion, especially when one considers how there is no express requirement within the Convention for incorporation at the national level.³³ There was also no political pressure for the Convention to be directly incorporated into domestic law when Article 26 was adopted in 1966;³⁴ this did not, however, prevent some commentators from arguing that incorporation is a requirement within the Convention itself by virtue of Article 1³⁵ and by inference of its popularity amongst Europe.³⁶

Indeed, there is some merit in suggesting that incorporation is a requirement which would bring about a greater civil rights society of the kind seen by many nations with a Bill of Rights. In *Ireland v UK*³⁷ the words 'undertake to secure' under Article 1 were held to illustrate how the drafters of the Convention 'intended to make it clear that the rights and freedoms set out in section 1 would be directly secured to anyone within the jurisdiction of the Contracting States ... That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law.'³⁸ It had always been assumed that human rights were already respected in member states when the ECHR was drafted.³⁹ Therefore, the ECHR was designed as a supervisory body which acted as a watchman for member state activities that would provide redress for citizens should they start violating

³⁰ Zander (n 16).

³¹ Report of the Select Committee on a Bill of Rights, HL Paper 176, June 1978.

³² Simpson, A.W.B. *Human rights and the end of empire: Britain and the genesis of the European Convention* (Oxford: Oxford University Press, 2001) 16.

³³ Drzemeczewski, A. *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford: Clarendon Press, 1983) 2-3.

³⁴ Hoffman, D. and Rowe, J. *Human Rights in the UK: A general introduction to the Human Rights Act* (London: Longman, 2003) 29.

³⁵ Article 1: The parties 'shall secure to everyone within their jurisdiction the rights and freedoms,' defined in Section 1 as Articles 2-18.

³⁶ Petzold, H. 'The Convention and the Principles of Subsidiarity' in Macdonald, R. Matscher, F. and Petzold, H. (eds.) *The European System for the Protection of Human Rights* (Dordrecht, 1993) 41. See also Dixon, M. *Textbook on International Law* (Oxford: Oxford University Press, 2005) 332: '[M]any states have formally incorporated the Convention into their national law, often as an element of their constitution.'

³⁷ *Ireland v UK* (1978) 2 EHRR 25.

³⁸ *Ibid* [239].

³⁹ See Simpson (n 32) 5.

individual rights already protected under domestic law because the 'individual citizen needing protection against his own state could not rely on domestic institutions, as they themselves might be subverted.'⁴⁰ Therefore, if it is true that the sheer number of cases brought under Article 26 indicates a failure of the common law under Thatcher to protect such rights when compared to the other member states, a more legalistic system, which is typically seen in the form of a Bill of Rights, could be said to be needed in order to comply with Britain's Article 1 obligations. In short, since the common law system of negative rights was not satisfactory,⁴¹ the incorporation of the ECHR could itself amount to a Bill of Rights and instil a more legalistic system which would thus satisfy the UK's Article 1 obligations and thus rectify the erosion of civil liberties felt under the eighteen years of Conservative party rule.

However, despite how New Labour's manifesto commitment to incorporate the ECHR into UK law made the incorporation of the Convention seem inevitable by the late 1990s,⁴² such a fact does not automatically guarantee that incorporation would satisfy the characteristics of Bills of Rights, or that it would provide a more secure way of satisfying Britain's Article 1 obligations. Much depends on the form of incorporation chosen.

4. The Type of Incorporation

Ultimately, it could be argued that the ECHR was introduced into the UK for purely practical reasons. This is supported by Leigh and Masterman, who argue that it was the 'central issues of costs and delay to those seeking redress,'⁴³ under the ECHR, that spearheaded calls for the HRA in 1997. British Citizens for over thirty years had to travel to Strasbourg in order to enforce their rights. Thus, when the white paper *Rights Brought Home: The Human Rights Bill*⁴⁴ was published and the HRA was enacted, it was clear that the intention of the newly elected Labour government was not to create an express Bill of Rights *per se*, a fact highlighted by the Acts less inspiring long title,⁴⁵ but simply to give 'further effect' to the ECHR in order to redress the practical difficulties of seeking relief under the Convention. But, as Coppel argues,

⁴⁰ Lyon (n 25).

⁴¹ Simpson (n 32) 39: 'All in all the common law did not put on an impressive performance before the world.'

⁴² Lyon (n 25) 452.

⁴³ Leigh and Masterman (n 15) 15.

⁴⁴ (Cm 3782, 1997) <<http://www.archive.official-documents.co.uk/document/hoffice/rights/intro.htm>> accessed 12.08.2009.

⁴⁵ 'An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.'

although the Act was indeed designed to give 'further effect'⁴⁶ to Convention rights, this does not mean that it was intended to give such rights 'full effect.'⁴⁷ As explained by the former Lord Chancellor, the Convention 'is not made part of our law. The Bill ... does not make the convention directly justiciable.'⁴⁸ Full incorporation could have the effect, as it did in other member states,⁴⁹ of ensuring their commitment to Article 1 and guaranteeing human rights by making the Convention rights freestanding 'positive' rights, thus leading to a substantial reduction in the number of applications to Strasbourg⁵⁰ and ensuring a more definitive move towards legal constitutionalism. However, since 'full force,' the usual term used when international treaties are incorporated into domestic law,⁵¹ was absent,⁵² it is submitted that the HRA is no normal incorporation act, especially when one considers how a number of key provisions were expressly excluded from incorporation.

This can be best seen with s 1(1) HRA, which defines the Convention rights to be incorporated into UK law. The Act only incorporates Articles 2 to 12 and 14 of the ECHR⁵³ (along with Articles 1 to 3 of the First Protocol⁵⁴ and Articles 1 to 2 of the Sixth Protocol⁵⁵) thus expressly excluding Article 1, 13 and 15 to 18. As such, the entire ECHR as an international treaty was not simply transposed into UK law and given domestic constitutional status as it had been elsewhere in Europe,⁵⁶ thus suggesting that the Act amounts only to a 'partial incorporation.' In the end, as stated by the former Home Secretary Jack Straw, 'the Bill ... makes the existing Convention rights more immediate and relevant.'⁵⁷ This idea of making such rights 'more immediate and relevant' is vague and problematic. It suggests that despite the governments claim that the HRA was 'based on bringing the European Convention ... into UK law,'⁵⁸ '[t]heir reasons for doing so were to a considerable extent cosmetic.'⁵⁹

⁴⁶ Grosz, S. Beatson, J. and Duffy, P. *Human Rights: The 1998 Act and the European Convention* (London: Sweet and Maxwell, 2000) 6.

⁴⁷ Coppel (n 23) 5.

⁴⁸ Hansard HL vol 585 col 421 (29 January 1998).

⁴⁹ Lyon (n 25) 332.

⁵⁰ Klug (n 17) 54: 'If it [a Bill of Rights] were truly successful there should in fact be far fewer civil rights cases than currently.'

⁵¹ Fenwick and Phillipson (n 9) 857.

⁵² Grosz, Beatson and Duffy (n 46) 8: 'The HRA does not contain a "force of law" provision.'

⁵³ Section 1(1)(a).

⁵⁴ Section 1(1)(b).

⁵⁵ Section 1(1)(c).

⁵⁶ Belgium, Cyprus, France, Greece, Luxembourg, the Netherlands, Portugal, Spain and Turkey. See Drzemeczewski (n 33) 189.

⁵⁷ Hansard HC vol 306 col 771 (16 February 1998).

⁵⁸ See *Rights Brought Home* (n 44) PM's introduction.

⁵⁹ Lyon (n 25) 452.

5. *Third Wave Bills of Rights and the HRA*

It is possible, however, that despite the fact that the government did not seek to create an express Bill of Rights, or a fully incorporated ECHR, the HRA could nevertheless be 'an example of a "third way" Bill of Rights, which, in its structure, retains an important role for Parliament, and facilitates inclusive debate on human rights issues.'⁶⁰ In other words, a compromising position between the two principal models of constitutional government: the UK and the American. However, although the third wave model does not give the rights contained within the HRA the same higher law status as the American Bill of Rights does, it nevertheless advocates an increase in judicial power, even if purely political, which could be seen as instilling greater democratic dialogue between the branches of state.

For example, the Act 'is not a Bill of Rights in the US or Canadian sense: the courts cannot override statutes.'⁶¹ As argued by Barnett, the HRA 'utilises a peculiarly British device which preserves parliament's theoretical sovereignty,'⁶² a device which finds form under ss 3 and 4.⁶³ Section 3 imposes a duty upon the judiciary to interpret UK legislation in order to ensure its compatibility with the Convention rights 'so far as is possible'⁶⁴ and s 4 permits the court to issue declarations of incompatibility for legislation that the courts find themselves unable to interpret in a Convention-friendly manner.⁶⁵ Crucial to this is how neither section 'affect[s] the validity, continuing operation or enforcement of any incompatible legislation.'⁶⁶ As such, the 'the will of Parliament prevails over Convention rights,'⁶⁷ something which would not occur if the Convention had been fully incorporated⁶⁸ and new substantive rights created. Although this would appear to fall far short of the level of human rights protection that some had hoped for,⁶⁹ such a uniquely British approach towards human rights protection shares immense similarities with the New Zealand approach towards civil liberties as explained above. Legislative supremacy is effectively preserved, suggesting that the HRA could be a compromise between the traditional parliamentary approach towards civil liberties and the more legalistic Bill of Rights approach.

⁶⁰ Klug, F. 'The Human Rights Act – a "third way" or "third wave" Bill of Rights' (2001) *EHRLR* 361.

⁶¹ Leigh and Masterman (n 15) 18.

⁶² Barnett, H. *Constitutional and Administrative Law* (5th edn, Cavendish Publishing Limited, 2004) 198.

⁶³ See Chapter Four.

⁶⁴ Section 3(1).

⁶⁵ Section 4(2).

⁶⁶ Section 3(2)(c) and section 4(6)(a).

⁶⁷ Grosz, Beatson and Duffy (n 46) 7.

⁶⁸ *Ibid*: '[C]omplete incorporation would impinge upon parliamentary sovereignty.'

⁶⁹ Dworkin (n 8) 15-16.

However, despite this, it could still be argued that the HRA is in fact an 'Interpretation Act.'⁷⁰ Many of the Act's key provisions, such as s 3, could be said to only give domestic effect to the ECHR's sixty year old rights in order to satisfy the UK's Article 1 obligations, with the absence of judicial strike down, as utilised in certain Bills of Rights, illustrating an intention to safeguard Britain's long held belief in the legislative supremacy of its elected representatives.⁷¹ Such an argument, however, is disputed by this thesis. Although it has been argued in this thesis that positive rights alone do not amount to a Bill of Rights, this does not mean that they are not significant to the state of civil liberties within a nation. The HRA does introduce a catalogue of new positive rights into UK municipal law, even if they are not to be viewed as superior to other statutory rights.⁷² As argued by Fenwick, the enactment of the ECHR 'created a constitutional transformation not only in terms of rights-protection, but also in terms of judicial reasoning.'⁷³ Therefore, '[s]ince, traditionally, the constitution recognised only negative liberties as opposed to positive rights, the judicial focus of concern always tended to be on the content and nature of the restrictions in question rather than on the value and extent of the right.'⁷⁴ To put it another way, the HRA 'asks the judiciary to consider matters such as the 'quality' of law, not merely its formal existence.'⁷⁵ Following this, it could be said that the Convention rights are also vague, in other words, 'there is no precision in the drafting, no effort to address particular situations, no anticipation of future problems.'⁷⁶ The result of such a characteristic is to empower the judiciary to act more creatively in assessing the very nature of the rights granted, thus theoretically moving judicial reasoning away from the parliamentary intention-seeking reasoning of the Diceyan model to a more 'philosophical approach to legal reasoning' which is often indicative of a Bill of Rights.⁷⁷

Therefore, despite Labour and Parliament's decision to not expressly enact an interpretation act (because of the potentially empowering effect the HRA could have on the judiciary) or a Bill

⁷⁰ Clapham, A. *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) 69.

⁷¹ See Hansard HC vol 306 col 772 (16 February 1998) (Jack Straw MP):.

⁷² Fenwick (n 2) 161: '[T]he HRA was not intended to be a Bill of Rights in the way that the US Amendments to the US Constitution or the Canadian Charter are Bills of Rights, in the sense that those rights have a higher status other laws.'

⁷³ *Ibid* 160.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ Gearty, C. *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004) 21.

⁷⁷ Fenwick, H. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 1. See also Sharpe, R. J. 'The Impact of a Bill of Rights on the Role of the Judiciary: a Canadian Perspective' in Alston, P. (ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999) and Darrow, M. and Alston, P. 'Bills of Rights in Comparative Perspective' in Alston, P. (ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999).

of Rights (because of the preservation of parliamentary supremacy), the introduction of positive rights and a 'duty of construction'⁷⁸ under s 3 could still empower judges to move human rights protection in Britain in a new direction, thus bringing it closer to a Bill of Rights specifically tailored for Britain⁷⁹ than perhaps originally intended or envisaged; in other words, a third wave Bill of Rights. However, due to the uncertainty demonstrated by the government over the status of the HRA and the role of the Convention in human rights adjudication, it is submitted that the judicial reaction to the 1998 Act leaves the question over the status of the HRA open; the application of the HRA is what will ultimately settle the dispute over the nature of the HRA. Thus, in order to assess fully the extent to which the HRA is a Bill of Rights for Britain, a more detailed analysis of the HRA and its key provisions since its coming into force in 2000 will be considered in the following chapters.

⁷⁸ Ewing, K. D. 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79, 87.

⁷⁹ See *Rights Brought Home* (n 44) [1.14]: The domestic enforcement of the Convention rights would allow British judges to make a 'distinctively British contribution to the development of the jurisprudence of human rights in Europe.'

Chapter Three

Judicial Reasoning under the Human Rights Act: Section 2

As Strasbourg has stated itself, the European Convention on Human Rights (ECHR) is a 'living instrument' which 'must be interpreted in light of present-day conditions.'¹ It has therefore been famously stated that the Convention is a secondary method of human rights protection.² It is up to domestic law and domestic courts to provide for the primary protection of rights and to ensure that the 'body of legal principles to which they [the member states] are obliged to conform'³ is done so effectively. With this aim in mind, it must be noted that the UK adoption of the Human Rights Act 1998 (HRA) 'was markedly different to the earlier experiences of legal systems – in Canada, New Zealand and South Africa – coming to terms with the adoption of a newly created Bill of Rights, for the reason that the 'rights' given further effect by the HRA were already to be found in the text of an established international treaty.'⁴

Therefore, accompanying the incorporation of the Convention rights, was a significant body of jurisprudence from the European Court of Human Rights (ECtHR) and the European Commission, which had the potential of ensuring that the British courts interpreted UK law in such a way as to guarantee that these legal principles of the ECHR were understood and applied properly. Because of this, s 2 was designed to help define the role Strasbourg case law would have in the new HRA era in fulfilling the UK's obligations under the ECHR (Article 1) and in helping to assert 'collective enforcement' of these legal principles throughout the member states of Europe.⁵

The approach of the judiciary in defining this relationship is fundamental to the question of whether the HRA is a Bill of Rights for Britain. A more expansive interpretation of s 2, which creates domestic rights beyond the limits of Strasbourg, would move the HRA into the realm of a Bill of Rights. Judges would be able to exercise greater judicial discretion over issues of human rights than had previously been the case. A failure to adopt such an approach risks the portrayal of the HRA as nothing more than a foreign human rights instrument whereby domestic judges merely follow the lead of the Strasbourg Court. For an empowered judiciary to emerge, and thus a Bill of Rights, the court must use its power as directed by the HRA. From

¹ *Tyrer v UK* (1979-80) 2 EHRR 1 [31].

² The Court of Appeal states this as so in *Handyside v UK* (1979-80) 1 EHRR 737 [48].

³ Drzemeczewski, A. *European Human Rights Convention in Domestic Law: A Comparative Study* (Oxford: Clarendon Press, 1983) 22.

⁴ Leigh, I.D. and Masterman, R. *Making Rights Real: the Enforcement of the Human Rights Act* (Oxford: Hart Publishing, 2007) 51.

⁵ See *Ireland v UK* (1978) 2 EHRR 25 [239].

the analysis below, it can be shown that an expansive interpretation has not been received gracefully by the courts, who have instead adopted the more restrictive interpretation of s 2; an approach which adds weight to the argument that the HRA is not a Bill of Rights for Britain.

1. The Purpose of s 2

Section 2(1) states that judges 'must take into account' Strasbourg case law when 'determining a question which has arisen in connection with a Convention right;' they are not bound by it. Thus, Strasbourg case law is given persuasive, but not binding, authority. As Harris *et al* states, Strasbourg decisions are 'essentially declaratory'⁶ in their nature and, according to Smith, 'it is difficult sometimes, to read them as giving rise to any clear *ratio decidendi*, of the kind of sought and applied by common lawyers.'⁷ Arguably, therefore, the decision to not make such case law binding on the UK courts was done out of necessity and common sense; domestic discretion is needed in order to make sense of the decisions of an international court which makes decisions on issues for over forty countries.⁸ Thus, discretion is arguably essential because, as Lord Irvine makes clear, '[t]he courts will often be faced with cases that involve factors perhaps specific to the United Kingdom which distinguish them from cases considered by the European Court ... it is important that our courts have the scope to apply that discretion so as to aid the development of human rights law.'⁹

Indeed, according to the government white paper, s 2 was designed in order to permit a 'distinctively British contribution to the development of the jurisprudence of human rights in Europe.'¹⁰ Therefore, Parliament wanted British judges to have greater interpretive discretion so that they could 'make an express contribution to the decisions of the European Court,'¹¹ as human rights law had, for many decades, been interpreted solely in light of European traditions. It could therefore be argued that the HRA was not intended to merely give easier access to the Convention rights within the domestic law, but to create domestic rights subject to judicial discretion akin to the 'living tree interpretation' of Bills of Rights in other

⁶ Harris, D.J. O'Boyle, M. and Warbrick, C. *Law of the European Convention on Human Rights* (London: Butterworths, 1995) 26.

⁷ Smith, A.T.H. 'The Human Rights Act: The Constitutional Context,' in Cambridge Centre for Public Law, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Oxford: Hart Publishing, 1999) 6.

⁸ Fenwick, H. M. *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 191: 'the adoption of the Strasbourg jurisprudence may, sometimes have the effect of 'reading down' the right due to the effect of the margin of appreciation doctrine.'

⁹ Hansard HL vol 584 cols 1270-71 (19 January 1998).

¹⁰ *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) <<http://www.archive.official-documents.co.uk/document/hoffice/rights/intro.htm>> accessed 12.08.2009 [1.14].

¹¹ Hoffman, D. and Rowe, J. *Human Rights in the UK: A general introduction to the Human Rights Act* (London: Longman, 2003) 53.

constitutional states.¹² In addition to this, because the obligation under s 2 is not restricted to legislation, it has been suggested that the courts are obliged to develop the common law in light of the Convention rights;¹³ an obligation which is arguably reinforced by the additional duty upon the courts, as a public authority under s 6, to not infringe any of the Convention rights.¹⁴ So far, however, the impact of this obligation appears to have been restricted to the law of privacy.¹⁵

It has been argued by Fenwick that this obligation on the courts to merely take into account Strasbourg decisions and not to be bound by them makes it 'open to the judiciary to consider but *disapply* a particular decision.'¹⁶ This is supported by Masterman, who states that s 2(1) 'creates a significant judicial discretionary power.'¹⁷ As a consequence of this, the 'ability of domestic courts to depart from Strasbourg jurisprudence has been seen by a number of commentators as one of the characteristics of the HRA which most resembles such a Bill [of Rights].'¹⁸ Such an assertion does have merit, as any increase in judicial power could fit, at the very least, the definition of a third wave Bill of Rights. For instance, as argued by Lord Kingsland, the absence of a duty to follow Strasbourg precedence in the HRA 'means that the Bill [HRA] is effectively a domestic Bill of Rights and not a proper incorporation of international rights. It means that the judges ... are not obliged to act on it and can go in whatever direction they wish,'¹⁹ just as Fenwick argues above. Therefore, as a result, it is clear that 'the injunction contained in HRA section 2(1) that courts should take Strasbourg jurisprudence into account is a flexible adjudicatory device but one which inevitably creates an area of uncertainty for judges.'²⁰

This sentiment is also reflected in part by Lord Kingsland, who agrees that 'if our judges only take account of the jurisprudence of the European Court of Human Rights, we cast them adrift from their international moorings.'²¹ It is this, he argues, that causes the HRA under s 2 to

¹² See Huscroft, G. 'The Trouble with Living Tree Interpretation' (2006) 25 *U. Queensland L.J.* 24.

¹³ See Fenwick (n 8) 198; Kavanagh, A. *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 144; and Wright, J. 'Interpreting s 2 of the Human Rights Act 1998: towards an indigenous jurisprudence of human rights' (2009) *PL* 595, 599-600.

¹⁴ Kavanagh (n 13).

¹⁵ Wright (n 13). For a more in-depth discussion see Chapter Five.

¹⁶ Fenwick (n 8) (emphasis added).

¹⁷ Masterman, R. 'Aspiration or Foundation? The status of the Strasbourg jurisprudence and the 'Convention rights' in domestic law' in Fenwick, H. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 62.

¹⁸ *Ibid.* See also Bonner, D. Fenwick, H.M. and Harris-Short, S. 'Judicial Approaches to the Human Rights Act' (2003) 52 *ICLQ* 549, 553.

¹⁹ Hansard HL vol 583 col 514 (18 November 1997).

²⁰ Tierney, S. 'Devolution issues and s 2(1) of the Human Rights Act 1998' [2000] *EHRLR* 380, 392.

²¹ Hansard HL vol 583 col 514 (18 November 1997).

become a domestic Bill of Rights because '[t]he Bill [HRA] ... will have no accurate charts by which to sail because judges are obliged only to take account of provisions of the Convention.'²² This issue is therefore of fundamental importance to the status of the HRA. If s 2 is to make the HRA a *de facto* Bill of Rights, much will depend on the extent to which the judges themselves use their discretion under s 2 to apply Strasbourg jurisprudence.

2. Section 2 and Outside Jurisprudence

This is equally applicable to case law from outside the ECtHR as well. According to Klug, s 2 HRA 'allows the courts to range wider than the ECHR and look at the jurisprudence of other human rights treatise' something which makes the HRA 'effectively a bill of rights or "higher law"'.²³ Contrary to what Klug believes, however, the bare text of s 2 states nothing about the application of authority from outside jurisdictions. However, despite this, Fenwick argues that 'it was always clear that the courts could also consider jurisprudence from other jurisdictions; s 2 clearly leaves open the possibility of so doing,²⁴ and in fact the House of Lords did so in the HRA case of *R v A*²⁵. The extent to which this makes the HRA, under s 2, a Bill of Rights is, however, debatable. Although s 2 'allows the scope for – or at least does not expressly prohibit – the consideration of jurisprudence from other jurisdictions'²⁶ this does not mean that the HRA is in fact a domestic Bill of Rights or "higher law." This is supported by Leigh and Masterman, who argue that the early experiences of domestic courts, such as in *Brown v Stott*,²⁷ could be evidence of 'English courts ... taking an activist approach: in placing increased reliance on comparative jurisprudence in human rights adjudication, even where their primary source, the Convention case law, has a wealth of 'relevant' jurisprudence available.'²⁸

According to Klug, the HRA is a Bill of Rights because it 'takes its source from a regional human rights treaty but is interpreted by domestic judges, who also draw from the human rights jurisprudence of *other* jurisdictions where appropriate.'²⁹ Thus, the use of jurisprudence from other jurisdictions, as demonstrated above, could be seen as evidence of an empowered judiciary under a Bill of Rights. Support for this can be found with the Victorian Charter of Human Rights and Responsibilities 2006 (VCHR). Under s 32(2), the Charter permits the Victorian courts to make reference to '[i]nternational law and the judgments of domestic,

²² *Ibid.*

²³ Klug, F. 'The Human Rights Act – a "third way" or "third wave" Bill of Rights' (2001) *EHRLR* 361, 370.

²⁴ Fenwick (n 8) 192.

²⁵ [2001] 2 WLR 1546.

²⁶ Leigh and Masterman (n 4) 75.

²⁷ *Brown v Stott* [2003] 1 AC 681.

²⁸ Leigh and Masterman (n 4) 76.

²⁹ Klug, F. 'A bill of rights: do we need one or do we already have one?' (2007) *PL* 705, 707.

foreign and international tribunals' when deciding the meaning of rights protected under the Charter. As argued by Masterman, '[a]t first glance the provision appears to offer considerable potential for judicial adventurism,' as it may result in the courts adopting principles which may not always be relevant to the cases before them,³⁰ thus increasing the potential, it is submitted, for judicial supremacy on issues of human rights as seen in America. However, Masterman also suggests that this provision 'is in fact one of the strengths of the document as a co-operative rights measure under which all three branches of government have a legitimate say in interpretative and definitional questions.'³¹ As he argues, '[b]y allowing courts to range more widely in their search for the meanings of human rights there is less of a likelihood that the courts' view will necessarily prevail in the discussion, or dialogue, which may ensure.'³² In this sense, the use of material from outside jurisdictions could be seen as a characteristic of both the American³³ and third wave model of Bills of Rights, although both are used to produce different outcomes in terms of the allocation of power between the arms of state.

Professor Robert Wintemute has argued, 'if a country voluntarily incorporates the exact wording of the Convention into its national law, the Convention ceases to be a European text but becomes a national text, to which *national* courts are free to give a more generous interpretation.'³⁴ However, despite how such a claim may indeed be theoretically sound, the reality is very different. Although there is evidence of judicial activism, as discussed below, this does not necessarily mean that the HRA is a Bill of Rights; for Wintemute's hypothesis to have any weight, the judiciary must move away from the Convention as its anchor, but there is very little evidence to suggest that Parliament intended this to be the case.

Lord Irvine, for example, stated during the debates in the Lords about the Human Rights Bill that s 2 was engineered in order to 'permit the United Kingdom courts to depart from Strasbourg where there was no precise ruling on a matter and a Commission opinion which does so had not taken into account subsequent Strasbourg case law.'³⁵ Clearly, from this, the purpose of s 2 was to merely provide British judges with the means by which to contribute to the development of human rights law in areas where the European case law is lacking any

³⁰ Masterman, R. 'Interpretations, declarations and dialogue: rights protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' (2009) *PL* 112, 117.

³¹ *Ibid.*

³² *Ibid.*

³³ Such a claim is greatly disputed. See *Roper v Simmons*, 125 S. Ct. 1183, 1200 [2005] (Justice Scalia): '[T]he basic premise of the Court's argument – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand.'

³⁴ Wintemute, R. 'The Human Rights Act's First Five Years: too strong, too weak or just right?' (2006) 17 *King's College Law Journal* 209.

³⁵ Hansard HL vol 583 col 514 (18 November 1997).

clear *dictum*; it does not permit judges to disapply Strasbourg jurisprudence on a mere whim. This proposition is also reinforced by how the HRA is supposed to provide a 'floor of rights' protection and not a ceiling.³⁶ In other words, judges should not, at the very least, 'read down' the Convention rights. If one follows the understanding of the Lord Chancellor above, the judges should, where possible, provide for greater protection of the rights. However, the phrase 'floor of rights' also allows judges to simply keep to the Strasbourg standard and go no further, though some commentators, such as Richard Clayton, believe that such an approach by the courts is 'open to question'.³⁷

3. A Ceiling not a Floor – the mirror principle

Although Strasbourg jurisprudence has only persuasive force under s 2, it has been argued that 'it has been treated in a fashion that comes close to giving binding force'.³⁸ Such an approach demonstrates reluctance on behalf of the judiciary to adopt an expansive Bill of Rights approach towards s 2 and to use their discretion to create free-standing domestic rights which go beyond the limits of Strasbourg; an assessment which is supported by Leigh and Masterman, who state that '[t]he trend of judicial reasoning under section 2(1) has overwhelmingly been towards limiting this area of discretion'.³⁹ This can be seen in a number of cases since the passing of the HRA which demonstrate a mixed response by the judiciary towards s 2, first, with how to engage with Strasbourg case law. As Leigh and Masterman note, '[i]n some cases counsel were told that domestic legislation already fully took into account the Convention so that it was unnecessary to cite relevant jurisprudence'.⁴⁰

For example, in *Re F (Care: Termination of Contract)*,⁴¹ Mr Justice Wall displayed a greater trust in English legal criteria of fairness and justice over that of Strasbourg reasoning when discussing compatibility with Convention rights, thus showing a flagrant disregard for his duty under s 2 to even take into account such case law 'whenever made or given.' Similarly, in *R v Davis (Michael George) (No 3)*,⁴² Lord Justice Mantell, as argued by Leigh and Masterman, 'stressed that the duty under the HRA to 'take account' of the Strasbourg decision did not mean that the English court had 'to adopt' or 'to apply it',⁴³ thus illustrating a degree of judicial distrust in their own powers under the HRA, stressing a desire to follow decisions of

³⁶ See Hansard HL vol 583 col 510 (18 November 1997).

³⁷ Clayton, R. 'The Human Rights Act six years on: where are we now?' (2007) *EHRLR* 11, 18.

³⁸ Fenwick (n 8) 192.

³⁹ Leigh and Masterman (n 4) 60.

⁴⁰ *Ibid* 56.

⁴¹ [2000] 2 FCR 481; *The Times*, 22 June 2000.

⁴² [2001] 1 Cr App R 8 [60].

⁴³ Leigh and Masterman (n 4) 57.

the House of Lords as always as opposed to engaging in meaningful human rights dialogue. This was made most explicit in the case of *R (Bright) v Central Criminal Court*,⁴⁴ where Lord Justice Judge stated that 'we [judges] are not permitted to re-examine decisions of the European Court to ascertain whether the conclusion of the House of Lords or the Court of Appeal may be inconsistent with those decisions, or susceptible to a continuing gloss.'⁴⁵

Indeed, as far as the early cases under the HRA are concerned, there would appear to be a distinct rejection of the very idea put forward by Lord Bingham of judges having a 'significant contribution to make in the development of the law of human rights,'⁴⁶ a rejection which, according to Leigh and Masterman, 'is down to a 'dangerous complacency over home-grown standards of justice, with a dash of mild Europhobia thrown in for good measure.'⁴⁷ However, despite such harsh and arguably inevitable reactions towards the introduction of s 2, it has still been asserted that such 'invocation of the doctrine of precedent and attempts to distinguish Strasbourg case law were reassuring: they indicate just how quickly most judges appear to have adjusted to the influx of a substantial new source of law into the legal system' thus leading to an 'engagement with the Strasbourg decisions at a detailed and sometimes extensive level.'⁴⁸ Though this may be true, thus suggesting a greater degree of human rights discussion and dialogue within the UK judiciary, it has still been argued that the intention behind the HRA and s 2 to develop Convention rights for the domestic sphere and, most importantly, to provide a floor and not a ceiling for Convention rights, has been lost because of what Jonathan Lewis describes as the 'mirror principle.'⁴⁹

According to Lewis, the 'mirror principle' is a description of the judiciary's approach towards jurisprudence they are obliged to take into account under s 2; namely that 'the scope and content attributed by domestic courts must always match that attributed to Convention rights by the European Court of Human Rights.'⁵⁰ The basis for such a claim can be traced to Lord Slynn's dictum in *R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment*.⁵¹ Here, Lord Slynn stated that:

Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In

⁴⁴ [2001] 1 WLR 662.

⁴⁵ *Ibid* 682.

⁴⁶ Hansard HL vol 582 col 1245 (3 November 1997).

⁴⁷ Leigh and Masterman (n 4) 57.

⁴⁸ *Ibid* 59.

⁴⁹ Lewis, J. 'The European ceiling on human rights' (2007) *PL* 720, 725.

⁵⁰ *Ibid* 720.

⁵¹ [2001] UKHL 23.

the absence of special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least a possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.⁵²

According to Fenwick, this 'stance appears to indicate that the domestic courts cannot provide greater Convention protection for citizens than is available at Strasbourg – that they are inhibited in developing a more expansive domestic Convention jurisprudence.'⁵³

This would certainly appear to be the case, especially when one considers the House of Lords' decision in *R (on the application of Begum) v Denbigh High School*, where it was held that 'the purpose of the HRA was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated, but to enable Convention rights and remedies to be asserted and enforced by the domestic courts, and not only by recourse to Strasbourg.'⁵⁴ Such a decision by the House of Lords demonstrates a clear rejection of the view that the HRA creates domestic rights,⁵⁵ thus also rejecting the adoption of a generous 'living tree interpretation' of the Convention rights which is used by other constitutional states with a Bill of Rights. A similar sentiment was also expressed in *R (on the application of Ullah) v Special Adjudicator*, where Lord Bingham reiterated Lord Slynn's statement that 'clear and constant' jurisprudence should be followed subject to 'special circumstances,' asserting that this approach 'reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this, it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law.'⁵⁶ Indeed, as Clayton reservedly acknowledges, '[i]t is a well established principle that when treaty obligations are incorporated into domestic law, the obligation will be construed by reference to the principles of international law governing its interpretation rather than any domestic principle of construction.'⁵⁷ Because of this, it could be said that the adoption by the courts of the 'mirror principle' is in line with conventional judicial approaches. However, it is submitted that such an argument stands in opposition to the apparent desire and intention of Parliament

⁵² *Ibid* [26].

⁵³ Fenwick (n 8) 193.

⁵⁴ [2006] UKHL 15; [2006] 2 WLR 719 [29].

⁵⁵ *In re McKerr* [2004] UKHL 12 (Lord Hoffmann) [65]: 'What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention.'

⁵⁶ [2004] UKHL 26 [20].

⁵⁷ Clayton (n 37).

for UK courts to 'take their lead from Strasbourg'⁵⁸ and thus create domestic human rights for the UK as typified by Bills of Rights.⁵⁹

4. Departure from Strasbourg – exceptions to the mirror principle

It must be noted that, according to Lord Slynn and Lord Irvine, there are certain situations where the courts can evoke their discretion under s 2 to not follow Strasbourg jurisprudence. As noted above, Lord Slynn has stated that 'clear and constant' Strasbourg jurisprudence should be followed in the absence of 'special circumstance',⁶⁰ with the Lord Chancellor, Lord Irvine, advocating that Strasbourg case law should not be followed under s 2 only where 'there was no precise ruling on a matter and a Commission opinion which does so had not taken into account subsequent Strasbourg case law'.⁶¹

Because of this, Kavanagh has offered an alternative explanation of s 2(1) to that advocated by this thesis which could arguably be viewed as better tailored to British legal tradition. Far from following Strasbourg jurisprudence automatically, Kavanagh argues that the judiciary have instead 'interpreted the section 2 obligation as creating a strong presumption in favour of following Strasbourg jurisprudence, which can only be rebutted in special circumstances'.⁶² As a result, she argues that, in practice, the judiciary have 'accorded the Strasbourg jurisprudence a binding status similar to that accorded by the House of Lords to its own precedents'.⁶³ Section 2 could therefore be said to operate under a system of partial and not absolute precedent.⁶⁴ In the same way that the House of Lords can depart from its own previous decisions 'when it appears right to do so',⁶⁵ they can depart from Strasbourg case law under 'special circumstances' also. In this way, judicial discretion, though limited, is nevertheless preserved under s 2.⁶⁶ However, when one examines the case law on this matter, it becomes clear that, as argued by Lewis, 'the courts have been very reluctant to exploit the two exceptions to the mirror principle'.⁶⁷

⁵⁸ *A-G's Reference, No 4 of 2002* [2004] UKHL 43 [33].

⁵⁹ See Clayton (n 37) 19. Despite acknowledging the uncertainty surrounding the appropriate construction of s 2, Clayton insists that 'the concentration on Strasbourg decisions has prevented the English courts from developing indigenous human rights jurisprudence.'

⁶⁰ *Alconbury* (n 51) [26].

⁶¹ Hansard HL vol 583 col 514 (18 November 1997).

⁶² Kavanagh (n 13) 146.

⁶³ *Ibid* 144.

⁶⁴ *Ibid* 148.

⁶⁵ *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

⁶⁶ Kavanagh (n 13) 146.

⁶⁷ Lewis (n 49) 731.

One possible example of 'special circumstances' can be seen in the case of *R v Spear and Others*, where Lord Bingham said that the court may not follow Strasbourg where they had not 'receive[d] all the help which was needed to from a conclusion.'⁶⁸ This possible exception is, however, clearly vague and unhelpful, and provides no real basis on when the courts will depart from Strasbourg. Simon Brown LJ also stated that 'where ... as here, the ECtHR itself is proposing to re-examine a particular line of cases, it would seem somewhat presumptuous for us, in effect, to pre-empt its decision,'⁶⁹ thus demonstrating a 'marked reluctance to offer either an invitation to Strasbourg to reconsider its position or to provide a lead to the Convention organs.'⁷⁰ When it is appropriate, therefore, for the courts to depart from Strasbourg and make their own mark on human rights jurisprudence would appear to be a question which the judiciary are keen to avoid answering.

Lord Hoffmann in *R v Lyons (No.3)* also provided another potential 'special circumstance' where the courts could be inclined to depart from Strasbourg's lead; namely when 'an English court considers that the ECtHR has misunderstood or been misinformed about some aspect of English law' or 'it may wish to give a judgment which invites the ECtHR to reconsider the question.'⁷¹ A similar sentiment could be argued to have been expressed by Buxton LJ in *Ghaidan v Godin-Mendoza*⁷² who was 'prepared to depart from an admissibility decision on the basis that Strasbourg had erred in its assessment of the purpose of domestic English legislation; departure was permissible because the court was not departing from Strasbourg interpretation of the article;⁷³ a ground for departure which Richard Clayton describes as 'mundane.'⁷⁴

In *Alconbury*, Lord Hoffmann also stated *obiter* that '[t]he House [of Lords] is not bound by the decisions of the European Court and, if I thought that ... they compelled a conclusion fundamentally at odds with the distribution of power under the British constitution, I would have considerable doubt as to whether they should be followed.'⁷⁵ From this, it could be inferred that 'Lord Hoffmann's *dicta* hints at a certain normative force to the principles on which the UK constitution is based which might justify a departure from the Strasbourg authorities,'⁷⁶ although such a scenario has not yet arisen.⁷⁷ Thus, what these principles are is

⁶⁸ [2002] UKHL 31; [2003] 1 AC 734 [12].

⁶⁹ *Ibid* [66].

⁷⁰ Masterman (n 17) 73.

⁷¹ [2002] UKHL 44, [2003] 1 AC 976, 18.

⁷² [2002] EWCA Civ 1533; [2003] Ch. 380 [24].

⁷³ Lewis (n 49) 730.

⁷⁴ Clayton, R. 'Developing principles for human rights' (2002) *EHRLR* 175, 177.

⁷⁵ *Alconbury* (n 51) [76].

⁷⁶ Masterman (n 17) 72.

not yet known. If they are in fact the underlying principles discussed in chapter one, this dictum by Lord Hoffmann may be completely contrary to the aims of the HRA as an Act engineered to bring greater human rights protection to a system of government open to potential abuse of such rights. Lord Hoffmann's reference to 'conclusions fundamentally at odds with the distribution of powers under the British constitution' is particularly problematic and supports the above analysis that the courts should not follow decisions concerning the Convention rights which affect the powers of the judiciary, the executive and the legislature; a view which may explain the reluctance of the judiciary to embrace the discretion given to them under s 2 to the fullest extent and move Britain closer towards a legal constitution.

Therefore, despite the numerous grounds stated by the court since the passing of the HRA of where they may be willing to depart from Strasbourg jurisprudence, '[i]n practice, these grounds ... have been both narrowly drawn and infrequently used,⁷⁸ thus making academic commentator Jonathan Lewis declare correctly that '[w]ith such a paucity of departures, the existence of the exceptions must be doubtful. It follows that the mirror principle is practically inescapable.⁷⁹

5. An Alternative Route?

However, this has not prevented some judges from attempting to break free from Strasbourg jurisprudence. In *R (on the application of Animal Defenders International) v Secretary of State for Culture, media and sport*,⁸⁰ the House of Lords had to consider a request by Animal Defenders International for the issuing of a declaration of incompatibility under s 4 for s 321(2) of the Communications Act 2003, which imposed a blanket ban on political advertising in broadcasting, which they argued was incompatible with Article 10. In his judgment, Lord Scott asserted firmly his opposition to the mirror principle. He stated that, although it was important for the courts to take into account Strasbourg jurisprudence, the 'domestic courts are nonetheless not bound by the European Court's interpretation of an incorporated article,⁸¹ thus asserting clearly his view that the HRA incorporated the Convention rights into the domestic law of the UK and were thus separate from the Convention rights at the international level.

⁷⁷ See Lewis (n 49) 731.

⁷⁸ Leigh and Masterman (n 4) 65.

⁷⁹ Lewis (n 49) 731.

⁸⁰ [2008] UKHL 15.

⁸¹ *Ibid* [44].

In *Re P (A Child) (Adoption; Unmarried Couples)*,⁸² which concerned the question of whether it is consistent with the Convention rights for couple to be prevented from adopting a child on the ground that they are not married, the court appeared to reaffirm this new Bill of Rights approach towards s 2. Lord Hope stated that '[t]he Strasbourg jurisprudence is not to be treated as a straightjacket from which there is no escape,'⁸³ indicating a clear dislike of the judiciary's attachment towards Strasbourg jurisprudence in the form of the mirror principle. Baroness Hale was also vocal in her opposition towards the mirror principle, arguing that Parliament intended for the courts to go further than Strasbourg in certain circumstances.⁸⁴

However, despite such reservations, the majority finding of a breach of Article 14 was not so radical as to disregard the existence and role of the mirror principle in the judiciary's application of s 2, identifying instead a new exception to the mirror principle, an exception which was described by Lord Mance as an 'alternative route.'⁸⁵ Lord Hoffmann firstly identified three justifications for the use of the mirror principle under s 2: (1) that although the courts are not bound to follow Strasbourg jurisprudence under s 2, it nevertheless establishes a 'dialogic' relationship between the UK Courts and Strasbourg whereby the courts should not construe legislation in such a way as to place the UK in breach of its international obligations, (2) that the domestic courts should respect the decisions of another court on the same point, and (3) that there should be a uniformed interpretation of the Convention across every Member State.⁸⁶ Following this, he declared that such justifications should not apply to situations where the Strasbourg Court has held that a particular issue lies within a member State's margin of appreciation.⁸⁷

It is argued, however, that instead of developing a new approach towards the judiciary's understanding and application of s 2, their Lordships instead stated the plain obvious; they declared that the domestic courts cannot follow a decision by Strasbourg when there is no decision by Strasbourg because there is too wide a variation in opinion amongst the Member States to merit one. In other words, they can not follow a decision which does not exist. Although resulting in the positive situation whereby the judiciary must decide an issue without help from Strasbourg, it is submitted that such a result is only radical to a bench which considers itself as *de facto* bound to follow Strasbourg's lead. The Lords effectively found

⁸² [2008] UKHL 38; [2008] 3 WLR 76.

⁸³ *Ibid* [50].

⁸⁴ *Ibid* [119].

⁸⁵ *Ibid* [126].

⁸⁶ Lewis, J. 'In Re P and others: an exception to the "no more, certainly no less" rule' (2009) *PL* 43, 45-46.

⁸⁷ *Re P* (n 82) [36].

themselves confronted with a question which Strasbourg had not already answered, and thus *had* to break away from the mirror principle and come to a decision on their own.

This did not, however, prevent their Lordships from basing much of their judgment upon Strasbourg case law. In *Re P*, their Lordships appeared to make their decision in line with the direction they believed Strasbourg was moving in. Basing his judgment upon an apparent change in ECtHR reasoning on the relevance to sexual orientation in adoption,⁸⁸ Lord Hoffman stated that '[i]t therefore seems to me not at all unlikely that if the issue in this case were to go to Strasbourg, the Court would hold that discrimination against a couple who wish to adopt a child on the ground that they are not married would violate article 14.'⁸⁹ Their Lordships therefore made a decision they believed Strasbourg would likewise make.

Therefore, it is submitted that such a ruling can never be considered a 'new approach' towards s 2. Although this decision could perhaps signal the beginning of a change in direction for the judiciary's approach and understanding of s 2, it is still reflective of the dominant trend of the judiciary to view Strasbourg as the primary protector of rights, thus rejecting the argument that s 2 and the HRA could create domestic rights for the UK as seen with a Bill of Rights. This is supported by Lewis, who argues that none of the 'justifications' for the mirror principle should apply, even where no margin of appreciation has been granted by the ECtHR, because the rights being considered were domestic and not international in nature.⁹⁰ In his judgment, Lord Hoffmann refers to the Convention rights 'as defined in section 1(1) of the Human Rights Act 1998,'⁹¹ not as defined in the ECHR. Therefore, it is argued that because, by their own admission, their Lordships were dealing with domestic rights, such international considerations should not apply.⁹² Although, as argued by Lewis, this decision 'is to be welcomed for its implicit nuanced erosion of the mirror principle,'⁹³ it still fails to go far enough to signal a new definitive approach towards s 2 which is more akin to a bill of rights.

6. The ECHR as 'Higher Law'?

Following this, questions are raised yet again over the status of the HRA as either an incorporating treaty or as a domestic Bill of Rights. Following Lord Bingham's reasoning in *Ullah*, the HRA could be said to be nothing more than an incorporation treaty, with s 2 acting as nothing more than the means by which domestic courts can 'keep pace with the Strasbourg

⁸⁸ *Ibid* [25].

⁸⁹ *Ibid* [27].

⁹⁰ Lewis (n 86) 46.

⁹¹ *Re P* (n 82) [1].

⁹² Lewis (n 86) 45.

⁹³ *Ibid* 47.

jurisprudence as it evolves over time: no more, but no less.⁹⁴ Undeniably, such a stance by the House of Lords contradicts entirely the opinions of Francesca Klug and Robert Wintemute⁹⁵ that there has been, because of the wording of s 2, a detachment from the Convention as the sole and most influential source of law. However, from the above cases, it appears plausible that the UK courts have developed a 'tendency towards regarding the Strasbourg standard as the aspiration rather than the foundation for developing of domestic rights jurisprudence.'⁹⁶

Therefore, it could be argued that Strasbourg case law, because of the wording of s 2 and because of the judicial approach towards it, amounts to a form of 'higher law.' Such a claim, however, has been heavily contested. As argued by Lord Irvine, the Convention is the 'ultimate source of the relevant law'⁹⁷ and thus not the Strasbourg jurisprudence. Therefore, the judiciary's somewhat precedent-like approach towards Strasbourg case law under s 2 does not make it a Bill of Rights. This is especially so when one considers how, even at the international level, member states are only obliged to 'abide by the final judgment of the Court in any case to which they are the parties';⁹⁸ they are not bound by decisions which do not concern them. Therefore, s 2 could be seen as mere domestic extension of this international obligation, thus supporting the reasoning of judges made above that the courts should be treating the Convention more as an aspiration than as a minimum, but purely because of the HRA's status as an incorporated international human rights treaty. This is reinforced by judicial attitudes and understandings of how to approach the Convention rights themselves. As argued by Lord Bingham, although '[i]t is of course open to member states to provide for rights more generous than those guaranteed by the Convention ... such provisions should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout that states party to it.'⁹⁹ This sentiment was also endorsed by Baroness Hale in *R (on the application of Marper) v Chief Constable of South Yorkshire*, where she said that the courts 'must interpret the Convention rights in a way which keeps pace with rather than leaps ahead of the Strasbourg jurisprudence as it evolves over time,'¹⁰⁰ as well as by Buxton LJ in *Ghaidan v Godin-Mendoza*.¹⁰¹ Such a stance has been enforced rigorously, regardless of the comments of Lord Woolf in *Marper* that domestic

⁹⁴ *Ullah* (n 56).

⁹⁵ See Klug (n 23) and Wintemute (n 34).

⁹⁶ Leigh and Masterman (n 4) 66.

⁹⁷ Irvine, Lord D. 'Activism and Restraint: human rights and the interpretive process' in Cambridge Centre for Public Law, *The Human Rights Act and the Criminal Justice and Regulatory Process* (Oxford: Hart Publishing, 1999) 14.

⁹⁸ Art 46 (1) ECHR.

⁹⁹ *Ullah* (n 56).

¹⁰⁰ [2004] UKHL 39 [78].

¹⁰¹ (n 72).

cultural traditions should determine the ambit of the Convention rights.¹⁰² Such a view, though arguably in line with the intention of the HRA to allow the British courts to make a uniquely British contribution to human rights law,¹⁰³ was nevertheless rejected outright by Lord Steyn in the House of Lords.¹⁰⁴

It is argued by Lewis that this judicial embrace of the 'mirror principle' – and thus a restricted approach towards human rights adjudication – is down to the HRA's lack of distinction between Convention rights and municipal rights. He states that when the HRA was enacted, '[t]he Courts automatically gave municipal rights the same interpretation as had been given to Convention rights. Hence, municipal rights and Convention rights were identical and could be used interchangeably.'¹⁰⁵ Thus, Lewis concludes that '[t]he mirror principle seems to have been inspired by s 2 which requires domestic courts and tribunals, when interpreting municipal rights, to "take into account", inter alia, any judgment, decision, declaration or advisory opinion of the Strasbourg Court. Therefore, unlike under the Convention where the United Kingdom has to accept a judgment of the Strasbourg Court as binding,¹⁰⁶ a court adjudicating in litigation in the United Kingdom about a municipal right is theoretically not bound by a decision of the Strasbourg Court.'¹⁰⁷ Therefore, a British court could not follow the decision of the Strasbourg Court on the understanding that it is a municipal right, despite it also being identical to a Convention right. Such a move, unsurprisingly, would appear unprincipled and suspect, hence the overall judicial understanding of s 2 as a tool of precedent as opposed to a tool of judicial interpretation. Although this judicial response could be seen as inevitable when one attempts to incorporate any international treaty into domestic law, it is undeniable that this 'rigid interpretation of section 2(1) is in stark contrast to the progressive approach to the Strasbourg jurisprudence seemingly envisaged by the Government during the parliamentary debates on the Human Rights Bill, and arguably undermines the role of national authorities as the primary mechanism for securing the protections afforded by the Convention.'¹⁰⁸ Although there would appear to be a softening of the judiciary's stance on the

¹⁰² CA [2002] 1 WLR 3223 [34].

¹⁰³ See *Rights Brought Home* (n 10).

¹⁰⁴ *Marper* (n 100) [27].

¹⁰⁵ Lewis (n 49) 728.

¹⁰⁶ Art. 46(1).

¹⁰⁷ Lewis (n 49) 728-729.

¹⁰⁸ Leigh and Masterman (n 4) 64.

application of the mirror principle as seen in *Animal Defenders*¹⁰⁹ and *Re P and others*,¹¹⁰ more is still needed for the HRA, under s 2, to be considered a domestic Bill of Rights for Britain.¹¹¹

7. Strasbourg Principles not Strasbourg Case Law

Much of the above discussion has been focused on the application of case law from the ECtHR under s 2 and the impact this has on the status of the HRA as a Bill of Rights. Such a discussion surrounding the status of Strasbourg case law under the HRA, though essential, is at the expense of an alternative interpretation of s 2; namely that the courts should be following Strasbourg *principles* as derived from the case law and not the case law itself. The argument that s 2 has therefore been misread finds authority in *Kay v Lambeth London Borough Council*; *Leeds City Council v Price*,¹¹² where 'Lord Bingham ... said that domestic courts are not strictly required to follow rulings of the Strasbourg Court, but that they must give practical recognition to the principles it expounds.'¹¹³ Additional authority for this claim can also be found in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* where Sir Andrew Morritt V-C noted that '[o]ur task is not to cast around in the European Human Rights Reports like black letter lawyers seeking clues. In the light of s 2(1) of the Human Rights Act 1998 it is to draw out the broad principles which animate the Convention.'¹¹⁴ Such an approach, if adopted by the courts, could make judicial decisions more flexible and creative as arguably seen under a Bill of Rights. However, the extent to which this approach has been adopted is mixed, with the judiciary displaying a clear deference towards Strasbourg as they traditionally did towards Parliament, hence the restricted approach towards s 2 as seen above. This can be seen most strikingly by the comments of Buxton LJ, who argued that the judiciary's reluctance under s 2 could be justified on the grounds that 'where an international court has the specific task of interpreting an international instrument it brings to that a range of knowledge and principle that a national court cannot aspire to.'¹¹⁵ Not only this, but due to the declaratory nature of ECtHR decisions, some members of the House of Lords have 'had some difficulty identifying any clear principles in the Strasbourg case law.'¹¹⁶

¹⁰⁹ *Animal Defenders* (n 80).

¹¹⁰ *Re P* (n 82).

¹¹¹ See Masterman, R. 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' (2004) PL 725, 735.

¹¹² [2006] UKHL 10.

¹¹³ Fenwick (n 8) 195.

¹¹⁴ [2001] EWCA Civ 713, [2002] Ch. 51, 65.

¹¹⁵ *R (on the application of Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 [91].

¹¹⁶ Clayton (n 37) 17.

Despite this, however, Anthony Lester argues that '[t]he key principles of proportionality was given practical content by the House of Lords in *Daly*,¹¹⁷ a significant step in the development of a more progressive human rights adjudication by UK courts as 'the courts are not bound by the Human Rights Act 1998 (HRA) to apply a test of proportionality when applying the European Convention on Human Rights, let alone when applying the common law.'¹¹⁸ The adoption by UK courts of this principle also suggest an embracement by the judiciary of s 2 as a tool for deriving Strasbourg principles from the case law as opposed to the case law itself as '[p]roportionality is not a term found in the Convention'¹¹⁹ but is a principle which 'plays a crucial role in the jurisprudence of the European Convention on Human Rights.'¹²⁰ Proportionality 'applies particularly to the qualified rights and where the expression "necessary in a democratic society" is contained within the article. Whether or not such a right has been violated will depend on whether the interference with the right is proportionate to the legitimate aim pursued by that interference.'¹²¹ Proportionality's primary application is in the realm of judicial review, and it has been argued by Nicholas Blake that 'proportionality in the application of human rights standards is a key mechanism for the protection of the rule of law' and that in judicial review cases 'proportionality can provide a principled basis for the maintenance of a balance of power between legislature and judiciary.'¹²²

The adoption of such a progressive principle could thus suggest that the HRA, under this alternative understanding of s 2, could in fact be a Bill of Rights, especially when one considers its application in other jurisdictions such as Canada, New Zealand and South Africa,¹²³ two of which adopt a more legal constitutional approach towards human rights protection than the UK. In *R (on the application of Daly) v Secretary of State for the Home Department*,¹²⁴ Lord Steyn 'took the opportunity of stating emphatically that the principle of proportionality, as opposed to the *Wednesbury* principle or any derivative of it, should also be applied in appropriate cases when assessing the justifications of interferences with Convention rights,¹²⁵ thus engraving the principle into domestic law as Anthony Lester states above.'¹²⁶

¹¹⁷ Lester, Lord A. 'The Human Rights Act 1998 – five years on' (2004) *EHRLR* 258, 265.

¹¹⁸ Hickman, T.R. 'The substance and structure of proportionality' (2008) *PL* 694.

¹¹⁹ *Ibid* n 2.

¹²⁰ Clayton, R. 'Regaining a sense of proportion: the Human Rights Act and the proportionality principle' (2001) *EHRLR* 504, 505.

¹²¹ Martin, E. A. (ed) *A Dictionary of Law* (Oxford: Oxford University Press, 2003) 389.

¹²² Blake, N. 'Importing proportionality: clarification or confusion' (2002) *EHRLR* 19.

¹²³ Clayton (n 120) 512.

¹²⁴ [2001] 2 *WLR* 1622.

¹²⁵ Hickman (n 118) 694-695.

¹²⁶ For further information on the impact of proportionality on the status of the HRA see Chapter Five.

8. Conclusions on s 2 of the Human Rights Act

Section 2 was designed to act as a guide for judges on the appropriate use of Strasbourg jurisprudence. It gave the courts the discretion needed to create free standing domestic human rights. However, the distinct lack of further legislative support over the exact scope and application of s 2 has forced the judiciary to retreat from the more activist approach envisaged by many. Although the judiciary's application of s 2 has introduced much needed principle into human rights adjudication, they nevertheless demonstrate a distinct reluctance to move beyond the traditional role of the judiciary into the realms of a legal constitution where the judges take the lead in human rights protection and the HRA becomes a Bill of Rights for Britain.

Chapter Four

Judicial Reasoning under the Human Rights Act: Sections 3 and 4

As argued earlier in this thesis, there is clear judicial supremacy over the issue of human rights in the United States of America because the Bill of Rights and the separation of powers are framed in absolute terms.¹ Unlike the Canadian model, which was framed in more relative terms,² each branch of state under the American model has clearer and more definitive areas of competence because the constitution, not the legislature, is sovereign. As a result, the role of the judiciary and the legislature in the realm of human rights is more adversarial in nature.

It is submitted here that this adversarial approach, as seen with the power of judicial strike down, was not intended by the Human Rights Act 1998 (HRA) and was instead firmly drafted with the principles of democratic dialogue in mind³ as characterised by third wave Bills of Rights. As Jack Straw noted, '[t]he sovereignty of Parliament must be paramount,⁴ illustrating how the HRA 'upholds the traditional conception of the separation of executive, legislative and judicial power⁵ of the United Kingdom. It will be argued that, despite evidence of the judiciary taking an expansive approach towards s 3 in some circumstances, the judiciary's greater reliance upon s 4, as well as Parliament's general response to the issued declarations of incompatibility, suggests that greater democratic dialogue has been introduced successfully under the HRA; thus establishing the HRA as a potential third wave Bill of Rights.

Judicial review can be separated into two distinct forms: applied review and legislative review.⁶ Legislative review concerns the validity or compatibility of legislation. Applied review, on the other hand, is concerned with the validity or compatibility of executive action. The HRA has impacted on both of these forms of judicial review, and as such will be discussed in detail. Due to the complexity of the issue as well as its significance to the status of the HRA, this chapter will focus on the changes made to legislative review and a discussion of applied review will be reserved for chapter five.

¹ Clayton, R. 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998 (2004) *PL* 33, 41.

² *Ibid.*

³ *Ibid* 46.

⁴ Hansard HC vol 306 col 772 (16 February 1998).

⁵ Leigh, I.D. and Masterman, R. *Making Rights Real: the Enforcement of the Human Rights Act* (Oxford: Hart Publishing, 2007) 123.

⁶ O'Brien, D. 'Judicial review under the Human Rights Act 1998: legislative or applied review? (2007) *EHRLR* 550.

1. Section 3 of the Human Rights Act

1.1 The Purpose of s 3

From the wording of s 3, four important characteristics can be identified which seem to distinguish s 3, and thus the HRA as a whole, from ordinary Acts of Parliament. Such characteristics assist in highlighting the purpose behind s 3 as a compromise between having either elected representatives or judges as the protectors of human rights; in other words, it is a compromise between maximalist and minimalist approaches towards judicial protection of civil rights as seen with third wave Bills of Rights.⁷

First, s 3 is an interpretative obligation upon the UK judiciary to read incompatible primary and secondary legislation as being compatible i.e. to interpret them in a Convention-friendly manner;⁸ an interpretative obligation which is 'similar to that adopted in New Zealand,'⁹ but nevertheless stronger. Secondly, this obligation under s 3 applies to primary and secondary legislation 'whenever enacted';¹⁰ a dramatic feature of the obligation as it makes inert and null the application of implied repeal with regards to the Convention rights. In other words, if a statute which is incompatible with the European Convention on Human Rights (ECHR) is passed after the HRA, it will not automatically repeal Schedule 1 of the HRA. Consequently, the rights under the HRA are protected from future parliaments other than by express repeal,¹¹ thus insulating and protecting the human rights of citizens from encroachment by the legislator. Although this can initially be seen as a strong feature of the HRA, especially when one considers how it was previously held to be theoretically impossible to accomplish,¹² thus suggesting that although 'the HRA does not benefit from the entrenched status of those and other comparable rights instruments internationally,'¹³ the provision could equally be seen as having a lower status than ordinary Acts of Parliament. This is because the HRA lacks the superior status to automatically override past incompatibilities or to automatically make null

⁷ Leigh and Masterman (n 5) 84.

⁸ Section 3(1): 'So far as is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

⁹ Grosz, S. Beatson, J. and Duffy, P. *Human Rights: The 1998 Act and the European Convention* (London: Sweet and Maxwell, 2000) 29. See s 6 New Zealand Bill of Rights Act 1990.

¹⁰ Section 3(2)(a).

¹¹ See *Thoburn v Sunderland City Council* (2003) QB 151; (2002) 3 WLR 247; (2002) 4 All ER 156.

¹² See *Ellen Street Estates v Ministry of Health* [1934] KB 590, 597 (Maugham LJ): '[A]ccording to our constitution ... it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of Parliament.' It must be noted that there is one notable exception to this with regards to European Community law in the form of the European Communities Act 1972 s 2(4).

¹³ Leigh and Masterman (n 5) 85.

and void future incompatible legislation in the form of judicial strike down as seen with the American Bill of Rights. This however was always the intention of the HRA; a view supported by the then Lord Chancellor Lord Irvine, who stated that the government 'did not wish to incorporate the Convention rights, and then, in reliance on the doctrine of implied repeal, allow the courts to strike down Acts of Parliament.'¹⁴ Grosz *et al*/describes this as an illustration by what the government meant by giving the Convention rights 'further effect;' in other words, a compromise between the two opposing views of civil rights protection.¹⁵

In this sense, s 3, as a result of compromise, may allow authority for the HRA to be described as an interpretation act¹⁶ which is designed simply to bring national compliance with the ECHR and thus satisfy the UK's Article 1 obligations. However, as correctly argued by Fenwick, 's 3 demands that all statutory provisions should be rendered, if possible, compatible with the Convention rights. Therefore, by imposing this interpretative obligation on the courts, the rights become capable of affecting subsequent legislation in a way that is not normally possible.'¹⁷ Therefore, thirdly, the 'reach of section 3(1), and the accompanying scope for judicial discretion is potentially enormous.'¹⁸ Indeed, the reversal of the rules of implied repeal should be seen as a strength because s 3 empowers the judiciary to interpret legislation '[s]o far as it is possible to do so,'¹⁹ thus, as Fenwick argues, placing the protection of human rights 'very much at the mercy of judicial interpretation of statutes.'²⁰ As a result, s 3 is much more than an interpretative measure in the traditional sense. Section 3 potentially gives an unusual degree of discretion to un-elected judges which could be construed as legislative, as under the American Bill of Rights, and undeniably one which could potentially allow judges to interpret legislation with Convention rights in a uniquely British way.²¹

However, it is submitted here that it was not the intention of Parliament to make the judiciary the sole protector of civil liberties because of the fourth important distinguishing feature of s

¹⁴ Grosz, Beatson and Duffy (n 9) 31-32.

¹⁵ *Ibid.*

¹⁶ Elliott, M. *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2003) 200. '[L]ike the New Zealand Bill of Rights Act 1990, the British legislation is essentially an interpretative instrument.'

¹⁷ Fenwick, H. M. *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 172.

¹⁸ Leigh and Masterman (n 5) 88.

¹⁹ Section 3(1).

²⁰ Fenwick (n 17).

²¹ See Hope, Lord D. 'The Human Rights Act 1998 – The Task of the Judges' in Andenas, M. and Fairgrieve, D. (eds.) *Lieber Amicorum in Honour of Lord Slynn of Hadley Volume II Judicial Review in International Perspective* (Kluwer Law International, 2000) 417: 'The Act has stopped short of giving power to the judges to set aside or to disapply legislation which has been enacted at Westminster. But the interpretative function will nevertheless be a far-reaching one.'

3: the preservation of parliamentary sovereignty,²² a provision which can also be found under s 6.²³ There is therefore a clear legislative intention for Parliament to remain as the supreme source of law, thus making the HRA 'not so radical as to exchange parliamentary supremacy for judicial supremacy.'²⁴ It is from this that the HRA can be seen as being a fair and principled compromise between maximalist and minimalist arguments.²⁵ Clearly, the express provision of an interpretative obligation under s 3 was designed to cement this compromise firmly in the minds of the judiciary, thus making the interpretative obligation weaker than judicial strike-down. However, despite its comparative weakness, the interpretative obligation under s 3 should not be viewed as insignificant. As argued by Kavanagh, there is a 'tendency to underestimate the considerable law-making power which judges exercise (and have always exercised) when they interpret statutes, and to overestimate the significance of the fact that judges in the UK do not have the power to 'strike down' Acts of Parliament.'²⁶ Therefore, although '[t]here is a big difference between the two [a Bill of Rights and an Interpretation Act] in terms of constitutional theory ... one should not be considered a 'stronger' version than the other.'²⁷ Although the inclusion of s 4 imposes limits on the use of s 3, the exact limit of what is possible under s 3 lies solely in the hands of the judiciary. If the inclusion of an interpretative obligation is to make the HRA a true third wave Bill of Rights, which perpetuates democratic dialogue, much depends on how the judiciary has approached the limits of its own power.

1.2 The Scope of the Interpretative Duty – what is 'possible'?

Gearty asserts that there are at least three interpretations of the scope of s 3 and what is 'possible': the pro-sovereignty argument (the narrow approach), the pro-human rights interpretation (the expansive approach) and the third way (the compromise approach where s 3(2) is a limit on the scope of s 3(1)).²⁸ Although Gearty's arguments have correctly been subject to criticism,²⁹ his evaluation of the relevant interpretations are worthy of further investigation because it highlights the obvious difficulties in trying to ascertain the exact scope

²² Section 3(2)(c) and (d).

²³ Section 6(3)(b) expressly excludes Parliament from the definition of a public authority and is therefore not subject to s 6(1).

²⁴ Leigh and Masterman (n 5) 92.

²⁵ See Fenwick (n 17): 'This subtle form of protection avoids entrenchment and therefore creates a compromise between leaving the protection of rights to the democratic process and entrusting them fully to the judiciary.'

²⁶ Kavanagh, A. 'Choosing between sections 3 and 4 of the Human Rights Act 1998: judicial reasoning after *Ghaidan v Mendoza*' in Fenwick, H. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 116.

²⁷ Clapham, A. *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) 69.

²⁸ Gearty, C. 'Reconciling Parliamentary democracy and human rights' (2002) 118 *LQR* 248.

²⁹ Phillipson, G. '(Mis)-reading Section 3 of the Human Rights Act' (2003) 119 *LQR* 183.

of the s 3 obligation in light of Parliamentary sovereignty. Under the pro-sovereignty model, s 3(1) must be interpreted in light of s 3(2)(b); in other words, s 3(1) 'must be interpreted in a way which does not produce an effect not only on the "validity" but also on the "continuing operation and enforcement" of the (presumptively) incompatible measure under scrutiny.'³⁰ Gearty dismisses this interpretation as 'simply not what Parliament intended.'³¹ With the pro-human rights interpretation, Gearty acknowledges the potentially wide remit of what could be 'possible' under s 3(1) and states that from such an understanding of this provision 'the term should be construed in a way which requires all legislation to be Convention compatible unless specifically stated not to be, and that this should be the case whatever kind of linguistic trick might be required in an individual case to achieve an end-result.'³²

Ultimately, Gearty outlines the two extremes: the traditional English constitutional approach which endorses the supremacy of elected representatives, and the legalistic-Bill of Rights approach which endorses greater judicial power. It is thus perhaps unsurprising that, given the common view that the HRA as a whole represents a compromise between these two positions, Gearty endorses a third way reading of the provision which essentially states that:

Once the search for compatibility is begun ... section 3(2)(b) will function as a guide, as to how far section 3(1) should be permitted to go. Thus section 3(1) should be able to operate creatively upon a provision, but only until such a time as a proposed reading would have the effect of so impairing the operation and/or effectiveness of the clause under scrutiny as to render it for all practical purposes a dead letter.³³

However, as argued by Phillipson, this 'third way' approach is almost identical to the pro-sovereignty approach due to Gearty's assertion that s 3(2)(b) is relevant to the interpretation of s 3(1), even though, in Phillipson's view, s 3(2) 'says nothing about what lengths the judges should be prepared to go in order to render prima facie incompatible legislation compatible,'³⁴ an interpretation endorsed by this thesis. Section 3(2)(b) merely 'tells us that incompatible legislation remains valid and usable,'³⁵ it preserves the sovereignty of Parliament, a view supported by Lyon, who states that '[i]f a statute is clear in its terms and clearly incompatible, the courts must give it effect,'³⁶ and is in no way a guide to interpretation for judges.

³⁰ Gearty (n 28) 252.

³¹ *Ibid.*

³² *Ibid* 254.

³³ *Ibid* 255-256.

³⁴ Phillipson (n 29) 185.

³⁵ *Ibid.*

³⁶ Lyon, A. *Constitutional History of the United Kingdom* (Cavendish Publishing Limited, 2003) 453.

Clearly, therefore, finding a middle-ground interpretation of s 3 is a difficult exercise. The scope of s 3 and what is 'possible' is dependent upon the courts and the extent to which they themselves interpret the power given to them. However, although the s 3 interpretative obligation is, as argued, potentially limitless, it is submitted here that it is still limited by the sovereignty of Parliament in a greater way than it is in the pro-human rights interpretation above. This is illustrated by Fenwick, who argues that 'since Parliament has enacted s 4, it clearly contemplated *some* limits on what could be achieved by means of s 3.³⁷ In other words, if s 3 was intended to empower judges to do whatever was necessary to find compatibility there would be no need for s 4 and declarations of incompatibility. Also, the HRA was not drafted in the same way s 2(4) of the European Communities Act 1972,³⁸ and as such the judiciary, if it were to follow the pro-human rights approach, would be moving the HRA into the realms of a Canadian-style third wave Bill of Rights, as the courts would effectively expect the legislature to issue a 'notwithstanding clause' if it wished the judiciary not to embark on an interpretative journey of the relevant incompatible legislation.

It is possible that the interpretative duty under the section does not depart from the pre-HRA position of interpretation too radically, and could thus still be limited only to ambiguous words. In other words, where Parliament's intention, if incompatible, is clearly and expressly stated the judiciary should not, cannot, interpret the legislation as being compatible. However, such a position is unfounded and unduly restrictive given the potentially vast scope of s 3 as mentioned above. A more tenable position is that s 3 was limited to the language of the legislation generally, regardless of ambiguity, a view endorsed by Lord Irvine who stated clearly that '[w]e want the courts to strive to find an interpretation of legislation which is consistent with Convention rights so far as the language of the legislation allows, and only in the last resort conclude that the legislation is so clearly incompatible with the Convention that it is impossible to do so.'³⁹ Therefore, one could conclude that it was the intention of the drafters of the HRA for judicial interpretations to be restricted to the words on the paper; to remove or read in additional words would thus be an overly bold interpretation of s 3 which would 'go well beyond the use of an interpretive technique, [and] would not have democratic legitimacy and would encroach on the role of Parliament.'⁴⁰

This was certainly a fear which shaped the judicial approach in New Zealand towards its interpretative duty under s 6 of the New Zealand Bill of Rights 1990. It was held in *Ministry of Transport v Noort* that 'a consistent meaning is to be preferred to any other meaning. The

³⁷ Fenwick (n 17).

³⁸ Section 2(4) states that 'any enactment passed or to be passed shall be construed and have effect.'

³⁹ Hansard HL vol 583 col 535 (18 November 1997).

⁴⁰ Fenwick (n 17) 173.

preference will come into play only when the enactment can be [given such a meaning]. This, must mean, I think, 'can reasonably' be given such a meaning. A strained interpretation will not be enough.⁴¹ As reaffirmed by Fenwick, this approach was to be taken in subsequent New Zealand cases, thus granting s 6 a somewhat narrow or limited scope.⁴² However, contrary to the trend in New Zealand and its s 6 Interpretative duty, a different approach was taken in the UK. As correctly argued by Fenwick, s 3 'allowed straining or distorting the meaning of words or 'reading down' statutory provisions in order to afford them a narrow construction, compatible with the right in question, since all those techniques were possible ones.'⁴³ This clearly suggests a greater scope to the interpretative duty under s 3 more closely affiliated with the American Bill of Rights, especially since the courts rejected the notion that any possible constructions should be subject to reasonableness as in New Zealand.⁴⁴ As will be shown below, it is also possible for words to be read into offending provisions,⁴⁵ an expansive approach which appears to have been followed without apprehension by the courts.⁴⁶

1.3 The Pro-Human Rights Approach – *Ghaidan v Godin-Mendoza*

This 'extremely rigorous stance when interpreting law in the light of Convention provisions under s 3'⁴⁷ was displayed early on in the life of the HRA and is best shown with the highly controversial⁴⁸ House of Lords decision in *R v A (No. 2)*.⁴⁹ The case concerned s 41 of the Youth Justice and Criminal Evidence Act 1999 which prevented a woman from being questioned as to an alleged previous sexual relationship with the defendant in rape cases. The issue in the case was that this provision – tagged by some as a 'rape shield' – could be detrimental to any defence of consent, and thus could be a breach of Article 6 ECHR.⁵⁰ Despite

⁴¹ [1992] 3 NZLR 260, 272.

⁴² Fenwick (n 17) 173.

⁴³ *Ibid.* See also Lord Hope (n 21): On the far-reaching power of s 3, Lord Hope notes that '[t]his may lead to conclusions which depart from the ordinary meaning of the words used, and would not be produced by the application of any of the other usual canons of construction which were in the mind of the legislator. So be it. That is what Parliament itself will have directed.'

⁴⁴ Fenwick (n 17) 173: 'In any event, it was always clear that the courts should not imply the word 'reasonably' into s 3. They are expected to find a possible, not reasonable, interpretation according to its wording.' This was confirmed by Lord Steyn in *R v A* [2001] 2 WLR 1546 [44]. See also Hansard HL vol 582 cols 1230-1231 (3 November 1997) (Lord Irvine).

⁴⁵ Lester, Lord A. 'The Art of the Possible – Interpreting Statutes under the Human Rights Act' (1998) *EHRLR* 665, 672: '[T]he courts will need where possible to read provisions into ambiguous or incomplete legislation.'

⁴⁶ Fenwick (n 17) 174.

⁴⁷ *Ibid.*

⁴⁸ See Nicol, D. 'Statutory Interpretation and Human Rights after Anderson' [2004] *PL* 274, 276: 'far-fetched' and 280: 'judicial overkill.'

⁴⁹ [2002] 1 AC 45 (rape shield case).

⁵⁰ *Ibid.*, 69 [46] (Lord Steyn).

claims that s 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 was passed in order to protect a woman's Article 8 rights,⁵¹ the court clearly held that the defendant's Article 6 claim was in need of greater protection regardless of the clear and unambiguous language of the legislation to the contrary. As held by Lord Steyn, '[i]n accordance with the will of Parliament ... it will sometimes be necessary to adopt an interpretation which linguistically will appear strained ... It is therefore possible under s 3 to read ... s 41(3)(c) [of the Youth Justice and Criminal Evidence Act 1999] ... as subject to the implied provisions that evidence on questioning which is required to ensure a fair trial under Article 6(1) ... [and] should not be treated as inadmissible.'⁵²

It is argued that this decision by the House of Lords represents a clear endorsement by the courts of the pro-human rights, or expansive, approach as identified by Gearty.⁵³ This is supported by Phillipson⁵⁴ and Fenwick, who state that this approach 'arguably went beyond using interpretative techniques and - in effect - rewrote a sub-section of the legislation [s 41(3) (C) Youth Justice and Criminal Evidence Act 1999]'⁵⁵ and thus a move which greatly encroaches upon the role of Parliament. Although Parliament wanted more creative adjudication with regards to human rights, this ruling by the Lords could be viewed as representing an unwanted shift of supremacy from Parliament to the ECHR, thus giving the Convention a more American 'higher law' status. Although such an interpretation of the facts would undeniably place the HRA under s 3 within the realms of a constitutional Bill of Rights, this is not strictly the case. Lord Steyn added in *R v A* that unless a 'clear limitation on Convention rights is stated in terms,'⁵⁶ Convention-friendly interpretations should be possible. Much like the Canadian Charter of Fundamental Rights, the judiciary would only be barred from such activist interpretations under s 3 where Parliament expressly excluded the application of certain Convention rights. In the case of *R v A*, following the reasoning of Lord Steyn, in order for s 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 to be legally enforceable, Article 6 would have to have been expressly contravened. Such an approach, though moving the HRA closer to a third wave Bill of Rights, is nevertheless grossly inconsistent with Parliament's decision to reject adopting a 2(4) European Communities Act 1972-style approach towards the HRA. In light of this rejection, the HRA was clearly intended to be more of a statutory third wave Bill of Rights, much like the New Zealand Bill of Rights Act, as opposed to a constitutional third wave Bill of Rights like the Canadian Charter.

⁵¹ Fenwick (n 17) 175.

⁵² *R v A (No. 2)* (n 49) 68 [44]-[45] (Lord Steyn).

⁵³ Gearty (n 28).

⁵⁴ Phillipson (n 29) 188.

⁵⁵ Fenwick (n 17) 175.

⁵⁶ *R v A (No. 2)* (n 49) [44].

However, this activist approach continued with the House of Lords decision in *Ghaidan v Godin-Mendoza*.⁵⁷ Considered as the leading authority under s 3,⁵⁸ the case concerned the succession rights to a protected tenancy under paragraph 2(2) of Schedule 1 of the Rent Act 1977. The paragraph contained the words 'living together as his or her wife or husband;' the issue in the case was whether the phrase could include same-sex couples in order to allow them to succeed to a statutory tenancy if their partner dies. By a majority of four to one, the House of Lords held that paragraph 2(2) could be read to include same-sex couples. After finding a *prima facie* discrimination with the ordinary meaning of the words, under Article 14 taken with Article 8 ECHR,⁵⁹ the Lords dismissed the claim that the phrase 'husband and wife' was not gender specific, as well as the argument that Parliament, in enacting the paragraph 2(2) provision, intended to expressly exclude same-sex couples. In other words, the House of Lords re-wrote the paragraph so that it read 'living together *as if they were* his or her wife or husband,' with Lord Nicholls stating that s 3(1) should not 'depend critically on the particular form of words adopted by the parliamentary draftsman,'⁶⁰ emphasising instead the importance of the 'concept expressed in that language'⁶¹ i.e. its purpose.

Lord Nicholls justified this purposive approach due to the injustice which would be caused 'if the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention compliance. If he chose a different form of words, section 3 would be impotent.'⁶² Following this reasoning, the House of Lords held that it could 'read in words which change the meaning of the enacted legislation, so as to make it Convention compliant' and thus allow the court to 'modify the meaning, and hence the effect, of primary and secondary legislation.'⁶³ However, as correctly argued by Kavanagh, 'Lord Nicholls does not explain what he means by 'the concept' expressed in the legislation or how judges are to elicit what this 'concept' is.'⁶⁴ However, from the reasoning of Lord Nicholls in *Ghaidan*, it is clear that the 'concept' or purpose of the legislation is more abstract than the language used. As explained by Kavanagh, '[a]lthough the term 'husband and wife' are gender-specific, the 'concept' underlying the legislative provision (i.e. the purpose of protecting people who are in stable, loving relationships who have set up home together)

⁵⁷ [2004] 2 AC 557, [2004] 3 All ER 411.

⁵⁸ Leigh and Masterman (n 5) 103.

⁵⁹ *Ghaidan* (n 57) [24] (Lord Nicholls); [128] (Lord Rodger); [55] (Lord Millet); [143] (Baroness Hale); with Lord Steyn supporting the reasoning of the majority.

⁶⁰ *Ibid* [31].

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ *Ibid* [32] (Lord Nicholls).

⁶⁴ Kavanagh (n 26) 120.

could include same-sex couples.⁶⁵ It is submitted, however, that such reasoning is flawed in principle and inconsistent with the parliamentary intention for s 3 because it leaves the determining of the statute's purpose solely up to the court; a determination which, as seen above with Lord Nicholls' reasoning in *Ghaidan*, presupposes Convention compliance even though this may not be the case, thus instilling *de facto* judicial supremacy. This assessment is supported by Kavanagh, who argues that 'in seeking to refute an argument that s 3 (1) interpretation was impossible in a case where the express legislative terms seem to violate the Convention, their Lordships went too far in the opposite extreme by seeming to deny that there were any textual limits to the operation of s 3(1).'⁶⁶ In so doing, the court, as in *R v A*, ignored the only real evidence of Parliamentary intention open to them.

To claim that this was a conscious decision by the judiciary to subvert the will of Parliament would, however, be a step too far. According to Lord Rodger, so long as the 'court implies words that are consistent with the scheme of the legislation but necessary to make it compatible'⁶⁷ the judiciary are interpreting and not legislating, and thus complying with the intention of Parliament and the purpose of s 3 HRA. Undeniably, it is with this idea of consistency with the scheme of the legislation in question that the court in *Ghaidan* sought to distinguish itself from *R v A*. Lord Nicholls, echoing his judgment in *Re W and B (Children) (Care Order)*,⁶⁸ held that the interpretation adopted by the court under s 3 should not 'adopt a meaning inconsistent with a fundamental feature of the legislation.'⁶⁹ In other words, the interpretation adopted should go 'with the grain of the legislation'⁷⁰ and be consistent with the meaning and purpose of the legislation in question.⁷¹ Although the court in *Ghaidan* clearly rejected the position in *R v A* by asserting that 'parliamentary intent ... remains relevant to the judgment over the possibility of interpretations under section 3(1),'⁷² it is still up to the court to determine what 'the grain of the legislation' is, thus providing nothing more than lip-service to the ideas of parliamentary sovereignty which appears wholly irrelevant in practice. However, an analysis of s 3 alone does not provide a true picture of the extent to which the

⁶⁵ *Ibid.*

⁶⁶ *Ibid* 121.

⁶⁷ *Ghaidan* (n 57) [121].

⁶⁸ [2002] 2 WLR 720 [40]: Section 3(1) should not 'depart substantially from a fundamental feature of an Act of Parliament.'

⁶⁹ *Ghaidan* (n 57) [33].

⁷⁰ *Ibid.* See also [32] (Lord Rodger).

⁷¹ See *R v A (No. 2)* (n 49) (Lord Hope); *R v Lambert* [2001] 3 All ER 577 (Lord Hope) and *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] QB 48; [2001] EWCA Civ 595 (Lord Woolf).

⁷² Leigh and Masterman (n 5) 103.

HRA can be viewed as a Bill of Rights; one must inevitably look to s 4 in order to fully grasp the judiciary's understanding of its new role under the Act.

2. Section 4 of the Human Rights Act

2.1 The Purpose of s 4

As argued above, 'since Parliament has enacted s 4, it clearly contemplated *some* limits on what could be achieved by means of s 3.'⁷³ From the text of s 4, it is clear that the issuing of declarations of incompatibility is purely discretionary⁷⁴ and may only be issued if the court is satisfied that the provision in question is incompatible with a Convention right⁷⁵ and if the primary legislation concerned prevents removal of the incompatibility.⁷⁶ As with s 3, the issuing of a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement of the provision'⁷⁷ and 'is not binding on the parties to the proceedings in which it is made.'⁷⁸ Such an arrangement clearly preserves the sovereignty of Parliament and thus clearly rules out the possibility of judicial strike down. Because of this, s 4 was designed to facilitate greater democratic dialogue between the judiciary and the legislator over issues of human rights.⁷⁹

The overly activist approach towards s 3 in *R v A* and *Ghaidan*, however, could frustrate the dialogic aims of the HRA. As argued by Clayton, 'the ability of the courts to reach a strained interpretation of legislation under s 3 HRA (which bears no resemblance to the true intention of Parliament) would at first blush point against the idea of "democratic dialogue."⁸⁰

2.2 A Measure of Last Resort – the remedial interpretation of ss 3 and 4

In *Ghaidan*, Lord Steyn declared that s 4 was 'a measure of last resort,'⁸¹ holding that s 3 was the 'prime remedial measure' of the HRA.⁸² This interpretation of s 3, with the abandonment

⁷³ Fenwick (n 17).

⁷⁴ Section 4(2): 'If the court is satisfied that the provision is incompatible with a Convention right, it *may* make a declaration of that incompatibility' (emphasis added).

⁷⁵ Section 4(4)(a).

⁷⁶ Section 4(4)(b).

⁷⁷ Section 4(6)(a).

⁷⁸ Section 4(6)(b).

⁷⁹ This is supported by Klug, F. 'Judicial deference under the Human Rights Act 1998' (2003) *EHRLR* 125, 130 and Young, A.L. *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2009) 10.

⁸⁰ Clayton, R. 'Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998' (2004) *PL* 33, 46.

⁸¹ *Ghaidan* (n 57) [46].

⁸² *Ibid* [46] and [50].

of 'overly literal techniques,'⁸³ as discussed above, is to emphasise the 'core remedial purpose of section 3(1);'⁸⁴ a purpose which could be frustrated if a 'broader approach' towards statutory interpretation is not taken.⁸⁵ On the face of it, this approach by the House of Lords in *Ghaidan* is to be commended,⁸⁶ and could be seen as evidence of the HRA acting more like a constitutional Bill of Rights.⁸⁷ As already noted, the enactment of the HRA expressly excluded Article 13 of the European Convention on Human Rights 1950 (ECHR).⁸⁸ Although still binding at the international level, the decision in *Ghaidan* demonstrates a willingness on behalf of the judiciary to provide 'effective remedies' at the domestic level for aggrieved parties and, more significantly, an appreciation of the inherent limitations of s 4. As Tom Hickman argues, 'section 4, unlike section 3, decouples rights from remedy. Whilst section 3 allows relief to the applicant and those similarly situated, section 4 leaves the legislative provisions in place, with its pernicious effects continuing to apply to those subject to it.'⁸⁹ In this sense, the House of Lords correctly recognised that the issuing of declarations of incompatibility is no more than a 'booby prize' for successful litigants expecting an effective remedy.⁹⁰ Although Young argues that '[s]ection 3 tips the balance of power in favour of the court ... [s]ection 4 tips the balance of power in favour of the legislature,'⁹¹ it is still the judiciary who must decide whether to use s 4 and thus give this power to Parliament to resolve the incompatibility. To rely on s 4 is to have faith that Parliament will respond and bring about real change. Thus, when one considers that there is no obligation upon Parliament to even respond to a declaration of incompatibility, it is not unsurprising that the House of Lords felt obliged to interpret legislation 'so far as is possible.' Such a position can also find support from the fact that declarations of incompatibility under s 4 are limited only to higher courts, whilst s 3 can apply generally.⁹² It is argued here, however, that although the remedial approach is to be welcomed as far as individual litigants are concerned, the adoption of such an approach by the

⁸³ Leigh and Masterman (n 5) 105.

⁸⁴ *Ghaidan* (n 57) [49].

⁸⁵ *Ibid.*

⁸⁶ See Kavanagh (n 26) 128.

⁸⁷ See Fenwick (n 17) 151: '[A] Bill of Rights is of value as providing a remedy which is far more flexible and comprehensive than a statute and which can adapt to changing social conditions more readily.'

⁸⁸ See Chapter Two.

⁸⁹ Hickman, T. 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act' [2005] *PL* 306, 327.

⁹⁰ See Leigh and Masterman (n 5) 113 and Leigh, I.D. 'The UK's Human Rights Act 1998: An Early Assessment' in Huscroft, G. and Crashworthy, P. (eds.) *Litigating Rights: Perspectives from Domestic and International Law* (Oxford: Hart Publishing, 2002) 324.

⁹¹ Young (n 79) 129.

⁹² See Lord Hope (n 21) 415: '[A]lthough section 4 of the Act will restrict the jurisdiction to make declarations of incompatibility to the higher courts, section 3 which deals with the interpretation of legislation will apply generally.'

House of Lords' would represent a level of distrust towards Parliament that, along with being unfounded, would have the effect of undermining the co-operative aims of the HRA and thus its classification as a third wave model Bill of Rights.

Although the government, in passing the HRA, did not express a desire for a broad approach towards s 3, they nevertheless intended its use to take priority over s 4. For example, the Lord Chancellor stated that 'in 99 percent of cases that will arise, there will be no need for judicial declarations of incompatibility';⁹³ this prediction was also shared by the former Home Secretary Jack Straw, who said '[w]e expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention.'⁹⁴

However, such statements of use can most likely be attributed to 'an unduly rosy view of British legislation.'⁹⁵ In fact, twenty-six declarations of incompatibility have been issued under s 4 since the HRA's enactment, eighteen of which have become final.⁹⁶ Therefore, despite the broad approach adopted by the court in *Ghaidan*, the courts have nevertheless relied more on their power to issue declarations of incompatibility under s 4 than they have their interpretative power under s 3.⁹⁷

In *Ghaidan*, Lord Nicholls stated that Parliament cannot 'have intended that section 3 should require courts to make decisions for which they are not equipped.'⁹⁸ Their Lordships clearly appreciated that there was a limit on the application of s 3; namely that some decisions are better left up to Parliament. Although it is clear that the remedial approach of Lord Steyn would ensure that virtually no decision would ever be referred to Parliament, as in almost all cases the judiciary would be better placed to provide an effective remedy because of the non-binding nature of s 4,⁹⁹ it is less clear what decisions Lord Nicholls believed were better left to Parliament to decide. However, some clarity can be ascertained from a brief analysis of the

⁹³ Hansard HL vol 585 col 840 (5 February 1998).

⁹⁴ Hansard HC vol 306 col 778 (16 February 1998).

⁹⁵ Leigh, I. and Lustgarten, L. 'Making Rights real: The Courts, Remedies and the Human Rights Act' (1999) 58 *CLJ* 509, 536.

⁹⁶ *Responding to human rights judgments: Government Response to the Joint Committee on Human Rights' Fifteenth Report of Session 2009-10* (Cm 7892, 2010) <<http://www.justice.gov.uk/responding-human-rights-judgements-2009-2010.pdf>> accessed 29.08.2010, 5.

⁹⁷ See *Ghaidan* (n 57) [39] and Appendix C (Lord Steyn). His Lordship lists a total of ten cases up until and not including *Ghaidan* where s 3 had been used successfully. Since the decision in *Ghaidan*, s 3 has been used successfully in *R (on the application of Hammond) (FC) v Secretary of State for the Home Department* [2005] UKHL 69; [2006] 1 AC 603, and in *Secretary of State for the Home Department (Respondent) v MB (FC) (Appellant)* [2007] UKHL 46; [2007] 3 WLR 681. For a detailed breakdown of where s 3 interpretations have been rejected by the courts, please see Stone, R. *Textbook on Civil Liberties and Human Rights* (7th edn, Oxford: Oxford University Press, 2008) 57.

⁹⁸ *Ibid* [33].

⁹⁹ Section 4(6)(b).

case law, it could be argued that the courts have taken a relatively restrained approach, seeking to respect the traditional British distribution of powers.

In *R v Lambert*, for example, Lord Hope noted that 'resort to it [s 3] will not be possible if the legislation contains provisions, either in the words or phrases which are under scrutiny or elsewhere, which expressly contradict the meaning which the enactment would have to be given to make it compatible.'¹⁰⁰ Following this reasoning, the issuing of a declaration of incompatibility would thus appear to be the more appropriate course of action to take under such circumstances. Admittedly, despite the words by Lord Hope, the court in *Lambert* seemed to contradict itself by using s 3 to substitute their understanding of the provision in question for that of Parliament's.¹⁰¹ A similar situation also arose in *R v A*, as mentioned above.

However, despite such contradictions, the decision in *Lambert* nevertheless demonstrates a desire to not construe a meaning which was expressly prohibited by Parliament; the democratically elected sovereign power of the state. As a consequence of this, they suggest that s 4 should be used over s 3 in the face of unambiguous parliamentary intent. This level of judicial restraint was demonstrated in *R (on the application of Anderson) v Secretary of State for the Home Department*, where the House of Lords held that reinterpretation under s 3 was not necessary because 'it is clear from the wording of section 29 of the Crime Sentences Act 1997 that Parliament intended that the decisions ... are to be taken by the Home Secretary and not by the judiciary or by the parole board.'¹⁰² This relatively restricted display of judicial deference towards Parliament is consistent with the earlier suggestion that s 3 must be used 'so far as is possible,' but must not go against the 'grain of the legislation';¹⁰³ in other words, the interpretation must not contradict the legislation's intention or purpose. However, as also noted above, the court appears to presuppose Convention compliance with regards to the intention of Parliament; a step which has the potential to place judges in a more powerful position than intended by Parliament.

It must also be noted that even when the courts do not have to resort to s 3 in order to achieve Convention compliance, and instead could simply reinterpret the meaning of a word, they have still shown restraint, issuing a declaration of incompatibility in order to engage Parliament in the debate. For example, in *Bellinger v Bellinger*,¹⁰⁴ questions arose over s 11 of

¹⁰⁰ *Lambert* (n 71) [79].

¹⁰¹ *Ibid* [94].

¹⁰² [2003] 1 AC 837 [80].

¹⁰³ *Ghaidan* (n 57) [33] (Lord Nicholls). See also [32] (Lord Rodger).

¹⁰⁴ [2003] 2 AC 467.

the Matrimonial Causes Act 1973 which reads as follows: 'A marriage ... shall be void on the following grounds only, that is to say ... that the parties are not respectively male and female ...' The appellant in the case argued that the word female should be interpreted to include post-operative transsexuals such as herself, or otherwise her marriage would be deemed void under law. Although acknowledging that all they needed to do was simply reinterpret the word female, thus not requiring any change in statutory language as permitted under s 3, the House of Lords nevertheless decided that the ramifications of such a change were so wide that they legitimately required consideration by Parliament. As Kavanagh states, 'the resulting change in the law would have [had] far-reaching practical ramifications, raising issues whose solution calls for extensive inquiry and the widest public consultation and discussion which was more appropriate for Parliament than the courts.'¹⁰⁵ Indeed, for if one is to hold to the parliamentary supremacy claims of Sir Ivor Jennings that Parliament could legally make a man a woman,¹⁰⁶ it seems inappropriate for the judiciary to do so instead. Such an act would, undeniably, raise accusations of legislating, something which s 4 was designed to prevent. In this sense, the decision was most correct.

Following the reasoning in *Bellinger v Bellinger*, it could be argued that the Matrimonial Causes Act, due to the time in which it was drafted, was designed to exclude what are now acceptable social relationships. As a result, it is up to Parliament to change its mind on this issue and not the judiciary to do it for them.

2.3 Parliamentary Deference?

Although the issuing of so many declarations of incompatibility could amount to evidence of dialogue, as it demonstrates a willingness on behalf of the judiciary to involve Parliament on human rights issues, they may also provide evidence to the contrary; namely that the Parliament now shows deference towards the judiciary. As Lord Borrie once noted about the HRA, 'the political reality will be that, while historically the courts have sought to carry out the will of Parliament, in the field of human rights Parliament will carry out the will of the courts.'¹⁰⁷ Such a result, if true, would almost undeniably move the HRA beyond a third wave model Bill of Rights and closer to an American or entrenched Bill of Rights, as such deference would point squarely towards the judiciary as the sole protector of human rights whose rulings Parliament must abide by. Thus, the differences between the issuing of declarations of incompatibility under s 4 and the power of judicial strike-down would amount to nothing more

¹⁰⁵ Kavanagh, A. 'Statutory interpretation and human rights after Anderson: a more contextual approach' [2004] *PL* 537, 541.

¹⁰⁶ Barnett, H. *Constitutional and Administrative Law* (5th edn, Cavendish Publishing Limited, 2004) 174.

¹⁰⁷ Hansard HL vol 582 col 1275 (3 November 1997).

than 'a technical distinction.'¹⁰⁸ Such an assessment is supported by Ewing, who argues that 'although the courts would not be empowered to strike down legislation, they would effectively be doing so indirectly, given that government would almost certainly want to change the law.'¹⁰⁹

Although there was very little concrete assurance by the executive during the passing of the HRA that declarations of incompatibility under s 4 would bring about immediate change in the law,¹¹⁰ the government still asserted a degree of confidence that in most cases change would follow the issuing of a declaration of incompatibility;¹¹¹ an assertion which has been followed in practice since the HRA's enactment. Not only have the government responded to the majority of declarations issued,¹¹² but appear also to have recognised the concerns of the judiciary in issuing the declarations and have responded in kind; even when government policy appears to be in question.¹¹³ This is supported by Kavanagh, who states that '[i]n no case has Parliament or the Government announced that they are legally and politically free to ignore a declaration of incompatibility and plan to do so.'¹¹⁴ However, despite this, it must be stressed that Parliament still has the power to repeal the HRA. Although such an outcome is politically unlikely, it is not legally impossible. As a result, any willingness on behalf of the government to respond to a declaration of incompatibility and carry out the will of the courts does not arise out of a legal obligation to do so. Consequently, any claim concerning legislative deference towards the judiciary on questions arising under the HRA, if it is to have any weight, necessitates a detailed scrutiny of the specific responses of Parliament and the government towards declarations of incompatibility.

¹⁰⁸ Hoffmann, Lord L. 'Human Rights and the House of Lords' (1999) 62 *MLR* 159, 160.

¹⁰⁹ Ewing, K.D. 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *MLR* 79, 92.

¹¹⁰ See Hansard HC vol 317 col 1301 (21 October 1998) (Jack Straw MP): '[I]t is possible that the Judicial Committee of the House of Lords could make a declaration that ... Ministers propose, and parliament accepts, should not be accepted.'

¹¹¹ See Hansard HL vol 583 col 1139 (27 November 1997): '[W]e expect that the government and Parliament will in all cases almost certainly be prompted to change the law following a declaration of incompatibility' and *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997)<
<http://www.archive.official-documents.co.uk/document/hoffice/rights/intro.htm>> accessed 12.08.2009, [2.10]: 'A declaration [of incompatibility] ... will almost certainly prompt the Government and parliament to change the law.'

¹¹² *Responding to human rights judgments* (n 96) 42. As of July 2010, all but three of the declarations issued have been addressed by the government.

¹¹³ See the Criminal Justice Act 2003 in response to *Anderson* (n 102) and *Leigh and Masterman* (n 5) 119.

¹¹⁴ Kavanagh, A. *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 283.

One of the leading cases under s 4 is the *Belmarsh Prison* case.¹¹⁵ In this landmark ruling, a panel of nine Law Lords, rather than the usual five,¹¹⁶ issued a declaration of incompatibility for s 23 of the Anti-terrorism, Crime and Security Act 2001. The majority declared that the indefinite detention of foreign nationals suspected of terrorism was disproportionate under Article 5 and discriminatory under Article 14, thus resulting in a finding that the derogation under Article 15 was not lawful.¹¹⁷

The government's reaction towards this decision by the House of Lords was, unsurprisingly, far from amicable. As the then Home Secretary Charles Clarke stated, the offending measures would 'remain in force' and the detainees would remain in prison until the legislation was amended.¹¹⁸ In other words, the offending provisions remained operational, despite the judiciary's issuing of a declaration of incompatibility, as permitted under s 4. Because the 2001 Act was due to expire in March 2005, and because the government still believed the Belmarsh detainees to constitute a threat to the general public, its replacement, the Prevention of Terrorism Act 2005, was passed only three months after the House of Lords decision. Upon the expiry of the 2001 Act, all of the Belmarsh detainees were released from prison and then immediately subjected to the new control orders issued under the 2005 Act by the Home Secretary.

The newly issued control orders, however, were carefully drafted so as to comply with the declaration of incompatibility issued by the House of Lords. As a result, the Belmarsh detainees were issued with *non*-derogating control orders; orders which did not amount to a deprivation of liberty under Article 5 ECHR, and which therefore did not require the United Kingdom to derogate out of its Article 5 obligations. The government could have refused to address the incompatibility declared by the House of Lords when drafting the 2005 Act. The provisions of its predecessor were an essential part of the government's post-9/11 policy on terrorism, and given the public's feelings towards the HRA,¹¹⁹ it is arguable that the British public would not have objected to a refusal to amend it. Instead, however, the government appeared eager to redeem their policy on anti-terrorism after their public defeat by the courts, thus suggesting that a degree of deference towards the final decision of the House of Lords occurred.

¹¹⁵ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

¹¹⁶ Leyland, P. *Constitutional Systems of the World, The Constitution of the United Kingdom A Contextual Analysis* (Oxford: Hart Publishing, 2007) 177: He argues that this was in 'recognition of the importance of the case.'

¹¹⁷ Lord Bingham, Lord Nicholls, Lord Hope, Lord Scott, Lord Rodger, Baroness Hale and Lord Carswell.

¹¹⁸ 'Terror detainees win Lord's Appeal' December 16, 2004 <<http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/4100481.stm>>accessed 31.07.2009.

¹¹⁹ See Chapter Six.

However, as argued by Leigh and Masterman, despite this apparent deference by Parliament towards the judiciary, 'it maybe going to far to portray the emerging practice under the HRA as establishing a *de facto* judicial supremacy over the domestic interpretation of the Convention rights.'¹²⁰ When one examines other cases where declarations of incompatibility have been issued, it becomes clear that the government's eagerness in addressing offending legislation following the *Belmarsh Prison* case is more of an exception to the rule rather than the rule itself.

The most striking example of this can be found in the case of *Hirst v UK (No. 2)*,¹²¹ where the Grand Chamber at Strasbourg found that s 3(1) of the Representation of the People Act 1983, which provided for a blanket ban on prisoners voting in elections, violated Article 3 of the First Protocol. However, despite the Secretary of State accepting the judgment of the case, the government failed to comply with the judgment. Following the decision of the Grand Chamber, the court in *Smith v Scott*¹²² issued a declaration of incompatibility for s 3(1) of the 1983 Act for a violation of Article 3. Although reinforcing the finding of a violation by the Grand Chamber, the issuing of the declaration of incompatibility has still not motivated the government to take action on amending or removing s 3(1) of the 1983 Act; thus constituting the longest gap in compliance with a finding of a violation of a Convention right to date. Likewise, the declaration of incompatibility issued in *R (on the application of Baiai and others) v Secretary of State for the Home Department and another*,¹²³ which concerned discriminatory legislation with regards to marriages, is still in the process of being responded to, having been delayed due to the change in government in May 2010.¹²⁴

Therefore, following these cases, the government's general response to the issuing of declarations of incompatibility cannot be said to be either automatic or swift. Consequently, any claim of parliamentary deference towards the judiciary under the HRA appears far removed from the facts. This is especially so when one considers s 19 HRA. Under s 19(1), a Minister, before the Second reading in Parliament, must state either, under s 19(1)(a), that the proposed Bill is compatible with the Convention right or, under s 19(1)(b), 'make a statement to the effect that although he is unable to make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House

¹²⁰ Leigh and Masterman (n 5) 120.

¹²¹ (2006) 42 EHRR 41.

¹²² [2007] CSIH 9.

¹²³ [2006] EWHC 823; [2008] UKHL 53.

¹²⁴ See *Responding to human rights judgments* (n 96) 57: 'The Government is currently considering afresh the issue of prisoners' voting rights and the outcome of this process will determine the Government's response to the declaration in *Smith*.'

to proceed with the Bill.’ Section 19(1)(b) could be said to be similar to the ‘notwithstanding’ clause of the Canadian Charter. However, as Fenwick notes, ‘s 19 does not expressly provide for the possibility that the government deliberately wishes to achieve incompatibility with the Convention. It merely leaves open the possibility or – in practice – the strong probability that the legislation, or at least certain of its provisions, are incompatible.’¹²⁵ This is an important distinction to make. Following it, s 19(1)(b) would appear to be no more than an expression of doubt on behalf of the government as to whether the proposed Bill is compatible with the Convention or not. It in no way excludes the application of the judiciary’s duty to interpret legislation in a Convention-friendly manner under s 3, or to issue a declaration of incompatibility under s 4.

However, the use of ss 3 and 4, where a negative statement has been issued under 19(1)(b), may nevertheless appear unlikely. As Fenwick suggests above, the issuing of a negative statement strongly suggests that the government expects there to be a finding of a violation. The issuing of a declaration under s 4 therefore appears to be an unnecessary step as the government will already be aware of the violation. In this sense, the issuing of a negative statement under s 19(1)(a) can be best seen as a pre-emptive declaration of incompatibility. As a result, the likelihood of the government amending or replacing the offending statute seems even more unlikely. Likewise, the use of s 3 to make the legislation compatible would have the appearance of directly challenging the will of Parliament to pass legislation which it suspected would most likely infringe people’s Convention rights. Consequently, it could be argued that s 19 preserves the traditional British doctrine of parliamentary sovereignty. When a negative statement is issued the judiciary are therefore compelled to show deference towards Parliament when exercising its powers under ss 3 and 4.

This could be argued to have occurred in the case of *R (on the application of Animal Defenders International) v Secretary of State for Culture, media and sport*,¹²⁶ which concerned a challenge to the Communications Act 2003; the only piece of legislation to date which has been passed with a negative s 19(1)(b) statement in relation to a blanket ban on political advertising in broadcasting. Although finding that the 2003 Act interfered with the claimant’s rights under Article 10, their Lordships nevertheless found the ban to be necessary in a democratic society. The dismissal of the appeal appeared to be motivated in no small part by the fact that the

¹²⁵ Fenwick (n 17) 206-207.

¹²⁶ [2008] UKHL 15.

2003 Act was passed with a negative statement under s 19(1)(b) HRA.¹²⁷ As Lord Bingham noted:

[I]t is reasonable to expect that our democratically-elected politicians will be peculiarly sensitive to the measures necessary to safeguard the integrity of our democracy. It cannot be supposed that others, including judges, will be more so. Secondly, Parliament has resolved, uniquely since the 1998 Act came into force in October 2000, that the prohibition of political advertising on television and radio may possibly, although improbably, infringe article 10 but has nonetheless resolved to proceed under section 19(1)(b) of the Act. It has done so, while properly recognising the interpretative supremacy of the European Court, because of the importance which it attaches to maintenance of this prohibition. The judgment of Parliament on such an issue should not be lightly overridden.¹²⁸

3. Conclusions on ss 3 and 4 of the Human Rights Act

It is argued that ss 3 and 4 were designed to facilitate greater democratic dialogue as characterised by third wave Bills of Rights. As such, the HRA was framed so as to avoid the adversarial approach towards judicial review as seen in the United States which results in a form of judicial supremacy. On the whole, this appears to have been achieved. Despite the overly activist approaches adopted by the courts in *Ghaidan* and *R v A* towards s 3, the judiciary overall have displayed greater restraint towards its use, opting instead for s 4. By issuing declarations of incompatibility, the judiciary appear to be respecting the traditional British distribution of powers. This is supported by the Department of Constitutional Affairs who, in 2006, noted that '[i]n general ... the Human Rights Act has not seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration,' stating that any '[a]rguments that the Human Rights Act has drastically altered the constitutional balance between Parliament, the Executive and the Judiciary have been considerably exaggerated.'¹²⁹ As a result, the judiciary, by involving Parliament more in human rights issues, appear to have achieved the co-operative aims of the HRA as seen with democratic dialogue under third wave Bills of Rights.

¹²⁷ See *Ibid* [14-20]. Lord Bingham also appeared to be motivated by reports by the Joint Committee on Human Rights which concluded that the 2003 Act did not contravene the decisions of the ECtHR.

¹²⁸ *Ibid* [33].

¹²⁹ Department for Constitutional Affairs, 'Review of the Implementation of the Human Rights Act' (2006) <http://www.justice.gov.uk/guidance/docs/full_review.pdf> accessed 31.07.2009, 4. For commentary see Ewing, K.D. and Tham, J. 'The continuing futility of the Human Rights Act' (2008) *PL* 668, 691.

Chapter Five

Judicial Reasoning under the Human Rights Act: Section 6

Judicial review of executive actions, or applied review, when coupled with legislative review, is a mechanism used to ensure the separation of powers and thus limited government. As seen in chapter one, the intensity of judicial review can be fundamental to whether or not a Bill of Rights exists; the greater the power of the judiciary the greater the chances of a Bill of Rights. The intensity of applied review is of particular importance to the question of whether the Human Rights Act 1998 (HRA) could be considered a Bill of Rights for Britain because it can involve the scrutiny of the decisions of elected officials, and as a result gives an indication as to the current separation of powers. In order for the HRA to be considered a Bill of Rights for Britain, there must be evidence of constitutional review: where the ruling of a judge concerning a decision or act of the executive must be justified by recourse to constitutional principles or guarantees.¹

This has not traditionally been the case in the UK. Although, as noted by Lyon, '[h]istorically, the higher courts have exercised control over public bodies to ensure that they act within their powers in accordance with the law,² this evolved in the UK to consider the manner by which the power was exercised, thus 'ensuring fairness and sound reasoning in the decision-making process.'³ Known as the '*Wednesbury* principle,'⁴ this approach states that any decision or action by a public body must not be unreasonable. In other words, a decision should not be 'so outrageous in its defiance of logic or accepted moral standards that no reasonable decision-maker ... could have come to it.'⁵ Its use, as argued by Leigh, can be attributed to the failure of the courts to protect civil liberties during the second half of the twentieth century because of its circularity; 'action was only reviewable if it was so unreasonable that no reasonable decision maker would have taken it.'⁶ Therefore, despite the fact that the principle aspired to ensure respect for individual rights by 'requiring decision-makers to treat citizens fairly and reasonably,'⁷ in practice it allowed excessive levels of deference towards the

¹ For further discussion of the meaning of constitutional review see Jowell, J 'Beyond the rule of law: towards constitutional judicial review' [2000] *PL* 671.

² Lyon, A. *Constitutional History of the United Kingdom* (Cavendish Publishing Limited, 2003) 449.

³ Elliott, M. *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2003) 203.

⁴ *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁵ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (Lord Diplock).

⁶ Leigh, I.D. 'The Standard of judicial review after the Human Rights Act' in Fenwick, H. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 175.

⁷ Elliott (n 3) 209.

executive. Also, as a result of shifting the judiciary's focus to the manner in which decisions were made, applied review, as argued by Lord Irvine, became 'something akin to the application of a set of rules. If the rules are broken, the conduct will be condemned. But if the rules are obeyed ... the decision will be upheld, usually irrespective of the overall merits of the policy.'⁸ In other words, applied review became more procedural; the merits of the decisions were not subject to review by the courts.⁹

As argued by Elliott, the 'emphasis on process clearly inhibited the judicial review jurisdiction from furnishing a fully comprehensive system of human rights protection.'¹⁰ Consequently, if the HRA is to usher in a new age of human rights and be seen as a Bill of Rights for Britain, the judiciary must move from procedural review to constitutional review. In order to assess whether this has occurred following the passing of the HRA, this chapter will examine the judicial approach taken towards s 6. Described by Fenwick as 'the central provision of the HRA',¹¹ it will be shown that the judiciary's approach towards s 6 has been far from consistent, and has prevented the law from moving beyond the UK's otherwise 'weak form of judicial review'¹² into the realm of constitutional review as seen under Bills of Rights.

1. The Standard of Review under s 6

1.1 Judicial Review after s 6

Section 6(1) states that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right.' At the very least, it is clear from the wording of s 6 that Parliament sought to reassert the importance of human rights considerations in the decision making processes of public authorities. Nevertheless, s 6 is still open to interpretation with regards to its overall effect.

Firstly, judicial review, as a concept, could be described as a remedial mechanism. If so, the absence of constitutional review is particularly problematic for the UK and its international commitments. For instance, Article 1 of the European Convention on Human Rights (ECHR) requires that all the Convention rights are complied with. Consequently, Article 13, and the

⁸ Irvine, Lord D. 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] *PL* 221, 235.

⁹ See *R v secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 and *Lyon* (n 1) 450.

¹⁰ Elliott (n 3) 209.

¹¹ Fenwick, H. M. *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 215.

¹² Tushnet, M. 'Weak-Form Judicial Review: Its Implications for Legislatures' (2004) 2 *N.Z. J. Pub. Int'l L.*

requirement for the UK to provide effective remedies,¹³ would also be included. In the case of *Smith and Grady v UK*¹⁴ it was held that UK judicial review 'had failed to amount to an effective remedy'¹⁵ due to the standard of review being so high 'that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicant's rights answered a pressing social need or was proportionate to the national security and public order aims pursued.'¹⁶

As a result, the UK, without constitutional review, could be seen as in breach of its Article 1 obligations. As noted in chapter two, one of the main reasons for incorporating the ECHR into UK law was to give further effect to the Convention rights in order to prevent national embarrassment at the international level for breaches of rights. It is submitted that the existence of this aim, in conjunction with the damning verdict of the European Court of Human Rights (ECtHR) in *Smith and Grady v UK*, provides a strong basis for the view that s 6 was designed to strengthen UK judicial review of executive actions to the point of constitutional review.

This interpretation of the purpose of the s 6(1) obligation is acknowledged by Leigh, who argues that the strong wording of s 6(1) could be emphasised so as to 'treat it as a duty on public authorities not to breach a person's Convention rights, unless compelled to do so by primary legislation,' thus acting as a 'legislative mandate to abandon judicial deference to the executive.'¹⁷ Such wording, Leigh argues, 'appears to create a distinct new ground of illegality, since it makes it unlawful for a public authority so to *act*.'¹⁸ Invoking a strong degree of constitutional review, this new ground of illegality would signal 'a major constitutional shift'¹⁹ for the UK, as judicial deference towards the executive would virtually disappear and the judiciary would become more of an equal player to that of the executive.

¹³ Article 13: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

¹⁴ (2000) 29 EHRR 413.

¹⁵ Leigh (n 6) 176.

¹⁶ *Smith and Grady* (n 14) [138].

¹⁷ Leigh (n 6) 179. See also s 6(2)(a) and (b).

¹⁸ Leigh, I.D. 'Taking rights proportionately: judicial review, the Human Rights Act and Strasbourg' (2002) PL 265. See also Leyland, P. *The Constitution of the United Kingdom A Contextual Analysis* (Oxford: Hart Publishing, 2007) 174: 'It is clear that the HRA 1998 establishes a new statutory type of illegality by requiring ministers and public officials at all levels to exercise their powers in ways that are compatible with Convention rights.'

¹⁹ Leigh (n 18) 265.

Described by Lord Bingham as giving the court a 'wholly democratic mandate',²⁰ support for such an expansive interpretation of s 6 can also be found by reason of s 6(1) applying equally to the executive and the courts as public authorities.²¹ Additional support can also be found from the nature of what Mark Elliott calls 'human rights review;' in other words, constitutional review whereby the constitutional principles or guarantees in question are human rights. For instance, Elliott identifies several key characteristics of human rights review which distinguish it from traditional review:

[I]t tends to be concerned with the protection of substantive values, not just procedural norms ... in order to uphold such values, the court examines not only the process by which the relevant decision was reached, but also the content and effect of the decision ... [and] the court, in its evaluation of the decision and its effect, forms a primary judgement on the extent to which the infringement of the right is justifiable, necessary and proportionate to the policy being pursued, not merely a secondary judgment on (for example) the reasonableness of the decision.²²

Thus, given the intrusive nature of human rights review, it would appear to be the most logical and effective form of review needed if the HRA is to be seen as a Bill of Rights. If a new culture of human rights is to be born, 'the decision-maker must correctly understand the law that regulates his decision-making powers and give effect to it,'²³ and it must be up to the courts to ensure that this is the case.

However, despite such reasoning, an expansive approach towards s 6 has failed to materialize amongst the judiciary. In *R (on the application of Alconbury Development Ltd) v Secretary of State for the Environment Transport and Regions*, Lord Hoffmann noted that 'the European court ... has never attempted to undermine the principle that policy decisions within the limits imposed by the principles of judicial review are a matter for democratically accountable institutions and not for the courts.'²⁴ He then went on to say that the HRA 'was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers.'²⁵ However, as seen in chapter three, the court in *R (on the application of Daly) v Secretary of State for the Home Department*²⁶ has nevertheless adopted the concept of proportionality into UK law,

²⁰ *A and others v Secretary of State for the Home Department* [2004] UKHL 56 [42].

²¹ See Leigh, I.D. and Masterman, R. *Making Rights Real: the Enforcement of the Human Rights Act* (Oxford: Hart Publishing, 2007) 150.

²² Elliott (n 3).

²³ *Brind* (n 9); *Council of Civil Service Unions* (n 5) 410-411 (Lord Diplock).

²⁴ [2001] UKHL 23 [84].

²⁵ *Ibid* [129].

²⁶ [2001] 2 WLR 1622.

thereby injecting some much needed Strasbourg principle into judicial review adjudication, and potentially moving the HRA into the realm of a Bill of Rights.

1.2 Proportionality Review?

Adopted originally by the ECtHR as a test by which to measure the legality of actions of authorities in *Dudgeon v UK*,²⁷ proportionality could essentially be seen as a balancing exercise which, as Leyland explains, 'decides whether the means employed, involving interference with fundamental rights, are justified by the end, which is nearly always associated with considerations such as pressing social need, public policy, national security, or public good.'²⁸ From this, a court would then 'decide between competing interests (often those of an individual against those of a public authority).'²⁹ The proportionality test could thus be viewed as an inherent characteristic of constitutional review because it empowers the judiciary to balance the competing rights, thus placing them in a more powerful and influential position than before the HRA.³⁰ Therefore, the adoption by the courts of proportionality could, within the realm of the Convention rights, replace the much criticised *Wednesbury* principle and thus introduce a stronger form of judicial review in the form of constitutional review. The potential for such a move is supported by Lord Steyn, who noted that proportionality is 'a more precise and more sophisticated' test and 'may go further than the traditional grounds for review.'³¹

However, this argument was expressly rejected by Lord Steyn in *Daly*.³² Despite the potential for proportionality to introduce greater constitutional review to the traditional British approach towards applied review, it has still been argued that proportionality is primarily concerned with the decision making process as opposed to the substance of rights. This is the view of Leigh, who argues that 'the structure of the Convention invites consideration of proportionality and in these instances the approach allows sufficient latitude to the decision maker so that one could argue that, overall, the process of judicial reasoning does not focus solely on the merits.'³³ If true, the use of proportionality could, like the *Wednesbury* principle, merely reinforce the traditional administrative or procedural role of applied review in the UK and thus prevent the HRA from ever being considered a Bill of Rights for Britain.

²⁷ (1981) 4 EHRR 149.

²⁸ Leyland (n 18).

²⁹ *Ibid* 176.

³⁰ See Leigh (n 18) 284: 'Section 6, by focusing on the consequences for Convention rights of the public authority's decision, shifts judicial review from secondary to primary review -- it is for the court to determine whether Convention rights have been contravened.'

³¹ *Daly* (n 26) [27] (Lord Steyn).

³² *Ibid*.

³³ Leigh (n 18)284.

It is thus submitted that the impact of proportionality as a standard of review is dependent upon the precise approach adopted by the judiciary. There are numerous variations in proportionality standards across the globe, as well as in Europe itself; some of which invoke greater degrees of constitutional review than others. This is supported by Thomas Poole, who argues that proportionality produces 'an area of discretionary judgment that can be massively broad or incredibly narrow – and anything else between.'³⁴

Proportionality can be better understood as the second test of the doctrine of necessity. Under the qualified rights of the Convention, an action will be deemed as 'necessary in a democratic society' if, once a legitimate aim has been identified, there was (1) a 'pressing social need' to interfere with the Convention right and (2) whether the actions taken were 'proportionate' to the legitimate aim pursued. Harris *et al* elaborates upon this point by identifying three approaches towards the doctrine of proportionality,³⁵ all of which, along with other tests, have been utilised by Strasbourg.³⁶ These tests are as follows: (1) the 'means/ends analysis,' where the seriousness of the measure adopted outweighs the legitimate aim pursued, (2) the 'strict' test, where a measure is not proportionate if a less intrusive means existed to satisfy the legitimate aim pursued but was not followed, and (3) the 'ineffective' or 'unsuitableness' test, where a measure is not proportionate where the purpose of the interference cannot be achieved by the measure adopted.³⁷

Of note here is the second approach, the 'strict' or 'less intrusive means' test, which would appear to have considerable support in other constitutional states with a Bill of Rights; a view supported by Clayton, who argues that it 'has become the heart and soul of proving that interferences with rights are justified under [the Canadian proportionality test],'³⁸ as well as significant to proceedings in South Africa and New Zealand.³⁹ As a result, this expansive approach is what the judiciary would have to adopt in the UK for the HRA to be viewed as a Bill of Rights. However, this 'intense standard of review'⁴⁰ appears to have been neglected by

³⁴ Poole, T. 'The reformation of English administrative law' (2009) CLJ 142, 146.

³⁵ Harris, D.J. O'Boyle, M. and Warbrick, C. *Law of the European Convention on Human Rights* (London: Butterworths, 1995) 300.

³⁶ Fenwick, H.M. and Phillipson, G. *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006) 93.

³⁷ *Ibid* 89.

³⁸ Clayton, R. 'Regaining a sense of proportion: the Human Rights Act and the Proportionality Principle' (2001) 5 *EHRLR* 504, 521.

³⁹ Fenwick and Phillipson (n 36) 90 and 92-93.

⁴⁰ Clayton (n 38) 512.

judges in the UK, primarily, as argued by Fenwick and Phillipson, because of the application by Strasbourg of a 'test significantly less vigorous than at least some of its international cousins'.⁴¹

The UK judiciary, as discussed in chapter three, have failed to recognise the limitations on the application of Strasbourg jurisprudence; the courts simply follows Strasbourg's lead under s 2 HRA instead of utilising their role as the primary protector of human rights. As argued by Fenwick and Phillipson, although the 'pressing social need' branch of the doctrine of necessity appears unproblematic at first, 'in application it demands widely varying standards,'⁴² ergo, they argue that the same is also true of the proportionality element because of the way in which the term is 'used to mean a wide variety of different things,'⁴³ particularly at Strasbourg. This is supported by Clayton, who states that 'the European Court of Human Rights has not identified a consistent or uniform set of principles when considering the doctrine of proportionality.'⁴⁴ This variation can be attributed to the ECtHR as an international court. As argued by Feldman, '[a] *'margin of appreciation', or area of discretionary judgment,* is allowed to states when making judgments about the existence of a pressing social need and the nature of an appropriate response.'⁴⁵ Because of this, it is not unsurprising that Strasbourg 'uses at times a much more restrained form of review than a national Constitutional court,'⁴⁶ such as Canada and South Africa.

Consequently, because of the lack of any definitive approach towards the application of proportionality at Strasbourg, the same variable standard of review has also occurred in the UK. This can be seen most visibly with the retention of the *Wednesbury* principle in judicial review proceedings concerning human rights.

In *Alconbury*, Lord Slynn announced that proportionality 'is part of English law, not only when judges are dealing with [European] Community acts, but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.'⁴⁷ Although this dictum by Lord Slynn displays much wisdom and aspiration, the widespread application of proportionality towards judicial review beyond the remit of human rights has not occurred. This is not, however, unsurprising. As noted throughout this thesis, the HRA purports to

⁴¹ Fenwick and Phillipson (n 36) 105.

⁴² *Ibid* 87.

⁴³ *Ibid*.

⁴⁴ Clayton (n 38) 510.

⁴⁵ Feldman, D. *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford: Oxford University Press, 2002) 57.

⁴⁶ Fenwick and Phillipson (n 36) 105.

⁴⁷ *Alconbury* (n 24) [51].

incorporate an international treaty. As a result, the developments in judicial reasoning, or lack of, as discussed in the previous two chapters, are restricted to issues concerning Convention rights only. Because of this, as argued by Jeffrey Jowell, '[t]here will not doubt remain areas where traditional techniques of reasoning and justification will suffice to ensure standards of legal, fair and reasonable administration based upon the practical morality familiar to our common law.'⁴⁸

Following *R (on the application of Association of British Civilian Internees (Far Eastern Region)) v Secretary of State for Defence*, the Court of Appeal validated Jowell's prediction by stating clearly that proportionality did not apply as a separate ground for judicial review unless there were issues concerning the ECHR or European Community law; *Wednesbury* unreasonableness was the appropriate test to be applied in all other instances.⁴⁹ On the face of it, this is no way detrimental to the HRA's chances of being a Bill of Rights for Britain. Because of the severity of the obligation imposed upon British courts under s 6, the judiciary, under s 2, have introduced a *de facto* proportionality review for decisions concerning Convention rights which, despite not being of the intensity seen in other Bill of Rights states, is still of a standard beyond the *Wednesbury* unreasonableness test.

However, it could be argued that the courts have nevertheless allowed the survival of the *Wednesbury* principle in issues concerning human rights in the recent decision of the House of Lords in the *Abu Qatada* case.⁵⁰ The case concerned the decision of the Home Secretary to deport three men because they constituted a threat to national security. Claiming a breach of Article 3, 5 and 6, one of the men, Abu Qatada, having had his appeal against deportation rejected by the Special Immigration Appeals Commission (SIAC), an immigration appeals tribunal established by the Special Immigration Appeals Commission Act 1997, eventually had his claim of a breach of Article 6 upheld by the Court of Appeal. The decision was then appealed by the Home Secretary to the House of Lords, where their Lordships unanimously overturned the Court of Appeal's decision and reinstated the original ruling by SIAC.

Clearly, this decision by the House of Lords did not concern the judicial review of executive action; it reviewed instead the decision of an inferior court. However, despite this, the decision is nevertheless worthy of discussion, as will be shown below. Because SIAC was established as a fact-finding tribunal, s 7 of the 1997 Act restricted appeals from SIAC to the Court of Appeal to questions of law. Consequently, it was held by Lord Phillips that SIAC could 'only be attacked on the ground that they failed to pay due regard to some rule of law, had

⁴⁸ Jowell (n 1) 682.

⁴⁹ [2003] EWCA Civ 473.

⁵⁰ *RB (Algeria) (FC) and another v Secretary of State for the Home Department* [2009] UKHL 10.

regard to irrelevant matters, failed to have regard to relevant matters or were otherwise irrational.⁵¹ In Lord Hope's opinion, Lord Phillips was speaking in the language of judicial review and thus interpreted his reference to 'irrationality' in the *Wednesbury* sense, arguing that '[i]f SIAC's determination can be shown to have been one which no reasonable tribunal could have reached, or to have been irrational in the *Wednesbury* sense, the appellate court must assume that there has been an error in point of law which entitles it to intervene.'⁵² Support for this application of the *Wednesbury* unreasonableness standard to tribunals came from the case of *Ashbridge Investments Ltd v Minister of Housing and Local Government*,⁵³ where Lord Denning MR said, in the words of Lord Hope, that 'the grounds on which the court could interfere with the decision of the Minister were identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law.'⁵⁴

The decision of the House of Lords states clearly that the decision of lower courts and tribunals are subject to *Wednesbury* unreasonableness. SIAC is a tribunal concerned with establishing whether, on the facts, any Convention rights have been infringed. Section 7 of the 1997 Act makes it clear that it is not the job of the courts to question the facts established by SIAC. Any grounds for review must therefore concern the law; in case of SIAC, most likely the Convention rights. Therefore, in reviewing whether a decision by SIAC concerning Convention rights is erroneous in point of law, *Wednesbury* unreasonableness, and not proportionality, is applied. Admittedly, if SIAC is not dealing with a qualified right, such as Article 3, proportionality will not be an appropriate standard of review. In this sense, since Article 3 was of paramount importance in the *Abu Qatada* case, the adoption of the *Wednesbury* standard may be justified. However, it is not stated in the judgment whether this standard may be waived in favour of proportionality when required. Consequently, the decision leaves open the possibility for the application of *Wednesbury* unreasonableness to qualified rights as well.

With regards to applied review, Lord Hope's reliance upon *Ashbridge* as the justification for the application of *Wednesbury* unreasonableness for tribunals appears to suggest that the doctrine applies equally to the actions of Ministers as it does to lower tribunals. In other words, *Wednesbury* unreasonableness could still apply to decisions made by Ministers concerning human rights. At any rate, his Lordship certainly does not make clear in his judgment that this level of review may no longer apply to human rights issues under the HRA,

⁵¹ *Ibid* [73].

⁵² *Ibid* [216].

⁵³ [1965] 1 WLR 1320.

⁵⁴ *RB (Algeria)* (n 50) [216] (Lord Hope) paraphrasing *Ibid* 1326 (Lord Denning MR).

thus creating the potential for creating confusion if not irregularity in the application of applied review.

Despite the increase in judicial discretion granted by the judiciary's adoption of proportionality for applied review concerning human rights, its application is severely limited, thus all but destroying its potential for meaningful constitutional review as seen in other states with Bills of Rights.

2. The Scope of Applied Review under s 6

2.1 Vertical and Horizontal Effect under Bills of Rights

Also of relevance to the s 6(1) obligation upon public authorities to not infringe the Convention rights is the scope of the application itself. There are two possible applications of any human rights instrument: vertical effect and horizontal effect. Vertical effect refers to the enforcement of rights by the individual against the state. In contrast, horizontal effect refers to the enforcement of rights by an individual against another individual. For public law, vertical effect is never in question. As a result of this, arguments in favour of horizontality find little support. This is certainly the case in the United States, where 'state action' must be proved in order for the Bill of Rights to be applicable.⁵⁵ One of the more recent Bills of Rights charters, the Victorian Charter of Human Rights and Responsibilities 2006 (VCHR), adopts a similarly strict approach to the issue of horizontality.⁵⁶

This does not mean, however, that horizontality is impossible under Bills of Rights. As Phillipson argues, 'the courts of virtually every country with a Bill of Rights have had to face this question, giving varying answers, depending only partly upon the text of the Bills of Rights themselves.'⁵⁷ This is also supported by Tushnet, who argues that the existence of horizontal effect is dependent upon the structure and ideological commitments of the constitutional structure in question.⁵⁸ The South African constitution, for example, deals with the issue of horizontality explicitly 'by making plain that private persons *are* in principle bound by the constitutional rights and that the courts must develop the common law to give effect to these

⁵⁵ Hunt, M. 'The "horizontal effect" of the Human Rights Act' (1998) *PL* 423, 427.

⁵⁶ For more detail see Masterman, R. 'Interpretations, declarations and dialogue: rights protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' (2009) *PL* 112.

⁵⁷ Phillipson, G. 'Clarity postponed: horizontal effect after Campbell' in Fenwick, H.M. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 146.

⁵⁸ Tushnet, M. 'The issue of state action/horizontal effect in comparative constitutional law' *Int. J. Constitutional Law*, Jan 2003; 1: 79.

obligations.⁵⁹ This can be found under s 8(2) of the South African Constitution, which states that '[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

In Canada, horizontal effect is not expressly provided for under the Canadian Charter. In this sense government action is required for the rights under the Charter to be relied upon. However, as argued by Murray Hunt, the courts appear to have developed a hybrid position between both vertical and horizontal positions, allowing for some horizontal application in private litigation,⁶⁰ the form of which is similar to s 8(2) of the South African Constitution. In the Supreme Court decision in *Dolphin Delivery*,⁶¹ McIntyre J. noted that the Canadian Charter could influence the development of the common law by virtue of s 52(1) of the Constitution Act 1982, which states that 'any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.' As McIntyre J. explains:

Where ... private party A sues private party B relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the purported assertion of Charter causes of action or Charter defences between individuals.⁶²

As noted throughout this thesis, the HRA is an attempt by Parliament to give 'further effect' to the ECHR. Because of s 2 and, unlike other nation with a Bill of Rights, the effect of the Convention internationally is very much relevant to the domestic application of the Convention rights, as well as to the approach to be taken by the judges in applying them. Following this, it must be emphasised that 'the Convention speaks to the state';⁶³ it does not

⁵⁹ Phillipson (n 57) 147.

⁶⁰ Hunt (n 55) 429.

⁶¹ *Dolphin Delivery Ltd v Retail, Wholesale and Department Store Union*, Local 580 (1986) 2 SCR 573.

⁶² *Ibid* [39]. This approach towards indirect horizontal effect was also later supported by the Supreme Court in the case of *McKinney v University of Guelph* (1990) 3 SCR 229.

⁶³ Warbrick, C. 'The European Convention on Human Rights and the Human Rights Act: The View from the Outside' in Fenwick, H.M. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 28.

speak to private persons. Thus, unsurprisingly, horizontal effect was never really considered during the drafting of the HRA.⁶⁴ Given the position of some states on this issue, it is submitted that a restrictive approach towards horizontality would not negate the HRA constituting a Bill of Rights for Britain. However, the degree of horizontality allowed under the HRA may act as an indication of the impact the HRA has had on judicial lawmaking at common law, and thus of the extent to which a new culture of rights has emerged.

2.2 Public Authorities under s 6

When applying vertical effect, it is important that the state is defined for the purposes of accountability. From the bare reading of s 6, it is clear that actions concerning the breach of Convention rights can only be brought against 'public authorities'⁶⁵ and, crucially, 'any person certain of whose functions are functions of a public nature.'⁶⁶ Therefore, as argued by Leigh and Masterman, '[t]he question of what constitutes a 'public authority' is obviously of crucial importance in determining the breadth of the application of this duty and, conversely, the protection given by it to individuals.'⁶⁷

According to the section itself, 'public authority' includes 'a court or tribunal',⁶⁸ but not Parliament, which is expressly excluded from the definition.⁶⁹ Although helpful to a degree, the section fails to list any other public authorities or criteria for determining public authorities beyond 'functions of a public nature.'⁷⁰ Consequently, it has been inferred from the drafting of s 6(1) and 6(3) that there are two types of public authorities: 'standard' and 'functional.' Standard public authorities are 'self-evidently of a public nature, such as the police, government departments, the Probation service, local authorities, the Security and Intelligence Services, and the BBC'⁷¹ and fall under the basic definition of 'public authority' under s 6(1). This is supported by the judgment of the House of Lords in *Aston Cantlow PCC v Wallbank*, where Lord Nicholls declared that 'the phrase 'a public authority' in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression ... The most obvious examples are governmental departments, local authorities, the police and the

⁶⁴ Zander, M. *A Bill of Rights?* (Sweet & Maxwell, 1997) 152: As he argues before the passing of the HRA, '[i]t appears to be widely agreed that actions brought under the Bill of Rights [what would eventually become the HRA] should lie in respect only of acts done by public authorities or by bodies that, though private, perform public functions.'

⁶⁵ Section 6(1).

⁶⁶ Section 6(3)(b).

⁶⁷ Leigh and Masterman (n 21) 138.

⁶⁸ Section 6(3)(a).

⁶⁹ Fenwick (n 11) 217.

⁷⁰ For a comparison see the Freedom of Information Act 2000.

⁷¹ Fenwick (n 11) 217.

armed forces.⁷² In contrast, functional public authorities are bodies which are 'quasi-public or hybrid bodies.'⁷³ In this sense, they are bodies which have both private and public functions, but they can only be bound by the Convention with regards to the latter functions. Therefore, it can be said that the HRA is only directed vertically towards the state; there is no direct horizontal application between private parties.⁷⁴ As a result, the judiciary have adopted a restrictive interpretation of public authorities under s 6 which is in-line with other Bills of Rights jurisdictions.

However, despite the fact that such an approach is consistent with other Bills of Rights, it has still been argued that the HRA is more than capable of permitting full horizontal effect, a view which is supported and advanced by Pattinson and Beyleveld.⁷⁵ Their argument is based around a distinction between horizontal applicability and horizontal effect. They argue that the incorporated Convention rights are conceptually held by individuals against other individuals and not only against the state. Therefore the Convention rights can be said to *apply* horizontally. Despite this, however, they note that such rights do not have horizontal *effect*; individuals cannot enforce their rights against the individual. Although they accept that there would be no redress at Strasbourg for such horizontal application as against the other individual, due to the nature of the Convention as an international treaty, they still contend that this does not imply that the rights should not be horizontally applicable in domestic law. A cause of action needs to be made available in domestic law for an individual to enforce for there to be effective horizontal effect. They argue that such a cause of action arises from the HRA itself, though such a claim has received little support.⁷⁶ In practice the judiciary, and even those sympathetic to the argument for full horizontal effect, have been reluctant to recognise a new cause of action based on the HRA.⁷⁷ This was the case in *Venables and another v News Group Newspapers*, where Butler Sloss stated clearly that '[t]he decisions of the European Court in *Glaser v UK*⁷⁸ and *X and Y v Netherlands*,⁷⁹ seem to dispose of any argument that a court is not to have regard to the Convention in private law cases.'⁸⁰

⁷² [2004] 1 AC 546 [6]-[8].

⁷³ Fenwick (n 10) 217.

⁷⁴ *Ibid* 218: '[T]here are purely private bodies which have no public function at all. It was accepted in parliament in debate on the Human Rights Bill that this was the correct reading of s 6.' See also Hansard HC vol 314 cols 409-10 (17 June 1998) (Jack Straw MP).

⁷⁵ Pattinson, S. D. and Beyleveld, D. 'Horizontal applicability and horizontal effect' (2002) 118 *LQR* 623, 626.

⁷⁶ See Phillipson, G. 'The Human Rights Act, 'horizontal effect' and the common law: a bang or a whimper' (1999) 62 *MLR* 824: He argues that s 6(1) creates *some* role for the Convention rights in litigation but does not create any new causes of action.

⁷⁷ Pattinson and Beyleveld (n 75) 646.

⁷⁸ [2000] 3 FCR 193.

Therefore, private parties only fall within the scope of the HRA if they are exercising 'functions of a public nature'.⁸¹ What constitutes 'functions of a public nature' is therefore of vital importance. However, the HRA unhelpfully and somewhat circularly states that '[i]n relation to a particular act, a person is not a public authority ... if the act is private'.⁸² It is thus up to the courts to define public from private functions; the results of which have led to dissatisfaction for numerous bodies and academics alike.⁸³

2.3 The Meaning of 'functions of a public nature'

Trying to distinguish between public and private acts is no easy task. As noted by Tushnet, 'the government is *always* somehow implicated in private decisions'.⁸⁴ In the UK, the issue of what amounts to a function of a public nature has been subject to much litigation, with the courts adopting a restrictive interpretation of the terms meaning. For example, it was held by Lord Woolf in *Poplar Housing & Regeneration Community Association Ltd v Donoghue* that '[t]he 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'.⁸⁵ A similar approach was adopted in *R (on the application of Heather) v Leonard Cheshire Foundation*,⁸⁶ which concerned the UK's leading voluntary sector provider of care and support services for the disabled. The court held that the authority in question was not exercising a public function because the home was not publicly funded, it was not standing in the shoes of the local authority, and the care provided in the home for those who were publicly funded did not differ from those who were privately funded.⁸⁷ This decision, as argued by McDermont, 'reject[ed] by implication any 'public interest' arguments'.⁸⁸ Instead, the Court of Appeal, as in *Poplar Housing*, appears to favour an 'institutional' rather than a functional test. In other words, the court places greater importance upon the nature of the institution in question, and its connection with the state, rather than whether the function being exercised is public in its nature or not, even though Lord Woolf thought that this was not strictly the case, stating that 'the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public

⁷⁹ (1985) 8 EHRR 235.

⁸⁰ [2001] 1 All ER 908, 916.

⁸¹ Section 6(3)(b).

⁸² Section 6(5).

⁸³ See Sunkin, M. 'Pushing forward the frontiers of human rights protection: the meaning of public authority under the Human Rights Act' (2004) *PL* 643.

⁸⁴ *Ibid* 79.

⁸⁵ [2002] QB 48; [2001] EWCA Civ 595, 69.

⁸⁶ [2002] 2 All ER 936; [2002] EWCA Civ 366.

⁸⁷ Fenwick (n 11) 224.

⁸⁸ McDermont, M. 'The Elusive nature of the 'Public Function': *Poplar Housing and regeneration Community Association Ltd v Donoghue*' (2003) 66(1) *MLR* 113, 121.

nature.⁸⁹ As comforting as this may be to some who favour a more generous interpretation of s 6(3)(b), the reality is very different. As a result, the position of the court has, unsurprisingly, been heavily criticised by many, such as the Audit Commission, who argued that, following these decisions by the court, '...most private organisations that contract with the public bodies to provide services do not constitute public bodies for the purposes of the Human Rights Act, despite the public nature of the work in which they engage.'⁹⁰ Similar concerns have been expressed by Maurice Sunkin, who argues that the approach by the court leaves gaps in the protection provided by the HRA which affects 'people who are particularly vulnerable to ill treatment.'⁹¹

Undeniably, the 'institutional' approach towards determining what functions of a public nature are leaves gaps in the protection given to the general public, particularly with regards to housing and social care.⁹² However, such the restrictive approach towards 'state action' in *Poplar Housing* and *Leonard Cheshire Foundation* should not be viewed as untypical of other jurisdictions with a Bill of Rights.

In the United States, for example, the Supreme Court adopts what has been dubbed the 'state action doctrine,' where the court will, in trying to distinguish private from public action, focus on the how much government involvement there is. There is still, however, 'no quantitative or qualified criteria'⁹³ for what degree of involvement is needed in order to make the otherwise private act public in nature.

In Canada, despite the adoption of a weak form of indirect horizontal effect as mentioned above, a relatively strict approach has nevertheless been adopted by the Supreme Court towards s 32 of the Canadian Charter. Section 32(1)(a) of the Charter states that it applies to 'to the Parliament and government of Canada in respect of all matters within the authority of Parliament.' According to McIntyre J., s 32 states to whom the Charter applies: the legislative, executive and administrative branches of government,⁹⁴ thus giving 'a strong message that the Charter is confined to government action.'⁹⁵ In the *Dolphin Delivery* case, the Supreme Court of Canada stated that '[i]t [the Canadian Charter] was not intended in the absence of

⁸⁹ *Poplar Housing* (n 85) 69.

⁹⁰ Audit Commission, *Human Rights Improving Public Services Delivery* (September 2003) 11-12.

⁹¹ Sunkin (n 83) 645.

⁹² *Ibid* 645.

⁹³ Clapham, A. *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) 163.

⁹⁴ *Dolphin Delivery* (n 61) [34].

⁹⁵ See the Canadian Legal Information Institute <www.canli.org/en/ca/charter_digest/s-32-1.html#_Toc68429566> accessed on 31.07.2009.

some governmental action to be applied in private litigation.⁹⁶ The Court was also reluctant to state what degree of governmental intervention was needed, declaring instead that 'it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the *Charter* by private litigants in private litigation.'⁹⁷ McIntyre J. was, however, willing to state that a direct and precisely-defined connection between the government action and the claim advanced must be present for the Charter to apply.⁹⁸ However, in *McKinney v University of Guelph*⁹⁹, it was held that the Canadian Charter applies to private entities in so far as they are implementing a specific government program or policy. In the case, it was held that a university's mandatory retirement policy was not part of a government policy or scheme, and as such the university could not be seen as governmental in order for the Charter to apply, despite how university could be seen as performing a public service through education. Thus, 'the mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32.'¹⁰⁰

However, despite this, the judiciary's restrictive interpretation of 'functions of a public nature' under s 6(3)(b) is still a missed opportunity for British judges to 'take the lead from Strasbourg.' Although the Court of Appeal believed that the term 'functions of a public nature' required for there to be some ascertainable connection with the state,¹⁰¹ the House of Lords, following their decision in *Aston Cantlow v Wallbank*,¹⁰² disagreed and placed greater weight on issues concerning the public interest. This expansive interpretation of s 6 by their Lordships goes much further than their American or Canadian counterparts on this issue, with Lord Nicholl's declaring that, in deciding whether an act was public or not, factors such as 'the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution'¹⁰³ must be taken into account. Although there is a clear overlap with some of these factors with those identified by the Court of Appeal, the House of Lords appeared to 'focus more on a generous functional approach than the Court of Appeal had been doing';¹⁰⁴ an assertion which finds support from the words of Lord Hope, who stated that '[i]t is the function that the person is performing that

⁹⁶ *Dolphin Delivery* (n 61) 693 (McIntyre, J.).

⁹⁷ *Ibid* 560 (McIntyre, J.).

⁹⁸ *Ibid* [37].

⁹⁹ (n 62).

¹⁰⁰ Canadian Legal Information Institute (n 95).

¹⁰¹ See Oliver, D. 'Functions of a public nature under the Human Rights Act' (2004) *PL* 329, 332.

¹⁰² (n 73).

¹⁰³ *Ibid* [8].

¹⁰⁴ Fenwick (n 11) 226.

is determinative of the question whether it is, for the purposes of the case, a 'hybrid' public authority.¹⁰⁵

This expansive public interest approach, or 'functional' approach, was, however, met with extreme opposition by the Court of Appeal. In *R v Hampshire Farmers Market ex parte Beer*,¹⁰⁶ the court argued that neither of the decisions in *Poplar Housing* or *Leonard Cheshire* had been overruled by the Lords in *Aston Cantlow*, asserting instead the 'institutional' approach towards s 6(3)(b). This was endorsed again by the Court of Appeal in *R (on the application of Johnson) v Havering London Borough Council*,¹⁰⁷ *YL v Birmingham City Council*,¹⁰⁸ where the court appeared to ignore the approach of the House of Lords as well as the Secretary of State of Constitutional Affairs, who intervened in an attempt to persuade the Court of Appeal that *Leonard Cheshire* had been decided incorrectly and that *Aston Cantlow* had been wrongly decided.

On appeal, a majority of the House of Lords in *YL*¹⁰⁹ wasted their opportunity to reassert their stance in *Aston Cantlow* by ruling that a private care home could not amount to a hybrid public authority. Lord Mance, with the majority, stressed the importance of Strasbourg jurisprudence on the definition of public authorities, arguing that the definition of public authority, and 'functions of a public nature,' was intended to cover bodies whose actions were the responsibility of the state at Strasbourg.¹¹⁰ Following this, he identified two scenarios or 'principles' from the Strasbourg jurisprudence where a private body's interference with a Convention right may invoke the state's responsibility in Strasbourg: firstly, if the UK failed to protect a person's rights when they were under a positive obligation to do so; and secondly, where state or governmental powers have been delegated to the private body.¹¹¹

Baroness Hale, dissenting, disagreed. She stated unequivocally that 'it is the nature of the function being performed, rather than the nature of the body performing it, which matters under s 6(3)(b),'¹¹² citing *Poplar Housing* as an example of the narrow and incorrect 'institutional' approach towards defining 'functions of a public nature.' Although Baroness Hale accepted that it is common for 'functions of a public nature' to 'include the exercise of

¹⁰⁵ *Aston Cantlow* (n 73) [41].

¹⁰⁶ [2003] EWCA Civ 1056.

¹⁰⁷ [2007] EWCA Civ 26.

¹⁰⁸ [2007] EWCA Civ 27.

¹⁰⁹ *YL v Birmingham City Council* [2007] UKHL 27.

¹¹⁰ *Ibid* [88].

¹¹¹ *Ibid* [92].

¹¹² *Ibid* [61].

the regulatory or coercive power of the state,¹¹³ this did not prevent her from finding that the care home in question was a hybrid public authority for the purposes of s 6(3)(b). In making her decision, Baroness Hale cited a number of factors which were relevant in determining functions of a public nature, such as: whether the state had assumed responsibility for seeing that the 'function' in question is performed, whether there is a public interest in having the task undertaken, whether it was publically funded, and finally whether there was any use of coercive statutory powers.¹¹⁴ Lord Bingham also joined Baroness Hale in finding the care home as a public authority, identifying similar factors to Baroness Hale and Lord Nicholls (in *Aston Cantlow*) which are relevant to determining the status of a public authority.¹¹⁵ Both seemed to place great weight upon the extent to which, if at all, the state had taken responsibility for the relevant task being performed and, most importantly, its recognition of the task's public importance.¹¹⁶

By Lord Mance's own admission, his approach towards s 6(3)(b) is narrower than the position of Lord Nichols' in *Aston Cantlow*, stating that Lord Nicholls supported 'a broad application.'¹¹⁷ Consequently, the decision by the majority demonstrates yet again reluctance on behalf of the judiciary to move away from Strasbourg and extend human rights protection in the domestic field like a Bill of Rights. This is supported by Alex Williams, who argues that 'Strasbourg can be unclear as to whether a state is responsible under head (1) (positive obligation) or (2) (delegated state powers),'¹¹⁸ thus undermining the reasoning of the majority in *YL*, criticising also Lord Mance for giving only secondary consideration to domestic definitions for 'governmental functions.'¹¹⁹

As argued consistently throughout this thesis, the role of the ECHR and the UK's obligations towards the Convention internationally distinguished the HRA from any other Bill of Rights. As argued by Fenwick, following the decision of the Court of Appeal decision in *Johnson*, and presumably *YL*, even though the private care home in question was not performing a function of a public nature, the United Kingdom government could still be the respondent in a claim made to the ECtHR on the grounds that 'the legislative arrangements in the state meant that residents in private care homes were not receiving their Art 8 rights.'¹²⁰ Therefore, as with the

¹¹³ *Ibid* [62].

¹¹⁴ *Ibid* [66]-[69].

¹¹⁵ *Ibid* [5]-[11].

¹¹⁶ In agreement with this see Williams, A. 'YL v Birmingham City Council: contracting out and 'functions of a public nature' (2008) *EHRLR* 524, 525-526.

¹¹⁷ *YL* (n 109) [91].

¹¹⁸ Williams (n 116) 527.

¹¹⁹ *YL* (n 109) [100]-[106].

¹²⁰ Fenwick (n 11) 229.

remedial intention behind ss 3 and 4, '[t]he purpose of ss 6-9 HRA was to provide for the delivery of effective remedies in the domestic courts. If the term 'public function' is defined too narrowly, that creates a situation where claimants could obtain a remedy at Strasbourg, by claiming against the state, but could not obtain it directly, under the HRA.'¹²¹ This understanding of ss 6-9 is supported by Lord Hope, who states that '[t]he purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention.'¹²²

However, following the House of Lords decision in *YL*, it must be noted that this two-tier approach towards rights may no longer be an issue. Further support is given by Leigh and Masterman, who argue that the approach by Lord Mance i.e. to connect the definition of public authorities under section 6 to the Convention, removes the risk of a gap emerging between the UK's domestic protection of human rights and Strasbourg's and thus satisfies the UK's obligations under Article 13.¹²³ However, such a stance, as mentioned above, would do little to move the HRA into the realm of a Bill of Rights, and as such is dismissed in this thesis as a credible interpretation of section 6.

Therefore, it is submitted that in order for the UK to satisfy its Article 13 obligations, without making it a right under the HRA, s 6 must be given a generous interpretation so as to avoid this dual standard from emerging. This is supported by Lord Nicholls, who said that the definition of 'function of a public nature' should be given a 'generously wide' interpretation.¹²⁴ The proposition also finds support from the Joint Committee on Human Rights, who stress the need for 'a more vigorous approach to re-establishing the proper ambit of the Act,'¹²⁵ and by Sunkin, who argues that 'many commentators, including those working in the field, have been highly critical of the court's failure to extend human rights protection to the private sphere in the manner apparently intended.'¹²⁶ It must also be noted that the decision in *YL* was reversed due to the passing of the Health and Social Care Act 2008. Section 145(1) states that:

A person ("P") who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions is to be taken for the purposes of subsection (3)(b) of section 6 of

¹²¹ *Ibid.*

¹²² *Aston Cantlow* (n 73) [44].

¹²³ Leigh and Masterman (n 21) 143.

¹²⁴ *Aston Cantlow* (n 73) [11].

¹²⁵ Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act,' (Seventh Report of Session 2004-04)

<<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf>> accessed 31.07.2009 [48].

¹²⁶ Sunkin (n 83).

the Human Rights Act 1998 (c. 42) (acts of public authorities) to be exercising a function of a public nature in doing so.

As a result, the scope of s 6 has been expanded, thus filling the gap left in protection by the House of Lords ruling in *YL*. The passage of the Act also shows the continuing sovereignty of Parliament over issues of human rights, as well as, perhaps, the judiciary's failure to interpret s 6 in the way its framers had intended. Despite this, however, it would be unwise to assume that a generously wide definition of s 6, whether by interpretation or by legislation, would automatically increase human rights protection in the UK and thus identify the HRA as a Bill of Rights for Britain. This is supported by Leigh and Masterman, who argue that '[i]t by no means follows that human rights protection can be maximised by simply catching more entities within the 'public authority' net, since private and not-for-profit sector bodies have human rights of their own to be considered, and the courts have wisely resisted demands to extend the Act to them.'¹²⁷ This does not, however, mean that the courts have failed to increase the protection granted by the HRA in other ways.

2.4 Indirect Horizontal Effect

Despite the reluctance shown by many jurisdictions towards *direct* horizontal effect, it is submitted that *indirect* horizontal effect, is not only possible, but that its presence can be a strong indicator of an emerging culture of rights. This is supported by Du Plessis and Ford, who argue that 'a Bill of Rights may have a form of indirect horizontal effect, so that while constitutional rights cannot be invoked directly by private litigants and do not create of themselves new private law causes of action, they can be relied upon indirectly to influence the interpretation, development or application of existing law.'¹²⁸

Although, as mentioned above, a weak form of indirect horizontal effect operates in Canada following the Supreme Court decision in *Dolphin Delivery*, the possibility for stronger indirect effect seems low. The Canadian courts are not considered as forming part of the mechanism of state. Consequently, they are not bound to comply with the Charter under s 32 as the UK judiciary is under s 6; the Canadian courts are only bound to apply the Charter. If the courts were bound by the Charter in the same way as the government and the legislature, it is likely that the Charter would apply to all private litigation.¹²⁹ As argued by McIntyre J. in *Dolphin Delivery*, if they were bound in this way:

¹²⁷ Leigh and Masterman (n 21) 134.

¹²⁸ Du Plessis, M. And Ford, J. 'Developing the common law progressively – horizontally, the Human Rights Act and the South African experience' (2004) *EHRLR* 286, 292.

¹²⁹ *Dolphin Delivery* (n 61) [36] (McIntyre, J.).

All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the *Charter* applies.¹³⁰

The Canadian position on this also finds support under s 4(1)(j) VCHR, which states that the Victorian courts are not public authorities when discharging their functions under the Victorian Charter. Thus, as argued by Masterman, '[e]xcluding the Victorian courts from the obligation to act compatibly [i.e. to 'act in a way that is compatible with human rights' under s 1(2)(c) VCHR] visibly reduces the scope of the Charter rights to influence judicial discretion in the field of common law adjudication between private parties.'¹³¹ Such a restrictive approach is not followed in South Africa, however, which, under s 39(2) of the constitution, states that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Considering how one of the principal aims of the HRA was to create a new culture of rights in the UK, the development of indirect horizontal effect, in line with the South African approach, could be very relevant in shaping the new human rights society and in classifying the HRA as a Bill of Rights.

This 'strong indirect horizontality' was in fact advocated as being applicable to the HRA by Murray Hunt, who argued that the courts have an absolute obligation under the HRA to ensure compatibility with existing law with the Convention rights themselves, as opposed to merely regard to it and the values it holds.¹³² It was the belief of a number of academics that this expansive approach was the correct interpretation of the HRA's stance on indirect horizontal effect.¹³³ However, as Phillipson argues, 'the HRA does not impose this absolute duty, but rather a weaker one – the obligation to take account of Convention principles or values when engaging in common law adjudication, affording them a variable weight, depending on the context.'¹³⁴ Support for this claim can be found by how the courts themselves are bound, under s 6(1), to act in a way which is compatible with a Convention right by virtue of their express inclusion under s 6(3)(a). This, in conjunction with s 7 (1)(b) which states that a person

¹³⁰ *Ibid.*

¹³¹ Masterman (n 56) 127.

¹³² See Hunt (n 55) 423.

¹³³ Lester, Lord A. and Pannick, D. 'The Impact of the Human Rights Act on Private law: The Knight's Move' (2000) 116 LQR 380 and Beatson, J. and Grosz, S. 'Horizontality: A Footnote' (2000) 116 LQR 385.

¹³⁴ Phillipson (n 57) 152.

may 'rely on the Convention right or rights concerned in any legal proceedings,' and thus horizontal proceedings, means that '[j]udicial decisions must, therefore, be consistent with the Convention, even if the proceedings are between private parties.'¹³⁵ If the courts are to shape the common law in light of the Convention, the UK would be acting consistently with the ECHR. Although the Convention is designed to speak to the state in order to 'restrict the power of government's over their own citizens,'¹³⁶ the ECtHR have made it clear that some of the rights contained under the Convention 'requires positive measures to be taken, even in the sphere of relations between individuals, if need be.'¹³⁷ Despite this, however, the position of indirect horizontal effect in the UK is far from secure. As correctly argued by Clapham, following the Strasbourg case law above, 'the question is no longer: do the Convention rights apply in the private sphere? Now it is: which rights apply? And to what extent?'¹³⁸

Article 8 has been the main focus of proceedings in the UK dealing with indirect horizontal effect. The case of *Campbell v MGN*¹³⁹ concerned the question of whether or not the publication of details and photographs of Naomi Campbell and her drug addiction amounted to a breach of confidence. Since the newspaper in question was clearly not a public authority, the issue arose as to the application of the HRA in the purely private proceedings. Baroness Hale seemed to promote a strong indirect horizontality, stating that the HRA 'does not create any new causes of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights.'¹⁴⁰ As submitted above, there is no express obligation upon the courts to develop the common law in light of the rights exclusively under the HRA. If one considers the duty of the court under s 2 (1) to 'take into account any rights – (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,' the underlying principles or values of the ECHR are more likely to be absorbed into English law. This was also the view of Lord Nicholls in *Campbell*, who stated that the courts should give effect to 'the values underlying Articles 8 and 10.'¹⁴¹ This approach would give the judiciary greater discretion in deciding what weight to give such principles, which could 'be overridden by any other interest that the court finds compelling in a particular case,'¹⁴² thus creating flexibility in the law. However, such a

¹³⁵ Coppel, J. *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (Chichester: J. Wiley, c1999) 26.

¹³⁶ Simpson, A.W.B. *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001) 12.

¹³⁷ Plattform 'Artze fur das Leben' (1988) series A, vol. 139 [32], as cited in Clapham (n 93) 89.

¹³⁸ Clapham (n 93) 89.

¹³⁹ [2004] 2 WLR 1232.

¹⁴⁰ *Ibid* [132].

¹⁴¹ *Ibid* [17].

¹⁴² Phillipson (n 57) 154.

stance has not been followed in the post-Campbell case law. In *McKennitt v Ash*, Buxton LJ held that 'in order to find the rules of the English law of breach of confidence we now have look in the jurisprudence of articles 8 and 10.'¹⁴³ As argued by Fenwick, this decision seems to 'impose something close to an absolute duty to develop the common law compatibly with the rights rather than a requirement merely to have regard to them.'¹⁴⁴

Thus, although, as noted by Fenwick, the courts appear to 'accept a duty to abide by the Convention rights in private common law adjudication,' it is nevertheless the case, as she also notes, that this new approach applies only 'in the context of misuse of private information. It cannot be said that they have accepted such a duty in other contexts.'¹⁴⁵ As a result, it could be argued that indirect horizontal effect does not apply to all the Convention rights, thus representing a rejection of the expansive 'strong form' envisaged by Hunt and as potentially utilised in South Africa.

3. Conclusions on s 6 of the Human Rights Act

Although the HRA, under s 6, has allowed the judiciary to move, even if only marginally, beyond the traditionally narrow scope of judicial review as epitomized by the *Wednesbury* principle for human rights issues, there is nevertheless a clear reluctance on their behalf to engage in meaningful constitutional review of the type seen under Bills of Rights. The courts have also, with regards to determining what constitutes a public function, taken an equally restrictive stance; one which Parliament was compelled to rectify by overruling the decision in *YL*. Despite this, however, the judiciary's approach towards indirect horizontal effect suggests that a new culture of rights is beginning to emerge; thus adding weight to the argument that the HRA may be a Bill of Rights for Britain. Although '[o]ther Bills of Rights offer at least more guidance'¹⁴⁶ on the issue of indirect effect, the UK courts have nevertheless interpreted a series of obligations under the HRA in light of the values of the ECHR; resulting in changes to the common law, if not in relation to all of the Convention rights, then at least to Article 8 and the protection of privacy.

¹⁴³ [2006] EWCA Civ 1714 [10]-[11].

¹⁴⁴ Fenwick (n 11) 255.

¹⁴⁵ *Ibid* 254.

¹⁴⁶ Phillipson (n 57) 147.

Chapter Six

The Public Reception of the Human Rights Act 1998

John Wadham argues that a 'Bill of Right, in order to be meaningful and to have a real effect and to be of real use needs to be known about and supported by the communities and peoples that it is designed to be used by. The support of lawyers and judges is not enough.'¹ This is supported by Nyerere, who argues that 'a constitution must be relevant to the society,' because if it 'ignores the social realities, or inhibits movement in the direction of the people's aspirations, it will be abandoned'².

Therefore, following this reasoning, the Human Rights Act 1998 (HRA) must not only have the widespread support of the general public to be considered a Bill of Rights, but also reflect the culture and society of Britain. Unfortunately for the HRA, it would appear to have failed to satisfy both of these requirements as it has endured persistent and often violent criticism since its coming into force in 2000, primarily by the media and politicians, which has resulted in the HRA being received as anything but a Bill of Rights by the British people.

However, it must be noted that there is little evidence to suggest that the British public are opposed to the introduction of a Bill of Rights in principle. According to the results of a survey conducted by the Equality and Human Rights Commission (EHRC), which was published in June 2009, 84% of people agreed with the statement that it was important to have a law that protects human rights in Britain.³ As a result, the majority of the criticisms made of the HRA are, in the eyes of their advocates, evidence of the HRA failing to relate towards British society and British people as a Bill of Rights should. However, such criticisms are greatly misconceived; the only real criticism of the HRA is that it has been acting too much like a Bill of Rights.⁴

¹ Wadham, J. 'Why Incorporation of the European Convention on Human Rights is not enough' in Gordon, R. and Wilmot-Smith, R. (eds.) *Human Rights in the United Kingdom* (Oxford: Oxford University Press, 1996) 35.

² Nyerere, M. J. K. 'Reflections on Constitutions and African Experience', in Barron, Edwards and Storey (eds) *Constitutions and National Identity* (Quadriga, 1993) 16.

³ Equality and Human Rights Commission, 'Public Perceptions of Human Rights' (2009) <http://www.equalityhumanrights.com/uploaded_files/public_perceptions_of_human_rights_ipos_mori.pdf> accessed 31.07.2009, 21.

⁴ An assessment which finds support in Klug, F. 'A bill of rights: do we need one or do we already have one?' (2007) *PL* 701, 714: 'The third, and possibly most important reason why the HRA has failed to bed down smoothly, is that it has been *too* successful at challenging the executive for the government's comfort.'

It will therefore be shown below that the HRA reflects not only British society, but that the specific criticisms made towards it displays a misconceived understanding of Bills of Rights which, far from condemning the HRA as anything but a Bill of Rights, serves to vindicate its status as a Bill of Rights for Britain.

1. A Failure to Promote the Human Rights Act

As noted above, a Bill of Rights needs to have popular support in order to be effective. Although such support is arguably derived from the extent to which the bill reflects the culture and traditions of the society it governs, it is argued here that the overtly negative reception of the HRA can be explained by a lack of information about the Act which could have been avoided. As Ackerman argues, 'a constitution emerges as a symbolic marker of a great transition in the political life of a nation' and can represent a 'new beginning' for a state.⁵ Such symbolism appears to have been lost with regards to the HRA. Although the ECHR has been described by one commentator as 'symbolic',⁶ it is an inescapable conclusion that the Labour Government failed to promote the HRA, a domestic incorporation of the Convention, as symbolic of a new era of human rights.

Such a conclusion is supported by Fenwick, who argues that the HRA 'was never really sold to the people of the UK.'⁷ According to a poll conducted by Liberty in 2008, 'only 13% of people remember ever seeing or receiving any information from the Government explaining the legislation.'⁸ Such a result was also reflected in the findings of the EHRC, which noted that 29% of the participants knew 'a great deal' or 'a fair amount' about the HRA compared with 58% of people who knew 'very little' or 'nothing at all' about it.⁹ It therefore stands to reason that people cannot give their support to something which they know nothing about.

As a result, the government failed in creating the necessary 'culture of rights' it hoped to achieve with the HRA,¹⁰ thus opening people's understanding and view of the 1998 Act open to damaging influence by the tabloids. This is supported by Klug, who criticises the government for allowing the Act to 'fall prey to a tabloid onslaught' by opposing the creation of a

⁵ Ackerman, B. 'The Rise of World Constitutionalism' (1997) 83 *Va. L. Rev.* 771, 778.

⁶ Simpson, A.W.B. *Human rights and the end of empire: Britain and the genesis of the European Convention* (Oxford: Oxford University Press, 2001) 5.

⁷ Fenwick, H. M. *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 156.

⁸ See 'British public overwhelmingly support Human Rights' <<http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2008/10-12-08-british-public-overwhelmingly-support-human-rights.shtml>> accessed 15.06.2009.

⁹ Equality and Human Rights Commission (n 3) 21.

¹⁰ Lewis, J. 'The European ceiling on human rights' (2007) *PL* 720, 722.

commission designed to promote the HRA,¹¹ and by Fenwick, who notes that 'the perception created by the media that the HRA is hindering counter-terrorist and crime control measures remains, and the appeal to the fear of terrorism, has been effective in creating a false image of the HRA.'¹²

This 'false image' of the HRA created by the media and by politicians will now be explored, one criticism at a time.

2. The Human Rights Act as Un-British

It is argued that the HRA suffers from an identity crisis, with the British public seeing the European Convention on Human Rights (ECHR), and thus the HRA, as distinctively un-British.¹³ This is supported by Fenwick, who argues that the HRA is 'perceived as a European instrument, as something imposed from outside, and as associated with the EU and over-regulation.'¹⁴ It will be argued below, however, that such a view of the ECHR and the HRA is greatly misconceived, with both instruments reflecting a deep understanding of British legal tradition which, instead of ruling out the possibility of a Bill of Rights for Britain, in fact encourages it.

2.1 The European Convention on Human Rights 1950

It is now well known that the Foreign Office played a leading role in both creating the Council of Europe and in drafting the ECHR.¹⁵ It is also a well known fact that the UK was the first nation to ratify the Convention in March 1951. Although it has been argued by some commentators that the Convention 'was a product of British foreign policy, not of British legal tradition, much less of British domestic policy,'¹⁶ it is respectfully submitted that this is not completely the case. Undeniably the Foreign Office was politically motivated to create a strong Europe in the wake of the Second World War and in the face of a new rejuvenated Soviet empire; Britain had to 'convince Europeans that Britain was a good European' in order

¹¹See Klug, F. 'Enshrine these rights' *The Guardian* June 27, 2006

<<http://www.guardian.co.uk/commentisfree/2006/jun/27/comment.politics1>> accessed 31.07.2009 and Klug (n 4) 713.

¹²Fenwick (n 7) 163. This is also supported by Klug (n 4) 713: '[T]he lack of a strong narrative about the HRA left the field wide open for the furtive imagination of the tabloids, in search of easy copy, to exploit with fervour' and by Wadham, J. 'The Human Rights Act: one year on' (2001) *EHRLR* 620, 627: 'Some media organisations saw the Act as a "villains' charter."'

¹³Zander, M. *A Bill of Rights?* (Sweet & Maxwell, 1997) 70.

¹⁴Fenwick, (n 7).

¹⁵See Simpson (n 6) 5-6; Coppel, J. *The Human Rights Act 1998: enforcing the European Convention in the domestic courts* (Chichester: J. Wiley, c1999) 3 and *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) <<http://www.archive.official-documents.co.uk/document/hoffice/rights/intro.htm>> accessed 12.08.2009 [1.2].

¹⁶Simpson (n 6) 18.

to 'strengthen the Western European bloc.'¹⁷ One way of doing this was by signing up to the ECHR, despite the belief of many that Britain already adequately protected the rights of man.¹⁸ However, regardless of Britain's political motivations, the ECHR nevertheless embodies some of UK constitutionalism's most fundamental concepts. This is certainly the view of Lord Hoffmann, who asserted that '[t]he United Kingdom subscribes to the Convention because it set out the rights which British subjects enjoyed under the common law,'¹⁹ and of Sydney Kentridge, who stated that most of the Convention rights 'are to be found in our common law; indeed, most of them may be said to have been derived from the common law of this country.'²⁰

The same is also true of the UK's Diceyan understanding of the Rule of Law. This is supported by Allison, who argues that 'the English rule of law's preoccupation with remedies – requiring that they be equally available against individuals and officials alike – is manifest in the right to an effective remedy, enshrined in Art. 13, for the violation of Convention rights.'²¹ In fact, the absence of Article 13 from the Convention rights listed under the HRA could be seen as testament to the belief that Britain already adequately protected civil liberties before the HRA, such as with the Diceyan emphasis on providing remedies for grievances.²² The ECHR could also be said to reflect British legal tradition with regards to the specific limitations on the qualified rights contained within the Convention, limitations which relate to public interest considerations so as to make the ECHR 'far more closely in tune with the essentially collectivist cultural heritage which forms part of the bedrock on which the constitution of the United Kingdom developed and must build than with American-style liberal individualism.'²³ Therefore, despite the general perception that the ECHR is foreign, un-British and thus inadequate for the British people, the reality couldn't be further from the truth. The ECHR could instead be described as a formal codification of the UK understanding of human rights,

¹⁷ *Ibid* 5.

¹⁸ See Blackstone, Sir W. *Commentaries on the Law of England* (1765-1769): England is 'A land, perhaps the only one in the Universe, in which political or civil liberty is the very end and scope of the constitution.'

¹⁹ *A and others v Secretary of State for the Home Department* [2004] UKHL 56 [88].

²⁰ 'The Incorporation of the European Convention on Human Rights,' Inaugural Conference of the Cambridge Centre for Public Law, Faculty of Law, University of Cambridge, Cambridge, 17-18 January 1998, University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing, 1998) 69-71, 69.

²¹ Allison, J.W.F. *The English Historical Constitution, Continuity, Change and European Effects* (Cambridge University Press, 2007) 222-223.

²² It must be noted that the HRA provides for judicial remedies expressly under s 8.

²³ Feldman, D. 'The Human Rights Act 1998 and constitutional principles' (1999) 19 *Legal Studies* 165, 178.

and could thus be seen not only as an 'international bill of rights',²⁴ but as a British Bill of Rights.

2.2 *The Human Rights Act 1998*

A similar evaluation can also be made of the HRA itself. Because of the fact that '[t]here is a strong body of opinion in the United Kingdom that deplores the influence of Europe – whether it is through the Community or through the ECHR ... foreign courts, foreign judges,²⁵ it could be argued that the HRA, as the vessel for the incorporation of the ECHR, has been difficult to 'sell' to the British public. Such Europhobia towards the HRA is, however, just as misconceived and as unjustified as criticisms towards the ECHR as being un-British.

For example, the Conservative party perpetuate the view that the HRA is nothing more than a foreign tool by which Strasbourg can subvert British sovereignty. In other words, they endorse the perception of the HRA and the ECHR as a scheme 'administered by some unknown court' which lacks what Lord Hoffmann called 'constitutional legitimacy'.²⁶ The leader of the official opposition, David Cameron, argues that the HRA 'obliges British courts to base their judgements on the ECHR and the case law ... that goes with it, giving them no scope to develop their own principles'.²⁷ Lord Hoffmann, although he acknowledges that the ECHR at the international level 'would be a perfectly serviceable British bill of rights'²⁸ because it expresses values which have 'deep roots in our national history and culture',²⁹ he nevertheless criticises its application at the national level. Echoing perhaps the views of Wadham and Nyerere,³⁰ he argues that human rights are 'universal in abstraction but national in application'.³¹ Using this as the basis for his argument, he criticises the prominence of the supervisory role of the Strasbourg Court in domestic human rights issues. In essence, he argues that the Court lacks the legitimacy to make decisions concerning the domestic application of rights in the UK³² and

²⁴ Simpson (n 6) 16.

²⁵ Zander (n 13) 63.

²⁶ Lord Jowitt LC 1950 from Pannick, D. 'The European rights court has its uses – to keep us on our toes' *The Times* May 7, 2009

<<http://business.timesonline.co.uk/tol/business/law/columnists/article6236306.ece>> accessed 31.07.2009.

²⁷ Cameron, D. 'Balancing freedom and security – a modern British Bill of Rights' *The Guardian* June 26, 2006 <<http://www.guardian.co.uk/politics/2006/jun/26/conservatives.constitution>> accessed 14.06.2009.

²⁸ Hoffmann, Lord L. 'The universality of human rights' (2009) 125 *LQR* 416, 431.

²⁹ *Ibid* 422.

³⁰ Wadham (n 1) and Nyerere (n 2).

³¹ Hoffmann (n 28) 422.

³² *Ibid* 429.

that the right to individual petition 'enables it [the Strasbourg Court] to intervene in the details and nuances of the domestic laws of Member States.'³³

Although the basis of his argument is not misplaced, his assessment of the HRA in relation to it is. Firstly, the right to individual petition to the Strasbourg Court is a fundamental characteristic of the supervisory nature of the ECHR at the international level. It is argued that Lord Hoffmann, by arguing that the margin of appreciation doctrine should go further in its application,³⁴ presumably to give greater leeway to the application of the Convention rights at the national level, and by not calling for withdrawal from the Convention, indirectly acknowledges its importance. Secondly, he shows concern over the judiciary's focus on Strasbourg jurisprudence at the expense of English legal history.³⁵ Undeniably, if Strasbourg, as he argues, is using the margin of appreciation doctrine to formulate a set of uniform rules applicable to all member states,³⁶ the Judiciary's blind adherence to the decisions of Strasbourg under s 2 could indeed produce decisions which are irrelevant to British people. However, this argument by Lord Hoffmann and David Cameron is greatly misplaced. Section 2 obliges the courts only to take account of Strasbourg jurisprudence if they themselves deem it to be relevant; there is no obligation for them to follow Strasbourg jurisprudence outright. Consequently, the HRA could be seen as a tool by which to curtail the influence of Europe and place a firm British stamp on human rights protection. As argued by Allison, 'the provisions of the Human Rights Act itself reflect the English common law in various ways.'³⁷ Indeed, as has been demonstrated in the previous chapters, the HRA was designed to create greater protection for human rights, but such protection was to operate within the constraints of the existing constitutional framework.

It must also be noted that despite the perception that the ECHR, and thus the HRA, as 'foreign' and un-British, it could be argued that the rights contained within the HRA, and also the ECHR, are synonymous with what many would consider to be values inherent within British society. Support for this comes from the EHRC survey, which discovered that of the rights listed within the HRA, which were considered to be British values, were also identified by participants as being fundamental human rights.³⁸ As noted by the EHRC, there is a 'strong correlation between the two,'³⁹ a correlation which strongly supports the assertion that the HRA is

³³ *Ibid* 431.

³⁴ *Ibid* 424.

³⁵ *Ibid* 424-425.

³⁶ *Ibid* 424.

³⁷ Allison (n 21) 224.

³⁸ Equality and Human Rights Commission (n 3) 9-14.

³⁹ *Ibid* 14.

anything but un-British and more than capable of being a British Bill of Rights which reflects British values and traditions.

3. A Bill of Rights for Criminals and Terrorists

The HRA has been 'widely portrayed as a charter for terrorists, paedophiles and other criminals,'⁴⁰ and has thus been seen as a 'charter for criminals'⁴¹ rather than as a charter for law abiding citizens, primarily by the press.⁴² This is supported by the results of the EHRC survey, which showed that 42% of people believe that the only people who benefit from human rights are 'those who don't deserve them such as criminals and terrorists.'⁴³ Such claims have been held as 'Myths and Misconceptions' by the Department of Constitutional Affairs,⁴⁴ a view which is also supported by this thesis. It will be shown that what people view as typically un-British – the legal protection of society's 'undesirables' – is a key characteristic of Bills of Rights and of British legal tradition and does not, contrary to the view of the majority, create a two-tiered system of rights.⁴⁵ It is argued that the only criticism which can be made of the HRA is that it is doing exactly what it was designed to do as a Bill of Rights for Britain.

First and foremost, the suggestion that the HRA has been too soft on criminals and terrorists would appear contrary to the events of the previous ten years. Following the events of September 11 2001, when almost three thousand people lost their lives in the world's largest terrorist attack, a vast array of anti-terrorism legislation has been enacted: the Anti-Terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005, the Terrorism Act 2006, and the Counter-Terrorism Act 2008; all of which has had a devastating impact on the protection of civil liberties within the UK. This is supported by Fenwick *et al*, who argues that '[t]he HRA currently exists in a climate very different from that prevailing in 2000. We no

⁴⁰ Leigh, I.D. and Masterman, R. *Making Rights Real: the Enforcement of the Human Rights Act* (Oxford: Hart Publishing, 2007) 4.

⁴¹ Gibb, F. 'A new year overhaul for the Human Rights Act' *The Times* December 9, 2008 <<http://business.timesonline.co.uk/business/law/article5313617.ece>> accessed 14.06.2009.

⁴² This is supported by Klug (n 4): 'The tabloids have effectively created a subtitle to the Act in the public's mind which reads: human rights for FTPs: foreigners, terrorists, and paedophiles – law abiding citizens need not apply.'

⁴³ Equality and Human Rights Commission (n 3) 16.

⁴⁴ See Department for Constitutional Affairs, 'Review of the Implementation of the Human Rights Act' (2006) <http://www.justice.gov.uk/guidance/docs/full_review.pdf> accessed 31.07.2009, 4.

⁴⁵ Equality and Human Rights Commission (n 3) 16: 44% of people agreed with the statement, 'Everyone in the UK enjoys the same basic human rights.' 43% disagreed.

longer feel that we are at the beginning of a new dawn for civil liberties in the UK; the post 9/11 debate tends to concern methods of avoiding its effects.⁴⁶

For example, the power to indefinitely detain foreign nationals suspected of terrorism under the Anti-terrorism, Crime and Security Act 2001, up until the decision of the House of Lords in the *Belmarsh Prison* case,⁴⁷ was not in breach of Article 5, which protects the individual's right to liberty and security of the person. This was because a state of emergency, which permits derogation from Article 5 under Article 15,⁴⁸ had been declared following the September 11 attacks. The Prevention of Terrorism Act 2005, although enacted in an attempt to remedy the 2001 Act's incompatibility with the Convention rights following *Belmarsh*,⁴⁹ nevertheless introduced intrusive security measures known as 'control orders,' which restrict people's freedom short of detention, such as house arrest, although full detention can still be issued via order of the High Court. The legislative change, though an arguable improvement from the previous regime,⁵⁰ could still be seen as undermined by further legislative schemes. For example, the Terrorism Act 2006 introduced a new wave of offences and, most significantly, allows for suspected terrorists to be detained by the police for up to 28 days without charge, subject only to judicial approval every two days.

From the above summary, one feels inclined to conclude that the HRA is not a British Bill of Rights, though not for the same reasons as the public advances. For example, Zander argues that Bills of Rights are often seen as preventing the government from taking necessary emergency action when needed.⁵¹ The HRA does not appear to have done this. This is supported by Greer, who argues that 'the fact that the United Kingdom's 28-day pre-charge detention period is considerably longer than that of any other western democracy, including other Convention Member States and the United States, tends greatly to undermine the claim that it is necessary and proportionate.'⁵² As a result, the conclusion of the Department of Constitutional Affairs in 2006, which said that '[i]n general ... the Human Rights Act has not

⁴⁶ Fenwick, H. Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press, 2007) 4.

⁴⁷ *A and others* (n 19).

⁴⁸ See Hickman, T.R. 'Before the Next Attack – Preserving Civil Liberties in an Age of Terrorism' (2007) *PL* 181.

⁴⁹ Leyland, P. *Constitutional Systems of the World, The Constitution of the United Kingdom A Contextual Analysis* (Oxford: Hart Publishing, 2007) 179: The House of Lords argued that 'if measures short of detention were sufficient to deal with suspected terrorists with a right of abode in the United Kingdom, it was not possible to maintain that such measures were 'strictly required' under the derogation from Article 5 for foreign nationals similarly designated in terms of threat posed.'

⁵⁰ See Greer, S. 'Human rights and the struggle against terrorism in the United Kingdom' (2008) *EHRLR* 163, 168.

⁵¹ Zander (n 13) 109.

⁵² Greer (n 50).

seriously impeded the achievement of the Government's objectives on crime, terrorism or immigration,⁵³ appears the most correct. As a result, the HRA, as a potential Bill of Rights for Britain, would appear to have failed in practice to protect people's individual liberties as an otherwise genuine Bill of Rights would.

If this was the only argument advanced by opponents of the HRA on this issue, this thesis would be inclined to agree with their conclusion that the HRA is not representative of the British people and thus not a Bill of Rights for Britain. However, this is not the case.

Opponents of the HRA argue that the HRA, far from failing to prevent the government from taking the necessary emergency action needed to tackle terrorism, has in fact succeeded in doing so.

Evidence of this success could be said to be seen with the House of Lords in the *Belmarsh Prison* case.⁵⁴ As discussed in chapter four, their lordships, by a majority of eight to one, declared disproportionate and discriminatory part IV of the Anti-terrorism, Crime and security Act 2001, which allowed for the indefinite detainment of foreign nationals suspected of terrorism without charge and without redress to a judge. For opponents of the HRA, this decision would appear to demonstrate a drastic imbalance in human rights protection to the benefit of criminals. This is certainly the view of David Cameron, who argues that the HRA has had a 'damaging impact on our ability to protect our society against terrorism.'⁵⁵

Although David Cameron acknowledges that in the *Belmarsh Prison* case '[t]here is no admissible evidence that these individuals [the men whom the Home Secretary wished to deport], all of them foreign nationals, have committed a crime under British law,' he nevertheless argues that there was still 'sufficient intelligence material relating to their danger to our security that a judge was persuaded... to detain them,' which constitutes a 'strong case for deportation.'⁵⁶ In order to address the unintentional damage caused to British safety by the HRA, David Cameron proposes the introduction of a new 'modern bill of rights for Britain,' which he claims would 'strike the right balance between security and liberty.'⁵⁷ However, such a Bill of Rights, which shares the view of David Blunkett that '[f]reedom from terrorist attack is also a human right,'⁵⁸ would be so in name only.

⁵³ Department for Constitutional Affairs (n 44).

⁵⁴ *A and others* (n 19).

⁵⁵ Cameron (n 27).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Blunkett, D. 'David Blunkett: Freedom from terrorist attack is also a human right' *The Independent* August 12, 2004 <<http://independent.co.uk/opinion/commentators/david-blunkett-freedom-from-terrorist-attack-is-also-a-human-right-556280.html>> accessed 06.07.2009.

Although the results of the EHRC survey appears to suggest that the right of only being arrested where there was reasonable grounds for suspicion is not seen as important to British people in the current climate,⁵⁹ thus reinforcing the view that the HRA is not a British Bill of Rights, such a conclusion ignores not only British legal tradition but some of the most fundamental characteristics of Bills of Rights. Freedom from arbitrary arrest without legal cause has been a long-held entitlement in UK legal tradition,⁶⁰ as well as internationally,⁶¹ and could not therefore be credibly labelled as unrepresentative of the nation's history and culture. More importantly, as argued by Klug, although 'there is now a growing list of people who have benefitted, when prior to the HRA they would have had no remedy at all,⁶² including the *Belmarsh* detainees, '[t]he underlying philosophy of human rights is, of course, that every human being is entitled to fundamental rights simply because they are human.'⁶³ In other words, the 'fundamental rights in democratic bills of rights generally apply to *everyone* within the jurisdiction of the state.'⁶⁴

Bills of rights are objective in nature and, as argued by Alston, 'must give redress to violations of rights,⁶⁵ regardless of who has been wronged. The judiciary, under the HRA, have done precisely that, thus supporting the argument that the HRA, although failing to prevent the onslaught of excessive anti-terrorism legislation, has, as argued by Greer, 'proved a powerful corrective to what might otherwise have been violations of human rights in the name of national security.'⁶⁶ Instead of creating a two-tiered system of rights where terrorists and criminals may benefit at the expense of the public, the HRA is ensuring that such a system never arises from hasty government legislation which discriminates against vulnerable non-British minorities under the guise of public safety. As argued by Lord Hope, '[i]t is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority.'⁶⁷ Therefore, contrary to the view that the HRA is a Bill of Rights for criminals and

⁵⁹ Equality and Human Rights Commission (n 3) 9-13: the right of only being arrested where there was reasonable grounds for suspicion came bottom of three lists of thirteen rights which the British people considered where (1) important values for someone living in Britain today, (2) important values personally and (3) fundamental human rights.

⁶⁰ See *Habeas corpus*.

⁶¹ Freedom from arbitrary arrest is protected under the ECHR (Art. 5) and the International Covenant on Civil and Political Rights 1966 (Art. 9).

⁶² Klug (n 4) 711.

⁶³ *Ibid* 717.

⁶⁴ *Ibid* (emphasis added).

⁶⁵ Alston, P. *Promoting Human Rights Through Bills of Rights* (Clarendon press, New York, 1999) 11.

⁶⁶ Greer (n 50) 171.

⁶⁷ *A and others* (n 19) [108].

terrorists, it can be said that the HRA 'is only doing the job it was intended to do';⁶⁸ in other words, to hold the executive and the legislature to account as any Bill of Rights should.⁶⁹

4. A Society of Responsibility – the misuse of the Human Rights Act

Another criticism of the HRA is that it has instilled an unwanted compensation culture, whereby people within society enforce their rights in court at the expense of the wider community. Support for this can be found from the results of the EHRC survey, which found that 80% of people in the UK believe that 'some people take unfair advantage of human rights.'⁷⁰ As a result, it is believed that the HRA not only fails to accurately reflect the wishes of the British people, but is also damaging to the wider public interests. However, it will be shown that such claims are wholly unfounded, and display a deep misunderstanding of the appropriate role and operation of a Bill of Rights.

The initial impetus for this criticism of the HRA came from the former Prime Minister Tony Blair. In a speech given in 2006, he declared that '[p]eople do not want a return to old prejudices and ugly discrimination. But they do want rules, order and proper behaviour. They know there is such a thing as society. They want a society of responsibility. They want a community where the decent law-abiding majority are in charge; where those that play by the rules do well; and those that don't, get punished ...'⁷¹ Following this, in a green paper published on 23 March 2009 entitled *Rights and Responsibilities: developing our constitutional framework*,⁷² the government, under Gordon Brown, outlined its own plans for a new Bill of Rights inspired by Tony Blair's above rhetoric. The sixty-eight page report begins with an indirect admission by the government that the HRA has failed to achieve the symbolic cultural significance that other Bills of Rights around the world have.⁷³ As a result, the report calls for '[a] new constitutional instrument, reflecting the values that give rise to these rights and responsibilities' which, they argue, 'could act as an anchor for people in the UK.'⁷⁴

The report provides an excellent explanation of this criticism of the HRA. It states that 'an over-emphasis on rights, to the exclusion of notions of responsibility, can lead to a 'me' society rather than a 'we' society, in which an unbridled focus on our own individual rights

⁶⁸ Gibb (n 41)

⁶⁹ See Alston (n 65): Alston identifies three common characteristics of Bills of Rights. The second common characteristic is that they should be binding upon governments. See also Klug (n 4) 705.

⁷⁰ *Ibid* 16.

⁷¹ Feldman, D. 'Human rights, terrorism and risk: the roles of politicians and judges' (2006) *PL* 364, 366.

⁷² (Cm 7577, 2009) <<http://www.justice.gov.uk/publications/docs/rights-responsibilities.pdf>> accessed 07.07.2009.

⁷³ *Ibid* 8.

⁷⁴ *Ibid*.

and liberties risks overtaking our collective security and wellbeing, and respect for other.⁷⁵ It goes on to say that although responsibilities are an inherent part of UK law, they are not clearly expressed, leading 'to a selfish and aggressive assertion of rights in a way which may damage others enjoyment of their own rights.'⁷⁶ Such an argument is not strictly without merit. As argued by Zander, 'claiming one's rights is not from all points of view a blessing. One does not relish the thought of a society where citizens reach for a lawyer and a writ like a six-shooter in the Wild West.'⁷⁷ However, despite this, there is little evidence to suggest that the HRA has created a compensation culture which is at the expense of the wider public interest.

EHRC evidence shows that people are, contrary to the view of the government, actually unlikely to seek legal action for breaches of their Convention rights. The results show that of the people who did not seek action for a breach, 27% did not know what they could do about it, 17% thought that there was nothing to be gained from taking action, and 16% did not know what their rights were anyway.⁷⁸ 73% also answered negatively to the question '[h]ave you or any of your close friends/family ever felt your human rights were not respected?'⁷⁹ Such results, it is argued, regrettably demonstrates a lack of understanding of the HRA amongst the general public, but also, at the very least, an inclination towards not rigorously seeking legal action. Thus, criticisms of the HRA as overly individualistic appear unfounded.

For example, critics of the HRA, such as Conservative MP Nick Herbert, argue that the newly emerged rights culture has 'distorted priorities in public bodies and undermined public safety.'⁸⁰ The damning effects of this 'me society' can be seen most vividly with the actions of public officials. As argued by David Cameron, such officials, because of a fear of being sued for breaches of Convention rights, instead of performing their duties properly, 'protect themselves rather than risk defeat in the courts.'⁸¹ Such fear of the new compensation culture, he argues, has had an adverse effect on public security. A popular example cited by the Conservatives of this can be seen with the infamous case involving convicted rapist Anthony Rice who, when wrongfully released on licence, murdered Naomi Bryant. According to the Bridges Report, which was set up to investigate the case, the public protection considerations of the case were

⁷⁵ *Ibid* 17 [2.17].

⁷⁶ *Ibid* 18 [2.24].

⁷⁷ Zander (n 13) 132.

⁷⁸ Equality and Human Rights Commission (n 3) 19.

⁷⁹ *Ibid* 18.

⁸⁰ Herbert, N. 'Rights without responsibilities – a decade of the Human Rights Act' November 24, 2008 <http://www.conservatives.com/News/Speeches/2008/11/Nick_Herbert_Rights_without_responsibilities_-_a_decade_of_the_Human_Rights_Act.aspx> accessed 02/09/2009 [2.5].

⁸¹ Cameron (n 27).

undermined by the human rights considerations of the prisoner,⁸² a fact which David Cameron was pleased to use on his attack on the HRA.⁸³

However, it is submitted that the HRA is not to blame for such failings; it is the conduct of public officials failing to utilise the HRA properly which has resulted in such devastating mistakes. The HRA, like the Bills of Rights in New Zealand,⁸⁴ Canada,⁸⁵ South Africa⁸⁶ and Japan,⁸⁷ contains some qualified rights, such as Article 8 and Article 11, which permit interference with an individual's rights so long as it is proportionate and necessary in a democratic society, a fact which was expressly acknowledged in the Bridges Report.⁸⁸

Therefore, in dealing with the release of Anthony Rice, it appears that the public officials in charge failed to do so out of an unfounded fear of being sued. There is no evidence to suggest that they would have been sued for breaches of Anthony Rice's human rights should they have opted to keep him in prison so long as their decision followed the procedures laid down by the HRA.

Section 8(1) HRA permits the court, on finding that an act of a public authority is unlawful, to grant 'such relief or remedy or ... order within its powers as [the court] considers just and appropriate.' Although damages are prohibited from being awarded in criminal proceedings under s 8(2), there is nevertheless the possibility for damages to be awarded in other proceedings such as judicial review.⁸⁹ However, the court can only grant damages when they are 'satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made,' having regard to 'any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court).'⁹⁰ However, as noted by Fenwick,

⁸² HM Inspectorate of Probation 'An Independent Review of a Serious Further Offence case: Anthony Rice' (2006) <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/10_05_06_probation.pdf> accessed 31.07.2009 [11.26].

⁸³ Cameron (n 27).

⁸⁴ See Keith, K. 'A Bill of Rights: Does It Matter' (1997) 32 *Tex. Int'l L. J.* 393, 397.

⁸⁵ See McMurtry, R. 'The Creation of an Entrenched Charter of Rights – A Personal Memoir' (2005-2006) 31 *Queen's L. J.* 456, 462: The Constitution states that the rights contained within it may be restrained if 'demonstrably justified in a free and democratic society.'

⁸⁶ Langa, P.N. 'Equality Provisions of the South African Constitution' (2001) 54 *S.M.U.L. Rev.* 2101, 2102: The 1996 Constitution states that any restriction on rights must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'

⁸⁷ Dahl, T.V. 'Individual Civil Liberties and the Japanese Constitution' (1978-1979) 14 *Tulsa L. J.* 515, 527: Article 12 of the Japanese Constitution states that people 'shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.'

⁸⁸ HM Inspectorate of Probation (n 82) [8.3.11]: '[T]he Act [HRA] allows for interference with the rights of an individual where this is necessary for public safety and the protection of the rights of others.'

⁸⁹ Fenwick, H. M. and Phillipson, G. *Text, Cases & Materials on Public Law & Human Rights* (2nd edn, Cavendish Publishing Limited, Norfolk, 2005) 874.

⁹⁰ Section 8(3).

'[t]raditionally, the courts have been reluctant to award damages in public law cases,' a trend which is encouraged, she argues, by the wording of s 8(3).⁹¹

Indeed, the courts have taken a restrictive interpretation of their power to grant remedies under s 8 following the House of Lords decision in *R (Greenfield) v Home Office*.⁹² Although a breach of Article 6 had been found to have occurred, their Lordships held that damages need not be awarded. In their eyes, the finding of a violation of the claimant's Article 6 rights alone constituted 'just satisfaction.' As Lord Bingham stated, 'the routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation.'⁹³ Also, because s 8(4) directs the court to take into account the principles applied by the ECtHR when deciding whether to award damages, it has been speculated that any damages awarded under s 8 would most likely be low.⁹⁴ Since the passing of the HRA, damages have only been awarded in three cases: *R (Bernard) v Enfield LBC*,⁹⁵ *R (KB) v Mental Health Review Tribunal*,⁹⁶ and *Van Colle v Chief Constable of Hertfordshire*.⁹⁷ Apart from in *Van Colle*, where a total of £50,000 was awarded under the HRA for breaches of Articles 2 and 8 due to the failure of the police to protect a murder witness, the damages awarded have been relatively modest; in *Bernard*, £10,000 was awarded, and in *R(KB)* £750 to £4,000 was awarded.⁹⁸

As a result, it can be said that any fears over the emergence of a compensation culture for breaches of Convention Rights protected under the HRA are greatly exaggerated. Instead of 'doing their job properly and applying proper procedures,' many public officials appear to be using the HRA as a 'smokescreen' in order to hide 'the failure of ministers to deliver.'⁹⁹

It is accepted, however, that although there is little evidence of widespread claims for compensation under the HRA, as advanced by some critics, the principal criticism, that only *some* people are taking unfair advantage of the HRA, remains. Such people, it is argued, could

⁹¹ Fenwick (n 7) 241.

⁹² [2005] UKHL 14.

⁹³ *Ibid* [9].

⁹⁴ Fenwick and Phillipson (n 89).

⁹⁵ (2003) HRLR 111.

⁹⁶ [2004] QB 836.

⁹⁷ [2006] EWHC 360 QB.

⁹⁸ See Fenwick (n 7) 247.

⁹⁹ Ford, R. and Gibb, F. 'Blair leads the attack on his own human rights law' *The Times* May 16, 2006 <<http://www.timesonline.co.uk/tol/news/politics/article719006.ece>> accessed 14.06.2009.

be the rich and powerful, who are widely portrayed as benefitting disproportionately under Article 8 and the right to privacy at the expense of wider public issues.¹⁰⁰

Although Article 8 has been invoked to protect the identity of people seen as vulnerable to harm, such as the killers of James Bulger in *Venables and another v News Group Newspapers*,¹⁰¹ the argument that the rich and powerful are benefitting more than most under the HRA is not so easily dismissed. Although there has been no formal recognition by the judiciary of an action for breach of privacy, the breach of confidence doctrine has instead been modified in light of Article 8 in a number of cases involving high-profile celebrities such as Michael Douglas and Catherine Zeta-Jones,¹⁰² Heather Mills,¹⁰³ Naomi Campbell¹⁰⁴ and Max Mosley.¹⁰⁵ In this sense, criticisms of people enforcing their rights directly are misleading. The HRA has merely allowed the common law to develop in light of the ECHR. However, this is a technical distinction which does not detract sufficiently from the claim that the rich and powerful are benefitting disproportionately as a result of the HRA. Because such privacy claims are not dealt with directly under the HRA, but under the modified common law, damages are not calculated according to the strict criteria administered under s 8. Instead, a claimant can potentially be awarded a more generous measurement of damages according to tort law.¹⁰⁶ Likewise, when one examines the cost of bringing such actions, it is not unsurprising that some feel as if the HRA, unlike a genuine British Bill of Rights, fails to represent the majority of people.

For example, Max Mosley received £60,000 in damages, the highest amount so far for a breach of privacy, after the News of the World 'printed pictures and published video of him indulging in a five-hour sadomasochistic sex session with prostitutes.'¹⁰⁷ However, this amount is trivial in comparison to the claimant's legal costs for bringing an action for breach of privacy. According to the News of the World, the legal costs for Max Mosley's privacy action, which the newspaper had to cover, was £900,000.¹⁰⁸ Thus, the cost for bringing the action was fifteen

¹⁰⁰ Support for this claim can be seen in Gibb (n 41).

¹⁰¹ [2001] 1 All ER 908.

¹⁰² *Douglas and Others v Hello! Ltd.* [2001] 2 WLR 992.

¹⁰³ *Mills (Heather) v News Group Newspapers Ltd.* [2001] EMLR 41, 4 June, High Court No HC 0102236, WL 720322.

¹⁰⁴ *Campbell v MGN* [2004] 2 WLR 1323.

¹⁰⁵ *Max Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (QB).

¹⁰⁶ See Fenwick (n 7) 247.

¹⁰⁷ Holmwood, L. and Fitzsimmons, C. 'Max Mosley wins £60,000 in privacy case' *The Guardian* July 24, 2008 <www.guardian.co.uk/uk/2008/jul/24/mosley.privacy> accessed 26.06.2009.

¹⁰⁸ Brook, S. 'Max Mosley privacy case cost News of the World almost £1m, editor tells MPs' *The Guardian* May 5, 2009 <www.guardian.co.uk/media/2009/may/05/max-mosley-colin-myler> accessed 26.06.09.

times as great as the compensation granted, a large fee which most ordinary members of the public would be unable to afford should they wish to protect their right to privacy. The same was also true of Naomi Campbell, who incurred legal costs in excess of £1,000,000.¹⁰⁹

Unsurprisingly, many ordinary people would not be able to pay such fees if their right to privacy was breached. However, it would be incorrect to assume that these decisions are disproportionately favourable to the rich and powerful; Conditional fee Agreements (no win no fee) are available to less wealthy individuals who feel that their privacy rights have infringed. It could also be argued that the compensation received by the rich and powerful for breaches of privacy does not accurately reflect the seriousness of the violation. Once lost, privacy cannot be regained. This would certainly appear to be the opinion of Max Mosley, who intends to challenge UK privacy law at Strasbourg. He argues that 'English law is inadequate to enforce the European Convention on Human Rights, and the right to privacy. A newspaper can simply publish very private information, completely illegally, without the victim of the publication having any opportunity to stop it.'¹¹⁰

Despite this, it has still been argued that such staggeringly high legal costs have resulted in the right to privacy winning at the expense of the right to freedom of expression, and thus the freedom of the press; something which many fear could result in a 'chilling effect,' whereby the media will be wary of publishing information it considers to be in the public interest because of the fear of being sued.¹¹¹ This is a particularly problematic issue for anyone arguing that the HRA is a British Bill of Rights as the freedom of the press is a value which, according to the EHRC survey, has much public support. The survey found that 68% of people viewed 'being able to express ones views freely' as an important British value.¹¹² 57% of people also identified 'being able to express ones views freely' as a fundamental human right.¹¹³ However, to assume that the victories of the rich and powerful in actions for breach of privacy means, not only that freedom of expression is not adequately protected under the HRA, but that it does not reflect the values of the British people and as a result cannot be seen as a Bill of Rights, would be to ignore some of the key characteristics of Bills of Rights.

¹⁰⁹ Witzleb, N. 'Justifying gains-based remedies for invasion of privacy' (2009) *OJLS* 325, 358.

¹¹⁰ 'Mosley plans European Court bid' October 7, 2008 <<http://news.bbc.co.uk/1/hi/uk/7657460.stm>> accessed 08.10.2009.

¹¹¹ This fear was acknowledged by Lindsay J in *Douglas v Hello!* [2003] EWHC 786 (ch); [2003] 3 All ER 996 [203], where he noted that a 'possible exposure to a substantial monetary award can deter and inhibit expression almost as completely as would an injunction'.

¹¹² Equality and Human Rights Commission (n 3) 9.

¹¹³ *Ibid* 13.

It is incorrect to assume that the HRA fails to adequately uphold the right to freedom of expression and thus the press. In fact, the right could be seen as having priority due to s 12(4), which states that when considering what relief is to be granted to an alleged victim '[t]he court must have particular regard to the importance of the Convention right to freedom of expression,' especially where the material is 'journalistic, literary or artistic material.' From this, it is clear that the HRA actively acknowledges the importance of a free press in a democracy. Critics would argue, however, that this provision of the HRA is no more than a hollow promise in light of the judicial decisions on the right to privacy which, with the creation of a *de facto* new tort of misuse of personal information,¹¹⁴ appear to give a disproportionately broad interpretation to actions for breach of privacy, often for behaviour which is seen as border-line criminal. This would certainly appear to be the position of the government, whose plans for a new Bill of Rights and Responsibilities aims to re-direct the legal reasoning of judges so as to make them more generous to the needs of the state and the wider public interest than to the individual. This can be seen with their proposals for judges to take into account the behaviour of successful claimants when awarding damages.¹¹⁵ However, it is argued that such reasoning is misconceived; judges already take into account the behaviour of the claimant.¹¹⁶ The HRA has in fact been actively engaged in a balancing exercise between the competing rights and interests of the parties involved in privacy cases in a manner much akin to a Bill of Rights.

For example, s 12(4) also states that consideration must be given to 'any relevant privacy code'¹¹⁷ and the public interest in publishing the material.¹¹⁸ Firstly, such considerations, based on the evidence of the EHRC survey, do not run contrary to the values of the British public, as it found that respect for private and family life is considered to be almost as important as 'being able to express ones views freely,'¹¹⁹ and as a result the HRA should not be viewed and unrepresentative of the people it governs. Secondly, although the right to privacy under the ECHR could be argued to have been interpreted broadly,¹²⁰ an interpretation which appears to be emerging in the UK following *Campbell*,¹²¹ such a *broad* interpretation can be justified on the grounds of being subject to *broad* qualifications, because 'both the broad

¹¹⁴ Fenwick, H.M. and Phillipson, G. *Media Freedom under the Human Rights Act* (Oxford: Oxford University Press, 2006) 769.

¹¹⁵ *Rights and Responsibilities* (n 72) 25 [2.55].

¹¹⁶ See *McCann v UK* (1996) 21 EHRR 97.

¹¹⁷ Section 12(4)(b).

¹¹⁸ Section 12(4)(a)(i).

¹¹⁹ Equality and Human Rights Commission (n 3) 9: 63% see it as an important British value; 13: 53% see it as a fundamental right.

¹²⁰ As argued in Jones, V. and Wilson, A. 'Photographs, privacy and public places' (2007) *EIPR* 357, 359.

¹²¹ *Ibid* 357.

principle and the qualification have value.¹²² Such an approach towards rights is a characteristic which is typically found in Bills of Rights,¹²³ and an example of such a broad qualification can be found in the HRA with the public interest consideration of s 12(4).

For example, as argued by the ECtHR in *Van Hannover*:

[A] fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of ‘watchdog’ in a democracy by contributing to ‘impart[ing] information and ideas on matters of public interest’...it does not do so in the latter case.¹²⁴

Because both rights at issue have value, the issue, as identified in *Campbell* by Baroness Hale, is about balancing the two competing rights. As she noted, ‘the political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by poring over the intimate details of a fashion model’s private life.’¹²⁵ Given the significance of Article 8, more is needed than simple ‘kiss and tell’ stories, in order to trump it;¹²⁶ to do otherwise would be to allow newspapers to treat privacy like a commodity to the expense of the welfare of the general public.

Therefore, it would be a mistake to accuse the HRA for creating a compensation culture which advances individual claims to the detriment of the wider public interest. It would also be an equal mistake to accuse it of favouring any one group in society such as the rich and powerful. As argued by Kavanagh, ‘one of the distinctive features of Bills of rights is that they provide individuals with a means of advancing a rights claim before an independent tribunal and seeking redress for a possible violation.’¹²⁷ To enforce one’s rights should not be condemned as a crime; a violation is a violation, regardless of who suffers it. Thus, far from failing as a Bill of Rights for Britain, the HRA has mimicked many of the key characteristics of Bills of Rights needed to enforce and protect people’s Convention rights, such as the right to privacy, fairly

¹²² Zander (n 13) 65.

¹²³ *Ibid* 64.

¹²⁴ (2005) 40 EHRR 1 [63].

¹²⁵ *Campbell* (n 104) 500.

¹²⁶ McLean, A. and Mackey, C. ‘Is there a law of privacy in the UK? A consideration of recent legal developments (2007) *EIPR* 389.

¹²⁷ Kavanagh, A. *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 339.

and objectively, as well as in-line with the public's understanding of what British values and fundamental rights are.

5. Conclusions on the Public Reception of the Human Rights Act

Because of the overwhelmingly negative reception of the HRA by the public, some may argue that this chapter is nothing more than an exercise in futility. As Wadham argues above, a Bill of Rights must have the support of the public if it is to be meaningful and effective.¹²⁸

Therefore, because the HRA has failed to achieve popular support, it is unlikely to be a Bill of Rights for Britain. However, what the analysis of people's objections to the HRA has shown is that the HRA nevertheless displays many of the general characteristics of a Bill of Rights.

Although proposals by the leading political parties for the introduction of a 'British' Bill of Rights helps cement the popular perception that the HRA is not a Bill of Rights, this investigation has at least demonstrated the HRA's potential for being so.

¹²⁸ Wadham (n 1).

Conclusion

'It would not be too much of an exaggeration to say that the advent of the HRA [Human Rights Act 1998] appeared at the time to herald a new dawn for civil liberties.'¹ These words by Fenwick encapsulate the promise and potential many felt about the HRA when it was first enacted a decade ago. Since then, its optimism has been replaced by pessimism and, as acknowledged by Leigh and Masterman, 'the HRA faces an uncertain future.'² With proposals for the introduction of a Bill of Rights either to replace or supplement the HRA, questions about its legal status in the UK seem more relevant than ever.

1. Sections 3, 4 and 6

On paper, the HRA has the potential to be a Bill of Rights for Britain. Sections 3 and 4 were designed with the ideals of democratic dialogue in mind,³ thus reflecting the core characteristic of third wave Bills of Rights.⁴ Section 6, with its duty upon public bodies to act compatibly with Convention rights, could be seen to advocate for the constitutional review of executive decisions and actions; at the very least, that such decisions should be proportionate to their legitimate aims.⁵ The HRA could also be said to satisfy a number of the broader requirements of Bills of Rights. It reflects the values and traditions of whom it governs, both in terms of the rights protected and in terms of its legislative structure; it applies indiscriminately to everyone within its jurisdiction as human rights should; it gives due consideration to the needs of the state to safeguard its security in the form of qualified rights; and competing rights are balanced against one another in order to reach a decision.⁶

However, despite this potential on paper, the judiciary's interpretation of the HRA's key provisions has been distinctively uneven. The courts have displayed unprecedented activism towards s 3 which has the potential to undermine the co-operative aims of the HRA. Although the House of Lords in *R v A (No. 2)*⁷ appeared to adopt a *de facto* Canadian 'notwithstanding clause' understanding of when s 3 was not to apply, and thus a characteristic of a third wave Bill of Rights, such an approach had nevertheless been expressly rejected by Parliament.

¹ Fenwick, H. M. *Civil Liberties and Human Rights* (Routledge-Cavendish, 2007) 157.

² Leigh, I.D. and Masterman, R. *Making Rights Real: the Enforcement of the Human Rights Act* (Oxford: Hart Publishing, 2007) 5.

³ See Chapter Four.

⁴ See Chapter One.

⁵ See Chapter Five.

⁶ See Chapter Six.

⁷ [2002] 1 AC 45 (rape shield case).

Additionally, in *Ghaidan v Godin-Mendoza*,⁸ the House of Lords also appeared to show a blatant disregard for the specific legislative intention of Parliament. However, despite this, the judiciary have, in cases such as *R (on the application of Anderson) v Secretary of State for the Home Department*, shown a reluctance to use s 3; opting instead for s 4. Although the government's responses to the issuing of declarations of incompatibility have been far from automatic, their general willingness to respond constructively to such declarations, even on issues of national security, could be seen as proof of an 'inter-institutional dialogue between Parliament and the courts.'⁹ In this sense, the judiciary's approach towards ss 3 and 4 could be seen as proof of the HRA constituting a third wave Bill of Rights.

In contrast to this, the judiciary's approach towards judicial review under s 6 has been distinctively minimalist, with the courts showing reluctance to directly challenge the decisions of elected officials and engage in meaningful constitutional review as typified by Bills of Rights. Although the courts have adopted the notion of proportionality as a principle of adjudication for issues concerning human rights under the HRA in *Daly*,¹⁰ the lack of a definitive approach towards it by the Strasbourg, and the judiciary's approach towards s 2, has resulted in the same lack of consistency in Britain.

Also, the fact that Parliament felt the need to overrule the decision of the House of Lords in *YL v Birmingham City Council*,¹¹ over the meaning of a public function, illustrates not only the judiciary's failure to take an expansive approach as seen under a Bill of Rights, but also of Parliament's continuing sovereignty. However, despite the judiciary displaying the same level of reluctance to acknowledge direct horizontal effect under the HRA as other nations with a Bill of Rights have, the judiciary have nevertheless developed some of the existing common law in light of the HRA in a way similar to, though not as strong as, the South African constitution, to the effect of creating indirect horizontal effect.¹² Because of this, it could be said that a new culture of rights has begun to emerge as seen with other nations with a Bill of Rights.

However, although the intensity of the judiciary's interpretation and application is indeed varied, it is submitted that their reasoning nevertheless represents the beginnings of a move beyond the traditional British approach towards the protection of fundamental human rights. This does not, however, mean that the HRA is a definitive Bill of Rights for Britain. As argued

⁸ [2004] 2 AC 557, [2004] 3 All ER 411.

⁹ Young, A.L. *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2009) 10-11.

¹⁰ [2001] 2 WLR 1622.

¹¹ [2007] UKHL 27.

¹² This has been the case with the right to privacy and actions for breach of confidence.

throughout this thesis, it is the role of the European Convention on Human Rights (ECHR) and the European Court on Human Rights (ECtHR) within the legislative framework of the HRA which has proved the most problematic for the judiciary, and it is this issue which prevents the HRA from being a true Bill of Rights in more than one way.

2. Section 2, Europe and Public Support

Section 2 had the potential of allowing UK judges to develop the Convention rights under the HRA in a distinctively British way.¹³ The House of Lords decisions in *Alconbury*,¹⁴ *Begum*¹⁵ and *Ullah*,¹⁶ however, rejected the argument that the rights contained under the HRA were free-standing domestic rights which they could interpret in light of British legal tradition, and decided instead to follow Strasbourg jurisprudence subject to only narrowly construed 'special circumstances'.¹⁷ Although the judiciary's approach towards s 2, following the decision in *Re P (A Child) (Adoption; Unmarried Couples)*,¹⁸ shows some signs of change, much must still be done in order to move the HRA into the realms of a Bill of Rights. Although s 2 has allowed the adoption of Strasbourg principles, such as proportionality, into UK adjudication on issues concerning Convention rights, the judiciary's approach towards it, as seen above with s 6, is far from synonymous with other Bills of Rights.

The judiciary's reluctance to adopt an expansive interpretation of s 2 has also been used by political opponents of the HRA to both perpetuate and reinforce the false perception of the Act amongst the public as being nothing more than a tool by which a foreign court may interfere with the affairs of the UK. As a result, the HRA has failed to gain the necessary popular support needed from the public. Instead of being symbolic of the nation's historical commitment to human rights and the individual, it has become a symbol of unfairness, inequality and foreign influence. Thus, despite the potential of the HRA constituting a Bill of Rights for Britain, following the judiciary's application of ss 3 and 4 as well as the progressive approach towards indirect horizontal effect, the Act's failure to gain popular support is likely to prevent it from being so.

However, it is submitted that the final verdict on the HRA as a Bill of Rights cannot be fully answered now. In an article written in 2003, Keir Starmer noted that a review of the workings

¹³ *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997) <<http://www.archive.official-documents.co.uk/document/hoffice/rights/intro.htm>> accessed 12.08.2009 [1.14].

¹⁴ [2001] UKHL 23.

¹⁵ [2006] UKHL 15; [2006] 2 WLR 719.

¹⁶ [2004] UKHL 26.

¹⁷ [2001] UKHL 23 (Lord Slynn). See Chapter Three.

¹⁸ [2008] UKHL 38; [2008] 3 WLR 76.

of the HRA two years on from its coming into force was 'too soon to draw firm conclusions.'¹⁹ The same could equally be said of ten or twenty years; especially when one considers how the American Bill of Rights has, over the last two-and-a-half centuries, endured more unrest than the HRA ever will. Following this, it is submitted that some of the most fundamental characteristics of Bills of Rights are unable to be addressed if and until Parliament tries to repeal the HRA. In other words, the HRA may still be able to become a Bill of Rights for Britain.

3. Entrenchment and the Common Law

It has been argued that the HRA is, at the very least, politically entrenched.²⁰ However, given the tide of criticism mounted against the HRA by the Conservatives and the media, such political entrenchment seems questionable. Kavanagh, on the other hand, argues that the HRA is entrenched under constitutional law. Basing her argument upon the view that entrenchment, as referring to the level of difficulty in amending law, is a matter of degree,²¹ she asserts that fundamental common law rights, as advanced by prominent judges such as Irvine and Woolf,²² not only exist, but are constitutionally entrenched in the common law.²³ Since the rights contained within the HRA and the ECHR 'overlap' with such entrenched common law rights, she surmises that 'once one admits the constitutional status of these rights at common law, one cannot avoid the conclusion that the rights embodied in the HRA also have constitutional status.'²⁴ Although Kavanagh acknowledges that this is a 'weaker form of entrenchment to that provided by the American Bill of Rights,'²⁵ she nevertheless insists that it 'satisfies the condition of being relatively entrenched.'²⁶ Therefore, because the Convention rights cannot be impliedly repealed, and because she sees express repeal as unlikely, she concludes that the Convention rights are 'entrenched to a considerable degree.'²⁷ It is respectfully submitted, however, that with calls for the repeal and replacement of the HRA gaining momentum, such an argument over the relative entrenchment of the HRA is unlikely to hold any water.

However, her argument about the entrenchment of fundamental human rights within the common law poses an interesting possibility. It has been asserted that before the creation of

¹⁹ Starmer, K. 'Two years of the Human Rights Act' (2003) *EHRLR* 14.

²⁰ See Kavanagh, A. *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 306.

²¹ *Ibid* 305.

²² *Ibid* n 145.

²³ *Ibid* 306.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ *Ibid* 306-307.

²⁷ *Ibid* 307.

the HRA, the ECHR had already been used to 'buttress the principle already contained in the common law,'²⁸ an assertion supported by Hunt who, writing before the creation of the HRA, notes that 'the vast majority of judicial references to unincorporated international human rights law has been to the ECHR.'²⁹ As Hunt goes on to say, '[t]here were some early signs that certain judges considered themselves obliged to interpret the common law ... in such a way as to achieve conformity with the Convention.'³⁰ Given this precedent, as well as progress made in human rights adjudication in the last ten years as a direct result of the HRA, it seems unlikely that the judiciary would not follow their HRA decisions, even if the government merely repeals the HRA or repeals it and replaces it. The basis for such a conclusion can be found with the ECHR's continued relevance at the international level. If the HRA were repealed, the UK would still be a signatory to the treaty; even David Cameron and the Conservative party have expressed no intention to withdraw from the treaty.³¹ Therefore, even if the UK were to lose a formal Bill of Rights, the common law maybe able to carry on the HRA's work and maintain a higher level of human rights protection than in the pre-HRA era.

4. Concluding Comments

In the end, the most convincing conclusion one can draw about whether the HRA is a Bill of Rights for Britain is that advanced by Fenwick: it 'comes as close to creating a Bill of Rights as the UK has ever come.'³² The HRA has the potential on paper to be a Bill of Rights for Britain; it has the potential in practice, due to an emerging activist trend amongst the judiciary, to be a Bill of Rights for Britain. However, the absence of popular support, along with calls for the repeal ad replacement of the HRA, means that the HRA lacks the time needed to firmly establish itself in the minds of the public and the judiciary.³³ As a result, despite its potential, the HRA cannot be recognised as a Bill of Rights for Britain.

²⁸ Clapham, A. *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993) 102.

²⁹ Hunt, M. *Using Human Rights in English Courts* (Oxford: Hart Publishing, 1998) 128.

³⁰ *Ibid* 143.

³¹ Cameron, D. 'Balancing freedom and security – a modern British Bill of Rights' *The Guardian* June 26, 2006 <<http://www.guardian.co.uk/politics/2006/jun/26/conservatives.constitution>> accessed 14.06.2009.

³² Fenwick (n 1) 116.

³³ See Amos, M. 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72(6) *MLR* 883, 904: 'With a general election to be held prior to May 2010, hypothesising what might be done to remedy the problems with the HRA ... is now almost a redundant activity.'

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